

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

In the Matter of )  
 )  
M D ) OAH No. 19-0829-SAN  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

The Office of Children’s Services (OCS) received a report that M D was allowing N T, a convicted sex offender, to live with her and her children, placing them at substantial risk of sexual abuse. In response, OCS investigated and substantiated the allegation only in regard to Ms. D’s then 11-year-old son L. OCS also notified Ms. D that the finding would be listed in conjunction with her name on the Child Protection Registry (Registry).<sup>1</sup> Ms. D requested a hearing to challenge OCS’s finding. Because OCS did not prove that the finding was justified as a matter of fact and law, the substantiated finding is overturned, and the entry regarding Ms. D on the Registry will be adjusted accordingly.

**II. Facts**

*A. Background*

M D and K O are the biological parents of four children: P, L, Q and R, ages 14, 13, 8, and 6, respectively.<sup>2</sup> Mr. O lives in State A.<sup>3</sup> At the time of the events giving rise to this hearing, Ms. D resided with the children in City A, Alaska.

Ms. D has been romantically involved with N T since 2017, and he has at various times shared the same address as Ms. D and the children.<sup>4</sup> Mr. T is a convicted sex offender, and is required to register as a sex offender due to a 2013 conviction for Attempted Sexual Assault in the Second Degree.

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<sup>1</sup> Administrative Record, 1. Further citations to the record will be annotated as R. (page number), e.g. – R. 15. 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. 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. AS 47.17.040.

<sup>2</sup> R. 6-7.

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

<sup>4</sup> R. 7, testimony of PO J, PSS Andrews.

Even though his probation conditions prohibited him from having contact with minors under the age of 16, he and Ms. D, the mother of four adolescents, maintained a romantic relationship.<sup>5</sup> During the course of the litigation of his criminal case, Ms. D appeared at Mr. T's court hearings on his behalf, posted his bail on several occasions, and expressed that Mr. T had been unjustly convicted.<sup>6</sup> At one point, Mr. T filed a motion with the Superior Court asking that his probation conditions be modified to allow him to have contact with Ms. D's children, a request which Ms. D fully supported.<sup>7</sup>

Ms. D testified that on July 20, 2018, she went to the office of Mr. T's Probation Officer, PO J, for what she understood would be a meeting regarding the department of adult probation allowing Mr. T to live with her and the children. PO J clarified that the purpose of the meeting was to review with Ms. D Mr. T's probation conditions, including the restrictions involving minors, and his obligation to complete a drug treatment program. PO J advised Ms. D that helping a person evade the police could lead to charges of hindering prosecution.<sup>8</sup> He also provided Ms. D a copy of a notice regarding the child protection laws of Alaska, including AS 11.51.100 which states in relevant part:<sup>9</sup>

AS 11.51.100. Endangering the Welfare of a Child in the First Degree:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

...

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person

(A) is registered or required to register as a sex offender under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) has been charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

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<sup>5</sup> R. 9, 30. Testimony of Sgt. E, PO J. Although the victim in the case was a 16-year-old girl, evidence suggested that on a prior occasion Mr. T engaged in sexual contact with a 14-year-old girl. While that case was not charged, additional probation conditions were added to his plea agreement in 3AN-00-00000CR that prohibited, among other things, unauthorized contact with minors.

<sup>6</sup> Testimony of PO J., Ms. D. *See also* Courtview.

<sup>7</sup> Testimony of Ms. D. This is seemingly corroborated by the docket listing Motion #1, Defense Motion to Modify Probation Conditions which was subsequently deemed moot.

<sup>8</sup> Testimony of PO J, R. 16. He also testified that as recently as March 27, 2020, he saw Ms. D in public and reminded her to contact the police if she heard from Mr. T, or risk being charged with hindering prosecution.<sup>8</sup>

<sup>9</sup> R. 33-34.

(C) has been charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.

Ms. D signed the notice, acknowledging having been advised of the child endangerment statute.<sup>10</sup>

*B. April 2019 Protective Services Report and investigation*

In April of 2019 OCS received a report that Ms. D was using methamphetamine, inappropriately physically disciplining her children, and allowing Mr. T to live in her home with the children. At the time, Mr. T was in abscond status, and had a warrant out for his arrest for failing to register as a sex offender as required by his 2013 conviction.<sup>11</sup>

The report regarding drug use, inappropriate discipline, and Mr. T living in Ms. D's home was "screened in" for further review and was assigned to Protective Services Specialist (PSS) Luke Andrews for investigation.

