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

In the Matter of )  
 )  
REBECCA SMITH ) OAH No. 21-2506-SAN  
\_\_\_\_\_ )

**DECISION AFTER REMAND**

**I. Introduction**

The Office of Children’s Services (OCS) placed Rebecca Smith on the Child Protection Registry based on two substantiated findings regarding her care of her daughter Beth. The first was for “Sexual Abuse” based on the statutory provision making it a form of child maltreatment to expose a child to a substantial risk of sexual abuse by another. The second was for “Neglect.”

A hearing was held on December 15, 16 and 21, 2022. Ms. Smith was represented by counsel and testified on her own behalf, along with sworn testimony from Beth. Assistant Attorney General Nicholas Torres represented OCS and presented sworn testimony from OCS Protective Service Specialist II (PSSII) Joseph Malatesta, Protective Services Manager I (PSMI) Katheryne Calloway, and Alaska State Trooper Investigator Shannon Fore.

After the hearing, Administrative Law Judge Andrew Lebo issued a proposed decision, rejecting both substantiations. He circulated it to the parties with an opportunity to prepare “proposals for action” under AS 44.64.060. After reviewing the proposed decision and proposals for action, the undersigned Commissioner’s delegate remanded the case to the Office of Administrative Hearings with directions to correct certain specific errors, obtain briefing from the parties on two legal issues, and return the case to the delegate with revisions as appropriate in light of that briefing. These tasks were accomplished by a new administrative law judge following the retirement of Judge Lebo.

It is important to note that when the Commissioner’s delegate issued the remand order, she had not yet reviewed the evidence in the case. The primary purpose of the remand was to enable her to start that process with a draft applying the correct legal standard. During the remand process and subsequent deliberations, the delegate has completed an evidentiary review. Accordingly, the present Decision After Remand incorporates both the changes growing out of the remand proceedings and changes based on the delegate’s review of the evidence. In this

overall final decision, as permitted by AS 44.64.060(e), certain factual findings have been changed based on an independent review of the evidence, and certain interpretations of law have been revised.

Based on a review of all of the evidence presented, this decision concludes that OCS did not meet its burden of establishing by a preponderance of the evidence that Ms. Smith had sufficient appreciation of the risk that her husband would engage in sexual abuse to support an independent finding of sexual abuse against her. Therefore, OCS's substantiated finding of sexual abuse against Ms. Smith, based on substantial risk, is overturned. However, Ms. Smith's inattention in the face of many red flags does support, more likely than not, a finding of neglect on her part.

## **II. Facts and Procedural History**

### *A. Background*

The key events in this case took place in February through October 2021. Ms. Smith and her husband Brandon Smith live in Alaska. Mr. Smith is a Law Enforcement Officer. The Smiths have four children (their ages noted as of October 2021): daughter Beth, age 12; daughter Laura, age 8; son Bradley, age 15; and son Gage, age 14.<sup>1</sup> In October of 2021, Beth had been pubescent for about a year.<sup>2</sup>

### *B. Pertinent Facts*

The Smiths raised their children from infancy with the expectation that nudity in the household was acceptable. Part of the explanation for this may be that when the children were young, and prior to living in Alaska, Mr. Smith was in the military and the family was stationed in Europe. While the family was living in Europe, they observed a culture that was more accepting of public nudity than in the United States. They saw people sunbathing nude at public beaches and showering nude at the public showers for pools and beaches.<sup>3</sup> This reportedly led Ms. Smith to increase her acceptance of nudity in their home.

From early in the children's lives, the Smiths and their children developed a habit of bathing and showering all together. Later when they lived in Alaska, as the boys got older, the

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<sup>1</sup> OCS Ex. 2 at Agency Record ("AR") 5.

<sup>2</sup> E.g., R. Smith testimony; October 14, 2021 ADPS interview of Ms. Smith (OCS Ex. 50/AR 281) at 24:15-24:25 (Beth reached menarche about a year previously, and her father was aware of this).

<sup>3</sup> There is no evidence that the Smiths observed or experienced a lifestyle in Europe in which adults and pubescent children showered privately together in their homes or shared beds while unclothed.

boys eventually stopped showering with their parents or being nude in front of their parents or siblings because they became uncomfortable with it. Beth and her sister Laura however, continued to feel free to be naked in front of their parents and frequently showered with them.<sup>4</sup> Over the years Beth in particular developed a regular habit of showering with her parents, primarily with her father.

