

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

In the Matter of)	
)	
A S, JR.)	OAH No. 20-0647-SAN
_____)	Agency No.

DECISION

I. Introduction

The Office of Children's Services (OCS) substantiated a report of child maltreatment against A S, Jr., based on its conclusion that Mr. S had sexually abused his daughter. Mr. S contested the substantiated finding.

Because OCS has not shown that that Mr. S more likely than not committed maltreatment as alleged, the substantiated finding is Reversed.

II. Facts¹

A. Historical Background

A S, Jr. was stationed in City A, Alaska, with the military in 2002. While in City A he formed a romantic relationship with E D. Their daughter, K, was born January 00, 2005. Although Mr. S and Ms. D did not marry nor maintain a monogamous romantic relationship, for the first seven years of K's life they lived in the same apartment complex and shared "family" events such as birthdays. Mr. S had exclusive physical custody of K during this time.²

Mr. S established and maintained a close relationship with Ms. D's sister, U T, and her husband who also lived in City A. They had a daughter who was six months older than K. The two families spent a lot of time together, including attending gymnastics/dance activities for the girls and going on joint camping trips. Ms. T considered her sister to be a deficient mother and took her obligations as aunt to K very seriously. She helped plan "princess parties" for the girls' birthdays and provided parenting advice on how to raise a daughter to Mr. S. This included advice to incorporate the idea of "good and bad touch" when K was a toddler. Ultimately, in 2011 or 2012 the Ts moved to City B. After that, Mr. S and the Ts maintained a close relationship, but it did not include regular contact in person.³

¹ These facts were established by a preponderance of the evidence from the Agency Record (AR), admitted exhibits, and testimony at the hearing.

² Testimony of R. S and T. T.

³ *Id.*

Mr. S's duty assignment to City A ended in 2012. He moved with K to City C, State A, where he has significant family, including his mother, R N. K spent her eighth birthday in City C. She remained in her father's primary care until sometime in 2015.⁴

On December 22, 2014, Ms. D gave birth to another daughter, Y. After her little sister was born, K desired to spend more time in Alaska. Thus, it appears K lived primarily in City A from some time in 2015-16 to autumn of 2018.⁵

During that time OCS received at least half a dozen reports of harm regarding Ms. D's inability or unwillingness to safely parent K and Y. These reports of harm included a report of pre-natal drug abuse during the pregnancy with Y, continued drug abuse and repeated absences leading to neglect of both girls, and the failure to protect them from sex abuse. One of Ms. D's boyfriends, "Z," believed to be Y's father, sexually abused K.⁶

Sometime after she was found to have been sexually abused by Z, K returned to her father's home in State A.⁷ This appears to be autumn 2018. Mr. S was married to C S by that time. The family lived only minutes away from K's maternal grandmother, Ms. N. K was enrolled in eighth grade. She participated in the theater arts and other activities.

However, K also exhibited signs of mental health distress.⁸

The signs included her revelation that she was "hearing voices" commanding her to hurt herself or something bad would happen to Y. The voices also told her that if she ate too much food something bad would happen to Y. In response to these audio-hallucinations K engaged in repeated acts of self-harm and lost so much weight the family sought treatment for possible anorexia.⁹

K's mental health issues reached a crisis in February 2019. She was committed to in-patient treatment at a juvenile psychiatric facility in State A where she spent two weeks. She was diagnosed with anxiety, depression, and temporary psychosis. Regimens for medication and out-patient psychiatric treatment were established.¹⁰

⁴ Testimony of R. S.

⁵ *Id.*

⁶ *Id.*; AR 00001-50.

⁷ K revealed the sexual abuse by Z to her father, grandmother, maternal aunt, and C S.⁷

⁸ Testimony of R. S, C. S.

