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**STATE OF ALASKA  
DEPARTMENT OF HEALTH AND SOCIAL SERVICES  
OFFICE OF HEARINGS AND APPEALS**

In the Matter of )  
 )  
 [REDACTED], ) OHA Case No. 09-FH-570  
 )  
 Claimant. ) Division Case No. [REDACTED]  
 )  
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**CORRECTED FAIR HEARING DECISION<sup>1</sup>**

**STATEMENT OF THE CASE**

[REDACTED] (Claimant) applied to become an approved child provider for the Child Care Assistance program on September 17, 2009. (Ex. 11) The Division of Public Assistance Child Care Program Office (Division) denied the Claimant's application on September 25, 2009. (Ex. 12)

The Claimant, on September 27, 2009, requested that the Division administratively review its denial of her application. (Ex. 13) On October 15, 2009, after its administrative review, the Division upheld its original determination denying the Claimant's application. (Ex. 14) The Division received the Claimant's fair hearing request on October 20, 2009. (Ex. 15) This office has jurisdiction pursuant to 7 AAC 41.440(c) and 7 AAC 49.010.

Pursuant to the Claimant's request, a hearing was held on November 30, 2009. The Claimant appeared in person, represented herself and testified on her own behalf. [REDACTED], a Program Coordinator with the Division's Child Care Assistance office, attended in person; she represented the Division and testified on its behalf.

**ISSUE**

Was the Division correct to deny the Claimant's application to become an approved child care provider for the Child Care Assistance program because she had previous negative child care licensing actions?

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<sup>1</sup> This corrected Decision replaces the Decision issued in this case on January 19, 2010. The correction is made to supply a two citations that were inadvertently omitted on page 8 of the January 19, 2010 Decision. There is no change to the outcome of the Decision.

## FINDINGS OF FACT

The following facts are established by a preponderance of the evidence:

1. The Claimant was a licensed child care provider in 1999 and 2000. (Ex. 6a)
2. A complaint was made against the Claimant on May 24, 1999 alleging that a 13 month old child (██████) enrolled in the Claimant's child care facility was injured at the facility on May 18, 2009. (Ex. 7b) The specific allegation was that ██████ had been slapped at the child care facility and that when her mother picked up from the child care facility, ██████ had a "red 'hand shaped' mark on her face and a split lip." *Id.*
3. The Office of Children's Services (then known as the Division of Family and Youth Services) jointly investigated the May 18, 1999 incident with the Anchorage Police Department. *Id.* They interviewed the Claimant, the child's mother, and the child's grandmother. (Exs. 7b – 7c) The Office of Children's Services also viewed photographs of the child and an Emergency Room report. *Id.*
4. The Claimant told the Office of Children's Services that another child had kicked a ball which hit ██████ in the face; she denied hitting ██████ (Ex. 7b) The Claimant was not at her child care facility when ██████'s mother picked her up. *Id.* The Claimant's 20 year old niece was watching the children at the time. *Id.*
5. The Office of Children's Services issued a May 3, 2000 report with regard to the May 18, 1999 incident. (Ex. 7) The report concluded:

The allegation that 13-month-old ██████ was slapped during day care is ***substantiated*** by the medical report of the child's physical injury. There is insufficient evidence to determine if the marks on the child's face and lips were caused by [Claimant] or another adult in the home, therefore whether or not [Claimant] slapped the child is ***unconfirmed***.

(Ex. 7c, emphasis in original) The report recommended the Claimant voluntarily relinquish her license. *Id.* The report did not recommend or institute that any action be taken against the Claimant's license. *Id.*
6. The Claimant voluntarily relinquished her child care license in 2000. (██████████ testimony; Ex. 4h)
7. A complaint was made against the Claimant on September 24, 1999 alleging that the Claimant "had more children in her childcare home than the licensing regulations allow, and she submitted fraudulent paperwork regarding capacity to both the [Alaska Childcare Food Program] and [the Division of Family and Youth Services]." (Ex. 6b)
8. The Office of Children's Services issued a May 3, 2000 report with regard to the September 24, 1999 complaint. (Ex. 6) The report concluded:

The allegation that [Claimant] was over capacity for children and over capacity for children less than 30 months is *substantiated*. The figures submitted by the food program and her attendance records show three non-ambulatory infants in her care. In addition, the allegation that [Claimant] reported false information to the Division to keep her license is *substantiated*. The discrepancies in [Claimant's] attendance and registration paperwork has been established through parent interviews, records reviews, and her own admission.

