

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

In the Matter of: )  
 )  
 T M ) OCS No. 000000  
 ) OAH No. 13-1200-SAN  
\_\_\_\_\_)

**DECISION**

**I. Introduction**

This is an appeal under 7 AAC 54.215 from a substantiated finding of child abuse by T M, issued by the Office of Children’s Services (OCS).<sup>1</sup> OCS’s finding was that there was credible evidence that Mr. M had sexually abused his daughter.<sup>2</sup>

Mr. M filed an appeal and the assigned administrative law judge conducted a hearing on December 17, 2013. Mr. M represented himself and Assistant Attorney General Laura Hartz represented OCS. OCS elicited testimony from A N (K’s mother), B J (K’s day care provider), C D E (a family nurse practitioner), W V (OCS), Z Y (No Name), and Det. Q R. Mr. M cross-examined those witnesses.

The preponderance of the evidence presented supports the OCS finding.

**II. Facts**

T M has five children, including two daughters with A N, K and X, who were born in February 2008, and August 2009, respectively.<sup>3</sup> By 2012, the couple were living separately, cooperatively sharing custody of the two girls.<sup>4</sup> Because both parents were working, the girls spent their days in a day care facility, beginning in September 2012 in a facility operated by B J. When they were observed with Mr. M, either at the day care facility or in Ms. N’s presence, the girls were happy to see him and showed no signs of distress or fear. They are well adjusted, well behaved, happy kids.

Sporadically, on three or four occasions K experienced vaginal irritation, which she mentioned to her mother.<sup>5</sup> Her mother examined her and observed some sort of inflammation, but when her mother asked if something had happened K did not report anything.<sup>6</sup> Her mother

<sup>1</sup> 7 AAC 54.215 was repealed effective September 7, 2013. Appeals from substantiated findings issued by OCS are currently heard pursuant to 7 AAC 54.255(b)(7).

<sup>2</sup> See R. 32.

<sup>3</sup> R. 2, 8.

<sup>4</sup> See R. 62.

<sup>5</sup> See, e.g., R. 21 (“noticed the child scratching her private area a few times over the past week”).

<sup>6</sup> T. N Testimony. See R. 27, 37.

thought that perhaps K had been playing doctor with a cousin or another child, or touching herself (as Ms. N had observed on occasion).<sup>7</sup> She applied Vaseline, which soothed the irritation. She had no reason to suspect that Mr. M, whom she has known for about eight years, had done anything untoward.

K and X spent the weekend of February 2-3, 2013, in Mr. M's care.<sup>8</sup> The girls spent Friday night at their cousins' house, and on Saturday evening the girls and one of their cousins came to Mr. M's house and played together, and all of them spent Saturday night there.<sup>9</sup> K and her cousin slept upstairs in the master bedroom, and Mr. M and X slept downstairs on the couch.<sup>10</sup> All the girls slept in their street clothes. Sunday was Super Bowl Sunday, and after the first quarter Mr. M brought the group over to the cousins' house and watched the rest of the Super Bowl there.<sup>11</sup> Later, he brought K and X back to Ms. N's home.<sup>12</sup>

When she returned to her mother's residence, K was wearing sweatpants, which was not unusual. She told her mother that her privates hurt. Ms. N looked at her vaginal area, and saw that the inside of vaginal opening was red and raw.<sup>13</sup> Ms. N gave her some petroleum jelly and, as she had before, asked, "Did something happen?"<sup>14</sup> This time, K said that her father had tickled her there, but only once.<sup>15</sup> X, who was nearby, said she saw her father tickle K.<sup>16</sup> She told her mother that K had been crying for her daddy to stop but he did not.<sup>17</sup>

On February 7, 2013, Ms. N told Ms. J what K had told her. Ms. J, because she is a licensed child care provider, was required by law to report the information to OCS, and she did so. The following day was K's fifth birthday. Staff from No NAME came to the child care facility to pick up the girls for interviews at No NAME. In order to provide a familiar face for the trip, Ms. J accompanied them to No NAME, where Ms. N joined them.

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<sup>7</sup> T. N Testimony. *See* R. 27, 37.

<sup>8</sup> *See* T. N Testimony.

<sup>9</sup> *See* R. 38, R. 52, R. 54.

<sup>10</sup> R. 38.

<sup>11</sup> *See* R. 38.