⁹ *Id.*

¹⁰ Testimony of R. S, C. S

K's mental health worsened during a family trip to State B in March 2019. Her classmates reported to her teachers that K was posting serious threats of self-harm on social media during the vacation. The teachers contacted Mr. and Ms. S. The Ss returned K the juvenile psychiatric facility for re-assessment at the conclusion of the vacation. K was again committed. She remained hospitalized from her return from State B until April 18, 2019.¹¹

While she was hospitalized, State A Social Work Specialist L P was assigned to assess her circumstances and insure she had not been the victim of neglect or abuse. Mr. P conducted a series of interviews to obtain background on K's situation and assess her support system. He also did a home visit of the S residence. The home was clean and well-maintained. K's room was like a "little art studio." Her father and his wife were clearly invested in her care and well-being.¹²

Mr. P also conducted an interview with K. In State A social work investigators like Mr. P receive five to six months of training on how to interview children. Mr. P is a certified child protection interviewer with a background in clinical social work. His interviews are one-on-one and tailored to meet the child's needs based on the background discovered in the interview process. The training requires the interviewer conduct a global investigation, including the possibility of physical or sexual abuse, no matter what type of complaint prompted the investigation.¹³

Mr. P met with K. He participated in rapport building with her. She spoke lovingly of her family, including her father. She felt safe in his home. She enjoyed living in State A. However, she articulated a strong desire to return to Alaska and care for her younger sibling. Mr. P was not surprised by her desire to provide care for her younger sibling. His background investigation had revealed the inadequacies in Ms. D's parenting and prior involvement by the Alaska OCS. It is not uncommon for the oldest child in a chaotic family to "parentize" their younger siblings or even their parents. K did not disclose any form of sexual abuse by Mr. S, although she was given the opportunity to do so and did disclose other forms of trauma to Mr. P.¹⁴

¹¹ *Id.*
¹² Testimony of D. P.
¹³ *Id.*
¹⁴ Testimony of D. P.

K was released from hospitalization on April 18, 2019. Mr. S, C S, and K spent that night together, having dinner and planning how to deal with K's mental health issues going forward. A private anniversary trip for Mr. and Ms. S beginning April 19-20, 2019 had been planned prior to K's institutionalization. The family decided the adults would take their trip. K would stay at her maternal grandmother's home and celebrate Easter while they were gone. She would start her ninth-grade placement tests on Monday, April 22, 2019, and her parents would be home before the end of the week.¹⁵

Mr. S went to work the morning of April 19, 2019. K was taken to her great-aunt's later that afternoon where her grandmother would pick her up to spend Easter weekend together.¹⁶ Ms. N picked K up from her aunt's home.¹⁷

Soon thereafter, K told Ms. N that K's mother had called. Ms. D was in State A and wanted to see K. Ms. N agreed K could spend the night of April 19, 2019 with Ms. D, but Ms. N would pick her up to attend Holy Saturday, Easter Vigil services.¹⁸ Easter was Sunday, April 21, 2019.

On April 20, 2019 Ms. N went to pick-up K to attend Easter Vigil services. The hotel clerk told Ms. N that Ms. D checked out with K earlier in the day. Ms. D did not leave any information on her plans. Ms. N tried to call Ms. D and K, but both phones went unanswered. In addition, the phone tracking app on K's phone had been disabled. Concerned, Ms. N called Mr. S.¹⁹

Mr. S was not able to contact Ms. D or K for several days. K did not appear at school to take her placement examinations. She left her psychiatric medications at the hotel. It was not until Ms. D called later in the week that Mr. S learned K had returned to Alaska. After speaking with K about her preferences, Mr. S agreed she could stay in Alaska on the conditions she attend school and maintain her mental health regimen.²⁰

From April 2019 to February 2020, Alaska OCS received multiple reports of harm regarding K. They were all substantially similar. They alleged Ms. D was abusing drugs and

¹⁵ Testimony of R. S, C. S, and M. N.

¹⁶ *Id.*

¹⁷ Testimony of M. N.

¹⁸ Testimony of M. N.

