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

In the Matter of	)	
	)	
L. D.	)	OAH No. 20-0212-SAN
	)	Agency No.

DECISION

I. Introduction

The Office of Children's Services (OCS) received a report alleging that L. D. may have sexually abused his three granddaughters. After an investigation, OCS concluded that the allegations were accurate, and notified L. D. that its findings would be placed on the state Child Protection Registry. L. D. requested a hearing to contest OCS's findings.

Following a hearing, this decision concludes that OCS established that it is more likely true than not true that L. D. engaged in conduct constituting attempted sexual abuse of the two older girls, Child A and Child B, and for which the substantiated maltreatment findings are warranted. OCS did not prove any sexual conduct towards the youngest child, Child C, and the maltreatment finding as to Child C is therefore reversed.

II. Facts

A. Background

In September 2019, Child A, Child B, and Child C (ages 12, 10, and 4) had been living for a year and a half in City A, Alaska with their maternal grandmother, T. D., and her husband, L. D.[1]

Child B reported to T. D. that L. D. was entering the girls' bedroom in the middle of the night and trying to remove their blankets. T. D. asked Child A about these allegations, and Child A reported the same thing had happened to her.[2]

T. D. confronted L. D. about the allegations, and he told her that that Child A was lying, and that he had simply been rearranging the girls' covers.[3] T. D. told the girls they should sleep together in an upstairs bedroom for protection, and that if this happened again, they should scream, and she would "fix" it.[4]

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1 Ex. 9.
2 Ex. 8, 9.
3 Ex. 5, pp. 2-3.
4 Ex. 8, 9.

On September 27, 2019, one week after first learning about these encounters, T. D. went to her pastor to discuss concerns about what the girls had told her.[5] The pastor informed T. D. that L. D. had previously been accused of sexually abusing his ex-wife's then-fourteen-year-old daughter.[6] The same day, T. D. was assisting four-year old Child C in the bathroom and saw blood on the toilet paper. T. D. contacted law enforcement.

B. Investigation

T. D. was directed to bring the girls to the Children's Advocacy Center (CAC), where they were interviewed by Alaska State Trooper Ethan Norwood.[7] The nature of the allegations had also prompted law enforcement to report the matter to OCS. OCS Protective Services Specialist Kara Green was assigned to investigate the allegations.[8] She observed all three forensic interviews, as well as Trooper Norwood's interview of T. D.[9]

1. Child A interview[10]

Child A was nearly thirteen when interviewed. Her demeanor was understated, level, and credible. She appeared slightly uncomfortable with some of the topics discussed (such as labeling "private" body parts), but was calm and earnest, and appeared to make an effort to answer fully and accurately.

Child A described having had a series of nighttime encounters in which L. D. would remove her covers while she was sleeping.

> Sometimes when I'm sleeping my grandpa will come into the room and pull the blankets off of me. And sometimes I can hear him telling me to pull my shorts down. But like, it's in my dream, like, it'll be written down on a piece of paper, and then I'll wake up and I'll be scared and freeze.

Trooper Norwood asked her if she felt like these were dreams or real. She responded, "I've seen him there; I'll wake up and he'll be standing there, or he'll try to hide but I can see him but I'm too scared to do anything." Child A reported having had similar dreams – when at some point in her dream she is instructed to pull her shorts down – several times. She indicated she had only

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5 Ex. 5, pp. 2-3.
6 Ex. 5, p. 3.
7 The interviews were videotaped and represent the bulk of the evidence in this matter.
8 At the time of this assignment, Ms. Green had been with OCS for a year and a half, and in an initial assessment role for only six months. However, she had ten years of experience in the Florida child welfare system, including more than four years of investigations there, and has conducted hundreds of child welfare assessments, with a substantial portion being sexual abuse investigations. Green testimony.
9 Green testimony; Ex. 5, p. 2.
10 Ex. 8

"known" it was happening for a week or two, but believes it had been happening for a longer period without her waking up.

