PPACA, HCERA, and the Federal regulations cited in this subsection. The requirements are:

1. All program integrity, screening, oversight, reporting, disclosure, moratorium, compliance, enrollment, payment adjustment, suspension of payment, inclusion of information, and National Provider Identifier provisions described under section 6401 and 6402 of PPACA, as amended and supplemented, or under the Federal regulations adopted at 76 FR 5862 through 5971, as amended and supplemented;

2. All face-to-face, medical review and certification requirements described under sections 3132 and 6407 of PPACA, as amended and supplemented, or under the Federal regulations adopted at 76 FR 5862 through 5971, as amended and supplemented;

3. All requirements to register with the State or with the Federal government as described at section 6503 of PPACA, as amended and supplemented, or under the Federal regulations adopted at 76 FR 5862 through 5971, as amended and supplemented;

4. All requirements to submit data elements as determined necessary by the Secretary for program integrity, program oversight, and administration, effective with respect to contract years beginning on or after January 1, 2010 as described at section 6504 of PPACA, at 42 U.S.C. §§ 1396b(r)(1)(F) and 1396b(m)(2)(A)(xi), as amended and supplemented, or under the Federal regulations adopted at 76 FR 5862 through 5971, as amended and supplemented;

5. The prohibition on payment for items or services provided under the Medicaid/NJ FamilyCare program to any financial institution or entity located outside of the United States, as described at section 6505 of PPACA, as amended and supplemented, or under the Federal regulations adopted at 76 FR 5862 through 5971, as amended and supplemented;

6. All requirements regarding reporting and returning of overpayments, as described at section 6402 of PPACA, as amended and supplemented, or under the Federal regulations adopted at 76 FR 5862 through 5971, as amended and supplemented, unless a more expedited timeframe for reporting and returning overpayments exists within this chapter; and

7. The prohibition on payments for any health care acquired conditions in accordance with section 2702 of PPACA, as amended and supplemented, or under the Federal regulations adopted at 76 FR 32816 through 32838, as amended and supplemented.

(c) The provisions of (a) or (b) above shall not apply in specific instances in which:

1. The Federal government has granted a waiver from compliance with a Federal requirement and the Division chooses to exercise its authority under that waiver; or

2. The Division determines that exercise of such provision would cause program expenditures to exceed amounts appropriated by law for any portion of the program.

(d) The provisions of (a) and (b) above specifically do not address State compliance with any provision of any Federal law or regulation that would expand eligibility under any program to any new groups, categories, or individuals.

CHILDREN AND FAMILIES

(a)

DIVISION OF CHILD PROTECTION AND PERMANENCY

Child Protection Investigations

Adopted Amendments: N.J.A.C. 10:120A-2.3 and 3.1; 10:122E-2.5; 10:126A-2.4; 10:129-1.2, 1.3, 2.1, 3.1, 4.1, 4.2, 7.3, 7.4, 7.5, 8.1, 8.2, 8.3, and 8.5; and 10:133G-3.1

Adopted New Rules: N.J.A.C. 10:129-7.4, 7.5, and 7.7

Proposed: February 21, 2012 at 44 N.J.R. 357(a).
Notice of Proposed Substantial Changes upon Adoption to Proposed Amendments: November 5, 2012 at 44 N.J.R. 2437(a).
Adopted: March 5, 2013 by Allison Blake, Commissioner, Department of Children and Families.
Filed: March 5, 2013 as R.2013 d.055, **with substantial and technical changes** to proposal after additional notice and public comment, pursuant to N.J.S.A. 52:14B-10 and **with substantial and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 9:6-8.15, 9:6-8.36a, 9:6-8.106, 30:1-12, and 30:4C-4(h).

Effective Date: April 1, 2013.
Expiration Dates: December 9, 2015, N.J.A.C. 10:120A;
December 2, 2015, N.J.A.C. 10:122E;
February 13, 2019, N.J.A.C. 10:126A;
December 13, 2018, N.J.A.C. 10:129;
May 21, 2014, N.J.A.C. 10:133G.

Summary of Public Comments and Agency Responses:

Comments on the original notice of proposed amendments were received from Debra L. Wentz, Ph.D., CEO of the New Jersey Association of Mental Health and Addiction Agencies, Inc. (NJAMHAA); Amy Vasquez, Esquire; Mary Coogan, Assistant Director of Advocates for Children of New Jersey (ACNJ); Jeyanthi Rajaraman, Family Representation Project, Supervising Attorney, Legal Services of New Jersey (LSNJ); Jacqueline F. Pivawer, Esq., Helfand & Associates; Court Appointed Special Advocates of New Jersey, Inc., (CASA); Randi Mandelbaum, Sabrina Burlew, Clinical Legal Intern, and Jeffrey Chang, Clinical Legal Intern, Rutgers Child Advocacy Clinic (RCAC); Joseph F. Suozzo, Deputy Public Defender, Office of the Law Guardian (OLG); and Senator Shirley K. Turner, 15th District.

Comments on the notice of proposed substantial changes upon adoption to proposed amendments were received from Mary E. Coogan, Assistant Director, ACNJ; Barbara Keshishian, President, New Jersey Education Association (NJEA); David Tang, Administrative Office of the Courts, Family Practice Division; Debra L. Wentz, Ph.D, Chief Executive Officer, NJAMHAA; Mary McManus-Smith, LSNJ; and Amy Vasquez, Esquire.

1. Comments Received During Initial Comment Period Giving Rise to Substantial Changes in Proposal upon Adoption

General Comments

1. COMMENT: Determinations of substantiated and established mean that child abuse or neglect was committed. The consequences of those acts are distinguished by one very important feature: a listing on the child abuse registry does not occur automatically from a finding of established. OLG urges that the proposed amendments be clarified to make this point very clear.

2. COMMENT: The proposed amendments are not clear that an "established" case does not go on the child abuse registry. There should be fewer names on the Registry and fewer OAL appeals. This still does not give due process.

3. COMMENT: The proposed regulations must comply with the disclosure requirements pursuant to N.J.S.A. 9:6-8.10.a and 8.11. The Division may only disclose "substantiated" findings to certain entities. The proposed regulations fail to clearly state whether CP&P intends to disclose "established" or "not established" findings. They must be clear that only substantiated findings may be disclosed pursuant to N.J.S.A. 9:6-8.40.

RESPONSE TO COMMENTS 1, 2, AND 3: The Department is responding to the comments about whether established findings are entered into the child abuse registry by adding a new subsection that states that only substantiated findings are disclosed, N.J.A.C. 10:129-7.7(a). While the Department will retain records of established findings, it will not disclose them pursuant to the statutory requirements or authorization to disclose substantiated findings of abuse and neglect at N.J.S.A. 2A:4A-92.d; 9:3-40.8; 9:6-8.10.a, 8.10.c, and 8.10.e; 30:4C-27.22; 30:4C-27.7; 30:5B-6.2; 30:5B-25.3; and 30:5B-32.

4. COMMENT: CASA of NJ is also concerned about the effect of the amended screening categories on its own screening of volunteers and staff. We have a concern regarding the "established" category, which will not come up with a positive CARI check. This creates an unacceptable

result for CASA by permitting an individual who has been found to have caused harm to a child to volunteer or work for CASA. We feel strongly that, if an individual has an "established" allegation of abuse or neglect, CASA should know about it to avoid placing children in harm's way. The need for information from CARI can be balanced by implementing a system whereby "established" incidents are removed from the CARI system after a specific number of years, provided there have been no other "established" or "substantiated" incidents.

RESPONSE: The Department declines to make the recommended change. The intent of the amendments is to create a genuine distinction between the findings of "substantiated" and "established." The release of established findings during a CARI check would negate that distinction. New N.J.A.C. 10:129-7.7(a) clarifies that only substantiated findings will be released pursuant to a CARI request.

N.J.A.C. 10:129-7.3

5. COMMENT: The Division's proposed change to N.J.A.C. 10:129-7.3(a) is endorsed by OLG.

This section provides an opportunity to further clarify that both the "substantiated" and "established" categories reflect a determination that the act investigated constitutes child abuse. The following modification is suggested:

The Division's child protective investigation shall fully evaluate the available information and, for each allegation, determine whether abuse or neglect has occurred and shall make every reasonable effort to identify the perpetrator of each allegation of abuse or neglect. An investigation finding of either "substantiated" or "established" is a determination that abuse or neglect has occurred.

RESPONSE: The Department thanks the Office of the Law Guardian for its support. The Department agrees that this is the process which the proposed amendments intended to establish. N.J.A.C. 10:129-7.3(a) addresses the issues of evaluation and identification. In order to clarify that a finding of either substantiated or established is a finding of abuse or neglect, the Department has added new N.J.A.C. 10:129-7.3(d).

6. COMMENT: It is "fundamentally unfair" to deny a hearing to individuals with a finding of "established" pursuant to N.J.A.C. 10:129-7.3(c)2 because such individuals will face significant obstacles becoming foster or adoptive parents, or relative placements through the Department, and will likely be denied employment opportunities within the Department.

7. COMMENT: An individual determined to be "established" or "not established" should be afforded an opportunity to appeal those findings regardless of registry placement and disclosure, as keeping that finding will likely result in a deprivation of civil liberty interests. The consequences include injury of a person's good name, the capacity to obtain employment in education-related jobs, the ability to adopt a child or to obtain kinship legal guardianship of a child, or to become a resource parent.

RESPONSE TO COMMENTS 6 AND 7: The Department declines to make a change to allow hearings on established findings and disagrees with the commenter's contention that this is fundamentally unfair or a denial of due process. Determinations given as examples by the commenter are uniformly made based on consideration of a totality of individual circumstances; a finding of "established" is not a prohibitive bar to an individual's eligibility for employment with the Department, or to suitability for child placement. Applicants for education-related employment are generally not even subject to a CARI check, and it is not anticipated that the Department's closer retention of established records will have any discernible impact in this area.

8. COMMENT: N.J.A.C. 10:129-7.3(b) and (c) do not truly reflect the process for making findings, since supervisors and in many cases other CP&P employees would be involved in making the determination of what particular finding is warranted. OLG suggests the following modification:

An investigative finding generally is made by the child protective investigator in consultation with others, and those individuals will be identified clearly in the relevant investigation documents regarding such determinations.

RESPONSE: The Department acknowledges that a child protective investigator does not make the decision about findings in a vacuum. The Department has changed the rule to use the term "Department representative," as defined at N.J.A.C. 10:129-1.3, instead of "child protective investigator" to indicate that this decision is made by Department staff. Changes have consequently been made at recodified N.J.A.C. 10:129-7.3(a), (b), (c), (e), and (f), and in new N.J.A.C. 10:129-7.5(a) and (b). It is not necessary to specify all levels of staff who may be involved in the decision in rules.