(Ex. 6c, emphasis in original) The Claimant's license was changed to a 90 day provisional license, with additional paperwork requirements (having the parents sign their children in and out of the day care). *Id.*

9. At hearing, the Claimant did not dispute the overcapacity and false documentation finding with regard to the September 24, 1999 complaint.

10. The Claimant disputed the Office of Children's Services finding that [REDACTED] had been slapped while at her child care facility. She testified that a Children's Services social worker called her and told her that there was a history of domestic violence in [REDACTED]'s family, and that [REDACTED]'s mother was not being honest with the social worker. She said that the only reason she relinquished her license is because the Children's Services social worker threatened her and her family with court action if she did not relinquish her license. She said she was also told by the child care licensing office that she could reapply for a new license after 6 months.

11. The Claimant applied to become a child care provider for the Child Care Assistance program in 2005. (Ex. 4) At the time, a criminal background check was performed for her and her household members. (Exs. 4h – 4t) There were no criminal history records found for the Claimant and her household members. *Id.* That application was denied. (Ex. 5) The Claimant did not appeal the denial. (Claimant testimony)

12. The Claimant reapplied to become an unlicensed non relative child care provider for the Child Care Assistance program on September 17, 2009. (Ex. 11)

13. On September 25, 2009, the Division sent the Claimant notice her application was denied "because of previous negative licensing actions involving a series of non-compliances while you were licensed with the Office of Children's Services, previously known as DFYS. . . . This action is based on 7 AAC 41.205." (Ex. 13b) The notice did not specify or otherwise identify the "non-compliances." *Id.*

14. The Claimant requested an administrative review of her application denial on September 29, 2009. (Ex. 14a) The Division reviewed the denial and upheld it, citing to 7 AAC 41.215, and referred to her "history of serious non-compliance issues" without specifying or otherwise identifying the "non-compliance issues." (Ex. 14a – 14b)

## **PRINCIPLES OF LAW**

### A. **Burden of Proof**

In an administrative proceeding, the party who seeks to change the status quo has the burden of proof. *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). Preponderance of the evidence is the standard of proof.<sup>2</sup> *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986).

B. Child Care Assistance Program

Child Care Assistance is a program that assists in paying day care costs for qualifying individuals and households. AS 47.25.001. An individual who is adversely affected by the Division's, or its agent's, action may request an administrative review of the action. 7 AAC 41.435(a). If the administrative review finds against the individual, that individual may request a fair hearing under 7 AAC 49. 7 AAC 41.440(c).

1. Licensing

An individual who applies to be a child care provider for no more than four unrelated children, outside the children's home, is not required to obtain a child care license. 7 AAC 57.015(a)(7). Such an unlicensed child care provider may apply to be an approved child care provider for the Child Care Assistance program.<sup>3</sup> 7 AAC 41.200(c) and (d).

2. General Requirements

Unlicensed non relative child care providers must ensure the following:

1. That the number of children present do not exceed the allowable number;
2. That the children are not exposed to high risk situations, including persons who pose a high risk;
3. That the caregivers do not abuse the children;
4. That supervision is adequate to prevent injury to the children;
5. Maintain childcare attendance records; and
6. That the children are not subjected to corporal punishment.

7 AAC 41.215(b), (c), (d), (e)(3), (e)(6), (e)(7), and (e)(9).

The applicant must satisfy compliance with the requirements of 7 AAC 41.205 and 7 AAC 41.215, and other applicable requirements contained in 7 AAC 41. 7 AAC 41.200(g)(5) and (7). If an applicant satisfies the requirements, the Division "shall authorize the provider to participate in the child care assistance program." 7 AAC 41.200(h). If the applicant fails to satisfy any of the

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<sup>2</sup> Preponderance of the evidence is defined as "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* 1064 (5<sup>th</sup> Ed. 1979)

<sup>3</sup> After an unlicensed non relative child care provider has been providing child care assistance for the Child Care Assistance program for up to one year. If they wish to continue being a child care assistance provider for the Child Care Assistance program for longer than one year, they must apply for a child care license. 7 AAC 41.200(d).

eligibility requirements contained in 7 AAC 41, the Division “shall issue a written denial of participation in the program.” 7 AAC 41.200(i).