¹⁹ *Id.*

²⁰ Testimony of R. S, C. S.

neglecting K and Y; K was at risk of suicide; K was not receiving needed mental health care or her medications; and K had not been seen at school.²¹

People were also calling Mr. S to report Ms. D was again abusing drugs and neglecting K. When he called the school district to check her enrollment, he found K was no longer enrolled in school nor had a home school alternative been established for her. He contacted Ms. D to have K return to State A.²² Ultimately, a child custody case was filed July 25, 2019. On February 18, 2020, the Alaska superior court issued a custody order requiring K's return to State A.²³

Before the transfer required in the custody order occurred, City A OCS received another report of harm that Ms. D was failing to provide safe and appropriate care for K due to drug and alcohol abuse. OCS Specialist Z Q was assigned to investigate the report. Mr. Q reviewed the OCS database and discovered the existence of multiple prior allegations that K and her younger half-sister, Y, had been neglected and abused due to Ms. D's inability or unwillingness to safely parent. He became aware the prior allegations often involved information that Ms. D was using methamphetamines and exposing her children to domestic violence and the risk of sexual abuse by her paramours. Mr. Q also spoke with K's school counselors who described K as "quiet" and "not a trouble-maker." He did not receive any information on her mental health. Mr. Q felt this information, including both substantiated and unsubstantiated reports of harm, provided him sufficient background on which to approach his interview with K.²⁴

Mr. Q's interview with K took place on or about February 22, 2020. Although the primary purpose of the interview was to assess the validity of the current complaint involving care by K's mother, Mr. Q has been trained to conduct a global assessment of the child's risk exposure. As part of that assessment he asks a series of broad, open-ended questions regarding the child's living environment and all the adults in the child's life. During this interview fifteen-year-old K stated her father, A S, Jr., had sexually abused her. Mr. Q immediately ceased his interview to arrange for a forensic interview to appropriately investigate K's disclosure.

²¹ AR 0001-00015.

²² Testimony of R. S.

²³ Testimony of R. S. *See also*, XXX-19-00000CI.

²⁴ Testimony of M. Q.

Notably, Mr. Q ceased his interview without exploring the original report of whether Ms. D was abusing drugs and alcohol and failing to provide adequate care for K or Y.²⁵

The forensic interview took place on February 25, 2020. Mr. Q did not conduct the interview, but he did observe it through a privacy window. K stated:

- She is in 9th grade at City D.
- She did not tell her mother or any other adult that she was coming for the interview.
- She told only one friend about the interview. She has also previously disclosed the sexual abuse to this same friend. The friend is the only person in whom she has previously confided. She did not confide in this friend until January 2020.
- She does not want to talk about what happened, but she “guesses” that she “has to” do so.
- Her father sexually abused her when she was 6 or 7 years old. She knows it happened in the apartment where they lived in City A before they moved to State A.
- The abuse was him touching her “down there.” At the time he told her he was “cleaning” her and “she did not know any better.” She is not sure how many times this touching took place, but it was always in the shower.
- Then on her sixth or seventh birthday or maybe the day before, the touching was done by something other than his hand or fingers. “I felt something go in, you know, I don’t think it was his finger.” “It was weird.” She can anchor her age on this event because she turned 8 while living in State A. The abuse on her birthday was painful.
- She does not like saying the abuse involved her dad’s penis, because talking or thinking about her father’s penis is “weird” and creepy.
- That type of abuse only took place one time.
- From that birthday until 2019 there were no other instances of abuse.
- She did not tell her mother or any other family members. She loves her grandmother and her aunt, but she could not tell them because on other times when she shared lesser complaints or concerns about her dad, they always responded that “he’s such a good dad,” “he loves you so much,” “that’s just how parents’ are” and she felt they would either discount what she said or not believe her.
- There has only been one other incident when her father acted in a sexual manner since the incident in the shower. On that occasion he “touched her

²⁵ *Id.*

through her clothes.” He touched her “down there.” The touch was very brief on the top of her thigh/crotch. It was “really nothing.”

