

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

In the Matter of)
)
K C-S) OAH No. 19-0875-SAN
_____)

DECISION

I. Introduction

K C-S contests two substantiated findings of child neglect entered against him by the Office of Children’s Services (OCS) on August 5, 2019, following investigation of a report of harm received April 27, 2019.¹ OCS substantiated findings of neglect based on its conclusion Mr. C-S failed to provide care and control necessary for his four-year-old daughter’s mental health and development due to delusions caused by his own mental health deficiencies or drug abuse.

Because OCS has not shown that it is more likely than not true that Mr. C-S neglected his daughter as defined by law, the substantiation finding is overturned.

II. Facts²

K C-S is the father of a daughter, N, born 00/00/2015. He, the child, and the child’s mother were living as a family in City A during the spring of 2019. Mr. C-S was working for a construction company building hotels. As part of that work, he was required to wear a hard hat. One day he forgot his personal hard hat, so the construction foreman fetched one that had been left on the job for him to temporarily use. The hat was dirty, which did not surprise Mr. C-S as it had apparently been left at the outdoor construction site for some time. He wore it that day.³

He also used the temporary hat the next day. Before doing so he gave it a more thorough cleaning. At that time, he noticed some “webs” strung between the interior supports. He removed those and wore the hard hat. Throughout the day, he noticed what he felt as “bugs” in his hair. Believing some type of small spider or pest must be in the hat, he tossed it to the side and ceased wearing it.⁴

¹ Agency Record (AR) at 0001-02.

² The following facts were established by a preponderance of evidence at the hearing.

³ Testimony of K C-S.

⁴ *Id.*

After wearing the hat, Mr. C-S became convinced he had been infected by parasites. He felt bugs crawling on his skin; noticed red marks on his scalp, forearms, and hands; and saw flies and other insects in his apartment he had never seen before. He and his significant other undertook a thorough cleaning of the apartment. They used bug “bombs,” mothballs, and other cleansers.⁵

Ultimately on April 26, 2019, Mr. C-S shaved his head to combat the infestation. He also gave his daughter a “buzz” cut. He testified he cut his daughter’s hair short out of concern for the possibility bugs had been transmitted to her hair and scalp and because she was so entertained by his own hair change. He testified she looked “cute” and did not mind the procedure.⁶ There was no evidence the child was physically hurt when her hair was cut.

Later the same day, April 26, 2019, Mr. C-S went to No Name Medical Center seeking treatment for the perceived bug infestation. He had already shaved his head and cut his daughter’s hair. Mr. C-S was prescribed permethrin after a medical examination.⁷ Permethrin is a medication and insecticide. As a medication, it is used to treat scabies (mites that attach themselves to the skin), lice, and other parasites. It is applied to the skin as a cream or lotion. As an insecticide, it can be sprayed on clothing or mosquito nets to kill the insects that touch them.⁸

During his hospital intake, Mr. C-S also told medical personnel he had used methamphetamine. Because of that admission and some emotional behavior by Mr. C-S, he was evaluated for psychiatric reasons as well as his medical complaint. The evaluation concluded he was not danger to himself or others, nor was he gravely disabled and in need of hospitalization. He was released without a mental health or substance abuse referral.⁹ No diagnosis of a mental health condition was made at that time.¹⁰ Nor was any evidence presented that Mr. C-S otherwise has a diagnosed mental health condition.

A member of the hospital staff made a report of harm to OCS.¹¹ The caller described Mr. C-S’s interactions with his daughter at the hospital as “appropriate and not indicative of abuse.” However, the caller expressed concerned that Mr. C-S’s perception of parasite infestation could

⁵ *Id.*

⁶ *Id.*

⁷ Faxed Exhibit received from K C-S on November 21, 2019, page 1. (Hereinafter “FAX”)

⁸ <https://en.wikipedia.org/wiki/Permethrin>.

⁹ FAX at 20.

¹⁰ *Id.*

¹¹ AR 00006.

be a delusion caused by illegal drug use. Thus, Mr. C-S's conduct could "escalate with continued drug uses and this could put the daughter at risk of harm."¹²

On April 29, 2019, OCS transferred the report of harm for follow-up.¹³ The intake worker was familiar with the family for other reasons and concluded a home visit should occur.¹⁴

Two OCS workers, Collette Meraz and Virginia Ramsey, conducted the home visit. Ms. Meraz has an extensive background dealing with families with substance abuse issues. Ms. Ramsey has known N and her mother most of N's life.