Child A told Trooper Norwood that she was unsure whether L. D. had touched her inappropriately while she was sleeping, but added, "I think so."

> 'Cause I'll be sleeping so I don't know exactly what's happening but sometimes I'd wake up and I can feel his fingers on my legs and they'd be like up here [gesturing] and then I'd pull away and try to cover myself and squeeze the blanket so he can't get it off.

When Child A said that he touched her "here," she gestured to the bikini line crease between her hip and pelvic area. Child A stated that L. D. had touched her in this manner on both thighs, but never "inside of [her] body." She indicated that this touching occurred over spandex shorts, and with L. D. wearing only a bathrobe.

She reported she had been "too scared" to tell her grandmother, but that she had told her younger sister, Child B, who told T. D.[11] Child A reported telling Child B about the dreams she had been having, and about having seen L. D. in the bedroom. Child B had then told her that she too had experienced L. D. trying to pull her own blankets off.

Child A told Trooper Norwood that as a result of these events she had begun sleeping in the same room with her two sisters:

> Because, my grandpa -- it's happened to my little ten-year-old sister -- it's happened to her before where she can feel the blankets pulling, coming off of her and she would grip it so it wouldn't slide down. So my grandma told us we all had to sleep upstairs together so that way if something did happen we'd have our sisters and then if one of us was too scared the other would tell him to stop or scream because my grandma said if it ever happens again to just scream and she'd come and fix the problem. So she told us we all have to sleep together.

Child A also reported that L. D. had recently apologized to her after she "had called him out on it after [she] built up the courage." She said this occurred a little over a week earlier, when she was alone in the upstairs room while her sisters were eating breakfast. She quoted L. D. as saying: "I'm sorry, Child A, I'm sorry. It's tempting, it's tempting for anyone; you have all the parts of a woman. It's tempting. I'm so sorry." Child A reported that L. D. "got really mad" when she said she couldn't currently accept the apology, and described him as becoming "more grumpy and more controlling" after this exchange.

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[11] Child A reported learning from her grandmother that "it had happened before with previous relationships," although the meaning of this statement was unclear.

When asked about other aspects of her relationship with L. D. or his behavior towards her, Child A indicated that he talks inappropriately to her about sex or sexual topics, specifically – talking about sexual behavior between children her age or younger, talking to her about his own sexual relationship with T. D., and making comments to her about knowing when her menstrual periods were. All of these comments were uncomfortable to her. The comments about her menstrual cycle were also suspicious to her, because he would "know" when she was menstruating despite her being very private about that issue.

2. Child B interview[12]

Child B was ten at the time of her interview. When asked if she knew why she was at the CAC, she became tearful and said she was there because "my grandpa was touching us, touching my sisters and I, in an inappropriate way." When asked what that meant, she said, "he was trying to pull off the blankets on me, and I don't know why," and began crying. She continued: "I don't know what he was trying to do, but apparently he's been doing it with my little sister, too, and my big sister, and my little cousin and I don't know why, and I don't know what he was thinking."

As to the one incident in which she was involved, she reported that the prior Thursday, she had been sleeping in the downstairs room and she saw her grandpa walk past her in his red robe. She felt a tug on her blanket and pulled the blanket back up. L. D. again tried to pull the blanket off, and she held onto it. She tried to go back asleep, he did it again, and she got into a really uncomfortable position to hold the blankets on her.

She told her grandmother the following day (Friday). She, T. D., and Child A then had a conversation about it in the car, which is when Child A disclosed what had happened to her. That day, T. D. told the girls she was sorry for what L. D. was doing and said she would talk to him.

The following day (Saturday), T. D. told L. D. to apologize "for what you've done," and he did so. Child B noted that L. D. didn't say what exactly he was apologizing for, and that this was inconsistent with how the family usually apologizes (which includes identifying the action for which the apology is being offered). Child B said that L. D. told them he didn't want them to feel uncomfortable at the D home but didn't say anything else.