- That happened while she was living with him and his wife in State A. She does not like her stepmother, but her stepmother would never let anything happen to her. She was in State A with them for about 6 months. She left State A at Easter, 2019. “My mom came and got me, and we left. He went out of town, and I left, and we told him when we got back to Alaska.”
- The days just before Easter 2019 were the last time she saw her father.
- The incident where he touched her over her clothing in State A “happened in the middle of” her visit.
- She is disclosing what happened because if the report of harm complaint against her mother is upheld, there is “a real possibility” she would be returned to her dad.²⁶ He is a much more stable person than her mother and, except for the abuse, a better parent. However, she believes that if she tells about the abuse she will not have to go to State A.
- Talking about what happened is hard and embarrassing. “How can you tell someone that you lost your virginity to your dad on your birthday when you were a kid? That is so weird.”
- She thought about revealing the abuse by her father prior to February 2020. After Z, her mother’s boyfriend, sexually abused her, she thought she would be able to tell someone about her father. But when she was interviewed about Z, she just “didn’t talk about it.” She never spoke about her father’s conduct until January 2020 when she told one of her friends.
- “Everyone” knows she does not like her dad.

At the conclusion of the interview, K asked, “will I ever have to see him?”

B. Procedural History

On May 27, 2020, OCS mailed a notice to Mr. S, “Notice of Alleged Child Maltreatment Decision and Cases Statutes and Placement on the Child Protection Registry.” The Notice stated OCS had received a report that K “was a victim of child maltreatment under Alaska Statute 47.17.290(9) as described in AS 47.10.011 and that Mr. S had been named as an alleged perpetrator of the maltreatment listed below.” What followed was a chart listing K as the victim and Mr. S as the perpetrator of a substantiated finding of sexual abuse. No details regarding the basis for the finding were included in the Notice to Mr. S.

²⁶ Despite K repeatedly stating that her mother was “not stable,” the OCS interview never explored the original report of harm regarding Ms. D or what fears K had from her mother’s conduct.

The substantiation finding was based on the conclusion Mr. S committed “maltreatment” as described in AS 47.17.290(9) by reference to 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.”

After Mr. S requested a hearing to challenge the allegation, the Office of the Commissioner referred the matter to the Office of Administrative Hearings. This led to a formal telephonic hearing at which Assistant Attorney General Brian Starr appeared on behalf of OCS and attorney Gary Stapp represented Mr. S.

Prior to the hearing, requests by Mr. S to subpoena witnesses were denied.²⁷ In support of his requests, Mr. S made an offer of proof that the witnesses had relevant information regarding K’s motive to fabricate, mental health, and credibility due to subsequent statements by her.²⁸ During the hearing, OCS acknowledged that the lack of subpoena power hampers its ability to present witnesses as well. For example, K was living in a City A suburb but unless she agreed to appear voluntarily, OCS could not mandate her appearance.

At the hearing, OCS presented the video interview with K and 15 pages of agency record were admitted. OCS Protective Service Investigator Z Q testified regarding the OCS investigation as outlined above. Neither K, her mother, nor the forensic interviewer testified.

C. Mr. S’s Defense

Mr. S testified and provided background information as set out above. He specifically denied that he had ever sexually abused his daughter in Alaska or State A. He testified that when she was a child, he did bathe K in the tub in the shower, but he did not engage in any form of sexual abuse during her baths. He remembered her sixth and seventh birthdays: they were princess themed parties and attended by a large social circle, including the Ts and Ms. D. He testified that he did not sexually abuse K on or near those occasions.²⁹

Mr. S testified he was confused and hurt by K’s allegations, but believed she was motivated to avoid compliance with the February 2020 child custody order. Prior to 2020, he

²⁷ 2 AAC 64.240.

²⁸ One of the witnesses identified by Mr. S did appear after receiving a simple notice of the hearing date.

²⁹ Testimony of R. S.

and Ms. D did not have a formal custody arrangement and permitted K to select where she wanted to live. After Ms. D's conduct in taking K without notice at Easter 2019 and her subsequent neglect, including not enrolling K in school or continuing her mental health care, he obtained a court decree ordering K returned to his custody in State A.³⁰ In his opinion, the unintended consequence of this order was to place K in fear that Y would be unprotected from Ms. D and Z and the allegations against him were motivated by that fear. Notably, the order requiring K be returned to State A issued four days before her allegation of sexual abuse.³¹

