

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

In the Matter of )  
 )  
B L. B ) OAH No. 17-0758-SAN  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

The Office of Children’s Services (OCS) substantiated two findings of maltreatment against B B, based on an incident in a grocery store with her step-daughter that was partially captured on video. Ms. B appealed the substantiated findings, and a hearing was held on December 19, 2017. Based on the testimony and a careful review of the video recording and other evidence presented at the hearing, the substantiated findings against Ms. B are overturned.

**II. Facts**

Ms. B’s appeal concerns events that transpired on August 27, 2016 at a grocery store in City A, Alaska.<sup>1</sup> She and her step-daughter, U B, were shopping in the store when No Name Grocery employees observed what they perceived to be physical abuse of U by Ms. B. The employees saw Ms. B “pinching, pulling and kicking” U in the store.<sup>2</sup> In addition, one of the employees followed them out to the parking lot and observed Ms. B “climb[ing] atop U while simultaneously grabbing U’s jaw.”<sup>3</sup> The No Name Grocery employees called the police, who interviewed Ms. B and U at their home later that day, then reported the incident to OCS. No Name Grocery management provided a recording of part of the incident from a store surveillance video system to the City A police, who later conveyed it to OCS.

OCS opened an investigation which was conducted by Protective Services Specialist II N X. Ms. X reviewed the police reports generated on the day of the incident,<sup>4</sup> watched the No Name Grocery video, and interviewed U, Ms. B, U’s father S B, four of U’s step-siblings,<sup>5</sup> the No Name Grocery employee who originally reported the incident to the City A police, and one of U’s schoolteachers.<sup>6</sup> At the conclusion of the investigation, OCS substantiated two findings

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<sup>1</sup> See Administrative Record (AR) 000007-8.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The police reports are located in the record at AR 000018-25.

<sup>5</sup> Several of the step-siblings are adults who do not currently reside with U, Mr. B and Ms. B.

<sup>6</sup> X testimony.

of maltreatment against Ms. B: one finding of physical abuse of U, as defined by AS 47.10.011(6), and one finding of putting U at risk of mental injury, as defined by AS 47.10.011(8).<sup>7</sup>

Ms. B requested a hearing to appeal the two substantiated findings of maltreatment. The hearing was held on December 19, 2017. Ms. B attended the hearing and represented herself, with the assistance of Mr. B. She testified on her own behalf. U and her step-brother O also testified for Ms. B. OCS was represented at the hearing by Assistant Attorney General Aaron Jabaay. OCS Protective Services Specialist II N X testified for OCS.

### **III. Discussion**

#### *A. The relevant statutes and regulations*

The Alaska legislature has enacted several statutory schemes designed to protect children from abuse, maltreatment, and neglect.<sup>8</sup> 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, maltreatment, or neglect is cause for concern, but does not immediately threaten the health and safety of the child, OCS can investigate, make a finding that the report of abuse, maltreatment, or neglect has been substantiated,<sup>9</sup> and place the child's parent or caretaker on OCS's "central registry," which essentially amounts to a confidential "watch list."<sup>10</sup> Alternatively, if the level of abuse, maltreatment, or neglect is more serious, and the child is in need of immediate assistance, OCS can initiate Child in Need of Aid (CINA) proceedings in Superior Court.<sup>11</sup> OCS may also pursue each of these remedies simultaneously, as it did in the case of Ms. B.<sup>12</sup>

OCS may issue a substantiated finding of abuse or neglect based upon probable cause.<sup>13</sup> If a person appeals a substantiated finding, OCS has the burden of proving at an administrative

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<sup>7</sup> AR 000001. OCS also substantiated similar findings of maltreatment against Mr. B, but those findings were overturned prior to any evidentiary hearing being held.

<sup>8</sup> See AS 47.10.005 - AS 47.10.990 (CINA statutes); AS 47.17.010 - AS 47.17.290 (child protection statutes).

<sup>9</sup> This is typically referred to as a "substantiated finding of abuse or neglect."

<sup>10</sup> See AS 47.17.010 - AS 47.17.290; 7 AAC 54.010 - 7 AAC 54.900.

