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

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| In the Matter of | ) | |
| | ) | |
| E O | ) | OAH No. 16-1407-SAN |
| | ) | Agency No. |

# DECISION

## I. Introduction

E O learned that the FBI suspected her husband of downloading child pornography. The Office of Children's Services became involved, briefly assuming legal custody of the couple's daughter, F, before releasing custody back to Mrs. O. Months later, Mrs. O allowed her husband to move back into the family home. In response to a report about Mr. O's return to the family home, OCS entered a substantiated finding of "maltreatment" against Mrs. O on the basis that, by allowing him to move back in, she had allowed F to be subjected to a substantial risk of sexual abuse. Mrs. O appeals. Because OCS did not prove that its finding of "maltreatment" by Mrs. O was justified as a matter of fact or law, that finding is overturned.

## II. Facts and Procedural History

E and H O are the parents of F O. H and E married in May 2002, and F was born at the end of that year. Until the summer of 2006, the family lived in [another state]. They moved [abroad] in 2006, then moved to Alaska two years later.

Prior to the events described below, the family led seemingly normal lives. In August 2015, Mr. O had recently retired from the military holding the rank of [redacted] and having received an honorable discharge. Mrs. O continued to work full time. F was a high-achieving honors student. She and Mr. O had a close relationship and bonded over subjects such as Star Wars.

Unbeknownst to Mrs. O, however, Mr. O had for more than a decade been using computers in the family home to view and distribute child pornography. The discovery by law enforcement officials of Mr. O's illegal activities led to the events at issue in this case.

### A. August 31, 2015 search warrant and Alaska Cares interview

On August 31, 2015, Mrs. O learned that her husband was the subject of an FBI investigation into child pornography. Specifically, the FBI believed that pornography involving pre-pubescent children was being downloaded to a computer at the family's home, and that this was occurring during

periods of time when Mrs. O was at work, F was at school, and Mr. O was at the home.[1] The FBI obtained a search warrant to search the family home and to seize all electronics.

As is standard practice in child pornography investigations where a child resides in the suspect's home, the FBI contacted OCS.[2] OCS coordinated with the FBI to arrange for Mrs. O to bring F from school to Alaska Cares for a forensic interview at the same time the search warrant was being served.[3] Unfortunately, attempts to prevent F from riding the school bus home that day were unsuccessful, and she arrived home to witness her house surrounded by police cars.[4] Mrs. O retrieved F and brought her to Alaska Cares, where she was interviewed by OCS Protective Service Specialist (PSS) Jessica Mulhern. F was understandably upset and confused about the scene she had witnessed from the school bus, but did not disclose any concerns or problems at home.[5]

As part of the initial screening, the multidisciplinary team also met with Mrs. O to get details about family history, screen for domestic violence concerns, better understand the dynamics in the home, and talk about possible child safety risks.[6] The team included Alaska Cares personnel, an advocate from Standing Together Against Rape, FBI Special Agent Jolene Goeden, and Ms. Mulhern.[7]

Agent Goeden and Ms. Mulhern explained the differences between their two agencies' investigations, as well as the kinds of child safety concerns that are implicated by the presence of child pornography in a home.[8] As a standard part of the team's interview, Mrs. O was asked whether there had been any "red flags" for abuse, such as concerns about F or Mr. O's other children, behavioral changes, or other concerning behaviors in Mr. O's past.[9] Mrs. O told the team there had never been any "red flags," and that she was sure Mr. O would never abuse F.[10]

In the course of this discussion about "red flags," Mrs. O – somewhat incredibly – did not disclose that ten years earlier, Mr. O's now-adult daughter, K, had accused him of sexually abusing her.[11] As is discussed further below, Mrs. O did not mention K's disclosures because she genuinely did not believe they were credible – having been made immediately on the heels of Mr. O filing a custody

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1 Mulhern testimony; R. 00141.
2 Mulhern testimony.
3 Mulhern testimony.
4 Mulhern testimony; O testimony; R. 0055, 0141.
5 Mulhern testimony; R. 0056.
6 Mulhern testimony.
7 R. 0055.
8 Mulhern testimony.
9 Mulhern testimony.
10 Mulhern testimony.
11 *See* R. 0019

petition, and, to Mrs. O's knowledge, never having been substantiated. She therefore did not consider them an actual "red flag."[12]

OCS would not learn about the prior reported sexual abuse until February 2016.[13] In the meantime, the multidisciplinary team proceeded with the information available to it. Ms. Mulhern and other team members discussed with Mrs. O the potential risks about which OCS is concerned when child pornography is present in a home – namely, the possibilities of pornographic exploitation of the child and/or "hands on" sexual abuse.[14] The team provided Mrs. O with counseling referrals for her and for F, a booklet about protecting children from sexual abuse, and a pamphlet about brain development.[15] Although Mrs. O repeatedly expressed her conviction that Mr. O would never abuse F, she agreed it was appropriate to exclude him from the home for the time being, and to ensure that any contact he had with F was supervised.[16]

**B. Mrs. O's September – October 2015 contacts with OCS**

OCS's next contact with the family was three weeks after service of the search warrant. On September 18, 2015, Ms. Mulhern and Mrs. O each spoke with Agent Goeden about the status of the FBI investigation – namely, that the family's electronics were still awaiting analysis – and Mrs. O then called Ms. Mulhern.[17] Mrs. O confirmed that Mr. O remained out of the home, but expressed that his absence was a strain on F, and asked about ways to increase contact between F and her father.[18] Ms. Mulhern reiterated that any contact needed to be supervised by a third-party, again provided information about resources available to facilitate supervised visits, and again encouraged Mrs. O to consider counseling for F and herself.[19]

