

**BEFORE THE NO OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of	)	
	)	
H E. O	)	OAH No. 14-1826-SAN
_____	)	Agency No.

**DECISION**

**I. Introduction**

On May 28, 2014, the Office of Children Services (OCS) reported to the home of H O. Ms. O had contacted the police, reporting that a young boy exposed himself to her 4-year-old granddaughter F in a park.<sup>1</sup> OCS investigated, and ultimately substantiated a finding of neglect against Ms. O for her care of F.<sup>2</sup> On September 12, 2014, Ms. O appealed the substantiated neglect finding.<sup>3</sup>

A telephonic hearing was held on May 12, 2015. Michael Heiser represented Ms. O, who testified on her own behalf. Assistant Attorney General Diane Foster represented OCS. Village Public Safety Officer (VPSO) D Q and L T, OCS protective service specialist, testified on OCS’s behalf.

The evidence at hearing established that Ms. O did not provide responsible oversight for F on the evening of May 28, 2015. However, it did not establish a temporal or causal connection between Ms. O’s caregiving and the incident in the park. Therefore, OCS did not meet its burden of proving that the substantiated neglect finding should be upheld; the finding is reversed.

**II. Facts**

P O is F’s mother. The Os live in No Name A, Alaska. F spent May 28, 2014, with her grandmother, Ms. O.<sup>4</sup> F went outside to play after she and her grandmother returned from a day spent in downtown No Name B. While outside, F left her yard and went to the park across the street from her home without permission. When Ms. O noticed F was not in the yard, she went over to the park and found F with a young boy. The park is directly across the street and no more than 100 feet from Ms. O’s house.<sup>5</sup> F told her grandmother that the young neighbor boy told her he would not let her out of a playground area unless she pulled down her pants.<sup>6</sup>

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<sup>1</sup> R. 8.

<sup>2</sup> R. 13.

<sup>3</sup> R. 1.

<sup>4</sup> This decision refers to F’s mother as P O. “Ms. O” refers to H O.

<sup>5</sup> See *Google Maps, streetview of Ms. O’s home*. Rotating the screen allows the viewer to see Ms. O’s home and the park. Ms. O does not live on a busy street. Allowed under 2 AAC 64.300, official notice.

<sup>6</sup> The witnesses described the playground area as tubes children crawl through.

The boy was thought to be seven years old, but OCS later confirmed he was eleven years old. Ms. O was understandably upset and went to the boy's home to report the incident. His parents were not home. Instead, he was in the care of his thirteen-year-old brother, who was also watching two other children.<sup>7</sup> Ms. O returned to her home and phoned 911 to report the incident. Officer Q responded and Ms. O allowed him into her home. Ms. O also phoned P O, F's mother, explained the situation, and told her to come to the house.

Officer Q interviewed F, but she was playing and he did not get any useful information from her. Officer Q confirmed that the boy did not have any adult supervision. Officer Q then contacted OCS concerning the incident. When Ms. T arrived at Ms. O's home, F was asleep on the couch, with no signs of injury. Ms. T did not interview F. P O was also at the home when Ms. T arrived; P O was under the influence of alcohol. At the time of the incident, P O had an agreement with OCS not to leave F unattended with her mother.<sup>8</sup> Ms. T discussed the situation with P O and recommended F stay with another adult for the evening. F left with her aunt.

The remaining facts are disputed. According to Ms. O, F had been playing in the yard on a trampoline with two neighbor girls while she prepared dinner. Ms. O checked on them by looking out the window every five minutes or so. At some point, Ms. O realized she no longer heard the sounds of noisy play, and went outside. Ms. O's description of the children playing and the events leading up to the park incident were credible. Per Ms. O's timeline, the maximum time that lapsed between her checking on F and finding her in the park was fifteen minutes. However, Ms. O also appears to have given conflicting information.

She testified that she and F had not been back from downtown for very long when she found F went to the park. According to OCS, Ms. O reported that F was unattended in the park for approximately four hours, then said F was in the yard for four hours and she was checking on her every five minutes.<sup>9</sup> OCS argues that Ms. O lost track of time and did not realize how long F was left unattended.

A definitive answer cannot be made for how long F was left unattended in the park. Both OCS records and Ms. O's report contain inconsistencies. OCS records note that an unknown person called to say F was left alone in the park for four hours.<sup>10</sup> However, neither OCS nor Officer Q presented any evidence to support this reference. It is undisputed that Ms. O, not an

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<sup>7</sup> R. 11.

