BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of:	)	
	)	
B B	)	OAH No. 12-0206-DHS
	)	

REVISED DECISION

I. Introduction

B B is appealing her placement on a registry of individuals found to have abused or neglected their children. The only justification asserted for placing her on that registry was a court determination in a Child in Need of Aid (CINA) proceeding. This case turns on whether that CINA determination was in fact a determination that Ms. B had caused any mental injury to her children.

A hearing was held on November 23, 2012. Ms. B appeared and represented herself. OCS was represented by Assistant Attorney General Karen Hawkins. OCS's only contention at the hearing was that Ms. B caused mental injury to one or more of her children by allowing them to be exposed to domestic violence, and by not protecting them from her husband's actions. In support of its position, OCS relied on a CINA finding that concluded Ms. B's children were in need of aid. After the hearing was complete and a proposed decision had been prepared, a new attorney appeared for OCS and offered additional arguments. The Commissioner returned the case to the administrative law judge for evaluation of the new arguments.[1] This is the revised decision after those supplemental proceedings.

Based on the original hearing and the additional proceedings, there is no basis for concluding that the relevant CINA finding holds Ms. B's actions or inactions caused actual mental injury to her children. In addition, aside from what the CINA findings may have been, there is insufficient evidence from which to conclude that Ms. B's children did in fact suffer mental injury. Accordingly, OCS's determination that there is such a finding or that the children suffered mental injury is reversed.

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[1] Oral argument was held, and the parties were invited to submit written pleadings explaining their positions. OCS did submit an additional brief, Ms. B did not.

II. Procedural History[2]

B B received notice that she could not be employed as a personal care assistant because of a prior finding of neglect. She contacted the Office of Children's Services (OCS)[3] to contest that determination, and requested a hearing.

On May 22, 2012, Ms. B, using a form created by OCS, requested a hearing "for the purpose of appealing a substantiated find [sic] of child abuse or child neglect against me as determined by the Office of Children's Services." This form does not refer to any statute or regulation other than AS 44.64.060, which governs the procedure for conducting a hearing before the Office of Administrative Hearings (OAH). OCS responded to Ms. B's hearing request on June 25, 2012. OCS stated:

> I am writing to inform you that your request to overturn the substantiated finding of child maltreatment and remove the barrier from your record has been denied. I am forwarding your request for an Administrative Hearing to the Attorney General's Office with this message. You can expect to have a hearing scheduled within the next few weeks.

Acting on behalf of the Commissioner, the agency referred Ms. B's hearing request to OAH on July 18, 2012. It was referred approximately 6 weeks after the date by which the referral should have been made pursuant to AS 44.64.060(b).[4] The referral specified that a hearing was requested pursuant to 7 AAC 54.215.

OCS moved for summary adjudication. OCS's motion argued that the prior CINA proceeding had found Ms. B's children were in need of aid pursuant to AS 47.10.011(8), and thus there was no remaining factual dispute. That motion was denied for the reasons discussed in section III E, below.

At the beginning of the hearing, OCS was asked to identify where in the record the substantiated finding of abuse could be found. After a brief break, OCS stated that there was no substantiated finding of abuse.[5] OCS then asked that Ms. B's request for a hearing be dismissed,

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[2] The procedural history is based on the documents contained within the OAH case file in this matter.

[3] At the time some of the events discussed below occurred, the agency was named the Division of Family and Youth Services. It will be referred to as OCS throughout this decision.

[4] The agency record was transmitted more than 100 days late.

[5] After the hearing was completed, after its proposal for action and a supplemental proposal for action, and after this matter was returned for additional proceedings, OCS asserted for the first time that there were in fact two prior substantiated findings from 1994 and 1995. OCS did not previously rely on those findings and has never claimed that they were the basis for telling Ms. B's employer that she had a barrier condition. As noted in section III(B)(1), below, those findings could not legally be reported to Ms. B's employer. The existence of the 1994 and

stating that her only remedy was to appeal the CINA finding. OCS's motion was denied because, as discussed below, there is an available administrative remedy. Accordingly, the hearing was held as requested.