### 3. Eligibility Barriers

An individual who applies to become an unlicensed non relative child care provider must not:

- a. Have been *charged with or convicted of a crime* “that is inconsistent with the standards for licensure or certification.” 7 AAC 41.205(b); AS 47.05.310(a) – (b).
- b. Be a parent, guardian, or custodian of a child who has been found by a court or agency to have neglected or abused the child under AS 47.10. 7 AAC 41.205(b); AS 47.05.310(c)(1).<sup>4</sup>
- c. Be listed on the Central Registry established under AS 47.05.330. AS 47.05.310(c)(2).<sup>5</sup>

AS 47.10, which is referred to in 7 AAC 41.205(b), is the Alaska Child In Need of Aid Act. It deals with the State taking action against parents, guardians, and custodians of minor children, who have abused or neglected the children in their care, custody, or control. *See* AS 47.10.01.

The term “custodian” is defined by both Alaska Statute and the Alaska Court System Child In Need of Aid rules as “a natural person 18 years or age or older to whom a parent or guardian has transferred temporary physical care, custody, and control of the child for a period of time.” AS 47.10.990(7); Alaska Court System Child In Need of Aid Rule 2(b).

In interpreting whether a person is a “custodian” under the Alaska Child In Need of Aid Act, the Alaska Supreme Court held that a “custodian” was a person who had temporary custodianship of the child transferred to him/her under AS 13.26.020: “We believe that the provisions of AS 13.26.020 are relevant and controlling in interpreting AS 47.10.010(a)(2)(A).” *T. B. v. State*, 922 P.2d 271, 275 – 276 (Alaska 1996).

AS 13.26.020 reads as follows:

A parent or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding one year, any powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward.

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<sup>4</sup> Abuse occurs when the child has suffered “substantial physical harm” resulting from the parent, guardian, or custodian or their failure to provide adequate supervision for the child. AS 47.10.011(5). “Physical harm” includes recklessly causing physical harm to another person. AS 11.41.230; AS 47.10.015(1).

<sup>5</sup> The Central Registry created under AS 47.05.330 is a list of individuals or entities who have been adjudicated or found to have committed abuse, neglect, or exploitation of children or vulnerable adults, medical assistance fraud, or have had a license or certification to be a service provider denied, suspended, revoked, or conditioned. AS 47.05.330(b).

#### 4. Compliance, Suspensions, and Terminations

The Division is entitled to inspect and investigate a child care provider to see if they are in compliance with the Child Care program's requirements. 7 AAC 41.407(a). If the child care provider is found not to be in compliance, the Division may issue a plan of correction. 7 AAC 41.407(b).

If a child care provider does not satisfy the terms of the plan of correction, the Division may impose sanctions including suspension or termination of a child care provider's ability to participate in the Child Care Assistance program. 7 AAC 41.407(c); 7 AAC 41.425(c). A suspension is temporary in nature and suspended child care providers are eligible to reapply, after expiration of the suspension period, if they meet the Child Care Assistance program's requirements. 7 AAC 41.425(e).

Terminated child care providers are not eligible to reapply. 7 AAC 41.425(f).

#### ANALYSIS

This case involves the issue of whether or not the Division was correct to deny the Claimant's September 17, 2009 application to be an unlicensed child care provider for the Child Care Assistance program because she had previous negative child care licensing actions.

Because this case involves an application, the Claimant is the party seeking to change the status quo. The Claimant therefore has the burden of proof by a preponderance of the evidence.

The undisputed facts in this case are as follows:

1. The Claimant was a licensed child care provider in 1999 and 2000.
2. Two complaints were filed against the Claimant in 1999. The first involved an allegation that a child had been injured in her care, specifically that the child had been slapped hard enough to leave a marks on her face and lips. The second was that the Claimant had more children in her child care than she was licensed for, and submitted false paperwork regarding her child care capacity.
3. The Office of Children's Services (then known as the Division of Family and Youth Services) investigated both of these allegations and substantiated them. The Claimant's child care license was placed in a provisional status for a 90 day period and additional record keeping requirements were added. However, the Division did not suspend or terminate her license, but instead recommended that the Claimant voluntarily surrender her license.
4. The Claimant voluntarily surrendered her child care license.

The Claimant did not dispute the allegation that found she had more children in her child care than authorized for and that she submitted false paperwork to the Division. It is therefore accepted as substantiated.

The Claimant did dispute the allegation that a child had been slapped while in her care. While she did not deny that she had surrendered her child care license, she argued she was essentially coerced into surrendering it. Each of these shall be addressed below.