9. COMMENT: There is no discernible difference between "not established" and "unfounded," except that records will be purged after three years in "unfounded" cases. Ms. Vasquez recommends the category of "not established" be eliminated.

If the "established" category will be subject to CARI disclosure, then there is no difference between it and substantiated. If so, "established" should be eliminated.

RESPONSE: The Department is retaining the four findings categories as proposed. The Department has changed the definitions of "established" and "not established" at recodified N.J.A.C. 10:129-7.3(c)2 and 3 in order to clarify the distinction between those findings and "substantiated" and "unfounded" findings. These changes were proposed in the notice of substantial change. Established findings are not subject to CARI disclosure.

10. COMMENT: OLG agrees with the proposed change at recodified N.J.A.C. 10:129-7.3(c)1, but greater clarity is needed to make clear the distinction between a finding of "substantiated," which could be an act of child abuse or neglect that also warrants listing in the child abuse registry, and a finding of "established," which is an administrative determination that the act constitutes an act of child abuse or neglect that remains a part of the Division's records but without the consequence of a registry listing.

RESPONSE: The Department thanks the Office of the Law Guardian for its support. The Department has clarified the definitions of substantiated and established at recodified N.J.A.C. 10:129-7.3(c)1 and 2. The Department has moved N.J.A.C. 10:129-7.3(c)1i and ii to recodified N.J.A.C. 10:129-7.4 and 7.5 and referenced these subsections in recodified N.J.A.C. 10:129-7.3(c)1.

11. COMMENT: The word "unusual," to describe aberrant sexual activity with a child is somewhat puzzling since any sexual activity with a child would warrant substantiation, notwithstanding that it might be unusual and inappropriate. A different situation might exist where a child is exposed to materials of a sexual nature. Factors such as the age of the child, the purpose of the exposure, and the content of the material would be critical to ascertain. This section warrants amendment.

RESPONSE: The Department agrees with the commenter and changed the language at new N.J.A.C. 10:129-7.4(a)2. The Department wishes to clarify that subjecting a child to any sexual activity requires a substantiated finding. The Department has separated subjecting a child to sexual activity from exposure to sexual activity or materials. Subjecting a child to sexual activity is always inappropriate, while there may be both inappropriate exposures to materials of a sexual nature and appropriate exposure for educational or other appropriate purposes.

12. COMMENT: OLG concurs in the need for the factor initially proposed at N.J.A.C. 10:129-7.3(c)1ii(1)(E). As written, it fails to capture repeated acts perpetrated against a child when a parent or guardian does not commit the behavior, but permits repetitious behavior to be perpetrated against the child. OLG suggests the following:

Repeated instances of physical abuse committed by the alleged perpetrator against a child, or failure to take reasonable action to protect against such physical abuse perpetrated against a child under circumstances where the non-perpetrator parent knew that such harmful acts were being inflicted against the child.

RESPONSE: The Department agrees with the OLG that the statutory definition of an abused or neglected child includes the concept of a non-perpetrating parent knowingly allowing harmful acts to be inflicted against the child. The failure to protect the child should be a required reason to substantiate abuse or neglect against a parent. The Department added this additional factor at new N.J.A.C. 10:129-7.4(a)5.

13. COMMENT: The factor initially proposed at N.J.A.C. 10:129-7.3(c)1i(5) does not provide guidance about what "substantial deprivation" means. The amendment is more confusing that the existing regulation.

14. COMMENT: The defining phrase "over an unreasonable period of time" in N.J.A.C. 10:129-7.3(c)1i(5) creates a very subjective standard that focuses on the passage of time and whether that time was "unreasonable." The test should be whether or not the deprivation caused harm or a likely risk of harm. OLG suggests the following:

Substantial deprivation of necessary care to the child which either caused harm or created a substantial risk of harm as a direct result of such deprivation.

RESPONSE TO COMMENTS 13 AND 14: The Department agreed with the OLG's comment to remove the standard based on determining what an unreasonable passage of time is. The Department also agreed that "substantial deprivation" is unclear. The Department adopted a different standard based on the statutory language of serious harm or risk of serious harm. The Department believes that this determination is clearer and less subjective. The changed language is found at new N.J.A.C. 10:129-7.4(a)6.

15. COMMENT: Abandonment is a circumstance already included in N.J.S.A. 9:6-8.21(c)(5). The additional language of a child "victim" suggests, but is not clear about, exactly the kind of circumstance intended here.

At the end of the originally proposed N.J.A.C. 10:129-7.3(c)1i(6), there are a semi-colon and an "or" intended to lead to subparagraph (c)1ii and suggesting that subparagraph (c)1i and ii are independently applied. It is potentially confusing. OLG recommends eliminating this sub-subparagraph.

RESPONSE: The Department deleted proposed N.J.A.C. 10:129-7.3(c)1i(6), as it is covered in new N.J.A.C. 10:129-7.4(a)6, depriving a child of necessary care which either caused serious harm or created a substantial risk of serious harm. The Department believed that this adequately addressed the issue of abandonment.

Because the subparagraphs that were originally in N.J.A.C. 10:129-7.3(c)1 have been separated into distinct sections, N.J.A.C. 10:129-7.4 and 7.5, respectively, the potentially confusing semi-colon and "or" have both been removed.

16. COMMENT: The language in Comment 53 item 1 is largely drawn from the original notice of proposal at N.J.A.C. 10:129-7.3(c)1ii(1)(A) and modified slightly for the reasons that follow. In and of itself, the fact that an investigation and finding is made in an institutional, school, residential group home, or other "institutional" setting does not fairly suggest that the incident presents a broader public safety concern, though in some cases it might. What seems more to the point is to isolate the failure of an alleged perpetrator to adhere to extant institutional (or regulatory) policies dealing with the situation at hand. For instance, the investigative finding for an injurious act or acts of an untrained person facing the escalating behavior of a distraught teenager might not be substantiated, but the same act or acts of a trained child care worker operating under, and violating, agency protocols and policies likely would be unacceptable and therefore may result in a substantiated finding. A key difference may well be the expectation that there is special training for the child care worker, or that agency policies were not followed, resulting in an avoidable injury or risk of injury. The critical aspect of this factor goes to the nature of the breakdown, for example, in the rules for alleged abuse or neglect in the institutional setting, or the failure to abide by specialized training techniques or protocols under which individuals are expected to operate.

RESPONSE: The Department considered this aggravating factor in light of the OLG's comment. While the Department has decided not to propose the OLG' suggestion as written, it concurs with the rationale of the suggestion, and determined that the factor should be changed to "institutional abuse or neglect" with no qualifying or explanatory information, at new N.J.A.C. 10:129-7.5(a)1. The Department wants any abuse or neglect committed in an institutional setting to be considered an aggravating factor in determining whether abuse is established or substantiated.

17. COMMENT: Failure to adhere to case or safety plans that lower inherent risk posed by a situation (or by an alleged perpetrator's behavior) is properly considered as a special factor, originally proposed at N.J.A.C. 10:129-7.3(c)1ii(1)(B). Consideration of such a factor should link non-compliance with risk and/or make clear that non-compliance ought to be substantial. Incorporating both these aspects seems essential. Mere violation of an agency protocol or non-compliance with offered services alone should not be considered to trigger this factor.

RESPONSE: The Department agrees with the commenter that a perpetrator's non-compliance should be linked to risk and should not be linked to a violation of agency protocols. The Department amended a paragraph now located at new N.J.A.C. 10:129-7.5(a)2, removing the originally proposed language regarding Department protocols, training, agency policies, or instructions, as not being an aggravating factor. The new language addresses the comment that non-compliance should be substantial by specifying that non-compliance is limited to court orders, or clearly established or agreed upon conditions designed to ensure that child's safety, such as a child safety plan or case plan.

18. COMMENT: OLG does not endorse using the child's removal as an aggravating factor. See the original notice of proposal at N.J.A.C. 10:129-7.3(c)1ii(1)(F). The allegations in a Title 9 or 30 complaint are not reliable indicators of the nature, veracity, or harm posed to children by the underlying allegations. Sometimes they are accurate, sometimes not. Understanding the circumstances where removal or non-removal may not relate directly to the nature of the underlying abuse or neglect should not be utilized as an aggravating factor or any other factor to consider as part of the findings. OLG recommends that this language be dropped from the rule.

RESPONSE: The Department declines to remove the aggravating factor as suggested, but has made revisions to more thoroughly address the issue. The Department added language at new N.J.A.C. 10:129-7.5(a)7 to read "[t]he child's safety requires separation of the child from the perpetrator." If the child and perpetrator were separated in any way for the child's protection, the Department wants to consider that factor in its determination of whether the finding is substantiated or established. If a separation was subsequently determined to have been unnecessary or imprudent, that would naturally diminish the weight accorded to it.

19. COMMENT: The OLG proposes the following amendment to proposed N.J.A.C. 10:129-7.3(c)2:

An allegation will be determined "established" if the preponderance of the evidence supports the conclusion that a child is an "abused or neglected child" as set forth in N.J.S.A. 9:6-8.21 but where the act or acts committed do not warrant a finding of "substantiated."

RESPONSE: The Department agrees that the definition of "established" suggested by the OLG is clearer and amended N.J.A.C. 10:129-7.3(c)2 to replace "there exists insufficient evidence to reach a finding of substantiated" with "the act or acts committed or omitted do not warrant" a finding of substantiated. The Department agrees that basing the determination of an established finding on the degree of seriousness of the act of abuse is more accurate than basing the determination on insufficient evidence, which may imply that the act did constitute abuse that the Department could not prove. The Department added "or omitted" to the OLG's suggested amendment in order to clarify that omitting certain behaviors can be neglect. The Department has also changed the verb "will" to "shall" in conformity to the language used throughout the chapter.

20. COMMENT: Children falling into the "established" category, who are still abused or neglected children, should be provided the same protections and afforded the same rights as those falling in the substantiated category. There seems to be little reason, from the child's perspective, to have both the "substantiated" and "established" categories. The risk is that caseworkers will over-utilize the established offense and will fail to provide needed protection to the child and services to the family. There must be some requirement that the child is entitled to the same protections and rights a child for whom there is a substantiated allegation.

RESPONSE: The Department agrees with the commenter, but declines to change the rule. Both substantiated and established findings are determinations that a child has been abused or neglected. No part of this rule provides for the disparate treatment of victims of abuse based on the finding. The Department will not distinguish between the findings of "substantiated" and "established" when determining the need for ongoing child protection or services.