About three weeks later, the FBI notified Mrs. O that child pornography had indeed been found on computers from the family home, and that none of the images appeared to be of F.[20] The FBI informed OCS that it had not yet completed its search of the electronics seized from the home. In fact,

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12 O testimony.
13 *See* R. 0173.
14 Mulhern testimony.
15 R. 0057-0060, 0070-0133, 0136-0139, 0141.
16 Mulhern testimony; R. 0056.
17 R. 0141.
18 R. 0142.
19 R. 0142. The need for supervision by a third party was driven by OCS's "concern that E does not believe F is at risk with her father at this point." R. 0142. As to counseling, Mrs. O indicated she would arrange for counseling if and when Mr. O was actually arrested.
20 O testimony; R. 0142.

at least one of the computers was highly encrypted and the FBI had not yet been able to access it.[21] But Mrs. O was not aware of this delay, and believed, at least initially, that the FBI had now concluded its search.[22]

Mrs. O contacted OCS to inquire whether Mr. O could resume contact with F in light of the information she had received from the FBI.[23] Mrs. O reiterated that Mr. O's absence from the home had been difficult on F, and stated that she had understood that he needed to be out of the home until it was determined whether F was pictured in any of the images under investigation. She believed the information received from the FBI alleviated those concerns.[24]

OCS was concerned about Mrs. O's request. After receiving another call from Mrs. O about these issues on October 8, 2015, Ms. Mulhern arranged to meet with Mrs. O and Alaska Cares Family Care Coordinator Jesse Nichols. At the meeting, Mrs. O again stated that Mr. O's continued absence from the home was a stress on the family and on F, and she believed he should be allowed to return home since the FBI had not found images of F. Ms. Mulhern clarified that the FBI had not yet completed its search of the family's computers, and she and Ms. Nichols also described again the potential child safety risks associated with child pornography.[25] Ms. Nichols provided Mrs. O with: (1) a handout titled, "Advice from a Child Molester," and (2) a printed copy of September 2006 congressional testimony by Dr. Andres Hernandez (the director of a federal prison sex offender treatment program), titled "[S]exual exploitation over the internet: the face of a child predator and other issues."[26]

Mrs. O stated she felt it was in F's best interest for Mr. O to return home, insisting that she was sure F had not been abused and was safe around him. She noted that F was struggling emotionally and academically with her father's sudden absence from the home (in response to which Ms. Nichols and Ms. Mulhern again encouraged her to take advantage of the counseling referrals they had previously provided).[27] Mrs. O described herself as still being "in denial," and indicated she still had not discussed the situation with anyone, including family, but agreed to review the literature they had provided.[28]

### C. October – December 2015: CINA petition, safety plan, and case closure

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21 Mulhern testimony; R. 0141, 0174.
22 O testimony; R. 0142.
23 R. 142.
24 R. 0143.
25 R. 0143.
26 R. 0061-0067; 0134-0135; 0143.
27 R. 0143.
28 R. 0143.

OCS personnel were alarmed at Mrs. O's resistance to supervised visitation, repeated requests for Mr. O to return to the family home, and inability or unwillingness to identify anyone in the family's life who could help supervise visits.[29] As a result, OCS convened Team Decision Making meetings on October 12 and 14, 2015, to address these concerns and to begin formulating a safety plan for F.[30] On October 16, 2015, because of its ongoing concerns, OCS filed a non-emergency petition asking the Superior Court to find that F was a Child in Need of Aid.[31] OCS did not seek physical custody of F because Mr. O was out of the home, and because a safety plan had been put in place to ensure that he remained out of the home and had no contact with F outside of supervised visitations.[32]

Once OCS filed its petition, Mrs. O was proactive in taking the steps OCS deemed necessary to keep F safe, and in keeping Ms. Mulhern updated about those efforts. In the week that followed OCS's filing, she worked on arranging supervised visitation, informed F's school about the issues at home, identified a family friend who would participate in the safety plan, and began working to find F a counselor.[33]

Into and through November 2015, the safety plan for F was in place and being followed.[34] While Mrs. O followed the safety plan, she also continued to view it as an unnecessary intrusion because she believed F was safe and because, from her perspective, the family had done everything OCS had asked it to do.[35] Ms. Mulhern did not share these views, believing that the family had only seriously complied with OCS's requests once the petition had been filed. Ms. Mulhern believed that Mrs. O's continued ambivalence about whether Mr. O should be allowed back in the home was evidence that a safety plan was necessary to ensure F's safety.[36]

OCS releases custody when parents have demonstrated the capacity to be protective of the child.[37] Mrs. O – in arranging counseling for F, ensuring F's contacts with Mr. O were supervised, and reaching out to family members for support – had done so, albeit only after OCS had pushed the issue.[38] OCS released custody of F on December 7, 2015.[39]

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29 Mulhern testimony; R. 0147, 0152.
30 R. 0152.
31 Mulhern testimony; R. 153-154, 155.
32 Mulhern testimony, R. 0152-0153, R. 0157-0159.
33 R. 0155-0156.
34 R. 0160-0172.
35 R. 0168.
36 R. 0168-0172; Mulhern testimony.
37 Mulhern testimony.
38 R. 0015 (Family services supervisor: "they closed the case due to mom being protective"); 0171; Mulhern testimony; O testimony. Although OCS and Alaska Cares had recommended counseling for F in late August, she

### D. March 2016: Mr. O returns to the home

After OCS released custody, Mrs. O initially continued to limit Mr. O's contacts with F to supervised visits and phone calls. Mr. O had no unsupervised contact with F in January, February, and most of March 2016.[40] When OCS had received the report about the FBI investigation in August 2015, it had "screened in" that report for investigation. The outcome of that investigation had been a substantiated finding against H O, in which OCS determined that Mr. O had subjected F to "maltreatment" under the Child Protection Statute by exposing her to a "substantial risk of sexual abuse." Based on these conclusions, OCS entered a substantiated finding against Mr. O for "sexual abuse," which Mr. O, through counsel, appealed.

