

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

In the Matter of )  
 )  
T Z SR. ) OAH No. 19-0657-SAN  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

The Office of Children's School As (OCS) substantiated a report of child maltreatment against T Z Sr. based on its conclusion that Mr. Z placed his four children at risk of sexual abuse, subjected them to neglect, and physically injured one child. Mr. Z contested the substantiated finding.

Because OCS has shown that that Mr. Z more likely than not committed maltreatment against his children as alleged in two of the three allegations- risk of sexual abuse and physical abuse- the substantiated findings for those allegations are Affirmed. The proof underlying the neglect allegation is legally defective, and the substantiation is therefore reversed.

**II. Facts<sup>1</sup>**

*A. Family Background*

N Z has six children: A, B, C, D, E, and T Jr. (F). T Z Sr. is the father of D, E, and F. He is not A, B, or C's biological father. N and T have been a couple since A was approximately 5 years old.

In 2019 N and T were living with the four youngest children in a large home in City A. A (22) and B (21) were young adults living on their own. T was a software engineer who in the past spent substantial time away from the home working for a military contractor. N was a stay at home mother.

C (17) was a senior at School A High School. She was president of the National Art Society and a former varsity soccer player. D (15) was a freshman at School A High School. She was president of the freshman class and enrolled in the Honors Program. E (11) was in middle school. A talented singer, she hoped to perform professionally. F (8) was in first grade. He liked recess and art but did not think he was as talented as his sister C.

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<sup>1</sup> These facts were established by a preponderance of the evidence at the hearing.

A School A High School teacher found a list written by C about “why she was a mess” on or about April 24, 2019. The note included information about domestic violence in her home and potential sexual abuse by T Z Sr. School A High School made a report of harm to OCS.

An OCS worker contacted N Z and requested she bring the four children to Alaska Cares for an interview. Ms. Z did so on April 25, 2019. When asked, Ms. Z stated she believed they had been asked to come for interviews due to an event in December 2018 where Mr. Z was arrested for domestic violence. The subsequent interviews with Ms. Z and the children thereafter encompassed a wider set of circumstances than the contents of C’s note.

*B. The Alaska Cares Interviews*

In her interview Ms. Z admitted to domestic violence within her relationship with Mr. Z. She did not believe his conduct with C, D, or E had crossed sexually inappropriate boundaries. Ms. Z acknowledged, however, that she had counseled all her daughters to take care around T, especially when he was drinking.

C’s interview was approximately two hours long.<sup>2</sup> In her interview, C stated she wrote the note and shared it with her friends when she was trying to explain the emotional chaos and pain that she felt was “messing her up.” She wanted to explain to them why she reacted the way she did to certain events. She described her family as “false family” where “bad things happen but we all pretend they don’t.” She described the bad things as follows:

- When she was little (under 6) T would put his hands-on top of her butt or down her pants when they hugged.
- When she was 6, on one occasion he gave her “wet kisses” and asked her to kiss him like “a boyfriend.” She remembers because the kiss was different from the little pecks on the cheek or forehead that he usually gave her.
- As she became a preteen, her older sisters A and B told her to be careful of T because he was “creepy and untrustworthy.” They told her he behaved sexually inappropriately with them, but she didn’t believe what they said because he was always so good to her. She and T shared interests like soccer and sports. He was very supportive.
- On October 11, 2013, when C was 11, A reported that C and her sisters had been or were at risk of sexual abuse by T.<sup>3</sup> Other than conducting interviews, OCS took no action regarding that report.

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<sup>2</sup> AR 92-202 (transcript); AR 203 (video interview).