He testified that K has consistently expressed fear for Y since 2015. She remained in City A in 2015-16 because she wanted to be near her little sister. He believed K was afraid that without her presence to provide care, Y would suffer due to her mother's lifestyle; that her mother would permit Z to return home after his release from jail; and Z would sexually harm Y the same way he sexually harmed her or worse. When K came to State A the fall of 2018, K's mental health suffered because of those fears and her concern for Y. He felt K returned to City A in 2019 to provide protection for Y in person. Thus, he theorized that when it became clear that K would be forced to leave Y because of the 2020 custody order, she made the allegations against him as a means of staying in City A with her sibling.³²

Four other witnesses testified on Mr. S's behalf. They were: C S, his wife; R N, his mother; U T, K's maternal aunt; and L P, the social worker from State A. Ms. S and Ms. N provided testimony giving a timeline for K's last visit to State A; the on-going affectionate and supportive relationship with her father; and K's mental health issues. Their description of K's mental health included descriptions of her long-standing fears regarding Y's safety and the prior actions K took to protect her sister. Those actions included responding to voices that told her to physically harm and starve herself.³³ Ms. S also testified that K asked if the Ss would be able to obtain custody of Y so they could live as a family in State A and was disappointed to be told that they could not do so.³⁴

U T provided testimony regarding the family history outlined above. In addition, she and her family attended K's sixth and seventh birthday parties. K and her daughter had princess

³⁰ XXX-19-00000CI.

³¹ Testimony of R. S.

³² Testimony of R. S, Jr.

³³ Testimony of C. S and M. N.

³⁴ Testimony of C. S.

parties those years. She has photographs of them dressed as princesses from those parties. She saw nothing unusual in K’s behavior at the parties. She believed that if something had happened to hurt K at the time, K would have told her given their relationship. She has never observed any indication of inappropriate conduct by Mr. S.³⁵ To the contrary, all she ever observed is a loving father-daughter relationship. In her opinion, Mr. S does not have the character to do such a thing.³⁶

Significantly, Ms. T has an educational background as well as experience in child development. She is alert to issues regarding child sexual abuse from her employment as the administrator of day care facilities. She understands that children often do not reveal abuse for long periods of time and that abusers do not fit a clear-cut mold, but she saw none of the classic signs of abuse between K and her father. In addition, she has seen K since February 2020 and believes K’s subsequent actions and revelations to family are inconsistent with the statement she provided to OCS.³⁷

L P testified regarding his investigation in State A, including his finding that there was no evidence of neglect or abuse in the S household.³⁸

IV. Discussion

A. The Merits of the Substantiation Findings

1. The Relevant Legal Framework

The Child Protection statutes require OCS to investigate reports of suspected harm to children and determine whether conduct by the suspect is “substantiated.”³⁹ To make a “substantiated” finding, OCS must determine, more likely than not, that the adult in question has abused, maltreated, or neglected a specific child. AS 47.17.290 sets out the legal standards used to make a substantiated finding. Under that 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

³⁵ Ms. T testified she would not say the same of her sister who was “a bad mother” who provided a “chaotic” environment for her children.

³⁶ Testimony of T. T.

³⁷ *Id.*

³⁸ Testimony of D. P.

³⁹ 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.”⁴⁰

Substantiated abuse, maltreatment, or neglect is reported on a list, established by AS 47.17.040, known as the "Child Protection Registry" the 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 registry can have meaningful implications on one's life and livelihood.⁴²

This case involves whether the allegations against Mr. S can properly be included in the Child Protection Registry. A substantiation 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.⁴³

OCS concluded Mr. S maltreated his daughter by engaging in conduct identified in AS 47.10.011(7). That statute addresses situations in which “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.”⁴⁴ The allegation in this case falls squarely within the conduct identified in AS 47.10.011(7). Thus, there is no dispute that if the allegation is proven it constitutes maltreatment under AS 47.17.290(9).⁴⁵ The single question presented is factual: did OCS prove the alleged sexual misconduct occurred.

⁴⁰ Note that this statutory definition is narrower in scope than the CINA definition. *Compare*, AS 47.10.014.

⁴¹ AS 47.17.040(b).

⁴² AS 47.17.040(b).

⁴³ *Id.*

⁴⁴ AS 47.10.011(7).