On March 18, 2016, OCS notified Mr. O that it had overturned the substantiated finding against him. The "overturn letter" stated that, although the sexual abuse finding was being overturned, "the Department continues to be very concerned about [F's] increased risk of sexual abuse because of the allegations in PSR 0000000."[41] However, this letter was only sent to Mr. O's attorney; there is no evidence either that it was sent to Mrs. O or her attorney, or that she was otherwise made aware of the concerns expressed therein.[42] In late March, after OCS overturned the substantiated finding against Mr. O, Mrs. O allowed him to move back into the home.

### E. February - April 2016: FBI contacts with OCS

In the meantime, as the FBI investigation wore on, Agent Goeden continued to contact Ms. Mulhern about developments in the case.[43] Thus in February 2016, after OCS had closed the "family services" case and released custody, Ms. Mulhern learned the FBI had uncovered evidence that Mr. O may have sexually abused a now-adult daughter.[44] Agent Goeden reported speaking to Mr. O's ex-wife, who reported that the couple's daughter, K, had disclosed sexual abuse by Mr. O when she was 12.[45] By the time she received this information, Ms. Mulhern was no longer assigned to the family's case.[46] She emailed the family services worker to whom the case had been transferred, expressing concern

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did not begin counseling until December. She attended four counseling sessions, but disliked going, finding it upsetting; Mrs. O reports the counselor said F did not need to keep coming.

39 R. 0174.

40 O testimony.

41 Ex. J. The letter also warns: "if the Department receives any new information, a new investigation may be conducted."

42 Mrs. O testified that she had not seen letter prior to the substantiated finding at issue in this appeal.

43 R. 0172.

44 R. 0173.

45 R. 0173. An email from K's mother clarifies K was 11 when she made that disclosure. R. 0019.

46 R. 0169.

about F's safety in light of this new information. However, it does not appear that anyone from OCS followed up on this report. Rather, apparently because the family services section had already "closed" its case, the report "fell through the cracks."[47]

Mr. O's March 2016 return to the family home caught the attention of an FBI agent who lived nearby, and who had observed Mr. O coming and going from the home.[48] On April 14, 2016, FBI agent Darryl Allison contacted Ms. Mulhern to express his concerns.[49] He described the FBI's investigation as ongoing, but said he did not know "if or when" the FBI would charge Mr. O. He explained that one of the family computers was "very encrypted" and still being worked on, but that the agency had found "a lot" of child pornography, some of which dated back 12-13 years, on the other computers. Agent Allison expressed concern that Mr. O had now returned to the home. He expressed concern about F's safety, "given the history of prior sexual abuse allegations by older daughter, then the long history of child pornography, now he's back in the home."[50]

**F. May 2016 Protective Services Report and investigation**

It had been Ms. Mulhern's expectation that Mrs. O would continue to prevent unsupervised contact between Mr. O and F even after the CINA case was closed, as long as the FBI investigation was ongoing.[51] Ms. Mulhern and her supervisor asked Agent Allison to put this information into a new Protective Services Report, and he reportedly agreed to do so.[52] That report was not made for another month, however, during which time OCS did not contact Mrs. O to investigate the concerns that had been raised or to inform her of additional information it had obtained.[53] There is no evidence that Mrs. O was informed by OCS or the FBI of the scope, volume, or nature of the child pornography the FBI had discovered. Her testimony is that she did not have this information, and had only been told – back in October – that there was "some" child pornography, and that none of it was of F.[54]

OCS received a new Protective Services Report about F on May 18, 2016. Like the informal report to Ms. Mulhern in April 2016, the PSR indicated that Mr. O was back living in the home despite an ongoing child pornography investigation, and that Mr. O had previously been accused of sexually

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47 Mulhern testimony; R. 0172-0173.
48 R. 0174.
49 R. 0027, 0174.
50 R. 0174.
51 Mulhern testimony; R. 0008.
52 R. 0174.
53 See R. 00015 (documenting May 18, 2016 call from FBI agent, indicating that workload issues had delayed him from "call[ing] the new concerns into [OCS] intake.")
54 O testimony.

abusing another daughter when she was F's age.[55] The PSR was screened in as a "priority one," and assigned to Ms. Mulhern for investigation.[56]

On the morning of May 19, 2016, Ms. Mulhern interviewed F at school. F confirmed that her father was back in the home, and disclosed no problems or concerns. When asked about her half-siblings, F reported that K had a strained relationship with their father, which F believed had to do with Mr. O moving away due to his military career; when she had asked K about this, K had said they just didn't get along.[57]

