

Shopkins were found in her stool. Ms. M reportedly told B that was not an appropriate way to play with the toys and asked her to get dressed.⁶

On March 11, 2020, in response to B's disclosure of having seen the pornographic movie and her troubling conduct with the Shopkin toys, Ms. M took B to see B's established therapist, O H. Ms. H is a licensed professional counselor and registered play therapist.⁷ B started therapy with Ms. H when she was less than two years old for reasons that are not disclosed in the record. Ms. H was told about the recent exposure to pornography and B's actions with the Shopkins. She was also given a drawing made by B in 2019.⁸

Ms. H described the session as follows:

B functioned at age appropriate level during session. She arrived with her mother and transitioned without difficulty or anxiety to session with this writer after check-in with her mom.

During time spent with mom and B, mom reported that B had told mom she has seen a video while at her father's house and described pornography. Mom brought with her pictures that B had drawn in November 2019.

Mom also reported that B had put small toys in her anal cavity. Mom stated that she had walked into the room and saw B attempting to put a doctor toy into her anal cavity. Mom reported at this time she helped B get redressed and explained that this was not appropriate way to play with her toys before returning downstairs herself. Mom stated that she made B a snack and called her down to get her snack, at which time B came downstairs with her underwear on backwards and no pants on. Mom observed her to appear as if something was wrong. B told her mom nothing was wrong, then told her that she needed to poop and complained of pain when she passed gas. When mom observed that she was having trouble using the bathroom she checked and saw a toy protruding from her anal cavity as well as a Shopkin toy already in the toilet. Mom reported that she and her mother (B) had found three Shopkins toys in the toilet and in her bum.

These events were shared with this writer by mom. Mom also brought these to session in a baggie.

After mom stepped out of the room, this writer and B engaged in child centered play, B was focused on doll house play. No significant themes observed. While this writer and B played, B looked over at the table with the picture that was brought in laying on it, and back at this writer. This writer asked B what the

⁶ Testimony of R. S-Q.

⁷ <https://www.psychologytoday.com/us/therapists/O-H-anchorage-ak/450848>

⁸ AR 0001-50.

picture was. She stated, "This is the daddy parts, and this is the mommy parts," while pointing at the two different figures which seemed to be a penis and vagina.

She continued to state that the daddy parts "go to the mommy parts and then it makes milk.' She then resumed play in the doll house.

B later brought this writer's Shopkin toys into the doll house, this writer asked her if she had Shopkins too. B stated that she did and that she put them in her butt. This writer asked why, she stated she did not know why and then pointed to the bag of Shopkins her mom brought with them. She stated "ya, these! I put those in my bum," and continued to play. Play continued to reflect no theme, dolls moved about house, played with toy food, and arranged furniture.⁹

The next day, March 12, 2020, Ms. M made a report of harm to OCS. She reported Mr. C exposed B to pornography. She also reported B's placing Shopkins "in her butt" and that B did so because "her daddy taught her to do so" or did it to her.¹⁰ Importantly, Ms. M told OCS that the O H, the therapist, had confirmed everything Ms. M was telling OCS, including that B was placing the Shopkins in her rectum because her father taught her to do so.¹¹ Ms. M told OCS that Mr. C also videotaped inserting items in B's rectum and sexually abused her.¹² As demonstrated by the therapist notes above and a subsequent interview with Ms. M, these aspects of the initial report were not borne out.¹³ This decision has concluded B did not tell her mother on March 10 or 11, 2020, that Mr. C taught her to insert items in her rectum or that he had ever done so to her.

Protective Services did a forensic interview with B on March 12, 2019. B appeared well-kept and, initially, happy. During the hour and a half interview, she reported the following.¹⁴

- She does not go to school because a mean girl named L picks on her. L is so mean that Santa does not bring her presents.
- She knows the members of her family: Daddy, Mommy, T (puppy); P (pregnant cat); and F (another cat).
- Her Daddy lives far away in a high home where no monsters can go. He has short hair and he takes her to get ice cream.
- She knows why she is there: her mother checked her out and they are going to get ice cream.
- She can identify her clothes.

⁹ Agency Record (AR) at 000050.

¹⁰ AR 00010-20.

¹¹ AR 00015; Testimony of R. S Q.

