Recent Caselaw on Access to Sexual Predator
Margaret A. Burt, Esq. June 2014

COURT of APPEALS SPEAKS on CONVICTED SEXUAL OFFENDER in the HOME – is it NEGLECT?

Matter of Afton C., ***17 N.Y.3d 1, ; 950 N.E.2d 101,926 N.Y.S.2d 365*** **(2011)**

The New York Court of Appeals concurred with the Appellate Division that Family Court Dutchess County erred in finding that a father has neglected his five children, all aged under 14, where he had pled guilty to Rape in the Second Degree for having had sex with a child under the age of 15 and also had pled to Patronizing a Prostitute under the age of 17. Further, the mother did not neglect the children by failing to remove the children from the home or by failing to inquire of the father the circumstances of the criminal convictions. The father had served one year in jail and was now listed as a level three sex offender. He had not been ordered to obtain any sexual abuse counseling. The Court of Appeals ruled that there is no presumption that an untreated sex offender, even where the victim was a child, residing in the home with his own children is neglectful, without other proof of the current risk to his children. Even the fact that the father would not discuss the allegations or exhibit insight into his behavior was not sufficient – nor was his invocation of the Fifth Amendment and his evasive answers in the Family Court proceeding sufficient. The Court did comment that perhaps proof that the father needed treatment, or had been ordered to obtain treatment and had not, might have established the link of risk. Further, they commented that a neglect finding might be appropriate where the conviction stemmed from the sexual abuse of unrelated children who were in the care of the parent[1]. The concurring opinion commented that the petitions may well be proven in such situations if the facts of the conviction or the reasons for his designation as a level three sex offender were more clearly introduced in the Family Court action.

[1] "No doubt there are circumstances in which the Facts underlying a sex offense are sufficient to prove neglect. Where, for example, sex offenders are convicted of abusing young relatives or other children in their care, their crimes may be evidence enough (see e.g. Matter of Christopher C. (Joshua C.), 73 AD3d 1349, 1351 [3d Dept 2010]; Matter of Shaun X., 300 AD2d at 772-773). Our conclusion here might also be different if respondent had refused sex offender treatment after being directed to participate in it, or if other evidence showed that such treatment was necessary. In all cases, however, petitioner must meet its statutory burden. It failed to do so here".

POST –Afton Cases:

Matter of Zachary T., 85 AD3d 1663 (4th Dept. 2011)

The Fourth Department concurred with Genesee County Family Court that a father neglected his son by failing to protect him from being sexually abused by an older brother and a cousin. The child and the older brother testified that the father knew of the sexual abuse but had done nothing to prevent it. Also the child was derivatively neglected due to the father having sexually abused a nephew when the families shared a home. The father was a person legally responsible for the nephew at that time.

Matter of Jayann B., 85 AD3d 911 (2nd Dept. 2011)

The Second Department reversed Dutchess County Family Court's ruling on a sex abuse matter. The lower court had dismissed the petition without a fact finding hearing, ruling that the petition failed to state a cause of action but on appeal the matter was remanded for a fact-finding. The allegations were that the mother's live in boyfriend had in 2004 been indicated for sexually abusing his 8 year old nephew. The respondent was now living in this mother's home with her child 6 years later. The respondent denied that he had sexually abused the nephew, in fact denied that he even knew that there had been an indicated report of this nature despite evidence that he did in fact know. Further, the respondent acknowledged that he had never attended any treatment program for sexual abuse. The petition was in the nature of a derivative allegation and there were no allegations that he had directly harmed the subject child of this petition. The Second Department ruled that the allegations were sufficient to require the lower court to hold a fact finding hearing.

Matter of Anastacia L., 90 AD3d 452 (1st Dept. 2011)

The First Department agreed that a man neglected his children as he was a level three sex offender who had committed past sex offenses against children and he was now with the subject children unsupervised. There had been a recommendation that he obtain sex offender counseling in a prior neglect proceeding but he had not done so. The court used this point to distinguish this from the ***Afton C.*** ruling.