The home was clean and tidy. It was stocked with appropriate food and toys for the child.¹⁵ N, the child, was dressed appropriately. She was friendly and affectionate with Ms. Ramsey. No indications of physical abuse or maltreatment were detected.¹⁶ There is no evidence that the child suffers from any mental or emotional disturbance.

The home did smell strongly of moth balls and other pesticides. Mr. C-S described the infestation and his attempts to eradicate it to the social workers. It was clear to the OCS responders that his belief in the "bugs" was sincere. They declined an offer to inspect his body for evidence of bites or insects under his skin.¹⁷

Mr. C-S did not exhibit any of the classic signs of methamphetamine use.¹⁸ Neither parent appeared under the influence of alcohol or controlled substances. No drugs or paraphernalia were found in the house. However, the social workers remained concerned that the bug infestation was a drug-induced hallucination or formication, and they concluded removal of the child from the home should occur to avoid risk of future harm should the situation escalate.¹⁹ Thus, the OCS workers told N's mother that she could choose to leave with N for the child's protection or they would take N into emergency custody. This "request" by OCS was

¹² *Id.*

¹³ AR 00008.

¹⁴ Testimony of

¹⁵ Testimony of C. Meraz and V. Ramsey.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* Ms. Meraz has decades years' experience working with families with drug abuse problems in Alaska and Alabama. While in Alabama she consulted with the local police vice unit. She is very familiar with the stages of methamphetamine use and abuse. She is familiar with the classic signs of methamphetamine usage, but testified that over the past few years, possible as the result of a change in buffering agents or concentration, many of the symptoms that used to be consistent "tells" are no longer displayed even when abuse is verified.

¹⁹ *Id.*

related to past indications of domestic violence in the home and a concern Mr. C-S could commit another act of domestic violence, especially if he was abusing controlled substances.²⁰

On August 5, 2019, OCS notified Mr. C-S that it had substantiated the report of abuse or neglect received on April 27, 2019.²¹ The notice informed him that the substantiation finding rested on the conclusion his daughter was a victim of “maltreatment under Alaska Statute (AS) 47.17.290(9) and described in AS 47.10.11.” The notice specified AS 47.10.011(9) and AS 47.10.011(10) as the statutes he violated.²² AS 47.10.011(9) prohibits “neglect” of a child. AS 47.10.011(10) addresses the circumstances under which the custodian’s ability to parent has been “substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in substantial risk of harm to the child.”

Mr. C-S appealed that finding on August 25, 2019.²³

OCS also took non-emergency, protective action regarding the family by filing a Child in Need of Aid (CINA) case.²⁴ Mr. C-S submitted to regular drug testing during the pendency of that protective action. Positive results for controlled substances or alcohol did not occur.²⁵

OCS did not have N evaluated for any delay or disturbance in her mental health development.

The hearing took place February 11, 2020. Mr. C-S appeared at the hearing and testified on his own behalf as outlined above. In addition, prior to the hearing Mr. C-S submitted a portion of his medical records from April 26, 2019 demonstrating the permethrin prescription.²⁶ The medical records also included notes from the hospital social worker describing N as behaving appropriately during the hospital visit while “both mother and father appeared to be caring and concerned for daughter, daughter appeared to be of normal height and weight, was appropriately dressed, showed no signs of bruising or maltreatment, she appeared to be happy and engaging with both parents.”²⁷

²⁰

Id.

²¹ AR 00001-02.

²² *Id.*

²³ AR 00022.

²⁴ Testimony of C. Meraz and V. Ramsey; OCS Response to Preliminary Conclusions dated February 21, 2020, Ex. 1. (Hereinafter “OCS Response”).

²⁵ Testimony of C. Meraz and K C-S.

²⁶ FAX at 17.

²⁷ FAX at 24.

Agency Representative Jennamarie Test appeared on behalf of OCS. She called two witnesses: Ms. Meraz and Ms. Ramsey. They testified as outlined above and submitted their conclusion that Mr. C-S's act of shaving his daughter's head and taking her to medical appointments to treat a non-existent bug infestation should qualify as neglect because there was "a reasonable potential that Mr. C-S's actions would affect his daughter's health and development." This behavior would have been "worrisome" and "scary" to a four-year old and more likely than not would "blur reality" for her.²⁸

Exhibits from both parties were admitted at the hearing, and the record was held open for filing supplemental materials. OCS submitted a supplemental written argument accompanied by a copy of the Temporary Order issued in the related CINA case against Mr. C-S.²⁹

III. Discussion

A. The Relevant Statutes and Regulations

The Alaska legislature has enacted a comprehensive statutory scheme designed to protect children from mistreatment and neglect. The Child in Need of Aid (CINA) statutes and Child Protection statutes are included in this scheme. These laws give OCS a range of possible responses and remedies, depending on the type and immediacy of harm faced by the children. OCS may pursue each of these remedies simultaneously, as it has done in this case; however only OCS's conclusions under the Child Protection statute are at issue in this administrative hearing.