<sup>3</sup> D and E were as interviewed about this report, but C was not. AR, 206-08; 305-07

- C had knee surgery after a soccer injury when she was 13. Her knee required regular icing and massage. T helped with that care. One night she woke up with him massaging her knee. His hand also slid up her thigh toward her groin. She felt “cool” air on her vulva as he moved her pajama shorts and underwear to the side. This upset her so she yelled at him “to get out.”
- After that night she put locks on her door to prevent T from entering. The decision to put locks on her door was influenced by her older sisters’ comments and her mother telling her that she had seen T watching C while she showered. Her mother also told her that once when B was young, N found T naked from the waist down in B’s bed. He was very intoxicated, and N pulled him away from B. C interpreted N’s description of what happened on that occasion as an attempted “rape.” Later, B told C what she remembered about that night as well.
- After the night C threw T out of her room, his contact often bothered her but she felt he “skates just close enough to the edge that” her mom “can excuse his behavior and there is nothing (she and her sisters) can do.”
- Her mother will text her to say, “T is coming home drunk, lock your door.”
- In January 2018 when C was 15, she found a “spy camera” hidden in her closet. Her mother verified that T ordered the camera. They looked it up on the internet and discovered the camera was motion activated. The camera could send photographs directly to the operator’s cell phone as they were taken.
- C and her mother did not move the spy camera after they found it in C’s closet. Instead, they called the police.<sup>4</sup> When the police arrived, the camera was gone<sup>5</sup>
- C and her mother also reported the spy camera to OCS. C felt OCS did not take that report seriously.
- T later apologized to C for putting the camera in her room. T told C that he put the camera in her room to monitor whether she was sneaking out. C did not believe that. Her room is at the top of the house. She cannot simply crawl out a window. Had checking whether she was sneaking out truly been T’s motive, he would have placed the camera at her door not in her closet.

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<sup>4</sup> According to the related police reports, T admitted he purchased the camera and secretly installed it in C’s room, but T told the police he did so only for convenience purposes because her room was nearest the modem and Wi-Fi. AR 465-482.

<sup>5</sup> *Id.*

- On December 4, 2018, T and N came home intoxicated. T was angry with D. When D slammed the door to prevent him from entering her bedroom, T broke down the door and assaulted D. He struck D and pulled her hair. D escaped the house. C followed, taking the younger children away in a car until the police arrived. The police arrested T, but he returned home the next day. C recorded this event on her phone.
- More events happened in the home from January to March 2019, but the family “never talked about them.”<sup>6</sup>
- D is verbal and will argue with her parents, so they are meaner to her.
- C prefers to “just close down.”
- C did not have a clear understanding of how the domestic violence, alcohol abuse, and T’s other conduct impacted E until April 2019. In April 2019 E disclosed that T hit or touched her butt in a troubling way; E had begun to cut herself. The sisters spent an evening crying together when they realized they were all fearful and hopeless about their situation.
- After that night, C made the “list of reasons why I’m messed up.” The list included the full family history, including multiple contacts with OCS. Inappropriate touching by T and fear of sexual abuse was on the list.
- C did not intend for the list to be found. It must have fallen out of one of her books. C perceived that cooperation with OCS is pointless because OCS will not be able to act until she or her sisters really do “get raped.”

D also participated in an extensive interview on April 25, 2019 at Alaska Cares.<sup>7</sup> D cried intermittently throughout her interview.

- T is extremely “touchy” with C. She has seen this. She knows about the massage and the spy camera.
- C cries a lot and has disassociated herself from the family.
- She has not seen T be “touchy” with E, but E has told D that he is. In April 2019, E told D and C about the touching and that E had started to cut herself.
- T is not “touchy” with her. Unlike her sisters, she would fight back or report him. T does tell her to “go kill herself.” She keeps a lock on her door for protection because of his drinking.
- The family dog is also frightened of T when he drinks. The dog will cower and pee or hide under the bed. T can get very drunk and pass out.
- On December 4, 2018, she was home in her room when her parents came home. T was very drunk. He brought a box into her room and kept screaming at her to open it. She refused to do so. When he left the room for some reason, she slammed the door. Then he broke down the door.

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<sup>6</sup> Neither OCS nor the police asked C to describe these events or what she meant by this statement.

<sup>7</sup> AR 229-303 (transcript); AR 303 (video interview).

