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

In the Matter of	)	
	)	
K L	)	**OAH No. 16-1145-SAN**
	)	Agency No.
In the Matter of	)	
	)	
B E	)	OAH No. 17-0088-SAN
	)	Agency No.

CORRECTED DECISION

I. Introduction

K L and B E each contest six substantiated findings of child neglect, one finding for each of the six children in their household. The Office of Children's Services (OCS) made the findings on August 18, 2016, following its investigation of a report of harm received on June 10, 2016.

This decision concludes that OCS properly substantiated neglect findings against Ms. L and Mr. E for knowingly and regularly leaving their four middle children, A, B Jr., C, and D, locked in a bedroom for extended periods of time without necessary and appropriate supervision and care, thereby harming or threatening their physical health and welfare. Those substantiation findings are affirmed.

OCS did not meet its burden to show that Ms. L or Mr. E neglected E, an infant, or then-16-year-old F. The substantiations as to those two children are therefore reversed.

II. Facts[1]

K L and B E are the parents of six living children: F, now 17, A, 10, B Jr., 8, C, 6, D, 3, and E, an infant.[2] The family lives in a trailer home in City A. Mr. E is a stay-at-home father who fixes up the family's homes, so they can be re-sold for a profit. Mr. E and F are the primary childcare providers for the younger children.[3] Ms. L works as a baker outside the home, typically on a night shift. She is the primary wage-earner in the family.[4]

The parents' eight-year-old son, B Jr., is autistic, largely nonverbal, and not yet toilet-trained. He often wears diapers, especially at night. His activity level has been described as

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1 Unless noted otherwise, the material facts are based on the testimonies of Trevor Walters, B E, and K L.

2 Agency record, p. 8. Mr. E is not F's biological father. However, he has been a father-figure to her for the 13 years he has been with Ms. L. In her testimony, F referred to him as her dad. He is therefore referenced here as her parent.

3 Agency record, pp. 10-11.

4 *Id.*

"hurricane-like."[5] He is often on the move, he is fast, and he is quick to rip, shred, and put things in his mouth. His parents indicate that he struggles with Pica, a disorder in which he seeks to eat non-edible materials. B Jr. also can be violent.[6] As a result of his behavioral issues, he must be supervised at all times.[7] Otherwise, he is at risk of running out of the house, of hurting himself or others with household items such as knives or cleaning chemicals, and of ingesting both edible and non-edible materials.[8]

Ten-year-old A has a seizure disorder, as well as learning impairments.[9] In April 2016, school testing concluded that she had the pragmatic judgment of a seven-year-old.[10]

Ms. L and Mr. E had another child, G, who was born in 2014, after D but before E. G died at two days old, likely from suffocation while she was breast-feeding with Ms. L on the floor.[11] Ms. L was found asleep on the floor, with G lying next to her. She did not remember how the baby came to be placed there. She believed that one of the other children must have put her there to feed.[12] She also felt that medication she was taking to control her high blood pressure may have poisoned G, since the baby would have been exposed to it through breast milk.[13]

Ms. L gave birth to E on June 10, 2016. OCS received a report of harm the same day. The reporter expressed concerns because Ms. L had not received any pre-natal care, and the reporter was aware that there had been conflicting stories about G's death in 2014. The reporter also indicated that Ms. L was making "quirky" statements that raised concerns, for instance, explaining that her blood pressure medication had caused her to wander the streets and punch someone, and that she had seen phantom babies.[14] At the time of the report, shortly after E's birth, Ms. L and Mr. E were preparing to leave the hospital against medical advice.[15]

An OCS caseworker met with Ms. L and Mr. E at the hospital. Both parents agreed to a protective action plan to ensure E's safety. Ms. L agreed to spend the night at the hospital, and then to stay in Anchorage with her friend E T, who would supervise the baby and ensure that the

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5 Agency record, p. 19.
6 *Id.*
7 *See* Agency record, p. 19.
8 F L testimony; E testimony.
9 *See* L Exhibit G.
10 L Exhibit H.
11 Agency record, p. 9.
12 Agency record, p. 16.
13 *Id.*
14 Agency record, pp. 9, 16.
15 *Id.*

baby did not co-sleep with Ms. L. Ms. L also planned to bottle-feed the baby an infant formula to avoid exposure to her blood pressure medication. Because of the protective action plan, Ms. L did not live in the family home between June 10 and June 15, 2016.