21. COMMENT: OLG proposes the following amendment to proposed N.J.A.C. 10:129-7.3(c)3:

An allegation will be determined "not established" if the preponderance of the evidence fails to support the conclusion that a child is an "abused or neglected child" as set forth in N.J.S.A. 9:6-8.21, but the evidence raises some concerns that the child was harmed, may have been harmed, or was placed at some risk of harm due to the alleged act or acts.

RESPONSE: The Department agrees that the concepts of "preponderance of the evidence," the statutory definition of an abused or neglected child, and "the child's harm or risk of harm" are useful additions to the definition of "not established" and has incorporated these concepts at N.J.A.C. 10:129-7.3(c)3. The additions that there is not a preponderance of the evidence and of the statutory reference allow the reader to contrast and compare "not established" with the definitions of the other three findings.

22. COMMENT: OLG proposes the following amendment to proposed N.J.A.C. 10:129-7.3(c)4:

An allegation will be determined "unfounded" if the preponderance of the evidence indicates that a child was not harmed or placed at risk of harm pursuant to N.J.S.A. 9:6-8.21.

RESPONSE: The Department agreed that the addition of the "not a preponderance of the evidence" standard clarifies the definition. The Department added this standard and the reference to the statute defining an "abused or neglected child," so that this definition can be contrasted and compared to the other three findings. The Department removed the "insufficient evidence" standard as it may lead to misinterpretation.

23. COMMENT: Currently, if there is a fact-finding hearing pursuant to N.J.S.A. 9:6-8.44, the agency will defer to the trial court and adopt its decision as to whether the defendant had abused or neglected the child. If a defendant is found to have abused or neglected a child at trial or had stipulated to abuse or neglect, the decision or stipulation will result in substantiation. If there is no finding of abuse or neglect, there is an "unfounded" determination. Under the proposed regulations, it must be made clear that a dismissal under Title 9 proceedings, like a fact-finding hearing, will result in an "unfounded" finding. Judicial findings will not affect the Division's ability to maintain their records.

LSNJ recommends that the regulations clearly state that in a Title 9 proceeding, the trial court judge is the ultimate adjudicator who makes the final determination of whether or not there is a finding of abuse or neglect. The regulations should clearly state that if there is no finding of abuse or neglect, the matter is dismissed and automatically results in an unfounded finding. This will ensure there is only one proceeding to review and determine if an individual has abused or neglected a child and/or shall be placed on the child abuse registry. The proposed regulations should clearly state once a matter has been determined to be unfounded in a Title 9 proceeding, the Division is not permitted to make additional findings of "established" or "not established."

RESPONSE: The Department is bound by the facts in the trial court, absent appeal. If there is no determination of abuse or neglect by the trial court, it is the Department's decision whether the finding is unfounded or not established. A finding is a Department administrative decision. The Department has added new N.J.A.C. 10:129-7.3(d) and new (h), clarifying that it is the Department's decision whether an act of abuse or neglect is established or substantiated and that "not established" means the child was not abused or neglected. A court determination that a child was not abused or neglected will not compel the Department to reach a finding of unfounded, but will preclude findings of substantiated or established.

24. COMMENT: While findings made after an investigation are agency decisions, appealable through the Office of Administrative Law, there is a concern that the findings will be used in arguments in Title 9/Title 30 family neglect (FN) litigation in Superior Court. Because a finding of "established" is an agency decision, these findings should not impact a FN proceeding filed in Superior Court. Decisions made by the trial judge in the FN matter are based upon the evidence submitted to the Superior Court. ACNJ recommends that the regulations clearly state that a CP&P finding of "established" does not prohibit a judge from removing a child from the home pursuant to N.J.S.A. 9:6-8.33 or entering an order for care and supervision pursuant to N.J.S.A. 30:4C-12, if that is what the circumstances warrant.

25. COMMENT: The proposed amendments require an unambiguous statement that acts determined to be substantiated and acts determined to be established are both deemed to fall within the statutory definition of child abuse or neglect as set forth in N.J.S.A. 9:6-8.21.

RESPONSE TO COMMENTS 24 AND 25: The Department added a statement at new N.J.A.C. 10:129-7.3(d) that a finding of either established or substantiated constitutes a determination that a child is an abused or neglected child. This was the intent of the proposed amendments. Since it was questioned by more than one commenter, the Department added this statement to clarify.

2. Comments Received During Initial Comment Period, Not Giving Rise to Changes in the Rule Proposal

General Comments

26. COMMENT: ACNJ has ongoing concerns that Child Abuse Record Information (CARI) disclosures are better addressed through statute.

27. COMMENT: Senator Turner wants the Division of Child Protection and Permanency ("Division" or "CP&P") to adopt categories outlined in Senate Bill S.453. (S.1570, its predecessor passed both houses of the Legislature unanimously during the 2010-2011 session.) These categories clearly address the problems identified by the New Jersey Office of the Child Advocate and are consistent with how other states are addressing the problems of a strict two-tier investigative findings system. The categories that should be established by the Division include: one category where abuse and neglect meet legal requirements (substantiated); cases in which there is troubling evidence of abuse/neglect that does not meet legal requirements (unsubstantiated); and cases in which there is no evidence at all that there are any risks to abuse/neglect (unfounded).

RESPONSE TO COMMENTS 26 AND 27: The Department of Children and Families ("Department" or DCF") has the regulatory authority to make these changes, and believes that establishing these rules by regulation rather than statute provides critical flexibility to accommodate future changes to child welfare practice.

The Department believes that the four-tier system adopted is preferable to the three-tier system proposed by Senator Turner, in that the Department's proposed system demands a determination that abuse or neglect did or did not occur. This avoids ambiguity that a "middle ground" finding would likely create.

28. COMMENT: Because of the importance of revision of this chapter, the commenter urges that a public hearing be held for further discussion and that the notice of proposal be published on the DCF website with an extension of time for written public comment.

RESPONSE: As the Department received only one request for a public hearing and an additional comment period, the Department declines to provide either of them.

29. COMMENT: The notice of proposal does not address retroactive application of this reform of the current findings system. The issue of fairness to individuals who may be on the child abuse registry currently for an act or acts which would not warrant such a determination under this proposed reform is significant.

ACNJ recommends that additional provisions be added to these regulations requiring CP&P to review cases pending on appeal and cases of people already in the registry, reviewing 1,000 cases or other specific number per year. With regards to pending appeals, if the investigation would result in an "established" finding under the new regulations, the current finding of "substantiated" should be changed to "established."

For people already in the registry, ACNJ recommends that CP&P start with the oldest cases first. If a review of the case under the new regulations would result in an "established" finding and there has not been another referral made against the individual in the last 15 years, then the person should no longer be subject to a CARI disclosure. If CP&P determines that there were aggravating factors warranting a substantiated finding pursuant to the amended regulations, the individual will continue to be subject to a CARI disclosure.

30. COMMENT: All of those cases formerly categorized as "unfounded" must be reviewed to be determined whether or not they meet the new definition of "unfounded" or one of the other new definitions. This has an impact on their eligibility for expunction. This will be costly and time-consuming.

RESPONSE TO COMMENTS 29 AND 30: The Department has determined that the new four-tier finding rules will apply only to investigations commenced on or after April 1, 2013, the effective date of the amendments, and has added new N.J.A.C. 10:129-1.2(b) upon adoption. This was done to preclude the need to conduct anew any near-completed investigations previously commenced to ensure conformity with the new requirements. It also allows the Department to abide by the time frame for making a finding mandated by this rule at recodified N.J.A.C. 10:129-7.3(b) and the terms of the *Charlie and Nadine H. v. Christie* settlement agreement, as modified. Investigations previously conducted did not utilize the evaluative criteria promulgated by the amendments. A wholesale reevaluation of all cases would be administratively impossible.

31. COMMENT: The Department should enumerate and describe the precise situations about where and when it will utilize their records and specifically, findings of "established" and "not established" in future actions, like investigations and placement decisions. As noted by the New Jersey Supreme Court, "that the same analysis is applicable if stigmatization is added to the impairment of … right to adopt or become a foster parent which also implicates weighty personal interests." *In the Matter of Allegations of Sexual Abuse at East Park High School*, 314 *NJ Super.* 149, 160-61 (App. Div. 1998).

RESPONSE: The Department will consider the underlying facts of each report and investigation on an individual basis when making decisions. The Department staff will not use the findings of "established" and "not established" to make future investigation and placement decisions. These two findings do not automatically exclude anyone from anything.

32. COMMENT: The proposed amendments do not address the expiration or expunction of findings. At the essential core is the notion that a substantiation for abuse should not necessarily remain in place for a person's lifetime. Authority to address the current lifetime listing on the child abuse registry arguably rests within the regulatory authority of the Department. The current legislation contains no explicit provision that limits the Department's exercise of its rulemaking power to address these issues.

RESPONSE: The Department cannot allow the expiration of findings by regulation. Statutory authority is necessary. The Department believes that with the correct application of the absolute factors stated at recodified N.J.A.C. 10:129-7.4 and the correct evaluation of the aggravating and mitigating factors stated at recodified N.J.A.C. 10:129-7.5, the issue of unfair lifetime listings on the child abuse registry will be mitigated. The Department believes that the expunction of unfounded findings after three years is reasonable and meets the needs of the Department and others.

33. COMMENT: Ms. Vasquez recommends a procedure regarding unfounded reports alleged to be made in bad faith or with malicious intent.

RESPONSE: The Department did not propose amendments related to the topic of malicious reports or those made in bad faith. The comment is beyond the scope of this rulemaking.

34. COMMENT: It is unacceptable that Office of Administrative Law (OAL) judges (ALJ) frequently find no abuse, but are overruled by the CP&P Director.

RESPONSE: The Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., allows for a final agency decision of the ALJ's decision by the Division Director.

35. COMMENT: The Federal monitor's report, dated Sept. 12, 2011, recommends that "[CP&P] review its allegation based system in order to determine ways to provide clearer, more decisive direction to the field" and that CP&P "update and simplify its investigations manual to create consistent requirements regarding collateral contacts and case planning." ACNJ and RCAC concur with these recommendations. ACNJ assumes that CP&P has begun this process.

RESPONSE: This comment is beyond the scope of this rulemaking. The Department has not proposed rules pertaining to the allegation based system, collateral contacts, or case planning. These matters are dealt with by CP&P in policy.

36. COMMENT: Information about child protection investigations and listing on the child abuse registry is not readily apparent or available to the general public. OLG respectfully urges that the Division make a concerted effort to make this information available in an informative and easy to access manner via a posting of that information on the Department's website, along with the identification of a person to contact for additional information or questions.

