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

In the Matter of	)	
	)	
T. S.	)	OAH No. 21-1992-SAN
	)	

COMMISSIONER'S FINAL DECISION

I. Introduction and Procedural History

The Office of Children's Services (OCS) received a report alleging that T. S. had physically abused M. "M." D.. After an investigation, OCS concluded that allegation was accurate and that Ms. S.'s acts over time, cumulatively, also inflicted a mental injury on M.. OCS notified Ms. S. of its substantiated findings against her on July 24, 2021.[1] Ms. S. requested a hearing to contest OCS's findings.

A hearing was held across three days in November of 2023. After the record closed, the administrative law judge (ALJ) submitted a proposed decision concluding that that OCS did not meet its burden to prove Ms. S. subjected M. to physical abuse or mental injury.

Upon reviewing the proposed decision, pursuant to AS 44.64.060(e)(2), the Commissioner's Delegate remanded the case for the taking of additional evidence and to make additional findings.[2] On remand, OCS submitted additional evidence, and the parties agreed to proceed by written arguments. The record closed March 22, 2024.

In this final decision the ALJ recommends that the maltreatment finding made against Ms. S., be reversed. This finding is made even though the initial information presented to OCS, and the evidence presented, showed there was significant cause for concern about M.'s mental health, and the appropriateness of the parenting choices made. However, OCS has the burden to prove through a qualified expert that conduct, or conditions created by Ms. S. have caused M. mental injury or placed M. at substantial risk of mental injury through a pattern of specific behavior. The evidence presented was simply insufficient to meet that burden. Therefore, the maltreatment findings against Ms. S. are reversed.

---

1 Ex. 1, AR 1.

2 *ACTION ON PROPOSED DECISION,* February 20, 2024.

II. Facts

A. Background

M. "M." D. was born in 2010 to C. D. and L. N. in City A, Alaska.[3] Her early years were chaotic, and at times Ms. N. left M. in the care of unknown adults.[4] At a very young age M.'s parents separated after an incident of domestic violence.[5] While M. was in the house, Ms. N. struck Mr. D. several times in the face and destroyed a television. The incident was severe enough that the police were called.[6] In part because of an unsafe and unstable environment, and in part because Mr. D. needed childcare, when M. was two years old her paternal grandmother, B. U., became her primary caregiver and M. moved in with Ms. U. in State A.[7]

Once in State A, M. had reduced in-person visitation with Mr. D. and Ms. N.. Even during her limited visitation with Mr. D., he was distant and distracted.[8] Mr. D. was distracted enough that his brother, K. A., was concerned about his brother's ability to parent M..[9] In 2016, Mr. D. returned to City A without M..[10]

Despite an apparently stable environment with Ms. U., M. exhibited some concerning behavior and began receiving counseling services in State A.[11] During one of these incidents, M. named several dolls after family members and placed the dolls she identified as her mother and father in sexual positions.[12] This incident resulted in protective service workers visiting Ms. U.' home. While OCS was aware that M. received therapy or counseling in State A during this time, OCS was unable to recover records of this care.[13]

In September of 2018, when M. was eight years old, she moved back to City A to live with her father and his new partner, T. S..[14] As it would be for most children, removing M. from her primary caregiver was difficult, and the record is replete with examples of M. expressing her desire to return to State A.[15] At times M. describes some of her behavior as an attempt to force a relocation to State A.[16]

---

3 Ex. 20, AR 376.
4 Ex. 10, AR 46.
5 Ex. 10, AR 33.
6 Ex. 10, AR 33.
7 Ex, 20, AR 381.
8 Testimony of K. A..
9 Testimony of K. A..
10 Ex. 10, AR 10.
11 Ex. 10, AR 46.
12 Ex. 10, AR 46.
13 Testimony of Raul Escobar.
14 Ex. 16, AR 176.
15 "I wan[t] to return to my "Nana" and my mother in State A." Ex. 16, AR 176. *See also,* "the client reports she wants to move back to State A with [her] grandmother when she return in a couple of weeks." Ex. 16, AR 215.