The Claimant's testimony with regard to the physical abuse issue presented a factual dispute over something that occurred in May 1999. She, while admitting the child was injured in her care through an accident with another child, argued that she should not be blamed for a "slap" to the child because there was domestic violence in the child's family. This factual argument seeks to revisit a factual determination made by the Office of Children's Services in 2000. It is now too late for the Claimant to challenge the Office of Children's Services substantiated abuse allegation. The abuse allegation is accepted as substantiated. Regardless, the Office of Children's Services did not take any action to suspend or terminate the Claimant's license. Instead, it recommended she voluntarily surrender the license.

The Claimant's testimony with regard to the fact that she voluntarily gave up her child care license was that she was effectively coerced into giving up the license, by the Office of Children's Services threatening to take her and her family to court. Because the record in this case does not show that any official negative action was taken against her child care license as a result of the 1999 abuse claim, merely a recommendation that the Claimant voluntarily surrender her license, the voluntary surrender of her license is not an admission that can be used against the Claimant.

A reasonable person, reviewing the 1999 substantiated abuse violation, could infer that the Division did not have enough evidence to justify attempting to suspend or terminate the Claimant's child care license. In other words, given the fact that the Division did not take official action to suspend or terminate the Claimant's child care license, the Division may not use the Claimant's surrender of her license to justify its current action denying her application.

The Division's representative was asked during the hearing if it made a difference that the incidents it is using to justify its denial of the Claimant's September 17, 2009 application occurred 10 years ago.<sup>6</sup> The Division's response was that it was allowed to rely on an applicant's past history when taking action on a new application.

The Division is allowed to rely on an applicant's past history when approving or denying an application. However, the Child Care Assistance regulations do not give the Division unrestrained power to deny an application based upon all negative history. For instance, an applicant who has previously been suspended from being a child care provider for the Child Care

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<sup>6</sup> The substantiated abuse incident occurred on May 18, 1999. The substantiated over capacity/false documentation complaint was made on September 24, 1999. *See* Findings of Fact 2 and 7 above.

Assistance program is eligible to reapply to be a child care provider for the Program. *See* 7 AAC 41.425(e).

A review of the applicable regulations and statutes show four possible reasons<sup>7</sup> for denying an unlicensed non relative Child Care Assistance provider's application:

1. The applicant *has been previously terminated* from the Child Care Assistance program. 7 AAC 41.425(f).
2. The applicant *has been charged with or convicted of a crime* "that is inconsistent with the standards for licensure or certification." 7 AAC 41.205(b); AS 47.05.310(a) – (b).
3. The applicant is a parent, guardian, or custodian of a child who has been found by a court or agency to have neglected or abused the child under AS 47.10 (Child In Need of Aid). 7 AAC 41.205(b); AS 47.05.310(c)(1).
4. The applicant is listed on the Central Registry established under AS 47.05.330. AS 47.05.310(c)(2).

The Claimant has two documented substantiated violations. Each of these is discussed below with regard to whether either violation justifies a denial of the Claimant's application.

A. Previous Termination.

There is no evidence in the record showing that the Division had previously terminated the Claimant from the Child Care Assistance program pursuant to 7 AAC 41.425(c)(4). Because there is no record of a previous program termination, the Claimant's application cannot be denied for this reason.

B. Previous Criminal Charge or Conviction.

There is no evidence in the record showing that the Claimant has been charged with or convicted of any crime. In fact, the only evidence in the record on this point is a 2005 criminal records check where the Claimant and her household members were all found to have no criminal records. *See* Finding of Fact 11 above. Because there is no evidence of the Claimant (or anyone in her household) having a previous criminal charge or conviction, the Claimant's application cannot be denied for this reason pursuant to 7 AAC 41.205(b) and AS 47.05.310(c)(1).

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<sup>7</sup> The Division's only evidence pertaining to the Claimant's fitness to be a Child Care Assistance program provider was her two 1999 substantiated child care licensing violations. This discussion therefore only addresses those two violations.

C. Substantiated Abuse under AS 47.10 (Child In Need of Aid).

In order for the Claimant to be barred from participating in the Child Care Assistance program under this provision, she must be a parent, guardian, or custodian of a child who has been found by a court or agency to have neglected or abused the child under AS 47.10 (Child In Need of Aid Act). 7 AAC 41.205(b); AS 47.05.310(c)(1).

The overcapacity and false documentation violation is not related to abuse or neglect. It therefore does not provide a reason for denial of the Claimant's application.

The substantiated abuse violation is serious; it has the potential for making the Claimant not eligible to be a Child Care Assistance program provider. However, in order for the Claimant to fall under this prohibition, she must have been a parent, guardian, or custodian of a child who has been found to have neglected or abused a child under the Child In Need of Aid Act, AS 47.10. 7 AAC 41.205(b); AS 47.05.310(c)(1).

