

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

In the Matter of)	
)	
D L)	OAH No. 16-1052-SAN
<hr style="width:50%; margin-left:0"/>)	Agency No.

DECISION¹

I. Introduction

The Office of Children’s Services (OCS) received a report that D L had sexually abused his stepdaughter, K. OCS investigated and substantiated the allegation of sexual abuse. OCS also notified Mr. L that his name would be placed on the Child Protection Registry.² Mr. L requested a hearing to challenge the substantiated finding that he sexually abused K.³

The evidence presented by OCS did not demonstrate that it is more likely than not that Mr. L sexually abused K. As a result, the substantiated finding is reversed.

II. Facts

Mr. L is married to E X, K’s mother. K is Mr. L’s stepdaughter. Ms. X and Mr. L also have two younger biological daughters. The family lives in No Name City, Alaska.⁴ In June 2015, Mr. L assaulted Ms. X in front of the children, was convicted, and served jail time.⁵ Mr. L was due to be released in February 2016.⁶ After the assault, K went to live with her maternal grandmother, E “E” O. Ms. O lives with T M, a registered sex offender.⁷

On December 28, 2015, law enforcement received a report from a third party that twelve-year-old K disclosed that Mr. L had been touching her inappropriately since she was six years old.⁸ Law enforcement briefly interviewed K at her grandmother’s home.⁹ There, K reported that Mr. L began touching, and trying to touch her, inappropriately when she was six years old. She also reported that Mr. L tried to “pull her away” so she would not report the inappropriate

¹ This revised decision has been issued pursuant to 2 AAC 64.350(a), to correct manifest typographical errors on pages 6 and 7.

² Administrative Record, 1. Further citations to the record will be annotated as R (page number), e.g. – R15. OCS already placed Mr. L’s name on the Child Protection Registry because of a 2015 domestic violence incident.

³ Case referral.

⁴ J, K’s sister and Ms. X’s oldest daughter from a previous relationship, was not living with the family. She was in state custody.

⁵ R7; K’s CAC interview; <https://records.courts.alaska.gov/courtview>. OCS issued a substantiated finding of abuse against Mr. L for the assault.

⁶ K’s CAC interview.

⁷ <http://www.dps.alaska.gov/sexoffenderregistry>; Ms. X reported that Mr. M held her hostage and repeatedly raped her as a child. See R13. Ms. O also reported that Mr. M sexually abused her, but later recanted. See R9.

⁸ R5.

⁹ CD, audio recording of interview, potential sexual abuse of a minor, No Name City, Alaska, December 28, 2015. Included in the Administrative Record.

touching to her mother.¹⁰ K told the trooper that Mr. L may have also inappropriately touched her older sister, J.¹¹

An Alaska State Trooper interviewed K at a child advocacy center (CAC) in No Name City 2 on January 4, 2016.¹² While in No Name City 2, K also underwent a partial SART exam, but did not allow the nurse to examine her genital region.¹³

In her CAC interview, K stated that she did not want Mr. L to come back to No Name City after his release from jail. According to K, Mr. L does not have a job, lays around all day, sees women other than her mother, and causes trouble. K also told the state trooper that:

- Mr. L started trying to touch her when she turned six years old, and it has been going on ever since.
- Mr. L tries to touch her when no one else is around.
- Mr. L touched her “girl parts” both over and under her clothes. K pointed to nipples, hands, and buttocks on a drawing of a female figure when asked where Mr. L touched her. Later in the interview, K again pointed to these areas, as well as the vaginal area.¹⁴
- Mr. L would put his hand under her tank top, touch her, and try to kiss her chest. If K was wearing sweatpants, he would try to put his hand in her pants and try to touch her “girl parts.”
- Mr. L would usually “bother” her when she was trying to sleep, and sometimes during the day. K would push his hand away and tell him to go away when he tried to “bother” her.
- Mr. L “bothered” her and touched her with his hands and his “boy part.”
- K wanted to tell her mother, but her mother was always busy with the other children or sleeping. K also described Mr. L placing his hand over her mouth when she started to report his inappropriate touching to her mother.
- Once, when Mr. L was drunk, he demanded that she stay at home with him after the other family members left. He got very close to K and pulled her pants down.¹⁵

¹⁰ Audio recording, December 28, 2015.

¹¹ R5; Audio recording, December 28, 2015.

¹² The CAC interview is part of the Administrative Record. It was viewed by the administrative law judge. OCS provided Mr. L with a copy of the interview. Mr. L testified that his copy contained audio, but not video footage. The copy of the CAC interview provided to the OAH was very difficult to review. It could only be viewed in its entirety; it did not rewind or fast forward. The audio and video were out of sync and the video portion could only be viewed by slowing scrolling the viewing bar.