In City A Ms. S. and Mr. D. lived with B. F., Ms. S.'s mother. In addition to the three adults, Ms. S.'s son, E. "E." T. also lived in the household.[17] At first M. had her own room, with Mr. D. and Ms. S. sharing a room and E. and Ms. F. sharing a room.[18] By January 2019 Ms. S. had given birth to twin boys, bringing the total number of people living in one house to seven with only three bedrooms. [19] That placed a premium on available space, but M. kept her own room until the end of October 2019 when Ms. F. returned to City A.[20] After Ms. F. returned she shared a bedroom with M., with M.'s bed lofted over Ms. F.'s bed.[21] Shortly before OCS's investigation began, a small room was repurposed to provide M. her own bedroom again.[22] While it was a very small room, it did have a bed for M. and space for her belongings.[23] Despite challenging financial circumstances, the record indicates that M. always had a bed and was never made to sleep on the floor.

Shortly after M. arrived in City A, Ms. S. learned she was pregnant with twins.[24] The pregnancy was unexpected and complicated, and Ms. S. developed gestational diabetes.[25] As City A was unable to handle the complexity of a twin birth, Ms. S. and Mr. D. traveled to Providence Hospital in Anchorage, where they stayed until the twins were born on January 1, 2019. Due to some of the twins' medical issues, Ms. S. did not return from Anchorage until approximately a month after they were born.

In addition to the logistical and financial challenges, M. also exhibited some troubling behaviors during this period. Multiple witnesses testified that M. had a habit of taking small items from other children, and they would find these items hidden among M.'s possessions.[26]

See also, "Client reports ideally, she wants to be with her paternal grandmother who lives in State A…" Ex. 16, AR 182. *See also,* "The client reports she wants [to] move back to State A with her grandmother when she returns this month." Ex. 16, AR 217. *See also,* "The client states 'I just want to move back to State A to live my mother and grandmother.'" Ex. 16, AR 236. See also, "I'm angry because I want to leave here and go back to State A with my Nana." Ex. 16, AR 237.

16 "The client reported she has thrown temper tantrums, put on punishment for fighting, in trouble for telling lies and stealing all in hopes of returning to State A with her maternal grandmother." Ex. 16, AR 218. See also, "Client's father reported that this past school year, client had gone to the elementary school counselor and reported that 'she was being abused.' He stated that she told this to the counselor because 'she wanted to go back to State A.'" Ex. 16, AR 177.

17 Testimony of B. F..

18 Testimony of T. S..

19 Ex. 17, AR 293.

20 While on vacation in State B Ms. F. had a significant heart attack and did not return until after she had recovered. Testimony of T. S..

21 Testimony of B. F..

22 Testimony of B. F..

23 Testimony of B. F..

24 Testimony of T. S..

25 Ex. 17, AR 293.

26 Testimony of B. F.. *See Also* Testimony of K. A.. *See Also* Testimony of T. S..

M. also had difficulty processing her emotions and had a habit of throwing physical tantrums.[27] During one incident M. hit Ms. S. in the stomach while she was pregnant with the twins.[28]

Late in the evening on December 31, 2018, while Ms. S. and Mr. D. were in Anchorage waiting for Ms. S. to give birth, Mr. A. arrived at Ms. F.'s home. He showed up unannounced with his wife, Z. G. H., and eight other people.[29] Initially, Ms. F. assumed Mr. A. was there to await news of the twins' arrival, but it soon became clear he was there to celebrate New Year's.[30] Eventually, the party expanded to 20 people, including several other children, and large amounts of alcohol were consumed.[31] While it is unclear exactly how the argument began, eventually Ms. G. H. became very agitated and attacked Mr. A.. She scratched his face, tore his t-shirt open, locked herself and Mr. A. in a bathroom, and drew a noticeable amount of Mr. A.'s blood.[32] The fight was significant enough that there was blood "all over" the bathroom and the bathroom door was broken.[33] This violent and chaotic situation led the other adults to remove children from the home. However, M. and E. were present for the entire incident.[34] Ms. F. got E. and M. upstairs and told them to remain there until it was safe. Ms. F. also yelled at Ms. G. H. and Mr. A. to leave.[35] Eventually, Ms. G. H. and Mr. A. left Ms. F.'s home, and Ms. G. H. was arrested outside her own home.[36]

