

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

In the Matter of)

X.X)

OAH No. 22-0192-SAN

DECISION

I. Introduction

X.X is the mother of G.N and the grandmother of Ms. N's minor children, K.T, B.N, C.N, and E.N. At the time of these events, Ms. X was the relative foster parent of all four of Ms. N's children. Due to previous illegal drug use by Ms. N and her partner L.T, the Office of Children's Services (OCS) had imposed a Family Contact Plan in December 2019, limiting Ms. N's contact with the children to supervised visitation only.

In July 2021, a caseworker with OCS learned that Ms. X was allowing unsupervised contact with the children by Ms. N and Mr. T, including overnight visits. OCS confirmed that the unsupervised visitation had occurred. Subsequent hair follicle testing of the children also revealed they had been exposed to significant illegal drug use. After investigating, OCS entered substantiated findings concluding that Ms. X was responsible for the neglect and physical abuse of the children while they were in her care and control. Ms. X disagreed and requested a hearing challenging the findings.

Based on that hearing, the evidence in this case establishes that Ms. X was responsible for the neglect and physical abuse of the children. Consequently, OCS's substantiated findings are upheld.

II. Facts

The facts in this case were established through a contested hearing.

A. Children Placed in Ms. X's Care

Based on a history of drug use and domestic violence, OCS took custody of G.N's three minor children, B, C and E.N, in December 2019.¹ Almost immediately after that occurred, the children were placed in the care and control of Ms. N's mother, X.X as a licensed, relative foster parent.² As of the events giving rise to this case in July 2021, B was 3 years-old, C 6 years-old and E was 10 years-old.³ Ms. N gave birth to K.T in May 2020, and he was subsequently placed in the custody of OCS and the care of Ms. X, together with the other children. He was 14 months-old at

¹ Sierra Hamilton Testimony; R. 63-69.

² Sierra Hamilton Testimony.

³ R. 14.

the time of the events giving rise to the substantiations.⁴

Ms. N's history of drug use at the time that OCS took custody of the children in December 2019, included methamphetamine, amphetamines, and heroin.⁵ Because of her ongoing drug use and history of partners associated with domestic violence, for the children's safety and well-being, OCS imposed a Family Contact Plan that allowed Ms. N to have contact with the children, but only with the supervision of Ms. X.⁶ There is no dispute that Ms. X was familiar with, understood and agreed to be bound by this requirement.⁷

B. Events Leading to Unsupervised Contact

Based on what she was being told by Ms. N as of July 2021 and just prior to that point, Ms. X became convinced that her daughter and Mr. T had stopped using illegal drugs and were getting their lives back under control. They had moved into a new rental home with another young couple and that couple's minor son. Ms. X was also told that this couple was not using illegal drugs.⁸

At or about this same time, Ms. X was encountering some challenges with real property she owned, located some distance away from where she was living, and that needed her attention. Because of this and because she was convinced that Ms. N and Mr. T were no longer using illegal drugs, she repeatedly contacted Ms. Hamilton seeking permission to leave the children for periods of time with their mother unsupervised. When permission by OCS did not occur, she became increasingly frustrated and adamantly disagreed with OCS's unwillingness to allow unsupervised visitation of the children by their mother.⁹

Ms. Hamilton testified that prior to July 21, 2021, although Ms. X repeatedly contacted her seeking authorization for the children to have unsupervised contact with Ms. N, OCS was unwilling to do so. This was because Ms. N had routinely failed to honor meeting commitments and appointments for assessments by OCS, failed to comply with drug testing, and failed to demonstrate that she had stopped using illegal drugs and was prepared to adequately care for the children. As a result, OCS had significant safety concerns regarding the children being unsupervised around Ms. N and that until these issues were addressed, OCS was going to err on the side of safety and not allow unsupervised visitation.¹⁰

⁴ Sierra Hamilton Testimony.

⁵ R. 63.

⁶ Sierra Hamilton Testimony; R. 63-69.

⁷ Sierra Hamilton Testimony; X.X Testimony.

⁸ X.X Testimony.

⁹ X.X Testimony.

¹⁰ Sierra Hamilton Testimony.