In addition to confirming that her father had returned home, F also disclosed that she and her father were leaving the next day for a trip to [another city] for her half-brother's graduation.[58] Ms. Mulhern, her supervisor, and other team members were, appropriately, very concerned about the travel plans F had disclosed.[59] When Ms. Mulhern spoke with Mrs. O later that afternoon, she told Mrs. O that the trip could not take place; Mrs. O agreed to keep F home.[60]

Regarding Mr. O's return to the home, Mrs. O said the family had not heard from the FBI, and that Mr. O had moved back in after OCS overturned the prior substantiation against him.[61] When asked about K's prior allegations against Mr. O – allegations Mrs. O had failed to disclose when asked about possible red flags during the initial Alaska Cares meeting – Mrs. O explained she had not viewed the allegations as a red flag because they had arisen in the middle of a custody dispute, amidst "suspicious" timing, and to her knowledge had never been substantiated.[62]

Mrs. O again reiterated her belief that F was not at risk from Mr. O, noting that she had read the Hernandez paper OCS had provided as well as published rebuttals.[63] Mrs. O felt confident that Mr. O was not a risk to F, and that F would tell her if anything had happened.[64] However, upon learning that OCS still had concerns about Mr. O being in the home, Mrs. O assured Ms. Mulhern that "she would do whatever she needed to do to keep OCS out of her and F's life, including having him vacate their

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55 R. 0006-0007.
56 R. 0051.
57 R. 0017, 0030
58 R. 0030.
59 Mulhern testimony; R. 15-17.
60 Mulhern testimony; R. 0020.
61 R. 0028; Mulhern testimony.
62 O testimony; R. 0028.
63 R. 0028; Mulhern testimony; O testimony.
64 R. 0016; O testimony.

home," and "no longer allow[ing] for F and H to be alone."[65] Mr. O moved out immediately, and no longer lives in the family home.[66]

On the same day she interviewed Mrs. O, Ms. Mulhern also interviewed K's mother, Q O.[67] Q told Ms. Mulhern that in 2005, when she was 11, K had disclosed that Mr. O had molested her while she was visiting him in [State A].[68] Q reported this disclosure to law enforcement in [State B] and in [State A]. A child protection case may also have been opened in [State A] and/or in [State B], but the report was apparently never substantiated.[69]

K's disclosures were actively disputed by her parents during their contentious and apparently lengthy custody dispute in [State B].[70] As to the custody case, there is an evidentiary dispute about whether Mrs. O (E) attended court hearings with Mr. O in [State B] about the custody dispute and K's allegations – and, therefore, about the extent of Mrs. O's knowledge of K's allegations. This dispute is relevant here because one of the factual bases for OCS's substantiation decision was that Mrs. O knew about K's allegations in depth, and had accompanied Mr. O to every court hearing about them.[71] Ms. Mulhern credibly testified to her *recollection* that Mrs. O told her she had gone to every court hearing. But the record evidence and Mrs. O's testimony calls into doubt the reliability of that recollection. Mrs. O and F were living [abroad] at the time; they were not traveling frequently back to the U.S. And, Ms. Mulhern's notes of her interviews with Q and Mrs. O only mention the court hearings in the interview with Q, not with Mrs. O.[72] Therefore, it is more likely than not that these statements came from Q, not from Mrs. O, and that, in fact, Mrs. O did not attend hearings in the [State B] custody case. While Mrs. O was aware of K's allegations, the evidence as a whole does not support the conclusion that she knew or should have known that the prior allegations were credible.[73]

### G. October 2016 substantiated finding

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65 R. 00012.
66 R. 0012; O testimony.
67 R. 0022-0024.
68 R. 0018, 0022.
69 R. 0016, 0018, 0022.
70 R. 0022.
71 See R. 0009.
72 R. 0024. To the extent the notes of the May 2016 interview with Mrs. O are incomplete and OCS has repeatedly failed to supplement the record, I draw an inference that the missing notes do not corroborate OCS's version of these events. *See* fn. 79, *infra*.
73 The evidence about K's possible abuse – and her current views about those events –is based on multiple levels of hearsay. Ms. Mulhern testified that she heard this from Q O and also from FBI Agent Goeden, but it appears Agent Goeden may also have only heard this from Q (as opposed to actually interviewing K herself). *See* R. 0027. The evidence about both the underlying events (i.e. what happened to K) and about K's current views is too attenuated to support a finding in this case that Mr. O more likely than not abused K. However, as discussed below, such a finding is not necessary to decide this case.

After OCS contacted Mrs. O about the second protective services report, Mr. O moved back out of the family home. During the summer of 2016, Mr. O was indicted on child pornography charges and arrested. He was later released on bail, with conditions barring contact with any minors.

On October 17, 2016, Ms. Mulhern completed her Initial Assessment Summary on the May 2016 PSR, entering substantiated findings of "maltreatment" against both parents for "sexual abuse."[74] The Initial Assessment Summary acknowledged that, immediately upon being notified of the PSR, Mrs. O had "indicated she would do whatever she needed to do to keep OCS out of her and F's life, including having [Mr. O] vacate the home."[75] The summary further indicated that, following Mr. O's arrest later that summer, Mrs. O now "recognizes Mr. O can no longer be around their daughter."[76] Nonetheless, the summary substantiates the allegation that Mrs. O failed to protect F from a "substantial risk of sexual abuse" based on the following facts:

(1) Mrs. O allowed Mr. O to return to the home after OCS released custody of F;

(2) Mrs. O's knew about K's earlier abuse allegation;

(3) Mrs. O purportedly "supported her husband through that previous investigation, including attending all the court hearings;"

(4) Mrs. O had been provided information by OCS "regarding the link between child pornography and sexual abuse;" and

(5) Mr. O was indicted and arrested by the FBI.[77]

On October 24, 2016, OCS mailed a notice to Mrs. O advising her of its substantiation decision.[78] The subject line reads: "Notice of Alleged Child Maltreatment Decision and Case Status and Placement on the Child Protection Registry." The notice states that a report was received that F "was an alleged victim of child maltreatment under Alaska Statute 47.17.290(9) and as described in AS 47.10.011," and advises: "You were named as an alleged perpetrator of the maltreatment below." The "maltreatment" then listed is "sexual abuse."