The door frame shattered. She tried to run, but T grabbed her by the hair. He slapped and hit her before pushing her to the ground. “He started beating me up.” When she fell, she cut her leg on the splinters and/or nails from the broken door. D received a cut more than a foot long from her ankle to knee.<sup>8</sup> He told her to “get out,” so she ran from the house. She hid behind a garbage can for two hours until the police arrived. T was arrested. After T’s arrest she saw that the box contained a paddle that T made to use on her. Her mother told her that T was coming home and to fix the door before he arrived. D took a hammer and nails and did her best to reframe it. T was angry and scary after he returned. She was too nervous to eat for a week.

- She wishes her mother had the courage to end the marriage. “We’d be broke living in a trailer, but I’d rather be poor and happy.”

E’s interview at Alaska Cares primarily focused on the December 2018 call to the police.<sup>9</sup> E was very fine-boned and petite. She appeared nervous and sad. When left alone she sang to herself. A portion of the lyrics she sang went: “I’ll tell the cops if you don’t stop. I’m not your (inaudible). You know that’s bull; you know that’s bull..”

In the interview she stated.

- Her sisters both have locks on their doors to protect them from T. She would like a lock on her door, too.
- They have the best dog. She is afraid of T, though.
- On December 4, 2018, she was asleep when her parents came home. It was late. They were too drunk to unlock the house door, so she went downstairs to let them in. T was clearly angry. She immediately went back upstairs. She could hear him screaming, “open the box, open the box” at D, but she did not understand what that meant. She heard D’s door slam. She heard T break it open. She saw her mother calling the police. She could hear D being hit. It was extremely scary. C came and took her and F away in the car. After T was arrested, she saw the box with a homemade paddle inside it. “He was going to beat D with it.”
- Once when she woke T up while he was sleeping on the couch, he “rubbed” her butt. She told her mother. Her mother talked to T and he quit rubbing her butt in that manner. He continues to pat or hit her butt. That makes her uncomfortable. She can’t really describe the touching, but she dislikes it and it makes her scared.
- Her family is fake.

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<sup>8</sup> AR 224-231.

<sup>9</sup> AR 317-411 (transcript); AR 304 (video interview).

F was the last child interviewed on April 25, 2019.<sup>10</sup> His interview was much shorter than his sisters' but contained several interesting details. F was focused on playdough art for most of the interview, but he noticeably swung his arms and legs when he talked about anger and the night the police arrested T.

- There is domestic violence between his parents, but it is mostly verbal. They argue a lot. Mom does push Dad.
- In December after she wrecked T's car, D stole his marijuana. She used the marijuana to make cupcakes to sell for money to pay for repairs to the car. T found out. He was very angry.
- He was very scared the night T broke the door down. Mom called the cops. No one got hurt except D's feelings.

The OCS file verified that OCS responded to repeated reports of sexual impropriety in the home: one regarding sibling on sibling tribadism or frottage and one regarding sexual contact or abuse by T. These reports were not substantiated.<sup>11</sup>

The OCS file included police reports regarding the January 30, 2018 spy camera report and the arrest for domestic violence on December 4, 2018.<sup>12</sup> The OCS file did not include the results of the criminal investigation or charges.<sup>13</sup> OCS did not have the children psychologically or behaviorally evaluated.

### *C. Procedural History*

On May 10, 2019, OCS mailed a "Notice of Alleged Child Maltreatment Decision and Cases Statutes and Placement on the Child Protection Registry" to Mr. Z. The Notice stated OCS had received a report that C, D, E, and F were all victims of maltreatment under Alaska Statute 47.17.290(9) as described in AS 47.10.011(6), (7), and (9). Mr. Z had been named as an alleged perpetrator of the listed maltreatment. What followed was a chart listing all four children and Mr. Z as the perpetrator of substantiated findings of sexual abuse and neglect. In addition, D was listed as the victim of physical abuse by him. No details regarding the basis for the finding were included in the Notice to Mr. Z.

### *D. The Hearing*

#### 1. The Division's Case

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<sup>10</sup> AR 427-463 (transcript); AR 464 (video interview).