¹² AR 00006; Testimony of R. S Q.

¹³ Testimony of R. S Q.

¹⁴ AR videotaped interview dated March 12, 2020 (Interview video).

- She names the parts of a girl and boy body on the drawings shown to her. She correctly identified the body parts on the girl drawing as she was shown eyes, nose, mouth, tongue, teeth, nipple, belly button, hands and fingers, girl parts, legs and toes; feet; head; back; hand; butt; feet. She also correctly identified the body parts on the boy drawing, including where a “boy part” would be. But she was obviously bored with the game and began to give the paper drawing “candy” and a “candy hat” she made from play dough.
- When asked to identify the parts it is not OK to touch on the girl drawing, she only identified the eyes. After repeated redirection, she identified almost all the parts of the body as not OK to touch.
- She likes it when Daddy touches her. He never touches her in a way she does not like.
- She touches Daddy and sometimes he farts.
- She saw a video. She saw a boy suck a boy part, a girl part, and a girl butt. He put his boy part on their butt and feet.
- It was not a long video. Daddy took it “right away” when he saw her with it.¹⁵

By this time B had been interviewed for half an hour. She was obviously bored with the conversation. She needed to go to the bathroom. She wanted to build the octopus from Ariel¹⁶ and created a Play-Dough game to do so. However, she continued to respond to the interviewer’s questions. In response to questioning she said:

- Daddy never touches her in a way she does not want.
- The only time she has been unsafe or uncomfortable with him was when she slept on an uncomfortable pillow.
- He has never touched her on her girl part.
- He has never touched her on her butt.
- The only place he touches her is on her toes and hair.
- She saw only the one video. Daddy was sleeping when she played it. He saw it and took it away.¹⁷

The interview continues with evaluator asking, “Has anyone ever seen you without your clothes.” B says, “Naughty people and strangers.” It is “really difficult to tell” people about that because she “does not want anyone to know.”¹⁸ B will not say more.

Then she is asked, “When you are at Daddy’s house, what do you do?” She answers, “he sticks stuff up my butt.” She continues:

¹⁵ Interview video 01:00-33:00.

¹⁶ This appears to be a reference to the Disney movie *The Little Mermaid*.

¹⁷ Interview video 33.00-38:00.

¹⁸ *Id.*

- “He sticks tiny stuff up my butt.” “Really tiny stuff.”
- “It does not feel good.”
- “I do not know why he does it.”
- “I don’t know when he does it.”
- “He has never put anything but tiny stuff up my butt”.
- They are both naked when this happens on a blue, pink, sparkling, spinning chair. This happens in a closet, too.
- He uses his butt to put stuff up her butt.
- There are tiny toys under his pillow. There are tiny toys under her pillow. He puts his toy up her butt. She putts her toy up his butt.
- She is asleep when he puts the toy in her butt.
- He is asleep when she puts the toy in his butt.
- They are pretending.
- He takes them out with tweezers. Gold Tweezers.
- He has a green machine he puts on his boy parts. He does not put the machine on her.¹⁹

During the final minutes of the interview, the evaluator used forensic dolls to facilitate B’s descriptions. When the evaluator took the dolls from B to conclude the interview, B became agitated. After B left, one of the protection team members, apparently an APD officer,²⁰ entered the room to conduct a debriefing with the interviewer. He told the interviewer, “I don’t buy it.”²¹

No signs of physical penetration were observed during B’s physical examination following the interview.²²

OCS spoke with Mr. C who admitted B had seen part of pornographic movie, but indicated her exposure was of limited duration and he took the screen away from her as soon as he recognized what she was watching. He denied sexually abusing his daughter or teaching her to put toys in her rectum.²³ Mr. C did not testify at the hearing.

The City A Police Department obtained a search warrant to record a phone conversation between Ms. M and Mr. C. During that conversation, Mr. C acknowledged B accessed a pornographic movie on his telephone. He denied improperly touching her.²⁴

The police also obtained to a search warrant for Mr. C’s home. The police seized several electronic devices. Some of these devices did contain pornography, but none involved children

¹⁹ *Id.* at 42:00 to end.

²⁰ R. S-Q testified the only men present to observe the forensic interview were himself and APD Detective W D.