The letter contains a five-column chart, with the first four columns bearing the headings: "Alleged Victim," "Alleged Perpetrator," "Allegation," and "Finding." The chart identifies Mrs. O as

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74 R. 0008-0013. The PSR describes the allegations against both parents as "neglect." R. 006. However, the initial assessment summary indicates that the allegations were not substantiated as "neglect," and were instead substantiated as "sexual abuse," based on an internal OCS decision-making document known as the Maltreatment Assessment Protocol ("MAP"). R.0009.

75 R. 0012.

76 R. 0009.

77 R. 009.

78 R. 0001-0002.

an "alleged perpetrator" of one allegation of "Neglect," which was "Not Substantiated," and one allegation of "Sexual Abuse," which was "Substantiated."

The chart's final column bears the title "AK Child Protection Statute 47.17.290(9) as described in:". This column is blank for each of the "Not Substantiated" findings. In the row with the substantiated "Sexual Abuse" finding, the box for this column reads:

> AS 47.10.011 subsection (7) 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; if a parent, guardian, or custodian has actual notice that a person has been convicted of a sex offense against a minor within the past 15 years, is registered or required to register as a sex offender under AS 12.63, or is under investigation for a sex offense against a minor, and the parent, guardian, or custodian subsequently allows a child to be left with that person, this conduct constitutes prima facie evidence that the child is at substantial risk of being sexually abused[.]

### H. Procedural history

Both parents appealed the substantiated findings entered against them. The cases were initially consolidated, and a hearing scheduled for May 2017. Due to delays by OCS in the production of records, the hearing was ultimately rescheduled to August 2017. During this time, Mr. O's counsel informed OAH that he and OCS were in the process of resolving his appeal. The hearing thus went forward only on Mrs. O's claims.

The hearing was held on August 24 and 25, 2017. Both parties were represented by counsel. Testimony was taken from Ms. Mulhern and Mrs. O. Following the hearing, the record was left open through September 6, 2017 for post-hearing submissions; none were received.[79]

## III. Discussion

### A. Applicable legal standard

When a parent challenges a substantiated finding of abuse or neglect under the Child Protection statute, OCS has the burden of proving that the substantiation should be upheld. This burden has both a factual and a legal component. That is, OCS must prove as a matter of fact that certain conduct occurred, and as a matter of law that the conduct warrants a substantiated finding.

A preliminary legal question presented in this case is whether OCS has appropriately characterized the nature of the substantiated finding. The context for this question is found in the

[79] During the hearing, it was discovered that Ms. Mulhern's notes in the agency record were incomplete. Specifically, when interviewing Mrs. O and F in May 2016, Ms. Mulhern took handwritten notes on both sides of the paper. Although the pages were hand-labelled with page numbers, only one side of each page – e.g. pages 1 and 3, but not page 2 – was produced in the record. *See* R. 0028-0031. Despite my request, OCS never supplemented the record with the missing pages.

distinction between AS 47.17, the Child Protection chapter, and AS 47.10, the Child in Need of Aid chapter. Protective service reports, such as the ones OCS received in this case in August 2015 and May 2016, are made and investigated under the child protection chapter, AS 47.17, which requires investigation and determinations as to reports of suspected "child abuse or neglect." AS 47.17.290(3) provides a broad definition of "child abuse or neglect" for purposes of the Child Protection chapter.

> In this chapter . . . (3) "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 that the child's health or welfare is harmed or threatened thereby[.]

In other words, "child abuse or neglect" for purposes of the child protection statute – and, therefore, for the purpose of PSRs – is physical injury, neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child that harms or threatens the child's health or welfare.

Some of the terms used to define "child abuse or neglect" for AS 47.17 purposes are then further defined elsewhere in AS 47.17.290. Of particular relevance here, 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." While "sexual abuse" is not further defined in AS 47.17.290, prior substantiation decisions involving acts of alleged sexual abuse have applied "the commonly accepted use of that term" in assessing whether alleged conduct falls within the definition of sexual abuse for purposes of a substantiated finding of child abuse or neglect.[80] Thus, included in AS 47.17's definition of "child abuse or neglect," without resort to any additional sources, are acts of either sexual abuse or failure to provide necessary care that harm or threaten the child's health or welfare.

But the legislature also included in AS 47.17's definition of "child abuse and neglect" the catch-all term "maltreatment," which it then defined to mean any "act or omission in which there is reasonable cause to suspect that a child may be a child in need of aid" under AS 47.10.[81] At some point in recent years, OCS began a practice of analyzing all AS 47.17 protective service reports through the lens of this "maltreatment" definition. Then, rather than analyzing a report under the definitions available in AS

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[80] *Matter of C.D.B.*, OAH No. 16-1332-SAN, at p. 9 (Comm'r of Health and Social Services, June 2017). The Child Protection statute does offer a specific definition of "sexual exploitation" as including allowing, encouraging, or permitting various criminal acts relating, broadly, to child pornography and prostitution. AS 47.17.290(17) (citing AS 11.41.455, AS 11.66.100-150).

