

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

In the Matter of)	
)	OAH Nos. 15-0803-SAN,
M L and N L)	15-0804-SAN, consolidated
_____)	

DECISION

I. Introduction

The Office of Children's Services (OCS) received a report of neglect by N and M L of their daughter J. OCS investigated, found the allegation substantiated, and notified the Ls that their names would be placed on the child protection registry. The Ls appealed.

A hearing was held on October 29, 2015. Vance Sanders and Larry Woolford represented N and M L. O C and D L testified for the Ls. Rachel Van Patten represented OCS. S H, supervisor of the OCS case worker who investigated the report of harm, testified for OCS. At the hearing, the agency record, the supplement to the agency record, the Ls' supplemented Exhibit 1, and the Ls' Exhibits 2 - 5 were admitted into evidence without objection.

At the hearing, the Ls refuted most of the allegations forming the basis of the substantiated finding. The allegation proved by OCS is not sufficient to support a finding of child abuse or neglect. The substantiated findings against N L and M L are reversed.

II. Background Facts

J L is in the sixth grade at No Name School. She is eleven years old and has significant developmental delays. She functions at the level of a nine- to eighteen-month-old.¹ She has cerebral palsy, static encephalopathy, and a seizure disorder.² She is affected by fetal alcohol spectrum disorders.³ She is blind and hearing impaired, but her senses of touch and smell are highly developed.⁴ She is incontinent and wears diapers. She can stand and pivot, but she does not walk.⁵ She uses a walker and a wheelchair.⁶ She needs help with most daily activities -- getting dressed, eating, bathing, and transferring. She has a few words and a few signs that she

¹ Agency Record at 28; Testimony of H.
² Agency Record at 18; L Exhibit 3.
³ Agency Record at 28.
⁴ Id., testimony of N L, M L, and O C.
⁵ Agency Record at 5.
⁶ Agency Record at 5, L Exhibit 4 at 1.

uses to communicate.⁷ She loves singing.⁸ J does not sleep through the night. Her blindness contributes to a pattern where she often sleeps only three to four hours a night.⁹ She sleeps in a self-enclosed bed with netting that zips up.¹⁰ J is working on objectives as part of a plan of care aimed at increasing her participation in activities of daily living. Objectives include using a cup and spoon, and helping to dress herself.¹¹

J lives with her parents, N and M L, who legally adopted her in 2008, and the Ls' other children, P and N Jr., as well as Mrs. L's adult son O C.¹² N L, M L, and O C all work outside the home.¹³ J also has direct service providers (DSPs) through No Name Services (NNS), who are with her six days a week. They come to the house at 6:30 a.m., get her ready for school, and put her on the bus. They come back after school to meet her when she gets off the bus, and stay until approximately 6:00 p.m.¹⁴

III. Alleged Misconduct and Analysis

A. Parameters for Review

OCS substantiated a finding of neglect against the Ls under AS 47.17 following an investigation. The Ls appealed. OCS's finding is reviewable by OAH under 7 AAC 54.255(b)(6). The review is *de novo*, with the agency required to prove its case for the neglect finding, and the respondent given a fuller opportunity to respond and challenge the evidence than is ordinarily available at the initial investigation stage. A determination that the allegation is unproven is not necessarily an indication that the OCS concerns were unfounded or that its preliminary conclusions were unreasonable, based on the more limited evidence available at the time.

The term "child abuse or neglect" is defined as "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"¹⁵ "Neglect" is defined for purposes of AS 47.17 as "the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical

⁷ Agency Record at 3, L Exhibit 2.

⁸ Agency Record at 3. Testimony of M L.

⁹ Appellant's Exhibit 3; Agency Record at 3; Testimony of N L.

¹⁰ Appellant's Exhibit 3.

¹¹ Appellant's Exhibit 2 at 2.

¹² Motion for Stay at 1; Agency Record at 17; Testimony of O C.

¹³ Testimony of N L, M L, and O C.

¹⁴ Testimony of M L; Agency Record at 3, 27.