On April 2019, PSS Andrews met individually with Q (Q) and R at School A.<sup>12</sup> When asked about their home lives, Q talked about playing video games and eating at McDonald's with his family, while R talked about working on an art project at daycare. Neither made any reference to physical discipline or drug use. Both children said they did not know anyone named N.<sup>13</sup>

PSS Andrews then drove to School B to speak with the older two children. He attempted to speak with P. Moments after they initially met, however, P left to go to the bathroom. PSS Andrews then received a text from Ms. D objecting to the interview taking place at her daughter's school. P never returned to meet with PSS Andrews. PSS Andrews was told that L was home sick that day, so he left for Ms. D's home to ensure that L was not alone with Mr. T. He also notified the City A Police Department (PD) that Mr. T may be hiding in the house.

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<sup>10</sup> R. 34.

<sup>11</sup> R. 9, *see also* online court records on Courtview for Anchorage Superior Court case number 3AN-00-00000CR. Mr. T was convicted under Attempted Sexual Assault in the Second Degree, AS 11.41.420(a)(3)(B); engaging in sexual penetration with an individual the offender knows is incapacitated.

<sup>12</sup> R. 10,

<sup>13</sup> PSS Andrews and PSS Mar testified that during prior contacts with the family the children had such a close relationship with Mr. T that they called him "Dad," and that he had photos of them on his cell phone. In her closing argument submitted on May 15, 2020 Ms. D acknowledged that the children consider Mr. T to be their father.

PD responded, sending several squad cars to Ms. D's residence.<sup>14</sup> Officers spoke with a neighbor who stated that Mr. T had been at a bonfire in the back yard of the home at 2:30 that morning.<sup>15</sup> Officers knocked on both the front and back doors and heard the sounds of a television and movement inside, but no one responded.<sup>16</sup>

Ms. D pulled up to the house, at which point L came out of the house and got into her car.<sup>17</sup> Ms. D immediately began backing the car up, but Officer U stopped her in the driveway to explain why PD was there.

Ms. D told officers that Mr. T was not in the home, then that she wasn't sure that he was inside, and she did not give PD permission to search the home without a warrant.<sup>18</sup> She said that she had returned to pick up L to take him to an appointment, and had not seen Mr. T in two months.<sup>19</sup> She initially said she hadn't spoken with him since October, but then admitted having spoken to him recently, encouraging him to turn himself in.<sup>20</sup> L told Officer E that he had been in the house alone, watching TV, and that he hadn't seen Mr. T in two months either.<sup>21</sup>

The officers applied for and were granted a telephonic search warrant for the residence.<sup>22</sup> The officers showed Ms. D the warrant and asked for a key to the home so they didn't have to damage property to gain entry.<sup>23</sup> Ms. D initially refused, maintaining that Mr. T wasn't inside. However, after several minutes she broke down, admitting that he was inside alone, without any weapons or a phone, to her knowledge.<sup>24</sup> She provided the officers with a garage door opener.<sup>25</sup>

The officers entered the house through the garage; Mr. T came out of a back bedroom with his hands raised and was arrested without incident. Sgt. E testified that the house was a ranch style, single family home of 2000 square feet or less, including the garage. The TV was on in the living room, which he estimated was 50-60 feet from the bedroom where Mr. T was found.

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<sup>14</sup> Ex. 10.

<sup>15</sup> Testimony of Officer U, R. 19.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> R. 19, 21. Testimony of Sgt. E.

<sup>20</sup> Testimony of Sgt. E.

<sup>21</sup> R. 21.

<sup>22</sup> R. 19. 1JU-00-00000.

<sup>23</sup> Testimony of Officer U, R. 19,

<sup>24</sup> Testimony of Officer U, R. 19. This was also recorded on the video footage taken by PD during the incident, Ex. 10.