RESPONSE: The Department thanks the commenter. Departmental rules are posted on the Department's website and available through other free public websites. The Department will consider additional ways to communicate the information to the public, as such becomes available.

37. COMMENT: The proposed amendments note that there will be no cost associated with adopting regulations. There will be costs associated with training staff about the new definitions. How will CP&P workers be trained?

RESPONSE: CP&P workers are routinely trained in investigative procedures and other matters by the Department's Child Welfare Training Academy.

38. COMMENT: ACNJ urges that CP&P should be obligated to report demographic data on the individuals subject to each category of the new findings annually to the Legislature and Governor's Office and its progress in reviewing findings of cases on appeal and existing cases in the registry with outcomes.

39. COMMENT: Ms. Vasquez recommends that statistics regarding geographic region, race, income, sex, and age for each individual listed in the child abuse registry be maintained as part of the DCF record to allow for measuring equality in determinations.

RESPONSE TO COMMENTS 38 AND 39: The comments are beyond the scope of this rulemaking. The Department has not proposed any rule pertaining to the collection, aggregation, or reporting of statistical information to the Legislature.

40. COMMENT: NJAMHAA looks forward to the adoption of these regulations, and, as a result, an improved process for following up on and taking appropriate action in response to findings of potential abuse and neglect.

RESPONSE: The Department thanks NJAMHAA for its support.

N.J.A.C. 10:129-3.1

41. COMMENT: NJAMHAA believes that a child protective investigator should obtain certified medical records from treating physicians while the investigation is taking place, in order to more accurately determine if an allegation of abuse or neglect could be classified as substantiated or established. As the regulation is currently written, there would be the possibility of a case inappropriately deemed as unfounded or not established if medical records were not analyzed as part of the investigation.

RESPONSE: The Department is required to obtain medical records as part of an investigation by N.J.A.C. 10:129-3.1(d) and 4.1(c). Certified records are needed for litigation and can be obtained either during or after the investigation. The Department declines to change this section further.

N.J.A.C. 10:129-7.3

42. COMMENT: Ms. Pivawer does not think anyone should be "substantiated" without a court fact-finding to ensure due process.

RESPONSE: Substantiated findings are appealable to the Office of Administrative Law and Superior Court. The New Jersey Supreme Court has held on numerous occasions that a trial type hearing before the Office of Administrative Law provides adequate due process. See, for example, *G.E. v. State*, 131 *N.J.* 552 (1992).

43. COMMENT: If the concern is that there is a need to have processes in place to allow for a removal or a waiver from being on the registry, the answer is to create or fix these processes, not to amend the regulatory definition of substantiated and in turn the statutory definition of abuse and neglect. There is a need to allow a person to petition to have their name removed from the registry. The proposed regulations cause more harm and confusion and are an inappropriate vehicle to reforming New Jersey's child abuse registry.

RESPONSE: New Jersey statutes do not permit an administrative waiver of information from the child abuse registry. Numerous statutes require disclosure of substantiated findings from the registry, and the Department is in no way empowered to circumvent those statutory requirements.

By prohibiting the disclosure of information on allegations established abuse or neglect in response to CARIs, the Department has reduced harm to those perpetrators. Every effort has been made to make the rules as clear as possible without sacrificing necessary detail.

44. COMMENT: LSNJ asserts that because prior "established" acts of child abuse may form the basis for a substantiation based on a pattern of abuse, individuals must be afforded a right to a timely hearing on those prior acts of abuse.

RESPONSE: Individuals have a right to an administrative hearing in accordance with N.J.A.C. 10:120A for a finding of "substantiated." Where the substantiation is based on a pattern of prior abuse, the facts of those prior acts of abuse, including those previously "established" are subject to review. Nothing in the rules estops the review of any fact underlying a substantiated finding based on a prior established finding. The rules do not provide that a pattern of abuse and neglect sufficient for a substantiated finding can be based on a history of "not established" findings absent independent evaluation of the facts of each case.

45. COMMENT: LSNJ believes the use of the phrase "evidence indicates" in the definitions of "not established" and "unfounded" in proposed N.J.A.C. 10:129-7.3(c) is confusing and potentially legally inaccurate because the plain meaning of that phrase denotes a preponderance of evidence, and both findings are used only when a preponderance of evidence indicates that a child has not been abused or neglected as defined in N.J.S.A. 9:6-8.21. LSNJ also objects to the use of "child was harmed or placed at risk of harm" as a "supplemental standard to the statutory definition of abuse or neglected child" and recommends that the definitions in proposed N.J.A.C. 10:129-7.3 be limited to the statutory definition of abuse or neglect.

RESPONSE: The Department declines to change the rule. Where utilized, "evidence indicates" refers to a child having been harmed or placed at risk of harm. This is a lesser standard than satisfaction of the statutory requirement in N.J.S.A. 9:6-8.21. The "not established" and "unfounded" findings are used when a preponderance of the evidence indicates that the statutory standard has not been met, and the usage of the descriptive terminology is therefore appropriate.

46. COMMENT: The proposed four-tiered system will be confusing for all individuals who work in the child welfare system. A four-tiered system is not consistent with how the majority of states govern child abuse and neglect allegations. Only three states have more than three categories for child abuse allegations. The RCAC asserts that a three-tiered system is needed and better than both the current and proposed regulation. It would provide a middle position between substantiated and unfounded, allowing more abuse and neglect allegations to remain in the system, be monitored, and never expunged, but not to be placed on the registry.

47. COMMENT: The four-tier system is too ambiguous to be effective. CP&P changed its regulations in 2004 to eliminate the category of "unsubstantiated" and create a category of "unfounded." A subsequent report by the Office of the Child Advocate found that the category of "unfounded" encompassed many cases in which there were concerns of abuse and neglect that could not be legally proven. The four-tier system is extremely ambiguous and does not rectify this problem. Adding these two terms, "established" and "not established," will only add confusion to the public and to other agencies and even to CP&P staff trying to distinguish between those cases in which abuse was confirmed and those in which it was not.

48. COMMENT: While appreciating that CP&P is attempting to carve out the cases in which the parent or guardian will not be subject to a CARI disclosure, ACNJ believes that the proposed amendments may further confuse an already murky process of investigations and findings. And from talking to stakeholders working in the field, it appears that the proposed amendments, as proposed, are confusing in their application, and raise questions regarding what impact these questions/issues may put children at risk of harm or may defeat the intended goal of the proposed amendments, which is to allow people who have committed an isolated act of child abuse or neglect and/or that had a minor or negligible impact on the child to avoid a negative CARI disclosure.

RESPONSE TO COMMENTS 46, 47, AND 48: The Department believes that the four-tier system of findings is clear, as there is a clear distinction between what is abuse and neglect and what is not abuse and neglect. The Department is committed to protecting children from harm and believes that the expansion of abuse and neglect findings will assist in fulfilling that commitment.

The Department believes that the proposed four-tier system of findings is more refined than a three-tiered system. There is a clear delineation between instances of abuse or neglect and those which are not abuse or neglect. With a three-tiered system, the middle finding can be ambiguous as to the occurrence of abuse or neglect.

49. COMMENT: As an alternate to the four proposed categories, Ms. Vasquez recommends the following plan to allow for a more efficient review of existing records and greater potential for fairness and equality:

Three levels of founded cases:

Level 1. This level includes those injuries/conditions, real or threatened, that result in or were likely to have resulted in serious harm to a child. Maintain the record for 18 years past the date of the complaint.

Level 2. This level includes those injuries/conditions, real or threatened, that result in or were likely to have resulted in moderate harm to a child. Maintain the record for seven years past the date of the complaint.

Level 3. This level includes those injuries/conditions, real or threatened, that result in minimal harm to a child. Maintain the record for three years past the date of the complaint.

RESPONSE: The Department believes that the proposed system of two findings to indicate that abuse or neglect occurred permits an adequate distinction between situations where abuse or neglect is severe enough to warrant permanent disclosure of the finding, as permitted by law, and where the harm or risk of harm to the child does not warrant that disclosure. The Department does not believe that a third tier of abuse or neglect is necessary. The Department has adopted the system of four findings, two of which indicate that a child was abused or neglected.

50. COMMENT: The current definition of a "substantiated" allegation is virtually identical to that set forth under N.J.S.A. 9:6-8.21(c), which ensures consistency between a CP&P finding of substantiated abuse or neglect and a court finding of abuse or neglect. Of great concern is that the proposed regulations seek to change this interconnected process by redefining what substantiated means by adding heightened standards to "substantiated," making it much more difficult to make a substantiated finding. Fewer claims will be substantiated and potentially serious allegations will not be handled appropriately in protecting children from known perpetrators.

RESPONSE: The safety of children is always the Department's first and most important priority. The rules are designed to bolster, not undermine, the Department's ability to protect children. The Department agrees with the commenter that fewer allegations will be substantiated under this amended rule. That does not mean that fewer children will be determined to be abused or neglected, as both findings of substantiated and established are findings that abuse or neglect did occur. The Department believes that serious allegations will be handled properly under the rules, as each allegation is investigated on its own merits. Review of prior allegations and findings is only one of many parts of a complete investigation, as indicated at N.J.A.C. 10:129-3.1 and 4.1.

51. COMMENT: The OLG endorses the concept of identifying an act of abuse or neglect under heinous, depraved, or harmful circumstances or because it is likely to recur and pose a continuous risk, so that those aspects compel a substantiated finding and listing on the child abuse registry. Long-standing experience strongly suggests that some flexibility is warranted. Air-tight categories can result in an unfair or unjust result, sometimes with tragic consequences for the child victims. OLG urges that the presence of factors A through F at the originally proposed N.J.A.C. 10:129-7.3(c)1ii(1) not be used to compel a final result. Instead, any of those factors would create a very high likelihood that a finding of "substantiated" would be warranted, subject to compelling circumstances warranted a different finding.

RESPONSE: The aggravating factors, relocated to N.J.A.C. 10:129-7.5(a), do not compel a finding of substantiated or create a presumption of substantiated. Both the aggravating and mitigating factors are designed to promote objectivity and consistency in decision-making throughout the State by listing the factors that may be important. The weight of each factor is dependent on the facts of each case. The Department believes that the language at new N.J.A.C. 10:129-7.5(a) and (b) clearly indicates

that the factors are considerations in the decision-making process and not requirements to make a finding that abuse or neglect either occurred or did not occur.

52. COMMENT: ACNJ suggests that N.J.A.C. 10:129-7.3 set forth the specific activities to be completed for all investigations, regardless of the allegation. If these activities are those set forth in N.J.A.C. 10:129-2.9, then that section of the rule should be referenced. If there are additional tasks that should be completed, they should be clearly stated in regulation.

