

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

In the Matter of)
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OAH No. 16-0329-SAN
Agency No.

DECISION

I. Introduction

On September 14, 2015, the Office of Children Services (OCS) received a report alleging that E J touched L T, then 17 years old, in a sexually inappropriate manner.¹ OCS investigated and substantiated a finding of sexual abuse against Mr. J.² OCS also substantiated findings of the threat of sexual abuse by Mr. J with regard to the other minor children in the household. Mr. J appealed the substantiated findings.³

This decision solely addresses the factual issue of whether OCS proved it was more likely than not that Mr. J touched L in a sexually inappropriate manner. OCS did not meet this evidentiary burden. Accordingly, the substantiated finding of sexual abuse is reversed.

II. Facts

L T, age 42, is the mother of 16-year-old U, 18-year-old L, 12-year-old M, and 20-year-old N.⁴ K T is the children's biological father. The Ts are divorced. Both parents and the children live in No Name. At the time of the alleged incident, Ms. T was dating Mr. J, age 28. Mr. J was living in Ms. T's home. L lived with her father, but stayed overnight at her mother's home on September 11, 2015. Friends of the T children, S and H, regularly stay overnight at Ms. T's home.

On September 12, 2015, the T living room contained two couches, a dog bed, and a box which served as a coffee table.⁵ The entertainment center was located against a wall perpendicular to the couches.⁶ The dog bed was in the corner of the room, behind the entertainment center. L was asleep on the floor between the dog bed and a beige couch with her

¹ R. 7.
² R. 1-2.
³ The March 28, 2016 appeal is not included in the agency record, but was attached to the OAH referral.
⁴ For ease of reading, this decision refers to L T as Ms. T. Her children are referred to by their first names.
⁵ T testimony; J testimony; referencing EX. A-C, photos of T living room. The living room furniture arrangement has since changed.
⁶ EX. A-C; T testimony; J testimony.

head near the wall.⁷ Her body extended out from the wall to the living room floor, between the entertainment center and coffee table box.⁸

Ms. T left for work at approximately 6:00 a.m. on the morning of September 12, 2015. She observed L asleep on the floor and U sleeping on the couch. Mr. J was not in the home when she left for work. Mr. J returned to the home at approximately 6:30 a.m. U woke up and saw Mr. J, whom she believed was probably looking for a video, and fell back asleep.⁹ U next awoke to the sounds of L and Mr. J fighting.¹⁰

OCS received a report of harm, alleging that Mr. J touched L in a sexually inappropriate manner on the morning of September 12, 2015.¹¹ OCS interviewed the female T children, Mr. and Ms. T, and Ms. T's mother.¹² OCS never interviewed Mr. J. On January 15, 2016, OCS notified Mr. J that it had substantiated findings of sexual abuse or threat of sexual abuse against him for M, U, and L.¹³

Mr. J appealed and a hearing was held on September 29, 2016. Mr. J appeared in person, with his attorney Michael Nash, and Ms. T. Ms. T; B F, Ms. T's sister-in-law and the children's aunt; and Mr. J testified on Mr. J's behalf. Laura Bowen, Assistant Attorney General representing OCS, appeared telephonically. OCS called one witness, O O, S's father, as a rebuttal witness.

The following outlines the facts as reported by L and Mr. J.

1. *L's report*¹⁴

In a recorded interview with OCS, L reported that E J touched her buttocks while she was asleep on the living room floor the morning of September 12, 2015.¹⁵ According to L,

I felt someone touching me, like my butt, and so I was like kay [sic], it might have been the dog because the dog will wake me up a lot. And so

⁷ T testimony.

⁸ L interview conducted by Susan Losbey, September 17, 2015. The interviewer wrote her name down on a pad, but the name was not visible to the ALJ in the video recording. This decision assumes Ms. Losbey is the interviewer based on OCS worker Linda Wahl's notes, R. 17; Ms. T testimony.

⁹ U interview conducted by Susan Losbey, September 17, 2015. R. 18.

¹⁰ R. 18.

¹¹ R. 7.

¹² R. 9; R. 18. OCS also interviewed H N, a minor and friend of the family who stayed with the Ts, and her mother.

¹³ R. 1.

¹⁴ L's report is taken from her interview with OCS and OCS case notes. She did not testify at the hearing.