In an interview with Trooper Investigator Fore, Mr. Smith explained that he and Beth regularly shower together, whenever Beth asks to do so, and that it has become their “father-daughter time” together. They may spend 45 minutes to an hour sitting on the floor of their shower, just talking about their day or what’s going on their lives, and sometimes washing each other.<sup>5</sup> The primary evidence was presented at the hearing to support a finding that any inappropriate touching took place during these father-daughter showers came from Investigator Fore’s secondhand account of the interview, because neither party chose to offer the recording of the interview itself into evidence.<sup>6</sup> In his police report regarding his investigation, Investigator Fore reported that Mr. Smith told him that “he takes showers with Beth and washes her entire body with his hands including her [breasts] and vagina.”<sup>7</sup> He reported that Mr. Smith said he occasionally had erections in the shower but Beth ignored them.<sup>8</sup> Investigator Fore testified at the hearing that his police report was based on his interpretation of certain responses by Mr. Smith as an admission that he had touched his daughter’s breasts and vagina while washing her. As noted, his characterization was neither bolstered nor impeached through introduction of the actual recordings, which were available to both sides.

During the same interview with Investigator Fore, Mr. Smith also mentioned that he and both Beth and Laura have “special kisses” that they engage in; his special kiss with Beth involves them touching their tongues together. Mr. Smith also admitted during the interview that Ms. Smith had more than once mentioned to him that his showering with Beth would have to end

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<sup>4</sup> R. Smith testimony.

<sup>5</sup> AST Fore testimony; R. Smith testimony on cross (up to 45 minutes).

<sup>6</sup> A.R. 282 (containing potential evidence at 33:30 – 36:45) is not available to support findings in this decision. Additional interview material in A.R. 283 is likewise unavailable.

<sup>7</sup> OCS Ex. 10 at AR 46. In contrast to court proceedings, the hearsay status of such reports does make them inadmissible or inherently unusable in an administrative substantiation proceeding. For a general discussion of the status of hearsay in these cases, *see, e.g., In re T.Z., Sr.*, OAH Case No 19-0657-SAN (Comm’r of Health & Soc. Serv. 2021), at 9 (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=6818>).

<sup>8</sup> *Id.* at AR 53.

eventually, because otherwise it would be “thrown into something that it’s not,” *i.e.*, it would be perceived by others as improper.<sup>9</sup>

Ms. Smith, who occasionally visited the bathroom during these father-daughter showers, admitted seeing Mr. Smith wash his daughter’s breasts.<sup>10</sup> She would not view it as weird if he had an erection the shower; indeed, “sometimes he’ll just be walkin’ around the room with an erection.”<sup>11</sup> An arresting aspect of Ms. Smith’s account is her relative lack of interest in what was going on during these lengthy joint showers involving a grown man and a pubescent girl. She said she would “glance over” and when she did, “no hands were on breasts longer than they should’ve been, in my opinion.”<sup>12</sup> But she does not appear to have monitored the activities much and, as noted, was not concerned about erections during the joint showers. She did, in the last three to six months (that is, well after Beth reached puberty) begin to suggest it should stop, because she “didn’t want it to get to 16, 17.”<sup>13</sup> At hearing, she professed to have only a vague idea of when the breast washing had taken place and suggested it was occurred long ago, although this is not easy to square with her earlier statements.<sup>14</sup>

In addition to showering together, Beth sometimes would sleep with her parents in their bed, between her father and her mother. They all sleep naked.<sup>15</sup> Beth’s sister Laura also sometimes sleeps naked or semi-naked in bed with her parents.<sup>16</sup> Ms. Smith admits that Mr. Smith would usually wake up in the morning with an erection, but there was no cuddling with the children while he had an erection.<sup>17</sup>

With Ms. Smith, Beth would jokingly refer to her dad as “*my sexy hubby*.”<sup>18</sup>

Ms. Smith stated in her testimony that she has never seen anything sexual going on between Mr. Smith and Beth, whether in the shower or in their bed or anywhere else.

The Smith children all participate in jiu jitsu training and competition at a local martial arts facility. Beth’s friend Marion became acquainted with the Smith family through these jiu jitsu activities, and she eventually became a close friend of Beth. In February 2021, she visited

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<sup>9</sup> *Id.*

<sup>10</sup> October 14, 2021 ADPS interview of Ms. Smith (OCS Ex. 50/AR 281).

<sup>11</sup> *Id.* at 23:30-24:15.

<sup>12</sup> *Id.* at 4:30-5:00.

<sup>13</sup> *Id.* at 5:00-5:30.

<sup>14</sup> R. Smith testimony on direct.

<sup>15</sup> OCS Ex. 10.

<sup>16</sup> OCS Ex. 2 at AR 6.

<sup>17</sup> R. Smith testimony (Transcript at 391-392); OCS Ex. 10 at AR 53.