<sup>25</sup> *Id.*

After Mr. T was arrested he was taken to a Correctional Facility and interviewed by Officer U.<sup>26</sup> Mr. T said he had flown into City A the day before on a flight around 5 or 6 p.m., but he couldn't remember the name of the airline.<sup>27</sup> He spent the night with a friend, then came over to Ms. D's house around 10 a.m.<sup>28</sup> He reported that L let him into the home and the two hugged each other.<sup>29</sup> He said that Ms. D had no idea that he was back in town.<sup>30</sup> He told PSS Andrews that he decided to come by Ms. D's home that day to surprise her on her lunch break and to see the children before turning himself in.<sup>31</sup>

PSS Andrews also spoke with Ms. D following Mr. T's arrest. Ms. D denied any drug use besides marijuana and provided a clean drug test.<sup>32</sup> She told PSS Andrews that she did not know that Mr. T was in her home on April 2019, and that he must have entered the home with a key to the home she gave him when they were in a dating relationship.<sup>33</sup> She maintained that Mr. T had no contact with L and that her son did not even know Mr. T was in the home.<sup>34</sup>

After receiving the report of child maltreatment that formed the basis of this matter, the interviews conducted by PSS Andrews with the children triggered no additional concerns about drug use or inappropriate discipline. However, after the children denied knowing anyone named "N," Ms. D first denied then admitted that Mr. T was in her home, the police arrested Mr. T in the home, and Mr. T's himself acknowledged interacting with L in the house, OCS substantiated a single allegation against Ms. D.

On July 23, 2019, OCS mailed a notice to Ms. D advising her of its substantiation decision. It was titled, "Notice of Alleged Child Maltreatment Decision and Cases Statuses and Placement on the Child Protection Registry" and stated "[L] was a victim of child maltreatment under Alaska Statute 47.17.290(9) and described in AS 47.10.011. You were named as an alleged perpetrator of the maltreatment listed below." What followed was a chart listing L as the

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<sup>26</sup> R. 19.

<sup>27</sup> *Id.* Officer U testified that Mr. T never appeared in video footage of secured departure lounge of the City A Airport on the evening of April 10, 2019. R. 22.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* Alternatively, Mr. T told PSS Andrews that he let himself in with a key to the home and found L there once he had arrived. R. 10.

<sup>30</sup> *Id.* Mr. T told PSS Andrews that he arrived two days earlier, then called Ms. D about coming over to use the Wi-Fi, but she said no.

<sup>31</sup> R. 30.

<sup>32</sup> R. 23.

<sup>33</sup> R. 10.

<sup>34</sup> *Id.*

alleged victim and M D as the alleged perpetrator of a substantiated finding of sexual abuse. The allegation was based on AS 47.17.290(9) as described in the following statute:

AS 47.10.011 subsection (7) the child has suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to adequately supervise the child; if a parent, guardian, or custodian has actual notice that a person has been convicted of a sex offense against a minor within the past 15 years, is registered or required to register as a sex offender under AS 12.63, or is under investigation for a sex offense against a minor, and the parent, guardian, or custodian subsequently allows a child to be left with that person, this conduct constitutes prima facie evidence that the child is at substantial risk of being sexually abused[.]

### **III. Procedural History**

A formal telephonic hearing was held on May 7, 2020. Ms. D participated and represented herself. Jenna Test participated and represented OCS. Protective Service Specialists Luke Andrews and Lori Mar testified on behalf of OCS, as did Police Officer U, Sergeant E, and Adult Probation Officer J. The hearing was audio recorded. At the close of the hearing all submissions were admitted into the record.<sup>35</sup> The record was left open until May 15, 2020 solely to allow Ms. D to submit a written closing argument, but no further evidence.

### **IV. Discussion**

#### *A. Relevant Statutes and Regulations*

The Alaska Legislature has enacted Child in Need of Aid (CINA) and child protection statutes, both intended to protect children from abuse, injury, maltreatment, and neglect.<sup>36</sup> These laws give OCS a range of possible recourses and remedies when responding to situations jeopardizing the safety and wellbeing of children. OCS may issue a substantiated finding of abuse, maltreatment, or neglect based upon probable cause.<sup>37</sup> Probable cause requires only a fair probability or substantial chance that the conduct occurred.<sup>38</sup> For sexual abuse cases OCS must

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<sup>35</sup> The Police Department videos (Exhibit 10) submitted by OCS to OAH on January 16, 2020 were admitted only in relevant portion as designated in the OCS memo dated January 22, 2020 and approved by an Order dated February 5, 2020, issued by the undersigned after an in camera review. Further citations to the exhibits will be annotated as Ex. (page number), e.g. Ex. 15.