Matter of Makayla L.P., 92 AD3d 1248 (4th Dept. 2012)

A Steuben County father neglected his child. The father had been convicted of attempted sodomy on the 1st degree when he was 21 years old for sexually abusing his 12 year old retarded stepsister. He was designated a level two sex offender. He was released from prison 2 years earlier but he did not engage in or complete sex offender treatment although he had been told that he needed to do so. After his release from prison he exhibited violent and unlawful behavior. He was convicted of assaulting the child's mother by biting, pinching and threatening to kill her. He led the police on a high speed chase with the mother in the car. He was driving over 80 miles an hour with no license as he was being pursued by the police. The courts have had to issue several orders of protection against him in favor of the mother, his own mother and the foster parents. The court distinguished *Afton C.* 17 NY3d 1 (2011) and said that the circumstances of the father's sex offense and his reckless behavior since were factors that supported the finding of neglect. The Court of Appeals had made it clear that a prior conviction arising from the sex abuse of a young relative may be sufficient for the neglect finding regarding the respondent's own children.

Matter of Hannah U., 97 AD3d 908 (3rd Dept. 2012)

The Third Department reversed a neglect finding from Clinton County Family Court that had resulted from an Art. 10 petition that had been filed by the attorney for the children at the direction of the lower court. DSS had not chosen to file a petition in the matter and in fact opposed the petition. After the adjudication, the respondent father appealed. The father had had prior issues and had been under DSS supervision at times but DSS had permitted the father to resume custody of the children. The court then gave the children's attorney permission to file a new Art. 10 petition. The petition alleged that the father of the 5 year old and 2 year old neglected them as he was an untreated sex offender who had violated his probation terms. The Appellate Court stated that the father's status as a registered level 2 sex offender stemming from a 2004 incident, does not constitute neglect of his own children per se as the Court of Appeals has held in ***Afton C.*** He was not even in fact an untreated offender as he had successfully completed two offender programs in 2007 and 2008 – more than 2 years before this petition was filed. While the lower court concluded that the father had not meaningfully benefitted from the programs, the evidence did not in fact demonstrate that. The counselor testified that the father had benefitted from the programs and there were no

allegations of any sex related offense since the original offense in 2004. It was solely the court's own belief that the counselors in the DSS referred program that the father had attended were not qualified and did not run a meaningful or successful program. Further, the allegations that the father had violated his probation were not connected to any neglect or risk of neglect to the children. Three years before the current neglect petition, and before one of the children was even born, the father had been convicted of one incident of DWAI and one of DWI. However these allegations were dealt with in prior neglect petition some three years earlier. There was no evidence that refuted the father's claim that he had not drunk any alcohol since 2007. While it was true that the father had falsified some AA attendance slips for his probation officer, there was no evidence presented that this action had created any actual or imminent impairment to the children. The father had not been under any supervision by DSS for over 2 years and his probation had ended over a year earlier. He had complied with DSS supervision in the past and had complied with all court orders.

Matter of John R. v NYS OCFS 97 AD3d 958 (3rd Dept. 2012)

An Albany County indicated CPS report was not expunged upon a fair hearing and the Third Department concurred that it should remain indicated. Four years earlier, the mother had been told by her brother that he had sexually abused her eldest daughter who was autistic. The mother had not called the police but has called the child's doctor who told them to work with the school psychologist. A few weeks later, the mother reported the situation to both the school and the hotline. The uncle was arrested and pled guilty to sex abuse in the first degree and was sentenced to 2 and a half years in prison and post release supervision. CPS told the mother that she was not to allow any contact between the children and the uncle in the future. After the uncle was released from prison, the mother did allow some contact. The children reported that they sometimes saw their uncle near their home and greeted him as the mother told them they were allowed to "say hi" if they saw him at the home or at church. The uncle telephoned the home and the child who had been abused was allowed to answer the phone even though the caller ID identified the uncle as the caller. The youngest child was, on one occasion, sent to the uncle's apartment to borrow a tool. The mother admitted that she would have acted differently had the abuser not been her brother. Substantial evidence supports the determination that the children were at risk due to the mother's failure to exercise a minimum degree of care.

Matter of Lillian SS., ___AD3d___, dec'd 6/5/14 (3rd Dept. 2014)

The Third Department affirmed Ulster County Family Court's determination that a mother and father had neglected her older boy from a previous relationship and their mutual daughter. The father had been determined to be a level III sex offender. He had been convicted in 1996 in North Carolina for placing his penis in the mouth of his two year old daughter. While on probation for that offense, he was charged with raping his girlfriends' 18 month old daughter and ultimately entered an Alford plea regarding that matter. He had never completed the sex offender treatment that was part of his probation requirement for the first offense and had not engaged in any sex offender treatment when he was incarcerated for the second offense. The father consistently denied that he had abused his daughter or that his second conviction was for a sexual act with a child. The father offered no evidence that he had completed any counseling for sexual offenders. The mother testified that she believed her husband and would leave the children alone with him. The court distinguished *Afton C.,* given the father's convictions for abusing young children in his care. An expert in sex offender risk assessment interviewed the father and concluded that he should not be allowed to be with the children unsupervised and that the mother was an inappropriate supervisor as she failed to recognize the father's conduct as a risk particularly to their daughter who was the same age and sex as the two children he had previously sexually abused.