III. Discussion

A. Introduction

This case involves a registry, or list, of individuals for whom there is a substantiated finding of abuse or neglect. The Department of Health and Social Services (DHSS) maintains two such registries, the central registry and the centralized registry. This case is about the centralized registry. In the context of this case, the only basis to be placed on this registry would be a prior finding by a court or other adjudicatory body that Ms. B has committed abuse or neglect.[6]

B. Registries

1. Central Registry

Certain individuals are required to report suspected child abuse or neglect.[7] OCS then investigates those reports unless they have been referred to a local government agency for investigation.[8] OCS maintains a central registry of all investigation reports.[9] The information in this registry, including whether an allegation has been substantiated, is confidential and may only be reported to other government agencies with child-protection functions, or in "connection with investigations or judicial proceedings involving child abuse, neglect, or custody."[10]

2. Centralized Registry

There is also a centralized registry.[11] This registry is used

> to facilitate the licensing or certification of entities and individual service providers, the authorization of payments to entities or individual services providers by the department, and the employment of individuals by entities and individual service providers.[12]

1995 findings was not the basis for Ms. B's appeal. During this proceeding, no evidence was presented to support the accuracy of the allegations of neglect made in 1994 and 1995.

6 One can also be placed on this registry for having committed child exploitation or medical assistance fraud, or for certain licensing actions, but there is no allegation that those other potential reasons are at issue in this matter.

7 AS 47.17.020.

8 AS 47.17.030.

9 AS 47.17.040(a).

10 AS 47.17.040(b).

11 AS 47.05.330.

12 AS 47.05.330(a).

The Department may not issue or renew a license or certification to an entity if the applicant's name appears on the centralized registry.[13] A person's name is placed on this registry if there is a decision, order, judgment, or adjudication finding that he or she committed "abuse, neglect, or exploitation under AS 47.10, AS 47.24, AS 47.62, or a substantially similar provision in another jurisdiction[.]"[14]

Attached to OCS' February 22, 2013 pleading is the first page of a notice sent to Ms. B. This notice is titled Notice of Barring Condition(s) and states, in part

> On 8/10/2004, Ms. B was found by the Office of Children's Services to have neglected a child under 47.10. This is [sic] finding constitutes a permanent barrier under AS 47.05.310(c)(1).[15]

The letter cites AS 47.05.310(c)(1) for the alleged barring condition. Pursuant to that statute, a person who has been found to have committed abuse or neglect may not have certain licenses or certifications issued or renewed. Ms. B was not seeking a license or certification. However, DHSS regulations place certain employment restrictions on a person with a barrier condition.[16] An adjudicatory finding that a person has committed abuse or neglect is a barrier condition under this regulation.[17]

3. Administrative Remedies for Placement on Registry

Prior to the hearing, neither party knew whether Ms. B's name was on the *central registry* based on an investigation and substantiated finding by OCS of abuse or neglect, or on the *centralized registry* based on a decision, order, judgment, or adjudication finding that that Ms. B had committed abuse or neglect.[18] This matters because Ms. B has different administrative remedies depending on the nature of the determination being appealed. A person whose name is placed on the central registry may appeal that determination pursuant to 7 AAC 54.215.

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[13] AS 47.05.310(c)(2). In addition, a licensed or certified entity may not employ, or have as a volunteer, an individual who has been charged with or convicted of certain crimes that are inconsistent with the standards of licensure or certification. AS 47.05,310(a). There is no evidence that Ms. B has been charged with or convicted of any crime.

[14] AS 47.05.330(b)(1)(A). *See also* 7 AAC 10.955 (provisions for centralized registry).

[15] Attachment 1 to February 22, 2013 pleading. Only the first page was submitted by OCS. It should be noted that under AS 47.10, it is the Superior Court and not OCS that makes findings.

[16] 7 AAC 10.900. The notice should have cited this regulation concerning employability, rather than the statutory provision related to licensing.

[17] In adjudicatory proceedings, as opposed to investigations, both parties have an opportunity to present evidence to a neutral fact finder.

[18] OCS has now asserted that her name is on the centralized registry, and that assertion is likely correct since the information was disclosed to a potential employer.

On the other hand, when DHSS[19] intends to place a person's name on the centralized registry, other more detailed regulations apply. Certain court or adjudicatory findings of abuse or neglect must be reported to the Department.[20] When a report is received,

> the department will investigate a report of abuse, neglect, or exploitation submitted under (c) of this section. If, after its investigation, the department makes a substantiated finding that an individual committed abuse, neglect, or exploitation, the department will notify any entity or individual service provider that made the report, and the individual who is the subject of the investigation, that the department has made a substantiated finding, and that it intends to place the finding in the centralized registry.[21]

Often, the existence of an adjudicatory finding of abuse or neglect will be obvious from the face of the documents submitted, and the investigation might be limited to verifying that the finding was in fact made. In other situations, it might be necessary to conduct a more detailed investigation to determine precisely what was adjudicated, and the nature of the adjudicatory findings.