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[12] Ex. 9.

Child B reported that Child A had told her about the dream with the note and L. D.'s hand being "really close to her private parts." She told Trooper Norwood that he had "heard it happened to Child A more than once," but didn't know if "it" happened to herself more than the one time she was aware of. She also said that no one has touched her private parts, but that her grandfather "got pretty close" to Child A's private parts by touching her thigh. She also reported that when T. D. learned about these nighttime incidents, she had told the girls to sleep together in the same room.

Child B was emotional during the interview and was obviously aware of and concerned about other people being upset. She described T. D. saying "she was sick to her stomach about what he'd done." She was visibly upset in recounting this, saying she hadn't meant to upset her grandmother but had "just wanted to tell her it had happened," and saying that T. D. "has been really stressed about it."

3. Child C interview and medical evaluation[13]

Child C, age four, was interviewed, but was mostly non-responsive to the questions asked. She also provided inaccurate information in her interview, for example, stating that her mother and father lived with them. She did disclose sexual contact with a same-age cousin, E. F., (who she described as having touched her "pee pee") but made no disclosures regarding L. D. Child C's non-responsiveness makes her interview of little to no evidentiary value.

Because Child C was reporting pain and had blood on toilet tissue when using the bathroom, a forensic medical examination was conducted. The examination was inconclusive, with the forensic nurse reporting that Child C had an abrasion on her labia but that it was impossible to determine whether the abrasion had been "inflicted" or had occurred innocuously.

4. T. D. interview

Trooper Norwood also interviewed T. D. PSS Green observed this interview. Her contemporaneous notes reflect the following disclosures by T. D.:

- She learned about the accusations a week ago, but L. D. had convinced her that this was all a misinterpretation of him simply tucking the girls into bed.
- L. D. also told her that Child A was just lying because she doesn't want to live with her grandparents anymore.

[13] Ex. 10, 12.

- When he apologized to the kids, he told them that he was "a sinner" and has "made mistakes." She also heard Child A tell him that he had apologized about it previously.
- Earlier in the day she had spoken with her pastor, who disclosed that L. D. had been accused of fondling his ex-wife's 14-year-old daughter.
- After T. D. informed her of the recent developments, her daughter S. F. (L. D.'s stepdaughter) disclosed that L. D. "makes inappropriate sexual comments to her," and that she hadn't previously told T. D. because she didn't want to upset her.
    - S. F. had also apparently relayed that her daughter E. F. responded negatively to overnight visits with the Ds. S. F. told T. D. that when she asked E. F. whether she missed visiting L. D., E. F. "said no because he makes her sing her ABCs and if it hurts really bad she has to sing louder."
- About a year and a half ago, a neighbor told T. D. that she didn't want L. D. at her house anymore "because he makes sexual comments and it makes her uncomfortable."
- T. D. had made arrangements for herself and the girls to stay with relatives, and they would not be returning to the home while L. D. was there.[14]

5. Interview of girls' cousin, E. F.[15]

The girls' cousin, E. F., was interviewed at the CAC two weeks after T. D.'s report and the girls' own interviews. It was not a credible interview as far as L. D., because E. F. was very obviously coached prior to the interview. For example, she began the interview by telling the investigator that she was "here to talk to you because [L. D.] is a bad man" and that "[y]ou're going to put him in a cage."