¹⁵ AS 47.17.290(3).

attention for a child."¹⁶ Food, clothing, shelter, and medical attention are not at issue in this case; the only question is whether N and M L failed to provide necessary care to J.

OCS has the burden of showing by a preponderance of the evidence that the neglect occurred.¹⁷ As explored below, because OCS failed to meet this burden, the substantiated findings of neglect against M and N L must be withdrawn.

B. The OCS Allegation

This case arises from an incident on November 14, 2014. A DSP arrived at the L home at 6:30 in the morning that day, and found J naked in her bed, curled in a fetal position. Her diaper was off and she and her bed were smeared with dried feces.¹⁸ The DSP photographed this, and a report was filed with OCS.¹⁹ OCS began investigating, first contacting the family on November 18, 2014. OCS closed the investigation on April 28, 2015, with a letter to the Ls substantiating the allegation of neglect against both M and N L.²⁰ The closing letter cited as the primary concern that J had been found on two occasions "covered with feces in her bed in the mornings." In addition, OCS was concerned about other information discovered during the investigation:

that J is often left in her bed from suppertime to early morning, without any interaction with others, despite the fact that she may be awake; that her hearing aids are often missing, interfering with her ability to gain communication skills; and that P sometimes dresses J and/or changes her diapers. Due to P's small size this puts both children at risk of injury due to the potential of falls.²¹

OCS notified the Ls that their names were being placed on the child protection registry.²²

C. Evaluation of the November 14 Incident

It is undisputed that J was found on the morning of November 14, 2014 in her bed, naked, with feces smeared on her and the bed. The incident is well documented in the agency record. However, the surrounding circumstances do not indicate that J's health or welfare was harmed or threatened.

¹⁶ AS 47.17.290(11).

¹⁷ *In re H.N.*, OAH No. 12-0715-SAN (December 28, 2012) (available online at <http://doa.alaska.gov/oah/>).

¹⁸ Agency Record at 27.

¹⁹ Agency Record 19 - 26.

²⁰ Agency Record at 31.

²¹ Agency Record at 11, 31.

²² Agency Record at 10.

i. M L was recovering from brain surgery throughout the period of the OCS investigation and had effectively delegated her parenting duties to her husband N L. In the fall of 2014, M L was diagnosed with a brain aneurysm, and she had to go to City Z for surgery. M L was out of town for approximately two weeks. She and N L had just recently returned to City Y at the time of the incident. When she came back to City Y following the surgery, she was extremely sensitive to light and also experiencing anxiety. She was instructed not to lift anything for 30 days, and not to lift anything heavier than two pounds for another 30 days. She was heavily medicated. She spent a good deal of time in her room (which has blackout curtains) recovering. She was able to return to work in February, 2015.²³

M L's behavior on the night of November 13, 2014, and during the period of the OCS investigation reflects the state of her health at that time. It was reasonable and not neglectful for her to delegate her parenting duties to her husband during her recovery from the surgery.

ii. While M L was recovering from surgery, N L relied on his mother to help care for J; this reliance does not constitute neglect. In late October 2014, just before M L and her husband N left for City Z for M's surgery, N L asked his mother, D L, to come to City Y and help with the household. D L flew up in late October and stayed until December.²⁴

On the evening of November 13, 2014, N L worked late and D L was in charge of J's care. Before leaving for the day, the DSP dressed J for bed, and put her in bed (D L cannot transfer J on her own). D L fed J dinner in bed. She gave J her medications, checked J's diaper to make sure she was dry, and zipped up her bed for the night.²⁵ N L got home around 9:00 p.m., checked in with D L to make sure J had been taken care of, and then went to his own room next door to J's.²⁶ D L retired to her room downstairs.

N L had effectively delegated his parenting duties to his mother until he got home at 9 p.m. on November 13, 2014. In its closing argument, OCS asserted that D L had not been adequately briefed on all the details of J's care, and suggested that leaving J with D L therefore constituted neglect on the part of J's parents. D L is J's grandmother. In caring for J, she did not do everything exactly as J's parents would have, but that does not mean she was not providing adequate care for J. She knew J from annual visits to the L home, including extended visits in

²³ Testimony of M L, D L.

