

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

In the Matter of	)	
	)	
B J. D	)	OAH No. 19-0965-SAN
	)	Agency No.

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**DECISION**

**I. Introduction**

In September 2019 B D traveled to Peru. She left her 14-year-old son alone with no adult to supervise or assist him. The Office of Children’s Services substantiated in its records that Ms. D’s action constituted neglect. Ms. D appealed the substantiation. She argued that her act was not neglect because her son was capable of caring for himself, that in the unlikely event of an emergency someone would certainly help him, and that her act of leaving actually demonstrated profound commitment to her son.

Under the law, however, Ms. D has a duty to care for her son. When she fails to fulfill her duty, she commits neglect. Although she has a strong commitment to her son and faced difficult circumstances, the circumstances do not excuse her failure to provide minimal care for her son. The substantiation of one count of neglect is affirmed.

**II. Facts**

B D is a disabled veteran.<sup>1</sup> In early September 2019, she, her 14-year-old son, H, and their 13 cats, were living in an apartment in City A, Alaska. By her own testimony, at this time, Ms. D was in or very near a mental crisis. In August, her landlord told her that he was going to evict her. In her view, this was unfair retaliation based on her well-founded complaints regarding mold on the windows and other deficiencies that the landlord had failed to address.<sup>2</sup> Nevertheless, the landlord served an eviction notice on September 5<sup>th</sup>.<sup>3</sup> In addition to the eviction notice, other things were not going well. As H testified, things go up and down for Ms. D.<sup>4</sup> By all accounts, this was a very low time.

Ms. D felt that she was different from other people.<sup>5</sup> She had gifts. She could see things that were invisible to others. She saw the good in people. Because she was different, however,

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<sup>1</sup> B. D testimony.  
<sup>2</sup> B. D testimony.  
<sup>3</sup> H. D testimony.  
<sup>4</sup> H. D testimony.  
<sup>5</sup> B. D testimony.

dealing with life was not easy. Turmoil and stress took its toll. By early September 2019, she felt she was in a stupor. She was unable to relate to H.<sup>6</sup>

To regain her mental health, and to be a better parent to H, Ms. D left City A on September 9<sup>th</sup>.<sup>7</sup> She flew to Peru. Her plan was that the trip would be a spiritual cleansing. Away from her telephone and computer, she would seek a purging with the help of a Peruvian shaman. She bought a one-way ticket because there was no savings to buying round trip and she did not know how long she would be gone. She thought that one month would be the longest possible time.<sup>8</sup>

Before leaving, Ms. D made some inquiries among her friends to recruit someone to look in on H while she was gone.<sup>9</sup> She had high expectations that her friend Mr. T would step up to the plate. She was excited about working with Mr. T, who was in the process of obtaining a grant to start a homeless shelter. The plan was that she would be staff for the shelter, where she and H would live. She also had discussions with another couple, whose names she did not remember. She may also have attempted to make arrangements with another friend, whom she referred to as F. Before she left town, however, she knew that no one was had accepted responsibility.<sup>10</sup> H would be on his own.

She did not consider that a bad thing.<sup>11</sup> H would learn from the experience, and grow, just as she was growing through her Peruvian experience. She knew instinctively that if H came up against a situation that he could not handle, someone would be there to help, whether it was a neighbor, one of the people she had contacted, or OCS. In her view, the fact that OCS did intervene, and take H into custody, proves that she was right.<sup>12</sup>

For H's part, he did, indeed, feel empowered by his freedom from supervision.<sup>13</sup> He attended City A High School, which was a few miles from home. He rode his bicycle or took the bus to school. Because he had after-school activities, he would take the city bus home if he was not on his bike. On day-to-day matters, he was a very capable 14-year-old. For example, when he needed groceries, he felt comfortable that he would be able to ride his bike or take the city bus to Safeway, which was a few miles away. (As it turned out, H did not have to go shopping

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<sup>6</sup> B. D testimony.  
<sup>7</sup> B. D testimony.  
<sup>8</sup> B. D testimony.  
<sup>9</sup> B. D testimony.  
<sup>10</sup> B. D testimony.  
<sup>11</sup> B. D testimony.  
<sup>12</sup> B. D testimony.  
<sup>13</sup> H. D testimony.

because the apartment was stocked with enough people food for the time he was there before OCS took him into custody. He did, however, run out of cat food.) He had plenty of money because on the day after his mother left town, he sold a four-wheeler for \$2500. He was able to handle transaction on his own, with no help from an adult.<sup>14</sup>

With regard to other matters, however, H had concerns.<sup>15</sup> He was not sure about what to do with all the cats, particularly in light of the pending eviction. He also did not know what to do with their belongings or where he would live once the eviction occurred.<sup>16</sup> In addition, he had some trepidation being alone in the apartment, particularly at night when he would hear some strange noises.<sup>17</sup>

H does not generally wear a helmet when he bicycles. He has no health insurance and no family doctor. He has not had a flu shot and is not vaccinated against common childhood diseases. Things are going well for him at school, where he is enrolled in the classes he wanted, and engaged in after school activities.