6. Conclusion of investigation

At some point after the interviews at the CAC, OCS transferred the matter out of the City B office due to an internal conflict created by a relationship between L. D. and someone in that office. Ms. Green's investigation stopped at that point.[16]

OCS did not interview L. D.[17]

At some point after the investigation had been transferred out of the City B office, Ms. Green was instructed to close out the case with the information currently in the file. She prepared an Investigation Summary report, in which she found cause to substantiate allegations

[14] Ex. 7
[15] Ex. 11.
[16] Green testimony.
[17] Green testimony; Exs. 5, 7.

of maltreatment against L. D. as to all three girls.[18] As to the two older girls, Ms. Green concluded that the girls' interviews provided sufficient information to conclude that L. D. had engaged in sexual abuse or attempted sexual abuse of both girls.[19] As to Child C, Ms. Green substantiated the allegation based on a conclusion that L. D.'s conduct against the older girls placed Child C at risk for sexual abuse.[20]

C. Procedural history

L. D. was notified of the findings and OCS's intent to place him on the child protection registry.[21] He requested a hearing to contest the findings.[22]

A hearing was held on December 1, 2020. The hearing was held telephonically. Assistant Attorney General Brian Starr represented OCS. L. D. was represented by Andy Pevehouse.

OCS presented the testimony of Protective Services Specialist Kara Green, who was initially tasked with investigating the allegations in the protective services report. However, Ms. Green had not separately spoken with any of the children. She was at the CAC when the children were interviewed and observed the interviews via video feed from another room, as well as observing the (non-recorded) interview with T. D. Because of Ms. Green's lack of investigative involvement outside of the recorded interviews, her testimony on the whole was not particularly useful. However, her testimony was helpful in interpreting the forensic interviews in the context of her extensive experience investigating sexual abuse cases.

Although L. D. attended the hearing, he elected not to testify.

III. Discussion

A. Legal framework

Alaska's Child Protection statute, AS 47.17, sets out a framework for OCS to receive and investigate reports of suspected child abuse or neglect.[23] The statute defines "child abuse or neglect" to mean "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

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18 Ex. 3.
19 Green testimony; Ex. 3; Ex. 4, p. 1.
20 Green testimony; Ex. 3; Ex. 4, p. 2.
21 Ex. 1.
22 Ex. 6.
23 Investigation reports arising out of this statute are maintained in the child protection registry. While the contests of the registry are confidential, substantiated reports of harm may be used by governmental agencies in certain contexts. AS 47.17.040.

the child's health or welfare is harmed or threatened thereby[.]"[24] Some but not all of these component parts are then further defined.

The statute defines "maltreatment" to mean "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[.]"[25] One of the bases on which a Child in Need of Aid finding may be made is if,

> [T]he 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.[26]

"[S]exual abuse" is then defined as conduct described in or prohibited by certain criminal statutes.[27] Relevant to this discussion, it includes the conduct described in AS 11.41.410 – 11.41.460, the statutes setting out the criminal offenses of sexual assault, sexual abuse of a minor, incest, online enticement of a minor, unlawful exploitation of a minor, and indecent exposure. These include AS 11.41.440, sexual abuse of a minor in the second degree, which includes sexual contact with any minor by their legal guardian, sexual contact against a child under 13 years of age by any adult, and sexual contact against a child under 16 by an adult in the same household and who holds a position of authority in relation to the victim.[28]

Alaska Statute 47.17.040(c) provides that, "[b] efore a substantiated finding may be placed on the child protection registry and provided as part of a civil history check under AS 47.05.325, the department shall provide the applicant notice of the finding and an opportunity to appeal the finding." When a parent challenges a substantiated finding 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.[29]

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[24] AS 47.17.290(3). The statute does not separately define "sexual abuse."

[25] AS 47.17.290(9).

[26] AS 47.10.011(7)

[27] AS 47.10.990(33).

[28] Of note, OCS could also – and perhaps more straightforwardly – investigate and substantiate a report of alleged sexual abuse without detouring through the Child in Need of Aid statute. The Child Protection statute itself defines "child abuse or neglect" to mean "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[.]" AS 47.17.290(3) (emphasis added). The statute does not separately define "sexual abuse," but prior Commissioner-level decisions have applied "the commonly accepted use of that term." *Matter of C.B.D.*, OAH No. 16-1332-SAN (Dept' Health & Soc. Svcs. 2017).