C. July 21, 2021, and Subsequent Findings

Sierra Hamilton is a protective services specialist with OCS overseeing the G.N case. She was contacted by the father of B, C and E.N in July 2021. He said he was travelling to Alaska for a scheduled visit with his children but had been told that the children were staying with their mother, G. He was concerned that this might interfere with his potential visitation and therefore reached out to Ms. Hamilton. Because the children were not entitled to stay with their mother unsupervised, Ms. Hamilton promptly followed up by contacting Ms. X on July 21, 2021.¹¹

During that conversations Ms. X ultimately admitted that the children were not with her at the time, but instead, were with their mother. When Ms. X was asked to provide the address where the children were at, she initially said she did not know it. Ms. X was also asked to simply provide directions. As Ms. Hamilton indicated, OCS needed to assess Ms. N and pick-up the kids because they were not allowed to be with their mother unsupervised. Ultimately, Ms. X provided the address and agreed to meet Ms. Hamilton at Ms. N's home.¹²

Interviews with the children were conducted by OCS that day. The interviews revealed that the children had stayed overnight with their mother at the home, not only the night before, but also on previous occasions. This occurred when Ms. X was not present. When asked about potential drug use, at least one of the children confirmed that people would smoke at Ms. N's house out in the living room. At least one of the children also said that while staying at the home with their mother, they had witnessed a physical altercation between Ms. N and her housemates.¹³

Ms. N and Mr. T performed an initial urinary analysis and hair follicle testing on July 22, 2021. As a result of the urinary analysis, both tested positive for amphetamine and methamphetamine.¹⁴ As to the hair follicle testing results, Ms. N's results were positive for amphetamine, methamphetamine, Morphine, Codeine and 6-acetymorphine. Mr. T's results were positive for amphetamine, methamphetamine, morphine and 6-acetymorphine.¹⁵

As Ms. Hamilton testified, if a person tests positive from a hair follicle test for both amphetamine, methamphetamine, it indicates ingestion of the drugs. 6-acetymorphine is a direct metabolite of heroin, and indicates ingestion of heroin, and not simply exposure to heroin smoke.¹⁶

Ms. Hamilton testified that, based on her training, experience, and discussions with

¹¹ Sierra Hamilton Testimony.

¹² Sierra Hamilton Testimony.

¹³ R. 17; Sierra Hamilton Testimony.

¹⁴ R. 47, 49; Sierra Hamilton Testimony.

¹⁵ R. 32-35; Sierra Hamilton Testimony.

¹⁶ Sierra Hamilton Testimony.

toxicologists, there is a roughly 72-hour look-back period applicable to the urinary analysis testing. In other words, positive results reflect consumption of the drug within approximately 72 hours of when the test was performed. Based on the urinary analysis results, Ms. N and Mr. T would have used amphetamine, methamphetamine, and heroin sometime between July 19 – 20, 2021 and the day they were tested on July 22, 2021.¹⁷

Ms. Hamilton further testified that there is a roughly 90-day lookback regarding hair follicle testing.¹⁸ As such, based on the positive results from the hair follicle testing, Ms. N and Mr. T were using illegal drugs including amphetamine, methamphetamine, and heroin, sometime between approximately May 21, 2021, and the day of testing on July 22, 2021. This illegal substance use was also confirmed by Mr. T to Ms. Hamilton. He told her he had relapsed on both methamphetamine and heroin and had been using the same within the previous month or two, if not longer.¹⁹

The children also had hair follicle testing performed on August 16, 2021. Those results indicated that E, C and B.N had each been exposed to amphetamine, methamphetamine. Further, the toddler, K.T, had been exposed to amphetamine, methamphetamine, morphine, and heroin. The heroin conclusion resulted from a positive 6-acetylmorphine result, which normally indicates ingestion of heroin.²⁰ However, as Ms. Hamilton testified, because of K.T's young age, and relatively thin, absorbent skin, it is not uncommon for children of his age to test positive for the metabolite of heroin even though they have only been exposed to the smoke and not ingested it. This is because it is easily absorbed through the skin of young children.²¹

Based on this information, the children were ultimately placed with Ms. N's sister. Eventually, B, C and E.N all moved out-of-state with their father. The youngest child, K.T is still in the care of Ms. N's sister.²² However, as Ms. X has testified, she is concerned because Ms. N's sister is already overwhelmed with the care of her own children and is currently going through a difficult pregnancy. Ms. X wishes to adopt K and is concerned that the substantiations may interfere with that process.²³

D. The Substantiations

¹⁷ Sierra Hamilton Testimony.

¹⁸ Sierra Hamilton Testimony.

¹⁹ Sierra Hamilton Testimony.

²⁰ R. 36-40; Sierra Hamilton Testimony.

²¹ Sierra Hamilton Testimony.

²² Sierra Hamilton Testimony; X.X Testimony.

²³ X.X Testimony.

