BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF FAMILY AND COMMUNITY SERVICES

In the Matter of	)	
	)	
DANIEL L.**	)	OAH No. 23-0319-SAN
	)	Agency No. 929963

FINAL DECISION AFTER REMAND

I. INTRODUCTION

The Office of Children's Services ("OCS") substantiated a finding that Daniel L. sexually abused his daughter while tucking her into bed one night. OCS based its investigation and case on a forensic interview of the daughter.

Following a hearing, a Proposed Decision ("*Daniel L. I*") recommended reversal of the substantiation for sexual abuse. The proposed decision took the view, however, that while sexual abuse was not proved, the evidence might support other theories for substantiation of child abuse. The Commissioner's Office remanded this matter to allow the parties to provide additional evidence and argument and to modify interpretation of certain laws.

On remand, both parties provided testimony from experts on forensic interviews. The evidentiary landscape also changed through the receipt of testimony from Mr. L, who had not testified in the *Daniel L. I* hearing. Mr. L. contradicted most of his daughter's statements.

While OCS was justified in believing the daughter's disclosures in her forensic interview, OCS did not ultimately gather and present a sufficient evidentiary record to sustain the substantiation, and Mr. L.'s counsel and expert were able to cast significant doubt on several aspects of the case. It is not possible to determine by a preponderance of the evidence that the events occurred in a manner constituting abuse.

II. BACKGROUND

A. Facts and Assertions

Daniel L. and Susan T. are the biological parents of Olivia T.-L., who was 15 years old at the time of the February 2023 events at issue in this case.

[OAH note: Pseudonyms have been used and redactions made for publication.]**

Ms. T. has had sole custody of Olivia . She and Olivia lived in [a city in Alaska] until late February 2023 when—just after the events at issue in this case—they moved [out of state].[1]

Ms. T. and Mr. L. do not have a formal visitation agreement, but according to Ms. T., Mr. L. "has been, you know, a part of her life as much as I think he possibly could have been with work and just, you know, our relationship as parents with [Olivia]."[2] They tried to share custody alternating weeks for a short time, but then reverted to intermittent visits by Mr. L. Ms. T. described the time between visits as varied, but the longest gap she described was a year.[3] When Olivia was about nine, Mr. L. moved to [another state] and Olivia spent the summer there with him, with Mr. L. seeing her every few months during the rest of the year while traveling back and forth to the North Slope for work.[4] Mr. L. then moved to Anchorage and continued to see Olivia a few times a year.[5]

Ms. T's impression of Mr. L.'s relationship with Olivia was that there "has been some rifts that were developed over the years," but that "she was really excited every time she saw her dad, anytime she talked to her dad, you know, on the phone or had visits with him. . . . I had to be, you know, the disciplinarian, the caretaker. And when they were together, they got to have more of the fun times."[6]

Despite not being a custodial parent, Mr. L. took an active interest in his daughter's behavior and school performance. Ms. T. and Mr. L, were both set up to receive alerts from Olivia's school in [another city].[7] In fall 2022, Mr. L. began receiving alerts that Olivia had been tardy or absent from school.[8] Mr. L. reached out to a guidance counselor at the school and learned Olivia had numerous unexcused absences and missing assignments.[9] According to OCS notes, a school counselor confirmed that Olivia was failing three classes, had already failed a class the previous term, "tended to leave class to walk around school," and had skipped multiple days of multiple classes.[10] Mr. L. discussed

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1 Susan T. testimony.
2 *Id.*
3 *Id.*
4 Susan T. testimony; Daniel L. testimony (remand hearing).
5 *Id.*
6 Susan T. testimony.
7 Daniel L. testimony (remand hearing).
8 *Id*.
9 *Id*.
10 R. 000013; *see also* Susan T. testimony (confirming Olivia failed a class in the fall 2022 semester).

putting Olivia in an after-school program to help her with her homework.[11] Olivia was resistant.[12]

Olivia visited her father two or three times during this period — in November/December 2022 and in February 2023.[13] According to Ms. T., Olivia returned from the late 2022 visit or visits "over the top excited," telling her mother that they were having fun.[14] After the final visit, she reports that Olivia returned "extremely quiet."[15]

Mr. L. says there was a shift in his conversations with Olivia during these visits as they addressed more serious topics. He reports that Olivia came out to him as "dating women and men," and that he gave her advice about not being "afraid to be judged at all" and to "have a level of integrity inside of who you are as you grow."[16] He relates that he also talked to her about the importance of pursuing an education and career and the need improve her school attendance and performance.[17]

In 2022-23, there began to be issues with Olivia's usage of her phone. Ms. T. cut Olivia's phone off, but Mr. L. added her to his own phone plan.[18] However, when her parents discovered that Olivia had been sending inappropriate pictures of herself and "looking up things online that she was not supposed to," and observed she was on her phone constantly and not listening to her parents, Mr. L. removed her from his phone plan, telling her to focus on school, attendance, and getting her grades up.[19] Olivia expressed her displeasure to her father.[20]

Olivia and her mother were about to move to [another state] at this point, a move Ms. T. had been planning since late 2022.[21] Prior to the move, Mr. L. had Olivia come to Anchorage for a visit during a split break in school in February 2023.[22] On one night during the

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11 Daniel L. testimony (remand hearing).

