

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

In the Matter of)
)
E U) OAH No. 19-0069-SAN
) Agency No.
_____)

DECISION

I. Introduction

The Office of Children’s Services (OCS) placed E U on the Child Protection Registry based on a substantiated finding that Mr. U had committed an act of child maltreatment against his teenage daughter in December 2017. Mr. U requested a hearing to challenge that finding and its inclusion in the Child Protection Registry. A hearing was held at which Mr. U represented himself and testified on his own behalf. Assistant Attorney General Erik Fossum represented OCS and presented testimony from OCS Protective Service Specialist II (PSSII) T D.

Based on a careful review of the evidence presented, this decision concludes that OCS did not meet its burden of establishing, by a preponderance of the evidence, that Mr. U committed the acts on which the substantiated finding of sexual abuse was based. Therefore, OCS’s substantiated finding of sexual abuse is overturned.

II. Facts

This case involves allegations of sexual abuse brought against Mr. U by his minor daughter J.H., who was 16 years old at the time of the December 2017 allegations at issue in this case. Prior to the winter of 2017-2018, Mr. U had not been very much involved in J.H.’s life.¹ In November 2017, however, she moved in with Mr. U as a result of being a victim of physical abuse at her mother’s home.² Apparently J.H. obtained a domestic violence restraining order against her mother in connection with that incident of physical abuse.³

J.H. lived in Mr. U’s home from November 2017 until late February 2018, when she reported that he had injured her in a physical altercation on February 27, 2018.⁴ She was interviewed by an OCS investigator in early March 2018 regarding this incident.⁵ At that time, in addition to describing in detail the physical altercation with her father, J.H. also disclosed that

¹ U testimony.
² D testimony.
³ *Id.*; U testimony.
⁴ *Id.*; Agency Record (AR) pp. 000027-29, 000036-46 (photos of extensive bruising on J.H.’s arms and legs).
⁵ AR pp. 000028-29.

“her father would sometimes get touchy with her when drinking, touching her thigh, touching her arm.”⁶ She said that “she would tell him it’s not appropriate ... he needs to stop” and “she had to slap his hands away at least one time.”⁷ The notes of this interview state that J.H. was “screened for sexual abuse, made no disclosures.”⁸

As a result of the physical altercation incident, OCS entered a substantiated finding of physical abuse against Mr. U.⁹ That finding is not at issue in this appeal. After leaving her father’s home, J.H. lived at a Shelter House for a few days, then was placed in foster care.¹⁰

About five and a half months later, in August 2018, J.H. reported that Mr. U had sexually abused her back in December 2017.¹¹ J.H. was eventually interviewed by an investigator at Alaska CARES;¹² a video recording of the interview was entered into the record of this matter.¹³ J.H. described an initial incident in which her legs had been sore from lifting weights or working out at school, so she had asked Mr. U to massage them. She said that she was lying on her stomach, and while massaging the backs of her legs, Mr. U moved up to massage her back, and while doing that she felt “this thing touched me.” J.H. would later clarify to the investigator that by “thing,” she meant Mr. U’s erect penis, and that she felt him rubbing it against her body. She said that she told Mr. U to stop, but he objected “no, I’m not done.” J.H. told the investigator that another similar incident occurred during this timeframe, in the approximate period between late December 2017 and early January 2018.¹⁴ J.H. repeated essentially the same allegations in an interview with an Anchorage Police Department investigator in mid-February 2019.¹⁵

⁶ AR p. 000028.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; U testimony. Ms. D also testified that J.H. obtained a restraining order against Mr. U as a result of the February 2018 incident; whether that is accurate, however, is not clear on this record.

¹⁰ D testimony.

¹¹ Apparently J.H. told her mother about these allegations, who then informed OCS, leading to OCS opening an investigation.

¹² Alaska CARES (Child Abuse Response Evaluation Services) is a multi-disciplinary child advocacy center in Anchorage.

¹³ The Alaska CARES interview did not take place until November 1, 2018; the reasons for this delay were unclear. In addition, it is noted for the record that technical difficulties in reviewing video of this interview caused several delays in completing the hearing.

¹⁴ J.H. forensic interview, November 1, 2018.