Both M. and E. participated in household chores, which they were assigned according to their physical ability.[37] For instance M., being the taller child, would put away all the dishes on higher shelves and E., the shorter child, would put away all the dishes on lower shelves.[38] M. also was responsible for cleaning the bathroom, a task she shared with Ms. F., on Sundays.[39] While Mr. D. and Ms. F. did the majority of the laundry for the household, at 11 years old M. began to wash her own clothes.[40] M. was given this chore, as she had specific preferences about how her laundry was folded and put away.[41]

---

27 Ms. S. testified that M. would throw herself on the floor, stomp around the house, and scream.
28 Testimony of T. S..
29 Testimony of B. F..
30 Testimony of B. F..
31 Testimony of B. F..
32 Testimony of B. F..
33 Testimony of B. F..
34 Testimony of B. F..
35 Testimony of B. F..
36 Testimony of K. A..
37 Testimony of B. F..
38 Testimony of B. F..
39 Testimony of B. F..
40 Testimony of B. F..
41 Testimony of B. F..

While M. had suffered from nightmares before returning to City A, these nightmares "started getting worse" when she moved away from Ms. U. and returned to live in City A.[42] These nightmares were graphic in nature.[43] Sometime in the spring of 2019, Ms. S. and Mr. D. noticed that M. had begun "picking" at her arms, biting her fingernails, and "picking her head" to the point of bleeding.[44] At Ms. S.'s suggestion, M. was enrolled in counseling at Behavioral Health Services A (BHS-A) with her first documented session taking place on June 25, 2019.[45] Initially, M. was diagnosed with an unspecified anxiety disorder. That diagnosis was later narrowed to separation anxiety disorder of childhood, with her counseling notes indicating "Client diagnosis change to (F93.0) Separation Anxiety due to her Client's Status Review indicate increased anxiety being away from her primary caregivers"[46] and "Disruption of Family by Separation or Divorce."[47] This was in part based on M. reporting to her counselors that she struggled with being separated from her paternal grandmother. Despite living in the same small community, M. also struggled with having a very limited relationship with her biological mother.

During her time living with Ms. S., M. cycled through multiple counselors. M. began counseling with D. B., followed by U. E., and then N. J..[48] F. C. was the supervising counselor during some of this period, and eventually worked as M.'s treating counselor after M. was removed from Mr. D. and Ms. S.'s care.[49] The counseling notes indicate that M. exhibited some non-suicidal self-injury behaviors (NSSI). Primarily, the NSSI presented as skin excoriations (picking at the skin on her arms and head) and Trichotillomania (a hair pulling disorder).

In August of 2019 Mr. D. had a serious boat accident. At first, it was on unclear if he would survive.[50] Mr. D. had to be transported to Anchorage by life flight, and he remained in Anchorage until November of 2019.[51] Mr. D. underwent six surgeries, was confined to a wheelchair for a period of months, and was reliant on sedating medications.[52] While he recovered Mr. D. was reliant on others to complete many of his day-to-day tasks.[53] Eventually

---

42 Ex. 16, AR 178.

43 "'She described her recent nightmare reporting that she saw a "pool as dark as blood" and "there was a girl in the van and I opened the door and turned on the light and there wasn't a shadow. But then I turned off the light and there were 2 shadows and they were saying 'la la la.'" Ex. 16, AR 178.