¹⁵ L interview.

like I woke up and like E is there and stuff and he like pulls away like really fast and stands up and tries to like play it off cool and stuff.¹⁶

At the time, L was wrapped tightly in a blanket, like a “mummy sleeping bag.” She reported that she felt E touching her buttocks over her blanket with his hand.¹⁷ L then called her father to pick her up. While waiting for her father to arrive, L and Mr. J had an argument. L told Mr. J to get out of the home and that no one wanted him there. Mr. J called L a whore and told her she was a bad influence on her sisters. Both hurled insults back and forth, waking up others in the household. L reported the incident to her father, grandmother, and aunts. Later that same day, L told her mother that Mr. J touched her.

In her OCS interview, L reported that, on another occasion, Mr. J had entered her bedroom and got into bed with her at 2:30 a.m. He reportedly lay on her bed and asked, “Do you know who this is?” L told him to get out of her room or she would call the police. L yelled for her mother, who met them in the hall. Ms. T explained to L that Mr. J was just confused and looking for her, not L. Per L, Mr. J was “crossfaded” or high on both marijuana and alcohol when he entered her bedroom. L reported that Mr. J was wearing shorts and a t-shirt during both incidents.

L also stated that S, her sister’s friend, reported to other friends that Mr. J touched her buttocks while she was sleeping over at Ms. T’s house. At the time, S was in 6th or 7th grade. L found out about the alleged incident with S on September 12, 2015, after reporting Mr. J’s actions to her mother.¹⁸

2. *Mr. J’s version*

Mr. J stayed the night at a friend’s house and arrived at the T home around 6:30 a.m. on September 12, 2015. He was hungover. Mr. J planned to finish watching a movie. Mr. J began watching the movie the day before, on September 11th, in the living room. He planned to get the movie from the living room and watch it in the bedroom.

According to Mr. J, he entered the living room, where he saw U asleep on the couch and someone wrapped up like a mummy in blankets lying on the floor. He was not aware it was L. The movie was no longer in the disc player and he began to look for the movie elsewhere in the entertainment center. Mr. J testified that he did not knowingly touch L.

¹⁶ L interview, September 17, 2015.

¹⁷ L interview.

¹⁸ L interview.

Mr. J turned around and noticed L, now leaning on the corner of the coffee table box with a phone in her hand. Mr. J asked L who she was calling. She responded by telling him that he just used her mother for her house. An argument ensued. During the argument, Mr. J admitted to calling L a “dick sucking whore,” among other things, and complained of how she treated her family members.

With regard to the prior incident in L’s bedroom, Mr. J admitted that he entered the house, went into a bedroom, and climbed into L’s bed, thinking it was Ms. T’s. Mr. J was in a drunken stupor and had never been in the home after dark.¹⁹ Mr. J denied touching S. Mr. J testified that neither the No Name Police nor OCS interviewed him regarding the alleged incidents with L or S.

3. *Other evidence*

S told several friends and family members, and eventually her father, Mr. O, that Mr. J “put his hands on her” while she was sleeping over at Ms. T’s. Mr. O testified that his daughter S does not lie. Mr. O reported the incident to the police. OCS worker Duncan Talome contacted Mr. O regarding the event. Mr. O confirmed S’s description of the incident to Mr. Talome. Mr. O never heard from OCS or the police about the matter after his initial report. Mr. O later saw Mr. J in a local bar. Mr. O confronted Mr. J, accusing him of inappropriately touching his daughter. Mr. J denied the accusation.

III. Discussion

Mr. J raised a number of challenges to OCS’s substantiation of sexual abuse. He challenged OCS’s definition of sexual abuse and its use of the internal OCS policy manual.²⁰ Mr. J also raised due process issues. At the end of the hearing, the parties requested to bi-furcate the post-hearing proceedings. The parties agreed that if OCS did not meet its factual burden, the underlying process issues are moot. The parties requested that an initial decision address only the factual dispute of whether OCS proved Mr. J touched L’s buttocks in an inappropriate matter.

OCS did not meet its burden. The record supports a finding that L believes Mr. J touched her buttocks the morning of September 12, 2015. She reported the touching incident to family and friends. L was genuinely and understandably upset.²¹ However, Mr. J’s theory of the case, as well as the OCS interview with L, offer a reasonable alternative to L’s version of events. L

¹⁹ Ms. T testified that Mr. J had not been inside the home after dark before the night he climbed into L’s bed.