RESPONSE: N.J.A.C. 10:129-2.9 was repealed in the notice of readoption with amendments, effective February 6, 2012. The material contained in that section is now located in N.J.A.C. 10:129-3.1 and 4.1. The Department does not believe it is necessary to reference these sections of the rule in N.J.A.C. 10:129-7.3.

53. COMMENT: OLG applauds the proposed amendments that explicitly identify and weigh specific factors to make a substantiated finding. Application of the factors through the dichotomy of separate but related aggravating and mitigating factors presents real questions. The confusion will undermine these reforms, particularly for determinations between substantiated vs. established. OLG suggest an alternative approach of the identified factors, instead of the aggravating/mitigating dichotomy. OLG proposes the following:

The substantiation is warranted, or unwarranted, based on consideration of the following seven factors:

1. The act or acts were committed in an institutional or other non-home setting, violating institutional rules or protocols and posing a broader public safety concern for children beyond the specific incident being investigated.

2. Failure or repeated failure to follow through with clearly established and agreed upon conditions, such as a child safety or case plan designed to insure the child's safety and resulting in harm or substantial risk of harm to the child.

3. The tender age, delayed developmental status, or other vulnerability of the alleged child victim.

4. The nature, extent, and duration of the impact on the physical, psychological, and/or emotional well-being of the child. The statements of child victims, aged 10 or over, regarding the impact of the alleged abuse should be expressly identified and carefully considered in the application of this factor.

5. Evidence that the behavior has been engaged in previously, and/or that it will be repeated in the future.

6. Prompt remedial actions taken by the alleged perpetrator to mitigate the harm and which make it unlikely that the act or acts would be repeated in the future.

7. Extraordinary, situational, or temporary stressors that caused the parent or guardian to act in an uncharacteristic abusive or neglectful manner.

RESPONSE: The Department declines to change the rule as suggested. The Department believes that it is clearer to staff and the public to maintain the separate lists of aggravating and mitigating factors as proposed.

54. COMMENT: OLG agrees that the impact of the act is an extremely important consideration, and the nature and extent of that impact (was it significant and lasting, or was it negligible and temporary?) should be included as a factor to consider in making an investigative determination. Based upon our experience, in some instances, the Division has made an investigative finding determination, or changed that determination after a preliminary finding determination, based on factors that have appeared to minimize, or simply not accounted for, the strong feeling expressed by the child victim. Such determinations should never be made in a fashion which fails to put the well-being and protection of the child victim as a central component of the final investigation determination. Application of this factor as modified from the original proposal at N.J.A.C. 10:129-7.3(c)1ii(1)(D), will provide some assurance that child victims will remain a central consideration when deliberating investigative findings.

RESPONSE: The Department is retaining the dichotomous factors of "any significant or lasting physical, psychological, or emotional impact on the child" at new N.J.A.C. 10:129-7.5(a)4 and "the limited, minor, or negligible physical, psychological, or emotional impact of the abuse or neglect on the child" at new N.J.A.C. 10:129-7.5(b)4. The Department believes that this includes the commenter's desire to maintain this factor in making the decision about the finding.

The Department has retained the structure of listing aggravating and mitigating factors separately. Consideration of a child's own statements is a critical component of the Department's investigative practice and an important consideration in planning for the family.

55. COMMENT: CASA of NJ is concerned that important terms are undefined and that many different factors must now be considered. This can lead to different interpretations by different investigators. The terms and factors may be misunderstood. The aggravating and mitigating impact can lead to differing interpretation by different investigators.

RESPONSE: The Department believes that each term that needs to be defined has been defined. Terms that are undefined in the rule are used in accordance with the standard meaning.

The Department believes that giving staff a list of factors that must be considered improves the consistency of evaluation throughout the State. Each child protective investigator will receive training on the process for determining if abuse or neglect occurred and in how to select a finding.

56. COMMENT: The recommended factor discussed in Comment 52, item 5 is drawn from factors in both the aggravating and mitigating sections in the original notice of proposal at N.J.A.C. 10:129-7.3(c)1ii(1)(E) and (2)(C), which address frequency: for example, the repetitive or, alternatively, aberrational nature of the acts committed on the child victim. Since these factors represent opposite ends of the spectrum of a similar consideration, applying it as a single factor makes good sense.

RESPONSE: The Department has relocated these factors to new N.J.A.C. 10:129-7.5(a)6 and (b)3 without change. The Department believes that the scheme of aggravating and mitigating factors best serves the decision-making process.

57. COMMENT: The OLG endorses the idea that remedial actions taken by the alleged perpetrator should be viewed as a factor the child protection investigation should view favorably. However, the OLG proposed change noted in Comment 52, item 6 makes clear that remedial action in and of itself is not sufficient; such action or actions must impact favorably on the investigation's evidence regarding likely future behavior, so that such acts likely would not be repeated in the future.

RESPONSE: The Department has retained this mitigating factor as proposed, while relocating it to new N.J.A.C. 10:129-7.5(b)1. The Department believes that only the remedial actions themselves can be considered in determining a finding. Within the narrow constraints of the investigative time frame, it is essential that each Department representative make determinations based on objective, concrete factors.

58. COMMENT: OLG fully endorses the language in the proposed N.J.A.C. 10:129-7.3(c)1ii(2)(B) and urges its adoption consistent with the commenter's prior comments.

RESPONSE: The Department thanks the Office of the Law Guardian for its endorsement. The Department relocated this mitigating factor to new N.J.A.C. 10:129-7.5(b)2 without change.

59. COMMENT: OLG urges the Department to amend the current rule proposal to indicate:

1. That the Division anticipates that there will be interplay between the provisions of this proposal (if adopted) with the family court's determinations of child abuse under Title 9; and

2. The Division's amendment of this proposal to embrace the likelihood that the outcome of an administrative finding can be the subject of a consent stipulation among the relevant parties in Title 9 judicial hearings. Such agreements, where appropriate and entered into freely by the parties, would advance the laudatory public policy to promote greater fairness in recognizing that not every act of abuse or neglect warrants the identical penalty of a lifetime listing on the child abuse registry.

OLG urges the Division to adopt the following provision:

When the Division as a party to Title 9 litigation alleging abuse and neglect agrees to a consent stipulation with the stipulating party and the Law Guardian that the defendants' act or acts constituted child abuse or neglect, and further where the Division consents to a stipulation that an administrative finding of either "established" or "substantiated" is agreed

upon, then in such cases the Division's entry into such agreement and its incorporation into the fact finding stipulation shall be valid and binding as the Agency's administrative investigative finding concerning the same act or acts by the defendant.

RESPONSE: The Department agrees with the concept of stipulation by consent among the parties in lieu of a fact finding hearing, but does not believe that it is necessary to change the rules to state that this is an option.

60. COMMENT: Amy Vasquez offers the following recommendations for revising the rules. When determining substantiation is warranted, the worker recommends a finding of abuse or neglect to the Superior Court by filing a Verified Complaint. A lifetime penalty should only be determined by the judiciary.

Ms. Vasquez also recommends a provision for handling the record when a judge has made a finding of abuse or neglect when DCF has determined the case to be "established," "not established," or "unfounded" and when a judge had determined that no abuse or neglect occurred but DCF determined administratively that the case is "established" or "not established." The Administrative Law Judge would use this system to affirm or overturn agency action, which would differ from the "appeal" through the litigated case.

RESPONSE: The Department declines to make these changes. All substantiated findings are subject to judicial appeal. Neither the adopted rules, nor the rules they replace, required a judicial determination that abuse or neglect is substantiated.

A finding of established or substantiated cannot be reached by the Department if a court has determined that no abuse or neglect occurred.

61. COMMENT: NJAMHAA requests that N.J.A.C. 10:129-7.3(d) be reconsidered since "treatment in good faith by spiritual means" is subjective.

RESPONSE: This language is in accordance with N.J.S.A. 9:6-8.21c and 30:4C-6. The Department retains the language without change at new N.J.A.C. 10:129-7.3(f).

N.J.A.C. 10:129-7.4

62. COMMENT: All notifications required under this rule should be made by certified and regular mail, if not personal service, including DCF's actions and the individual's rights, and specific information about CARI disclosure.

RESPONSE: The Department agrees that persons who are perpetrators of substantiated abuse or neglect should be notified by either personal service or regular and certified mail. The Department has added new N.J.A.C. 10:120-7.6(a)2 to state that the "Department representative," rather than the "child protective investigator" shall provide written notice, and to require said written notice to be by either personal service or regular and certified mail for every perpetrator of a substantiated allegation.

63. COMMENT: N.J.A.C. 10:129-7.4(c)2 does not address whether "established" findings will be entered into the Department's registry. RCAC assumes that it will not. If so, a system will be created where a court may determine a finding of abuse or neglect, resulting in the perpetrator's name being sent to the registry under N.J.S.A. 9:6-8.21 and a CP&P finding of "established" will not be, even though they are essentially defined the same.

RESPONSE: While the Department did not propose amendments to the paragraph cited by RCAC, the Department has clarified that the Department shares only information about perpetrators with a finding of substantiated as the result of a CARI check.

N.J.A.C. 10:129-8.2

64. COMMENT: Purging of unfounded records should occur after one year to allow for completion of the investigation and services, if needed.

65. COMMENT: NJAMHAA recommends the addition of a clause specifying that an unfounded record be kept for a period of years in case another unfounded claim is made. There is no harm in retaining an unfounded record in storage under strict confidentiality requirements. No report should ever be discarded.

RESPONSE TO COMMENTS 64 AND 65: These comments are outside the scope of this rulemaking, as the Department did not propose a change to N.J.A.C. 10:129-8.2.

3. Comments Received upon Publication of Notice of Proposed Substantial Changes upon Adoption to Proposed Amendments to N.J.A.C. 10:129-7.3, 7.4, 7.5, 7.6, and 7.7

General Comments

66. COMMENT: ACNJ has ongoing concerns that Child Abuse Record Information (CARI) disclosures are better addressed through statute.

RESPONSE: The Department of Children and Families ("Department" or DCF") has the regulatory authority to make these changes, and believes that establishing these rules by regulation rather than statute provides critical flexibility to accommodate future changes to child welfare practice.

67. COMMENT: The notice of proposal does not address retroactive application of this reform of the current findings system. The issue of fairness to individuals who may be on the child abuse registry currently for an act or acts which would not warrant such a determination under this proposed reform is significant.