44 Ex. 16, AR 178.

45 Ex. 16, AR 278.

46 Ex. 16, AR 286.

47 Ex. 16, AR 190-192.

48 Ex. 16, AR 190-192

49 Testimony of F. C..

50 Testimony of T. S..

51 Testimony of T. S..

52 Ex. 24, AR 503

53 Testimony of B. F..

Mr. D. regained the ability to walk with the use of a cane, but from the time of his accident until M. was removed from the home, he was unable to work. [54] This event was traumatic for M., something that she expressed often to Ms. S. at home,[55] and to her counselor during a session.[56]

With Ms. F. recovering from a heart attack out of state, and Mr. D. unable to work, Ms. S. found herself the sole provider for the household. This situation was further stressed by a lack of childcare for her twin boys who, after April 2019, became too old to come with Ms. S. to her work at the hospital.[57] So in April of 2019, Ms. S. changed jobs and began to work part-time at a cargo company.[58] The collective impact was that household finances were stretched extremely thin.

The family stopped eating out, began to rely on free school breakfast and lunch, and limits were placed on the type of snacks that were available.[59] Despite these limitations dinners were still provided at home and always included a starch, a protein, and a vegetable.[60] While the family still had fruit, yogurt, and graham crackers available, access to luxuries like chips and cookies were restricted for all the children. M., particularly, struggled with the loss of snack options and took to acquiring chips and sugary snacks wherever and whenever possible.[61] During this period, however, M.'s weight remained above average for her height,[62] and there is no medical evidence in the record to suggest that she was physically malnourished or experienced a drastic weight loss.

In the spring of 2021, M. underwent a psychiatric examination conducted by Dr. Roman Rodriguez, a board-certified child and adolescent psychiatrist.[63] At the beginning of April of 2021, Dr. Rodriguez prescribed Prozac "to target her OCD symptoms of trichotillomania and skin excoriations." [64]

On June 30, 2021, Dr. Rodriguez wrote a letter explaining that M.,

> "has Deprivation/Maltreatment Disorder of Infancy to Early Childhood with Disinhibited Attachment Disorder. In the DSM-5 classification system she has elements of both Reactive Attachment Disorder (RAD) and Disinhibited Social

54 Ex. 24, AR 503.
55 Testimony of T. S..
56 Ex. 16, AR 201.
57 Testimony of T. S..
58 Testimony of T. S..
59 Testimony of T. S..
60 Testimony of T. S..
61 Testimony of T. S.. *See Also:* Ex.16, AR 198.
62 Testimony of Raul Escobar.
63 Ex. 16, AR 165.
64 Ex. 16, AR 165.

Engagement Disorder. Additionally, she also has Obsessive Compulsive Disorder (OCD)."[65]

Dr. Rodriguez noted that he found Prozac to be helpful in treating M.'s NSSI. Notes from M.'s counseling sessions support this conclusion. In notes from a session on March 24, 2021, M. endorsed recent NSSI.[66] Then, as described in a note dated April 12, 2021, regarding her first session after being proscribed Prozac, M. reported no NSSI.[67] Her counselor, N. J., noted, "[t]he client appears to be doing well in terms of cessation of NSSI".[68] Again, in notes from a May 8, 2021 session, M. denied exhibiting NSSI.[69]

Dr. Rodriguez's letter advised that other symptoms of RAD are usually only minimally helped by medication and recommend that M. engage in "long-term therapy [with] a therapist trained in child development" which, depending on the severity, could be done on an outpatient basis or at an inpatient residential facility.[70]

B. Investigation

On June 7, 2021, OCS received a report alleging that Ms. S. physically abused M..[71] That report alleged that Ms. S., "put her hands around M.'s neck and tried to choke her."[72] That report stated, "they were not informed when this happened or if the child had any injuries, but it was reported to them today, 6/07/21."[73]

On June 8, 2021, the case was assigned to Raul Escobar, a protective services specialist III (PSS) with OCS.[74] On June 11, 2021, M. was taken to City A's Children Advocacy Center (CAC) by her uncle, K. A..[75] PSS Escobar was able to observe the interview.