<sup>12</sup> R. 38, 52, 54. It is not clear from the record whether the girls spent Sunday night at their father's house, or at their cousins'. One note in the file states that K's report to her mother was made on Monday. R. 54. Elsewhere the report is stated to have been made on Sunday. R. 38.

<sup>13</sup> R. 20. T. N Testimony.

<sup>14</sup> T. N Testimony.

<sup>15</sup> T. N Testimony. *See* R. 37 ("K told her '...mom, he only did it one time.'").

<sup>16</sup> *See* R. 37.

<sup>17</sup> T. N Testimony.

Both K and X were interviewed at No NAME. X was interviewed by Z Y. Detective Q R interviewed K, observed by Mr. Y, Dr. Z O, C K. E, a licensed family nurse practitioner (FNP), and social worker G H (No NAME).<sup>18</sup>

K was provided a drawing of a male and a female and she identified different parts of the body, including the groin, which she identified as “private”.<sup>19</sup> She was asked if she had been touched on her “private.” She said yes, and that she was hurt there when her daddy had tickled her there and it didn’t hurt before (but it did hurt “a long time ago”).<sup>20</sup> She said he tickled her underneath her clothing, one time.<sup>21</sup> She stated it happened while she was sitting in his lap, and X saw it.<sup>22</sup> She said he pulled down her pants and she said “stop it” and he did not stop.<sup>23</sup> He stopped when X scratched his back, she added.<sup>24</sup> After that, K said, she went to play and he followed her; she was under the covers and he tickled her “private” again.<sup>25</sup> She said that his clothes were on, and he did not have her touch his body.<sup>26</sup> K said that he tickled her inside her “private” while her pants were on, and that she told him, “I didn’t like that” and he said he was sorry.<sup>27</sup> X stated that she saw her father tickle K’s privates, outside of “something” and that afterwards K got off his lap.<sup>28</sup> She said her daddy did not touch her privates.

After the girls were interviewed, Det. R interviewed Mr. M, who denied inappropriately touching the girls.<sup>29</sup> Also following the interviews, FNP E examined K. She noted an anomaly of some sort on the clitoral hood, possibly a skin flap.<sup>30</sup> After reviewing photographs of the examination, she noted an atypical skin lesion on the left clitoral hood.<sup>31</sup> The lesion was not present at a subsequent examination on February 18.<sup>32</sup> Ms. N had observed K scratching herself

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18 R. 12.  
19 Video Recording (0:20). See R. 8.  
20 Video Recording (0:22-23, 0:37). See R. 9-10.  
21 Video Recording (0:24). See R. 9.  
22 Video Recording (0:24-25). See R. 9.  
23 Video Recording (0:26). See R. 9.  
24 Video Recording (0:29). See R. 9.  
25 Video Recording (0:29-0:30). See R. 9.  
26 Video Recording (0:32). See R. 9.  
27 Video Recording (0:37-38). See R. 10.  
28 Video Recording (0:14-0:17). See R. 2-3.  
29 See R. 38-39.  
30 R. 16.  
31 R. 19.  
32 R. 23.

during the interim.<sup>33</sup> FNP E considered lichen sclerosis as a differential diagnosis for the itching and irritation.<sup>34</sup>

### III. Analysis

#### A. Applicable Law

AS 47.17.290(2) states in part that “‘child abuse or neglect’ means the...sexual abuse...of a child....” The term “sexual abuse” is not defined in AS 47.17, but it is defined in AS 47.10.990(31) to mean the conduct described in AS 11.41.410-.460. As in prior cases, that definition will be applied in this case.<sup>35</sup> Among the conduct described in those provisions is sexual contact by an adult with a minor under age 13.<sup>36</sup> Sexual contact includes knowingly touching, directly or through clothing, the minor’s genitals, other than contact that may reasonably be construed as normal caretaker contact, interaction with a child, or affection for a child.<sup>37</sup>

OCS’s written policy, which has previously been adopted for purposes of hearings under 7 AAC 54.215, is to issue a substantiated finding when “the available facts indicate a child suffered harm as a result of abuse or neglect as defined in AS 47.17.290.”<sup>38</sup> A finding will be sustained following a hearing if the preponderance of the evidence supports the finding issued by OCS.<sup>39</sup>

#### B. Evidence Relevant to Sexual Abuse

##### 1. *Indeterminate Physical Signs*

FNP E found K’s physical condition to be indeterminate, that is, to neither confirm nor preclude the occurrence of the alleged acts. She did not note any inflammation or redness in the vaginal area.<sup>40</sup> Upon reviewing a photograph, she observed a very small lesion on K’s clitoral

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<sup>33</sup> R. 20.