<sup>11</sup> See AS 47.10.005 - AS 47.10.142.

<sup>12</sup> OCS initiated a CINA proceeding regarding U in City A Superior Court, took temporary custody of U for a short period, then dismissed the CINA proceeding in early November 2016. X testimony.

<sup>13</sup> *In re X.Y.*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services, 2011).

hearing, by a preponderance of the evidence, that the alleged acts of abuse or neglect actually occurred.<sup>14</sup>

There are several statutes that are applicable to OCS's substantiated findings in this case. They include AS 47.17.290(3), where "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 the child's health or welfare is harmed or threatened thereby."<sup>15</sup> The statutory definition of "maltreatment" guides us to Alaska's CINA statutes: "Maltreatment means 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 AS 47.10.011."<sup>16</sup> AS 47.10.011, contained within the CINA statutes, defines a "child in need of aid" as a child who has "suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by ... the child's parent ... or custodian..."<sup>17</sup> The CINA statutes then provide that "physical harm to a child or substantial risk of physical harm to a child" may be found if:

- (1) the child was the victim of an act described in [statutes covering violent crimes from murder to domestic violence and reckless endangerment] ... and the physical harm occurred as a result of conduct by ... a parent ... or custodian; or
- (2) a negligent act ... by a parent ... or custodian creates a substantial risk of injury to the child.<sup>18]</sup>

In addition, AS 47.10.011 further defines a "child in need of aid" as a child who has been subjected to "conduct by or conditions created by the parent, guardian, or custodian [that] have ... placed the child at substantial risk of mental injury as a result of ... exposure to conduct by a household member ... against another household member [that constitutes any of a list of enumerated criminal offenses]."<sup>19</sup> The enumerated offenses include the crime of assault in the 4<sup>th</sup> degree, i.e. words or conduct placing the child in fear of imminent physical injury.<sup>20</sup>

Thus, the question to be decided here is whether OCS established, by a preponderance of the evidence, that during the August 27, 2016 No Name Grocery incident Ms. B committed

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<sup>14</sup> *In Re K.C.G.*, OAH No. 13-1066-SAN (Commissioner of Health & Social Services, 2013).

<sup>15</sup> AS 47.17.290(2).

<sup>16</sup> AS 47.17.290(9).

<sup>17</sup> AS 47.10.011(6).

<sup>18</sup> AS 47.10.015.

<sup>19</sup> AS 47.10.011(8)(B)(ii).

<sup>20</sup> AS 47.10.011(8)(B)(ii).

physical abuse of U, or placed U at substantial risk of mental injury, as defined in the above-quoted statutes.

*B. OCS did not meet its burden of proving that Ms. B engaged in physical abuse*

OCS presented evidence that indicated that Ms. B's actions towards U in the No Name Grocery store were the equivalent of a physical assault. Ms. X testified that the No Name Grocery employee told her she saw Ms. B kicking and punching U, and she followed them outside and saw Ms. B "get on top of" U in the car and grab her jaw. Ms. X also testified that Ms. B admitted to her that she struck U with her hand at the No Name Grocery, and that U admitted to her that her step-mother hurt her in the No Name Grocery store. In reaching the conclusion that Ms. B committed acts of physical abuse, Ms. X also relied heavily on the No Name Grocery video, testifying that when she watched the video she saw Ms. B pull U, shove her, and kick her, and "that's physical abuse."<sup>21</sup>

On the other hand, Ms. B presented credible evidence that contradicted OCS's view of the incident as physical abuse. U testified credibly that she was not hurt by her step-mother at the No Name Grocery, that she did not feel threatened by her on that day, and that she was not afraid of her. U also testified that she did not actually say to Ms. X some of the statements she attributed to her, including that her step-mother had pinched her, struck her with her hand, or kicked her with her legs.<sup>22</sup> Ms. B testified that she never "climbed on top of U" in the car, and that Ms. X attributed admissions to her that she did not make, such as admitting to striking U with her hand in the store.