²⁸ Testimony of C. Meraz; OCS Response at 1-2.

²⁹ The Temporary Order was not submitted prior to the hearing and Mr. C-S had no opportunity to respond to it. To the extent OCS included the Temporary Order as a suggestion the doctrine of collateral estoppel be applied to give the CINA finding binding effect in this proceeding, it is rejected. That doctrine binds the parties to factual findings, as well as legal conclusions, that have been the subject of prior litigation. *Wilson v. Municipality of City A*, 977 P.2d 713, 726 (Alaska 1999). The doctrine "aim[s] to prevent parties from again and again attempting to reopen a matter that has been resolved." *Id.*; see also *State, Child Support Enforcement Div. v. Bromley*, 987 P.2d 183, 192 (Alaska 1999). The principle of collateral estoppel applies in administrative proceedings as well as in court proceedings. See *United States v. Utah Construction and Mining Company*, 384 US 394, 422 (1966).

In *State of Alaska v United Cook Inlet Drift Association*, 895 P. 2d 947, 950-951 (Alaska 1995) the Alaska Supreme Court held there are three requirements for application of collateral estoppel: (1) The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action; (2) The issue to be precluded from relitigation must be identical to that decided in the first action; and (3) The issue in the first action must have been resolved by a final judgment on the merits. The elements are not met in this case. The doctrine is being "asserted against a party ... to the first action," i.e., Mr. C-S. However, there is no proof the issues in this case are "identical" to the issues decided in the first action because page 2 of the Temporary Order does not identify the basis of its finding and the original petition alleged alternative CINA theories, including ones not submitted in this proceeding. FAX at 10. Finally, a Temporary Order by definition is not the equivalent of a "final judgment."

1. The Child in Need of Aid (CINA) statute (AS 47.10)

One portion of the statutory scheme is designed to “promote the child’s welfare and the parent’s participation in the upbringing of the child to the fullest extent consistent with the child’s best interests.”³⁰ Thus, OCS is authorized to take action to protect a child whenever a parent’s conduct triggers a finding that the child is a Child in Need of Aid (CINA) as defined in AS 47.10.005 - AS 47.10.990. The CINA statutes list twelve discreet actions that trigger OCS action.³¹

Neglect, defined for CINA purposes as when "the parent, guardian, or custodian fails to provide the child with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child's physical and mental health and development, though financially able to do so or offered financial or other reasonable means to do so,"³² is a qualifying trigger.³³ Conduct or conditions created by the parent that result in “mental injury” to the child or place the child at substantial risk of mental injury due to exposure to domestic violence or a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting behavior is also a trigger.³⁴ “Mental injury” means “a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness.”³⁵ In the context of CINA proceedings, the Alaska Supreme Court has repeatedly held OCS to a rigid standard of proof to establish mental injury or harm.³⁶

³⁰ AS 47.10.005(1); see also AS 47.05.060 providing: The purpose of this title as it relates to children is to secure for each child the care and guidance, preferably in the child’s own home that will serve, the moral, emotional, mental, and physical welfare of the child and the best interests of the community; to preserve and strengthen the child’s family ties unless efforts to preserve and strength the ties are likely to result in physical or emotional damage to the child, removing the child from the custody of the parents only as a last resort when the child’s welfare or the safety or the protections of the public cannot be adequately safeguarded without removal; and when the child is removed from the family, to secure for the child adequate custody and care and adequate planning for permanent placement of the child.

³¹ AS 47.10.011(a)(1) -(12).

³² AS 47.10.014.

³³ AS 47.10.011(9).

³⁴ AS 47.10.011(8).

³⁵ AS 47.17.290(9).