The Division has not shown or made any argument that the Claimant was either a parent or a guardian of an abused child. Therefore, in order for the Claimant to be prohibited from being a Child Care Assistance program provider, she must have been a "custodian" of the child.

Both the Child In Need of Aid Act and the Alaska Court System Child In Need of Aid rules define the term custodian as "a natural person 18 years or age or older to whom a parent or guardian has transferred temporary physical care, custody, and control of the child for a period of time." AS 47.10.990(7); Alaska Court System Child In Need of Aid Rule 2(b).

While a parent "transfer[s] temporary physical care, custody, and control" of their child to a day care provider for the short periods of time the child is in the day care provider's care, the Alaska Supreme Court has made it clear that the term "custodian" refers to legal custodianship: "We believe that the provisions of AS 13.26.020 are relevant and controlling in interpreting AS 47.10.010(a)(2)(A)." *T. B. v. State*, 922 P.2d 271, 275 – 276 (Alaska 1996).

AS 13.26.020 reads as follows:

A parent or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding one year, any powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward.

There is nothing in the record showing that the Claimant was a custodian of the minor child in the 1999 substantiated abuse violation. Because the Claimant was not a "custodian" of the minor child at the time of the 1999 substantiated abuse violation, the Division may not deny the Claimant's application for this reason.

D. Central Registry

There is no evidence in the record showing that the Claimant is listed on the Central Registry created under AS 47.05.330. Because there is no evidence of the Claimant (or anyone in her

household) being listed on the Central Registry, the Claimant's application cannot be denied for this reason.

E. Summary

Consequently, despite the fact the Claimant has two substantiated violations of her child care license which date back to 1999, she has met her burden of proof to show that she is eligible to be a Child Care Assistance program child care provider because:

- Her participation in the Child Care Assistance program has not been terminated in the past.
- She does not have a criminal history.
- She is not a parent, guardian or custodian who was found to have abused or neglected a child in her care under the Child In Need of Aid Act (AS 47.10).
- She is not listed in the Central Registry created under AS 47.05.330.

Under these circumstances, the Claimant's prior ten year old history, where she was given a provisional license for her overcapacity and documentation violations, and the substantiated abuse violation, do not show that she is unable to comply with the Child Care Assistance program's requirements. Her voluntary relinquishment of her child care license in 2000 does not show she is unable to comply with the Child Care Assistance program's requirements nor constitute a termination pursuant to 7 AAC 41.425(c)(4) or even suspension pursuant to 7 AAC 41.425(c)(5).

The Division was therefore not correct to deny the Claimant's September 17, 2009 application to become a Child Care Assistance program child care provider.

**CONCLUSIONS OF LAW**

1. The Claimant had a child care licensing history, where she was found to have committed two substantiated child care violations. However, there is nothing in the record showing that her child care licensing history made her not eligible to be an unlicensed non relative child care assistance provider for the Child Care Assistance program.

2. The Claimant had the burden of proof by a preponderance of the evidence. She met her burden of proof and demonstrated that she was eligible to be an unlicensed non relative child care assistance provider for the Child Care Assistance Program.

3. The Division was therefore not correct to deny the Claimant's September 17, 2009 application to become an unlicensed non relative child care assistance provider for the Child Care Assistance Program.

**DECISION**

The Division was not correct to deny the Claimant's September 17, 2009 application to become an unlicensed non relative child care assistance provider for the Child Care Assistance Program.

**APPEAL RIGHTS**

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, the Claimant must send a written request directly to:

Director of the Division of Public Assistance  
Department of Health and Social Services  
PO Box 110640  
Juneau, AK 99811-0640

An appeal request must be sent within 15 days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision.

DATED this 22nd day of January 2010.

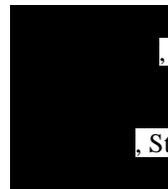
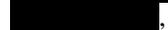
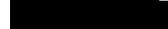
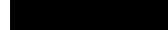
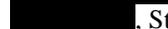
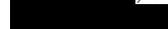
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*/Signed/*  
Larry Pederson  
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 22nd day of January 2010, true and correct copies of the foregoing were sent to:

Claimant by USPS First Class Certified Mail, Return Receipt Requested.

And to the following by email:

, Director  
, Administrative Assistant II  
, Policy & Program Development  
, Eligibility Technician I  
, Staff Development & Training  
, Fair Hearing Representative

\_\_\_\_\_  
J. Albert Levitre, Jr., Law Office Assistant I