ACNJ recommends that additional provisions be added to these regulations requiring CP&P to review cases pending on appeal and cases of people already in the registry, reviewing 1,000 cases or other specific number per year. With regards to pending appeals, if the investigation would result in an "established" finding under the new regulations, the current finding of "substantiated" should be changed to "established."

For people already in the registry, ACNJ recommends that CP&P start with the oldest cases first. If a review of the case under the new regulations would result in an "established" finding and there has not been another referral made against the individual in the last 15 years, then the person should no longer be subject to a CARI disclosure. If CP&P determines that there were aggravating factors warranting a substantiated finding pursuant to the amended regulations, the individual will continue to be subject to a CARI disclosure.

RESPONSE: The Department has determined that the new four-tier finding rules will apply only to investigations commenced on or after April 1, 2013, the effective date of the amendments, and has added new N.J.A.C. 10:129-1.2(b) upon adoption. This was done to preclude the need to conduct anew any near-completed investigations previously commenced to ensure conformity with the new requirements. It also allows the Department to abide by the time frame for making a finding mandated by this rule at recodified N.J.A.C. 10:129-7.3(b) and the terms of the *Charlie and Nadine H. v. Christie* settlement agreement, as modified. Investigations previously conducted did not utilize the evaluative criteria promulgated by the amendments. A wholesale reevaluation of all cases would be administratively impossible.

68. COMMENT: Ms. Vasquez recommends a procedure regarding unfounded reports alleged to be made in bad faith or with malicious intent.

RESPONSE: The Department did not propose amendments related to the topic of malicious reports or those made in bad faith. The comment is beyond the scope of this rulemaking.

69. COMMENT: ACNJ urges that CP&P should be obligated to report demographic data on the individuals subject to each category of the new findings annually to the Legislature and Governor's Office and its progress in reviewing findings of cases on appeal and existing cases in the registry with outcomes.

70. COMMENT: Ms. Vasquez recommends that statistics regarding geographic region, race, income, sex, and age for each individual listed in the child abuse registry be maintained as part of the DCF record to allow for measuring equality in determinations.

RESPONSE TO COMMENTS 69 AND 70: The comments are beyond the scope of this rulemaking. The Department has not proposed any rule pertaining to the collection, aggregation, or reporting of statistical information to the Legislature.

71. COMMENT: NJAMHAA looks forward to the adoption of these regulations, and, as a result, an improved process for following up on and taking appropriate action in response to findings of potential abuse and neglect.

RESPONSE: The Department thanks NJAMHAA for its support.

72. COMMENT: Absent from the proposed amendments is a clear mechanism for a family in need of services to receive services without

threat of prosecution or being labeled as child abusers. A chilling effect for seeking assistance or cooperating with investigators is likely to result from the four-category proposed changes.

RESPONSE: Rules regarding a family applying for and receiving services are located at N.J.A.C. 10:129-6.1, 10:133-1.4 and 10:133E. There is no requirement that a child protection investigation be completed in order for a family to receive services from the Department.

N.J.A.C. 10:129-7.3

73. COMMENT: An adjudication of abuse or neglect results in a "substantiation." There would be no analyses by the agency in litigated cases that mitigating circumstances exist to allow for an established classification. For cases that are litigated under Title 9 of the New Jersey Statutes, those that are adjudicated with a finding are lumped together with those that the agency has identified as the most severe perpetrators and subject to CARI checks. This provision has the likelihood of violating equal protection principles as parents are the class of individuals that are the litigants in Title 9 actions. In addition, parents who work to achieve reunification with their children through the legal system are more likely to be prosecuted under Title 9 for jurisdictional reasons. The unavailability of judicial determination for the category of "established" is therefore unjust.

RESPONSE: An adjudication that abuse or neglect occurred may or may not result in a finding of "substantiated." The Department determines the finding, based on the factors stated in new N.J.A.C. 10:129-7.4 and 7.5. The Superior Court's jurisdiction in Title 9 litigation extends to the determination of whether a child is abused or neglected pursuant to N.J.S.A. 9:6-8.21. The determination of whether an act of abuse or neglect is substantiated or established is an administrative decision made by the Department. A parent may appeal a finding of substantiated in accordance with N.J.A.C. 10:120A-4.3(a)2.

74. COMMENT: LSNJ asserts that because prior "established" acts of child abuse may form the basis for a substantiation based on a pattern of abuse, individuals must be afforded a right to a timely hearing on those prior acts of abuse.

RESPONSE: Individuals have a right to an administrative hearing in accordance with N.J.A.C. 10:120A for a finding of "substantiated." Where the substantiation is based on a pattern of prior abuse, the facts of those prior acts of abuse, including those previously "established" are subject to review. Nothing in the rules estops the review of any fact underlying a substantiated finding based on a prior established finding. The rules do not provide that a pattern of abuse and neglect sufficient for a substantiated finding can be based on a history of "not established" findings absent independent evaluation of the facts of each case.

75. COMMENT: Amy Vasquez comments that the likely effect of keeping records of "not established" findings indefinitely is to bolster new allegations of abuse or neglect with alleged prior acts.

RESPONSE: Individuals have a right to an administrative hearing in accordance with N.J.A.C. 10:120A for a finding of "substantiated." Where the substantiation is based on a pattern of prior abuse, the facts of those prior acts of abuse, including those previously "established" are subject to review. Nothing in the rules estops the review of any fact underlying a substantiated finding based on a prior established finding. The rules do not provide that a pattern of abuse and neglect sufficient for a substantiated finding can be based on a history of "not established" findings absent independent evaluation of the facts of each case.

76. COMMENT: LSNJ noted that the Department has "appropriately acknowledged" in proposed N.J.A.C. 10:129-7.3(g), "the authority of the Superior Court to adjudicate determinations of child abuse or neglect," and recommended that the language be amended at N.J.A.C. 10:129-7.3(h) to state that when a litigated case results in a finding that there was not a preponderance of evidence that the child is abused or neglected, the Department will adhere to determinations once made.

RESPONSE: The Department agrees that further clarification of the rule as proposed for a substantial change at 44 N.J.R. 2442 is necessary. New N.J.A.C. 10:129-7.3(h), proposed at 44 N.J.R. 2442, has been further changed upon adoption to state that it is the Department's authority to determine the finding after an allegation of abuse or neglect is adjudicated by the Superior Court, Chancery Division, as well as when an allegation of abuse or neglect is not adjudicated by the Superior Court, Chancery Division.

The Department has also changed N.J.A.C. 10:129-7.3(i) to reiterate that perpetrators of substantiated abuse or neglect retain eligibility to appeal that finding through an administrative hearing following a judicial determination that abuse or neglect did occur.

77. COMMENT: NJEA asserts that the addition of the findings of "established" and "not established" in proposed N.J.A.C 10:129-7.3 is contrary to the 2004 findings of the Department and independent experts, which then justified the elimination of a finding category of "not substantiated." Quoting from 36 N.J.R. 4617(a), the commenter notes that at that time, it was concluded that the "not substantiated" finding allowed workers to avoid concluding "either that the abuse or neglect had occurred (substantiated) or that definitely had not occurred (unfounded)" and alleviated "the burden of making a more definitive finding determination." The current proposed amendments, NJEA contends, recreates those "exact circumstances."

RESPONSE: The Department thanks the commenter, but declines to modify the rule. As the commenter correctly notes, an inherent failing of the three tier findings structure utilized by the Department prior to 2004 was that the "not substantiated" finding provided a means by which a determination of the occurrence of abuse or neglect's occurrence could be avoided. None of the four findings adopted in this rulemaking provide such a mechanism. Findings of "substantiated" and "established" require that a preponderance of evidence supports a finding that abuse or neglect did occur; findings of "not established" and "unfounded" require determination that there is insufficient or no evidence that abuse or neglect occurred. This is consistent with the Department's prior rationale for the elimination of the "not substantiated" finding.

78. COMMENT: NJEA asserts that it is false for the Department to claim that findings of "established" will not be disclosed to anyone because recodified N.J.A.C. 10:129-7.6(e)4 requires that the finding be disclosed to the chief administrator of an institution, if the alleged abuse or neglect occurred in an institutional setting. NJEA asserts that such findings will then "be used as evidence, at least, or more likely, as having a collateral estoppel impact" on staff in disciplinary proceedings. It will also, the commenter contends, lead to civil suits against the alleged abuser. The potential harm resultant from the use of findings in such a way, the commenter contends, demands that all such findings be subject to a due process hearing.

RESPONSE: The Department declines to change the rule. A finding of "established" does not infringe upon a protected interest in life, liberty, or property. Disclosure of such a finding is extremely limited, and not subject to CARI disclosure. Such a finding is not an adjudication of facts sufficient to justify a deprivation of a protected interest, and its employment as such in any of the hypothetical scenarios described by the commenter would be inappropriate and subject to challenge at the time of harm.

79. COMMENT: David Tang recommended that the language in new N.J.A.C. 10:129-7.3(h) be modified to reflect that the Department's administrative authority to determine whether an act of abuse or neglect is established or substantiated, or the determination of whether an allegation of abuse is not established or unfounded is limited to situations in which the Superior Court has not made such a determination.

RESPONSE: The Department declines to make this change. The authority of the Superior Court, Chancery Division pursuant to N.J.S.A. 9:6-1 et seq. is to determine the occurrence of abuse or neglect as defined by statute. The more nuanced determination of "substantiated" or "established" for cases in which abuse or neglect as statutorily defined is held to have occurred and "not established" or "unfounded" for cases in which there is not a preponderance of evidence to support a determination that abuse or neglect as statutorily defined occurred is not within the Title 9 jurisdiction established by the statute.

80. COMMENT: Mr. Tang recommended that the rule consistently use "Departmental representative" in place of "child protective investigator." Both terms are employed interchangeably throughout the rule as proposed.

RESPONSE: The Department acknowledges that a child protective investigator does not make the decision about findings in a vacuum. The Department has changed the rule to use the term "Department

representative," as defined at N.J.A.C. 10:129-1.3, instead of "child protective investigator" to indicate that this decision is made by Department staff. Changes have consequently been made at recodified N.J.A.C. 10:129-7.3(a), (b), (c), (e), and (f), and in new N.J.A.C. 10:129-7.5(a) and (b). It is not necessary to specify all levels of staff who may be involved in the decision in rules.

81. COMMENT: While it is commendable that DCF has revised its original notice of proposal, the current amendments continue to raise questions with regard to the interest of justice, equality, and due process. Overall, the four-category system proposed clouds the purpose of the rule, which is to investigate and identify instances or reported child abuse and neglect and identify perpetrators, so that children will be protected from harm.