This case presents a classic "he said / she said" scenario, where most of the key elements of the evidence relied upon by OCS to prove its case have been contradicted by the testimony of U and Ms. B. The No Name Grocery video, however, speaks for itself, and I have taken the opportunity to view it many times.<sup>23</sup> Ms. B's actions depicted on the video appear to amount to terrible, controlling, even mean parenting practices. It is understandable that No Name Grocery employees felt compelled to report what they saw to the police.

But Ms. B's actions on the video do not constitute physical abuse. U credibly testified that she was not hurt or fearful during the incident, and her behavior on the video appears to

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<sup>21</sup> X testimony.

<sup>22</sup> Although U was clearly put in a difficult position by being asked to testify in this proceeding, her testimony did not appear to the administrative law judge to have been coached or manipulated by her parents.

<sup>23</sup> There is no audio recording accompanying the video.

corroborate her testimony; she doesn't cower in fear or shy away from her step-mother, and she looks like a typical, perky 13-year old girl shopping. Ms. B's actions towards U at the No Name Grocery did not injure U, did not place her at "substantial risk of injury," nor did they place her "in fear of imminent physical injury." Therefore, they do not meet the definition of physical abuse under the child protection statutes cited above.

The No Name Grocery video shows an example of reprehensible parenting practices, and Ms. B would do well to acknowledge that fact and to treat the outcome of the No Name Grocery incident and her dealings with OCS as a learning experience. Bad parenting, however, in and of itself is not against the law. OCS did not meet its burden of establishing that Ms. B committed physical abuse of U during the August 27, 2016 incident at the No Name Grocery store.

*C. OCS did not meet its burden of proving that U was put at risk of mental injury*

In order to establish that Ms. B put U at risk of mental injury, OCS needed to establish that she exposed U to an act of assault or domestic violence. OCS typically enters substantiated findings of "risk of mental injury" against a parent where they have engaged in domestic violence against another person, such as the child's other parent or a sibling, in the presence of the child. In this case, Ms. X struggled during her testimony to explain the basis for the substantiated "risk of mental injury" finding against Ms. B, testifying that the risk of mental injury was demonstrated by U allegedly saying that she blamed herself for the No Name Grocery incident and felt "she couldn't do anything right;" these factors, however, do not rise to the level necessary to meet the statutory definition of a risk of mental injury finding.

At the close of the testimony, OCS's counsel confirmed that OCS essentially based the risk of mental injury finding on the physical abuse finding discussed above. However, counsel also argued that, theoretically, "conduct or conditions" could pose a risk of mental injury without independently constituting physical abuse. The problem with that approach is that AS 47.10.011(8)(B)(ii) requires that the conduct in question fall within one of the enumerated criminal offenses.<sup>24</sup> Therefore, OCS had to establish that Ms. B committed physical abuse against U in order to establish that she placed U at risk of mental injury.

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<sup>24</sup> OCS did not assert that its risk of mental injury finding against Ms. B was based on AS 47.10.011(8)(B)(i) ("a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting behavior") or AS 47.10.011(8)(B)(iii) ("repeated exposure to conduct by a household member ... against another household member" that constitutes reckless endangerment or stalking). In any event, the facts here would not support such a finding.

I have already found that OCS did not meet its burden of proving that physical abuse or any other behavior falling within AS 47.10.011(8)(B)(ii) occurred during the No Name Grocery incident. Therefore, OCS has not established the underlying action that is necessary to a risk of mental injury finding.

#### **IV. Conclusion**

OCS did not meet its burden of establishing by a preponderance of the evidence that Ms. B committed physical abuse of U or placed U at risk of mental injury. Therefore, OCS's substantiated findings of maltreatment against Ms. B are overturned.

Dated this 18<sup>th</sup> day of January, 2018.

*Signed* \_\_\_\_\_

Andrew M. Lebo  
Administrative Law Judge

#### **Adoption**

The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order 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 15<sup>th</sup> day of February, 2018.

By: *Signed* \_\_\_\_\_

Name: Erin E. Shine

Title/Agency: Special Assistant, DHSS

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