³⁶ *E.g., Theresa L. v. State, Dept. of Health and Social Serv.*, 353 P.3d 831, 839 (Alaska 2015) (“As we said in *Josephine B. v. State, Department of Health & Social Services, Office of Children's Services*, the text of the statute limits CINA jurisdiction to cases in which parental conduct causes “substantial mental injuries.” The legislature's choice of words demonstrates this limitation. “Serious” means “[g]rave in quality, character, or manner: SOBER” or “[i]nvolving important rather than trivial matters: WEIGHTY.” “Observable” is defined as “deserving of observation: NOTEWORTHY” or “capable of being observed: DISCERNABLE, DETECTABLE, NOTICEABLE.” An “impairment” is “the act of impairing or the state of being

The CINA statutes specifically provide for protective action based on the likelihood of future harm as well as completed acts of harm.³⁷ OCS may take emergency or non-emergency action depending on the immediacy of harm.³⁸

CINA proceedings take place in superior court and are designed to facilitate family reunification through the provision of state services addressing the causes underlying parental failure.³⁹ The touchstone of CINA proceedings is the “best interest of the child.”⁴⁰ OCS is authorized to seek permanent removal of the child from the home only as a “last resort.”⁴¹ CINA proceedings are “not concerned with imposing either criminal penalties or civil liability on the abuser,” but rather with determining “whether the child’s well-being is imperiled.”⁴²

2. The Child Protection statute (AS 47.17)

In contrast, AS 47.17.010 - AS 47.17.290, the Child Protection statutes, look more narrowly at whether a particular event occurred, and, if so, whether it constitutes child maltreatment under the law. Substantiated findings are placed on an internal DHSS registry which can have meaningful implications on one’s life and livelihood.⁴³

The Child Protection statutes require OCS to investigate reports of suspected harm to children and determine whether conduct by the suspect is “substantiated.”⁴⁴ To enter a “substantiated” finding, OCS must determine, more likely than not, that the adult in question has abused or neglected a specific child. These terms are defined as follows for purposes of the Child Protection statute:

- Abuse or neglect is defined in AS 47.17.290(3) as “the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under

impaired: INJURY ... DETERIORATION.” “Substantial” has a number of meanings, including “[o]f, relating to, or having substance: MATERIAL” and “[b]eing of considerable importance, value, degree, amount, or extent.” “Developmentally” in this context is related to “develop” and its meaning “[t]o progress from earlier to later stages of individual maturation.” The plain meaning of the statutory language thus indicates that for a mental injury to confer CINA jurisdiction, it must be significant and must noticeably impact the child's functioning.” (Emphasis in the original) (internal citations omitted).

³⁷ *Theresa L., supra; See also, In re K.L.*, OAH 16-1145-SAN (Commissioner of Dep.t of Health and Soc. Servs. 2016). Decision at 8. Available on-line at <https://aws.state.ak.us/OAH> as are all cited OAH cases.

³⁸ AS 47.10.142.

³⁹ *A.A. v. State, Dep’t of Family and Youth Servs.*, 982 P2d 256, 259-60 (Alaska 1999).

⁴⁰ *Id.*

⁴¹ AS 47.05.060.

⁴² AS 47.17.010.

⁴³ AS 47.17.040.

⁴⁴ AS 47.17.025; AS 47.17.030.

the age of 18 by a person under circumstances that indicate the child's health or welfare is harmed or threatened thereby.”

- Maltreatment is defined in AS 47.17.290(9) and permits OCS to substantiate a report of harm under any circumstances which would trigger a CINA finding under AS 47.10.011.
- Neglect is defined in AS 47.17.290(11) 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.”⁴⁵

Substantiated maltreatment or neglect is reported on a list, established by AS 47.17.040, known as the "central registry." The central registry contains all investigative reports (but not reports of harm) filed by the Department of Health and Social Services (DHSS).⁴⁶ The registry is confidential, but can be used by governmental agencies with child and adult protective functions, inside and outside the Alaska, relating to investigations or judicial proceedings involving abuse, neglect, or custody.⁴⁷ Presence on the list can impact an individual's eligibility for certain occupational licenses.⁴⁸

3. Substantiation appeal framework

Proceedings regarding the propriety of an OCS substantiation finding are handled through the Office of Administrative Hearings. (OAH).⁴⁹ The administrative proceeding does not focus on the best interest of the child or a possibility of future harm, but only whether a discreet act violative of the statutes occurred.⁵⁰ As stated above, neglect is defined, for purposes of these proceedings, 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."⁵¹ Under AS 47.17.290(2), a finding of neglect also requires that the circumstances "indicate that the child's health or welfare is harmed or threatened thereby." A substantiated finding by OCS will be affirmed following an administrative hearing/appeal only if OCS proves, by a preponderance of the evidence, that the alleged misconduct occurred and that the child was harmed thereby.⁵²

⁴⁵ Note that this statutory definition is narrower in scope than the CINA definition. *Compare*, AS 47.10.014.