On June 15, 2016, Ms. L and Mr. E had a 12:30 p.m. meeting with OCS in City A.[16] The night before, F stayed up all night playing games on her cell phone.[17] F fell asleep at 6 a.m.[18] Mr. E was aware that F had been awake most of the night, because he saw her up at 4 a.m. when he got up to check on B Jr. Mr. E left the home in the morning, drove to Anchorage, picked up Ms. L and E, and drove them back to the meeting site in City A. Before he left, he woke F and asked her to babysit the other children. She agreed, but she then fell back asleep.

Later that morning, around 10 a.m., OCS Protective Services Specialist Trevor Walters arrived at the home for an unscheduled home visit as part of his investigation of the earlier report of harm.[19] He was accompanied by at least one other OCS employee. Mr. Walters knocked repeatedly on the door. He could see some of the younger children waving at him, yelling, and bouncing up and down in the back room, but no one answered the door. Mr. Walters became concerned, and he eventually contacted the Alaska State Troopers. A trooper joined him at the house approximately 30 minutes later.[20] After another 5 to 10 minutes of knocking, nearly an hour after Mr. Walters first arrived, A opened the door. She explained that she and her three younger brothers had been locked in the back bedroom. She eventually was able to unlock the door with a coin, which permitted her to enter the front room and open the front door.

Sometime after A opened the front door and let the visitors in, F heard unfamiliar voices in the house. She woke up and came out of her bedroom, still dressed in her sleeping attire. Her speech was slurred, and she seemed to be intoxicated.[21] Mr. Walters observed that she was in no shape to babysit her siblings, and that she had not been aware of their needs all morning.

Mr. Walters observed that B Jr. and the younger boys were still wearing dirty diapers. They had few clothes on, and there were very few clothes available in the house. The house was unkempt, and there were two piles of dog feces in the front living room.[22] The back bedroom,

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16 Exhibit A; E & Walters testimony.

17 She also stated that she had been up all night crying and worrying that OCS would take custody of E.

18 F L testimony.

19 Agency record, p. 17; Walters testimony.

20 Agency record, p. 17.

21 Agency record, p. 17; Walters testimony.

22 OCS did not rely on the home conditions or the lack of clothing to substantiate the findings in this case. Mr. E credibly explained the lack of clothing, testifying that he had taken the dirty laundry to Anchorage for cleaning. When he returned to the house on June 15th, he had clothing in his car, which he provided to the children.

where the four children had been locked, had nearly nothing in it. There was one flattened twin-size mattress on the floor, with one blanket but no other bedding. There were no toys or other objects in the room, except for a TV on the wall and a Play Station console. The floor was littered with pieces of carpet and carpet padding, which B Jr. had been shredding.[23]

A informed Mr. Walters that she and her younger siblings were often locked in that room, especially when her dad or F were in charge.[24] She said that her father or F normally were in charge, and they provided most of the childcare for the family. However, she stated that her dad and F were usually sleeping when they babysat. She also said she and her siblings had no access to food or water when locked in the back room, though she sometimes could unlock the door, so they could drink water from the bathtub, which they were not supposed to do.[25] A added that the household did not have any toys, except for a couple they had found under the house when they moved in.

C separately told Mr. Walters that his dad or F usually watched him and his siblings. He also said that both were usually asleep when they were in charge.[26] Like A, C said the children were often locked in the back bedroom, and they had to undo the lock to get water from the bathtub.[27]

Mr. E returned to the house after receiving a text from F about the visitors. He consented to field sobriety testing for F, which F failed. Mr. E later took F for a limited drug test. The test showed that she did not have any of twelve targeted drugs in her system, including methamphetamine or opioids.[28] However, the test did not check for alcohol or prescription medications.[29]

OCS substantiated six findings of child neglect for Ms. L and six for Mr. E, one finding for each of the children.[30] Ms. L and Mr. E appealed.[31] The formal hearing took place on

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[23] Ms. L submitted indoor and outdoor photos of the house, taken on June 15, 2016. They are in the record at Exhibit A - F.