Matter of Hannah U., 110 AD3d 1258 (3rd Dept. 2013)

The Third Department reversed a neglect finding on a Clinton County mother who was alleged to have neglected her children by allowing the father, a known sex offender, to reside in the home. Previously the Third Department had reversed the finding against the respondent father based on ***Afton C*** grounds. (**Matter of Hannah U. 97 AD3d 908 (3rd Dept. 2012**) Simply being a registered sex offender and living in a home with children is not sufficient to demonstrate that they children are being neglected. The court ruled it was illogical to conclude that the children were neglected by the mother for letting the father live there when the court had already ruled that it was not neglect on the father's part to live with the children.

Significant - PRE AFTON C CASES

Matter of Anndrena 13 Ad3d 1164, 787 NYS2d 766 (4th Dept. 2004)

A Cattaraugus County neglect finding was upheld by the Fourth Department. The respondent neglected his girlfriend's 15 year old daughter. He has prior convictions of sexual abuse of children. This child is at risk of sexual abuse because this respondent is in her home and is "unreconstructed sexual abuser who denies his guilt in the prior incidents" (**citing Kasey C. 1182 AD2d 1117 (4th Dept. 1992)**

Matter of Alan FF., 27AD3d 800, 811 NYS2d 158 (3rd Dept. 2006)

The Third Department reversed Saratoga County Family Court's dismissal of neglect proceeding against two parents. The lower court had dismissed, on motion, a petition, which alleged that the father was living in the home with 3 children and was an untreated sex offender who had sexually abused another child. Without holding a fact-finding, Family Court had found that the allegations in the petition would not demonstrate that the father was a substantial risk to the children. The Third Department disagreed. Upon a motion to dismiss, the court must consider as true all the allegations in the petition. Here if the allegations were true the children were neglected. The petition alleged that the father was a convicted sex offender who had admitted in both Family Court and criminal court to having sexual abused an infant daughter in a prior petition. There had been a Family Court order in 2001 requiring that all contact with his children be supervised. That order had expired in 2003. In the meantime, he failed to complete any offender program and his limited intellect and mental health issues impair his ability to benefit from any program. A 2002 mental health evaluation recommended that his contact with his children be supervised. Now, he denies having sexually abused the other child. The mother is fully aware of his prior admissions, his current denial, his lack of treatment and the recommendation that he have no unsupervised contact with the children. She does not prevent unsupervised contact. Further, the petition alleged that there was domestic violence in front of the children and that the father threw one of the children into a couch. If DSS can prove these allegations, these children are neglected by both of the parents. The court did make a comment in a footnote that the record contained no explanation why the DSS had not sought ongoing orders of supervision of this family after the original dispositional order of 2001 had ended in 2003.

Matter of Ahmad H., 46 AD3d 1357, 849 NYS2d 140 (4th Dept. 2007)

The Fourth Department found a derivative neglect adjudication was appropriate regarding two children even though the original finding on which it was based was from 1989. Although 17 years had passed since the Onondaga County father had been found to have neglected other children in his care, this original finding had been based on sexual abuse of those children. There is no indication that the father's "proclivity for sexually abusing children" has changed. The father is a convicted sex offender and has never been in a treatment program despite much advice that he get treatment. He is on probation with a condition that he have no contact with children under 18 years of age and there is an order of protection that he stay away from another child that is in the custody of the respondent mother. This man has a fundamental defect in his understanding of parenthood and even 17 years between the Art. 10 petitions is not too remote in time.

Matter of Selena J. __AD3d__, 825 NYS2d 749 (2nd Dept. 2006)

The Second Department upheld Queens County Family Court's neglect adjudication against a mother. The mother allowed a cousin access to her home and her children even after a counselor informed her that the younger's child had revealed that the cousin had touched her buttocks. The mother choose not to believe the child. A few months later she learned that the cousin had sexually abused her 14 year old daughter and she still allowed him access to the home. A reasonable prudent parent would have taken steps to protect the children.