12 *Id*.

13 Susan T. testimony; Daniel L. testimony (remand hearing); R. 000006. *Id.*

14 Susan T. testimony.

15 Daniel L. testimony (remand hearing).

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17 *Id.*

18 *Id*.

19 *Id*.

20 *Id*.

21 Susan T. testimony.

22 *Id*. (Tr. at 89). See also R. 000005 ("[Daniel] asked to be able to visit with [Olivia] prior to them leaving"). Ms. T's testimony on the sequence of events here is logical, and is more believable than Mr. L's recollection that he did not find out about the move until the day of the move (which would have been the day after the Stevie's Place interview).

February 2023 visit, Olivia went to bed. Mr. L. came into her room after she was lying in her bed, on her side. It is at this point that their stories diverge.

Mr. L. had a practice of hugging his kids while they were in bed, tucking them in, and kissing them goodnight.[23] According to Mr. L.'s testimony in January 2024, that is what happened this night as well. Olivia was lying on her side. While standing with his feet on the floor, he leaned over her, with his right hand on the edge of the bed and his left hand on the mattress, just over her left shoulder. Mr. L. leaned in, gave her a kiss on the cheek, and said, "Goodnight, I love you."[24] He claims a rather precise recollection of the whole interaction, although he describes it as routine. Mr. L. stated that his girlfriend was in the house when he tucked Olivia in and kissed her good night.[25] He says he then went into the kitchen and he and his girlfriend cleaned up and went to bed.[26]

Olivia's account of the night in question comes from a videotaped forensic interview taken 12 days after the event. It is matter-of-fact in tone and quite precise in terms of how the body dynamics worked although, as will be seen, some details were left unexplored by the interviewer. Olivia does not seem inclined to make the account more lurid, and readily volunteers when she does not remember particular details of what words were spoken.

Olivia stated that Mr. L's girlfriend had left the house, and Mr. L. only left her room when the front door opened, indicating that his girlfriend had returned.[27] According to Olivia, Mr. L. climbed into bed with her and "spooned" her from behind.[28] When asked which of Mr. L's body parts were touching her, Olivia responded that he was "pushing his genital area into my rear end," touching his mouth to her ear, and holding her "really tight" across her chest with his right arm, which he had wrapped around "underneath" her.[29] Olivia demonstrated that Mr. L's right arm was holding her across her sternum,

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23 Daniel L. testimony (remand hearing). Mr. L. had another family [out of state].

24 *Id.*

25 *Id.*

26 *Id.*

27 R. 000048 (Olivia interview).

28 *Id.*

29 *Id.* Olivia demonstrated the placement of Mr. L's arm across her sternum multiple times in the interview. During one of the times, soon after 2:37:20 p.m. on the video, she explains that "he put his arm underneath me" and makes it clear that the right arm was wrapped around from below and then up across the sternum, while the left was on top and free. The original proposed decision in this matter (at p. 12) misunderstood this testimony and, regrettably, OCS did not correct the misunderstanding in its proposal for action. However, the misunderstanding has been recognized in further review of the record following the remand.

above her breasts.[30] Mr. L. also put "his [left] hand in my pants, but he didn't really do anything. It just kind of rested there."[31] When asked if Mr. L's left hand was over or under her pants and underwear, Olivia stated that his hand was under her underwear.[32] The interviewer then asked, "his hand, when he put it under your underwear, was it on the outside, was it on the inside, or something else?" Olivia responded, "He was just resting it right on the outside."[33] The interviewer did not ask for clarification of (and Olivia did not state) where under her underwear Mr. L. allegedly put his left hand or the body part the hand was "right on the outside" of. While this was occurring, Olivia stated (speaking quite rapidly) that:

> He was like shushing me and, like, stroking my hair, and he was like, um, like, just, you're so beautiful, and was like, um, he said something else but I couldn't, I don't even remember what he said, but he just, like, kept telling me that I was pretty and that, all sorts of stuff, and that it's gonna be okay and I wasn't talking and I th--, he thought that I was sleeping? So I assume maybe that he didn't hear what, that he didn't know that I know, but, then, um, I opened my eyes, finally, and he left, he just kind of stood there and stared at me and walked away.[34]

After the interviewer asked who else was around when this happened, she said:

> Um, it was just me, his girlfriend, and um, him in the apartment but she had gone to Target, or Walmart, or somewhere, um for a little bit and then when, and, right when the front door opened he stood up, and that's when I opened my eyes, and it all just happened at once, he stood there, stared at me, and then left.[35]

Olivia also stated that "in the past, he's made, like really inappropriate comments about, like, how I was — my body was developed and stuff like that. And, like, would say, like, really sexual things about me or, like, touch my butt and, like, come really close to me in my personal space."[36] When asked for more information, Olivia described a time when Mr. L. slapped her butt while they were baking brownies and another time when he woke her up by "touching my butt and like, my lower back and was like, using his knee and pushing me around and stuff."[37] She clarified that these touches were over her clothes, not under, and the second incident was accompanied by Mr. L. saying "wake up."[38]