²⁰ J’s Motion for Summary Adjudication; J’s Reply to Motion for Summary Adjudication.

²¹ F testimony.

told the OCS worker that she at first thought the dog was touching her.²² When she saw Mr. J, and saw him stand up rapidly, her belief changed.

There is no doubt that Mr. J was next to L in the early morning hours of September 12, 2015. According to L, he crouched down and touched her buttocks. According to Mr. J, he was in front of the entertainment center looking for a video; he did not knowingly touch L. Mr. J may have inadvertently touched L when he was looking for a video. Alternatively, the T family dog may have rubbed up against L, whether to wake her or to greet Mr. J. Although the evidence does not support a finding that any of these scenarios more likely than not occurred, each is plausible.

The evidence presented that S also reported that Mr. J “put his hands on her” is troubling.²³ But this does not necessarily make it more likely than not that Mr. J rubbed L’s buttocks. Instead, this evidence supports a finding that Mr. J touched S, not L, inappropriately. The substantiation of sexual assault is based on allegations that Mr. J touched L. Here, the propensity hearsay evidence, even combined with L’s report of the incident, is not persuasive, reliable, or substantial enough to establish that Mr. J touched L in a sexually inappropriate manner on September 12, 2015.

Furthermore, Mr. O testified that his daughter does not lie. The evidence does not support the same conclusion with regard to L. L has a deep dislike for Mr. J and a very contentious relationship with her mother. Her mother, father, and aunt all identified L as a difficult child, who perhaps has challenges with the truth.²⁴

In addition to L’s reported difficulties, the OCS record contains several errors. First, the notes from the interview with L do not mention that she first believed that the dog, not Mr. J, touched her backside. Second, the notes inaccurately reflect other information from the OCS interviews. OCS notes indicate that L, M, and U were “very clear” that they don’t like Mr. J and prefer not to speak to him or have anything to do with him.²⁵ In the recorded interview, however, only L states she does not like Mr. J. U and M reported that they get along with Mr. J. Likewise, the agency record inaccurately notes that “U also stated in this interview that she felt

²² L interview, September 17, 2015.

²³ This evidence was admitted over Mr. J’s objection under Evidence Rule 404(b). Alaska Evidence Rule 404(b)(2) creates an exception to the general prohibition against propensity evidence for crimes involving sexual abuse of a minor. Although this is an administrative, not criminal, proceeding the rule is instructive. Administrative proceedings do not apply the rules of evidence, although they may be used as a guide. 2 AAC 64.290(b).

²⁴ R. 19; T testimony; F testimony.

²⁵ See R. 10-11.

that Mr. J had come into the house and invaded the space.”²⁶ In the video, U reported that it was L who felt that Mr. J invaded the space. These discrepancies in the agency record do not make it more or less likely that Mr. J touched L in a sexually inappropriate matter, but it does raise questions regarding the accuracy of the investigative notes, which is the primary evidence relied upon by OCS.

The OCS notes also state that L told her mother, when asked if it was possible that Mr. J was doing something else (other than touching her buttocks), that she knew when she was being “felt up.”²⁷ Ms. T testified credibly that L never made this statement. Instead, Ms. T and Ms. F testified that L never told them where Mr. J touched her. In sum, the evidence that Mr. J inappropriately touched L is relatively slim and rebutted by plausible alternatives. L, now an adult, did not testify, nor did any OCS employees.

To be clear, this decision does not conclude that Mr. J did not inappropriately touch L. The only determination is that OCS did not meet its burden to establish that he did.

IV. Conclusion

OCS did not establish by a preponderance of the evidence that Mr. J touched L in a sexually inappropriate manner. The substantiated finding that Mr. J sexually assaulted L is therefore reversed. Additionally, the substantiated findings of threat of sexual assault against Mr. J related to M and U were based on Mr. J’s inappropriate contact with L. Accordingly, these substantiated findings are also reversed.

DATED this 9th day of November, 2016.

Signed _____
Bride Seifert
Administrative Law Judge

²⁶ See R. 10.

²⁷ R. 7.

Adoption

The undersigned, by delegation from of 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 16th day of December, 2016.

By: *Signed*

Name: Douglas Jones

Title: Medicaid Program Integrity Manager

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