[29] *Matter of E.O.*, OAH No. 16-1407-SAN (Dep't Health & Soc. Svcs 2017).

B. Evidentiary issues

In an administrative proceeding under AS 44.64.060, "[t]he administrative law judge may admit any evidence of the type on which reasonable people are accustomed to rely in the conduct of serious affairs."[30] The rules of evidence used in the judicial system "do not apply to an administrative hearings except as a guide[.]"[31] Here, the evidence is comprised chiefly of the three forensic interviews, and supported by the caseworker's contemporaneous notes and later testimony. The nature of the evidence raises several evidentiary issues that require attention.

1. Forensic interviews

As is often the case with allegations of child maltreatment, the chief evidence available here is the children's forensic interviews.[32] In judicial proceedings, it would be necessary to conduct a strict admissibility analysis to determine whether these hearsay statements were admissible. Here, however, the question is far simpler: whether the interviews are the type of evidence upon which reasonable people would rely in the conduct of serious affairs. The answer to that question is plainly yes. The recorded interviews are the product of a formalized and well-recognized process for investigating alleged harm to children. There can be no doubt that they are admissible in an administrative proceeding.

Separate from admissibility, there remains a question as to the weight the interviews should be given. In this connection, it is worthwhile to note that the older girls' interviews would be admissible for all purposes even under the more rigorous standard used in judicial proceedings.[33] Child A and Child B present as mature and credible, using age appropriate language and not appearing to have been coached or rehearsed.[34] Both girls made spontaneous disclosures of L. D.'s concerning conduct, and their statements in the recorded interviews are the

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30 2 AAC 64.290(a)(1).

31 2 AAC 64.290(b).

32 See *Matter of A.S.W.*, 834 P.2d 801, 804 (Alaska 1992) ("The out-of-court statements of a child in proceedings where abuse is alleged are often quite necessary to the administration of justice.")

33 See *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1219 (Alaska 1991); *Matter of A.S.W.*, 834 P.2d at 804; *In re T.P.*, 838 P.2d 1236, 1241 (Alaska 1992). The Court has also emphasized that these factors – (1) the spontaneity of the child's statements; (2) the age of the child; (3) the use of "childish" terminology; (4) the consistency of the statements; (5) the mental state of the declarant; and (6) the lack of motive to fabricate – are not all inclusive, nor should they be applied mechanically. *Broderick,* at 1219.

34 The question of age-appropriate terminology is less clear cut because of Child B's statement to Trooper Norwood she was at the CAC because L. D. had been "touching us inappropriately." While this is not typical age appropriate language, it is not entirely out of bounds either. It is certainly conceivable that after Child B and Child A made their disclosures to T. D., someone told Child B that what her grandfather was doing was "inappropriate." Her use of this single word does not override the overall credibility of her statements.

products of a non-leading interview process.[35] Both girls appear measured in their statements about what happened – readily acknowledging what did not happen or what they are unsure about. As to the factor of consistency, Child A's narrative is internally consistent in terms of describing what occurred, as well as being open about the events that are hazy or unclear to her. Her story is then externally corroborated by Child B's account of L. D. removing her blankets, and by T. D.'s descriptions of prior similar accusations against L. D.[36] While both interviews are hazier about what may have happened to others, each girl is consistent in her own interview describing what happened to her. As to the final element, a motive to fabricate, no evidence was submitted to support such a motive.[37] To the contrary, Child B expresses credible grief about the impact her initial disclosure has had upon her grandmother.

In short, the forensic interviews are admissible in this proceeding because they readily satisfy OAH's evidentiary standard. A review of the Supreme Court's factorial analysis supports giving weight to the interviews of Child A and Child B, whose interviews would be admissible for all purposes even under the more stringent standards applicable in judicial proceedings.