<sup>18</sup> October 14, 2021 ADPS interview of Ms. Smith (OCS Ex. 50/AR 281) at 16:30-17:00.

the Smith family for dinner and stayed for a sleepover. After dinner that evening, Mr. Smith, Beth, and Marion stayed up to watch movies in their living room, while the other children and Ms. Smith went to bed or were in their rooms elsewhere in the home.<sup>19</sup> After that evening, Marion did not report anything out of the ordinary and continued to interact with Beth and the Smith family at jiu jitsu.

On October 10, 2021, Marion told her mother that Mr. Smith had sexually abused her during the February 2021 sleepover. Marion had been attending a church retreat with her mother earlier that day, and on the drive home she disclosed this allegation to her mother. Her mother reported this to local police, and Marion was interviewed at the Alaska Cares child advocacy center (CAC). A video recording of her CAC interview was made part of the record of this proceeding. In the interview, she said that after dinner she, Mr. Smith and Beth had stayed up to watch movies from the Smith's living room couch, while the rest of the Smith family had gone to their rooms or to bed. Eventually she observed Mr. Smith grope Beth's breasts under her pajama shirt. She further stated that Beth subsequently fell asleep, and at that time Mr. Smith told Marion to come sit next to him. Marion reported that while Beth was still asleep, Mr. Smith reached under Marion's shirt and touched her breasts and penetrated her vagina with a finger.<sup>20</sup> None of this was witnessed by Ms. Smith.

Mr. Smith was subsequently arrested and charged with five counts of felony sexual assault of a minor with reference to both Marion and Beth. As of the date of this decision he has not yet gone to trial on those charges. During her the second interview with the Troopers, which apparently took place after Mr. Smith had been arraigned on the criminal charges, Ms. Smith states "I feel just guilty because I let it happen, but I didn't know anything was happening." Investigator Fore then asks her "what type of stuff" she saw, and she responds that Beth showers with her dad and sleeps in her parents' bed, but "that was normal." As to the showers, she says "there was never anything that made me feel 'OK this is not right.'"<sup>21</sup>

All four of the Smith children were interviewed at the CAC after Marion made her allegations against Mr. Smith.<sup>22</sup> OCS PSS II Malatesta observed most of these interviews and of

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<sup>19</sup> October 10, 2021 CAC interview of Marion (OCS Ex. 46).

<sup>20</sup> *Id.*

<sup>21</sup> October 14, 2021 ADPS interview of Ms. Smith (OCS Ex. 50/AR 281).

<sup>22</sup> October 12, 2021 CAC interviews of Bradley (OCS Ex 13/AR 76); Gage (OCS Ex. 14-15/AR 77, 78); Beth (OCS Ex. 16/AR 79); Laura (OCS Ex. 17/AR 80).

Investigator Fore’s first interview of Ms. Smith from an observation room adjacent to the interview room. However, the audio in the observation room failed during Ms. Smith’s interview, so Mr. Malatesta did not hear the discussion of Beth showering with her father and sleeping naked with her parents. Subsequently when he and his supervisor, PSM I Calloway, heard about these statements, Ms. Calloway decided they needed to do follow-up interviews with the children and Ms. Smith. They went to the Smith home on October 16, 2021 and separately interviewed the children and Ms. Smith. No audio or video recordings were made of these interviews, which generally confirmed that Beth often showered with her father and occasionally slept naked in her parents’ bed with the parents also naked, and Laura would do so also but would shower with her father less often.<sup>23</sup>

PSS II Malatesta’s notes from the October 16 interviews indicate that Beth told him regarding showering with her father, that if she wanted Mr. Smith to shower with her, he would and vice versa.<sup>24</sup> When asked if her father had ever asked to wash anything else besides her back, legs, and feet, Beth “looked away” from Malatesta and said no. When he pointed out to Beth “how she looked away from [him] when answering that question and if that meant that her father has washed other places of her body,” she looked at him “and without saying anything shook her head no.”<sup>25</sup>

In her testimony at the hearing, Ms. Smith testified that their three older children all have cellphones, and while the family’s home Wi-Fi does have parental controls that block certain websites, the children can access anything they want on the internet if they do so outside of the Wi-Fi system. She was also questioned about text messages between Mr. Smith and the children and about “GIFs” exchanged among the family members.<sup>26</sup> OCS submitted as evidence a selection of GIFs found on Beth’s and Mr. Smith’s cellphones, some of which portrayed quasi-sexual imagery.<sup>27</sup> Ms. Smith testified that the family sometimes shares such GIFs because they are humorous. In reviewing this evidence, however, it was unclear who shared which images

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<sup>23</sup> See OCS Ex. 3/AR 8-9. As further discussed below, Ms. Smith’s counsel objected to admission of those notes or related testimony based on the fact that the interviews were not recorded, citing AS 47.17.033.