[81] AS 47.17.290(3), (9) (Defining "Maltreatment" as "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, except that, for purposes of this chapter, the act or omission need not have been committed by the child's parent, custodian, or guardian").

47.17 – for example, using the AS 47.17 definition of neglect – OCS staff instead analyze it under the definitions in AS 47.10, the Child in Need of Aid statute.

As has been explored in prior substantiation appeal decisions, OCS's approach of classifying all protective services report substantiations as substantiating "maltreatment," and then reviewing the conduct under the CINA statute, can be problematic in cases where the conduct is readily reviewable and more appropriately considered under the Child Protection statute.[82] As other decisions have observed, the purpose of AS 47.17 is notably different from the purposes of AS 47.10 CINA adjudications.[83] CINA adjudications are forward-looking in terms of the need to assess and avoid possible future risks, while AS 47.17 substantiations look backwards to determine if particular acts or omissions constitute "abuse or neglect."

While a child may be found to be "in need of aid" because the child is at heightened risk of future sexual abuse, it defies common sense to say that an allegation against a parent has been "substantiated" for "sexual abuse" where the allegation does not involve the parent (or, here, anyone) actually having committed an act of sexual abuse against the child. It is troubling that OCS's closing letter – and, presumably, its entry in the central registry – characterizes Mrs. O's conduct here under the very misleading title of "sexual abuse."

Somewhat remarkably, OCS's substantiation notice to Mrs. O indicated that it had considered "maltreatment" allegations against her as to both "neglect" and "sexual abuse," and that the allegation of "neglect" was "not substantiated," while the allegation of "sexual abuse" was "substantiated."[84] While it is not at all apparent from the face of its substantiation notice, which summarizes the "finding" against Mrs. O as "sexual abuse" and then quotes without explanation the entire AS 47.10.011(7) definition, OCS's actual factual theory is not that Mrs. O sexually abused F, but that her choices placed F at heightened risk for such abuse.

Because the term "neglect" more appropriately characterizes the wrongful nature of that alleged conduct than the term "sexual abuse," the parties were offered the opportunity to brief whether the Department could, at the administrative appeal level, modify a substantiated finding from "sexual abuse via maltreatment via subjecting a child to a substantial risk of sexual abuse" to a finding of "neglect" as defined in the child protection statute. Neither party submitted briefing on this subject, and I decline to

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82 *See*, *Matter of K.L & B.E.*, OAH No. 16-1145-SAN (Comm'r Health & Social Services, April 2017); *Matter of S.K,* OAH No. 16-0686-SAN (Comm'r Health & Social Services, April 2017).

83 *Matter of K.L.*, OAH No. 16-1145-SAN, at p. 9.

84 R. 0001-0002.

reach it, given my conclusion, below, that OCS did not meet its burden of proving that its substantiated finding is factually justified.

### B. OCS has not met its burden of proving that the May 2016 substantiated finding against Mrs. O should be upheld.

Whether this case is viewed through the lens of AS 47.17 as "neglect," or through OCS's circuitous determination of AS 47.17 "maltreatment" via AS 47.10's "substantial risk of sexual abuse," OCS did not meet its burden of proving that the substantiation against Mrs. O should be upheld.

As a threshold matter, Mrs. O is correct that the appropriate vantage point for assessing her actions is based on the information reasonably available to her as of May 18, 2016. While it is of course possible that events that unfold during an investigation could justify a substantiated finding, here the undisputed evidence is that as soon as she was made aware of OCS's renewed concerns, Mrs. O took all necessary protective steps to remove Mr. O from the home and prevent unsupervised conduct. Thus, while further neglectful or abusive acts during an investigation could potentially justify a substantiated finding in that investigation, the facts here do not support such a finding.

OCS alleges that, allowing Mr. O to return to the home, Mrs. O maltreated F through inadequate supervision that subjected F to a substantial risk of sexual abuse. As noted above, OCS's initial assessment summary relied on five factual allegations to support this conclusion:

- Mrs. O had been provided information by OCS "regarding the link between child pornography and sexual abuse;"
- Mrs. O knew about K's earlier abuse allegation;
- Mrs. O purportedly "supported her husband through that previous investigation, including attending all the court hearings;"
- Mrs. O allowed Mr. O to return to the home after OCS released custody even though the FBI had been investigating him for child pornography;
- Mr. O was eventually indicted and arrested by the FBI on child pornography charges.[85]

The evidence presented on these issues at hearing does not support OCS's substantiated finding against Mrs. O.

#### 1. Awareness of Dr. Hernandez's study

OCS's view that Mr. O should have been barred from the home once child pornography had been confirmed on his electronics (i.e. in October 2015) was largely based on a belief in what Ms.

[85] R. 0009.

Mulhern characterizes as a known correlation "between child porn and abuse."[86] In Ms. Mulhern's view, once OCS provided Mrs. O with research about this linkage, it was unreasonable for Mrs. O to continue resisting the possibility that Mr. O could be a threat to F.