2. Double hearsay from T. D.'s interview with investigators

In addition to the hearsay videotaped interviews, other evidence in this case is in the form of double or triple hearsay – namely, in Ms. Green's account of T. D.'s interview. Ms. Green's account of T. D.'s statements is itself hearsay. T. D.'s statements, in turn, contain another layer of hearsay in describing the neighbor's and daughter's complaint about L. D.'s sexual commentary. And the description of the pastor's statement – that L. D. had previously been accused of sexually touching a step-daughter – is at best triple hearsay (if the victim told the pastor, who told T. D., who told the investigators).

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[35] While the Supreme Court's inquiry includes the "mental state of the declarant," this factor was initially introduced in a case where the declarant was a third party to whom the child had made a disclosure. *See Broderick*, 808 P.2d at 1218. When the hearsay is preserved in a videotaped forensic interview, this factor becomes more about the quality of the interview. While there were certainly points at which Trooper Norwood could have asked more clarifying questions to strengthen the interviews, he conducted himself in a neutral fashion and did not coerce or manipulate the statements made. This factor does not support a finding that the hearsay statements are unreliable.

[36] L. D.'s counsel argued that Child B's statements were unreliable because she was largely describing what she believed had happened to others. But this decision's use of Child B's interview is chiefly limited to her description of her own middle of the night encounter with L. D. Child B presents as a consistent and reliable reporter of that incident, which in turn is consistent with the experiences described by Child A.

[37] While L. D.'s counsel argued that the reports were fabricated as part of a messy divorce, no evidence supporting this theory was introduced. Counsel argued that official notice should be taken of the fact that the Ds are now divorced, as reflected in Courtview. But Courtview reflects that the Ds' divorce proceedings – Superior Court Case No. 3KN-20-00000CI – were not initiated until February 2020 – more than four months after the girls' disclosures. The procedural history of that matter does not support an inference that the girls were lying at T. D.'s behest; the contrary, it could more readily be read to suggest that the disclosures led to the divorce.

The hearsay nature of these statements lessen their reliability. However, when taken as a whole, they are sufficiently similar to the conduct at issue here to at least be considered in evaluating and contextualizing the girls' statements about L. D.'s behavior towards them. There is no prohibition against hearsay in these proceedings, and the question is whether a reasonable person would rely on this information in the conduct of serious affairs. A reasonable person would not rely on this information alone. However, a reasonable person could rely on the information to supplement, explain, or otherwise contextualize other admissible evidence.[38] This is particularly so where, as here, L. D. could have but did not testify to rebut these allegations.

3. L. D.'s failure to testify

A final evidentiary issue is raised by L. D.'s decision not to testify. Prior decisions in which the credibility of forensic interviews has been assessed have involved weighing the sworn testimony of the alleged perpetrator against the statements made in a videotaped interview.[39] Here, however, L. D. elected not to testify. This tactical choice raises another evidentiary issue.

It is well-established that, where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so, the finder of fact may draw an inference that it would be unfavorable to him.[40] From this derives the rule that if a party with knowledge of a fact fails to testify, there is an inference that his testimony would not be favorable to him.[41] While the presumption cannot take the place of proof of a fact necessary to the other party's case in chief, once the party bearing the burden of proof has presented sufficient evidence to establish a prima facie case, the opposing party's silence gives rise to an adverse factual inference.

Here, to the extent that Child A and Child B's recorded interviews, and the other evidence presented by OCS, is sufficient to establish a prima facie case against L. D., his silence creates a presumption in favor of the admitted evidence. That is, having had the opportunity to swear an oath and subject himself to cross examination, and to explain his nighttime behaviors in his granddaughters' rooms, or to deny the allegations of prior misconduct, or to otherwise offer

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[38] Cf. AS 44.62.460(d). While the Administrative Procedure Act does not apply in these proceedings, its approach to hearsay is instructive in considering what weight to give this evidence.

[39] See, e.g., *Matter of E.B.*, OAH No. 16-1362-SAN (Dep't Health & Soc. Svcs. 2017), *Matter of C.B.D.*, OAH No. 16-1332-SAN (Dep't Health & Soc. Svcs. 2017).