²¹ Interview Video at 50:00 to end

²² Testimony of R. S-Q.

²³ *Id.*

²⁴ *Id.*

or B. The police also found several adult magazines stored wrapped in blankets 8 feet above the floor in Mr. C's bedroom closet. A sex toy disguised as a flashlight was also found in the closet. Mr. C was not charged with any crimes.²⁵

III. Procedural History

On April 9, 2020, OCS mailed a notice to Mr. C titled, "Notice of Alleged Child Maltreatment Decision and Cases Statuses and Placement on the Child Protection Registry." The Notice stated OCS had received a report that B "was a victim of child maltreatment under Alaska Statute 47.17.290(9) and described in AS 47.10.011 and that Mr. C had been named as an alleged perpetrator of the maltreatment listed below." What followed was a chart listing B as the victim and Mr. C as the perpetrator of a substantiated finding of sexual abuse.

The substantiation finding was based on the conclusion Mr. C committed "maltreatment" as described in AS 47.17.290(9) and by reference AS 47.10.011(7), a portion of the Child In Need of Aid (CINA) statute. In pertinent part AS 47.10.011(7) defines a violation as occurring when "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."

A formal telephonic hearing was held. Assistant Attorney General Brian Starr appeared on behalf of OCS. The video interview with B and the agency record were admitted. OCS submitted a document from H Y to provide expert context for B's interview. Ms. Y is an experienced OCS social worker who reviewed B's disclosure interview to assess its compliance with professional forensic interview standards. Ms. Y concluded some errors occurred, but they were not significant enough to impact OCS's substantiation finding. In addition, Protective Service Specialist R S-Q testified regarding the OCS investigation as whole. Neither the forensic interviewer, the child's therapist, nor the child's mother testified.

Mr. C was represented by attorney Regan Williams. Witten exhibits were submitted, including therapeutic reports regarding Mr. C.²⁶ Dr. Leigh M. Baker testified as an expert witness in child forensic interview techniques. Importantly, Dr. Baker testified persuasively and

²⁵ *Id.*

²⁶ These reports were prepared to assist OCS and the custody judge in assessing Mr. C's need for treatment. Although interesting, they were not particularly germane to the issue presented in this case.

at length regarding deficiencies in the OCS interview process. In her opinion some errors were grievous enough to render a portion of B's statements unreliable.²⁷ Mr. C did not testify.

The hearing was audio recorded. At the close of the hearing all submissions were admitted into the record.

IV. Discussion

When OCS receives a report of potential harm, it must investigate the report to determine whether it can substantiate if the person identified in the report committed an act of child abuse or neglect.²⁸ If OCS finds that a parent, guardian, or custodian has sexually abused a child, OCS will substantiate in its records that the parent or guardian has committed child abuse.

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.²⁹

A. The Merits of the Substantiation Findings

1. 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; however only OCS's conclusions under the Child Protection statute are at issue in the administrative hearing.

a. 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 protect a child whenever a parent's conduct

²⁷ Testimony of Dr. L. Baker. For example, the failure of the interviewer to establish B knew the difference between the truth and a lie and would only tell the truth was a critical error. The failure to use open-ended questions also violated professional standards. Finally, the use of forensic dolls has been discredited among experts for more than a dozen years.

²⁸ AS 47.17.290(3).

²⁹ *Id.*

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

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 circumstances that trigger OCS action.³¹

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.³² The CINA statutes specifically provide for protective action based on the likelihood of future harm as well as completed acts of harm.³³ OCS may take emergency or non-emergency action depending on the immediacy of harm.³⁴ The touchstone of CINA proceedings is the “best interest of the child.”³⁵ OCS is authorized to seek permanent removal of the child from the home only as a “last resort.”³⁶ 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.”³⁷

b. The Child Protection Statute (AS 47.17)

In contrast, the Child Protection (CP) statutes, AS 47.17.010 - AS 47.17.290, look more narrowly at whether a particular event occurred, and, if so, whether it constitutes child maltreatment under the law. The Child Protection statutes require OCS to investigate reports of suspected harm to children and determine whether conduct by the suspect is “substantiated.”³⁸ To make a “substantiated” finding, OCS must determine, more likely than not, that the adult in question has abused or neglected a specific child. Those 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 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.