<sup>8</sup> Because OCS did not present evidence regarding the basis of the agreement, and because the agreement was between P O and OCS, its existence is not given significant weight.

<sup>9</sup> R. 21; T testimony.

<sup>10</sup> R. 19.

unknown person, called 911 after finding F in the park.<sup>11</sup> Ms. O testified at hearing and reported on the day of the incident that she was checking on F frequently.

F went to the park without permission and Ms. O went over to the park as soon as she noticed that F was no longer in the yard. The amount of time Ms. O left F unattended likely falls somewhere between her report of a few minutes and OCS's supposition of a few hours.

Another apparent contradiction is between Ms. O's testimony at hearing and the initial incident report regarding what occurred between F and the young boy. At hearing, Ms. O testified that F's pants were at her hips with her underwear still up. She also testified that the boy's pants were up and his shirt was tucked in. The Department of Public Safety's incident report from May 28, 2014, states that Ms. O reported that the boy was pulling his pants up and that F had her pants down when she arrived at the park.<sup>12</sup> Similar to the length of time F was unattended, what actually occurred in the park is not clear.

What is clear is that Ms. O was likely under the influence of a substance.<sup>13</sup> Both Officer Q and Ms. T testified to their belief that Ms. O was under the influence of an unknown substance at the time of the incident. Ms. O denied that she was under the influence, and testified that she slurred because she was upset and had ill-fitting dentures. Ms. T's notes indicate that she believes H O was under the influence, but do not indicate the level of her impairment. Officer Q's report makes no mention of any impairment on Ms. O's part, but his testimony to that effect was credible.

Ms. O's argument that denture slippage caused both Ms. T and Officer Q to mistakenly believe she was impaired is not persuasive. Her ill-fitting dentures may have contributed to their belief, but it is unlikely that two professionals trained to identify impairment would both wrongly label her as impaired. They both believed Ms. O exhibited behavior consistent with some type of impairment. Officer Q testified credibly that he has interacted with Ms. O in the past and compared with those interactions, she appeared impaired on the evening of May 28, 2014.

After investigation, OCS substantiated a finding of neglect against Ms. O for general lack of care, lack of supervision, and parental substance abuse.<sup>14</sup>

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<sup>11</sup> Q testimony; O testimony.

<sup>12</sup> R. 15.

<sup>13</sup> The agency record contains information that Ms. O may abuse prescription pills. However, OCS did not present evidence at hearing with regard to the substance Ms. O was suspected of using. The record establishes that Ms. O was likely impaired. It does not establish the type of substance or level of impairment.

<sup>14</sup> R. 19.

### III. Discussion

OCS maintains a central registry of all investigation reports.<sup>15</sup> 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.<sup>16</sup> At the conclusion of an investigation, OCS may find that an allegation has been substantiated. Here, OCS substantiated neglect.

“Neglect means the failure by a person responsible for the child’s welfare to provide necessary food, care, clothing, shelter, or medical attention for a child.”<sup>17</sup> The only portion of the definition appropriate to the facts of this case is a neglect finding on the basis of failure to provide care. When a substantiated finding is appealed, OCS has the burden of proving by a preponderance of the evidence that the finding should be upheld. OCS has not met its burden.

OCS maintains that F suffered harm by the events of May 28, 2015.<sup>18</sup> OCS argued that F suffered harm whether or not she pulled her pants down, and whether or not the young boy exposed himself to her. OCS deems the interaction between F and the 11-year-old boy an assault. OCS believes that F’s “assault” could not have occurred in the timeline put forth by Ms. O and would not have been able to occur if Ms. O was checking on F every five minutes.<sup>19</sup> Ms. T testified that if Ms. O was checking on F every five minutes, F would not have been harmed.

In Ms. T’s opinion, the fact that the boy told her she would have to pull her pants down to leave the play area is harmful, in and of itself. OCS’s argument that F was harmed by the park incident, whatever it may have been, is not supported by the record.

There is no evidence that F suffered harm from the park incident. Officer Q attempted to interview F, but she was interested in playing instead. Ms. T did not interview F. There is no mention that F was upset or scared at the time of incident. The record also lacks any evidence

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<sup>15</sup> AS 47.17.040.

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

<sup>17</sup> AS 47.17.190(11).