¹³ SART stands for “Sexual Abuse Response Team.” U T, OCS case worker, testimony; R15.

¹⁴ The trooper used the words “girl parts” and “boy parts” to refer to genitalia.

¹⁵ It is not clear whether this was a single incident or whether Mr. L demanded she stayed home once when he was drinking, and at another time when he was drinking he pulled her close and pulled down her pants.

- Mr. L touched her inappropriately more than once, with the last incident occurring “maybe last year.”
- K felt uncomfortable when Mr. L tried to touch her, and did not feel safe around him.
- Mr. L got very angry when he ran out of marijuana and someone owed him money. K went on to describe Mr. L beating Ms. X and not allowing her or the children to leave the home.

This was not the first time K reported that Mr. L inappropriately touched her. In 2010, K reported to the police that Mr. L spanked her on her naked buttocks, watched her bathe, and tried to touch her private parts when she was in the bath.¹⁶ During that OCS investigation, K recanted, and told the police that her grandfather, Y X, told her what to say to the police.¹⁷ OCS did not issue a substantiation based on the 2010 report.¹⁸

At the hearing in this case, OCS relied primarily on the Administrative Record and interview recordings.¹⁹ OCS presented a single witness, U T, the case worker originally assigned to investigate the protective services report.

Ms. T traveled to No Name City on January 14, 2016. Ms. T interviewed A, K’s seven-year-old sister.²⁰ A relayed the story of Mr. L abusing Ms. X in front of the children, and K calling the police.²¹ A reported that she also witnessed Mr. L hit two of her siblings - D, Jr., and K.²² A told Ms. T that K was afraid of Mr. L because he swears often. A also told Ms. T that she heard her mother say her sister was raped. Ms. T testified that she believed A was talking about K, but did not note that in the agency records. A described rape as “when Papa T gets on top of her, I think.”²³

Ms. T also interviewed Ms. X. K’s mother did not readily believe K’s report.²⁴ Ms. X reported to OCS that she did not know who to believe.²⁵ Mr. L’s aunt, N E, told OCS that she

¹⁶ R7.

¹⁷ R7.

¹⁸ R7.

¹⁹ After numerous delays, Mr. L’s telephonic hearing occurred on September 13, 2017, with a follow-up hearing on October 3, 2017. The October 3, 2017 hearing was scheduled for Mr. L to call a witness that was unavailable on September 13, 2017. Mr. L decided against calling that witness, and presented his closing argument instead.

²⁰ R12. Ms. T also interviewed eight-year-old D Jr., who did not report any concerns in the home.

²¹ R12.

²² R12.

²³ R12.

²⁴ R12 – 13; R15.

²⁵ R12 – 13.

could not imagine him doing such things.²⁶ Ms. T also interviewed K, but did not ask questions about Mr. L's inappropriate touching, and K did not offer any information on the subject.²⁷ K told OCS that things were going well because Mr. L was in jail.²⁸ Ms. T did not remember speaking with law enforcement about the investigation or allegations. Ms. T did not interview Mr. L. OCS also never interviewed Ms. O or Mr. M, even though K resided with them when she made the report. OCS did not interview J, K's older sister, identified as another possible victim.

Ms. T returned to No Name City on April 8, 2016, and interviewed four-year-old B X; eight-year-old D, Jr.; and Ms. X. OCS created a safety plan for K, whereby she would live with her godmother R R.²⁹ OCS did not interview Mr. L or re-interview K.³⁰ On April 16, 2016, OCS completed its initial assessment summary, and substantiated a finding of sexual abuse against Mr. L.³¹ OCS received Mr. L's appeal on August 17, 2016.³²

At his hearing, Mr. L testified under oath that he never touched K inappropriately. He also testified that the police did not meet with him or interview him about the alleged abuse until after he appealed the OCS substantiation. When asked to speculate why K would make false allegations, Mr. L speculated that she was angry with him.³³ Mr. L also testified that he preferred K not to stay with Ms. O and Mr. M, due to concerns that Mr. M has sexually assaulted other family members.

III. Discussion

A. Substantiation of Sexual Abuse

We now turn to the legal framework surrounding a finding of child maltreatment. The Alaska legislature has enacted several statutory schemes designed to protect children from abuse, maltreatment, and neglect.³⁴ These laws give OCS a range of possible responses and remedies, depending on the level and immediacy of harm faced by the children. If the level of abuse,

²⁶ R13.

²⁷ T testimony.

²⁸ T testimony.

²⁹ R14.