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.

³² *A.A. v. State, Dep’t of Family and Youth Servs.*, 982 P2d 256, 259-60 (Alaska 1999).

³³ *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.

³⁴ AS 47.10.142.

³⁵ *Id.*

³⁶ AS 47.05.060.

³⁷ AS 47.17.010.

³⁸ AS 47.17.025; AS 47.17.030.

- 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.”³⁹

Substantiated abuse, maltreatment, or neglect is reported on a list, established by AS 47.17.040, known as the "Child Protection Registry" This registry contains all investigative reports filed by the DHSS as outlined above.⁴⁰ The internal registry is not available to the general public, but is used by governmental agencies with child and adult protective functions as well as occupational licensing and enforcement.⁴¹ Placement on the central registry can have meaningful implications on one’s life and livelihood.⁴² Thus, unlike CINA statutes, the Child Protection statutes result in some civil sanction on the abuser even if such sanction is not a primary purpose of the registry.

This case involves whether the allegations against Mr. C can properly be included in the Child Protection Registry.

c. The Substantiation Appeal Framework

Proceedings regarding the propriety of an OCS substantiation finding are handled through the Office of Administrative Hearings (OAH). 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.⁴³ Thus, 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.⁴⁴

The formal rules of evidence do not apply in these proceedings “except as a guide.”⁴⁵ The standard for admissibility is whether the evidence presented is the kind of evidence on which reasonable people might rely on in the conduct of serious affairs.⁴⁶ This is a lower standard than applied at OAH hearings conducted under the Administrative Procedure Act (APA), AS 44.62.330-660. In those cases, hearsay continues to be generally admitted, and may be used to supplement or explain direct evidence, but “is not sufficient by itself to support a

³⁹ Note that this statutory definition is narrower in scope than the CINA definition. *Compare*, AS 47.10.014.

⁴⁰ AS 47.17.040.

⁴¹ *Id.*

⁴² AS 47.17.040(b).

⁴³ *In re K.L., supra*, at 8.

⁴⁴ *Id.*

⁴⁵ 2 AAC 64.290(b).

⁴⁶ 2 AAC 64.290(a)(1).

finding unless it would be admissible over objection in a civil action.”⁴⁷ For purposes of deciding whether reasonable people would find the type of evidence submitted in this case persuasive and reliable, it is necessary to keep this distinction in mind.

2. B’s Exposure to Pornography Does Not Establish a Violation of AS 47.10.011(7).

OCS notified Mr. C that it substantiated a report of child of maltreatment against him after concluding he violated AS 47.10.011(7). A violation of AS 47.10.011(7) requires proof by a preponderance of the evidence that the “child has suffered sexual abuse or there is a risk that the child will suffer sex abuse as a result of conduct by or conditions created by the” alleged abuser. “Sexual abuse” is defined in AS 47.10.990(33). The statutory definition of “sex abuse” incorporates the conduct described in AS 11.41.410-460, the statutes criminalizing sexual assault and sexual abuse of minors. It also incorporates the conduct described in AS 11.66.100-150, the statutes criminalizing sex trafficking and related crime. Lastly, the statutory definition of sexual abuse incorporates the conduct described in AS 47.17.290, which prohibits any person from “allowing, permitting, or encouraging a child to engage in prostitution.” Notably, the criminal statutes related to pornography, AS 11.61.123-128, are not referenced or included in the statutory definition of sexual abuse set out in AS 47.17.290(33).

OCS Specialist R S-Q testified he substantiated the maltreatment finding against Mr. C utilizing the Maltreatment Assessment Protocol (MAP), a matrix created by OCS to guide its workers in assessing reports of harm.⁴⁸ The MAP specifically includes exposure to pornography as a reason to substantiate a report of harm. Mr. C admitted his daughter had been exposed to pornography, and that admission met the “MAP criteria.” According to Mr. S-Q, no other analysis was required per OCS policy. He, therefore, substantiated the March 12, 2020 report of harm. Mr. S-Q unaware of the governing statutory definition and did not consider it.⁴⁹

As stated above, the fact B viewed pornography on her father’s telephone was not disputed. Mr. C’s case raises the question of whether exposure to pornography qualifies as “sexual abuse” under AS 47.10.011(d) and AS 47.10.990(33) and can, therefore, support a substantiated finding of child maltreatment. This is a question of statutory interpretation.