If there are substantiated findings after this more detailed investigation, the person against whom a finding was made has the right to request a hearing[22] held in accordance with the Administrative Procedure Act.[23] Once the determination becomes final, either through a hearing or a waiver of a hearing, the individual has an additional right to ask the department to delete or modify the information to correct any inaccuracy.[24]

C. Right to a Hearing

At the beginning of the evidentiary hearing, OCS suggested that no hearing should be held because it had not made a substantiated finding of abuse. Ms. B objected to dismissal because she had asked OCS what she needed to do to clear her name. OCS told her to request a hearing, which she did, and a hearing was scheduled. After the proposed decision was issued, and after the matter was returned by the Commissioner for additional proceedings, OCS argued

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19 It is not clear from the record which division is responsible for investigating individuals for placement on the centralized registry.

20 AS 47.05.330; 7 AAC 10.955(c). The Department may also submit information to the registry. AS 47.05.330(g).

21 7 AAC 10.955(e).

22 7 AAC 10.955(e)(4) & (f).

23 7 AAC 10.955(i).

24 7 AAC 10.955(l).

that the hearing was premature as Ms. B had not exhausted her administrative remedies, and that OAH had no jurisdiction to hold a hearing in this matter.[25]

OCS argued that there is no statutory right to appeal the determination that placed Ms. B's name on the centralized registry. Alaska Statute 47.05.330 provides that a person "about whom information is placed in the registry . . . may request the department to delete or modify the information to correct inaccuracies."[26] OCS argued that, pursuant to this statute, Ms. B should have requested a variance through the procedures set out in 7 AAC 10.930 – 950. Only after exhausting that procedure, according to OCS, may someone contest whether he or she should have been placed on the registry. OCS's argument puts the cart before the horse and ignores the procedure set out in 7 AAC 10.955. That regulation specifically states that a person may request a variance *after* exhausting his or her appeal rights to contest placement on the registry.[27] Logically, there should be no need to seek a variance that would allow someone on this list to be employed if there was no legal basis for placing that individual on the list in the first place. It makes sense to allow someone to request a hearing to determine whether he or she should be on the registry without first deciding if there is a good reason for a variance. The existing regulations provide for different remedies, and nothing in the regulations requires a person to seek the variance remedy before seeking a remedy pursuant to 7 AAC 10.955.[28]

The CINA finding concerning Ms. B was made in 2002, and the centralized registry was not created until 2005.[29] At some point after the creation of this registry, the responsible division must have received a report of the Superior Court's ruling in the CINA case.[30] The division should then have investigated the allegations in that report,[31] and if it made a substantiated finding that the CINA proceeding found that abuse or neglect had occurred, it

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[25] OCS also argued that if a hearing were permitted at all, it could only be held after the Commissioner makes a final decision. Of course, the normal course of events is to base a final decision on the evidence taken during the hearing. *See* AS 44.62.500; AS 44.64.060. To reach a decision *before* holding a hearing would raise serious due process concerns.

[26] AS 47.05.330(j).

[27] 7 AAC 10.955(k).

[28] When she requested a hearing, OCS could have notified Ms. B, pursuant to 7 AAC 10.955(g), that it believed that the substantiated findings had been previously decided in a civil or criminal court action, and that it intended to issue a summary determination. She would then have been given an opportunity to submit a written objection to that summary determination. The regulations do not specify what occurs after an objection is submitted. In this case, however, OCS did not provide a notice of its intent to make a summary determination. Thus, it is not necessary to determine what procedure would be followed, if any, when such a notice is issued.

[29] The implementing regulations became effective in 2007.

[30] AS 47.05.330(e); 7 AAC 10.955(c).