<sup>24</sup> *Id.* at AR 8.

<sup>25</sup> Malatesta testimony; OCS Ex. 7 at AR 31. At the hearing, Beth flatly denied that her father had ever washed her breasts, which was in contrast to other evidence in the case.

<sup>26</sup> GIF stands for “graphics interchange format” and is an image file that typically is an extremely short animation or video, often used to express jokes, emotions or social commentary.

<sup>27</sup> Examples included two-second videos of a person’s finger massaging a splayed-out chicken breast that may resemble a vagina, and of a “hand puppet” simulating a male masturbating.

with whom, and ultimately OCS was unable to establish that Mr. Smith shared any sexually explicit images with Beth or the other children.

PSS II Malatesta and PSM I Calloway both testified at the hearing. It was clear from their testimony that they believed Marion's allegations to be true, to the effect that Mr. Smith had sexually abused Marion when she was at their home in February 2021, and that she had also seen him sexually abuse Beth by touching her breasts under her shirt while they were seated on the couch. Given their acceptance of Marion's allegations, they viewed Beth's showering with her father and sleeping nude in the parents' bed as part and parcel of a pattern of grooming and abuse by Mr. Smith. And given Ms. Smith's admitted awareness of those activities, they viewed her as knowingly having failed to protect Beth from her father's abuse. This was a central basis for OCS substantiating both findings against Ms. Smith that are at issue in this case: one finding under AS 47.10.011(7) for causing "substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created" by Ms. Smith; and one finding under AS 47.10.011(9) for "conduct by or conditions created" by Ms. Smith that "subjected the child to neglect."

### *C. Proceedings*

Ms. Smith appealed the two substantiated findings of maltreatment in November 2021. The case was stayed for a time while a parallel Child In Need of Aid (CINA) matter was resolved. OCS then moved for summary adjudication, but ultimately withdrew its motion at oral argument.<sup>28</sup> After relatively extensive pre-hearing proceedings, the hearing was held on three days in December 2022. Testimony was taken on December 15, 16 and 21, 2022.

During the hearing, Ms. Smith's counsel made an objection to evidence offered by OCS regarding Malatesta and Calloway's interviews with the Smith children at the family's home on October 16, 2021.<sup>29</sup> The objection was overruled, and the evidence admitted. Counsel subsequently submitted legislative history that he argued was supportive of the objection; the legislative history materials were admitted into the record.

During the hearing, Ms. Smith's counsel objected to admission of OCS's notes and testimony related to the interviews conducted by PSS II Malatesta and PSM I Calloway on October 16, 2021, based on the fact that the interviews were not recorded. Citing AS 47.17.033,

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<sup>28</sup> Oral record, Aug. 1, 2022. A cross-motion for summary adjudication from Ms. Smith was effectively dropped at the same time.

<sup>29</sup> Ms. Smith's written closing argument reiterated this objection.

counsel argued that the October 16 interviews were obtained illegally, and therefore the related notes and testimony were not admissible. The objection was overruled, and the evidence was admitted.<sup>30</sup>

The following OCS exhibits were admitted: 2 (consisting of AR 5-7), 3 (AR 8-10), 4 (AR 11-12), a portion of 7 (AR 22-33 only), 9 (AR 6, 8, 9 20-25 unredacted), 10 (AR 46-67), 11 (AR 68-74), 12-17 (AR 75-80, synchronized versions), 30 (AR 140-184), 46-48 (AR 230-236), and 50 (AR 281), as well as the slideshow of text messages (AR285-307). OCS expressly declined to offer its exhibits 5, 6, 8, 18-29, 31-43, 45. OCS exhibits 44 and 49 were excluded.

The following Smith exhibits were admitted: Exhibit 1 (Beth transcript); a Swisher Deposition excerpt (submitted 12/20/22); an excerpt of legislative history (submitted 12/19/22); and an annotated photo of a couch (submitted 12/21/22).

After the record closed on January 24, 2023, Administrative Law Judge Lebo prepared and circulated a proposed decision. As has previously been noted, that proposed decision rejected both substantiations. After a preliminary review of the proposed decision, the undersigned remanded the matter, as permitted by AS 44.64.060(e)((2), primarily for additional work to elucidate the legal framework for considering the evidence.