Matter of Mary MM 38 AD3d 956, 831 NYS2d 273 (3rd Dept. 2007)

The Third Department affirmed a finding of neglect regarding a Broome County mother. The mother's 8 year old daughter had been the victim of sexual abuse by a 13 year old boy in another state. DSS found a convicted sex offender at the family home on two occasions after specifically advising the mother on the first occasion that the offender, who was about to begin a prison sentence, should not be in the home. The DSS brought both a sexual abuse petition against the convicted offender who appeared to be residing in the home and a neglect petition against the mother. DSS was unable to prove the sex abuse but the lower court did make a

finding of neglect against the mother. The Third Department agreed that the mother was neglectful even though there was no proof that the current paramour had abused the child. The mother had a known history of associating with sex offenders. The child's father had been a convicted sex offender, she had dated a man convicted of indecent exposure and she was aware that this new boyfriend had plead guilty to sexual abuse in the first degree and was about to be incarcerated as a second felony offender. Allowing this man to be in the presence of her child is more than sufficient for find that she neglected the child. Further it was appropriate to place and keep the child in foster care given that the mother "has used what Family Court charitably termed "extremely poor judgment" in associating with known sex offenders". Until the mother and the child receive counseling and services, it is in the child's best interests to remain in foster care.

Matter of Kayla F., 39 AD3d 983, 833 NYS2d 742 (3rd Dept. 2007)

The Third Department reversed a sex abuse and neglect findings against two parents. An Otsego County father had been placed on probation due to a criminal conviction involving photographing girls undressing in the locker room at the high school where he worked. A condition of his probation was that he not be responsible for the care of any child although he was permitted to live at home with his two children. His 7 year old daughter was in special education and was diagnosed with anxiety and selective mutism and it was alleged that she told a school counselor that she had been alone with her father and that he had put his penis between her legs. The child told the caseworker and law enforcement that she had been alone with her father but did not repeat any allegations of sexual abuse. The older brother also alleged that he knew that his sister had been alone with the father and that he had been alone with the father on at least 2 occasions. Otsego County Family Court found that the father had abused the daughter and derivately neglected the son and that the mother had neglected both children by allowing them to be alone with the father. The Third Department found that the out of court statement by the child about sexual abuse was not sufficiently corroborated, There was no medical evidence offered and there was no expert witness called to interpret any behavior on the part of the child. Given the child's problems, there would need to be specific interpretation of any behaviors of the child. The child did not repeat the allegations to the caseworker or to law enforcement - although that in and of itself would not serve as corroboration as repetitious out of court statements by the same child are not enough. The court can take a strong negative inference from the father's lack of testimony but that cannot be used to corroborate the child's out of court statement. Since the child's out of

court statements were not corroborated, abuse can not be adjudicated and neither can the derivative neglect on the son as there was no underlying abuse for the basis. As to the mother, one parent permitting the child to have contact with the other parent in violation of an order of protection may be, but is not automatically, neglect. Here there was no order of protection and no court had ruled that this father was a danger to his own children. The probation terms specifically allowed him to live in the same house as the children. The mother testified that she had no reason to not trust him with his own children as she had never been aware of any sexual contact. She did know that he had been convicted and what the probation conditions were but leaving them alone with the father on a few occasions is not proof that she failed to exercise reasonable care.

Matter of Christian F. 42 AD3d 716, 838 NYS2d 451 (3rd Dept. 2007)

The Third Department affirmed Tompkins County Family Court's dismissal of neglect proceedings against a grandmother and her boyfriend. The boyfriend was a convicted sex offender and the grandmother knew of the conviction. She had custody of her young granddaughter. The petition against the boyfriend was appropriately dismissed as he had never been legally responsible for the child. It was also appropriate to dismiss the petition against the grandmother as she kept the boyfriend away from the child and in fact terminated her relationship with the boyfriend. (Note: the child was in the home for 15 months before she terminated the relationship) While exposure of a child to a known sex offender can constitute neglect, the grandmother's testimony that she did not allow contact between the boyfriend and the child was believed by the lower court.