<sup>34</sup> R. 26.

<sup>35</sup> See In Re X.Y., at 11, OAH No. 10-0312-DHS (Commissioner of Health and Social Services 2011); In Re H.N., at 3, OAH No. 12-0715-SAN (Commissioner of Health and Social Services 2013).

<sup>36</sup> AS 11.41.440(a)(1).

<sup>37</sup> AS 11.81.900(a)(58)(A)(i), (B)(i).

<sup>38</sup> Child Protective Services (CPS) Manual §2.2.10.1 (rev. 6/1/2004) (“Policy: ...A substantiated finding is one where the available facts indicate a child suffered harm as a result of abuse or neglect as defined by AS 47.17.290.”) (available online at [dhss.No.gov/ocs/Documents/Publications](http://dhss.No.gov/ocs/Documents/Publications); accessed May 23, 2014). See, e.g., In Re John Doe, at 2, OAH No. 06-0112-DHS (Commissioner of Health and Social Services 2007); In re K.S., at 5-6, OAH No. 07-0600-DHS (Commissioner of Health and Social Services 2008).

<sup>39</sup> See generally, e.g., In Re K.S., OAH No. 07-0600-DHS (Commissioner of Health and Social Services 2008).

<sup>40</sup> See R. 16.

hood that had escaped notice on her visual examination.<sup>41</sup> FNP E testified that the lesion was consistent with K being touched there (either by another person or by herself) and with lichen sclerosis, a medical condition occasionally present in prepubescent females.<sup>42</sup> Lichen sclerosis, FNP E testified, is a condition that waxes and wanes over an extended period of time, and which is characterized by an itching sensation.<sup>43</sup> FNP E testified that she had told Ms. N that if the irritation continued, she might consult K's pediatrician regarding treatment. It is unknown whether K has been treated for her vaginal condition. FNP E noted that when K was re-examined on February 18, some ten days after the initial examination, the lesion was healing.

## 2. *Absence of Behavior Indicative of Abuse*

Ms. N testified that K had touched herself on occasion before the incident, but that she had not done this recently.<sup>44</sup> FNP E was specifically asked if she drew any conclusion from the apparent cessation of self-touching, and FNP E replied that she did not.<sup>45</sup> OCS did not establish that this particular behavior was indicative of sexual abuse rather than of a pre-existing medical condition or K's own conduct, and it provided no evidence that K's behavior in any other way was possibly indicative of sexual abuse (*e.g.*, sexualized behavior, use of inappropriate language).

## 3. *Disclosure to Ms. N*

K had been asked by her mother on several prior occasions, when she exhibited irritation in the vaginal area, whether anything had happened to her, and she had always replied negatively.<sup>46</sup> On this occasion, she reported that her father had tickled her there, and it hurt. She did not report digital penetration to her mother. That K had not previously reported any sexual contact, notwithstanding quite similar symptoms and absent any report that Mr. M had told her to keep his conduct secret, supports an inference that whatever occurred on this particular occasion was a singular event, consistent with K's statement to her mother that Mr. M touched her only one time. That this was apparently a singular occurrence, however, does not shed light on whether the incident was innocuous.

## 4. *No NAME Interview*

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<sup>41</sup> C. E Testimony #5 0:38.

<sup>42</sup> *See* C. E Testimony #5 0:15, 0:31-33, 0:42.

<sup>43</sup> *Id.*

<sup>44</sup> T. N Testimony #2 0:27. *See also* R. 21 ("noticed the child scratching her private area a few times over the past week") (2/18/2013).

<sup>45</sup> C. E Testimony #5 0:19.

<sup>46</sup> T. N Testimony.

K was interviewed by Det. Q R of the Anchorage Police Department at No NAME on Friday, 00/00/13. A video recording of that interview is in the record.

The interview occurred on K's fifth birthday. She described an event that had occurred (as reported to her mother) over the preceding weekend.<sup>47</sup> That event was in the immediate past and, notwithstanding her age, K would likely have been able to recall it and report it with substantial accuracy. Nothing in the record or in common experience suggests that K's report was fabricated, embellished, or imagined.