### **III. Discussion**

#### *A. Applicable Statutes*

OCS maintains a central registry of all investigation reports.<sup>31</sup> Those reports are confidential but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.<sup>32</sup> At the conclusion of an investigation, OCS may find that an allegation has been substantiated. Although Ms. Smith has characterized a substantiation as a “sanction,”<sup>33</sup> it is not a sanction. It is a confidential finding that the government can and in some cases must use in determining whether to permit certain activities implicating public safety, such as working in a day care or practicing as psychiatrist. Broadly, OCS views a substantiated finding as a finding that the available facts gathered from the investigation indicate that, more likely than not, the individual

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<sup>30</sup> It is noted, however, that little weight is given to the portion of Malatesta’s testimony that was central to this objection: that his reported perceptions of Beth’s changed body language, facial expressions or hesitation in answering his questions were indicators that information was being withheld.

<sup>31</sup> AS 47.17.040.

<sup>32</sup> AS 47.17.040(b).

<sup>33</sup> Smith Briefing on Remand at 16.



has subjected a child to maltreatment under circumstances that indicate the child’s health or welfare is harmed or threatened thereby.<sup>34</sup>

AS 47.17.290(3) states that “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 the child’s health or welfare is harmed or threatened thereby.”<sup>35</sup> The statutory definition of “maltreatment” in AS 47.17 leads us to Alaska’s “child in need of aid” provisions: “Maltreatment means 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.”<sup>36</sup> AS 47.10.011, in Alaska’s Child in Need of Aid statute, has twelve separate subsections, each of which sets out a distinct circumstance under which a child could be found to be “a child in need of aid.” Much of what is described in these twelve subsections can therefore lead to a finding under AS 47.17.290(3), provided the circumstances result from “an act or omission” and provided the particular child’s “health or welfare is harmed or threatened thereby.”<sup>37</sup>

Of some peripheral importance to the issues raised in this appeal is AS 47.10.019 includes a “lifestyle exclusion,” which provides that:

[T]he court may not find a minor to be a child in need of aid under this chapter solely on the basis that the child’s family ... exhibits a lifestyle that is different from the generally accepted lifestyle standard of the community where the family lives. However, this section may not be construed to prevent a court from finding that a child is in need of aid if the child has been subjected to conduct or conditions described in AS 47.10.0011 - 47.10.015.

Thus, a substantiation through the “maltreatment” prong referencing AS 47.10 could not be sustained “solely” on the basis of a lifestyle more tolerant of in-home nudity than is typical in the local community, but *conduct or conditions* listed in the twelve subsections of AS 47.10.011 nonetheless can give rise to a substantiation, even if they occur in such a home.<sup>38</sup>

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<sup>34</sup> OCS Child Protection Manual, Ch. 2.2.6.1 (Rev. 2/22/23), available at: [CPS Manual \(state.ak.us\)](https://www.state.ak.us/cps/manual).

<sup>35</sup> AS 47.17.290(3).

<sup>36</sup> AS 47.17.290(9).

<sup>37</sup> For a discussion of the substantial, but not complete, overlap between AS 47.10 and AS 47.17, see *In re K.L.*, OAH No. 16-1145-SAN (Commissioner of Health & Soc. Serv. 2017) (Swiderski, ALJ).

<sup>38</sup> OCS argued at pages 7-9 of its brief on remand that AS 47.10.019 has no application to substantiations because it is limited to findings “under this chapter”, and substantiations are ultimately made under a different chapter, AS 47.17. However, insofar as AS 47.17 imports AS 47.10 CINA concepts through its explicit cross-reference to AS 47.10, all of the limitations written into AS 47.10 apply to the concepts that are imported. In other words, AS 47.10.011 means what it means—including the lifestyle limitation imposed on it in AS 47.10.019—both when it is read directly and when it is read through the cross-reference in AS 47.17.290(9).

## B. *Analysis*

In this case, OCS has substantiated two findings, one for substantial risk of sexual abuse under AS 47.10.011(7), and one for neglect under AS 47.10.011(9). The circumstances that can support substantiation are different for each of these theories, and they will be taken up one at a time.

In this administrative hearing requested by Ms. Smith, it is OCS's burden to prove, by a preponderance of the evidence, that she committed the acts of maltreatment that are the basis for OCS's substantiated finding against her.<sup>39</sup> "Preponderance of the evidence" means that a disputed fact is shown to be more likely true than not true.<sup>40</sup> While preponderance of the evidence is a relatively low evidentiary threshold, it is still a threshold that OCS is required to satisfy.

### 1. Substantial Risk of Sexual Abuse

It is important to note that OCS is not required to prove that Mr. Smith in fact did commit sexual abuse or intended to do so; the inquiry in this case relates to there being a substantial risk that he was doing so or would do so.<sup>41</sup> The OCS finding that Ms. Smith committed conduct or made omissions causing substantial risk of sexual abuse is predicated on the theory that Ms. Smith knew or should have known that there was a substantial possibility Mr. Smith would sexually abuse Beth, and that she failed to take adequate steps to shield Beth from the risk of such abuse.