Matter of Jessica P., 46 AD3d 1142, 848 NYS2d 412 (3rd Dept. 2007)

A Columbia County mother neglected her three children by living with her mother and her mother's boyfriend when she had reason to be suspicious of the boyfriend's potential for sexual abuse. After the mother had left the grandmother's home, her oldest daughter revealed that the grandmother's boyfriend had been sexually abusing her for a long time. Both the mother and the grandmother were found to have neglected the children and the mother only appealed. The mother knew that another family member had accused the boyfriend of raping her when she was 17 years old. The mother also had been subjected to unwanted sexual advances by the boyfriend and admitted to being scared to be alone with him. "Most notably", on at least two occasions while living in the home with the

boyfriend, the mother asked her daughter if "anything bad" was happening with the boyfriend. Given these concerns, it was neglect to continue to live in the home with the boyfriend, to allow him to be alone with the child and to allow him to bathe the child. The mother claimed that the out of court statements of the child were not corroborated. However, the mother was not charged with sexual abuse, only neglect, and she in fact conceded that the child had been sexually abused. The mother's neglect is based on her failure to take action to protect the child based on her own fears and suspicions about the boyfriend and therefore corroboration of the undisputed sexual acts are not required.

Matter of Ian H., 42 AD3d 701, 840 NYS2d 202 (3rd Dept. 2007)

In a case of first impression, the Third Department reviewed evidentiary issues in a neglect matter from Tioga County. The father in this matter lived with his wife and twin sons. The mother operated a day care in the home and although the father was not an employee of the day care, he did assist from time to time in the care of the day care children. The father was criminally charged with sexually touching two female day care children and DSS then filed an Art. 10 petition alleging that this behavior resulted in derivative neglect of his own children. The proof of the sexual abuse included the taped interview of a 7 year old who had attended the day care until she was about 5 and who disclosed sexual penetration as well as the out of court statements of a 3 year old who alleged touching when the father assisted her in toileting. The out of court statements that the DSS used to establish the allegations were statements by children who themselves were not the subjects of the petition. The Third Department found that the term "child" in FCA 1046 (a)(iv) is not limited by its' definition to only children named in the petition. The father also argued that the out of court statements were not adequately corroborated but the Third Department disagreed. The children's statements cross corroborated each other and the spontaneous circumstances of the out of court statement of the 7 year old also corroborated. The 7 year old former day care child saw the TV report of the father being arrested and was told that he was being arrested for touching little girls and she spontaneously declared "just like he did to me" . The respondent also admitted that he had placed his hands in the vaginal area of the two current day care children under the guise of checking them for wetness and this also supported the older child's statement that he had touched his penis to her vagina while in the bathroom. Lastly, the respondent failed to take the stand and this also added corroboration and allowed the court to draw a strong negative inference. The father argued that his request to have the 7 year old former day care child testify in court should not have been denied. The lower court acknowledged

his obligation to balance the rights of the father against the emotional well being of the child and had all the parties brief the issue and concluded that the child's age and emotional well being indicated that she should not be made to testify. The derivative neglect finding regarding his own two children was based in the neglect of the day care children as it showed his impaired level of judgment as to appropriate parenting and it was perpetuated on multiple victims when his own children were in the same home.

Matter of Brian I., 51 AD3d 792, 858 NYS2d 286 (2nd Dept. 2008)

The Second Department affirmed Orange County Family Court's adjudication of neglect against a father and the placement of the children in foster care. The father had been criminally convicted of multiple sexual crimes against other children which demonstrated an impaired level of parental judgment as to create a substantial risk of harm to the children.

Matter of Nassau County DSS v J.P., 21 Misc3d 1126(A) (Family Court, Nassau County 2008)

Nassau County Family Court granted a summary judgment of derivative neglect against a father who had been criminally convicted of sexually abusing the 14 year old "best friend" of his own daughter. His three children were in the home when the acts were committed. The court ruled that it would hold a hearing to determine if the father was a person legally responsible for the victim child to determine if a finding of abuse could be made as to that child.

Matter of Neithan CC., 56 AD3d 1000, 867 NYS2d 758 (3rd Dept. 2008)

The Third Department agreed with Clinton County Family Court that a convicted sex offender neglected his live in girlfriend's 7 year old child. The respondent had been convicted in 1998 of a felony due to his repeatedly subjecting his former girlfriend's child to sexual abuse. He is classified as a level three sex offender. He did participate in sex offender treatment while incarcerated. He admitted that he was instructed not to have unsupervised contact with children and not to drink

alcohol. The respondent has been alone with the subject child by his own admission, "numerous times" and he continues to consume alcohol.