²⁴ Testimony of D L.

²⁵ Testimony of D L.

²⁶ Testimony of N L.

2012 and 2013.²⁷ She was familiar enough with J and her routines to be trusted with her care. Entrusting J's care to D L did not constitute neglect of J on the part of N L.²⁸

iii. N L was responsible for J's care the night of November 13, 2014. He failed to check on J during the night and change her diaper; however, there is no evidence that J's health or welfare was harmed by that failure. After D L went to bed downstairs the evening of November 13, 2014, N L was the adult responsible for J's care. D L could not be expected to hear from her room downstairs from J whether J needed something during the night. N L testified that he did not check on J that night.

He also testified that he did not feel that he needed to do anything else for J that evening beyond what his mother had done. Mr. L has consistently attributed the circumstances in which J was found on the morning of November 14, 2014 -- naked, smeared with feces -- to the failure of the DSP to put J in the proper pajamas the night before.²⁹ J usually wears one-piece pajamas because they help restrict her access to her diaper and prevent her from removing her pajamas and her diaper.³⁰ The DSP assigned to care for J the afternoon of November 13, 2014 was new. Neither she nor D L recognized the importance of putting J to bed in one-piece pajamas. N L did not notice that J was in two-piece pajamas that night because he did not go in and check on her himself.

However, even if J had been in her usual one-piece zip-up pajamas, it could only have contained the mess. Since she was not checked on, J still would have been in a dirty diaper for a significant period of time.³¹

N L's failure to check on J himself between 9:00 p.m. that night and 6:30 a.m. the next morning constitutes neglect for purposes of AS 47.17.290(11). J needed a diaper change, fresh pajamas, and clean sheets during the night and N L did not meet that need for care. J was found "naked, covered in feces and food, and had somehow gotten out of her clothing and had been rolling around in her own excrement for quite some time, it was dried on her body, she was

²⁷ Testimony of D L.

²⁸ See *O.R. v. State*, 968 P.2d 93, 98 n. 25 (entrusting a child to the care of relatives in a physically healthy environment could not be described as potentially harmful inaction); compare *Phoebe S. v. State*, S-15112, 2014 WL 1691614 (Alaska April 23, 2014) (mother leaving children with a woman she had met at the AWAIC shelter and hardly knew, with other Clare House residents, and with other inappropriate caregivers was sufficient to support a finding of neglect).

²⁹ Agency Record at 1; Testimony of N L.

³⁰ Testimony of N L.

³¹ See Testimony of H (the fact that the feces on J's bed was dried indicated that it had been there for some time).

covered in it, and it was dried on her bed surfaces, which was obviously very concerning I think to the provider and to her family as well."³² OCS was certainly correct to have initiated an investigation based on this, combined with the reporter's other concerns about the care J was receiving.³³ However, OCS did not prove that J's health or welfare was actually harmed by this incident, which, as explained below, appears to have been an isolated occurrence. The evidence presented by OCS about the condition J was found in on the morning of November 14, 2014 did not meet the definition of "child abuse or neglect" in AS 47.17.290(3).

iv. OCS alleged, but did not prove, that there was a pattern of failure to attend to J's needs that threatened to harm J's health or welfare. OCS argues that its "first and primary concern is that on two occasions, J has been found covered with feces in her bed in the mornings."³⁴ However, the witness for OCS at the hearing described only the November 14, 2014 incident, and could not provide a date for the second incident.³⁵ She said she would have to refer to the notes of the social worker who conducted the investigation for NNS's assertion that the morning of November 14, 2014, was not the first morning J had been found in this condition.