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30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* (2:38:30).
35 *Id*. (2:39:15).
36 *Id*
37 *Id.* Mr. L. denied making any such comments or touching Olivia inappropriately. *Id*.
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When Olivia returned home after the February 2023 visit, her mother noticed she was "extremely quiet, which is not like her."[39] Ms. T. testified that she asked Olivia what was wrong. After about two days, while they were in their truck, Olivia told her about the event at her father's house and then "completely fell apart." In her mother's retelling at the hearing in September 2023, Olivia said that

> she was in the -- in her bedroom at her father's apartment, and that he came into her bedroom and got into bed with her and kind of, like, and hugged her from the back, like he was behind her, and was kissing on her neck and then proceeded to put his hands down her pants. And that's as far as she got telling me what happened.[40]

An earlier retelling, which can be inferred to be from Ms. T. as well and was much closer to the event, was as follows:

> [Olivia] said she was sleeping [in] her room and her father came into the room she was in, got in bed with her and grabbed her tightly so she was not able to move. He pushed his genitals into her buttocks, put his hands on her vagina and he put his hand down the back of her pants. [Olivia said] she was too afraid to say anything so she only moved to try to let him know she was awake. She also [said] earlier in the day he had been asking her to cuddle in bed with him.[41]

The incident was reported to OCS. Shortly afterward, and the day before Ms. T. and Olivia were to move [out of state] (as previously noted, about 12 days after the alleged incident), Olivia was interviewed at Stevie's Place.[42]

The OCS investigation involved a very limited effort to check collateral sources. OCS spoke with Ms. T., a counselor from Olivia's school[,] and a friend of Ms. T's regarding Ms. T's parenting.[43] OCS also received a call from Mr. L's ex-wife, but it does not appear from the notes that OCS interviewed or otherwise gathered information from the ex-wife.[44]

Ms. T. spoke to Mr. L.'s ex-wife about the February 2023 incident. She relayed her impressions of the ex-wife's demeanor, but not any statements by or information from the ex-wife herself. Ms. T. also spoke with a daughter and niece of Mr. L., who "didn't say that there was an act made, but they alluded to that, you know, this wasn't the first

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39 Susan T. testimony.
40 *Id.*
41 R. 000005.
42 R. 000010; R. 000048 (Olivia interview).
43 R. 000011-12
44 R. 000012.

occurrence of something like this happening."[45] OCS, however, did not reach out to or otherwise speak to these relatives of Mr. L.

OCS's agency records include two prior reports against Mr. L., but no substantiated findings. One of the reports involved a 2008 allegation of leaving infant Olivia unattended while at a bar. It was not substantiated because of an inability to interview Mr. L. or other witnesses.[46] The other was a 2011 physical and sexual abuse allegation by the child of his then-girlfriend. It was not substantiated because the child admitted that she fabricated accusations against Mr. L. because she was upset with her mother and Mr. L. in connection with domestic violence against her mother by Mr. L.[47]

In the present investigation, OCS did not attempt to interview Mr. L. According to OCS notes, an Anchorage Police officer initially asked OCS, on March 8, 2023, to hold off contacting Mr. L. until it received a copy of Olivia's interview.[48] Notes indicate an OCS representative emailed the police officer on March 13, 2023 for an update and left a follow up voicemail on March 21.[49] Having not received a return call from the police officer, OCS elected to close its investigation on March 23, 2023, without speaking to Mr. L., his girlfriend, or any other potential percipient witnesses.[50]

In its investigation, OCS did not speak to Mr. L.'s girlfriend who was present some or all of the night of the incident. For the checklist item "Interview any other household members", the assessor simply entered "N/A".[51] OCS did not speak to other family members of Mr. L. OCS did not gather evidence related to Olivia's phone or phone usage. It did not speak to her teachers, but did contact a school counselor, without receiving any particularly helpful information.

OCS issued a notice of substantiated finding of sexual abuse on April 5, 2023.[52] Mr. L. requested a hearing to challenge the finding.[53]

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45 Susan T. testimony.
46 R. 000018.
47 R. 000031-32, 000036-37.
48 R. 000012.
49 R. 000013-14.
50 R. 000015.
51 R. 000007.
52 R. 000001-3.
53 R. 000040.

B. Procedural History

In this type of appeal, a proposed decision must be issued within 120 days of the hearing request unless the parties and Chief Administrative Law Judge agree to an extension.[54] Mr. L. did not want an extension, so the hearing was set to start July 18 with a decision to follow by August 17.[55] Several pre-hearing dates were set as well, including a July 5, 2023 deadline for witness lists.[56] OCS timely filed a witness list.[57] Mr. L. did not, signaling that he did not intend to call any witnesses at the hearing. OCS's witness list included Pamela Karalunas as "an expert witness who was retained by the state to review the records pertaining to this case."[58] OCS also filed a notice stating that Ms. Karalunas is "an expert in the areas of forensic interviewing and in disclosures of child sexual abuse victims."[59]

The parties later asked to briefly extend the schedule to allow Mr. L. to file a motion for summary adjudication. The hearing was rescheduled for September 12, with a decision to follow 30 days after the record closed.