This theory is a potentially viable one under AS 47.10.011(7). The provision, quoted in its entirety, permits a CINA finding or a substantiation if:

*(7) the child has suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to adequately supervise the child; if a parent, guardian, or custodian has actual notice that a person has been convicted of a sex offense against a minor*

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<sup>39</sup> *In Re K.C.G.*, OAH No. 13-1066-SAN (Commissioner of Health & Soc. Serv., 2013).

<sup>40</sup> 2 AAC 64.290(e).

<sup>41</sup> Because of this, the analysis of this case in the proposed decision must largely be put aside. That analysis concluded that "OCS failed to meet its burden of establishing by a preponderance of the evidence that its substantiations against Ms. Smith should be upheld, because it did not show that Ms. Smith knew or should have known that her husband *had committed* or *was going to commit* sexual abuse." Proposed Decision at 11 (italics added). The legal question posed in this kind of substantiation is about risk, however, not actual abuse ("had committed") or certainty of future abuse ("was going to commit").

Nothing in this decision should be viewed as a finding or opinion as to whether or not abuse actually did occur, or as to the appropriate outcome of the separate administrative proceeding regarding OCS's substantiated findings against Mr. Smith.

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[.] [*italics added*]

Thus, if Ms. Smith engaged in “conduct” that created a substantial risk that Beth would “suffer sexual abuse,” she could be substantiated. If she “created” “conditions” giving rise to such a substantial risk, she could likewise be substantiated. And more to the point for this case, if “failure . . . to adequately supervise the child” on her part gave rise to such a substantial risk, she again could be substantiated.

The italicized legal standard quoted above does not expressly contain a knowledge component in the four corners of its language. Thus, if read absolutely literally, the language before the semicolon in AS 47.10.011(7) could lead to strict liability for innocent parties. The provision could support a substantiation against Parent A if she left a child with Parent B who was in fact a serial child abuser, even if Parent A had absolutely no inkling of Parent B’s history and had no way of finding out.

Both OCS and the respondent agree, however, that this is not the way the language should be read. And they are surely correct. The non-italicized language shows this: it makes prior sex offender history prima facie evidence for substantiation only if Parent A “has actual notice” of the prior history. This implies that if Parent A had no “notice” of the history, there would be no prima facie case and thus no substantiation. Of course, prior sexual offender history is not the only way risk of future sexual abuse can arise, but the fact that there is plainly a “notice” requirement for that theory of substantiation strongly suggests that there must be some kind of “notice” of other kinds of risks before a parent will be substantiated for failing to guard against them.

Where OCS and the respondent disagree is over the degree of culpability that has to be present before a parent will be substantiated for allowing a substantial risk that someone *else* will sexually abuse a child. The respondent contends that the threshold is an “‘actual knowledge’ or ‘recklessness’ standard,” such that a non-abusing caregiver being substantiated for substantial risk of sexual abuse must either have actual knowledge of the risk posed by a potential abuser, or must be reckless (perhaps willfully blind) as to that risk.<sup>42</sup> OCS posits a “reasonable person”

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<sup>42</sup> Respondent’s Briefing on Remand at 2.

standard—that is, a negligence standard—whereby the caregiver would be substantiated if the caregiver “should have known” of an unacceptable risk.<sup>43</sup>

Let us turn first to the OCS argument. OCS has devoted most of its brief on this issue to arguing against a series of straw men, making a convincing case that a caregiver should not be able to avoid substantiation “simply by saying they did not know anything was occurring.”<sup>44</sup> But no one, not even respondent, has advocated so lax an interpretation of AS 47.10.011(7). The question is not whether “anything was occurring,” but rather whether there was an excessive *risk* that abuse would occur, and the mental state at issue is whether the caregiver has to have appreciated the risk or merely *should* have appreciated the risk, or something in between.

Respondent, on the other hand, tries to draw a parallel between and AS 11.51.100(a), the felony statute for endangering the welfare of a child. Subpart (3) of the latter statute criminalizes leaving a child with another “knowing that the person has previously . . . had sexual contact with any child.” Noting that in one committee that was considering the legislation that became AS 47.10.011(7), one presenter used the phrase “parallels the ‘endangering’ statute”<sup>45</sup> when describing AS 47.10.011(7), respondent tries to bring the word “knowing” across from the criminal statute to the civil substantiation statute.<sup>46</sup> But this is too much bootstrapping: in AS 47.10.011(7) the Legislature *didn’t* use “knowing” or “knowledge,” even though it could have; instead, it chose to use “actual notice.”<sup>47</sup>

But although respondent’s effort to drag the word “knowledge” from the criminal statute into the CINA statute is not convincing, the phrase “actual notice,” when used in a statute, generally means something quite close to knowledge. One often-quoted formulation is that “A notice is regarded in law as actual when the party sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having the means of knowing it.”<sup>48</sup> Another, used recently in Alaska, is: “notice is regarded in law as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or

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<sup>43</sup> Office of Children’s Services Additional Briefing at 6.