[31] 7 AAC 10.955(e).

should have promptly provided notice of that finding to Ms. B.[32] That notice would have included informing Ms. B of her right to request a hearing.[33]

It appears that the procedure set out in 7 AAC 10.955 was not followed.[34] Ms. B was not notified of her right to request a hearing when her name was placed on the centralized registry. She did not learn of that action until after her employer requested a background check.[35] Then, when she asked how to correct what she believed was an error, OCS gave her a form to fill out which OCS treated as a request to appeal pursuant to 7 AAC 54.215 (related to central registry appeals). Although she did not receive proper notice,[36] Ms. B was ultimately able to have the hearing to which she was entitled. OCS' arguments that 7 AAC 10.955 does not grant hearing rights or, in the alternative, that no administrative hearing may be held until after seeking a variance, are inconsistent with the plain meaning of the language in 7 AAC 10.955, and those arguments are rejected.

D. Office of Administrative Hearings' Jurisdiction

OCS also argued that OAH has no jurisdiction to hear Ms. B's appeal. OCS argued that the Commissioner never asked OAH to hold a hearing under 7 AAC 10.955, and also argued that even if requested by the Commissioner, OAH has no jurisdiction to hold hearings held pursuant to that regulation.

OAH has mandatory jurisdiction over a wide variety of hearings, including hearings for the Department of Health and Social Services.

> The office shall conduct all adjudicative administrative hearings required under the following statutes or under regulations adopted to implement the statutes:
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> * * *
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> (42) AS 47.05 (assistance programs);
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> (43) AS 47.07 (medical assistance for needy persons);
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> (44) AS 47.25 (public assistance);
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> (45) AS 47.27 (Alaska temporary assistance program);

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[32] *Id.* Or, as discussed in note 28, it could have informed her that it intended to make a summary determination based on the CINA ruling.

[33] 7 AAC 10.955(e)(4).

[34] OCS appeared to be unaware that this regulation even existed prior to being asked about the regulation during oral argument.

[35] Because placement on the registry restricts her ability to be employed in her chosen profession, due process likely requires the notice and an opportunity to be heard provided for in 7 AAC 10.955.

[36] There is no evidence in the record that Ms. B caused or contributed to any of the procedural shortcomings that occurred here.

(46) AS 47.32 (licensing by the Department of Health and Social Services;

(47) AS 47.37.130 (alcohol safety action program);

(48) AS 47.37.140 (treatment facilities);

(49) AS 47.45.050 (longevity bonuses);

(50) AS 47.45.306 (Alaska senior benefits payment program)[.[37]]

The regulation at issue here, 7 AAC 10.955, was adopted to implement AS 47.05. OCS argues that the parenthetical descriptor in subsection 42 – assistance programs – limits the mandatory jurisdiction to hearings under AS 47.05 related to assistance programs. That is not a proper construction of this statute. First, the statute does not specifically indicate that the descriptor was intended to be limiting. When statutory drafters want to limit the scope of a particular legislative provision, it is done explicitly, and not with a parenthetical phrase. This can be seen in several places in AS 44.64.030 where the statute uses words like "expect as provided" or "other than."[38]

Second, although 7 AAC 10.955 provides for hearings, there is no provision for hiring or selecting a hearing officer. All other DHSS hearing functions were transferred to OAH by Executive Order 116 and, absent a specific listed exception, it is reasonable to interpret the inclusion of AS 47.05 as part of OAH's mandatory jurisdiction.

Even if there were no mandatory jurisdiction, OAH still has jurisdiction to hear an appeal in this case.

> An agency may request the office to conduct an administrative hearing or other proceeding of that agency or to conduct several administrative hearings or other proceedings under statutes not listed in (a) of this section [listing mandatory referrals].[39]

When someone requests a hearing, the Commissioner has several options. He can deny the request for a hearing, or he can refer the request to OAH.[40] In addition, because hearings related to the centralized registry are governed by the Administrative Procedure Act,[41] the Commissioner could contract for the services of a hearing officer, after first obtaining approval of the Chief Administrative Law Judge.[42] If the Department still has its own hearing officers,

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37 AS 44.64.030(a). The addition of subsections 42 – 45 to OAH's mandatory jurisdiction became effective on July 1, 2012, by way of Executive Order 116, dated January 13, 2012.

38 *See* subsections 5, 6, 17, 20, 25, and 41.

39 AS 44.64.030(b).

40 AS 44.64.060(b).

41 AS 44.62.330(a)(45).

42 AS 44.62.350; AS 36.30.015(d)

the Commissioner could also use one of those hearing officers to conduct the hearing.[43] In this case, OCS, acting on behalf of the Commissioner, referred this matter to OAH for a hearing. As long as the hearing being referred is on a subject that OAH is not prohibited from hearing,[44] that voluntary referral provides OAH with jurisdiction. There is no prohibition preventing OAH from hearing this type of appeal.