³⁰ L testimony; OCS case notes do not contain any evidence of contact with Mr. L.

³¹ R8; R11. OCS found a "substantial risk of sexual abuse" according to the Agency Record. In its prehearing brief, at p. 3, OCS wrote that Mr. L's conduct meets the definition of "other sexual assault" under the Maltreatment Assessment Protocol (MAP), which includes "groping, fondling, stroking, or similar behavior – directly or through clothing." The notice sent to Mr. L does not draw a distinction between sexual abuse and the risk of sexual abuse. *See* R1.

³² Case referral.

³³ L testimony.

³⁴ *See* AS 47.10.005 - AS 47.10.990 (Child in Need of Aid (CINA) statutes); AS 47.17.010 - AS 47.17.290 (child protection).

maltreatment, or neglect is cause for concern, but does not immediately threaten the health and safety of the child, OCS can investigate and make a finding that the report of abuse, maltreatment, or neglect has been substantiated.³⁵ Child abuse, maltreatment, and neglect, as defined by statute, specifically include sexual abuse as it is defined in the criminal statutes.³⁶

Substantiated abuse, maltreatment, and neglect is reported on a list, established by AS 47.17.040, known as the “central registry.” The central registry contains all investigative reports filed by the Department of Health and Social Services.³⁷ These reports are confidential, but can be used by governmental agencies with child-protection functions, inside and outside the state, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.³⁸

Prior decisions suggest that OCS may issue a substantiated finding of abuse, maltreatment, or neglect based upon probable cause.³⁹ Probable cause requires only a fair probability or substantial chance that the conduct occurred.⁴⁰ For sexual abuse cases, a substantiated finding by OCS will be affirmed following an administrative hearing if OCS proves, by a preponderance of the evidence, that the sexual abuse actually occurred.⁴¹ A preponderance of the evidence means that the conduct more likely than not occurred.⁴²

B. Evidence of Sexual Abuse

The question is whether the evidence supports a finding that Mr. L more likely than not sexually abused K. Here, OCS relies heavily on K’s CAC interview. The Alaska Supreme Court identified six factors to be considered when determining the reliability of a child’s out-of-court statement.

- (1) the spontaneity of the child's statements;
- (2) the age of the child;
- (3) the use of “childish” terminology;
- (4) the consistency of the statements;

³⁵ This is typically referred to as a “substantiated finding of abuse or neglect.”

³⁶ AS 47.17.290(9); AS 47.10.011(7); AS 47.10.990(31).

³⁷ AS 47.17.040(a). The registry is actually an OCS database known as ORCA.

³⁸ AS 47.17.040(b).

³⁹ *In re X.Y.*, OAH No. 10-0312-DHS (Comm’r of Health and Soc. Services, 2011) (available online at http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS100312.pdf?_ga=2.136013938.2105652554.1497906011-931794347.1416513843).

⁴⁰ *See Matter of A.J.*, 962 P.2d 173, 176 (Alaska 1998).

⁴¹ *See generally, In Re T.M.*, OAH No. 13-1200-SAN (July 7, 2014) (available online at http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN131200.pdf?_ga=2.258099657.2105652554.1497906011-931794347.1416513843).

⁴² *In re X & YZ*, OAH No. 09-0589-DHS (Comm’r of Health and Soc. Services 2010)(available online at: http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS090589.pdf?_ga=2.188689007.674054244.1512342183-1184569918.1499974989).

(5) the mental state of the declarant; and (6) the lack of motive to fabricate.⁴³

Prior OAH cases provide additional factors to consider when examining a child's report of sexual abuse. First, *In re XY* observed that, "[e]xpert opinion supports the common-sense view that a child's narrative that is coherent, spontaneous and appropriately detailed bears characteristics of credibility."⁴⁴ Next, *In re XY* looked for corroborating evidence for the accusation from the child's own statement or behavior, including "trauma, shame, fear" and "symptoms of sexual abuse."⁴⁵

We will first examine whether K's narrative was "coherent, spontaneous, and appropriately detailed." To begin, K painted a relatively coherent picture – that of a stepfather who inappropriately touched a child when unobserved by others. As to the spontaneity of statements, the trooper generally asked, "tell me more," and K would provide a bit more information. Furthermore, K responded in the positive to each question or suggestion by the interviewing trooper. Compare this to *In re B.N.*, a recent OAH case that upheld a substantiated finding of sexual abuse. There, the child "firmly denied invitations to describe conduct in ways that would be more damning to" the alleged perpetrator.⁴⁶

In terms of detail, K's CAC interview contained some specific information to support the accuracy of her report. K reported that Mr. L got drunk, made her stay home when the other family members left the home, pulled her close to him, and pulled down her pants. She also reported that Mr. L would put his under her tank top and try to kiss her chest.