In that CAC interview M. alleged that Ms. S. pushed her against a wall and that Ms. S. put one hand on M.'s throat.[76] M. estimated she was nine or ten when this incident happened. When asked how her breathing was during this incident, M. says "it kind of stopped a little bit"

---

65 Ex. 16, AR 165.
66 Ex. 16, AR 254.
67 Ex. 16, AR 256.
68 Ex. 16, AR 256.
69 Ex. 16, AR 257.
70 Ex. 16, AR 165.
71 Ex. 20, AR 380.
72 Ex. 20, AR 380.
73 Ex. 20, AR 380.
74 Testimony of Raul Escobar.
75 Testimony of K. A..
76 "A year or two after I was here, living here, umm I got in trouble and I was going (demonstrates hyperventilating) after my mom had spanked me and so, she had kind of pushed me kind of to the wall and like had her hand like this (demonstrates hand on throat) that's, one of the things I was scared of about her." Ex. 12.

but then demonstrated taking sharp breaths.[77] When asked if "*anything* that has ever happened" ever left marks or bruises, M. only mentioned a separate incident which occurred within the last three days. In that incident, M. alleges that Ms. S. and Mr. D. hit her with a belt 27 times.[78]

On June 12, 2021, Mr. D. agreed to a safety plan placing M. in the care of his brother, Mr. A..[79] That same day, PSS Escobar observed M.'s bedroom for the first time, and observed it was cluttered with household items and boxes.[80] However, PSS Escobar was not aware of what was in the boxes, or what M. may have taken with her to her uncle's house.[81] PSS Escobar also observed a prominently placed board titled "M. Safety Boundaries".[82] That board lists out: "No living room access w/ Mom + Nana Present *No blankets, Pillows, toys; In kitchen @ designated Chair; no sitting on floors; no play w/others toys; Dropping whatever is in hand if wanted by twin; Say "stop" once + walk away to adult; no calling brothers to her; No physical contact w/Anyone."[83]

On July 9, 2021, F. C., M.'s counselor at the time, was notified by email that Dr. Rodriguez had diagnosed M. with RAD and prescribed medication.[84] This email included an attachment of Dr. Rodriguez's diagnosis letter, his prescription for M., and M.'s diagnostic questionnaire.[85] While Ms. C. was aware of Dr. Rodriguez's diagnosis, she did not follow up with Dr. Rodriguez, and did not consider his diagnosis when providing counseling in any meaningful way.[86]

On July 16, 2021, PSS Escobar filed a Non-Emergency Child in Need of Aid (CINA) petition against M.'s biological parents, Mr. D. and Ms. N.. Ms. S. was not a party to the petition. PSS Escobar continued to have contact with M., with corresponding notes entered until August 5, 2021.[87]

C. Procedural history

On July 24, 2021, OCS sent Ms. S. a notice with the results of its investigation, and notifying her of its intent to place her on the child protection registry.[88] OCS substantiated two

77 Ex. 12.
78 Ex. 12.
79 Ex. 24, AR 504.
80 Testimony of Raul Escobar.
81 Testimony of Raul Escobar.
82 Testimony of Raul Escobar.
83 Ex. 19, AR 332.
84 Testimony of F. C..
85 Ex. 19, AR 337.
86 Testimony of F. C..
87 The parties stipulated that any contact after August 5, 2021, would not be considered for this decision.
88 Ex. 1, AR 1-2.

findings of maltreatment against Ms. S.: one finding of physical abuse of M., as defined by AS 47.10.011(6), and one finding of mental injury, as defined by AS 47.10.11(8).[89] OCS also substantiated findings against Mr. D. for neglect and mental injury.[90] Ms. S. timely filed a request for an administrative hearing to challenge OCS's findings. Initially Ms. S.'s matter was joined with Mr. D., and it was stayed while the related CINA matter pended. After multiple postponements, Mr. D. withdrew his appeal.