Mr. L.'s motion for summary adjudication was denied because there were disputed issues of material fact.[60]

Mr. L. also moved to exclude expert testimony from Ms. Karalunas. Because a deposition of Ms. Karalunas indicated she had no opinions to testify about, and because OCS did not present any practical solutions in its response to the motion to exclude Ms. Karalunas's testimony, the exclusion was granted. The case proceeded to a hearing on September 12. OCS had the option to call Olivia as a witness, but chose not to because of the belief that it did not have enough time to prepare her after what it viewed as the unexpected loss of Ms. Karalunas as a witness. At the close of OCS's case, Mr. L.'s attorney offered to have Mr. L. testify, but stated that he would withdraw the request if OCS objected. OCS objected. Without seeking a basis for the objection, Mr. L. withdrew the request. The resulting hearing was very brief, consisting of less than two hours of testimony and argument. The only witnesses were an OCS initial assessor and Ms. T.

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54 AS 44.64.060(d).
55 May 23, 2023 Scheduling Order.
56 *Id.*
57 Office of Children's Service Witness List, July 5, 2023.
58 *Id.*
59 Notice of Expert Witness and Filing of Resume and Curriculum Vitae, July 5, 2023.
60 August 17, 2023 Order.

"Daniel L. I" was issued October 25, 2023, finding that OCS had failed to meet its burden to present factual evidence proving any of the legal theories recognized in the decision. The Commissioner remanded to permit a fuller exploration of the matter notwithstanding certain procedural missteps by counsel, and to ensure that certain legal issues were approached correctly. The remand order provided that the ALJ should: (1) explore the facts under a theory of substantial risk of sexual abuse, if pursued by OCS (with the OCS permitted to advocate both attempted sexual abuse and unacceptable risk of escalation); (2) apply the holding in *In re LD*, which held that attempted sexual abuse can be substantiated as sexual abuse; (3) reevaluate certain Supreme Court holdings; (4) permit arguments about certain aspects of OCS's internal Maltreatment Assessment Protocol tool; and (5) permit testimony from one expert each "about the quality and best interpretations of [Olivia's] interview."

At the remand hearing, OCS offered testimony from its original expert, Pamela Karalunas. Mr. L. provided testimony on his own behalf and from his expert, Dr. Jason Dickinson. The parties also submitted post-hearing briefing.

III. DISCUSSION

OCS maintains a Child Protection Registry for conducting background checks for limited purposes on persons seeking to provide certain services, such as childcare.[61] This Registry reflects any "substantiated findings under AS 47.10 [Child in Need of Aid] or AS 47.17 [Child Protection]."[62] Here, OCS initially gave notice of a single substantiated finding of sexual abuse based on Olivia's interview and her statements about the February 2023 visit. Following the order of remand, OCS provided supplemental notice that it would also rely on a theory that Mr. L. had created a substantial risk that Olivia would suffer sexual abuse.[63] OCS has the burden of showing by a preponderance of the evidence that Mr. L's actions constitute sexual abuse or created a substantial risk of sexual abuse.[64] Thus OCS's burden is both factual and legal: "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."[65]

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61 AS 47.17.040.
62 AS 47.17.040(a).
63 OCS Notice of Intent (Dec. 12, 2023).
64 *In re EK Q*, OAH 20-0655-SAN at 7 (Commissioner Health and Social Services 2021).
65 *Id.*

The formal rules of evidence do not apply in these proceedings. The standard for admissibility is whether the evidence presented is the kind of evidence on which reasonable people might rely in the conduct of serious affairs.[66] This is a lower standard than applied at OAH hearings conducted under the Administrative Procedure Act (APA), AS 44.62.330-660.

A. Types of Conduct that Would Support a Substantiation

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.[67] 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 the child's health or welfare is harmed or threatened thereby[.]"[68] 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[.]"[69]

In this case, OCS substantiated a finding under "maltreatment," and more specifically referenced AS 47.10.011(7), which specifies that a child may be a child in need of aid if they have "suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse."[70] Thus a finding under this statute can be based on conduct that either constitutes sexual abuse or created a substantial risk to the child of being sexually abused.

1. Direct Sexual Abuse

For purposes of AS 47.10.011(7), sexual abuse is defined as the conduct described in certain criminal statutes.[71] Considering the facts here, the potentially applicable criminal statutes are all ones that have "sexual contact" as a material element.[72] Sexual contact is defined as

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66 2 AAC 64.290(a)(1).

67 Investigation reports arising out of this statute are maintained in the child protection registry. While the contents of the registry are confidential, substantiated reports of harm may be used by governmental agencies in certain contexts. AS 47.17.040.