⁴⁷ AS 44.62.460.

⁴⁸ Although it can be a useful tool for OCS employees, the MAP has not been adopted by regulation and is not entitled to deference in the administrative hearing.

⁴⁹ *Id.*

The objective of statutory interpretation is to give effect to the intent of the legislature.⁵⁰ Statutes and regulations are interpreted *de novo* by looking at three factors: the language of the regulation, the regulatory history, and the purpose behind the regulation.⁵¹ Although Alaska no longer strictly applies the “plain meaning” rule of statutory construction, the clearer the statutory language, the more convincing any contrary regulatory history must be to overcome the plain language adopted.⁵² Unambiguously language is typically given its ordinary and common meaning.⁵³

In this case AS 47.17.990(33) is quite straightforward. The phrase “sexual abuse” is defined to encompass three specific forms of prohibited conduct: sexual assault and sexual abuse of minors;⁵⁴ sex trafficking and related crimes,⁵⁵ and prostitution;⁵⁶ The pornography statutes⁵⁷ are not included in the unambiguous list adopted by the legislature.

OCS conceded at the hearing that inadvertent exposure of pornography to one’s child is not conduct included on the face of the child protection statute defining sexual abuse. Nor is inadvertent exposure to pornography a criminal offense.⁵⁸ OCS nevertheless urged its decision be affirmed because exposure of pornography to children ought to be qualified as sexual abuse since it is harmful to them in much the same way as the other misconduct identified by the legislature.

Although that argument may have strong public policy appeal, it is not persuasive as a matter of statutory construction. Differences in statutory language convey different meanings which must be given effect and due regard.⁵⁹ The useful and logical maxim of statutory construction that *expression unis est exclusion alterius*⁶⁰ leads to the conclusion that the Alaska legislature did not intend to include exposure to pornography as a trigger for substantiation of sexual abuse for placement on the Child Protection Registry. Thus, both the plain language of

⁵⁰ *Seward Marine Services, Inc. v. Anderson*, 643 P.2d 493, 495 (Alaska 1982).

⁵¹ *Western Star Trucks, Inc. v. Big Iron Equip. Serv., Inc.*, 101 P.3d 1047, 1050 (Alaska 2004).

⁵² *City of Valdez v. State*, 372 P.3d 240, 248 (Alaska 2016); *Benavides v. State*, 151 P.3d 332 (2006).

⁵³ *Id.*

⁵⁴ AS 11.61.41-460.

⁵⁵ AS 11.66.100-150.

⁵⁶ AS 47.17.290.

⁵⁷ AS 11.61.116-129.

⁵⁸ AS 11.61.128 (the crime of Distribution of Indecent Materials to Minors requires intentional exposure).

⁵⁹ *E.g., Tesoro Petroleum Corp. v. State*, 42 P. 3d. 531, 537 (Alaska 2002) (citation omitted).

⁶⁰ *E.g., Trapp v. State, Office of Pub. Advocacy*, 112 P.3d 668, 674 n. 16 (Alaska 2005) (citation omitted).

AS 43.23.005(d) and the presumed legislative intent demonstrated by that language lead to the conclusion the Division erred in its substantiation decision.

The Division did not identify anything in the legislative history regarding AS 47.17.330(33) or AS 47.10.011(7) to counter or rebut the plain language adopted by the legislature. The legislature could have defined “sexual abuse” more broadly for purposes of the child protection statutes, but because it did not this decision must apply the definition as written. This decision acknowledges the importance of the question of how to protect children from exposure to unhealthy or damaging sexual content, but the Division’s policy arguments must be directed at lawmakers for consideration of the serious and difficult issues presented.

However, it should be noted that although exposure to pornography as alleged in this case does not constitute a violation of AS 47.10.011(7), this decision does not resolve the question of whether exposure to pornography could constitute abuse under a differing section of the Child Protection statutes. That issue is neither addressed nor resolved herein.

OCS erred. That portion of the substantiation finding is Reversed.