D. Evaluation by Doctor G.

T. S. was evaluated by Dr. O. G. at OCS's request.[91] Dr. G. was initially tasked with assessing Ms. S.'s future risk for committing child abuse and to assess OCS's concern that Ms. S. may be dealing with factitious disorder imposed on another.[92] Dr. G. met with Ms. S., interviewed her, and had her complete the Minnesota Multiphasic Personality Inventory 2 (MMPI-2) and the Child Abuse Potential Inventory-VI (CAPI-VI).[93] The MMPI-2 is a psychometric test designed to assess personality traits, and screen for mental health issues people may have. CAPI-VI is a test that compares a subject's beliefs and attributes with those of known child abusers.[94] The result of the CAPI-VI was that Ms. S. did not fall within the "at risk" range for physical child abuse. While Dr. G. did have concerns, she did not make a diagnosis of Ms. S..

E. Administrative Hearing

A hearing was held over Zoom on November 1-2, 2023, and November 17, 2023. OCS was represented by Jennamarie Test and Ms. S. was represented by Amanda Harbor. Exhibits 1-24 were admitted into evidence. The record closed December 4, 2023.

OCS presented testimony from: Raul Escobar, the investigative caseworker and a protective services specialist III (PSS); K. A., M.'s paternal uncle; F. B. C., a licensed professional counselor and one of M.'s treating counselors; and Dr. O. G., PsyD, an expert in clinical psychology and child abuse and neglect. Ms. S. testified in her own defense and presented testimony from her mother, B. F..

F. Remand Order

89 Ex. 1, AR 1-2.
90 Ex. 6, AR 7.
91 Testimony of Dr. G..
92 Factitious disorder imposed on another was previously called Munchausen's syndrome by proxy.
93 Testimony of Dr. G..
94 Testimony of Dr. G..

On February 20th, 2024 the Commissioner's Delegate, Senior Policy Advisor Chrissy Vogeley, remanded this matter to the ALJ pursuant to AS 44.64.060(e)(2). That order returned the case to allow for the taking of additional evidence in two areas: (1) M.'s medical records from the therapy she received while living in State A; and (2) Notes from Dr. Roman Rodriguez's examination of M.. That order also asked for additional findings about:

(1) the therapeutic treatment notes from Behavioral Health Services A;
(2) the July 31, 2023 letter from M.'s treating clinician, N. V. J., titled "Safety Concerns Regarding M. D."; and
(3) the creation and use of the board titled "M. Safety Boundaries" found in M.'s home.

G. Records from Dr. Rodriguez

On remand OCS submitted records from Dr. Rodriguez's treatment of M.. These records included notes from sessions on April 01, April 07, May 05, June 28, and July 28 of 2021. Dr. Rodriguez met with M. during, at least four of these sessions: April 1, May 5, June 28, and July 28, 2021.[95] Dr. Rodriguez met with Mr. D. and Ms. S., without M. present, on April 7, 2021.[96] Dr. Rodriguez's notes provide significant additional detail that further supports M.'s diagnosis of reactive attachment disorder and show that Dr. Rodriguez spoke directly to M. in making his diagnosis.[97] Dr. Rodriguez's notes clearly indicate that M.'s NSSI behaviors were significantly reduced or eliminated after she was proscribed Prozac, but before her removal from Ms. S.'s care.[98] Throughout Dr. Rodriguez's notes he provides a Global Assessment of Functioning (GAF) score. M.'s GAF score ranges from 78-80.[99] A score between 71-80 is an indicator of no more than slight impairment in social, occupational, or school functioning.[100]

Dr. Rodriguez's notes indicate that M. was experiencing no side effects as late as June 28, 2021.[101] On July 28, 2021 K. A. accompanied M. to a session with Dr. Rodriguez. At that session, K. A. admitted to taking M. off Prozac for about one week, without consulting M.'s

---

95 AR 545-555.
96 AR 548.
97 AR 550-555.
98 AR 550: "Mother and Father report that the patient's nail-biting and picking has reduced about 10%. She also appears to be less anxious, overall and seems to be more compliant with chores, etc. at home. The changes are slight, but the parents have noticed. The patient also says that she has noticed these small changes." *See also:* AR 552 ""The patient has responded to the medication in that she seems not to be pulling at her hair as frequently and also not picking at her skin. The patient does agree that she is picking at her skin less frequently."
99 AR 547, 550, 553, 555.
100 *Theresa L. v. State, Dept. of Health and Social Serv*., 353 P.3d 831, 842 (Alaska 2015).
101 AR 552. "The patient is compliant with her medication regimen an[d] is not complaining of side effects."