68 AS 47.17.290(3). The statute does not separately define "sexual abuse."

69 AS 47.17.290(9).

70 AS 47.10.011(7).

71 AS 47.10.990(33) ("'sexual abuse' means the conduct described in AS 11.41.410 – 11.41.460; conduct constituting 'sexual exploitation' as defined in AS 47.17.290, and conduct prohibited by AS 11.66.100 – 11.66.150").

72 *See* AS 11.41.425(a)(7) (third degree sexual assault for nonconsensual sexual contact); AS 11.41.436(a)(3) (second degree sexual abuse of a minor for sexual contact between a parent or guardian and child under 18); AS 11.41.438(a) (third degree sexual abuse of a minor for sexual contact between a 17+ year-old offender and a 13-15 year-old child at least four years younger than the offender).

knowingly touching a person's genitals, anus, or breast or causing a person to touch the perpetrator's genitals, anus, or breast.[73] The touch may be direct or through clothing, but excludes certain incidental touching, including shows of affection for a child.[74]

2. Substantial Risk of Sexual Abuse

AS 47.10.011(7) also permits a CINA finding or a substantiation if:

> (7) . . . 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[.]

Thus, if Mr. L. engaged in "conduct" that created a substantial risk that Olivia would "suffer sexual abuse," he could be substantiated. If he "created" "conditions" giving rise to such a substantial risk, he could likewise be substantiated. A third way of creating substantial risk—"failure . . . to adequately supervise the child"—is not relevant to the present case.

The Alaska Supreme Court has found a substantial risk of sexual abuse when a parent has previously sexually abused a child, when a child is left in the care of a known or suspected sex offender, or when another child in the household has been sexually abused.[75] But neither that court nor any other tribunal has held that these are the only conduct or conditions a parent can create that would give rise to substantial risk. One additional type of such conduct is attempted sexual abuse—if a caregiver attempts to do something that would fit the definition of sexual abuse, but is interrupted, thwarted, or unsuccessful in completing the act, a substantial risk of sexual abuse would likely be present while the attempt was in progress.[76] This was the basis for

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[73] AS 11.80.911(b)(61)(A).

[74] AS 11.80.911(b)(61)(A)-(B).

[75] *See*, *e.g.*, *Cynthia W. v. Dep't of Health & Soc. Servs., Off. of Children's Servs.*, 497 P.3d 981 (Alaska 2021) (substantial risk of sexual abuse from being left in care of person indicted for sexual abuse of minors); *Rowan B., Sr. v. State, Dep't of Health & Soc. Servs.*, 320 P.3d 1152, 1158 (Alaska 2014) ("when a trial court finds a parent has sexually abused one child in the household, the court may presume that other children in the household are at substantial risk of sexual abuse."); *Jared S. v. State, Dep't of Health & Soc. Servs., Off. of Children's Servs.*, No. S-11836, 2006 WL 1957903, at *6 (Alaska July 12, 2006) (affirming finding of risk of sexual abuse based on parent's past sexual abuse, expert testimony of parent's likelihood of re-offending, and parent's lack of acknowledgement or reform).

[76] As noted in a prior decision, "'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.'" *In*

a Commissioner finding of substantial risk of sexual abuse in the prior Alaska substantiation case of *In re LD*.[77] It is also expressly included in Maltreatment Assessment Protocol ("MAP") section A3 (the portion of an internal guidance flowchart under which this substantiation was made), which expressly encompasses "attempted physical contact . . . of a sexual nature."[78] Another type of such conduct, likewise consistent with the MAP, is where the conduct, though not bringing the perpetrator into contact with genitalia, breasts, or anus, seeks to arouse the minor in a way that could lead to escalation and thereby creates a substantial risk that such contact would ensue.

B. Quality of the Forensic Interview

Forensic interviewing of children is a complex task requiring considerable skill and training.[79] The interview of Olivia followed the ChildFirst protocol, a widely-accepted way of maximizing the reliability of children's statements. In general, this protocol involves following the child's lead, using the child's terminology, maintaining comfort, and avoidance of leading or suggestion.[80] Both experts in this case were well-versed in this protocol (both are trainers), and both felt the protocol was generally followed in Olivia's interview.

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re LD, OAH 20-0212-SAN (Comm'r Health & Soc. Serv. 2021) at 13 (published at https://aws.state.ak.us/OAH/Decision/Display?rec=6963). (quoting AS 11.31.100(a)).

[77] *Id.* at 12-13.

A case from early in the development of OAH's SAN docket, *In re PN*, could be interpreted as taking a different approach to attempted sexual abuse, declining to substantiate in an instance where a court had previously found the perpetrator to have engaged in attempted sexual abuse of a minor. *See In re PN*, OAH Case No. 14-0061-SAN (Comm'r of Health & Soc. Serv. 2014) (pub. at https://aws.state.ak.us/OAH/Decision/Display?rec=6963). In that early case, however, OCS set out only to prove "sexual abuse" as that phrase appears in AS 47.17.290. It did not advocate, and the tribunal did not consider, that a substantiation could also be made under the rubric of "maltreatment," and that "maltreatment" is expressly defined with a cross-reference to AS 47.10.011, where it specifically encompasses "substantial risk that the child will suffer sexual abuse." *In re PN* did not address a substantial risk theory at all; it simply held that attempted sexual abuse is not "sexual abuse" as that phrase appears in AS 47.17.290.