[24] Agency record, pp. 19; Walters testimony.

[25] Agency record, pp. 17-19; Walters testimony. Mr. E explained that he had instructed the children not to drink from the tub, because he had not tested the water. However, he later determined that it posed no threats.

[26] Agency record, p. 18.

[27] *Id.*

[28] Walters testimony; Agency record, p. 10.

[29] Walters testimony.

[30] Agency record, pp. 1-2.

[31] Ms. L filed a timely appeal. During the hearing in her case, Mr. E indicated that he had not received OCS's letter substantiating the findings against him, but he also wanted to contest them. OCS agreed that Mr. E should be allowed to file a late appeal, and both parties asked to consolidate his appeal with Ms. L's. They agreed that the evidence in the existing record was adequate for each party to present its case. Each party had an opportunity to address all of the substantiated findings during the hearing.

February 2, 2017. Ms. L and Mr. E appeared in person, represented themselves and testified as witnesses. Two other witnesses testified on their behalf: F L and E T. Assistant Attorney General Laura Bowen represented the Office of Children's Services. Protective Services Specialist Trevor Walters testified for OCS.

III. Discussion

A. Overview of substantiation cases

This appeal arises from OCS's investigation and substantiation of alleged child abuse or neglect under the "Child Protection" provisions of AS 47.17. These provisions include references to related "Child in Need of Aid" (CINA) provisions in AS 47.10. However, Chapter 47.17 and Chapter 47.10 each have a different focus: AS 47.17 seeks to determine whether a person (typically an adult) has abused or neglected a child, while AS 47.10 seeks to determine whether a child is a "child in need of aid." These questions are often, but not always, two sides of the same coin. A child may be a "child in need of aid" because of past abuse or neglect to the child. In such cases, there is substantial overlap between a CINA determination and a related substantiation finding. However, CINA determinations are also forward-looking; they allow OCS to assess risks of future harm to a child, for instance, based on a parent's past treatment of other children.[32] Therefore, a child may be "in need of aid" because of the high risk of future maltreatment, even if he or she has not actually been abused or neglected.

To protect children who may be victims of abuse or neglect, the child protection chapter requires people who work in certain occupations to report suspected cases of child abuse or neglect.[33] OCS often receives reports of harm (sometimes also called "protective services reports") from these "mandatory reporters," though it also receives reports from other sources. These reports come from people who have reasonable cause to suspect that a child "has suffered harm"—notably, the phrasing is in the past tense—as a result of child abuse or neglect.[34] In this case, OCS began its investigation because it received a June 10, 2015 report of harm from someone who suspected that E had suffered harm as a result of child abuse or neglect.[35]

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[32] Child in Need of Aid provisions can be found at AS 47.10.011.
[33] AS 47.17.010, AS 47.17.020.
[34] AS 47.17.010, AS 47.17.020.
[35] *See* AS 47.17.010, AS 47.17.020(a). OCS is prohibited from disclosing the identity of confidential reporters.

When OCS receives a report of harm, it is required to investigate the allegations and document its findings in a central registry.[36] The investigation reports and reports of harm are confidential. However, they may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.[37] The documentation in the central registry includes OCS's determination whether the allegations of child abuse or neglect were "substantiated," "unsubstantiated," or "closed without a finding."[38]

When it enters a "substantiated" finding, OCS has determined that, more likely than not, the adult in question abused or neglected a specific child, who is also identified in the registry as the victim of the abuse or neglect.[39] When a substantiated finding of abuse or neglect is appealed, OCS has the burden of proving by a preponderance of the evidence that the finding should be upheld.

B. Legal standard for substantiation of neglect

In the Child Protection provisions of AS 47.17, the legislature included specific statutory definitions that govern the handling of reports of alleged child abuse or neglect. These include the definition of "child abuse or neglect," as that term is used throughout AS 47.17.[40] The statute then further defines terms such as "maltreatment," "neglect," "mental injury," and "sexual exploitation."[41]

The allegations in this case involve neglect.[42] For purposes of substantiating a report of harm to a child, "neglect" is defined as "the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child."[43] Under this definition, therefore, the first question in this case is whether Ms. L or Mr. E failed to provide necessary food, care, clothing, shelter, or medical attention for any of their six children. If they did, they neglected the child in question. This is not the end of the inquiry, however. To uphold a substantiated finding of neglect, it is also necessary to find that the child's health or welfare was harmed or threatened by the parent's conduct.[44]

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36 AS 47.17.040.
37 AS 47.17.040(b).
38 OCS Child Protective Services Manual, 2.2.10.1.
39 *See* Agency record, pp. 1-2.
40 AS 47.17.290(3).
41 *See* AS 47.17.290(9), (10), (11), (17).
42 Agency record, pp. 1-2.
43 AS 47.17.290(11).
44 *See* AS 47.17.290(3).