primary care provider or OCS first. Mr. A. explained that he ceased M.'s medication as a response to negative side effects including headaches and stomach queasiness.[102] Dr. Rodriguez advised Mr. A. that he should not cease providing M.'s medication without consulting a doctor first. Dr. Rodriguez returned M. to Prozac, at a reduced dose, with the agreement of Mr. A. and M..[103] In that meeting with Dr. Rodriguez, Mr. A. and M. reported that M. felt less stressed in her current placement with Mr. A..[104]

F. Records From State A

The remand Order from the Commissioner's Delegate returned this matter, in part, to take additional evidence about "M. 'M.' D.'s medical records from the therapy she received while living in State A". Unfortunately, despite diligent efforts, OCS was not able to procure these records.

[102] AR 554.
[103] AR 554.
[104] AR 554.

III. Discussion

A. Applicable Law

1. Legal framework

Alaska's Child Protection statute, AS 47.17, sets out a framework for OCS to receive and investigate reports of suspected child abuse or neglect.[105] The child protection 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[.]"[106] 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[.]"[107] One such provision is AS 47.10.011(6). That provision specifies that a child may be considered a child in need of aid if: "[t]he child 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 the parent, guardian, or custodian to supervise the child adequately."[108]

Another such provision is AS 47.10.011(8). That provision specifies that a child may be considered a child in need of aid if: conduct or conditions created by the parent result in "mental injury" to the child or place the child at substantial risk of mental injury due to exposure to domestic violence or a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting behavior

---

105 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.

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

107 AS 47.17.290(9).

108 AS 47.10.011(6). The OCS notice of substantiated finding articulated the legal basis for its substantiated finding as "AK Child Protection Statute 47.17.290(9) as described in: AS 47.10.011 . . ." Ex. 1, AR 1. As explained in *In re DS*, OAH 21-0016-SAN (Health and Social Services 2021) at 3-5, this phrasing is misleading because AS 47.17.290(9) is not "described in" AS 47.10.011 — it is a definition for "maltreatment" in the AS 47.17 chapter. The defined term "maltreatment" in AS 47.17 appears only in AS 47.17.010, which addresses reporting requirements. Statutory definitions like AS 47.17.290(9), may assist in interpreting statutes, but do not themselves provide an independent basis for liability. *See*, *e.g.*, *Cent. Delta Water Agency v. Bureau of Reclamation*, 452 F.3d 1021, 1026 (9th Cir. 2006) (statutory language was "merely a definition" and therefore did not create a duty for the agency and thus plaintiffs failed to demonstrate a failure to satisfy such a duty); Inartful phrasing aside, OCS's notice quoted the AS 47.10.011(6) physical abuse provision, and AS 47.10.011(8) mental injury provision, putting Ms. S. on notice that this statute was the basis for OCS's finding. AS 47.10.011(6) and AS 47.10.011(8) were the focus of OCS's evidence and argument.

is also a trigger.[109] "Mental injury" means "a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness."[110] In the context of CINA proceedings, the Alaska Supreme Court has repeatedly held OCS to a rigid standard of proof to establish mental injury or risk of mental injury.[111] While they share many definitions, a substantiated finding of maltreatment is distinct from a CINA case in that it is not a forward-looking finding – it is concerned with whether a particular action constituted mental injury or placed the child at substantial risk of mental injury in the moment that it occurred.[112]

2. Hearings on AS 47.17 substantiated findings

OCS may issue a substantiated finding of abuse or neglect based upon probable cause.[113] If a person appeals a substantiated finding, OCS has the burden of proving at an administrative hearing, by a preponderance of the evidence, that the alleged acts of abuse or neglect actually occurred.[114] To satisfy this burden, OCS may rely on recorded statements and other documents that would ordinarily be excludable hearsay under the Alaska Rules of Evidence so long as it meets the standard of being "evidence of the type on which a reasonable person might rely in the conduct of serious affairs."[115] The rules of evidence used in the judicial system "do not apply to an administrative hearing except as a guide[.]"[116] This means substantiation hearings can, and typically are, conducted without any in-person testimony from child witnesses. Instead, to meet its burden of proof OCS can rely upon forensic interviews, written statements and affidavits, medical records, counseling records, and photographs.