⁴⁵ “Sexual abuse” is defined in AS 47.10.990(33). That definition incorporates the conduct described in AS 11.41.410-460, the statutes criminalizing sexual assault and sexual abuse of minors. Penetration, AS 11.81.900(62), of the vagina of child under 18 years of age by a parent constitutes Sexual Abuse of a Minor in the First Degree, AS 11.41.434(a)(2). Engaging in “sexual contact” with a fourteen-year-old child by an adult constitutes Sexual Abuse of a Minor in the Third Degree, AS 11.41.438. “Sexual contact” includes “knowingly touching, directly or through clothing, the victim’s genitals, anus of female breast.” AS 11.81.900(61(A)(i). It does

The formal rules of evidence do not apply in proceedings regarding the propriety of an OCS substantiation “except as a guide.”⁴⁶ 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.⁴⁷ 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 finding unless it would be admissible over objection in a civil action.”⁴⁸ 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. Evaluation of K’s Juvenile Hearsay Statements

Mr. S denied the alleged sexual penetration or sexual contact under oath. He, his family, and friends provided a convincing timeline of events leading to the February 25, 2020 disclosure and insight into K’s mental processes. Thus, the OCS case rested entirely on the persuasive value of K’s video-recorded interview and whether it was enough to meet OCS’s burden.⁴⁹

The administrative law judge “may admit evidence of the type on which a reasonable person might rely in the conduct of serious affairs.”⁵⁰ The forensic interview conducted by OCS qualifies as such evidence. A child’s out of court testimony, standing alone, can be enough to meet OCS’s burden of proof.⁵¹

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

not include acts that “can reasonably be construed to be normal caretaker responsibilities for a child, interactions with a child, or affection for the child.” AS 11.81.900(61)(B).

⁴⁶ 2 AAC 64.290(b).

⁴⁷ 2 AAC 64.290(a)(1).

⁴⁸ AS 44.62.460.

⁴⁹ Mr. Q testified that after K made an undetailed disclosure to him, he arranged a full forensic interview. Mr. Q did not conduct that interview, although he did observe it from behind mirrored glass. The person who conducted the interview did not testify. Nor was K called as a witness. Thus, the outcome in this case depends almost entirely on evaluation of the video.

⁵⁰ 2 AAC 64.290(a)(1).

⁵¹ *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.

“childish” terminology;⁵² (4) the consistency of the statements; (5) the mental state of the declarant; and (6) the lack of motive to fabricate.⁵³ 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”⁵⁴ as well as external details.

In this case K’s statements were not spontaneous. K made her first statement in response to questioning by an OCS investigator. Although Mr. Q framed his queries in the form of open-ended questions, they were questions, nonetheless. In addition, K’s subsequent, substantive report came only at an interview specifically designed to solicit information regarding sex abuse.

As for her age, K was a fifteen-year old girl when the disclosure was made. She was old enough to appreciate the seriousness of her revelations which weighs in favor of them. However, the events she revealed primarily occurred nine years before the interview and she acknowledged her recollection had been impacted by the passage of time. In addition, her age and lack of life experience at the time those events took place would have shaped her ability to create a framework for her memories. Later events, including subsequent molestation, would also have influenced the prism through which K understood what occurred in the shower.

The third factor involving “childish” terminology is not a consideration.

With regard to the consistency factor, K’s revelations regarding abuse in the shower were consistent once disclosure took place. Her communication terminology and manner were also consistent with the recollection of a childhood event. The timing of the abuse was anchored to another event with emotional resonance to a child: a birthday. The mechanics of what happened are less detailed both because of the passage of time and because at the time they took place any child would have had fewer life experiences on which to base her understanding. However, the statement is also very brief, so the opportunity for inconsistency to arise was minimal. Importantly, K stated that at the time she believed she was merely being bathed, and it was only later as she matured that she concluded something else may have occurred.

K’s disclosure regarding the 2019 touching over clothing allegation was not consistent or detailed. In large part that is due to deficiencies in the interview. The interviewer made no

⁵² 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., supra.*

⁵³ *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.