The specific research OCS provided to Mrs. O on this topic was a printed copy of September 2006 Congressional testimony by Dr. Andres Hernandez.[87] The Hernandez Congressional testimony appears on Federal Department of Justice letterhead, and is titled:

> Statement of Andres E Hernandez, Director of the Sex Offender Treatment Program Federal Correctional Institution, Butner, NC, Before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, United States House of Representatives, concerning "sexual exploitation over the internet: the face of a child predator and other issues."[88]

In his five-page prepared testimony, Dr. Hernandez described the sex offender treatment program at FCI Butner, then shared his "observ[ation] that in the course of treatment many child pornography offenders admit to unreported sexual crimes."[89] He described a "poster" he had presented at a research conference, documenting preliminary findings on participants' self-reported contact offenses, as well as more recent findings, both of which found high rates of unreported contact offenses amongst the child pornography offenders in his treatment program.[90] Dr. Hernandez's non-peer-reviewed poster presentation is referred to in academic literature as the "Butner Study." The later findings he describes were ultimately published in 2009 as "The 'Butner Study' Redux" in the *Journal of Family Violence.*[91] Both Butner studies have been analyzed – and sometimes criticized – by federal courts in sentencing defendants convicted on child pornography charges.[92]

The only witness OCS presented on this (or any) issue was Ms. Mulhern. Ms. Mulhern readily admitted that OCS did not attempt a case-specific analysis of whether F was at heightened risk of sexual abuse. Rather, OCS relied on Dr. Hernandez's 2006 congressional testimony for the general principal that a substantial risk of sexual abuse exists whenever a child is present in the home of a child pornography offender. In OCS's view, once it provided Dr. Hernandez's research findings to Mrs. O, she should have recognized that Mr. O posed a substantial risk of sexual abuse to F. But Mrs. O was not

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86 R. 0168.
87 R. 0061-0067; 0134-0135; 0143.
88 R. 0061.
89 R. 0062-0064.
90 R. 0065-0066.
91 Bourke, M. L. & Hernandez, A. E. (2009). *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*. Journal of Family Violence, 24, 183-191.
92 For a very detailed discussion, see, e.g., *United States v. Crisman*, 39 F. Supp. 3d 1189, 1215-1257 (D.N.M. 2014).

persuaded by the Hernandez testimony she was provided at AlaskaCares – at least, she was not persuaded that this study established that Mr. O posed a substantial risk of sexual abuse to F.

Upon researching Dr. Hernandez's work online, Mrs. O learned that it is controversial. Ms. Mulhern was dismissive of this suggestion, saying that "anyone can put anything online." But concerns about "the Butner study" – both the reliability of its findings and whether those findings are generalizable beyond the unique population being studied – are well-documented in social science literature and case law.[93] Indeed, Dr. Hernandez himself has criticized what he sees as misuse of the Butner data. In a 2009 position paper, he cautioned:

> Some individuals have misused the results of Hernandez (2000) and Bourke and Hernandez (2009) to fuel the argument that the majority of [child pornography] offenders are indeed contact sexual offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence.[94]

Whether and to what extent the Butner studies establish a clear link between child pornography offenders and contact offenses is beyond the scope of this case. The more relevant consideration, as Dr. Hernandez has since cautioned, is that the study "is not a conclusive finding that can be generalized to all [child pornography] offenders."[95] As the District Court observed in *U.S. v. Crisman*:

> [Dr.] Hernandez'[s] opinion that the results cannot be generalized is the strongest argument against using the study as proof that a higher sentence is warranted in a child pornography case. If their findings admittedly do not apply to all child pornography offenders, then judges should not presume the study is relevant to every case.[96]

In short, Dr. Hernandez's findings about an association between child pornography and contact offenses do not establish a *per se* substantial risk of sexual abuse in any specific case. This concern is exactly the one articulated by Mrs. O: she was not convinced that the Butner study's findings were generalizable to establish an actual risk – let alone a substantial one – in her family's situation.

2. Knowledge of K's earlier abuse allegations

OCS's prior concerns about F were renewed when it learned about K's 2005 abuse allegations (although this information came to Ms. Mulhern's attention twice in the months before the May 2016

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93 *See generally*. *United States v. Apodaca*, 641 F.3d 1077 (9th Cir. 2011) (discussing "growing body of empirical literature" calling into question the assumed similarities "between contact and possession-only offenders") and concurrence by Fletcher, J. (noting that "the best available empirical evidence" does not support assumptions that possession convictions are associated with a high risk of contact sex offenses); *see also*, *U.S. v. Crisman*, 39 F.Supp. at 1249-1251 (describing Butner Study's "limitations," including "several methodological flaws" and questionable evidentiary value, even where formal rules of evidence do not apply).

94 Ex. B, p. 4.

95 Ex. B, p. 5.

96 *United States v. Crisman*, 39 F. Supp. 3d 1189, 1254 (D.N.M. 2014).

PSR without prompting any action by the agency).[97] When Mrs. O first brought F to Alaska Cares in August 2015, she knew but did not reveal that Mr. O had been the subject of a sexual abuse allegation ten years earlier while engaged in a custody dispute over the children of his first marriage. Both at the time the allegation was made and at the time of the first Alaska Cares encounter, Mrs. O believed the allegation involving K was false and had been motivated by the custody dispute.