⁴⁶ AS 47.17.040.

⁴⁷ *Id.*

⁴⁸ AS 47.17.040(b).

⁴⁹ AS 47.17.040(c).

⁵⁰ *In re K.L., supra*, at 8.

⁵¹ AS 47.17.290(10)

⁵² *Id.*

a. *Substantiation was not appropriate under AS 47.10.011(10)*

OCS originally substantiated the report of harm against Mr. C-S on the conclusions he violated AS 47.10.011(9)(neglect) and AS 47.10.011(10)(his ability to parent had been substantially impaired by the addictive or habitual use of an drugs resulting in a substantial risk of harm to the child).⁵³ Given that OCS's own documentation indicated Mr. C-S did not repeatedly test positive for controlled substances, the latter grounds were not pursued at the hearing, and the hearing focused on whether he had neglected his daughter. The substantiation finding based on AS 47.10.011(10) is reversed.

b. *Substantiation was not appropriate under AS 47.10.011(9)*

As to the remaining substantiated claim involving neglect, the first question in this case is whether Mr. C-S failed to provide necessary food, care, clothing, shelter, or medical attention for his daughter, N. If he did, he neglected her. That would not end the administrative 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.⁵⁴

It must first be noted that OCS's framing of the issues leads to certain analytical difficulties. OCS specifically argued that Mr. C-S's *actions* harmed his child. OCS asserted:

“[t]his four-year-old who's brain is in the period of its most dynamic and elaborate changes in development, with imagination just starting to really peak, was subject to her father taking her to multiple appointments, shaving her head, and vehemently insisting she is infected with bugs. It is clear, this behavior, more likely than not would impact her mental health and development as it repeatedly blurred reality for a 4-year-old. A reasonable person would conclude the insistence of being infected with bugs would be worrisome and scary to a four-year-old regardless of the root cause propelling Mr. C-S's belief and behaviors. ... A 4-year-old by definition is vulnerable and does not have the complex brain functioning to understand nor protect oneself from this abnormal insistent hallucination. The OCS submits that these actions constitute neglect under AS 47.10.014.⁵⁵

However, both AS 47.10.014 and AS 47.17.290(11) define neglect in terms of failure to act. Indeed, the statutes define neglect in terms of very specific failures and omissions. AS 47.10.014 defines neglect for CINA purposes as the failure to provide “adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child's physical

⁵³ AR 00001-02.

⁵⁴ AS 47.17.290(2); *In re S.X.*, *supra*, at 9; *In re K.L.*, *supra*, at 9.

⁵⁵ *OCS Response* at 1-2.

and mental health and development.” AS 47.17.290(11) is even more restrictive; it covers only failures to provide “necessary food, care, clothing, shelter, or medical attention for a child.”

OCS does not allege Mr. C-S omitted to provide N with food, clothing, shelter, education, or medical attention. The requirements of AS 47.17.290(11) were not established. The finding of substantiation on that basis is reversed.

As for the broader scope of AS 47.10.011(9), assuming it could be used to expand the scope of AS 47.17.290(11), OCS does not allege that Mr. C-S failed to provide N with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child's physical and mental health and development, though financially able to do so or offered financial or other reasonable means to do so. To the contrary, what OCS asserts is that Mr. C-S took affirmative acts—the haircut, attendance at his own medical appointments, cleaning the home—that would have mentally harmed N. The problem with this approach is that it does not establish neglect under either the CINA statutes or the child protective statutes. Accordingly, the finding of substantiation on that basis is reversed.

Affirmative acts leading to mental injury may justify a CINA finding or maltreatment finding under the child protection statutes. However, such reports are appropriately pursued under CINA statute AS 47.10.011(8) and child protective statute AS 47.17.290(3), not the statutes selected by OCS. Expert testimony would generally be required to establish mental injury or harm.⁵⁶

OCS seeks to avoid the requirement for expert testimony to establish mental or developmental injury to N by arguing that so long as it pursues the neglect theory contained in AS 47.17.290(11) to explain causation of the mental harm to the child, it is exempt from the requirement for expert testimony contained in AS 47.17.290(10).⁵⁷ OCS explained its position as follows: the agency was “not attempting to cite a finding for Mental Injury in which an expert witness is necessary. OCS was intending to provide clarity in the definition and subsequent finding for Maltreatment for Neglect as it relates to AS 41.10.011(9) and AS 7.17.290(11) in which Neglect does not necessitate an expert witness.”⁵⁸ Therefore, it necessarily follows under OCS reasoning, OCS is not required to present expert testimony to demonstrate mental injury or mental harm to N because expert testimony is not required in neglect cases.