K stated that her father "tickled" her. Tickling is common and innocent conduct, and, in that context, contact with a squirming child's genitals, particularly from the outside of clothing, could reasonably be construed as normal interaction with a child. In order to establish sexual abuse, OCS needed to prove that: (1) Mr. M directly or indirectly touched K's genitals; and (2) the touching may not reasonably be construed as normal interaction.

K identified the part of her body that was touched by pointing on a drawing to the location she had described as her privates, and by pointing to her own body. It is possible that K was describing contact with her lower belly or groin, rather than her genital area. However, she added that the contact hurt her, and tickling, even if accompanying by squeals and tears, would not normally be described as hurtful. Moreover, she stated that the touching was "inside," which supports an inference that it was her vagina rather than the surface of her body that was touched, and that there was some degree of digital penetration. As described by K, the contact that occurred is not reasonably construed as a normal interaction with a child. Accordingly, K's testimony, unrebutted and unexplained, is sufficient to meet OCS's burden of proof that sexual contact occurred.<sup>48</sup>

K's description of what occurred was not entirely consistent: for example, at one time she stated Mr. M pulled her pants down, at another that he put his hand inside her pants. However, X's unsolicited corroboration of the incident is highly persuasive evidence that some sort of contact occurred, and notwithstanding some inconsistency in the details, K's statements that she was tickled, that it hurt, and that it was inside her privates are a plausible description of sexual

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<sup>47</sup> In her interview at No NAME, K stated that she had been touched by her father in the summer. Apart from that statement, which is inconsistent with K's statement to her mother that she was only touched on one occasion, there is no evidence that K was touched on more than one occasion.

<sup>48</sup> Given the occurrence of sexual contact, the evidence is also sufficient to establish that sexual abuse occurred under circumstances indicating that the child's health or welfare was threatened. Sexual abuse by a caretaker of a young child constitutes a threat of harm to the child's welfare. See In Re H.N., at 6, OAH No. 12-0715-SAN (Commissioner of Health and Social Services 2013).

abuse by Mr. M. It is possible that Mr. M innocently tickled K and incidentally indirectly contacted her genitals, and that the contact was hurtful due to a pre-existing vaginal irritation. However, although Mr. M denied having touched K's privates when he was interviewed by Det. R, Mr. M did not describe any incident that might otherwise explain what K reported and X observed. Absent any description by Mr. M of conduct that might have prompted K's report and which could reasonably be construed as normal interaction with her, there is no evidence to support an alternative explanation for K's report.

C. Evidence Relevant to Harm

As previously observed, OCS's policy is to issue a substantiated finding when the available facts show abuse and that the child is thereby harmed.<sup>49</sup> In a case involving physical abuse, a showing of physical injury to the child is sufficient to establish harm.<sup>50</sup> Similarly, in a case involving sexual abuse, a showing that the child incurred a physical injury as a result of the abuse is sufficient to establish harm. OCS argues that K incurred a physical injury in the form of an abrasion or lesion to her clitoral hood. However, OCS did not establish, by a preponderance of the evidence, that Mr. M was responsible for the lesion on K's clitoral hood. As FNP E testified, K's physical condition was consistent with lichen sclerosis. That condition waxes and wanes over time, and Ms. N testified that K had reported vaginal irritation on multiple occasions, while she reported being touched by Mr. M only one occasion. That K had a pre-existing medical condition that irritated her vaginal area, caused her to scratch, and resulted in a lesion, is at least equally plausible as that she incurred a lesion when touched, on a single occasion, by Mr. M. OCS did not prove that Mr. M caused physical injury to his daughter.

That OCS did not prove that K's lesion was the result of sexual abuse does not, of course, mean that she was not harmed. Harm can occur in the form of mental, psychological, or emotional injury. OCS did not submit evidence that K has exhibited any shame, fear, anxiety, or other adverse mental, psychological or emotional symptom as a result of the event that she described to her mother. Rather, OCS argued that it was not required to show any specific harm, because OCS considers any act of sexual abuse of a child to be harmful for purposes of a substantiated finding.

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<sup>49</sup> See note 38, *supra*.

<sup>50</sup> See In Re F.T., at 3-4, OAH No. 13-0050 -SAN (Commissioner of Health and Social Services 2013).

