

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

850

**CAF 25-00124**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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IN THE MATTER OF MARIAH W.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AMBER N., RESPONDENT-APPELLANT.

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CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

JAMES M. CHERNETSKY, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO  
(RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 19, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of fact-finding and disposition that, inter alia, determined that she neglected the subject child by taking certain actions after learning that the child claimed to have been sexually abused by the stepfather. We reverse.

In the petition against the mother, petitioner alleged that the mother neglected the child by inflicting or allowing to be committed sex offenses against the child (*see generally* Family Ct Act § 1012 [e] [iii] [A]). Petitioner proceeded with that theory at trial and argued in summation that the mother knew or should have known of the sexual abuse and failed to protect the child. In its decision, however, Family Court stated that it did not believe that the mother had knowledge of the abuse allegations until child protective services came to her home and concluded that, if she was not on notice of the abuse, she could not be faulted for a failure to intervene. The court further held, however, that the mother had neglected the child (*see* § 1012 [f] [i] [B]) based on its belief that the mother's reaction to the child's disclosure placed the child at risk of emotional harm.

Pursuant to Family Court Act § 1051 (b), "[i]f the proof does not

conform to the specific allegations of the petition, the court may amend the allegations to conform to the proof; provided, however, that in such case the respondent shall be given reasonable time to prepare to answer the amended allegations." Here, the basis for the court's finding of neglect pursuant to section 1012 (f) (i) (B) was not alleged in the petition, and the court did not amend the allegations to conform to the proof or give the mother notice or an opportunity to respond to any such implied amendment (see *Matter of Malia A. [Dwayne T.M.]*, 213 AD3d 492, 492-493 [1st Dept 2023]; *Matter of Justin R. [Gilbert R.]*, 127 AD3d 758, 759 [2d Dept 2015]; cf. *Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1439 [4th Dept 2011]). As the mother contends, had she known that the court was considering a theory of neglect based solely on her post-disclosure conduct, she would have prepared a defense to that theory. We therefore conclude that the court's finding of neglect on that ground was improper (see *Justin R.*, 127 AD3d at 759; *Matter of Arianna S. [Virginia R.]*, 111 AD3d 461, 461-462 [1st Dept 2013]), and the petition must be dismissed (see Family Ct Act § 1051 [c]; *Arianna S.*, 111 AD3d at 461-462).

In light of our determination, we do not address the mother's remaining contentions.