

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

In the Matter of the)
)
 H N)
_____)

OAH No. 12-0715-SAN

DECISION

I. Introduction

The Office of Children’s Services (OCS) substantiated two findings of abuse against H N. Mr. N appealed those findings, and this matter was referred to the Office of Administrative Hearings for a hearing.

A hearing was held on December 11, 2012. Mr. N appeared in person and represented himself. Assistant Attorney General Megyn Greider represented OCS. Based on the evidence presented, one substantiated finding of sexual abuse is affirmed.

II. Background Facts

M C is the mother of X, Y, and Z. In 2010, she was living with her children and with H N, who was her fiancée and is the father of Z. Mr. N and Ms. C were originally living in A Midwest State, when they decided to move because they did not think where they were then was a good place to raise children.¹ At first they moved to a west coast city, but eventually they all moved to Alaska.²

In 2010, OCS received a report of sexual and physical abuse. X was 11 years old at the time, and was listed as the victim. Mr. N was listed as the alleged perpetrator.³ At the conclusion of its investigation, OCS found that an allegation of physical abuse and an allegation of sexual abuse were substantiated.⁴

III. Discussion

A. Evidentiary Ruling

Both X and Y were interviewed during the investigation, and OCS offered video recordings of those interviews into evidence. Initially, the undersigned ALJ ruled against

¹ Testimony of Mr. N.

² Testimony of Mr. N.

³ Agency Record at 86.

⁴ Agency Record at 45. OCS found that allegations of neglect concerning all three children were not substantiated.

admitting the recordings, in part because there was other evidence available of what occurred in the interviews, and because Mr. N had not claimed that the interviews were conducted in a misleading or coercive manner. Upon further reflection, this initial ruling was not correct. The recordings are the best evidence of what was actually said during the interviews, and the best evidence of whether the interviews were conducted properly. In most cases, such recordings would be proper evidence, and should be submitted as evidence.⁵ Using the civil rules of evidence as a guide, these statements could be outside the definition of hearsay.⁶

At the conclusion of the testimony, the motion to admit these recordings was renewed. The motion was again denied, in part because Mr. N had not had an opportunity to review the recordings in advance of the hearing. OCS explained that the recordings are kept by Alaska CARES, and were not available to OCS or its attorney until Ms. C signed a release the morning of the hearing. OCS suggested that the recording could be quickly made available for Mr. N to review, and that there was time for that review because the hearing was ending several hours earlier than its originally scheduled ending time.

The scheduling order issued in this case required all exhibits to be marked and exchanged by November 27, 2012. This order stated that exhibits could be added after that date only for good cause. OCS did not show that it had only recently learned of the existence of the recordings, or that it had attempted to obtain them earlier, without success. It did not request a subpoena to compel the production of those recordings.

Mr. N did not have access to the recordings before preparing his case, and before cross examining witnesses. Admission of this evidence would have been prejudicial to him. In addition, although he asserted that the allegations were not true, there were no allegations that the interviews were conducted in a way that might have elicited false accusations. Since there were interview notes in the record that reflected what was said during those interviews, and because the late submission was prejudicial to Mr. N, the recordings were excluded. The second ruling correctly excluded these recordings.

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⁵ It is important to protect the confidentiality of these recordings. While the paper records are also confidential, improper disclosure of video recordings of child abuse interviews would likely cause more harm than the improper release of paper records. Even so, protections can be put in place to reduce the risk of improper disclosure.

⁶ Civil Rule of Evidence 801(d)(3).

B. Child Abuse Or Neglect

OCS asserted that its Child Protection Manual requires the use in this hearing of the definition of abuse or neglect contained in AS 47.17.290. The Child Protective Services Manual was not an exhibit in this matter, so it cannot be determined what that manual requires, or even if that manual is controlling for this type of hearing. However, the definition in AS 47.17.290 has been previously applied in similar cases,⁷ and no other definition has been proposed. Alaska Statute 47.17.290 contains the definitions that should be used in this case. This statute says:

(2) “child abuse or neglect” means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby; in this paragraph, “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[. ⁸]

Physical injury and sexual abuse are not defined by this statute. Physical injury is commonly understood to be anything that causes some damage to a person’s body, even if slight. Sexual abuse would include any conduct that constitutes the crime of sexual abuse of a minor in AS 11.41.434 – 440. The conduct alleged here fits within the definition of sexual abuse of a minor in the second degree because it is alleged that Mr. N engaged in sexual contact with X when she was less than 13 years of age.⁹