Turning back to Ms. D, as stated earlier, she did not take a telephone with her on the trip to Peru. She and H shared a cell phone, and her purge included freedom from electronics, at least initially. Thus, when asked about how H could contact her, the only way that Ms. D could think of was through her Facebook account. That would not have worked, however, because after arriving in Peru, Ms. D could not remember her Facebook password. She had to set up a new Facebook account, which she did.

Ms. D did, however, make an effort to stay in touch. She called H from the Seattle airport. He was fine. Once in Peru, she bought a phone and called H. By calling H from Peru, she learned that OCS had taken him into custody.

The OCS custody process began on September 9<sup>th</sup>, when OCS received a report of harm from a community member. The report informed OCS that H was on his own with no arrangements made for adult supervision. Protective Service Specialist Michael Patton was assigned to the matter.

Mr. Patton attempted to call Ms. D.<sup>18</sup> He left a message, but later found out that the phone he called was in H's possession. Mr. Patton interviewed H on September 11<sup>th</sup>. He also

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<sup>14</sup> H. D testimony.

<sup>15</sup> H. D testimony; Patton testimony.

<sup>16</sup> H. D testimony; Patton testimony.

<sup>17</sup> Patton testimony.

<sup>18</sup> Patton testimony.

interviewed others, including a school counselor and the person who had filed the report of harm. He concluded that H was at risk of harm because he was on his own with no safety net to protect him in case of emergency or make important decisions that could affect his health, safety, and education. He was also concerned about long-term effects that can occur when a child feels that his parent has abandoned him. Accordingly, on September 12<sup>th</sup>, OCS took H into custody. Having no relative or responsible adult in his life with whom he could live, H was placed into foster care.<sup>19</sup>

Ms. D decided to return to City B.<sup>20</sup> Although she had not yet met with the shaman, or undertaken the medicinal purge that she was intending, she already felt that she had made significant progress. Indeed, she described her arrival at the LAX airport on the return trip as a significant realization of clarity and well-being such that she was feeling very positive.<sup>21</sup>

Ms. D began her return trip from Peru on September 13<sup>th</sup>.<sup>22</sup> It is not clear exactly when she arrived in City B. Mr. Patton interviewed her on September 16<sup>th</sup>. Later, she met with OCS again later for a “team-decision meeting” regarding custody. The result of this meeting was that H continued in his same foster-care placement.<sup>23</sup>

On September 26, OCS substantiated a finding that Ms. D had committed child abuse or neglect when she left H alone with no responsible adult to supervise his care. Ms. D requested an administrative appeal of this finding. An in-person hearing was held in City B on November 22<sup>nd</sup>. Ms. D and H testified, as did Mr. Patton, and an OCS protective services supervisor, Wendy Nethkin.

### **III. Discussion**

When OCS receives a report of harm, it must investigate and determine whether to substantiate the report. It maintains a central registry of its investigation reports, including whether the report was substantiated or not substantiated.<sup>24</sup> The registry is confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.<sup>25</sup> The standard that must be met to make a finding of substantiated abuse or neglect is found in the definition of child abuse or neglect:

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<sup>19</sup> Patton testimony.

<sup>20</sup> B. D testimony.

<sup>21</sup> B. D testimony.

<sup>22</sup> B. D testimony.

<sup>23</sup> Patton testimony.

<sup>24</sup> AS 47.17.040.

<sup>25</sup> AS 47.17.040(b).