3. B’s Statement Did Not Otherwise Prove a Violation of AS 47.10.011(7).

The question then becomes one of whether OCS established by a preponderance of the evidence that E C otherwise sexually abused his daughter. Mr. C did not testify. Neither did B, Ms. M, nor the OCS worker who conducted the forensic interview. Thus, the decision in this case rests almost entirely on review of B’s video-recorded interview from March 12, 2020, and a decision whether it is enough to meet OCS’s burden.⁶¹

B’s recorded statement raises several issues. It is hearsay evidence given by a young child who was not under oath. In an administrative hearing the rules of evidence do not apply “except as a guide.”⁶² The administrative law judge “may admit evidence of the type on which a reasonable person might rely in the conduct of serious affairs.”⁶³ The forensic interview conducted by OCS qualifies as such evidence. A child’s out of court testimony, standing alone, can be sufficient to meet OCS’s burden of proof.⁶⁴

⁶¹ Information from experts Dr. L. Baker and H. Y was useful in providing a framework in which to evaluate B’s statement. OCS Specialist R. S-Q’s testimony and the admitted exhibits provided additional context and background. But the outcome in this case depends almost entirely on evaluation of the video.

⁶² 2 AAC 64.290(b).

⁶³ 2 AAC 64.290(a)(1).

⁶⁴ *In re E.B., supra*, at 4-9.

The framework for analyzing the credibility of hearsay statements by children has been set out by the Alaska Supreme Court. Six factors have been identified for consideration. They are: (1) the spontaneity of the child's statements; (2) the age of the child; (3) the use of “childish” terminology;⁶⁵ (4) the consistency of the statements; (5) the mental state of the declarant; and (6) the lack of motive to fabricate.⁶⁶ The fact-finder should also consider corroborating evidence for the accusation from the child’s own statement or behavior, including “trauma, shame, fear” and “symptoms of sexual abuse”⁶⁷ as well as external details.

In this case almost all the factors weigh against a finding of reliability. First, B’s statements were not spontaneous. Ms. M first told OCS that B made the statement that Mr. C put toys in her rectum and taught her to do so on March 10, 2020. She also told OCS that B’s therapist confirmed that statement.⁶⁸ However, that was not true. B’s therapist, Ms. H, did not confirm that statement, because B did not tell the therapist her father did those things. To the contrary, Ms. H’s notes explicitly state B gave no reason for putting the Shopkins up her butt during therapy. From Ms. H’s contemporaneous notes, it also appears that Ms. M did not tell Ms. H that B claimed her father was videotaping or sexually abusing her on March 10, 2020.⁶⁹

There were other conflicts in Ms. M’s reports as to when B made the accusation against Mr. C. After first telling OCS the statement was made on March 10, 2019, she next stated it happened on March 11, 2020 after the therapy appointment with Ms. H. Lastly, she stated it happened “in the car” possibly going to or from OCS.⁷⁰ Given Ms. M’s implausible hearsay timeline, the first verifiable report of sexual abuse involving the Shopkins by Mr. C happened during the March 12, 2020 video interview after B had been questioned for approximately an hour. That statement was not spontaneous.

⁶⁵ The OAH has independently recognized that “[e]xpert opinion supports the common-sense view that a child’s narrative that is coherent, spontaneous and appropriately detailed bears characteristics of credibility.” See, *In re E.B.*, OAH 16-1362-SAN (Commissioner of Health and Social Services 2017) (synthesizing prior OAH decisions regarding substantiation of sex abuse reports by minor children) (available online at <https://aws.state.ak.us/OAH/Decision/Display?rec=5990>) pp. 4-9.

⁶⁶ *In re T.P.*, 838 P.2d 1236, 1241 (Alaska 1992); see also *In re A.S.W.*, 834 P.2d 801, 804 (Alaska 1992). In common experience, [young] children may also be suggestible. *In re E.B.*, *supra*, at 5.

⁶⁷ *Id.*

⁶⁸ Had Ms. M testified, B’s purported statement to her could have qualified as a “first-report” hearsay exception pursuant to *Greenway v. State*, 626 P.2d 1060 (Alaska App. 1980). But Ms. M did not testify, and the double hearsay on this point was not reliable.

⁶⁹ AR 00050.

⁷⁰ AR 000010-45; Testimony of R. S-Q.