Matter of Bethanie AA., 55 AD3d 977, 866 NYS2d 372 (3rd Dept. 2008)

A Columbia County stepfather neglected his 17 year old stepdaughter by having sex with her and by not preventing his father, the child's step grandfather also having sex with her. The child had became pregnant at age 17 and an abuse and neglect petition was filed. The abuse allegation was withdrawn when the evidence indicated that the child was 17 and had "consented" to the sexual contact such that no penal law had been violated and therefore no sexual abuse could be proven. However, the stepfather had lived with the child since she was 4 years old and had treated her as a daughter, therefore his admission that he had, albeit consensual, intercourse with her and may have impregnated her constitutes behavior which is "grossly inappropriate". Further he was aware that his own father had been seen in a sexual situation with the child when she was 15 years old and he had done nothing about it. He failed to satisfy his parental responsibilities to this child and did not provide her with proper supervision and guardianship. His judgment is significantly flawed and his behavior also resulted in a substantial risk of harm to his step son and his own daughter who also live in the house and who are therefore derivately neglected.

Matter of Kirk V., 60 AD3d 4271, 874 NYS2d445(1st Dept. 2009)

New York County Family Court properly dismissed a neglect petition ruling that the aid of the court was not necessary given that the older brother who had allegedly sexually abused the younger brother had not lived in or visited the family home for over four years before the decision was issued. ACS was unable to articulate what disposition that were seeking as against the parents given that the older brother had long since been out of the home.

Matter of Kole HH., __AD3d__, 876 NYS2d 199 (3rd Dept. 2009)

A Broome County father was arrested for sexually abusing the mother's cousin's 9 year old daughter who was on occasion in the home. Ultimately the criminal charges were dismissed. The father and mother were alleged in Family Court to have neglected their own two boys. The mother had consented to a neglect order but the father requested a hearing. The lower court found that the 9 year old had

been sexually abused in the home but dismissed the petition regarding the two sons as the father had not been a person legally responsible for the 9 year old and therefore this could not form the basis of a derivative finding regarding the sons. The abused child testified in court, albeit unsworn, and her statements were supported by tapes on her interviews with caseworkers in which she provided graphic descriptions of the sexual activity that were clearly inappropriate for her age. The Third Department ruled that the proven abuse of the 9 year old could in fact provide the legal basis for a derivative finding even though the father had not been a person legally for the victimized child. The father's behavior demonstrates an impaired level of parental judgment to the extent that his own children are at risk. He lacks the capacity to care for and protect his own children.

Matter of Patricia B., 61 Ad3d 861, 877 NYS2d219 (2nd Dept. 2009)

A Nassau County mother neglected her children as she was aware that one of her sons had sexually abused one of her other children but continued to allow him to live in the home. It was appropriate to grant a dispo order that the abuser child could have no contact with the other children except in therapeutic counseling.

Matter of Christopher C., 73 AD3d 1349 (3rd Dept. 2010)

The Saratoga County father of young child had a history of sexual abuse of children. He had been convicted of sexual abuse of his niece and served time in jail and was a level three sex offender. He also admitted sexually abusing another niece over the course of a three year period, including engaging in sexual intercourse. These events occurred when he lived in the home with the nieces. Further he had sexually abused an unrelated 8 year old boy. He had not completed sex offender treatment. When he fathered this baby, DSS became involved and still he was unable to complete any sex offender treatment as the program discharged him due to his untruthfulness . They recommended that he have no contact with any child at all due to his high risk of reoffending. The Saratoga County Family Court dismissed the petition. DSS appealed and the Third Department reversed. The father not only had a lengthy history of sexually abusing children but this history included male and female children, related and unrelated and had gone on for years. He failed to stay in treatment even at the risk of having a neglect petition field regarding his own child. He did not act as a reasonably prudent parent to prevent imminent danger to his son.

Matter of Elizabeth S., 70 AD3d 453 (1st Dept. 2010)

The First Department reversed the New York County Family Court's dismissal of an abuse and neglect petition on a prima facie motion. The petition alleged that the mother should have known of the stepfather's sexual abuse of her daughter and should have taken appropriate action to protect the child. In their direct case, ACS had offered the child's in court testimony that she had told her mother twice that she was being sexually harassed by the stepfather. The child also testified that the mother knew of and in fact arranged for the stepfather to come to her bedroom at night, allegedly to "improve" their relationship. The child testified that the mother allowed the stepfather to give her "massages" and that her mother ridiculed her and called her a liar when she complained to her mother about the stepfather's actions. ACS also provided emails that the mother had sent to the child's biological father that tended to support the claim that she did in fact know of the child's complaints.