⁵⁶ AS 47.17.290(8).

⁵⁷ The statute defines “mental injury” for purposes of both AS 47.10.011(8) and AS 47.17.290(3).

⁵⁸ OCS Response at 2.

That argument must fail. First, the definitions of neglect in AS 47.17.290(11) and AS 47.10.014 do not require clarification. They are straightforward and clear. OCS's suggested expansion is contrary to those definitions.

Second, OCS acknowledges that it is attempting to prove harm or a risk of harm to N's mental health or development. Childhood mental health and brain development are not issues of common understanding. Some form of expert testimony would almost certainly be required to establish the existence of mental harm or developmental impact.

Lastly, statutory schemes like individual statutes are to be interpreted so "all provisions are given effect and no part will be inoperative or superfluous, void, or insignificant."⁵⁹ OCS offered nothing in the statutory language or history of AS 47.17.290(10) or (11) to indicate that the legislature intended to make proof of harm to mental health or development easier in cases of "neglect" than in cases of affirmative misconduct. Adopting the OCS argument would render AS 47.10.011(8) and AS 47.17.290(10) superfluous because OCS could always argue that a failure to act or the decision to act was taken with negligent disregard to the risk of mental injury or harm to the child's mental health and development.

Therefore, the argument by OCS that it could rely on neglect as a theory to prove affirmative acts by Mr. C-S harmed or threatened harm to his child's mental health and development without the presentation of expert testimony is rejected. OCS was required to establish the elements of the statutes as written by the legislature. OCS did not establish that it is more likely than not that Mr. C-S failed to provide his daughter with necessary food, care, clothing, shelter, or medical attention or other care as required by AS 47.10.290(9) or AS 47.10.011(9).⁶⁰ The substantiation finding is reversed.

⁵⁹ *Homer Elec. Ass'n v Towsley*, 841 P.2d 1042, 1045 (Alaska 1992) (quoting *Alascom, Inc. v. N. Slope Borough, Bd. of Equalization*, 659 P.2d 1175, 1178, n. 5 (Alaska 1983)).

⁶⁰ There were other problems with the OCS finding. For OCS to prove its case, even if its theory of negligence were correct, it was first required to prove Mr. C-S's belief he was infested with bugs was false. Although OCS argued his belief was a delusion caused by drug abuse, it had no proof for this assertion. OCS had some evidence Mr. C-S had used methamphetamine in the past, but it had no information that he suffered a mental lapse because of drug abuse. A medical doctor prescribed medication to treat the issue, providing some indication the infestation was legitimate. N's mother told OCS she had seen the bugs. OCS declined to inspect Mr. C-S. He submitted photographs and videos which did not conclusively prove the existence of insects, but did demonstrate something unusual on his body. Thus, while the administrative law judge did conclude by a preponderance of evidence there was no infestation, it was a close call and it did not necessarily follow that his daughter was neglected or harmed by his sincere attempts to discover the cause of his discomfort.

In addition, OCS was required under AS 47.17.290(2) to establish the circumstances indicated N's health or welfare was harmed or threatened by her father's conduct. There was no evidence that N's personal mental health or development was negatively impacted by her haircut, the housecleaning, or attending medical visits. To

IV. Conclusion

It appears in this case OCS had concerns based on past contact with the C-S family that use of controlled substances by Mr. C-S could result in a risk of future harm to his daughter. Regardless, of the propriety of a CINA response to address that risk, the focus in this proceeding requires OCS separately establish that its decision to place him on the central registry was correct. OCS did not establish that is more likely than not that Mr. C-S failed to provide his daughter with necessary food, care, clothing, shelter, or medical attention or other care as required by AS 47.10.290(9) or AS 47.10.011(11). Accordingly, the August 25, 2019 substantiated findings are reversed.

Dated: April 8, 2020.

Signed

Carmen E. Clark

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 22nd day of May, 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.]

the contrary, all evidence indicated she was well-cared for and happy. Thus, OCS was required to present evidence regarding risk of harm. Brain development and early childhood mental health are generally matters requiring expert testimony. OCS presented no evidence to support the suggestion four-year-old brain development is more likely than not at risk under these circumstances. A fact-finder could conclude as a matter of common sense that certain conduct by a parent might be “scary” or “worrisome”, but the simple experience of a negative emotion is not the equivalent of harm to mental health.