Second, B is a very young child with a history of emotional or mental disturbance. It is highly unusual for a child her age to be in therapy, much less to have been in therapy for over a year.⁷¹ The lack of information on the nature of her difficulties makes it difficult to assess her ability to accurately perceive or convey information.

Third, B did use “childish” and age-appropriate language. Her description of “boy” and “girl” parts was consistent with expectations for a four-year-old. But the fact that a child demonstrates an ordinary degree of language sophistication is hardly strong indication that the contents of the statement are true. For example, B also had an age appropriate belief in the existence of Santa Clause.

Fourth, B’s overall statements were not consistent. She told her established therapist during a reliable form of play therapy that she did not know why she put the Shopkins up her butt. The next day for approximately an hour, she repeatedly told the OCS interviewer in response to questions that her Daddy never touched her in a way that she did not like. When she finally said her father did put “tiny things” in her rectum, she told multiple versions of what happened. She stated: she “did not know when he did so;” that he did so “with his butt;” “while she was asleep;” after taking the toys from under his pillow; in a closet; and on a colorful spinning chair not found by the police in the C residence. Some variance in the details in the report from a young witness would not be troubling, but here B’s descriptions swing from denial to lurid, far-fetched descriptions.

Fifth, B’s mental state at the time of disclosure is troubling. This factor weighs in favor of OCS. No reasonable person who observed the video interview would be undisturbed by B’s behavior. When the interviewer decided to take away the forensic dolls to end the interview, B’s demeanor drastically changed. She raised her voice. Her motions became exaggerated, including how she handled the dolls. She began to run around the room. Unfortunately, this is a point during which the experts agreed the interview was not conducted within appropriate professional standards to ensure reliability.⁷² In addition, it is at this point the interviewer decided to stop the interview rather than redirect B or explore the source of her energy. Thus, it

⁷¹ Testimony of Dr. L. M. Baker.

⁷² Ms. Y did not consider the errors to be significant, but Dr. L. M. Baker’s testimony that the errors were material was more compelling.

is impossible to determine whether B was agitated because she was revealing trauma or whether she was exasperated after an hour and a half of confinement in a small room with a stranger.

Lastly, this decision concludes that motive to fabricate in the classic sense of a known exaggeration or falsehood does not exist. B's parents seem to be in a high-conflict custody dispute. However, B does not appear to have been coached nor have an agenda of her own to avoid her father. What does appear probable is that B has been "obsessed"⁷³ with her butt and sexual matters for some time. The cause for her interest is entirely speculative given the evidence presented, however.

This is a very difficult case. Upon review, B's hearsay statements lacked reliability, but her conduct at the conclusion of her OCS interview was extremely troubling. The best evidence presented, the information Dr. Baker and Ms. Y, established that portion of the interview was problematic and untrustworthy. Neither of B's parents nor her established therapist testified, any of whom could have provided useful testimony to explain the likely cause of her stimulation. Nor did OCS have other evidence to corroborate the interview.

This decision concludes the contents of the video interview did not meet the Division's burden of proof. The factors identified by the Alaska Supreme Court tilt almost universally in Mr. C's favor. The one exception is B's mental state toward the conclusion of the forensic interview. On balance, however, the other factors coupled with expert testimony, especially Dr. Baker's discussion on how forensic interviews of children should be conducted, leads to the conclusion the final portion of B's videotaped statement standing alone is not the type of evidence upon which reasonable people would base their important affairs after thoughtful consideration.

Accordingly, the substantiation finding is Reversed.

V. Conclusion

OCS proceeded against Mr. C based on very specific allegations. OCS was hindered by the unavailability of witnesses at the hearing. OCS did not establish that it is more likely than not that Mr. C committed a violation of AS 47.10.011(7) as defined by law when B observed pornography on his telephone. Nor did OCS prove by a preponderance of the evidence that he committed a violation of AS 47.10.011(7) by perpetrating an act of sexual abuse involving

⁷³ According to Mr. S-Q, Ms. M used this word to describe B's curiosity regard her butt.

Shopkins or B's person because it lacked reliable evidence to do so. Accordingly, both substantiation findings are Reversed.

Dated: November 30, 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 4th day of January, 2021.

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.]