⁵⁴ *Id.*

attempt to anchor the event in time. The only temporal marker was the statement it took place sometime in the “middle” of K’s visit. Evidence at the hearing suggests K was in State A a minimum of six to eight months before her departure in April 2019. There were no questions as to whether the inappropriate touching occurred at day or night; whether it took place in or outside the S residence; what K was wearing; what led up to the touching or what happened afterward.⁵⁵ Nor did the interview clarify what K meant by the statement: “it was really nothing.”

As for K’s mental state at the time of the disclosure, the most notable aspects of her demeanor are a certain despondency and world-weariness. K presented as a sad child who did not anticipate a remedy to her problems. When she closed her interview with the query, “will I ever have to see him?” she appeared to be expressing a genuine, plaintive hope that she would not have to do so.

However, K’s overall mental state must also be addressed in conjunction with the final analytical factor regarding motive to fabricate. This was the most contested aspect of the hearing. Mr. S and his witnesses established a legitimate reason for K to manufacture a claim: a desire to remain in City A to protect Y. K’s own interview established that she was aware that she would be required to return to State A without Y unless some unexpected intervention occurred. K clearly desired to stay with her mother and sister.

There was no genuine dispute that Ms. D had a substance abuse disorder characterized by recurrent use of drugs and alcohol that resulted in problems such as being unable to control her use of substances; failing to meet obligations to her children, family, and work; and spending a significant amount of time getting, using, or recovering from the effects of using her substances of choice. Ms. D’s conduct had a profound influence on the lives of her children. They experienced direct negative effects, including neglect and maltreatment, fewer household resources, and exposure to a sexual predator, Z.

There appears no doubt K attempted to compensate for Ms. D’s deficiencies and protect herself and Y. She expressed her need to assume responsibility to the S family and Mr. P. Such patterns of compensation are not unusual in the eldest children of addicted parents.⁵⁶

⁵⁵ There was an indication the family dog was present suggesting it occurred in the home.

⁵⁶ Testimony of D. P.

That K was willing to engage in elaborate and extreme measures to care for Y is evidenced by her decision to remain in her mother’s chaotic household after the birth of her sibling from 2015 to 2018. The depth of her commitment is evidenced by the psychic distress she felt at leaving Y in the fall of 2018. When K was physically distanced from Y while living with the Ss in State A, she experienced anxiety, depression, and, ultimately, temporary psychosis. That psychosis led her to ritualistic self-harm, including cutting and starving herself to “protect” Y. That K was willing to engage in self-harm in a misguided attempt to safeguard Y indicates that Mr. S’s belief she would also be willing to harm his reputation to do so is plausible.

This decision concludes the contents of the video interview did not meet the Division’s burden of proof. On the main allegation regarding sexual penetration in the shower, the factors identified by the Alaska Supreme Court tilt primarily in Mr. S’s favor and he testified credibly under oath that he did not penetrate or engage in sexual contact with K. Cleansing a child’s genitals by a parent as a form of legitimate care does not constitute sexual abuse of a minor or trigger a maltreatment finding.⁵⁷ On balance, the totality of circumstances establish that it is more probable than not that Mr. S engaged in normal caretaking responsibilities while bathing K when they were living at the apartment in City A.

K’s hearsay statement regarding touching through clothing lacked sufficient temporal or other detail to establish that it occurred by a preponderance of evidence, particularly considering Mr. S’s sworn denial. Reasonable people would not base their important decisions on a vague description coupled with the disclaimer “it was really nothing.”

Accordingly, the substantiation finding is Reversed.

V. Conclusion

The Division proceeded against Mr. S on very specific allegations. Both parties were hampered by the Administrative process that does not include the power to subpoena witnesses to the hearing. This decision does not involve whether OCS acted appropriately in its CINA response or whether Mr. S should have custody or visitation with K. However, the decision does conclude the Division failed to establish that Mr. S should be placed on the Child Registry. It is

⁵⁷ AS 11.81.900(61)(B).

more likely than not that Mr. S did not perpetrate an act of sexual abuse or sexual contact against K equaling maltreatment under AS 47.17.290 as defined by AS 47.10.011(7). Accordingly, the substantiation finding is Reversed.

Dated: December 28, 2020

Signed _____
Carmen E. Clark
Administrative Law Judge

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