OCS argued that the Commissioner never intended to make a voluntary referral of a hearing pursuant to 7 AAC 10.955. But when Ms. B asked OCS how to contest the fact that her employer was told she had a barrier condition precluding her from being employed, she was told to request an appeal, which she did. OCS itself may not have known the type of hearing Ms. B should be given, but it is clear that it was offering her a hearing on the issue in dispute: whether she had a barrier condition. It is the dispute, not a particular legal theory for adjudicating the dispute, that was then referred to OAH to conduct a hearing.[45]

In referring a matter to OAH, the Commissioner is not required to refer to any statute or regulation. Even if the Commissioner should inadvertently refer to the wrong legal authority for a hearing, a hearing may be held as long as there is a proper basis for a hearing. There was a proper basis for a hearing here, and even if there were no mandatory jurisdiction, OAH has jurisdiction to hear this matter as a voluntary referral.[46]

E. Substantiated Finding of Abuse

As noted above, in the context presented by this case, a person may only be included on the centralized registry if there has been a decision, order, judgment, or adjudication that the person committed abuse or neglect.[47] OCS relied entirely on the CINA determination as the decision or judgment finding that Ms. B committed abuse or neglect.

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[43] AS 44.62.350(b).

[44] For example, OCS could not refer a CINA matter to OAH because the Superior Court has subject matter jurisdiction over those cases.

[45] Once a matter is referred, the agency may not take further adjudicatory action except as the final decisionmaker. AS 44.64.080(c). Thus, once referred for a hearing, the agency may not revoke the referral and hold a hearing outside the OAH process.

[46] OCS argues for a dichotomy between APA hearings and OAH hearings, going so far as to suggest that if a hearing is an APA hearing under AS 44.62, it cannot be an OAH hearing under AS 44.64. OCS's legal argument on this issue is frivolous. Many hearings conducted by OAH are governed by provisions in both AS 44.62 and AS 44.64. To give just one example, all Medical Board licensing proceedings must be referred to OAH and handled under AS 44.64, and yet all such proceedings are APA proceedings. *Compare* AS 44.64.030(a)(6) *with* AS 44.62.330(a)(5).

[47] AS 47.05.330(b)(1)(A). As stated in note 6, other potential reasons for inclusion on this registry are not applicable here.

Under AS 47.17.290(2), there are several types of conduct that can constitute "child abuse or neglect." One of them is "mental injury." The CINA judgment was a determination based solely on AS 47.10.011(8), relating to mental injury. Other bases for abuse or neglect were not addressed. Accordingly, this analysis must focus on mental injury.

To constitute "child abuse or neglect" under AS 47.17.290(2), mental injury has to actually occur. Mental injury means "serious injury . . . evidenced by an observable and substantial impairment in the child's ability to function."[48]

The CINA court determined that, based on Ms. B's conduct, her children were "in need of aid under AS 47.10.011(8) based on the children's exposure to domestic violence in the home."[49] Findings under this subsection of the statute may include *actual* mental injury or a *substantial risk* of mental injury.[50] Actual mental injury is handled under subdivision (A) of AS 47.10.011(8), and substantial risk of mental injury is handled under subdivision (B) of AS 47.10.011(8). The CINA judgment does not say which subdivision it is applying. In other words, the CINA judgment does not specify that Ms. B's children suffered *actual* mental injury.[51]

For there to be actual mental injury for purposes of AS 47.10, there must be an observable and substantial impairment.[52] Had the Superior Court made a factual finding that one or more of Ms. B's children had an observable and substantial impairment, OCS would be correct in alleging that they suffered actual mental injury and thus were in need of aid pursuant to AS 47.10.011(8)(A). That finding by the Superior Court would be controlling, and it would be appropriate to include Ms. B on the centralized registry. The Superior Court did not make that factual finding, however.[53] The only finding is that the children either suffered a mental injury or were at risk of mental injury. Being at risk of mental injury is not abuse or neglect under AS 47.17.290 because the required "observable and substantial impairment in the child's ability to function"[54] is not present (there is only a risk of it occurring if the child is not

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48 AS 47.17.290(9).