C. Physical Abuse of X

X testified that when Mr. N was caring for her and her brothers, and her mother was not at home, Mr. N would sometimes slap or hit her.¹⁰ One time he hit her legs with an electrical cord. She testified as to one occasion when he pinned her down and his arm was across her throat and she had trouble breathing. She testified to another incident when Mr. N caused a scratch on her back. This testimony is consistent with the notes of her interview at Alaska

⁷ See *In re M.M.*, OAH No. 08-0531-DHS (Commissioner of Health and Social Services 2009), page 2. *But see In re M.M.*, page 2, n.5 (cautions concerning the use of the Protective Services Manual, and definitions referred to in the manual).

⁸ AS 47.17.290(2).

⁹ AS 11.41.436(a)(2). Sexual contact is defined in AS 11.81.900(b)(58).

¹⁰ There was also testimony from X and from Y that Mr. N hit Y. The substantiated findings being appealed only refer to X as the victim. There is no substantiated finding in the record of abuse or neglect as to Y. Thus, this hearing cannot uphold or reverse a finding based on any abuse or neglect of Y.

CARES.¹¹ X stated during that interview that Mr. N had hit her and that this had sometimes caused bruises and scratches. She stated that one time he spanked her with a belt which left marks on her back.¹² There are some differences between what she testified to at the hearing and what X stated during her Alaska CARES interview. This hearing was more than two years after the interview, and it is not surprising that she would have used different words, or had a different recollection. In both statements she indicated that only sometimes did Mr. N cause or scratch or bruise, and in neither statement did she suggest any serious injury.

Y also testified that Mr. N would slap or hit X, though he did not say that this ever caused a physical injury.

Mr. N denied injuring X, but he did admit to hitting Y with a belt when they were in a west coast city. He also admitted hitting Ms. C with a broom one time, though under circumstances when, he asserted, she first picked up the broom to hit him. Most of his testimony was directed to explaining his role in the family, and disputing the sexual contact. He did not provide very much testimony to rebut the allegation of physical abuse. On the other hand, there would be little more that he could say if, as he asserted, he did not slap or hit X.

It is OCS's burden to prove the physical abuse occurred, and that it caused some physical injury. It must prove this by a preponderance of the evidence, which means that the fact being proven is more likely true than not true. Meeting this burden only requires that the fact be slightly more likely true.

In this case, it is more likely true than not true that Mr. N did slap or hit X, and that on at least one occasion this caused a scratch or a bruise. In order to prove a physical injury, OCS only needs to prove a slight physical injury, and a scratch or bruise is sufficient. However, in order to substantiate a finding of abuse or neglect, OCS must also show that the physical injury occurred "under circumstances that indicate the child's health or welfare is harmed or threatened thereby[.]"¹³ Based on the evidence presented, OCS has not proven by a preponderance of the

¹¹ Alaska CARES is part of Providence Hospital, and it brings together various professionals and law enforcement personnel to assist with interviewing children after an allegation of abuse has been made. Testimony of P U.

¹² Agency Record, page 5. Hearsay may be used to supplement or explain direct evidence. AS 44.62.470(a). See also, 2 AAC 64.290(a)(1) (admission of evidence that a reasonable person might rely on in serious matters).

¹³ AS 47.17.290(2); *In re John Doe*, OAH No.06-0112-DHS (Commissioner of Health and Social Services 2007), page 13.

evidence that X's health or welfare was harmed or threatened by the physical abuse.¹⁴ Accordingly, this substantiated finding must be reversed.

D. Sexual Abuse of X

X testified that Mr. N was in charge of waking her up for school. One morning she awoke, and he had placed his hand inside her pajama bottoms and was touching her vagina. She said he stopped when she woke up. According to X, neither of them said anything about the incident, and he left the room. She also testified that she thought this had happened once before, but at the time of the first incident, she thought she must have been mistaken. X reported the second incident to her fifth grade teacher.

Her description of the sexual contact during her interview at Alaska CARES was similar, except that in the interview she said that it had happened a total of four times, and that the touching also involved digital penetration.¹⁵ During her interview she stated she was wearing cheetah pajamas, while during her hearing testimony she stated she was wearing leggings. Both times she stated that her pants were not pulled down.