When viewed as a whole, however, K did not provide much detail, despite multiple requests by the trooper to tell him more about specific occurrences of abuse. Unlike the children in *In re B.N.* and *In re H N*, who gave detailed accounts of abuse, K made general and vague statements about Mr. L "bothering" her and did not give specific answers regarding the number of instances or dates of abuse.⁴⁷ In contrast, K gave significant detail when describing Mr. L's

⁴³ *In re T.P.*, 838 P.2d 1236, 1241 (Alaska 1992); see also *In re A.S.W.*, 834 P.2d 801, 804 (Alaska 1992).

⁴⁴ *Id.* at 15 n.126.

⁴⁵ *Id.* The unpublished Alaska Supreme Court case *Jared S. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, No. S-11836, 2006 WL 1957903 (Alaska July 12, 2006) provides similar guidance. That decision cites with approval the superior court analysis that a child's testimony of sexual abuse was reliable. The superior court had noted that the child's testimony was consistent and that the mother, who was not in a custody battle, had no motive to coach the child. *Id.* at 4. The court also noted the presence of nightmares as a corroborating detail to conclude by clear and convincing evidence that inappropriate sexual contact occurred. *Id.*

⁴⁶ OAH No. 16-0272-SAN (Comm'r Health & Soc. Services, 2017).

⁴⁷ OAH No. 16-0272-SAN (Comm'r Health & Soc. Services, 2017); OAH No. 12-0715-SAN (Comm'r Health & Soc. Services, 2013).

assault of Ms. X. Witnessing a family member's assault and being touched in a sexual manner by your step-father are both traumatic experiences. K, however, was able to describe the single assault in much greater detail than six years of inappropriate touching. Likewise, K provided specifics when describing her negative opinion of Mr. L.

This brings us to the motive to fabricate. K made very clear that she did not want Mr. L back in the home or back in the community. K knew that Mr. L's release date was fast approaching when she reported the abuse. This could be motivation for K to fabricate a story of inappropriate touching. History also demonstrates that K will report false (or at least recanted) allegations of sexual abuse.⁴⁸ OCS cited the 2010 report of abuse, but did not address the fact that K later recanted.⁴⁹ During the 2016 investigation, no one asked K about her prior false statement. She was never challenged in any way as to the truthfulness of her statements. Overall, K's interview and the investigation do not provide indicia of reliability seen in other abuse and neglect cases.

For example, in *In re B.N.*, the child testified at a hearing and was subject to cross-examination.⁵⁰ The child's mother and aunt also believed her report.⁵¹ In another case affirming a substantiation of sexual abuse, *In re H N*, both the victim and interviewing detective testified, and the examiner reminded the child of the importance of telling the truth.⁵²

The current case lacks such corroborating evidence. K's mother did not believe her statement. There is no police report or nursing notes from the SART exam. Here, the trooper who interviewed K did not testify, making an inquiry into his training, experience, and perspective impossible. No family members, teachers, or counselors testified to their belief that Mr. L touched K inappropriately, or that K displayed signs of sexual abuse.

The only evidence of trauma, shame, or fear in the Agency Record occurs in two places - A's report that K is afraid of Mr. L because he used rough language, and K's response to the trooper that Mr. L's actions made her uncomfortable. These reports are understandable given Mr. L's history of domestic violence, regardless of whether he also sexually abused K.

As stated, K's desire to protect her mother, herself, and other family members by keeping Mr. L out of the home created a motive to fabricate. This, plus the relatively vague interview and

⁴⁸ R7.

⁴⁹ OCS prehearing brief, p.2 (July 13, 2017).

⁵⁰ OAH No. 16-0272-SAN (Comm'r Health & Soc. Services, 2017). There, the child testified at a court martial proceeding, which was included in the OAH Agency Record.

⁵¹ OAH No. 16-0272-SAN (Comm'r Health & Soc. Services, 2017).

⁵² OAH No. 12-0715-SAN (Comm'r Health & Soc. Services, 2013).

thin record do not establish that it is more likely than not that Mr. L abused K. This is not to say that Mr. L did not sexually abuse K. OCS simply did not establish the abuse by a preponderance of evidence.

IV. Conclusion

OCS's substantiated finding that Mr. L sexually abused K is reversed.

DATED: December 20, 2017.

By: Signed
Bride Seifert
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 25th day of January, 2018.

By: Signed
Erin Shine
Special Assistant to the Commissioner
Department of Health and Social Services

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