<sup>11</sup> AR 58-75.

<sup>12</sup> AR 38-55; 465-482.

<sup>13</sup> AR; Testimony of G H.

After Mr. Z requested a hearing to challenge the allegations, the Office of the Commissioner referred the matter to the Office of Administrative Hearings. This led to a formal telephonic hearing May 26, 2021. Assistant Attorney General Brian Starr appeared on behalf of OCS and attorney George Davenport represented T Z Sr. The Division case was straightforward: veteran OCS investigator and supervisor G H testified regarding the OCS investigation and the agency record, including the forensic interviews from May 2019, was admitted.

OCS argued that Mr. Z committed maltreatment as defined by reference to AS 47.10.011(7) by touching C during care of her knee injury as well as kissing and fondling her butt when she was younger. OCS also argued Mr. Z maltreated E under the statute when he touched her butt. In addition, OCS asserted the totality of Mr. Z's conduct placed his children at risk of sexual abuse.

OCS argued Mr. Z committed maltreatment as defined by reference to AS 47.10.011(7) because his was or should have been aware that his conduct was causing his children mental injury. OCS argued this conduct constituted neglect because their mental injury proved he failed to provide them with necessary care and control.

Lastly, OCS argued Mr. Z committed maltreatment as defined by reference to AS 47.10.011(9) on December 4, 2018, when D was physically injured during an incident of domestic violence.

## 2. Mr. Z's Defense

Mr. Z did not testify. Mr. Z's defense to the substantiated finding based on AS 44.10.011(7) was that he had not committed any act of sexual abuse. According to his argument, the girls had misinterpreted innocuous expressions of physical affection, and they were not at risk of sexual abuse.

Mr. Z primarily presented a legal defense to the substantiated finding based on AS 44.10.011(9). He argued OCS had misconstrued and misapplied the statute. Mr. Z argued he had not failed to provide his children with adequate food, clothing, shelter, education, medical attention, or other care and control as defined by law. Mr. Z argued that his children's academic, athletic, and social success demonstrated he had not failed to provide adequate care and control. He argued there was no evidence his children were mentally injured. Further, Mr. Z pointed out that if mental injury was the basis of OCS's substantiation, a specific statute addressing mental

injury exists but was not alleged in his case presumably because OCS was aware it could not meet the evidentiary requirements.

Mr. Z offered a more blurred defense to the substantiated finding based on AS 44.10.011(6), substantial physical injury to D. Mr. Z used N's and F's statements to OCS to suggest that he did not intend to injure D. He pointed to N's statement to OCS that D "injured herself" when she fell in the room after Mr. Z broke the door. From his perspective, it necessarily followed that the injury was an unfortunate, accidental by-product of a sordid but isolated event, not substantial physical injury as defined by law.

### 3. The Division's Rebuttal

In response to Mr. Z's legal arguments, OCS acknowledged that it could not prove the elements of sexual abuse as defined by the statutes listed in AS 11.47.011(7). OCS asserted, however, that it had proved risk of sexual abuse.

OCS also acknowledged its theory that Mr. Z "neglected" his children because his conduct negatively impacted their mental health, did not fit squarely within the parameters of AS 47.10.011(9).

Lastly, OCS argued that it did not have to prove Mr. Z purposefully injured D. The statute was satisfied because he intentionally or recklessly caused physical injury to her.

## **III. 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."<sup>14</sup> 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. 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.

Substantiated maltreatment is reported on a child protection registry established by AS 47.17.040. The registry is not available to the general public, but is used by governmental agencies with child and adult protective functions as well as in some occupational licensing and

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<sup>14</sup> AS 47.17.025; AS 47.17.030.



enforcement.<sup>15</sup> Placement on the registry can have meaningful implications on one's life and livelihood.<sup>16</sup> This case involves whether the allegations against Mr. Z can properly be included in the registry.