Detective D K was the officer who actually conducted the interview at Alaska CARES. Det. K has been trained to conduct forensic interviews of children so as to elicit accurate information from the witness. She testified that X was able to give details about the incident, and that most 11 year old children don't understand what digital penetration is unless they have experienced it.

Mr. N adamantly denied having touched X's vagina at all. Several of the questions he asked during cross-examination, and some of his testimony, addressed whether people believed he had abused X because he refused to take a polygraph examination. Mr. N was advised by an attorney not to agree to that examination. Some people might view this refusal as a sign of guilt, but polygraph examinations are not always accurate. Whatever others might have thought, at this stage the only question is whether the final decisionmaker believes he touched X's vagina. His decision not to submit to this examination, especially since it was on the advice of his

¹⁴ Testimony was elicited at the hearing that X has had some problems at school, a period of hospitalization at a mental health care facility, and some lasting emotional distress. These issues arose after the alleged sexual contact, and the implication from the way this testimony was presented was that any mental harm was caused by the sexual contact, and not by the physical abuse. To the extent that OCS intended otherwise, this evidence was not sufficient to show that the circumstances surrounding the physical abuse threatened X's health or welfare.

¹⁵ Agency Record, page 5.

attorney, has no bearing on whether OCS's substantiation finding should be upheld.¹⁶ His decision not to submit to this examination is given no consideration whatsoever.

In addition, Mr. N suggested that X only reported the abuse after he had punished her for using his computer. He implied that she may have been trying to get him in trouble. Ms. C and X both agreed that X and Mr. N did not get along very well. The record includes a case note dated April 2, 2010, describing a telephone conversation between a caseworker and the Vice Principal at X's school. The Vice Principal reportedly said that X has a history of lying and that she, the Vice Principal, asked X to make sure she was telling the truth this time before she reported the sexual abuse.¹⁷

Ms. C mentioned more than once that Y is a truthful child; he never lies. She did not make similar statements about X. On the other hand, nothing about X's demeanor or her answers to questions suggested she was not telling the truth during her testimony.

X's statements have remained reasonably consistent over the two and half years since she reported this incident at school. During much of her testimony her voice was quiet and she was looking down, and appeared uncomfortable.¹⁸ During direct examination, she was reminded of the importance of telling the truth. She had previously stated that she wasn't sure if an earlier incident had happened or she just imagined it, and was asked whether the incident she did report had actually happened, or was just imagined. She said "it actually happened." When questioned by Mr. N, she was able to look at him and say "you did it" in a stronger, confident voice.

OCS only needs to prove that it is slightly more likely true than not true that Mr. N had sexual contact with X. OCS has met that burden here. It is more likely true than not true that Mr. N touched X's vagina one time when he woke her up for school. As with the physical abuse, OCS must also prove that this occurred in a way that X's health or welfare was harmed or threatened.¹⁹ Unlike the physical abuse, however, inappropriate sexual contact between a caretaker like Mr. N and a young child will always at least threaten to harm the child's welfare.

¹⁶ OCS's counsel did not argue that his refusal should be considered. It was Mr. N who raised this issue at the hearing.

¹⁷ This evidence is hearsay, but it is not the type of information that would be recorded if the conversation had not occurred, and a school Vice Principal is unlikely to report this information unless she believed it to be true. Reasonable people would rely on this evidence in conducting serious affairs, though it is accorded less weight than sworn testimony which has been subject to cross-examination. See 2 AAC 64.290.

¹⁸ This is not surprising given her age and the subject matter of the testimony.

¹⁹ AS 47.17.290(2).

This contact is illegal because it creates either harm to the child or a risk of harm to the child.
OCS's finding of sexual abuse is affirmed.

IV. Conclusion

Based on the evidence presented at the hearing OCS' substantiated finding of physical abuse is REVERSED. The substantiated finding of sexual abuse by Mr. N of X is AFFIRMED.

DATED this 28th day of December, 2012.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

Non-Adoption Options

B. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set forth below, and adopts the proposed decision as revised:

I reject the proposed decision overturning the substantiation of physical abuse due to evidence and appropriately interpreting the disjunctive use of "or" in the statute. I adopt the proposed decision to uphold the substantiation of sexual abuse.

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 10th day of February, 2013.

By: *Signed* _____
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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