¹⁵ AR pp. 000065-66; the reasons for APD not interviewing J.H. until February 2019 were unclear.

As a result of these allegations by J.H., OCS substantiated a single finding of sexual abuse against Mr. U.¹⁶ He requested an administrative hearing on January 11, 2019.¹⁷ The hearing was held telephonically on August 2 and September 23, 2019.

During the hearing, OCS requested that the documents and interview recordings relating to the March 2018 physical abuse finding be excluded from the record. This request was initially granted. Later in the hearing, however, when Mr. U clarified his position that J.H.’s previous statements to investigators were relevant to her later interviews regarding the sexual abuse allegations, the March 2018 materials were admitted. The record was then closed and the matter taken under advisement.

III. Discussion

OCS maintains a central registry of all investigation reports.¹⁸ Those reports are confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.¹⁹ At the conclusion of an investigation, OCS may find that an allegation has been substantiated. A substantiated finding is one where the available facts gathered from the investigation indicate that more likely than not, a child has been subjected to maltreatment under circumstances that indicate the child’s health or welfare is harmed or threatened thereby.²⁰

Alaska Statute 47.17.290(3) states that “child abuse or neglect means 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.”²¹ The statutory definition of “maltreatment” leads us to Alaska’s “child in need of aid” provisions: “Maltreatment means an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.011.”²² AS 47.10.011 has twelve separate paragraphs, each of which sets out a distinct definition of what constitutes maltreatment. In this case, OCS has substantiated a single finding of sexual abuse, which is covered by AS 47.10.011(7), defining a “child in need of aid”

¹⁶ AR pp. 000001-2 (December 14, 2018 letter from Ms. D to Mr. U).

¹⁷ AR p. 000024.

¹⁸ AS 47.17.040.

¹⁹ AS 47.17.040(b).

²⁰ OCS Child Protection Manual, Ch. 2.2.10.1 (Rev. 5/16/15), *available at*: <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

²¹ AS 47.17.290(3).

²² AS 47.17.290(9).

as a child who has “suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse, as a result of conduct by ... the child’s parent, guardian or custodian”²³

In this administrative appeal by Mr. U, it is OCS’s burden is to prove, by a preponderance of the evidence, that Mr. U committed the acts of sexual abuse that are the basis for OCS’s substantiated finding against him.²⁴ “Preponderance of the evidence” means that a disputed fact is shown to be more likely true than not true.²⁵

While preponderance of the evidence is a relatively low evidentiary threshold, it is still a threshold that OCS is required to satisfy. The evidence presented here did not satisfy OCS’s burden.

The factual record presented in this matter establishes that J.H. alleged that Mr. U sexually abused her in late December 2017 to early January 2018. She did not make these allegations to her mother, however, until August 2018 (later repeating them to OCS investigators in November 2018).

In the meantime, in March 2018, J.H. made allegations concerning the physical altercation with her father that were substantiated as a physical abuse finding against Mr. U. During the March 2018 interview, the investigator noted that J.H. was “screened for sexual abuse, made no disclosures.”²⁶ In addition, during that interview J.H. stated that when her father drank alcohol he would sometimes “get touchy with her” and inappropriately touch her on the thigh, and that on at least one occasion she had to slap his hand away.²⁷

The fundamental flaw in OCS’s case in support of its substantiated finding of sexual abuse against Mr. U is that the finding is based on allegations made by J.H. nearly a year later and that are contradicted by her own statements in an interview done about two months after the incidents were alleged to have occurred. While it is not inconceivable that a victim of sexual abuse would initially deny that abuse occurred, and would later disclose it, OCS did not meet its burden of showing that that scenario is more likely true than not true in this case.

The critical question is, why did J.H. not disclose her sexual abuse allegations at the prior interview? OCS argued at the hearing that J.H.’s March 2018 interview was focused on the

²³ AS 47.10.011(7).

²⁴ *In Re K.C.G.*, OAH No. 13-1066-SAN (Commissioner of Health & Social Services, 2013).

²⁵ 2 AAC 64.290(e).

²⁶ AR p. 000028.