Despite the child protection chapter's standalone definition of "neglect," OCS typically reviews all of its substantiation decisions under the rubric of "child maltreatment," which OCS reads as broadly encompassing all forms of child abuse or neglect. Under the child protection statute, "maltreatment" is defined in relevant part to mean "an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid," as described in the CINA provisions of AS 47.10.011.[45]

By relying on "maltreatment" and its incorporation of CINA standards for every substantiation determination, however, OCS can stray from the basic thrust of AS 47.17. Alaska courts interpret statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[46] "The meaning of a statutory provision is determined by the language of the particular provision construed in light of the purpose of the whole instrument."[47] And, critically, in interpreting a statute, the Alaska Supreme Court presumes "that no words or provisions are superfluous and that the legislature intended 'every word, sentence, or provision of a statute to have some purpose, force, and effect.'"[48]

OCS's reliance on "maltreatment" to substantiate every case of child abuse or neglect sidesteps these principles – particularly, the presumption that no words or provisions are superfluous. Because the Child Protection chapter tells us repeatedly that protective services reports are reports of suspected "child abuse and neglect," its definition of that term must be the starting point for analyzing those reports. That definition states:

> "[C]hild 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[.][49]

OCS's approach to this statute is that "child abuse or neglect" means "maltreatment," which means anything covered by the CINA statute. However, this reading impermissibly renders superfluous significant portions of AS 47.17.290. It cannot be that "reports of suspected child abuse and neglect" simply means "reports of maltreatment," because that reading makes the other statutorily-designated ways in which a child might be abused or neglected unnecessary:

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45 AS 47.17.290(9).

46 *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999).

47 *Wien Air Alaska v. Arant*, 592 P.2d 352, 356 (Alaska 1979) overruled on other grounds by *Fairbanks N. Star Borough Sch. Dist. v. Crider*, 736 P.2d 770, 775 (Alaska 1987).

48 *Id.* at 16.

49 AS 47.17.290(3).

"physical injury," or "neglect, mental injury, sexual abuse, sexual exploitation," or "maltreatment."

As a practical matter, this approach also can create problems. For example, in this case, because OCS seeks to show that the children were neglected as a result of "maltreatment," OCS argues that it meets it burden by showing that there was reasonable cause to suspect that any of the children were "children in need of aid" under AS 47.10.011(9), the CINA provision for neglect. Under that statute, however, a child may be found to be a "child in need of aid" if "conduct by or conditions created by the parent . . . have subjected the child *or another child in the same household* to neglect."[50]

In the context of a CINA proceeding, this definition is perfectly sensible. That is, a child indeed may be "in need of aid" because he or she is at heightened risk of *future* harm, as evidenced by the parents' *past* conduct with *other* children. In such a case, OCS is appropriately involved on a proactive basis to protect the child. However, in the context of a substantiation case under AS 47.17, it is not possible to substantiate that the parent has, in fact, neglected Child A, based only on the risk of *future* harm to that child, or based only on the fact that the parent actually neglected a *different* child, Child B. Instead, the correct substantiation under AS 47.17, using the definitions provided in that chapter, would be to substantiate neglect of Child B.

In this way, the purpose of substantiation determinations is notably different from the purposes for CINA determinations. Alaska Statute 47.17 focuses on OCS's receipt and investigation of reports regarding suspected cases of child abuse or neglect. The central registry functions as a repository for these reports and investigations, including OCS's factual determination whether the allegations of abuse or neglect actually occurred, not whether they may occur in the future.