The agency record shows that NNS told OCS on November 17, 2014, that "the workers have been marking her diaper when they leave in the evening with a sharpie and she has the same one on in the morning."³⁶ This allegation was repeated to OCS on November 24, 2014.³⁷ It came up again in a meeting on January 9, 2015, between the OCS investigator and NNS staff: "[f]or a while staff were marking her diapers at night and finding them unchanged in the morning."³⁸ However, in her notes on that same meeting, the investigator wrote that "[s]taff has not routinely noted their findings of neglect in therapy notes. I urged them to do so. We discussed how the notes could be compiled in 'S Coms' and forwarded to me."³⁹

At the hearing, the OCS witness reported that OCS never received any written documentation from NNS, despite multiple requests.⁴⁰ NNS did not provide OCS with documentation of any other specific incident where a DSP arrived in the morning to find J in

³² Testimony of H.

³³ See Agency Record at 17 - 18 (protective services report).

³⁴ Agency Record at 11.

³⁵ Testimony of H.

³⁶ Agency Record at 1.

³⁷ Agency Record at 2.

³⁸ Agency Record at 4.

³⁹ *Id.*

⁴⁰ Testimony of H. For examples of requests, see Agency Record at 4, 7, and 8.

circumstances like those found on the morning of November 14, 2014. Finally, both N and M L testified that they were not aware of any other time when J had woken up in that condition. The allegation that the November 14, 2014 incident was not an isolated incident is not supported by a preponderance of the evidence.

The agency record and exhibits submitted by the Ls indicate that diapering issues are a significant concern for the Ls and those involved in J's care. The agency record includes an email dated November 18, 2014, from Mr. L reporting to OCS on the quarterly meeting he had had the previous day with J's school, nurse, and NNS, where the school reported that J "has been also soaking through her diaper at school -- not because of changing issues but because of the volume, placement of the diaper, etc."⁴¹ The Ls also submitted case notes from NNS documenting other daytime diaper-related incidents.⁴² Finally, Mr. L testified that the adequacy of diapers had been a "constant theme" at school, that everyone who worked with J was having difficulties with her diapers, and that they had started including a pad inside her diaper to try to address this. M L testified that bladder function is a health issue for J, and that diaper capacity will remain an issue as long as that is the case. All of this tends to show parental awareness and involvement with this aspect of J's care, not neglect.

The preponderance of the evidence shows that keeping a ten-year-old who relies on diapers clean is challenging for everyone involved. It shows that there was one isolated incident on November 14, 2014, when this effort failed. It does not show that there was a pattern of neglect on the part of N or M L.

v. J is not routinely left alone from the time her DSPs leave in the evening until the next morning. As part of the basis of the finding of neglect against N and M L, OCS asserted that J "is often left in her bed from supertime to early morning, without any interaction with others, despite the fact that she may be awake."⁴³ This finding is based on reports from NNS staff.⁴⁴ However, NNS DSPs are not in the home between 6:00 p.m. and 6:30 a.m. N L, M L, D L, and O C, who were present in the house during these hours over the course of the OCS investigation, all testified that J is with other family members in the evening.⁴⁵ She spends time in the living

⁴¹ Agency Record at 2.

⁴² Exhibit 2 at 3 and 8 (10/28/14 "Her diaper leaked so she needed a good shower."; 1/26/15 "J came home from school today cover [sic] in poop all over privates down to her thighs and soaking wet.")

⁴³ Agency Record at 11, 31.

⁴⁴ Agency Record at 1, 3.

⁴⁵ See also Agency Record at 1, 6.

room, and other family members spend time with her when she is in her room. N L testified that the family eats dinner together, and that J eats at the table with them. When D L was taking care of J during M L's absence and convalescence, J's DSPs would put her in bed before they left for the day, because D L is not able to transfer J on her own. D L would feed J dinner in her bed, and P and N Jr. would also come into J's room to visit with her.⁴⁶

The witness for OCS opined that most parents of toddlers check on the toddler in the middle of the night, and that the absence of a baby monitor in J's room was a concern because her parents might not hear her cry.⁴⁷ However, M L testified that they could hear J from their bedroom, which is next door to J's, even if J's door is closed. The door to N and M L's room is left open. M L testified that she usually checks on J at night, smelling the room to see if J has a soiled diaper that needs changing. However, if she does not smell a soiled diaper and J is asleep, she does not wake J to see whether the diaper is dry because J gets so little sleep.