<sup>36</sup> 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).

<sup>37</sup> *In re X.Y.*, OAH No. 10-0312-DHS (Comm'r of Health and Soc. Ser., 2011) (available online at [http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS100312.pdf?\\_ga=2.136013938.2105652554.1497906011-931794347.1416513843](http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS100312.pdf?_ga=2.136013938.2105652554.1497906011-931794347.1416513843)).

<sup>38</sup> See *Matter of A.J.*, 962 P.2d 173, 176 (Alaska 1998).

prove, by a preponderance of the evidence, that the child was placed at risk of sexual abuse.<sup>39</sup> A preponderance of the evidence means that the conduct more likely than not occurred.<sup>40</sup>

The child protection statutes, AS 47.17.010 - AS 47.17.290, direct OCS to investigate reports of harm, and determine if there is evidence of “child abuse or neglect” under the law. For the purposes of the Child Protection chapter, AS 47.17.290(3) defines “child abuse or neglect” 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[.]

In the matter at hand, the police arrested Mr. T, a convicted sex offender, hiding in the residence of Ms. D while her then eleven-year-old son was home alone. OCS determined that she had placed her son at substantial risk of being sexually abused, opting to characterizing this act as “maltreatment,” which is broadly defined in the child protection statute as any “act or omission in which there is reasonable cause to suspect that a child may be a child in need of aid” under AS 47.10.<sup>41</sup> OCS further defined the specific alleged “maltreatment” substantiated against Ms. D as “sexual abuse,” despite the lack of any evidence or even suggestion that L had been actually sexually abused, nor any suggestions whatsoever that Ms. D had committed any acts of sexual abuse.

As a threshold matter, OCS’s determination of sexual abuse is problematic. “Sexual abuse” under the child protection statute has been previously defined as “the commonly accepted use of that term” when assessing whether the alleged conduct falls within the definition of sexual abuse for the purposes of a substantiated finding of child abuse or neglect.<sup>42</sup> Here, the conduct allegedly committed by Ms. D does not fall within the commonly accepted definition of sexual abuse. Rather, if anything, what OCS is alleging is “neglect” – defined in the child protection statute 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” – in that Ms. D allegedly negligently left

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<sup>39</sup> See generally, *In Re T.M.*, OAH No. 13-1200-SAN (Comm’r of Health and Soc. Ser., 2014) (available online at [http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN131200.pdf?\\_ga=2.258099657.2105652554.1497906011-931794347.1416513843](http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN131200.pdf?_ga=2.258099657.2105652554.1497906011-931794347.1416513843) ).

<sup>40</sup> *In re X & YZ*, OAH No. 09-0589-DHS (Comm’r of Health and Soc. Serv. 2010)(available online at: [http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS090589.pdf?\\_ga=2.188689007.674054244.1512342183-1184569918.1499974989](http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS090589.pdf?_ga=2.188689007.674054244.1512342183-1184569918.1499974989)).

<sup>41</sup> AS 47.17.290(8).

<sup>42</sup> *Matter of C.D.B.*, OAH No. 16-1332-SAN, at p. 9 (Comm’r of Health and Social Services, June 2017).

her son in the care of a sex offender. A substantiated finding on that ground would allow a clearer analytical path for determining whether OCS had met its burden under the child protection statute.

By instead choosing to base the substantiation finding under the catch-all “maltreatment” allegation, OCS specifically relies on a subsection that references “a child in need of aid.”<sup>43</sup> This triggers the application and a requisite interpretation of the CINA statutes. This is concerning, as child protection statutes require an investigation of an act that has already reportedly occurred, while the CINA statutes largely focus on future needs and risks involving a child or children and the family. The CINA statutes are applied very differently than child protection statutes, as they govern matters filed before the Superior Court and often implicate an ultimate determination of whether a child should be removed from a home, and parental rights terminated. In contrast, the sole jurisdiction before the commissioner of health and social services in a substantiation appeal is to determine if an individual should be listed in the agency’s central registry as having a substantiated allegation of mistreatment of a child under the child protection statutes.