²⁷ *Id.*

physical altercation between her and Mr. U, that J.H.'s focus was on leaving Mr. U's home, and that as a minor, she may have been somewhat intimidated by the investigative process and thus avoided "an uncomfortable topic" when faced with an unexpected question. OCS also argued that the specificity of J.H.'s description of the sexual abuse allegations in her November 2018 interview bolster their credibility.

In his testimony at the hearing, Mr. U adamantly denied the sexual abuse allegations at issue in this matter. He denied ever even massaging his daughter's legs and said that when she complained about sore muscles from working out, he laughed at her. Mr. U pointed out the inconsistencies between J.H.'s statements in March 2018, when the alleged sexual abuse incidents would have been fresh in her mind, and in the November 2018 interview, when several months had passed after her protective order against her mother had been dissolved, leaving ample time for her to be influenced against him by her mother.²⁸ Mr. U also argued that the proposition that J.H. would be intimidated in an OCS investigative interview lacks credibility, because J.H. had been involved in at least 12 OCS investigations throughout her childhood. He stated emphatically that the alleged sexual abuse incidents never occurred, and he argued that the inconsistencies in J.H.'s statements to investigators fatally undermine OCS's sexual abuse substantiation against him.

J.H. did not testify at the hearing; nor were Mr. U or the administrative law judge (ALJ) ever given any opportunity to question her or to question the investigators who interviewed her in March 2018, November 2018, or February 2019. The only investigator to testify at the hearing, Ms. D, observed the November 2018 interview but did not directly participate in it. Mr. U and the ALJ were both able to review the video recordings of the March and November 2018 interviews, but it can be very difficult to assess the credibility of abuse allegations based on such recordings.²⁹

The decision in this case boils down to a weighing of competing evidence. On one hand, weighing against the substantiated finding, there is Mr. U's relatively credible testimony, in which he admitted to the facts concerning the physical abuse substantiation against him (which

²⁸ The protective order was apparently dissolved at some point in August 2018.

²⁹ This problem is exacerbated by the fact that forensic investigators interviewing minors regarding abuse allegations are, understandably, more focused on supporting the minor's ability to make disclosures than on resolving inconsistencies in their statements.

he did not appeal), while adamantly and consistently denying that he ever committed any acts of sexual abuse against his daughter.

On the other hand, weighing favor of the substantiated finding, there are J.H.'s statements in the November 2018 and subsequent interviews -- but these statements are clearly inconsistent with her statements in March 2018. In evaluating the import of these inconsistencies, it must be noted that OCS's argument that the March 2018 interview was solely focused on J.H.'s physical abuse allegations is not accurate. To the contrary, during that interview J.H. discussed in considerable detail her allegation that on occasions when Mr. U drank alcohol, he sometimes got too "touchy" with her. J.H. was clearly comfortable with discussing these types of allegations against her father in March 2018, yet she denied any sexual abuse had occurred. OCS has provided no reasonable explanation for why J.H. would disclose her father's being inappropriately "touchy" while omitting any mention of rubbing up against her with an erection. In addition, if J.H.'s focus in March 2018 was on "getting out of her father's house," as argued by OCS, fully disclosing any inappropriate behavior by her father at that time would have been consistent with that focus.

OCS has the burden of proving that it is more likely true than not true that Mr. U committed acts of sexual abuse against J.H. Weighing the competing evidence, this decision finds that OCS did not meet its burden in this matter. The inconsistencies between J.H.'s statements to investigators, the lack of a reasonable explanation for those inconsistencies, and the absence of any testimony from anyone who was directly involved in discussing these allegations with J.H., all lead to the conclusion that OCS's evidence does not outweigh Mr. U's credible denial that he did not sexually abuse his daughter.

IV. Conclusion

OCS failed to establish by a preponderance of the evidence that Mr. U committed acts of sexual abuse against J.H. Therefore, OCS's substantiated finding of sexual abuse, and the entry of that finding on the Child Protection Registry, are overturned.

Dated this 31st day of December, 2019

Signed _____
Andrew M. Lebo
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 28th day of January, 2020.

By: *Signed*

Name: Doniel Wolfe

Title: Regulations & Policy Analyst

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