RESPONSE: The Department believes that the four-tier system of findings is clear, as there is a clear distinction between what is abuse and neglect and what is not abuse and neglect. The Department is committed to protecting children from harm and believes that the expansion of abuse and neglect findings will assist in fulfilling that commitment.

The Department believes that the proposed four-tier system of findings is more refined than a three-tiered system. There is a clear delineation between instances of abuse or neglect and those which are not abuse or neglect. With a three-tiered system, the middle finding can be ambiguous as to the occurrence of abuse or neglect.

82. COMMENT: While appreciating that CP&P is attempting to carve out the cases in which the parent or guardian will not be subject to a CARI disclosure, ACNJ believes that the proposed amendments may further confuse an already murky process of investigations and findings. And from talking to stakeholders working in the field, it appears that the proposed amendments, as proposed, are confusing in their application, and raise questions regarding what impact these questions/issues may put children at risk of harm or may defeat the intended goal of the proposed amendments, which is to allow people who have committed an isolated act of child abuse or neglect and/or that had a minor or negligible impact on the child to avoid a negative CARI disclosure.

RESPONSE: The Department believes that the four-tier system of findings is clear, as there is a clear distinction between what is abuse and neglect and what is not abuse and neglect. The Department is committed to protecting children from harm and believes that the expansion of abuse and neglect findings will assist in fulfilling that commitment.

The Department believes that the proposed four-tier system of findings is more refined than a three-tiered system. There is a clear delineation between instances of abuse or neglect and those which are not abuse or neglect. With a three-tiered system, the middle finding can be ambiguous as to the occurrence of abuse or neglect.

83. COMMENT: NJEA asserts that there is "no rational basis" for designating in new N.J.A.C. 10:129-7.5 that the occurrence of abuse or neglect in an institutional setting is an aggravating factor that weighs in favor of a substantiated finding. It is a purely arbitrary criterion and should be eliminated.

RESPONSE: The Department declines to make the recommended change. The abuse or neglect of a child in an institutional setting is likely to have more significant and further reaching ramifications for public welfare. Caretakers in institutional settings are more likely to have responsibility for and access to a greater number of children. For the reasons well articulated by OLG in Comment 16, the Department wants any abuse or neglect committed in an institutional setting to be considered an aggravating factor in determining whether abuse is established or substantiated.

N.J.A.C. 10:129-7.4

84. COMMENT: All notifications required under this rule should be made by certified and regular mail, if not personal service, including DCF's actions and the individual's rights, and specific information about CARI disclosure.

RESPONSE: The Department agrees that persons who are perpetrators of substantiated abuse or neglect should be notified by either personal service or regular and certified mail. The Department has added new N.J.A.C. 10:120-7.6(a)2 to state that the "Department representative," rather than the "child protective investigator" shall provide written notice, and to require said written notice to be by either personal service or regular and certified mail for every perpetrator of a substantiated allegation.

N.J.A.C. 10:129-7.7

85. COMMENT: LSNJ commends the Department for stating in new N.J.A.C. 10:129-7.7 that the only finding that will be disclosed is one of "substantiated."

RESPONSE: The Department thanks the commenter for its support.

86. COMMENT: NJEA objects to the barring of expunction in cases which are found to be "not established" in new N.J.A.C. 10:129-7.7(b) The only purpose of this provision is "to allow the [Department] to maintain records on people who are not guilty, but 'need to be watched' in the [Department's] eyes."

RESPONSE: The Department declines to change the rule. N.J.S.A. 9:6-8.40a authorizes the Department to define "unfounded" by regulation. 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. Because the investigation of future allegations must include consideration of past incidents in which an involved child was harmed or placed at risk of harm, the critical information contained in records of not established cases must be maintained.

Summary of Agency-Initiated Changes:

1. N.J.S.A. 9:3A-10b was amended, effective June 29, 2012, changing the name of the Division of Youth and Family Services (DYFS) to the Division of Child Protection and Permanency (CP&P). N.J.A.C. 10:129-1.3, definitions of "Child Abuse Record Information," "Division," and "local office," 10:129-3.1(d), 4.1(c), 4.2(b), and 8.2(e) have been changed to reflect up-to-date terminology.

2. As the Department has recodified and added new sections to Chapter 129, citations to N.J.A.C. 10:129-7.3, 7.4, and 7.5 have been updated. See N.J.A.C. 10:120A-2.3 and 3.1(a)2v; 10:129-2.1(c), 8.2(a) and (c), and 8.5; and 10:133G-3.1(b). Additional changes due to the recodifications were made to N.J.A.C. 10:122E-2.5(b) and 10:126A-2.4(a)2.

3. The Department made changes to N.J.A.C. 10:120A-3.1 and 10:129-2.1(c) to the references made to N.J.A.C. 10:129-7.3. Because those rules previously cited N.J.A.C. 10:129-7.3(a), the content of which was expanded to encompass the entire section, the subsection identifier of the cross-reference was removed.

4. The Department made a change to N.J.A.C. 10:122E-2.5 to reflect that information cited has been relocated from N.J.A.C. 10:129-1.3 to 7.3(c)4. A similar change was made to N.J.A.C. 10:126A-2.4, to reflect that information previously at N.J.A.C. 10:129-5.3(a) has been relocated to N.J.A.C. 10:129-7.3(c)1.

Federal Standards Statement

The adopted amendments and new rules do not require New Jersey to exceed Federal requirements.

Specifically, the rules assist the Department to comply with 42 U.S.C. § 5106a(b)(2)(A) and 42 U.S.C. § 5106c(a)(3), which provide a grant to states ". . . to improve . . . the investigation and prosecution of cases of child abuse and neglect . . ."

42 U.S.C. § 671(a)(9) requires that the state has a State Plan, which provides for reporting an injury, sexual abuse, or neglectful treatment of a child receiving aid under either Title IV-B or Title IV-E of the Social Security Act, to an appropriate agency. The amended and new rules require that the reporting of child abuse and neglect to the county prosecutor happens and are cited in the State Plan.

The proposed amendments and new rules are consistent with the Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)xii, regarding expunction of records.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

CHAPTER 120A
DISPUTE RESOLUTION

SUBCHAPTER 2. GENERAL PROVISIONS FOR DIVISION DISPUTE RESOLUTION AND ADMINISTRATIVE HEARINGS

10:120A-2.3 Notice of substantiated findings

The Division shall provide notice of a finding of substantiated abuse or neglect to each perpetrator pursuant to N.J.A.C. 10:129-*[7.4(c)]***7.6(c)***.

SUBCHAPTER 3. DISPOSITIONAL REVIEW

10:120A-3.1 When to hold a dispositional review

(a) When preliminary efforts described in N.J.A.C. 10:120A-2.4 have been declined by the appellant or have failed to resolve an issue and an appellant requests a dispositional review, and when the request is made in accordance with N.J.A.C. 10:120A-2.5, the Division shall provide a dispositional review with:

1. (No change.)

2. A resource parent who disagrees with the removal of a child receiving foster care in his or her resource home when the child has been residing with the resource parent for at least six months, except when:

i.-iv. (No change.)

v. The resource parent or household member has a finding of substantiated abuse or neglect in accordance with N.J.A.C. 10:129-7.3*[(a)]*;

3.-5. (No change.)

(b) (No change.)

CHAPTER 122E
REMOVAL OF CHILDREN IN PLACEMENT FROM RESOURCE FAMILY HOMES

SUBCHAPTER 2. REMOVING A CHILD IN PLACEMENT FROM THE RESOURCE FAMILY HOME

10:122E-2.5 Considerations in deciding whether or not to remove

(a) (No change.)

(b) A child in placement may be removed temporarily from a resource family home before or during a child abuse or neglect investigation for the child's safety and protection. If the Division representative makes a finding of unfounded (as defined in N.J.A.C. 10:129-*[1.3]***7.3(c)4***), the Division representative shall use the criteria listed in (a) above to determine whether the child who has been removed will be returned to the resource family home.

CHAPTER 126A
DIVISION UTILIZATION OF FAMILY CHILD CARE PROVIDERS

SUBCHAPTER 2. DYFS-AUTHORIZED FAMILY CHILD CARE SERVICES PROGRAM REQUIREMENTS

10:126A-2.4 Use of family child care provider when child abuse or neglect is substantiated

(a) The Division shall stop using, and the Department of Human Services or its agents shall suspend payment to, a family child care provider for each child under the Division's supervision when the Department of Children and Families' child protection investigator:

1. (No change.)

2. Makes a finding of substantiated in accordance with N.J.A.C. 10:129-*[5.3(a)]***7.3(c)1***.

(b) (No change.)

CHAPTER 129
CHILD PROTECTION INVESTIGATIONS

SUBCHAPTER 1. GENERAL PROVISIONS

10:129-1.2 Scope

(a) (No change.)

(b) The provisions of this chapter as effective April 1, 2013, shall apply to investigations commenced or reopened by the Division of Child Protection and Permanency on or after April 1, 2013. Investigations commenced on or prior to March 31, 2013, for which a finding has not been made are subject to the provisions of this chapter in effect immediately prior to April 1, 2013.

10:129-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

. . .

"Child Abuse Record Information" or "CARI" means the information in the child abuse registry as established in N.J.S.A. 9:6-8.11, which may be released to a person or agency outside the Department's Division of *[Youth and Family Services]* ***Child Protection and Permanency*** only as prescribed by law.

. . .

"Division" ***or "CP&P"*** means the Division of *[Youth and Family Services]* ***Child Protection and Permanency*** at the New Jersey Department of Children and Families.

"Established" has the meaning given in N.J.A.C. 10:129-7.3(c).

. . .

"Local office" means an office of the Division of *[Youth and Family Services]* ***Child Protection and Permanency,*** which provides direct services and referrals to clients within a limited geographic area of New Jersey. The services provided may be child welfare services, child protective services, and adoption services.

. . .

"Not established" has the meaning given in N.J.A.C. 10:129-7.3(c).

. . .

"Substantiated" has the meaning given in N.J.A.C. 10:129-7.3(c).

. . .

"Unfounded" has the meaning given in N.J.A.C. 10:129-7.3(c).

SUBCHAPTER 2. CHILD PROTECTION INVESTIGATION PROCESS

10:129-2.1 When an investigation is required

(a)-(b) (No change.)

(c) A child protective investigator shall handle each report in which the harm alleged to a child is the result of treatment in good faith for a medical condition by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof in accordance with this chapter, except for N.J.A.C. 10:129-7.3*[(a)]*.

SUBCHAPTER 3. CHILD PROTECTION INVESTIGATION PROCESS FOR LOCAL OFFICE INVESTIGATIONS

10:129-3.1 Requirements for an investigation

(a)-(c) (No change.)