“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.<sup>26</sup>

In this case, OCS has charged that Ms. D committed maltreatment when she left H with no alternative caregiver designated to care for him. “Maltreatment” means

an act or omission that results in circumstances in which there is a 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.<sup>27</sup>

This definition cross-references the child-in-need-of-aid statute, AS 47.10.011, which has twelve paragraphs. Each paragraph identifies a different avenue that could constitute maltreatment. OCS’s substantiation document in this case, however, identifies only one theory of maltreatment: neglect.<sup>28</sup> Neglect occurs when a parent

fails to provide the child with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child’s physical and mental health and development, though financially able to do so or offered financial or other reasonable means to do so.<sup>29</sup>

One confusing aspect of this hearing is that the one count of neglect charged by OCS included the word “abandonment.” OCS clarified, however, that it was not charging Ms. D with “abandonment” as a term of art defined under AS 47.10.013. Rather, OCS was using that term as a shorthand for an element of neglect. This is consistent with OCS’s Maltreatment Assessment Protocol (MAP), which uses the term “abandonment” to describe one type of neglect as occurring when the parent “is absent and does not intend to return or is away from home without having arranged for an appropriate surrogate caregiver.”<sup>30</sup>

The MAP is not binding law, but to the extent that its commonsense descriptors help in applying existing legal standards, they can be considered in determining whether OCS has proved that Ms. D’s conduct met the elements of neglect.<sup>31</sup> Here, the description of neglect in the MAP

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<sup>26</sup> AS 47.17.290(3).

<sup>27</sup> AS 47.17.290(9).

<sup>28</sup> AS 47.10.011(9).

<sup>29</sup> AS 47.10.014.

<sup>30</sup> OCS Exhibit 2.

<sup>31</sup> See, e.g., *In re LK*, OAH No. 15-0903-SAN (Dep’t Health and Soc. Servs. 2015) at 5-6; available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5964>.

is consistent with commonsense and the elements of neglect described in AS 47.10.011(9). When a parent is absent from home for an indefinite period of time, the parent cannot provide adequate care unless a competent surrogate is available. Although OCS agreed that a teenager like H could certainly take care of himself for a short a period of time—say a long weekend—an indefinite absence would be generally be neglectful unless the parent could establish that the circumstances of the parent’s absence did not constitute neglect under AS 47.10.011(9).

In opposing the substantiation, Ms. D makes three arguments. First, she minimizes the risk to H. She points out that H was exceptionally careful and healthy. H could not recall a trip to the doctor. He does not have any history of hurting himself. Although he did remember one minor bicycle accident when he tipped over in a rocky section of road, he was not seriously hurt and he generally avoids riding on rocky terrain. His preferred activities are playing video games and drawing. Moreover, Ms. D argued (and the truth of her argument was obvious at the hearing), that H is an exceptionally capable young man who could no doubt handle many exigencies.

Second, Ms. D argues that the alternative to leaving H would have been to stay, which would have been far worse for H. At the time that she left, she was not able to cope. In her view, leaving for Peru was the best possible thing she could do for both herself *and* H. In making this argument, she did not deny that technically she had temporarily abandoned H. But she asked the rhetorical question, “when is abandonment not abandonment?” She answered the question, “when it is commitment.” She argued that her commitment to H’s well-being required her to leave. She used the analogy of a parent on an airplane, who must don her own oxygen mask first in order to be able to help the child don his or her oxygen mask.

Third, Ms. D argued that H never was put at risk because someone is always there to help. It might be a stranger, it might be a neighbor, a school official, a friend, or it might be OCS. Given no real risk of harm to H, Ms. D asserts, it follows that she did not commit child abuse or neglect.

Turning to this last argument first, Ms. D is correct that many adults who live alone face greater risks than those faced by H. Many infirm or mentally unstable adults are extremely vulnerable yet live alone with no guardian. In the event of harm, these adults must rely on the kindness of strangers or the availability of emergency assistance from a government agency. The point here, however, is that H is not in the same shoes as a person who does not have a legal

guardian. H has a guardian—his parent. The law requires that parent to take steps to protect H from harm.<sup>32</sup> When parent does not take those steps, the parent has committed neglect.

The issue here is whether H’s parent fell short of her duty by leaving H with no substitute who could act on H’s behalf if H was injured or his welfare was otherwise at risk. The answer to that question is yes. Here, no one was tasked with even the bare minimum job of looking out for H. No one could sign his permission slips for school field trips, authorize medical care, advocate for him with officials, assist him in finding housing, or otherwise provide care. For H to not have that minimal level of adult assistance is, under the law, neglect.