A preponderance of the evidence shows that J routinely interacts with family members after her DSP leaves for the day, that J's mother regularly checks on her during the night, and that her parents are in the room next to J's and can respond to her needs that arise during the night.

vi. J's hearing aids are not missing. The third grounds cited by OCS for its findings of neglect was that J's hearing aids are often missing, interfering with her ability to gain communication skills. Again, this assertion is based on reports by NNS staff. The investigator assigned to the case did not visit J's school.⁴⁸ Two NNS case notes indicated that J was wearing her hearing aids at school shortly before and after the period covered by the OCS investigation.⁴⁹

There was testimony indicating that there had been some tension between the DSPs and the Ls related to the hearing aids.⁵⁰ N L testified that J had two pairs of hearing aids: one specially designed to integrate with the system at school; and the other an older pair used in the home and when J was with her DSPs. He said the old pair had been broken a number of times, and were destroyed in August or September of 2014. He testified that there had been a lot of turnover with DSPs and that he had concerns about untrained DSPs working with the hearing aids. He testified that broken hearing aids had to be sent to City Z for repair, a process that could

⁴⁶ Testimony of D L.

⁴⁷ Testimony of H.

⁴⁸ Testimony of H.

⁴⁹ L Exhibit 4 at 1 - 2.

⁵⁰ Testimony of H, N L. *See also* L Exhibit 4 at 3 - 5.

take weeks. He was concerned that if the hearing aids that she uses for school were broken by a DSP that J could be left entirely without hearing aids for a period of weeks.

The available evidence indicates that J uses her hearing aids at school. There have been issues between the Ls and the DSPs relating to care of the hearing aids, and it may be that the hearing aids were not always made available to the DSPs; however, the hearing aids are not missing. The evidence does not support a finding of neglect based on missing hearing aids.

vii. P does not change J's clothes or diapers. OCS's final concern supporting its finding of neglect was that P L, who is about the same age as J but smaller in stature, "sometimes dresses J and/or changes her diapers," posing a risk to J. OCS interviewed P, and P reported that she helps J get dressed, and "I change her diapers, I need a little help."⁵¹ NNS staff reported finding P "trying to change [J's] diapers."⁵² However, all of the adults in the L household testified that P did not change J's diapers. Both N and M L testified that P helps them change J's diapers by handing them baby wipes and diapers, but that she is not capable of lifting J and is not asked to change J's diapers on her own.

The evidence, including P's own report, indicates that P helps the grownups in her family care for J as she is able. However, it also indicates that P is not capable of changing J's clothes or diapers by herself. The allegation that P dresses and diapers J on her own is not supported by the evidence, and there is nothing to suggest that N and M L are putting J at risk of injury by allowing P to assist them with dressing J or changing her diapers.

IV. Conclusion

J is a particularly vulnerable child due to her developmental delays and medical issues. The OCS investigation into her circumstances was warranted, given the report OCS received. However, the evidence does not support a substantiated finding of neglect against either parent.

OCS cited four grounds for substantiating the finding that N and M L neglected their daughter J. Of the four, three were not supported by a preponderance of the evidence. OCS did prove that N L failed to provide a needed check and diaper change on the night of November 13, 2014. However, OCS did not prove that this resulted in actual harm to J's health or welfare, nor

⁵¹ Agency Record at 6.

⁵² Agency Record at 5.

did it prove that the failure that night was indicative of a larger pattern of neglect that threatened J's health or welfare.

The substantiated findings of neglect against N and M L are withdrawn.

DATED: November 27, 2015.

Signed

Kathryn L. Kurtz

Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, 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 8th day of January, 2016.

By: *Signed*

Name: Jared C. Kosin, J.D., M.B.A.

Title: Executive Director

Agency: Office of Rate Review, DHSS

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