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. Unlike in criminal prosecutions, where the state must carry its burden beyond a reasonable doubt, in this context the burden of proof is considerably lower. OCS must only prove that it is more likely true than not true that Mr. Z committed the acts of which he is accused, and that the children were harmed thereby.

## 2. The Relevant Evidentiary Framework

The formal rules of evidence do not apply in proceedings regarding the propriety of an OCS substantiation "except as a guide."<sup>17</sup> 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.<sup>18</sup> 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."<sup>19</sup> 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.

As mentioned, the administrative law judge "may admit evidence of the type on which a reasonable person might rely in the conduct of serious affairs."<sup>20</sup> 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.<sup>21</sup>

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

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<sup>15</sup> AS 47.17.040(b).

<sup>16</sup> AS 47.17.040(b).

<sup>17</sup> 2 AAC 64.290(b).

<sup>18</sup> 2 AAC 64.290(a)(1).

<sup>19</sup> AS 44.62.460.

<sup>20</sup> 2 AAC 64.290(a)(1).

<sup>21</sup> *In re E.B.*, OAH 16-1362-SAN (Commissioner of Health and Social School As 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.

are: (1) the spontaneity of the child's statements; (2) the age of the child; (3) the use of “childish” terminology;<sup>22</sup> (4) the consistency of the statements; (5) the mental state of the declarant; and (6) the lack of motive to fabricate.<sup>23</sup> 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”<sup>24</sup> as well as external details. While this analysis is not required in the administrative proceeding, it can provide a useful framework.

*B. Did OCS meet its burden of showing that the maltreatment allegations should be substantiated?*

Turning finally to the merits of OCS’s substantiated findings in this case, OCS contends that Mr. Z’s conduct – touching his daughters and assaulting D – justifies substantiated findings of neglect, substantial risk of sexual abuse, and physical injury.

1. OCS Did Not Prove Mr. Z Committed Neglect as Alleged

OCS substantiated a finding that Mr. Z committed maltreatment under Alaska Statute (AS) 47.17.290(9) as described in AS 47.10.011(9). AS 47.10.011(9) applies when “conduct by or conditions created by the parent, guardian, or custodian have subjected the child or another child in the same household to neglect.” Neglect is defined as the failure 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.”<sup>25</sup> OCS’s conclusion that Mr. Z neglected C, D, E, and F was based on its theory that he placed them at risk of sexual abuse and, as a result, the children suffered mental injury. Mental injury is defined as “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.”<sup>26</sup>

Mr. Z’s legal argument that the theory of alleged maltreatment articulated by OCS does not fall within the parameters of AS 47.10.011(9) statute is correct. Parental action and inaction

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<sup>22</sup> 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.*

<sup>23</sup> *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, [Z] children may also be suggestible. *In re E.B., supra*, at 5.

<sup>24</sup> *Id.*

<sup>25</sup> AS 47.10.014.

<sup>26</sup> AS 47.17.290(10); AS 47.10.990(23).

can cause children to suffer mental injury.<sup>27</sup> However, AS. 47.10.011(8)(A) rather than AS 47.10.011(9) addresses the circumstances where the parent has caused mental injury to the child.

Mental injury cases require a showing that the child demonstrates psychological or behavioral problems because of parental failure.<sup>28</sup> The injury and resulting harm are confirmed by experts such as therapists or social workers who can testify that the mental injury suffered by the child was caused or at least exacerbated by living with the parent.<sup>29</sup> OCS did not meet or attempt to meet these standards.

OCS did not have the children evaluated so it could not demonstrate that any child experienced psychological, behavioral, or emotional injury. OCS did not present expert evidence on the likelihood of risk of such injury from Mr. Z's conduct. OCS merely asked the tribunal to speculate that mental injury was established and, ergo, neglect must have occurred, because the children described disturbing events and their emotional responses to those events. Being scared or worried does not necessarily result in mental or psychological injury just as being scared and worried is not physical abuse.<sup>30</sup> In the absence of testimony identifying an actual diagnosis of any child or expert testimony as required in the more specific statute, it is not possible for this tribunal to find that mental injury occurred regardless of the presences of circumstances that could raise concern about such injury. By electing not to meet the required statutory showing, OCS has made its case on this allegation untenable.<sup>31</sup>

The OCS substantiation based on neglect is reversed.