Therefore, to the extent OCS seeks to substantiate a finding of neglect, based on "maltreatment" and a showing that the child may be a "child in need of aid" due to neglect, OCS only may substantiate "maltreatment" if it shows that: (1) the parent actually neglected the child in question; and (2) the health or welfare of the child in question was harmed or threatened by the parent's conduct. This brings the analysis back to the discussion set forth initially – a showing of neglect that is based on and consistent with the requirements of AS 47.17.290(3) and AS 47.17.290(11). Accordingly, this decision considers whether Ms. L or Mr. E failed to provide

[50] AS 47.10.011(9) (emphasis added).

necessary food, care, clothing, shelter, or medical attention for any of the six children, under circumstances indicating that the children's health or welfare was harmed or threatened thereby.

C. Substantiation of neglect regarding A, B Jr., C, and D

First, specifically regarding the events of June 15, 2016, OCS properly substantiated findings of neglect for Mr. E, pertaining to A, B Jr., C and D. On that day, it is clear that F failed to provide appropriate care or supervision of the children, and Mr. E is the parent responsible for leaving them without appropriate care. While Mr. E was away, F was entirely unavailable to the children, who were awake but locked in a barren bedroom for several hours, poorly clothed, without food or water, while some of the boys had full-to-overflowing diapers. F could not be awakened, despite nearly an hour of knocking at the door and her siblings' yelling, and she likely would not have gotten up when she did if Mr. Walters and the trooper had not been in the home. Her unavailability created a number of risks of physical harm to the locked-in children, who had no recourse for aid or care. They also had no one to monitor or address B Jr.'s significant special needs and potentially dangerous behaviors.

When he left the house that morning, Mr. E stated that the four young children were all asleep, so he did not wake them.[51] He was aware that F had been awake most of the night. Although Mr. E woke F up before he left the home, he should not have been surprised that she fell heavily back to sleep, and she was unable to provide appropriate care of her siblings. The record does not indicate that F was never capable of babysitting her siblings; however, it does raise questions whether, at 16 years old, she was equipped to provide the constant oversight and care required by four young children, including a special-needs child like B Jr., for any extended period of time.

Ms. L was not responsible for the decision to leave the children in F's care on June 15th, and it appears that Ms. L typically did not lock the children in the room for extended periods of time when she supervised them. However, the evidence in the record indicates that the childcare situation on June 15th was representative of a broader pattern of conduct, for which Ms. L shares responsibility. This is because Ms. L was aware that F and Mr. E regularly locked the four children in the bedroom, sometimes for inappropriately long periods of time, without necessary supervision and care. Despite this, she did not take appropriate steps to stop the practice.

[51] However, he stated that he removed a second mattress that had been in their bedroom, placing it outside because A had had an accident on it that night. E testimony.

Accordingly, OCS also correctly substantiated neglect findings against Ms. L for A, B Jr., C and D.

During the hearing, both parents emphasized that the children were locked in the back bedroom for their own safety, not for punishment, because that was the only way to contain B Jr. and keep him away from more serious dangers while the caregiver was not physically with him. Though perhaps well-intentioned, this shows that the practice was part of a conscious and intentional plan, as was the decision to keep the room unfurnished and largely devoid of stimuli for the children.

Further, as part of this standard practice, it is likely that the children were locked in the room for hours at a time with some regularity, while their needs went unmet. Mr. E asserted that he never left the children in the locked bedroom for more than an hour at a time, except while they slept at night. He explained the events of June 15, 2016 as an anomaly, caused by the safety plan's disruptive effect on the household. He indicated that the children normally were not locked in the bedroom for so many daytime hours.

Given the totality of the evidence, this argument is not persuasive. First, there is no question that the children had been in the locked room for several hours before Mr. Walters entered the home on June 15, 2016. They likely would have been there substantially longer if he had not visited. Further, while the events of June 15th were unusual in that Ms. L was staying in Anchorage, the childcare situation was not unusual. The parents' normal practice was to leave the younger children in Mr. E's or F's care. In addition, A and C credibly reported that Mr. E and F usually were "asleep" when they babysat, or at least unavailable to supervise and care for them. Throughout those times, the children were locked alone in the bedroom. This went on for extended periods, such that A needed to learn how to free herself to get water from the bathtub, because no one was responding to the children's basic needs.