49 Agency record 827.

50 AS 47.10.011(8)(A) & (B).

51 OCS had previously moved for summary adjudication based on the CINA judgment. That motion was denied because the judgment did not specify whether the finding was based on actual injury or only a risk of injury.

52 AS 47.17.290(2) & (9), made applicable by AS 47.10.990(21).

53 In the CINA proceeding, the central question was whether the children were in need of aid, and it was irrelevant whether they were in need of aid because there was actual mental injury or because of a risk of mental injury.

54 AS 47.17.290(2).

protected). Because there was no specific finding in the CINA proceeding that Ms. B's children had been abused or neglected, there was no legal basis for including Ms. B's name on the centralized registry.

The CINA finding certainly raised a question as to whether Ms. B's children had suffered actual mental injury. Accordingly, it would have been appropriate for OCS to have conducted a more detailed investigation to determine whether Ms. B's name should be placed on the registry.[55] Had it made a substantiated finding, it would then have notified her of her right to appeal that finding.[56] A hearing would then be held to determine whether the she substantiated finding was correct. That question is addressed is section III, F, below.

F. Substantiation of Abuse or Neglect by Ms. B

1. Facts Related to Allegations of Abuse

B B has three children, L G, C G, and J G. She is married to A B, who is not the children's biological father. The assertion that Ms. B abused or neglected her children is based on Ms. B's failure to intervene or protect her children from the actions of her husband.

The first incident alleged by OCS occurred in December of 1998, when A B struck J several times with a belt to discipline him for lying.[57] J was seven years old at the time, and a later medical report confirms the existence of several bruises on his back and buttock.[58] Ms. B confirmed that this occurred, but said she spoke with her husband afterwards, and told him not to discipline any of the children in that manner again.[59] J testified that he recalled the incident when he was struck with the belt. He testified that it happened because he had cut the cord of an electric fan, and then lied about it.[60] At first he said that he had been disciplined with a belt more than once, but later testified he could only remember this one occasion. Based on the evidence, it is more likely true than not true that Mr. B struck J with a belt on more than one occasion, but also that he stopped doing it once Ms. B instructed him to stop.

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55 It is assumed for purposes of this case that that OCS may attempt to determine whether the court *could have* found abuse or neglect, and not determine simply whether the court did make such a finding. Given the language used in AS 47.05.330(b), this assumption is debatable.

56 7 AAC 10.955(e).

57 Agency Record 036.

58 Agency Record 103.

59 Testimony of Ms. B.

60 Testimony of K B.

In October of 2001, J arrived at school with a black mark on his lip. He told his teacher that his dad hit him because he could not find the spatula.[61]

In December of 2001, L reported to the school nurse that Mr. B had struck her on her eye and face. The nurse reported that L's cheek was swollen and red, and that there were small blood spots on her upper eyelid and above and below her eyebrow.[62] At the hearing, L testified that Mr. B got angry with her and then started to get physical. He hit her and bounced her head off the door. He also pulled her arm so that, according to L, it was pulled out of the socket. She testified that her mother was not home at the time, but she talked to her mother about it later. Her mother would not listen, and said she didn't see anything wrong. According to L, her mother never did anything about this incident.[63]

Ms. B testified that she talked to L about the incident and, at that time, could not see any swelling or other marks on L's face. At the hearing she implied that any marks seen by the school nurse may have developed overnight. Ms. B testified that she also spoke with her husband, who told her that L slapped him, and he instinctively struck her back.[64] Ms. B testified that she had L and Mr. B talk to each other, and that they both admitted they had done something wrong and talked it over.[65] It is undisputed that Mr. B did strike L, and it is more likely true than not true that this caused swelling and other marks. He may have pulled her arm, but did not pull it out of its socket.

Following L's report to the school nurse that she had been slapped, the children were removed from the home. L later reported that at some earlier date, Mr. B was wrestling with her and stripped her of her clothes and held her down.[66] At the time she reported this, she said there had been no sexual touching or penetration.[67] She reported that this happened twice to her and once to her sister.[68] L asserted that her mother was aware of this but did not intervene.[69] C did

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61 Agency Record 081. According to Ms. B, K always called A "dad."

62 Agency Record 077.

63 Testimony of L G.

64 Testimony of Ms. B. A B attended the hearing to support his wife, and sometimes interjected, but he was not called as a witness and his statements during the hearing are not the basis for any factual findings in this matter.