## 2. OCS Did Establish a Substantial Risk of Sexual Abuse

OCS substantiated a finding that Mr. Z committed maltreatment under Alaska Statute (AS) 47.17.290(9) as described in AS 47.10.011(7). 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

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<sup>27</sup> See *V.S.B. v. State, Dept. of Health and Social School As, Div. of Family and Youth School As*, 45 P.3d 1198 (Alaska 2002)

<sup>28</sup> AS 47.17.290(10); AS 47.10.990(23).

<sup>29</sup> *Id.* ; *V.S.B.*, 45 P.3d at 1203-04.

<sup>30</sup> See, *In the Matter of K.Q.*, OAH No. 20-0012-SAN (Commissioner of Health and Social School As 2020).

<sup>31</sup> There is no doubt that Mr. Z's daughters experienced emotional distress. They discussed living with fear. They kept locks on their doors. They were warned by their siblings and mother to take care around Mr. Z. Mental health includes emotional, psychological, and social well-being. It affects how people think, feel, and act. It also helps determine how they handle stress, relate to others, and make choices. Mental health is important at every stage of life, from childhood and adolescence through adulthood. The chronic stress, anxiety, fear, shame, and sadness that accompany domestic violence and sexual abuse can constitute legitimate harm to children. However, the statute regarding proof of mental injury imposes obligations of proof on OCS that it did not meet or attempt to meet.

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.”

OCS conceded that it did not have evidence that Mr. Z sexually abused any of his children. In this case the question is whether OCS could establish the children were at substantial risk of sexual abuse before the substantiated finding in May 2019. Prior decisions by the Office of Administrative Hearings (OAH) have repeatedly stressed the difference in purpose between the child protection statutes, AS 47.17, and those of the Child in Need of Aid (CINA) statutes, AS 47.10. “CINA adjudications are forward-looking in terms of the need to assess and avoid future possible risks, while AS 47.17 substantiations look backwards to determine if particular acts or omissions constitute ‘abuse or neglect’” or maltreatment.<sup>32</sup>

Given the concession that there is no proof Mr. Z sexually abused his daughters, it is important to begin the remainder of the risk-of-sexual-abuse analysis with discussion of *In the Matter of D.N., supra*. In that case OCS substantiated a report of maltreatment referencing AS 47.10.011(7) against a mother who OCS concluded failed to protect her child from a substantial risk of sexual abuse by permitting the child’s father, believed by OCS to be a potential perpetrator of sexual abuse, to have contact with the child. The decision concluded that OCS was factually wrong—the mother had not failed to protect her child.<sup>33</sup> Importantly, in the circumstances where the substantiation rested on the conclusion the individual failed to protect a child from potential sexual abuse by another, the Commissioner indicated that “neglect” not “sexual abuse” was the appropriate characterization on which to base placement on the child protection registry.<sup>34</sup>

In this case, Mr. Z himself is alleged to be the source of risk of sexual abuse. It would be logically and legally tortuous to conclude this very different circumstance should also be viewed through the lens of neglect rather than abuse or maltreatment- that is, that he “neglected” to protect the children from himself. Therefore, in this circumstance, the neglect characterization will not be applied.

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<sup>32</sup> *In the Matter of D.N.*, OAH 16-1407-SAN (Commissioner of Health and Social School As 2017)(available on line at <https://aws.state.ak.us/OAH/Category/Item?cat=121>) p.13.

<sup>33</sup> *In the Matter of D.N.* at 14-19.

<sup>34</sup> *Id.* at 12-14.