Following Ms. Hamilton's investigation of the July 21, 2021, incident, OCS notified Ms. X that it made substantiated findings that she had neglected and physically abused K.T and B, C and E.N.²⁴ The basis for these findings were OCS's conclusions that Ms. X repeatedly allowed the children to be with Ms. N and Mr. T, unsupervised, and when neither of them had sufficiently demonstrated they were able and willing to control their behavior or addiction, take responsibility for their actions, and how those actions could harm the children. Based on Ms. X's allowing unsupervised contact, the children suffered both a risk of harm and actual physical harm by their exposure to amphetamine, methamphetamine, morphine, and heroin. The children were also exposed to a physical altercation between their mother and other adults.²⁵

E. The Hearing

Ms. X requested a hearing to challenge OCS's substantiated findings.²⁶ The hearing occurred via Zoom on May 18, 2022. Ms. X was self-represented and was her only witness. Sierra Hamilton, a Protective Services Specialist with OCS, testified on its behalf.

Following the hearing, an order was issued asking OCS to supplement the record with the custody plan that had been put implemented and was applicable to Ms. X's care and control of the children. OCS was also asked to provide documentation, if any existed, demonstrating how the custody plan had been communicated to Ms. X. OCS subsequently provided the custody plan, and the record was deemed closed on May 20, 2022.²⁷

F. Exhibits and Testimony at Hearing

At the hearing, OCS moved for the admission of the entire record in the case. The record consisted of 69 pages of Bates stamped documents. None of the documents were individually marked as exhibits, but were instead, simply referenced during the hearing by their Bates numbers. Ms. X had no objection to admission of the documents, and they were all deemed admitted and taken into consideration in the case. An itemization of the admitted record is as follows:

- R. 1 – 13, OCS notice of substantiated findings (September 22, 2021);
- R. 14 – 31, OCS Protective Services Report, Case ID 000000, Report #0000000 (September 22, 2021, and involving July 21, 2021, incident);
- R. 32 – 40, Hair follicle testing results (July 30, 2021, and August 12, 2021);

²⁴ R. 1-12.

²⁵ R. 16-19.

²⁶ R. 41-43.

²⁷ Order for Supplementation of the Record (May 18, 2022); R. 63-69.

- R. 41 – 45, Appeal request from Ms. X and character references (February 18, 2022);
- R. 46 - 49, Urinalysis testing results (July 23 and 28, 2021);
- R. 50 – 52, OCS Team Decision Making Meeting Referral (undated);
- R. 53 – 62, OCS OCS Foster Care Licensing, Amended Report of Investigation/Notice of Violation and Settlement Agreement (February 2, 2022); and
- R. 63 – 69, OCS Family Contact Plan (December 30, 2019).

Ms. X testified that based on what she had observed and being told by Ms. N and Mr. T, as of July 2021, they had come a long way toward getting their lives back on track. Neither of them appeared to be using illegal drugs, they had recently moved into a nice home with friends who were also clean. Ms. N and Mr. T were also not exhibiting any of the telltale signs she had previously learned to recognize from when they were abusing illegal drugs.²⁸

Ms. X also testified as to her frustration at Ms. Hamilton's continued denial of her requests to allow unsupervised visitation with the children by Ms. N. She said that because of her need to deal with her real property and other issues, and due to OCS's refusal to allow unsupervised visitation by Ms. N, she was basically left with no choice but to do what she did and take matters in her own hands. In other words, leaving the children with Ms. N, unsupervised and overnight on at least two separate occasions.²⁹

In doing so, she does not deny she was aware she was not allowed to leave the children with Ms. N or Mr. T unsupervised, and that this fact had been previously communicated to her by OCS. However, she questioned whether the trauma caused by OCS removing the children from her care outweighed any negative impacts that the children may have experienced by being left unsupervised with their mother and Mr. T.³⁰

Ms. Hamilton testified that the actions and inactions of Ms. N and Mr. T in routinely failing: 1) meeting commitments and appointments for assessments with OCS; 2) to comply with drug testing; and 3) to demonstrate that they had stopped using illegal drugs, caused OCS to have continued safety concerns regarding the children. When asked about the trauma inflicted upon the children by removing them from Ms. X's care, and why would OCS do that, Ms. Hamilton simply

²⁸ X.X Testimony.

²⁹ X.X Testimony.

³⁰ X.X Testimony.

said that OCS concluded the children were safer being placed in the care of another family member (Ms. N's sister) and that while they were in Ms. X's care, they were exposed to meth.³¹

III. Discussion

A. *The Child Protection Registry*

OCS maintains a child protection registry.³² That registry contains OCS investigative reports and substantiated findings of child maltreatment. The reports and substantiated findings are confidential but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.³³

After conducting an investigation of child maltreatment, OCS may find that an allegation has been substantiated. A substantiated finding is one where the available facts gathered from the initial assessment indicate that more likely than not, a child has been subjected to maltreatment under circumstances that indicate the child's health or welfare is harmed or threatened.³⁴ An individual's placement on child protection registry due to a substantiated finding of maltreatment, has the potential to limit an individual's ability to hold certain certifications and licenses, or to participate in activities and businesses, whether as an owner, manager, shareholder, director, or employee, that are regulated by the Department of Health and Social Services.³⁵

Alaska Statute 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."³⁶ The statutory definition of maltreatment is found in the "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."³⁷

For the purposes of this case, a "child in need of aid," under AS 47.10.011, in relevant part, means a child who has "suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of parent, guardian, or custodian to supervise

³¹ Sierra Hamilton Testimony.