PSS Andrews initially responded to Ms. D’s home to investigate whether abuse or drug use was occurring, or if the children were being left with a sex offender. After interviewing all the parties, none of the children was determined to be a child in need of aid. Similarly, OCS did not take the stance that it was concerned about anyone having ongoing contact with Mr. T or suggest that the children be removed from Ms. D’s home due to exposure to drugs or violence. Rather, the only substantiated allegation was that Ms. D had placed L at substantial risk of sexual abuse by allowing him to have contact with Mr. T the morning of April 2019. The substantiation, therefore, was based on a specific incident, not contemplated future concerns, which implicates the child protection statutes, not those related to CINA matters.

In short, OCS’s exclusive use of “maltreatment” as an analytical approach to child protection findings is not well taken. In this and in other cases, it is often an approach that fits poorly with the facts and law at issue. Moreover, and regardless of its election of legal authorities, OCS failed to meet its burden of establishing that its substantiated finding is factually justified.

*B. OCS did not meet its burden of proving that the July 11, 2019 substantiated finding against Ms. D should be upheld.*

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<sup>43</sup> AS 47.17.290(10).



Even if OCS's allegation against Ms. D based on maltreatment by way of a CINA statute is found to be merely inappropriate, but not fatal, OCS must still establish under AS 47.10.011(7) that Ms. D left L with Mr. T, knowing that he was a convicted sex offender. But OCS did not meet this burden.

The record shows that Ms. D was very cognizant that Mr. T was a convicted sex offender, as she was intimately aware of the details of Mr. T's prior sexual assault conviction, as well as his probation conditions. But the record is not nearly as clear that she "left" L in Mr. T's care.

The only evidence that OCS produced that Mr. T was present in the home the morning of April 2019 before Ms. D went to work was the report of an anonymous neighbor that Mr. T had been spotted at a bonfire in the backyard of the house around 2:30 a.m. that morning.<sup>44</sup> But no further details were presented at the hearing, including the location of the neighbor's home in relation to Ms. D's, if the neighbor had a clear line of vision to the bonfire area, how Mr. T was recognized, or if Mr. T was also seen heading back into the home to presumably spend the rest of the morning. In a substantiation hearing the rules of evidence apply as a guide. The neighbor's comment, as reported to the officer, represents unreliable double hearsay and is not sufficient to show that its more likely true than not true that Mr. T was in the backyard that morning. Indeed, had OCS concluded that Mr. T was present in the home earlier than shortly before the arrival of the police on April 2019, allegations would have been substantiated based on *all* the children in the home having been placed at risk of possible sexual abuse, not just L. Therefore, given that Mr. T did not spend the night at the house, but showed up in the morning sometime after Ms. D was already gone, it would not be accurate to say she "left" her son with a sex offender. Rather, Mr. T showed up of his own accord when she was no longer at home.

Additionally, even if OCS had proven that Ms. D left L with Mr. T, the statute provides that such conduct would constitute only prima facie evidence that L was at substantial risk of being sexually abused.<sup>45</sup> But as opposed to conclusive evidence, prima facie evidence may be overcome by rebuttal evidence presented by the other side.<sup>46</sup> Ms. D was adamant even prior to the initiation of this matter that Mr. T was not a risk to her children, that they considered him a

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<sup>44</sup> Ex. 10, R. 19.

<sup>45</sup> AS 47.10.011(7).

<sup>46</sup> Black's Law Dictionary, 1228, (8<sup>th</sup> ed. 2004).

father figure, that he should be allowed to move back into the family household.<sup>47</sup> OCS offered no evidence in response that Mr. Ts – whose prior conviction referenced two young women, ages 14 and 16 – posed a specific threat to L, an 11-year-old boy. The burden of proving by a preponderance of the evidence that L was placed at substantial risk of sexual abuse is borne by OCS. This burden was not met.

**V. Conclusion**

Regardless whether OCS based the substantiated allegation against Ms. D on the child protection or the CINA statutes, it did not prove that the finding should be upheld. No convincing evidence was presented that Ms. D left her son L in the care of N T, a convicted sex offender, or that L was ever placed at substantial risk of being sexually abused. Therefore, the substantiated finding is overturned.

Dated: June 10, 2020

*Signed*  
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Danika B. Swanson  
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 27th day of July, 2020.

By: *Signed*  
\_\_\_\_\_  
Name: Jillian Gellings  
Title: Project Analyst  
Agency: Office of the Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

<sup>47</sup> R. 1-31, testimony of Ms. D.