The maltreatment statute, AS 47.17.290(3) is clear: provided the parent caused the conditions, if OCS can prove that past conditions within the household met one or more of the standards established in AS 47.10.011 then a finding of maltreatment can be made. AS 47.10.011(7) is expressly disjunctive. It can be triggered in either of two ways: first, by proof of sexual abuse itself or, second, by proof of substantial risk of sexual abuse. This decision concludes that although there is no evidence that Mr. Z sexually abused any of his children, the evidence is sufficient to affirm that his daughters were at substantial risk of sexual abuse prior to May 10, 2019, the date OCS substantiated the complaint.<sup>35</sup> Specifically, this decision concludes they were at risk in the past, regardless of whether they also remained at risk in the future.

The evidence on this point was extensive. It included assertions going back more than a decade that Mr. Z behaved with sexual impropriety toward A. A exhibited sexually precocious behavior as a child while living in his custody. As an adult A reported her own abuse and suspicions of continued abuse to OCS.<sup>36</sup> While OCS did not substantiate abuse at the time, the existence of these reports would be considered by reasonable people in evaluating the totality of circumstances and whether a risk of harm to C, D, and E existed.

The same is true of the hearsay statements that N and B told C and D about the time an intoxicated Mr. Z was found unclothed in B's bed on one occasion and curled around her clothed on another. Standing alone these second-hand reports would not be sufficient to support a substantiated finding, but reasonable people would consider them relevant in assessing the totality of circumstances surrounding risk to Mr. Z's children.

C and D believed their older sister had almost been "raped" by Mr. Z. Notably, C and D took precautionary steps to prevent Mr. Z from accessing their rooms when they were alone or asleep. Both girls had locks on their doors. There was no dispute that these precautions existed in the Z household. Use of door locks to prevent Mr. Z from entering his daughters' rooms is significant indication of risk of harm.

It is possible to suggest the locks were merely to prevent physical violence, but on balance that does not seem to be their probable purpose. Certainly, none of the girls expressed fear of purely physical harm by Mr. Z. They expressed fear of sexual abuse. In addition, until December 2018 there was no other indication Mr. Z was physically abusive toward his children

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<sup>35</sup> This decision does not find evidence to support the conclusion that Mr. Z's son was at risk of sexual abuse.  
<sup>36</sup> AR 058-75.

while there had been allegations of sexual improprieties with his stepdaughters for more than a decade.

N supported keeping locks on her daughters' doors. She also established a family text alert system regarding Mr. Z's drinking. Mr. Z was a heavy drinker. There is no doubt that overconsumption of alcohol can lead to reduced judgment and impulsive behavior, including sexual misconduct. The fact that the women in his household had an electronic safety-chain is also a significant indication of risk of harm.

C told OCS about specific instances of touching consistent with grooming or attempted sexual abuse over an extended period. She credibly described being touched and kissed inappropriately as a child. Mr. Z also touched her on her leg and thigh when she was a teenager. His conduct stopped only when she responded by telling him to leave her room. After that she kept locks on her door.

C changed her bathing habits after her mother told her that Mr. Z watched her shower. After that, Mr. Z put a spy camera in her room.<sup>37</sup> The camera was placed inside a closet which suggests a plan only to photograph C when she opened the door to dress or undress. This does not appear to be innocuous conduct.

C's sister, D, observed Mr. Z's "touchy" behavior toward C and how it differed from the expressions of affection she received.

E stated that she was uncomfortable with the way Mr. Z touched her buttocks. She believed she, too, was the victim of grooming behavior. E told her sisters she had started to cut herself as reaction to her fear.

The concerns expressed by C, D, and E do not appear to be groundless fears given the totality of circumstances described. In their interviews their disclosures were consistent with one another but did not have indicia of having been coached or influenced. No motive to fabricate was suggested. It appears the girls were sufficiently cynical regarding the ability of their mother and the system to protect them, that they saw no point in making additional reports to their teachers or OCS. However, beneath the cynicism, their mental affects were consistent with

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<sup>37</sup> Neither his explanation to C or the police seemed particularly credible. Placing a motion detector camera in a closet to monitor his daughter leaving the room does not seem practical. His statement to the police that the camera needed to be near a modem for it to work is inconsistent with technology an IT expert like Mr. Z would be expected to know. Typically, security cameras are connected to routers not modems for security reasons. In addition, it is puzzling that if the camera had merely been left in the closet to charge, that Mr. Z would not have been able to produce it for the police. Overall, his explanations made his actions more rather than less suspicious.

legitimate fear, worry, and anger. The factors listed in *In re T.P., supra*, support a finding their reports were credible.