No prior decisions address whether OCS must make a factual showing of harm in a case involving a substantiated finding of sexual abuse of a minor.<sup>51</sup> No statute or regulation addresses that issue, and OCS's written policies do not address it. As a policy issue of first impression, the commissioner may adopt a policy consistent with law. Mental, emotional and psychological harm resulting from sexual abuse absent physical injury may exist without immediate behavioral or other symptoms, as compared with harm resulting from physical abuse, which typically causes readily observable physical injury or pain. The policy advocated by OCS comports with the distinct nature of harm resulting from sexual abuse absent physical injury. It is consistent with the department's interpretation of AS 47.17.290(2),<sup>52</sup> OCS's protective function, the need for prompt investigation of and response to reports of harm, and the legislature's intent to "avoid subjecting a child to multiple interviews about the abuse and neglect."<sup>53</sup> For these reasons, OCS is not required to make a factual showing of harm to substantiate a finding of sexual abuse.<sup>54</sup>

#### IV. Conclusion

OCS chose not to call Mr. M as a witness, and Mr. M chose not to testify.<sup>55</sup> Because Mr. M did not testify, K's interview is the only direct, first-hand evidence in the record regarding what occurred. Based on the department's interpretation of AS 47.17.290(2) and the record in this case, and consistent with the policy that OCS is not required to make a factual showing of

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<sup>51</sup> OCS argued that prior administrative decisions have adopted this position. However, OCS did not cite to any decision in support of that argument. In Re H.N., OAH No. 12-0715-SAN (Commissioner of Health and Social Services 2013) sustained a substantiated finding of sexual abuse based on a single incident in which a man touched the vagina of his fiancée's eleven-year-old daughter. The decision states, "inappropriate sexual contact between a caretaker...and a young child will always at least threaten to harm the child's welfare." *Id.*, at 6. In Re X.Y., OAH No. 10-0312-DHS (Commissioner of Health and Social Services 2011) withdrew a substantiated finding of sexual abuse based on a single incident in which a man allegedly touched the vaginal area of his girlfriend's four-year-old daughter. The decision noted, "[b]ecause no sexual abuse occurred, it is not necessary to determine whether, under the circumstances of this case, [the child] incurred an identifiable physical, mental or emotional injury." *Id.*, at 19, note 135.

<sup>52</sup> Since 2013, the Department has interpreted AS 47.17.290(2) to mean that abuse in the form of physical injury, sexual abuse, sexual exploitation, or neglect may occur without regard to whether the child's health or welfare was harmed or threatened by the abusive conduct. *See, e.g., In Re U.H.*, at 6-7, OAH No. 12-0099-DHS (Commissioner of Health and Social Services 2014), *appeal pending*, No. 3KN-14-00000CI (Superior Court); In Re U.Z., at 3, OAH No. 12-0433-SAN (Commissioner of Health and Social Services 2013), *appeal pending*, No. 3AN-13-00000CI (Superior Court).

<sup>53</sup> AS 44.17.010.

<sup>54</sup> This ruling is a specific interpretation or application of the OCS policy as set forth in CPS Manual §2.2.10.1, which has previously been adopted for purposes of substantiated findings. *See* note 38, *supra*.

<sup>55</sup> OCS had the burden of proof, and Mr. M was under no obligation to testify. Because Mr. M had previously denied any wrongdoing, and OCS chose not to call him as a witness, no adverse inference is taken from his failure to testify at the hearing.



harm for purposes of a substantiated finding of sexual abuse absent physical injury, the preponderance of the evidence supports the finding issued by the Office of Children’s Services.<sup>56</sup>

DATED May 30, 2014.

Signed  
\_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

**Adoption**

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 7<sup>th</sup> day of July, 2014.

By: Signed  
\_\_\_\_\_  
Signature  
Ree Sailors  
\_\_\_\_\_  
Name  
Deputy Commissioner  
\_\_\_\_\_  
Title

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

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<sup>56</sup> A substantiated finding as defined in CPS Manual 2.2.10.1 and AS 47.17.290(2), both as interpreted by the department, “may or may not be a valid or useful element on which to base other decisions made by OCS, by other agencies, or the courts; this may depend on the context and on the role played by the finding in the other decision.” In re K.S., at 6, OAH No. 07-0600 (Commissioner of Health and Social Services 2008).