In the years between *In re PN* and *In re LD*, OCS refined its understanding of the statutory substantiation process and began to make use of the definitional material in AS 47.10.011. None of this implicates the recent case of *Stefano v. State of Alaska, Dep't of* Corrections, 539 P.3d 497, 503 (Alaska 2023), which Mr. L. has relied on seemingly to assert that every refinement in legal reasoning by an agency requires formal rulemaking. Neither OCS nor the department has altered its interpretation of a statute at all, still less one regulating conduct in the manner of the one at issue in *Stefano*. All that has happened is that OCS has shifted away from basing cases like this on the definition of "sexual abuse" in AS 47.17, and instead now bases them (both in its notices and its argument) on the broader "sexual abuse, or . . . substantial risk" language found in AS 47.10.011(7).

[78] For a discussion of the significance of the MAP, *see In re NN*, OAH Case No. 15-1224-SAN (Comm'r of Health & Soc. Serv. 2016) at 6 (published at https://aws.state.ak.us/OAH/Decision/Display?rec=5970).

[79] Dr. Jason Dickinson testimony (Tr. at 107-8).

[80] Pamela Karalunas testimony.

There was, however, a significant weakness in the interview, acknowledged even by the OCS expert: lack of breadth and follow-through.[81] Dr. Dickinson, a noted national expert in forensic interviewing who has designed protocols for multiple states, explained the relevant aspect of effective interviewing as follows:

> [I]f there are alternative explanations, if there are points of ambiguity, it's really important that the interviewer be open and pursue those alternative explanations. What we kind of want to do is rule those out. It's kind of -- as opposed to trying to confirm an allegation, you kind of want to go in and rule out plausible alternatives, and that makes the allegation much stronger. In terms of the ChildFirst protocol, the training document I have, suggesting alternative explanations is mentioned on page 11, 113, 115, and 133. So, it's part of the question and clarification phase of any investigative interview, including the ChildFirst protocol.[82]

This is where the interview of Olivia —which was very brief—fell somewhat short. Notably, regarding the hand that was inside her underwear, Olivia said Mr. L. "was resting it right on the outside." The context strongly suggests it was resting on the outside of her genitals, but the interviewer did not circle back to rule out that it might have been resting on the outside of something else or otherwise not in contact with the genitals—a distinction that would affect whether the hand placement met the definition for "sexual abuse."[83] Additionally, there was no exploration of discussions Olivia may have had with others about the incident, an area interviewers may need to probe to uncover potential suggestion, coaching, or ulterior motive.[84] There was no significant probing of what Olivia meant by spooning, or what she may have felt from her father pressing against her. And finally, there was no effort to steer the conversation in such a way as to see whether Olivia would, or wouldn't, mention surrounding events of interest that had been relayed to OCS by the reporter, such as that "earlier in the day he had been asking her to cuddle in bed with him."[85]

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81 The OCS expert, Pamela Karalunas, was equivocal as to whether this deficiency was a departure from the ChildFirst protocol, first saying "I didn't observe any" deviations, but then describing the failure to get as many details as the interviewer "perhaps . . . should have" and saying, "I didn't see any *other* deviations" (italics added). Regardless of whether she viewed it as a deviation from the protocol itself, however, she acknowledged the lack of probing questions as a weakness in the interview.

82 Dr. Jason Dickinson testimony (Tr. at 96-97).

83 A hand placement not meeting that definition could nonetheless implicate attempted sexual abuse or another dimension of substantial risk of sexual abuse.

84 Dr. Jason Dickinson testimony (Tr. at 98, 102).

85 R. 000005. *See also* Dr. Jason Dickinson testimony, Tr. at 98 ("an interviewer should not be completely blind to the allegation or the disclosure") and Tr. at 99-100.

C. Credibility of the Forensic Interview

In evaluating the trustworthiness of a child's statement, the Alaska Supreme Court has pointed to six key 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."[86] These factors are not exclusive and are not necessarily at issue in all circumstances.[87] Applying these factors here reveals Olivia's account is quite strong.

Spontaneity. A minor's statement is considered spontaneous if "made without undue suggestions by someone else."[88] Here, the interviewer asked Olivia open-ended questions and did not prompt or suggest particular statements. As both sides' experts testified, the interview was consistent with the aspects of the "ChildFirst Protocol" aimed at preserving spontaneity. The video demonstrates that Olivia's statements were generally spontaneous.

Age. Courts and OAH have considered that particularly young children, such as under the age of six, lack the ability for sophisticated deception but can be suggestible.[89] At 15, Olivia is not in this category. Thus "[n]o significant conclusions can be drawn from her age, but for the fact that she is old enough to be deliberately untruthful."[90]

Childish Terminology. Use of childish terminology by a young child, such as anatomical euphemisms, can suggest a statement is true and not the product of coaching.[91] At fifteen, Olivia was old enough that one would not expect use of particularly childish terminology. And indeed her interview included none. This factor is neutral.