The combination of these factors leads to the conclusion C, D, and E were at risk of experiencing sexual abuse in 2019 and before. It is not necessary to determine to what extent vigilance, precautions, and/or lack of opportunistic timing obstructed or prevented completion of any particular act of sexual abuse. The risk prior to May 2019 appears clear and definite.

The OCS substantiation based on risk of sexual abuse is affirmed.

However, this decision rests on the very narrow circumstances existing in this case. Those circumstances established a constellation of factors including evidence that 1) Mr. Z engaged in affirmative conduct inconsistent with typical expressions of parental affection; 2) the children and/or another caregiver recognized a risk of sexual abuse; and 3) active precautions were taken to protect the children at the time. This decision should not be read as a requirement that all those circumstances must exist before a finding of past risk of sexual abuse existed. However, it should also not be read as a finding that conduct consistent with “grooming” behavior was or will be sufficient to meet the OCS burden of proof that maltreatment under AS 11.47.011(7) occurred. This decision does not address that issue, especially in the absence of expert testimony identifying “grooming” and analyzing the particular risk within the household.

### 3. OCS Did Prove Mr. Z Committed Substantial Physical Abuse of D

OCS concluded Mr. Z maltreated D by engaging in conduct identified in AS 47.10.011(6). That statute addresses situations in which “ the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately.”<sup>38</sup> “Physical harm” will be found if the child was the victim of an act described in AS 11.41.100— 11.41.250,<sup>39</sup> 11.41.300,<sup>40</sup> 11.41.410 — 11.41.455,<sup>41</sup> or AS 11.51.100<sup>42</sup> and the physical harm occurred as a result of conduct by or conditions created by a parent, guardian, or custodian.”<sup>43</sup> The allegation in this case is that Mr. Z intentionally or recklessly assaulted D causing pain and a

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<sup>38</sup> AS 47.10.011(6).

<sup>39</sup> The Homicide, Assault, and Reckless Endangerment statutes.

<sup>40</sup> The Kidnapping statute

<sup>41</sup> The Sexual Assault and Sexual Abuse of Minor statutes.

<sup>42</sup> The Endangering the Welfare of a Child in the First-Degree statute.

<sup>43</sup> AS 47.10.015.

cut. These allegations if proven fall squarely within the conduct identified in AS 47.10.011(6) because they satisfy the elements of AS 11.41.230, Assault in the Fourth Degree.

The evidence overwhelmingly established that Mr. Z intentionally or recklessly assaulted D. Mr. Z did not testify. However, the evidence clearly established that D felt fear and pain from the pulling of her hair, his blows to her body, and the injury she received when she fell in the debris from the door broken by Mr. Z. There is no evidence that Mr. Z acted in a thoughtful and reasonable manner to provide appropriate parental discipline as implied by argument: he was drunk and angry. Nor did D “injure” herself when she was pushed or fell to the ground during their struggle.

The OCS substantiation based on physical injury is affirmed.

#### **IV. Conclusion**

For the reasons contained herein, the OCS substantiated findings of maltreatment based on AS 47.10.011(6) and (7) are affirmed.

The OCS substantiated finding of maltreatment based on AS 47.10.011(9) is reversed.

Dated: June 21, 2021

*Signed* \_\_\_\_\_  
Carmen E. Clark  
Administrative Law Judge

#### **Adoption**

The undersigned, by delegation from the Commissioner of Health and Social School As, 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 30<sup>th</sup> day of July, 2021.

By: *Signed* \_\_\_\_\_  
Name: Christine R. Marasigan  
Title: Program Coordinator II

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