<sup>18</sup> Recent OAH SAN cases have developed a new statutory interpretation, not requiring a showing of harm except in maltreatment cases. Those cases, however, dealt with physical abuse, not neglect. *See In re F.T.*, OAH No. 13-0050-SAN, p. 3 (Commissioner, Dept. of Health & Soc. Serv. 2013). This decision considers whether F was harmed because OCS has asserted that F was harmed and both the manual and statute appear to require a harm showing.

<sup>19</sup> T testimony.

that F suffered any post-incident effects. OCS stated that sexual abuse is always harmful, but the facts here do not support a finding of sexual abuse or assault.<sup>20</sup>

The facts here can be contrasted with other neglect cases. In a recent OAH case, a child's dentist informed the mother that treatment was necessary for her daughter's decaying teeth. The mother failed to get treatment, which resulted in substantial decay and multiple extractions. The substantiation was upheld.<sup>21</sup> In another case, the Alaska Supreme Court upheld neglect findings based on repeated instances of head lice, poor parenting, lack of housing, and lack of clean clothing, and food.<sup>22</sup> On the other hand, the Court has also rejected a finding of neglect based on allowing a two-year-old to jump in a slippery bath tub and be placed in a glass bowl on a stove to take photos.<sup>23</sup> The Court stated the allegations were not, "indicative of any general tendency toward insensitivity...to child safety issues."<sup>24</sup>

OCS has also asserted in this case that although the substantiation is based on a general lack of care, lack of supervision, and parental substance abuse (Ms. O is the grandparent), the substantiation should be upheld even if Ms. O were not impaired. This contention, which aligns with OCS's argument that the incident could not have occurred if Ms. O was regularly checking on F, is also not persuasive. The park is directly across the street from Ms. O's home. The boy could have approached F immediately when she entered the play area, or he could have approached her after she was in the park for hours. OCS's hunch that it would take longer than five or fifteen minutes for the incident to occur is not supported by substantial evidence. It also does not support a finding that F was more likely than not in the park for hours, unattended. The facts of this case fall outside of the spectrum of adjudicated neglect findings.

This is not to say that Ms. O's actions were acceptable. As stated, it is more likely than not that Ms. O was under the influence of some substance, which is troubling. It is not acceptable for a child's caregiver to be impaired. However, caregiver impairment, whether from alcohol, prescription drugs, or illegal substances, does not necessarily give rise to a neglect finding. A neglect finding might reasonably be sustained if there were harm to the child or if the

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<sup>20</sup> See OCS Child Protection Manual, 2.2.10.1, "A child's welfare is always threatened by sexual abuse and abandonment." See also, AS 11.41.434-440, sexual abuse of a minor; AS 11.41.230, assault in the fourth degree. (sexual abuse requires contact and assault requires physical injury or fear of imminent physical injury).

<sup>21</sup> See *In re L D*, OAH No. 15-0207-SAN (Commissioner Health & Soc. Serv., 2015).

<sup>22</sup> *Ralph H. v. State, Dept. of Health & Soc. Serv.*, OCS, 246 P.3d 916, 918 (Alaska 2011).

<sup>23</sup> *J.F.E. v. J.A.S.*, 930 P.2d 409 (Alaska 1996).

<sup>24</sup> *J.F.E. v. J.A.S.*, 930 P.2d 409, 412 (Alaska 1996).

evidence established that the child was left alone, unattended for a significant length of time. These facts are not established here.

It is also troubling that during Ms. O's period of inattention F crossed a street, albeit a small and non-busy street, and was subjected to a wholly improper request. More troubling again is the possibility that F complied with the young boy's request and was subjected to exposure from him. However troubling the incident was, the record did not establish that Ms. O neglected F. The record only established some level of impairment and inattention on Ms. O's part and an unfortunate experience with another unattended child in the park.

#### **IV. Conclusion**

OCS did not establish by a preponderance of the evidence that the circumstances of May 28, 2014, amount to neglect by Ms. O. The substantiated finding of neglect is therefore reversed.

DATED this 6th day of October, 2015.

*Signed*  
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Bride Seifert  
Administrative Law Judge

### **Adoption**

The undersigned, by delegation from of 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 12th day of November, 2015.

By: *Signed*  
\_\_\_\_\_  
Name: Jared C. Kosin, J.D., M.B.A.  
Title: Executive Director  
Agency: Office of Rate Review, DHSS

[This document has been modified to conform to the technical standards for publication.]