Consistency of Statements. The record does not include multiple firsthand statements by Olivia from which to assess her consistency across time or contexts. However, her account at Stevie's place appears to be generally consistent with the account she gave her mother soon after returning from the visit to her father. The one potential disconnect—that she mentioned to her mother that Mr. L. had wanted her to cuddle in bed with him earlier in the day, but

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86 *In re T.P.*, 838 P.2d 1236, 1241 (Alaska 1992).

87 *Id*; *In re A.S.W.,* 834 P.2d 801, 804 (Alaska 1992) ("these factors were not all inclusive nor should they be applied mechanically").

88 *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1219 (Alaska 1991).

89 *See*, *e.g.*, *Broderick*, 808 P.2d at 1219; *In re EK Q*, OAH Case No. 20-0655-SAN (Comm'r of Health & Soc. Serv. 2021), at 11 (published at https://aws.state.ak.us/OAH/Decision/Display?rec=6799).

90 *In re EK Q*, OAH 20-0655-SAN at 11 (applying age factor to an eleven-year-old).

91 *Broderick*, 808 P.2d at 1219.

did not mention that in her interview—is more of a reflection of the lack of follow-through and exploration by the interviewer than a discrepancy that can necessarily be attributed to the child.

There is a potential internal inconsistency in that Olivia stated that Mr. L. was holding her tightly with his right arm, putting his left hand in her pants, and stroking her hair. She did not describe these actions as a series of events, she instead seemed to suggest they were happening at the same time.[92] Mr. L. has only two hands. However, Olivia has an ample volume of hair, and the account could easily be reconciled if the right hand was stroking her hair on the far side of her sternum (the interviewer did not explore this). In any case, it would not be surprising for a person in a stressful situation to merge some aspects in remembering them.

There is an external inconsistency between how Olivia described her relationship with her father and how her parents described it. Olivia stated that she and her father were "never really close."[93] But Ms. T. recalled that Olivia "was really excited every time she saw her dad, anytime she talked to her dad."[94] Mr. L. described the two of them having discussions about her sexual identity and future.[95] Olivia's characterization of her relationship with her father contrasts with the facts both her parents provided about the time she and Mr. L. has spent together, her positivity about the relationship prior to the February 2023 visit, and Mr. L's level of involvement in her life. On the other hand, a child who has been abused might well discount the closeness of the relationship as a self-protective measure. Olivia does appear—by her mother's largely unchallenged account—to have been very disturbed emotionally by the events of the February 2023 visit.

Although these inconsistencies are not particularly troubling, it must be remembered that Mr. L. had no opportunity to cross-examine Olivia about these inconsistencies.

Mental State. Mental state, in this context, means the mental state a minor exhibited at the time of the hearsay statement at issue.[96] Olivia's demeanor appeared calm and generally

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92 R. 000048 (Olivia interview).

93 *Id.*

94 Susan T. testimony.

95 Daniel L. testimony (remand hearing).

96 *See Idaho v. Wright,* 497 U.S. at 821 (citing *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988) as the source of the "mental state" factor); *Morgan v. Foretich*, 846 F.2d at 948 (considering observations of minor's apparent mental state shortly before hearsay disclosure).

comfortable speaking with the interviewer. Her demeanor did not exhibit any indications of deception. This factor is neutral.

Motive to Fabricate. It is conceivable, based on the information in the evidentiary record, that Olivia had a limited motive to fabricate allegations against her father. He had set himself up to receive notifications from her school in [another city] and had recently been involved with her attendance and performance problems in school, even though living in a different city. Olivia could thus have reason to expect Mr. L. to continue to be involved in this manner in her new school in [another state]. Both parents had recently disciplined Olivia regarding her phone use. She would have reason to expect Mr. L. to continue to monitor and control her phone use, and even though the phone discipline had come (sequentially) from both parents, eliminating one of them from the supervisory picture might seem attractive. On the other hand, the availability of her father's phone plan had been her salvation from her mother's cutoff of her phone service, and so it might not be particularly logical to reduce her options for phone service to just one parent, instead of two. All in all, the motive to fabricate is weak and speculative.

Other Factors. As the Alaska Supreme Court has emphasized, the six factors it has identified are not an exhaustive list of the factors that may bear on the credibility of a particular statement.[97] Additional factors are at play in this case. One, a positive factor, is that Olivia did not demonize her father at all. She was non-judgmental about such matters as his prior substance abuse, indicating awareness of those things but assuring the interviewer that he had them well under control. This overall approach to the interview suggests a lack of exaggeration. A second factor is negative: lapse of time. This interview was taken about 12 days after the event, and several days after the first conversation with Ms. T. The lapse of time introduces some potential for outside influences.

Overall Evaluation. The six factors and the supplemental factors are generally positive overall, and do not yield any persuasive reason to doubt Olivia's forensic interview. It is the limited scope of the interview—the interviewer's lack of curiosity and lack of probing—that potentially undermine its usefulness, not Olivia's statements or her demeanor.[98]

[97] *In re TP*, 838 P.2d at 1241.