Contrary to OCS's findings, Mrs. O had not attended court hearings with Mr. O related to the custody case; by the time of those hearings, Mrs. O and F were living [abroad], and rarely traveled back to the U.S. It does not appear that Mrs. O had full information about the nature of K's allegations, or about any court findings or orders related to those.[98] It appears that Mrs. O believed – possibly until the evidentiary hearing in this case – that K's earlier allegations were baseless fabrications arising out of the contentious dispute between Mr. O and his ex-wife. Thus, at the time Mrs. O allowed Mr. O to return to the family home, Mrs. O also did not know that K apparently still maintains that he sexually abused her. Mrs. O was visibly moved by this information during the hearing, and explained how profoundly it changed her assessment of the situation.[99]

At the time period at issue in this case, Mrs. O knew about K's prior allegations, but did not know that K (allegedly) still stands by those allegations. Even if K does in fact stand by her prior disclosure, OCS did not prove that Mrs. O knew or should have known this fact, or any other fact about K's allegations supporting a risk to F. While other parents may well have responded differently, OCS did not show that Mrs. O "maltreated" F in allowing Mr. O to return home despite her awareness of K's 2005 allegations.

3. Allowing Mr. O to return home in March

Ms. Mulhern was concerned when she learned that Mrs. O had allowed Mr. O to return to the home. And again, other parents may well have followed a different course of action under the same facts available to Mrs. O. But OCS did not meet its burden of showing that, in allowing Mr. O to live in the family home between late March and mid-May 2016, Mrs. O's decision-making and supervision of F was so poor as to rise to the level of maltreatment (let alone warranting a label of "sexual abuse").

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97 *See, e.g.,* R 0173.

98 The evidence of such judicial findings or court orders is third-hand and ambiguous at best. There are triple hearsay statements in the record that an unidentified judge in an unidentified proceeding ordered that Mr. O's contact with K and her brother be supervised. R. 0016, 0023; O testimony. As to this constituting evidence establishing Mrs. O's level of knowledge of whatever happened to K, it is not the kind of evidence on which reasonable people would rely in the conduct of serious affairs. I therefore do not consider it here.

99 As noted above, there is not enough reliable evidence in the record to conclude whether Mr. O actually abused K, but such a finding is not necessary to decide this case.

OCS had released custody of F months earlier. There is no evidence in the record that Mrs. O was told Mr. O could not be in the home or have unsupervised contact. (Ms. Mulhern admits she doesn't know what Mrs. O was told by the family services workers). And OCS had overturned its earlier substantiated finding of sexual abuse against Mr. O. In the meantime, although the FBI had told Mrs. O that child pornography had been found on the family's computer, Mr. O had still not been arrested or charged nearly six months later. And Mrs. O was faced with a daughter who continued to be upset by her father's absence from the home, and with her own personal conviction that Mr. O posed no threat.[100]

At the same time, Mrs. O did not have critical facts that OCS had, and which may well have led her to act differently. Specifically, Mrs. O did not know that the computers contained more than a decade's worth of child pornography. This information about the scope and extent of Mr. O's habit was part of the basis articulated for the FBI's concern about Mr. O's return to the home. Likewise, as discussed above, Mrs. O had an incomplete understanding of the events surrounding K's earlier allegations.

4. Mr. O's post-PSR arrest and indictment

The Initial Assessment Summary also mentions, in explaining the substantiation, that Mr. O has since been arrested and charged with child pornography offenses. But these events occurred more than a month after the May 2016 PSR. There is no evidence that Mrs. O knew, in May 2016, that Mr. O was going to be arrested or indicted. Indeed, Ms. Mulhern's notes of her own April 2016 contact with Agent Allison quote him as saying he did not know "if or when" Mr. O would be arrested. The fact that these events later occurred does not make them evidence of prior abuse or neglect. In short, under the facts presented here, OCS did not meet its burden of showing that, at the time she allowed Mr. O to return home, Mrs. O knew (or should have known) and disregarded that F was at a substantial risk of sexual abuse.[101]

## IV. Conclusion

Whether characterized as "sexual abuse" or as "neglect," OCS did not meet its burden of proving that the substantiated finding against E O should be upheld. Under the totality of admittedly incomplete

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[100] Had Mr. O been allowed to travel out of state alone with F, the outcome of this appeal may well have been different. I recognize that that travel was only prevented by Ms. Mulhern's intervention. However, an event that was planned but then cancelled cannot, at least on this record, justify a finding that abuse or neglect has occurred.

[101] Of note, the same result would be reached reviewing Mrs. O's conduct under the straightforward neglect definition in the Child Protection statute. OCS did not show that, at the time of the May 2016 PSR, she had failed to provide appropriate care, thereby threatening or harming F's wellbeing.

facts available to her – a limited understanding of the events in K's allegations; the lack of an arrest more than six months after service of the FBI search warrant; the lack of awareness of the extent of what the FBI had found on Mr. O's computer; OCS having overturned the substantiation against Mr. O; her own observations of F's relationship with Mr. O; F's struggles with Mr. O's continued absence from the home; and studies questioning the literature OCS had provided – Mrs. O's decision to allow Mr. O to return home in March 2016 was not so unreasonable as to constitute child maltreatment. OCS's substantiation decision relied on facts not available to Mrs. O during the relevant time frame – either because they had not yet occurred or because they had not been relayed to Mrs. O, and OCS did not prove that – without the benefit of this information, and with the information available to her – Mrs. O disregarded a substantial risk of sexual abuse to F. The substantiated finding is therefore overturned.

Dated: September 27, 2017

*Signed*
Cheryl Mandala
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 6th day of November, 2017.

By: *Signed*
Name: Erin E. Shine
Title: Special Assistant to the Commissioner
Agency: Office of the Commissioner, DHSS

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