With regard to H being exceptionally healthy, careful, and capable, even accepting the truth of that argument (which I do), it does not change the legal analysis. Everyone is at risk of accidental injury. Everyone is at risk of infectious disease. Everyone is at risk of being victimized. Indeed, while H’s remarkable abilities likely make him somewhat less at risk than other 14-year-olds, his circumstances (a pending eviction) made him more in need of a guardian than might be the case for other young teens. For purposes of this analysis, however, his special risk or need factors do not matter. As explained above, the law requires that a child’s parent or guardian take normal precautions to protect against normal risk. When Ms. D failed to do that, she violated the law.

With regard to Ms. D’s arguments that her leaving for Peru was the best action she could take for H, and that someone would be there if H needed help, those arguments, too, are not persuasive. An argument that Ms. D was doing the best she could does not work in this substantiation case because here the only issue is whether her conduct fell below the standard required by the law. Intent or fault are not relevant in this administrative matter. Here, we can recognize Ms. D’s compassion and commitment. She loves her child, and wants the best for him. When she does not provide the minimal care required by law, however, the Department of Health and Social Services will record in its database that Ms. D committed an act of neglect. Even if someone happens to be there to pick up the pieces when she leaves, if she fails to take the proper steps to ensure that H is safe and nurtured, she has committed neglect.

With regard to her argument that, given her mental condition, the disinterest of her friends, and the disinterest of any agency, it would have been impossible for her to do more, Ms. D’s

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<sup>32</sup> Cf. *Michael v. State*, 767 P.2d 193, 198 (Alaska Ct. App. 1988), rev'd on other grounds, 805 P.2d 371 (Alaska 1991) (holding that under common law “A parent had a clear duty to aid his child.”).

argument is that her action was compelled by necessity. We recognize necessity as defense.<sup>33</sup> For example, if an adult slightly injured a child in order to save the child from greater injury—say by pushing the child out of the way of a speeding car—we would not consider that to be child abuse. Alternatively, if a parent were unable to care for a child because the parent had been injured and was in a coma, that would not be neglect.

Necessity, however, is most commonly recognized as a defense when it occurs in exigent circumstances. A parent who argues that physically injuring a child as punishment for bad behavior is necessary because the child needs to learn to behave better would not succeed in proving that it was necessary to abuse the child. Other, less abusive alternatives, were available to the parent.

Here, Ms. D's necessity argument is not persuasive. The problem is that she had plenty of time to take action that was more protective of H. Even if we accept her argument that the situation was exigent on September 9<sup>th</sup> because at the moment she left for Peru the crisis was so dire that she had no alternative but to leave H without any alternative care, that tells us nothing about September 8<sup>th</sup>, 7<sup>th</sup>, or 6<sup>th</sup>. Surely on one of those days, or perhaps earlier, she could have met her duty to provide care for H while she was gone. Her argument that she could not have foreseen that Mr. T or her other friends would let her down is simply passing the buck. She is responsible for finding responsible care for H. If she does not do so in any situation other than a sudden unforeseeable dire emergency, then she has committed neglect.<sup>34</sup>

Moreover, the evidence did not prove that she had exhausted all avenues of assistance. She did not, for example, call OCS, H's school, or mental health agencies before she left. In short, her situation was not proof that leaving H with no care was due to an exigent necessity. Therefore, the substantiation of one count of neglect is affirmed.

In closing, I will comment on Ms. D's accusation that OCS lacks compassion. To the contrary, I observed that the OCS officials in this case exhibited considerable compassion for both H and Ms. D. To Ms. D's credit, she also exhibited compassion for the OCS workers—she recognized that they have a duty to do their job protecting children, and that it is not an easy job.

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<sup>33</sup> *Cf., e.g., In re SS*, OAH No. 14-0060-SAN at 6 (Dep't of Health and Social Serv. 2015) (discussing availability of defense of self-defense in child abuse or neglect substantiation).

<sup>34</sup> If Ms. D were arguing that her neglect should be excused because of mental incapacity—and I did not understand that she was—that would not be a defense to the substantiation. Even if she proved mental incapacity, it would simply shift the substantiation to a different subsection of the statute. *See* AS 47.10.011(11).



It is unusual for a parent to have that perspective, and Ms. D's acknowledgement, as well as OCS's concern for Ms. D and H, are appreciated.

#### **IV. Conclusion**

B D committed an act of neglect when she left her son H alone with no adult to provide for him. OCS's substantiation of one count of neglect is affirmed.

DATED: November 23, 2019.

By: Signed  
Stephen Slotnick  
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 8th day of January, 2020.

By: Signed  
Name: Doniel Wolfe  
Title: Regulations & Policy Analyst

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