[40] *See Interstate Circuit v. U.S.*, 306 U.S. 208 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse[.] Silence then becomes evidence of the most convincing character.").

[41] *Layne v. Vinzant*, 657 F.2d 468, 472 (First Cir. 1981).

any evidence whatsoever to rebut the evidence presented by OCS, an inference arises that the facts of these events are unfavorable to L. D.

C. Did OCS meet its burden of proof that the substantiated findings should be upheld?

1. Did OCS meet its burden of proof as to Child A?

Of the three children, Child A gave the most detailed interview and described the greatest degree of inappropriate conduct – including both sexualized touching and inappropriately sexualized conversations.

While Child A was frank in acknowledging that some of her nighttime encounters with L. D. were foggy because they began while she was asleep, she credibly reported that her grandfather had removed her covers and touched both of her inner thighs. As a threshold matter, there is no "tucking in the children" explanation for this conduct. Further, Child A credibly described an apology that obviates the "innocent misunderstanding" version of events. According to Child A, L. D.'s apology stated that he had been "tempted" because she "has all the parts of a woman."

The sexualized nature of the conduct is further enforced by L. D. engaging attempting to engage Child A in sexualized conversations – talking about children engaging in sexual conduct, his own sexual relationship with T. D., and Child A's menstrual cycle. While it is conceivable that one such topic, alone might be innocently introduced or explained, the combination of sex-themed topics, coupled with the suspicious bedroom behavior and the "temptation" apology, support the conclusion that L. D.'s comments were of an inappropriate sexual nature.[42]

Additionally, T. D. revealed an earlier allegation of sexual abuse against a similar-aged stepchild, as well as other women complaining of sexually inappropriate comments. Despite the hearsay nature of these reports, they are sufficiently consistent with the type of conduct described by Child A to bolster the likelihood that her version of events is accurate.

Lastly, in declining to testify, L. D. did not attempt to counter Child A's version of events, nor the tenuous but numerous collateral concerns raised in T. D.'s trooper interview, nor to otherwise provide some non-predatory explanation for the conduct described. The available factual inference drawn from L. D.'s silence further supports Child A's credible report.

[42] Ms. Green described L. D.'s sexualized comments and other conduct as "very typical grooming behavior." Green testimony.

Separately from arguing that Child A's story is untrue, L. D. argues that the conduct she describes cannot give rise to a finding of sexual abuse. L. D.'s actions – removing Child A's covers and touching her inner thigh – probably do not alone meet the criminal statute definition of sexual abuse.[43] However, to the extent that the actions did not reach the statutory definition of sexual contact, they can fairly be understood as *attempted* criminal sexual contact. "A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime."[44] L. D.'s actions in removing Child A's bedcovers and touching her inner thigh are each substantial steps toward the commission of sexual contact, and therefore each a substantial step toward the commission of sexual abuse of a minor.

Thus, even accepting L. D. may not have technically committed a sexual crime, he nonetheless engaged in conduct under which "there is a substantial risk that the child will suffer sexual abuse." Of note, prior Commissioner-level decisions in substantiation cases have rejected OCS attempts to substantiate for "sexual abuse" in the absence of actual sexual contact. But those cases have arisen in contexts where the legal theory presented is more accurately understood as neglect. Thus, a mother who knowingly exposes her child to a sexually predatory parent – who is not alleged to have then engaged in sexual misconduct towards the child – cannot be said to have committed "sexual abuse," but could certainly be considered to have committed neglect.[45]

In general, Commissioner-level decisions have been loath to accept substantiations based on "risk" alone, and the reasoning for this hesitation is set out in detail in those decisions.[46] This case presents a different set of circumstances, however, and one in which the "risk of abuse" is properly attributed to the maltreating caregiver and properly forms the basis of a substantiated finding. Here, L. D.'s actions put Child A at a substantial risk of sexual abuse because the actions themselves constituted attempted sexual abuse. In this context, even though an act of actual sexual contact has not been established, the substantiated finding of sexual abuse is justified based on L. D.'s commission of attempted sexual abuse, and the substantial risk posed by those actions.