[98] The experts were not permitted during the remand hearing to opine on the elements of the interview that bolster or detract from its credibility (*e.g.,* Pamela Karalunas testimony, Tr. at 29), and hence their views on that question are not relied upon here. This decision does not hold, however, that such testimony would never be useful in an administrative substantiation hearing, particularly in contexts where the assessment of credibility presents special problems, as with young children or with older children with certain pathologies or behaviors. *Cf., e.g*., E.

It must be recognized that Olivia's forensic interview is hearsay evidence. Under Alaska Rule of Evidence 801(d)(3)—creating an exception for certain recorded forensic interviews of children—it likely would not be hearsay had Olivia been made available for cross-examination (if desired) by Mr. L., but this did not occur.

D. Credibility of Daniel L.'s Denial

Mr. L. testified at the remand hearing. This was the first time OCS had spoken to Mr. L. in the course of this matter. For this reason, the decision in the present case is based on a significantly different mix of information from what was available to OCS at the time it made its original substantiation.

In his hearing testimony, Mr. L. denied putting his hand in Olivia's pants. He denied patting her on her buttocks. He denied holding her down on her bed. He denied trying to kiss her in a romantic way. He denied making comments about her body and development. He denied making comments of a sexual nature. He denied touching her genitals. He denied putting his groin area against any part of her body. He denied stroking her hair or whispering to her.[99]

In general, hearsay (such as Olivia's statement) may be considered in this type of proceeding, but it typically "is accorded less weight than sworn testimony that has been subject to cross-examination."[100] This does not mean that unsworn out-of-hearing statements by a child cannot prevail over in-hearing testimony. But all else being equal, credible first-hand testimony subject to cross-examination will be given more weight than testimony that is not subject to cross examination.

Mr. L's testimony was perfunctory and, in many respects, led by his counsel. Its reliability is hard to assess. OCS's cross-examination was likewise perfunctory in many respects, making no effort to explore the circumstances surrounding the incident, Mr. L's professions about his relationship with his daughter, or difficulties with Mr. L's version of how he learned of the move [out of state]. OCS had not previously interviewed Mr. L, and it remained incurious about his version of the events even at the hearing. The cross-examination did show Mr. L. to be willing to make an implausible denial, however, in that he denied

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Boals, *Is It Science or Storytime? Expert Testimony Evaluating Child Witness Credibility in Sexual Assault Cases*, 73 Am. U. L. Rev. 1 (2023); A. Poulin, *Credibility: A Fair Subject for Expert Testimony?*, Villanova U. Charles Widger School of Law Working Paper Series (2007).

[99] Daniel L. testimony (remand hearing).

[100] *In re KD*, OAH 16-0753-SAN at 6 (Commissioner Health and Social Services 2017).

that he had ever whispered to any of his children, sticking to that position until pressed hard on its improbability.

E. Balance of the Evidence

There is substantial and worrying evidence in this case that conduct occurred meeting the definition of sexual abuse or substantial risk of sexual abuse. That evidence includes a forensic interview that was broadly conducted in accordance with a valid interviewing protocol and that may well contain a wholly truthful disclosure.

While there are deficiencies in the proof in this case, Olivia is not responsible for any of them. She cooperated, gave direct answers to everything she was asked, and gave the impression of being frank. It is regrettable that her disclosures were not investigated more thoroughly.

Nonetheless, three important factors weigh on the other side of the scale. First, there is the deficiency in properly evaluating and investigating t he matter just after it occurred, with significant oversights such as:

- the unexplained failure to reach out to the other person in Mr. L's home (the girlfriend),
- the failure to run down leads to other important collaterals,
- the lack of follow-through in talking to Mr. L. (although APD played a role in this, OCS needed to be much more persistent regarding this important step),
- the failure to obtain an unambiguous account and to probe alternative explanations in the forensic interview, and
- the delay in considering substantial risk of sexual abuse as an appropriate way to evaluate this matter under the Maltreatment Assessment Protocol.

Second, there is the unavailability of Olivia —who is old enough to testify—for cross-examination by Mr. L's attorney, a matter that creates an issue of fairness in the particular context of this case.[101] Finally, there is Mr. L's denial, which was not obviously false and was not significantly undermined by cross examination. In combination, these three factors prevent the undersigned from making a finding of maltreatment supported by the preponderance of the evidence.

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[101] This is a case-specific observation drawing on Olivia's maturity and on the inadequacy of other evidence. There will be many cases in which the child should not be asked to testify.

IV. CONCLUSION

For the reasons discussed above, OCS failed to meet its burden to show by a preponderance of the evidence that in a visit to his home in February 2023, Daniel L. subjected Olivia T-L to sexual abuse or to conduct placing her at substantial risk of sexual abuse. The substantiated finding is overturned.

Judicial review of this Decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

Dated: June 11, 2024

Chrissy Vogeley
Senior Policy Advisor
Commissioner's Delegate