65 Testimony of Ms. B.

66 Agency Record 792; 1038.

67 Agency Record 792.

68 Agency Record 793.

69 Agency Record 793. This was also described during an interview conducted by the police. Agency Record 1057 – 1058.

not report this or any similar incident during counseling.[70]

L testified to this incident at the hearing. During this testimony, she stated that Mr. B had touched her vagina. She also described the event differently than she had when she first reported it.[71]

During her testimony, Ms. B denied that Mr. B had done anything similar to what L had described. However, there are notes in the record that indicate she told a counselor that Mr. B had:

- Taken L's shirt off and taken her outside for a "snow bath."
- While L and C were wrestling, held C down while L took C's shirt off.
- Demonstrated to L how a person could walk behind her and undo her bra.[72]

Elements of these actions are similar to things L testified to at the hearing, and reported to her counselor after being removed from the home. It is more likely true than not true that the "snow bath" incident, the wrestling incident, and the unhooking of L's bra did occur as initially reported by Ms. B during the investigation.

2. The Children Did Not Suffer Substantial Impairment

The allegation in this case is that Ms. B's actions or failure to take action resulted in actual mental injury to one or more of her children. For purposes of AS 47.10, mental injury is given the same meaning as that in AS 47.17.290:[73]

> "[M]ental injury means a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness[.[74]]

Similarly, the definition of "child abuse and neglect" includes mental injury, and for purposes of that definition, mental injury:

> means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function[.[75]]

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70 *See* Agency Record 1034 – 1035.

71 It is not unusual that the same person would describe an event somewhat differently when asked several years apart, even if it is a traumatic event.

72 Agency Record 1043; 1052.

73 AS 47.10.990(21).

74 AS 47.17.290(9).

75 AS 47.17.290(2).

There are differences between these two definitions, but because both use the term substantial impairment, and because the evidence in the record does not establish a *substantial* impairment, it is not necessary in this case to determine which definition should apply.

Allen Levy testified on behalf of OCS.[76] He has a master's degree, and is a licensed psychological associate in Alaska. He was J' individual therapist after the children were removed from the home, and also helped conduct the family therapy for the B family.

Mr. Levy prefaced his testimony by pointing out that he had not had an opportunity to review records and refresh his memory of J' therapy.[77] He testified that he reviewed some documents before the hearing, but was relying mostly on his unrefreshed recollection. A party has the right to refresh a witness's testimony with documents from the record or with any other material. OCS did not attempt to do that in this hearing.

Mr. Levy stated that he was treating J "for the things he experienced in the home." He further explained:

> [J] was having school problems, he was having problems with impulsivity at times problems with aggression, problems with reality testing . . . in the sense of being able to . . . rationally interpret the world around him. He was having impairments in that regard as well. Low self-esteem, depression, anxiety, and at times oppositional defiant behaviors.

Mr. Levy also explained that if a parent is not protective of a child, that behavior can be experienced as abandonment or rejection, and this is "potentially harmful" for that child. There is a risk of "very deep and long term harm to the child." Mr. Levy acknowledged, however, that this does not occur in every case. Mr. Levy concluded his testimony by stating that it was safe to say the impairment and harm J experienced was the result of the dysfunction in the family. He attributed this to the family system as a whole, but could not apportion, at least without refreshing his memory, responsibility for harm between individual family members. Mr. Levy did not describe the severity of the problems J was experiencing.

J' own testimony did confirm that he had been spanked with a belt. Nothing in his testimony acknowledged a substantial impairment in his ability to function.[78]

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[76] The discussion below reflects the testimony of Mr. Levy unless otherwise noted.

[77] He mentioned this lack of opportunity more than once, and appeared at times to be uncomfortable testifying about professional opinions reached several years earlier without having the chance to refresh his recollection. Counsel for OCS did not seek to refresh Mr. Levy's memory.

[78] K was called as a witness by Ms. B and appears to have remained close to both parents. That he did not state that he was harmed by either parent is not weighed for or against OCS or Ms. B.

L testified about the impact of the family situation on herself. She said she continues to have self-assurance problems, and always worries about relationships with others. She lives in Florida to be far away from Mr. and Ms. B. She is still terrified of Mr. B. She is still upset that Mr. B was abusive and Ms. B stood up for him instead of the children.

C testified reluctantly. She stated that Mr. B had hurt her brother and had been abusive at times with excessive spanking and hitting him. She stated that her mother did not protect her brother. She only vaguely remembered any time when L was injured. She also testified that the home situation was not as hard on her as it was for her brother and sister.