The evidence does not suggest that Ms. L and Mr. E willfully neglected the children. However, they both face their own personal challenges, their children have many needs, and the family had few or no supports in place prior to June 2016.[52] B Jr.'s needs and behavioral issues would challenge any parent or caregiver. Therefore, it is not surprising that Ms. L, Mr. E, and F would often be overwhelmed and unable to provide the supervision he requires, let alone meet his

[52] *See* Agency record, pp. 11, 20-21.

needs and those of the other young children.[53] It is also not surprising that Mr. E and F often had their own needs, projects, and priorities to attend to while they watched the children.

However, while the children were locked in the room, their caregivers often were not aware of or responsive to their needs, including their need for food, water, and adequate hygiene. Moreover, the regularity and extent of this practice denied all four children necessary supervision and care for children their age, thereby placing at risk their physical safety as well as their mental/emotional well-being and development. This supervision and care was particularly necessary given B Jr.'s needs and behavioral problems, which the other three young children clearly were not capable of managing.

Both parents pointed out A's age and learning impairments, arguing that she is an unreliable judge of time. In addition, they argued that the locks on the doors were not difficult for A or C to unlock; they were just difficult enough to keep B Jr. from opening them.

It is true that young children often are not reliable reporters of time. However, A was ten and capable of providing reasonably reliable information about the amount of time the children spent locked in the bedroom. Even if they could not pinpoint the number of hours spent in the room, A and C both credibly reported that they were regularly locked in, sometimes for uncomfortably long periods of time. Even a cognitive seven-year-old can reliably report that her caregivers often left her and her younger siblings in a locked room, that the caregivers were unavailable to meet the children's basic needs during those times, sometimes for extended periods, and the children had to free themselves to get water. This summary is completely consistent with the situation Mr. Walters observed on June 15, 2016.

Ms. L and Mr. E explained that they installed the locks on the bedroom and bathroom doors at the recommendation of prior OCS caseworkers, who were concerned that B Jr. might harm himself or others if he was not kept out of the bathroom and kitchen. The primary issue is not that the doors had locks, however. The issue is the frequency and length of time the children were left locked in the room, without an available and responsible caregiver to ensure appropriate care while they were there. At those times, despite good intentions to keep B Jr. safe, Ms. L and

[53] Perhaps because of B Jr.'s overwhelming needs, the record suggests that Ms. L largely delegated her childcare responsibilities to Mr. E and F. Nonetheless, following her night shift, she was home on many occasions when the children were in Mr. E's and F's care, and she likely was aware of the frequency and extent of the household practice of locking the children in the bedroom.

Mr. E denied all four children the care that was necessary for their physical and mental health and development.[54]

Lastly, although A (and perhaps C, though that is not clear) may have been capable of unlocking the bedroom door, this task apparently was not as simple as her parents believe. On June 15th, it took A nearly an hour to unlock the door, so she could let Mr. Walters in the house. A's other statements also suggest that she could not always perform this task.

Given the totality of the evidence, it is more likely than not true that Ms. L and Mr. E failed to provide A, B Jr., C and D with care that is necessary for their physical and mental well-being and development. Their conduct regularly placed the young children at risk of substantial physical and other harm.

D. OCS's substantiation of neglect as to F

F was 16 years old in June 2016. She was not locked in a room, or unable to access food or water. At age 16, there is no evidence that she required close monitoring or caregiving while her parents were away from the home. OCS did not establish by a preponderance of the evidence that F's parents routinely expected too much of her, or that she had become a "functional parent," thereby resulting in harm to her.

The primary concern with F appears to involve her sobriety on June 15, 2016. To explain her seeming lack of sobriety, F testified that, having been up all night, she was sleeping heavily when OCS visited, and she was groggy and confused after she woke up. She also was scared and angered by the presence of the trooper and OCS workers.[55] This could explain her behavior that day. Given the limits of the twelve-panel drug test she later took, it is also possible that F was under the influence of alcohol or prescription medications. However, the evidence in the record is not sufficient to call that possibility a likelihood. In addition, there is no evidence that Ms. L or Mr. E knew of, yet tolerated or condoned, any illegal substance use by F.