<sup>44</sup> *Id.* at 6.

<sup>45</sup> Statement of AAG Susan Wibker, House Judiciary, April 17, 1998.

<sup>46</sup> Respondent’s Briefing on Remand at 8.

<sup>47</sup> Respondent’s argument in reliance on the “rule of lenity” is also rejected; that rule only applies in the context of “sanctions,” and a substantiation is a civil factual finding, not a sanction.

<sup>48</sup> *Parker v. Maslin*, 116 P. 227, 228 (Kan. 1911) (quoting an earlier Missouri case).

is conscious of having the means of knowing it.”<sup>49</sup> It is therefore likely that, by using an “actual notice” standard for making a prima facie case regarding a particular type of substantial risk of sexual abuse, the Legislature was indicating that this category of substantiation would require something more than a negligent failure to appreciate risk. It would require either direct awareness of the risk, or else conscious awareness of a potential for a risk and of the means to find out about the risk.

In this litigation, OCS, through counsel, has taken formal positions that make it difficult to find that this level of awareness was achieved in Ms. Smith’s case. It has flatly asserted that “[a]ssessing the appropriateness of sexual behaviors related to parents and children takes skill and knowledge.”<sup>50</sup> OCS has also stipulated the following:

Mr. Smith was a Law Enforcement Officer who abused his position of power both in and outside of the home to groom and sexually abuse his daughter and her friend while manipulating Ms. Smith to disregard her intuition to protect her daughter, even when she felt what was going on was suspect. She questioned the showering behavior more than once, to be told by Mr. Smith (he) “was an officer and would know when it crossed the line.”<sup>51</sup>

In sum, OCS seems to concede for purposes of this case that special knowledge can be required to assess ambiguous behavior by an adult, and to concede that Ms. Smith was manipulated by a person who credibly professed to possess such superior knowledge.

OCS cites an expert report procured by Ms. Smith for the CINA matter, in which the author concludes that Ms. Smith “sanctioned destructive parenting by endorsing a boundary-challenged home environment” and that the Smiths as parents “normalized inappropriate sexual boundaries.”<sup>52</sup> But as true as this assessment surely is, it is not inconsistent with Ms. Smith being manipulated by her partner into near obliviousness to the risk of *sexual abuse*. She does seem to have had some awareness of the broader undesirability of continuing this behavior, which factors into the neglect evaluation below.

In the same vein, PSS II Malatesta recorded the following notes in OCS’s file for this matter after the October 16, 2021 interviews: “The Department's concern with Mrs. Smith is that she is unable to understand how what was occurring between her husband and Beth is wrong. ...

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<sup>49</sup> *Ogle v. Salamatof Native Ass’n*, 906 F. Supp. 1321, 1326 (D. Alaska 1995). The *Ogle* court distinguished “actual notice” from “constructive notice” and “inquiry notice.” *Id.* at 1330-31.

<sup>50</sup> OCS Proposal for Action at 4.

<sup>51</sup> *Id.* at 6.

<sup>52</sup> OCS Closing Argument, January 11, 2023, at p. 9 (*quoting* Dec. 26, 2021 report of Philip N. Kaufman, OCS Ex. 30/AR 140-184).

Mrs. Smith 's inability to identify this safety threat places her children at substantial risk of being harmed in the future.”<sup>53</sup> PSM I Calloway offered testimony to the same effect: “You have to acknowledge maltreatment, you have to understand what you’re protecting against, and that was not the case” with Ms. Smith. Again, these observations are perceptive, but while they are consistent with a neglect substantiation, they do not help OCS to meet its burden for a sexual abuse substantiation against Ms. Smith.

Under the circumstances of this case, and in light of the concessions made by OCS, the first substantiation against Ms. Smith will not be upheld. The matter is more appropriately addressed under the rubric of neglect.