³² AS 47.17.040.

³³ AS 47.17.040(b).

³⁴ OCS Child Protection Manual, CH. 2.2.10.1 (Rev. 5/16/15), available at: <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

³⁵ AS 47.05.325 - 330.

³⁶ AS 47.17.290(2).

³⁷ AS 47.17.290(8).

the child adequately.”³⁸ It also occurs when “conduct by or conditions created by the parent, guardian, or custodian have subjected the child or another child in the same household to neglect.”³⁹

OCS substantiated maltreatment by Ms. X. Its notice, and the agency record, demonstrate that it was substantiating maltreatment for neglect and physical abuse.⁴⁰ OCS has the burden of proof by a preponderance of the evidence (i.e., that it is more likely true than not true) that the alleged acts of neglect and physical abuse actually occurred.⁴¹

B. Neglect and Physical Abuse

Because the facts that demonstrate neglect and physical abuse in this instance are so closely related, the substantiations for both forms of maltreatment are analyzed together. Other than the conclusions that are to be drawn, the relevant facts are virtually uncontested by the parties.

Neglect is statutorily defined as when a “parent, guardian, or custodian fails to provide the child with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child's physical and mental health and development.”⁴² To substantiate neglect, OCS must not only meet this definition but must also show that the children’s “health or welfare is harmed or threatened thereby.”⁴³

OCS can also substantiate for physical harm to the children. Physical harm is statutorily defined as having caused physical harm to a child or a substantial risk of physical harm if the child is victim of a criminal assault (sexual and/or physical), or the unreasonable application of physical discipline resulting in some form of physical damage, or if there is some negligent act or omission by a parent that creates a substantial risk of injury to the child.⁴⁴

Here, Ms. X made a conscious decision on at least two occasions to leave the children with their mother and Mr. T, unsupervised and overnight. She did this because she chose to rely on the representations of Ms. N and Mr. T that they were no longer using illegal drugs. But this was not Ms. X’s decision to make. Instead, OCS was responsible for making decisions regarding visitation of the children and OCS had concluded that it was unsafe to allow unsupervised visitation of the children by Ms. N and Mr. T. Ms. X was also aware of the fact that OCS required all visitation by

³⁸ AS 47.10.011(6).

³⁹ AS 47.10.011(9).

⁴⁰ R. 1-69.

⁴¹ *In re K.C.G.*, OAH No. 13-1066-SAN (Commissioner of Health and Social Services, 2013), available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5952>.

⁴² AS 47.10.014.

⁴³ AS 47.17.290(3).

⁴⁴ AS 47.10.015; AS 11.51.100.

Ms. N and Mr. T to be supervised. As such, she knew what was required of her by OCS regarding the care of the children, and yet chose to ignore this.

By allowing unsupervised visitation of the children by Ms. N and Mr. T, the children were not only exposed to dangerous and illegal drugs, but they were also physically impacted by these substances. This was evidenced by their testing positive for amphetamine, methamphetamine, and heroin through hair follicle testing.⁴⁵ There is also no doubt that, based on the look-back period applicable for this testing, the exposure occurred when the children were supposed to be in Ms. X's exclusive care and control and yet by her own admission, they were not. The children also witnessed at least one physical altercation as between Ms. N and other adults in the home while unsupervised contact was occurring.

Based on these facts, OCS has met its burden of proof concerning Ms. X's neglect and physical abuse of K.T and B, C and E.N. The facts clearly demonstrate that the children's health and welfare was harmed and/or threatened by Ms. X failure to adequately provide for the children's care and control as necessary for their physical and mental health and development. Further, it is also clear that because the children ultimately tested positive for exposure to amphetamine, methamphetamine, and heroin for a period during which they were required to be in Ms. X's exclusive care and control, she was undeniably negligent in creating a substantial risk of injury to the children. OCS has therefore established that Ms. X maltreated each of the children.

IV. Conclusion

OCS's substantiated findings of maltreatment by Ms. X of K.T and B,

C and E.N, due to neglect and physical abuse are upheld.

DATED this 3rd day of June 2022

Signed

Z. Kent Sullivan
Administrative Law Judge

⁴⁵ As noted above, K.T tested positive for all three substances. The other children tested positive for amphetamine, methamphetamine.

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 28th day of June, 2022.

By: Signed
Name: Jillian Gellings
Title: Project Analyst, DHSS

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