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43 That definition requires either penetration or "sexual contact." AS 11.41.470(6).

44 AS 11.31.100(a).

45 *See Matter of E.O.*, OAH No. 16-1407-SAN (Dep't Health & Soc. Svcs. 2017).

46 *See, e.g., Matter of E.O.*, OAH No. 16-1407-SAN; *Matter of K.Q.*, OAH 20-0012-SAN (Dept' Health & Soc. Svcs. 2020); *Matter of K.L. and B.E.*, OAH Nos. 16-1145/17-0088-SAN (Dep't Health & Soc. Svcs. 2017).

2. Did OCS meet its burden of proof as to Child B?

Child B did not report that she had been touched in an inappropriate manner. However, she did report that L. D. had attempted to remove her bedcovers, making multiple attempts that required her to wrap herself in the blankets to keep him from removing them.

Again, L. D.'s failure to offer testimony in response to Child B's report gives rise to a negative evidentiary inference that further supports Child B's narrative of L. D.'s repeated attempts to remove her bedcovers.

As with Child A, the question remains whether the conduct Child B describes is sufficient to give rise to a finding of child maltreatment. And, as with Child A, the answer lies in L. D.'s conduct being fairly viewed – in the full constellation of evidence in this record – as a substantial step towards criminal sexual abuse. The evidence establishes that L. D. removed Child A's bedcovers and then touched her inner thighs. It is reasonable to accept that L. D.'s identical conduct with Child B's bedcovers was, as with Child A, a step towards sexual contact. While the lack of sexualized touching in Child B's case makes this a closer call than with Child A, the pattern of conduct as to Child A supports a finding that removing the bedcovers more likely than not constituted a substantial step towards sexual abuse. Under the facts presented here, where the "risk" at issue is risk of continued conduct by a perpetrator who has committed attempted sexual abuse, a substantiated finding of sexual abuse is appropriate.

3. Did OCS meet its burden of proof as to Child C?

Unlike Child A and Child B, there is no evidence that L. D. engaged or attempted to engage in sexual contact with Child C. Although Child C had a labial abrasion, the forensic nurse did not make a finding as to the origin of the abrasion, including whether or not it had been "inflicted." There is no evidence linking L. D. to the abrasion, and no evidence other than the abrasion to support a finding of sexual abuse of Child C.

The theory under which Ms. Green substantiated the allegation as to Child C is a pure risk theory – that is, because L. D. is believed to be sexually abusing the two older girls, Child C is at risk of sexual abuse. As noted above, numerous Commissioner-level decisions have rejected this application of a purely speculative risk-based substantiation.[47] While the Child in Need of Aid statute certainly allows OCS to pursue CINA proceedings where it believes that

[47] *See, e.g., Matter of E.O.*, OAH No. 16-1407-SAN; *Matter of K.Q.*, OAH 20-0012-SAN; *Matter of K.L. and B.E.*, OAH Nos. 16-1145/17-0088-SAN.

circumstances present an unreasonable risk of future harm, the Child Protection statute cannot be applied to purely theoretical risk.

There is insufficient evidence in the record to support a sexual abuse substantiation as to Child C.

IV. Conclusion

The evidence presented supports a finding that L. D. more likely than not engaged in conduct that placed Child B and Child A at a significant risk of sexual abuse. The evidence does not support such a finding as to Child C. Accordingly, the findings as to Child A and Child B are upheld, and the finding as to Child C is reversed.

Dated: January 4, 2021

By: *Signed*
Signature
Cheryl Mandala
Name
Administrative Law Judge
Title

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 8th day of February, 2021.

By: *Signed*
Name: Jillian Gellings
Title: Project Analyst

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