## 2. Neglect

The second allegation in this case involves neglect. Here—although the distinction is essentially meaningless—OCS substantiated for “maltreatment” in the form of “neglect” as that term is used in the CINA statutes, rather than for “neglect” as that term appears in the Child Protection statutes. For purposes of substantiation under the Child Protection chapter, “neglect” is statutorily defined as “the failure by a person responsible for the child’s welfare to provide necessary food, care, clothing, shelter, or medical attention for a child.”<sup>54</sup> Similarly, under the CINA chapter, neglect is failure to provide “adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child’s physical and mental health and development . . . though . . . able to do so.”<sup>55</sup> Under these definitions, therefore, the first question in this case is whether Ms. Smith failed to provide “necessary . . . care” or “adequate . . . care and control” for Beth’s well-being. If Ms. Smith did not provide adequate care and control, she neglected the Beth. This is not the end of the inquiry, however. To uphold a substantiated finding of neglect, it is also necessary to find that the child’s health or welfare was “harmed or threatened” by the parents’ conduct.<sup>56</sup> And this threat to health and welfare encompasses a threat of sexual abuse, as well as a threat of psychological injury.

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<sup>53</sup> OCS Ex. 3 at AR 9.

<sup>54</sup> AS 47.17.290(11). It has been held that the person must have had the basic means and opportunity to do so; matters beyond the caregiver’s control do not constitute neglect. *See, e.g., In re K.S.*, OAH No. 14-1681-SAN (Comm’r of Health & Soc. Serv. 2015), at 9. (<http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN141681.pdf>).

<sup>55</sup> AS 47.10.014. The department has indicated in prior cases that the meaning of “neglect” in AS 47.10.011(9) is not materially distinct from the meaning of the same word in AS 47.17. *See In re T.T. & S.K.*, OAH Case No. 16-0594-SAN (Commissioner of Health & Soc. Serv. 2017) (<https://aws.state.ak.us/OAH/Decision/Display?rec=5979>), at 4 n.12.

<sup>56</sup> *See* AS 47.17.290(3).

At first glance, the substantiation inquiry for neglect seems indistinguishable from the inquiry for substantial risk of sexual abuse. Substantial risk of sexual abuse would satisfy the “threat” prong of a neglect substantiation, and failure to adequately supervise a child in reference to such a threat would satisfy the “adequate . . . care” prong. But the neglect inquiry is actually broader, because it is not limited to risks of sexual *abuse*. It encompasses the whole panoply of risks of inadvertent but harmful contact, or inadvertent but harmful psychological impacts, that come with such activities as sharing a bed with a naked man with an erect penis.

Moreover, substantiation under the definitions of neglect in AS 47 comes with none of the language suggesting a need for “actual notice” of a risk the parent needs to deploy care and control against. In other words, there is no indication the Legislature wanted to limit neglect substantiations to parents who fully understood their parental responsibilities. Parents who—for whatever reason—simply can’t appreciate that their protective care is inadequate can nonetheless be substantiated for neglect.

In this broader context, there can be little doubt that Ms. Smith sufficiently neglected the protection of Beth to be substantiated for neglect. She observed a remarkable constellation of risky behaviors by her husband toward a pubescent daughter: lengthy socialization in a confined space in the nude, accompanied by occasional erections, possible occasional genital contact, and contact with breasts; side-by-side bed sharing in the nude with occasional erections; tongue-touching; and indications that her daughter might be developing a perception of her father as “sexy.” She had some discomfort with the situation, and in the last few months had begun to suggest that it should stop. She did not, however, insist that it come to an end or otherwise step in protectively. This may be because she was overly susceptible to manipulation by her husband, but it was nonetheless an almost complete failure of supervision and control in the face of a dangerous situation.

### 3. Summation

This final decision deviates from the original version in that it is based on slightly different facts and legal interpretations. It is the result of considerable review, having gone through the proposal for action process, been reviewed by the Commissioner’s delegate, remanded for additional briefing, and finally returned to the delegate after a rewrite. Pursuant to this additional consideration, it is decided that OCS did not meet its burden of establishing by a preponderance of the evidence that the risk of sexual abuse allegation should be upheld. Ms.

Smith, heavily influenced by a manipulative partner, did not sufficiently appreciate the risk of sexual abuse created by the lack of appropriate boundaries in the home as required under AS 47.10.011(7). However, OCS did establish, by the same standard of proof, that under AS 47.10.011(9) Ms. Smith did not adequately protect her daughter from Mr. Smith's highly disturbing grooming behaviors. As the substantiation for "neglect" does not require a parent to be aware of their failure to appropriately parent, this allegation should be upheld.

#### **IV. Conclusion**

OCS's substantiated finding of sexual abuse, based on substantial risk of sexual abuse, is overturned. OCS's substantiated finding of neglect is upheld.

DATED: April 10, 2024.

*Signed*

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Chrissy Vogeley  
Senior Policy Advisor  
Commissioner's Delegate

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