(d) The child protective investigator shall obtain a medical assessment of the injury, which may include photos or a body chart, when completing an investigation of a report containing any allegation that involved a physical injury and when a physician has examined the child. The child protective investigator shall request a certified copy of hospital or other medical or forensic records, if available, for the *[DYFS]* ***Division of Child Protection and Permanency*** record, if abuse or neglect is substantiated or established.

(e) (No change.)

SUBCHAPTER 4. CHILD PROTECTION INVESTIGATION PROCESS FOR THE INSTITUTIONAL ABUSE INVESTIGATION UNIT

10:129-4.1 Requirements for an IAIU investigation

(a)-(b) (No change.)

(c) The IAIU investigator shall obtain a medical assessment of the injury, which may include photographs or a body chart, when completing

an investigation of a report containing any allegation that involved a physical injury and when a physician has examined the child. If hospital or other medical or forensic records are available and abuse or neglect is substantiated or established, the IAIU investigator shall request a certified copy for the *[DYFS]* ***CP&P*** record.

(d)-(e) (No change.)

10:129-4.2 Safety assessment for IAIU cases

(a) (No change.)

(b) The IAIU investigator shall assess the safety of an alleged child victim when investigating an allegation in a *[DYFS]* ***CP&P*** resource home, using a Department-designated assessment tool, during the investigation.

(c) (No change.)

SUBCHAPTER 7. FINDINGS AND DOCUMENTATION

10:129-7.3 Investigation findings

(a) The *[child protective investigator]* ***Department representative*** shall evaluate the available information and, for each allegation, determine whether abuse or neglect has occurred, and shall make every reasonable effort to identify the perpetrator for each allegation of abuse or neglect.

(b) The *[child protective investigator]* ***Department representative*** shall make findings for each report in accordance with (c) below within 60 days of the report being received at the State Central Registry, except for good cause approved by the office manager or designee. The office manager or designee may grant extensions in increments of 30 days, if the child protective investigator is continuing efforts to confirm credible information.

(c) For each allegation, the *[child protective investigator]* ***Department representative*** shall make a finding that an allegation is "substantiated," "established," "not established," or "unfounded."

1. An allegation *[will]* ***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. 10:129-7.4 or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 10:129-7.5.****

*[i. The investigation indicates the existence of any of the following circumstances:

(1) The death or near death of a child as a result of the abuse or neglect indicated;

(2) The subject or exposure of a child to unusual or inappropriate sexual activity;

(3) The infliction of injury or creation of a condition requiring the child to be hospitalized or to receive significant medical attention;

(4) Repeated instances of physical abuse committed by the alleged perpetrator against a child;

(5) The child's substantial deprivation of necessary care over an unreasonable period of time; or

(6) The abandonment of a child victim; or

ii. The substantiation is warranted based on consideration of both:

(1) One or more of the following aggravating factors:

(A) Institutional abuse or neglect, suggesting that the alleged perpetrator presents a broader public safety concern;

(B) The alleged perpetrator's non-compliance with Department protocols, training, agency policies, case or safety plan, or instructions;

(C) The tender age, delayed developmental status, or other vulnerability of the alleged child victim;

(D) Any significant or lasting physical, psychological, or emotional impact on the alleged child victim;

(E) Evidence suggesting a repetition or pattern of abuse or neglect, including multiple allegations in which abuse or neglect was substantiated or established; and/or

(F) The removal of the child from his or her home as a result of the allegation; and

(2) One or more of the following mitigating factors:

(A) Remedial actions taken by the alleged perpetrator before the investigation was concluded;

(B) Extraordinary, situational, or temporary stressors that caused the parent or guardian to act in an uncharacteristic abusive or neglectful manner;

(C) The isolated or aberrational nature of the abuse or neglect; and/or

(D) The limited, minor, or negligible physical, psychological, or emotional impact of the abuse or neglect on the child.]*

2. An allegation *[will]* ***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 *[there exists insufficient evidence to reach]* ***the act or acts committed or omitted do not warrant*** a finding of "substantiated" as defined in (c)1 above.

3. An allegation *[will]* ***shall*** be "not established" if there is ***not a preponderance of the*** evidence that a child *[has been harmed or placed at risk of harm]* ***is an abused or neglected child as defined in N.J.S.A. 9:6-8.21***, but *[there exists insufficient evidence to reach a finding of "substantiated" or "established" as defined in (c)1 or 2 above]* ***evidence indicates that the child was harmed or was placed at risk of harm***.

4. An allegation *[will]* ***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*[, and there exists insufficient evidence to reach a finding of "substantiated," "established," or "not established" as defined in (c)1, 2, or 3 above]*.

(d) A finding of either established or substantiated shall constitute a determination by the Department that a child is an abused or neglected child pursuant to N.J.S.A. 9:6-8.21. A finding of either not established or unfounded shall constitute a determination by the Department that a child is not an abused or neglected child pursuant to N.J.S.A. 9:6-8.21.

(e) The Department representative shall determine if abuse or neglect occurred. The Department representative shall substantiate abuse or neglect if one or more of the circumstances in N.J.A.C. 10:129-7.4 exists. Absent any of the circumstances in N.J.A.C. 10:129-7.4, the Department representative shall determine if the abuse or neglect is substantiated or established based on the factors listed in N.J.A.C. 10:129-7.5.*

*[(d)]***(f)*** The *[child protective investigator]* ***Department representative*** shall not make a finding of substantiated or established on an allegation of medical neglect or medical neglect of a disabled infant when the harm or risk of harm to a child is the sole result of treatment in good faith by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof. The Department representative may need to develop a safety protection plan after consulting with the deputy attorney general.

(g) Pursuant to N.J.S.A. 9:6-1 et seq., the Superior Court, Chancery Division, has jurisdiction to adjudicate determinations that a child is an abused or neglected child.

(h) The Department shall retain the administrative authority to:

1. Determine whether an allegation of conduct determined to be abuse or neglect 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;

3. Determine the finding for each allegation of abuse or neglect that is not adjudicated by the Superior Court, Chancery Division.

(i) 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. 10:120A.

10:129-7.4 Required findings of substantiated

(a) 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 a substantial risk of serious harm.

10:129-7.5 Factors to be considered in determining a finding of substantiated or established

(a) 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 conditions designed to ensure the child'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 impact 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.

(b) The Department representative shall consider 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 uncharacteristic 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 impact of the abuse or neglect on the child.*

10:129-*[7.4]***7.6*** Notification of finding

(a) The *[child protective investigator]* ***Department representative*** shall provide notification of the finding to those persons specified in (c) through (e) below. The *[child protective investigator]* ***Department representative*** shall delay the notification as long as the delay does not appear to put the alleged child victim at risk, when a case is in litigation or a report is under criminal investigation and the police, prosecutor, or deputy attorney general has determined that notification of the investigation findings to persons in (c) through (e) below, would interfere with the litigation.

1. A Department representative shall consult with the deputy attorney general before a finding of unfounded or not established is made on a case in litigation*[, as such findings result in the dismissal if litigation is based on an allegation of abuse or neglect]*.

2. The Department representative shall provide written notification by either personal service or regular and certified mail to the perpetrator of each substantiated allegation.

[2.] ***3.*** The *[child protective investigator]* ***Department representative*** shall provide written notification of the finding by regular mail ***to those persons specified in (d) and (e) below***.

(b)-(e) (No change.)

***10:129-7.7 Use of findings**

(a) A Department employee shall disclose only substantiated findings for a Child Abuse Record Information (CARI) check.

(b) Only unfounded findings shall be eligible for expunction pursuant to N.J.A.C. 10:129-8.*

10:129-*[7.5]***7.8*** (No change in text.)

SUBCHAPTER 8. EXPUNCTIONS

10:129-8.1 Expunction limited to a record that consists of an unfounded report; contents of record to be expunged

(a) A Department employee shall expunge a record in any format relating to an unfounded finding within the time frames set forth in N.J.A.C. 10:129-8.2, pursuant to N.J.S.A. 9:6-8.40a, unless one of the exceptions listed in N.J.A.C. 10:129-8.3 exists. A record scheduled for expunction shall be expunged in its entirety.

(b) The Department shall retain each record which contains a substantiated, established, or not established report, as specified in N.J.A.C. 10:129-7.3.

10:129-8.2 Time frames and start date

(a) A Department employee shall expunge a record which consists of an unfounded report, as specified in N.J.A.C. 10:129-7.3*[(a)]***(c)4***, three years after determining that the report was unfounded, unless one of the exceptions listed in N.J.A.C. 10:129-8.3 exists.

(b) (No change.)

(c) The Department shall limit routine expunction of records to those which consist of unfounded reports, as specified in N.J.A.C. 10:129-7.3*[(a)]***(c)4***, for which the finding was made on or after the April 7, 1997 enactment of N.J.S.A. 9:6-8.40a.

(d) (No change.)

(e) An alleged perpetrator may submit a request, in writing, to the *[Division of Youth and Family Services]* ***Department of Children and Families***, Closed Records Liaison, PO Box 717, Trenton, New Jersey 08625-0717***,*** when he or she seeks expunction of a record that consists of a report that was unfounded prior to April 7, 1997. The *[Division's]* ***Department's*** Closed Records Liaison shall make a determination on each request in accordance with the criteria contained in this subchapter, and shall advise the alleged perpetrator, in writing, as to whether the Department shall expunge or retain the record.

10:129-8.3 When the Department retains rather than expunges a record

(a) The Department employee shall retain a record which contains a report unfounded on or after April 7, 1997, when one or more of the following circumstances exist:

1. The investigation of the report results in more than one finding, including both an unfounded and a substantiated, established, or not established finding;

2. (No change.)

3. The State Central Registry receives a subsequent report regarding the alleged child victim, a member of his or her family or household, or the alleged perpetrator, during the three years prior to eligibility for expunction, and the subsequent report is substantiated, established, or not established;

4.-9. (No change.)

(b) (No change.)

10:129-8.5 Notification of record expunction

A *[child protective investigator]* ***Department representative*** shall include information about record expunction as set forth in this subchapter, when providing notification of the finding in accordance with N.J.A.C. 10:129-*[7.4]***7.6***.

CHAPTER 10:133G
CLIENT INFORMATION

SUBCHAPTER 3. RELEASE OF CLIENT INFORMATION TO PERSONS OTHER THAN THE CLIENT

10:133G-3.1 Protective service information

(a) (No change.)

(b) A *[Division]* ***Department*** representative shall notify the police or local law enforcement authority of each substantiated incident of abuse or neglect involving a child who resides within their jurisdiction in accordance with N.J.A.C. 10:129-*[7.5(e)]***7.8(e)*** and (f).