The evidence summarized above shows that at least J and L had some degree of mental injury as a result of the family dynamics in the home.[79] Where a parent has permitted her children to be exposed to domestic violence, and where that exposure does in fact result in substantial impairment in the child's ability to function, a finding that a child has suffered mental injury and is, therefore, a child in need of aid under AS 47.10.011(8)(A) is appropriate.[80]

However, as testified to by Dr. Levy, not every child who is exposed to domestic violence suffers a substantial impairment. No definition of "substantial impairment" has been found in statute or case law. The term "substantial" has a wide range of meanings. It can mean having any substance at all, as in slight or merely existing.[81] It can also mean being "of considerable importance, value, degree, amount, or extent."[82] In the context of AS 47.17, it is the second meaning that was most likely intended by the legislature. It is unlikely that the legislature would have wanted to require reports of harm for every action that caused the risk of a slight mental injury.[83] In addition, if the legislature had intended to include within the definition of substantial impairment any mental injury that had any substance at all, even slightly, it would have left out the word "substantial" because it would not have been necessary to describe the particular level of impairment it intended. By qualifying the word "impairment"

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79 The evidence in the record does not establish that C suffered mental injury.

80 *See Josephine B. v. State*, 174 P.3d 217, 221 (Alaska 2007). Contrary to OCS' assertion, the children in *Josephine B.* were subjected to more pervasive and extensive abuse than what occurred in this case. *See Josephine B.* 174 P.3d at 219.

81 *Webster's II New Riverside University Dictionary*, Riverside Publishing Company 1988, page 1155.

82 *Id.*

83 Virtually any parental mistake could create a risk of a slight, possibly short-term, mental injury. It is unlikely that the legislature intended reports of harm, and findings that a child was in need of aid based on the risk of a minor injury of this nature.

with the word "substantial," the legislature has defined mental injury as existing only where the impairment is considerable in amount or extent.

The testimony of Mr. Levy established that the conditions in the B household put all three children at risk of considerable, long lasting impairment in their ability to function. The failure of Ms. B to recognize the problems in the household and to take more steps[84] to protect the children caused a *risk* of "very deep and long term harm."[85] But the evidence presented at the hearing did not address whether deep and long term harm *actually occurred* in this case. Mr. Levi did not describe in any detail the degree of J' impairments. The difficulties J was having at school and at home are difficulties many children have without those difficulties being classified as substantial. J essentially denied any impairment caused by Mr. or Ms. B, and L's testimony was also vague as to the degree of impairment she has suffered. C was even more indefinite.

The current regulations require prompt notification of substantiated findings which should, in turn, allow hearings to be held when memories are fresh. However, those regulations had not been written at the time of the events at issue in this case, which resulted in a delay in the decision to place Ms. B's name on the registry. That delay put OCS in the difficult position of trying to prove the existence of an injury that occurred, if at all, more than ten years in the past. At least in part because of the passage of time, OCS was not able to prove by a preponderance of the evidence that the children suffered actual mental injury as that term is defined by statute.[86]

IV. Conclusion

The Office of Children's Services acknowledged that it had not made a substantiated finding of abuse or neglect based on Ms. B's conduct. Instead, it relied on the CINA determination, and placed Ms. B on the centralized registry solely on the strength of that ruling. However, in determining that Ms. B's children were in need of aid, the Superior Court did not make a finding of actual mental injury. In addition, the evidence presented at the hearing was insufficient to support a substantiated finding that Ms. B's conduct caused any mental injury. Accordingly, the substantiated finding is reversed.

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[84] She testified as to some things she did to change Mr. B's behavior. But Ms. B's own description of some of the incidents, such as the "snow bath," acknowledge abusive conduct by Mr. B, and her acceptance of that conduct as appropriate could be viewed as a failure to protect the children from harm.

[85] Testimony of Mr. Levy.

[86] Because there was no mental injury, it is not necessary to resolve the factual dispute concerning what actually occurred in the home, and whether it was Ms. B's actions or inactions that caused a mental injury.

Ms. B's name shall be removed from the centralized registry (AS 47.05.330).

DATED this 15th day of March, 2013

Signed
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The undersigned adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 21st day of March, 2013.

By: *Signed*
William J. Streur
Commissioner

[This document has been modified to conform to the technical standards for publication.]