The evidence in the record does not support a finding that Ms. L or Mr. E deprived F of any necessities, or that they failed to provide her with care that is necessary for her physical and mental health and development. As a result, OCS did not meet its burden to show that Ms. L or Mr. E more likely than not neglected F.

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[54] *Cf. J.F.E. v. J.A.S.*, 930 P.2d 409, 412 (Alaska 1996) (neglect is shown by conduct that demonstrates a general tendency toward insensitivity to child safety issues).

[55] F L testimony.

E. OCS's substantiation of neglect as to E

Because of the protective action plan, E did not live at the family home between June 10 and June 15, 2016. He was not in F's care when Mr. Walters visited on June 15th, nor had he been at any prior time.

OCS asserts that E was at substantial risk of harm due to his parents' failure to seek prenatal medical care, their preparation to leave the hospital against medical advice after his birth, and their general failure to provide appropriate care or oversight of their other children, including their deceased child, G.

On June 10, 2016, OCS had many legitimate reasons to be concerned for E's welfare, and he may have been a "child in need of aid" for purposes of AS 47.10.011(9). As a result, OCS appropriately took proactive steps to assure E's safety. Following its investigation of the home on June 15th, OCS had additional causes for concern about E's welfare. Despite this, with the possible exception of the issue of prenatal care, there is no evidence in the record suggesting that Ms. L or Mr. E deprived E of any necessary food, care, clothing, shelter, or medical attention. Nothing suggests that either parent co-slept with E, fed him improperly, left him unsupervised or with an inappropriate caregiver, or failed to meet other needs. As a result, OCS did not meet its burden to show that either parent neglected E.

OCS argues that E nonetheless was at substantial risk of physical harm, given his parents' history with G and the level of care provided to the other children. As discussed previously, these facts indeed may qualify E as a "child in need of aid" under AS 47.10.011(9). However, in the context of documenting investigation reports and substantiating actual instances of child abuse or neglect, it cannot be possible to substantiate neglect of *E*, based exclusively on his parents' behavior with their *other* children. The parents' failure to provide necessary care of the other children justifies substantiation of neglect findings with respect to each of those children, but there is no showing that the parents "neglected" E as that term is defined in the child protection statute. Therefore, while the parents' history with other children may create a substantial risk of future harm to E, that does not justify the conclusion that Ms. L or Mr. E have already neglected him. To reiterate, this conclusion does not preclude a concurrent finding that E nonetheless may be a child in need of aid under AS 47.10.011(9), given the substantial risk of harm to him, based on his parents' conduct with their other children.

To the extent that OCS's neglect finding as to E is based on alleged medical neglect, OCS also did not meet its burden of proof to justify upholding such a substantiation. Ms. L's failure to

seek prenatal care could be the basis of a claim that she failed to provide E with necessary medical attention, thereby threatening or harming his health or welfare. However, OCS has not pointed to any legal precedent holding that a mother's failure to receive prenatal care is *per se* neglect.

Ms. L's failure to utilize available prenatal care shows poor parental judgment.[56] Despite this, it is not clear that this conduct denied E necessary medical care, even if its absence did place him at an increased risk of harm. Fortunately, E was born healthy, and there is no evidence that he required particular prenatal medical attention, or that he was harmed by its absence.[57] It is not clear that the legislature intended to identify the failure to obtain prenatal care as "neglect" or the "maltreatment" of a child, without a showing of a specific unmet medical need or adverse consequence. Accordingly, OCS did not meet its burden of proof as to its substantiation of neglect as to E.

IV. Conclusion

OCS established by a preponderance of the evidence that its substantiated neglect findings against Ms. L and Mr. E were justified with respect to A, B Jr., C, and D. Those findings are affirmed. OCS did not show that either parent more likely than not neglected F or E. Those findings are therefore reversed.

DATED: March 3, 2017.

By: *Signed*
Kathryn Swiderski
Administrative Law Judge

[56] Her efforts to leave the hospital shortly after E's birth also may show poor parental judgment. However, there is no showing that this deprived E of any necessary post-birth medical care.

[57] Notably, nothing about G's death suggests that E required specific prenatal or post-birth medical attention.

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 14th day of April, 2017.

By: *Signed*
Name: Douglas Jones
Title: Medicaid Program Integrity Manager

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