3. Objections to the Remand Order

Ms. S.'s attorney, Amanda Harbor, raised several objections to the remand order. First, she argues that ordering the ALJ to "take additional evidence" is contrary to 2 AAC 64.290. In its relevant section, 2 AAC 64.290 holds that "[t]he administrative law judge may" admit, refuse to admit evidence that is unduly repetitious, or exclude evidence that was not disclosed as

---

109 AS 47.10.011(8). OCS stipulated at the start of the hearing that it was only seeking to substantiate a finding of mental injury under AS 47.10.11(8)(A) or AS 47.10.11(8)(B)(i) and was not seeking a substantiation against Ms. S. based on any exposure to domestic violence.

110 AS 47.17.290(9).

111 E.g., Theresa L. v. State, Dept. of Health and Social Serv., 353 P.3d 831, 839 (Alaska 2015).

112 In re BK, OAH 15-1246-SAN (Commissioner of Health & Social Serv. 2016).

113 *In re X.Y.*, OAH No. 10-0312-DHS (Commissioner of Health & Social Serv. 2011).

114 *In Re K.C.G.*, OAH No. 13-1066-SAN (Commissioner of Health & Social Serv. 2013).

115 2 AAC 64.290(a)(1).

116 2 AAC 64.290(b).

required in a discovery plan. Even if, assuming for the sake of argument, this provision of the administrative code prohibited the Commissioner from ordering the admission of certain evidence, the Commissioner has not ordered the admission of certain evidence in this matter. Instead, the remand order only requires the *taking* of certain evidence. Had that evidence been inadmissible for any reason, the order does not prohibit the ALJ from excluding that evidence.

Ms. S.'s attorney also argues that the order violates the Commissioner's previous decision in *In re TT and SK* and that this presents a problem under *Stefano v. State*. This decision does not need address what might create a problem under *Stefano,* however, as the Commissioner's order in this case does not run contrary to the holding of *In re TT and SK. In re TT and SK* does not address a remand order, and it does not address the Commissioner's powers on remand, instead it only addresses 2 AAC 64.290 in so far as finding that it gives the ALJ the power to refuse to admit a portion of the agency record when that portion "…is not the kind of evidence on which a reasonable person might rely in the conduct of serious affairs."[117]

While *In re TT and SK* do not address remanding for taking additional evidence, the text of AS 44.64.060(e)(2) does. It specifically empowers the Commissioner to "return the case to the administrative law judge to take additional evidence". While Ms. Harbor characterizes this remand as OCS receiving a "do-over" the remand order is hardly that expansive. The initial hearing happened across three days, included over 500 pages of records, and a video recorded CAC interview. On remand, OCS only adds 12 pages to the agency record, of which only 10 pages add any information of substance.

Ms. Habor also argues about the fundamental fairness of the remand order which caused some additional delay and attorney fees to be borne by Ms. S., who did not create the need for remand. These arguments are insufficient to find the remand order invalid when this type of remand is provided for, verbatim, in AS 44.64.060(e)(2). Additionally, while only raised in a footnote and not in a motion for fees, AS 44.64.040(b) does give OAH the authority to order attorney fees that result from action done in bath faith or as a result of tactics used frivolously or solely intended to cause delay. As none of those circumstances exist in this case, a motion requesting attorney fees, could not be granted.

---

[117] *In re T.K. and S.K., OAH Nos* 16-0594/0686-SAN (Commissioner of Health and Soc. Serv. 2017)(Available at https://aws.state.ak.us/OAH/Decision/Display?rec=5979).

Evaluation of the Evidence

1. Hearsay Evidence[118]

During the hearing Ms. S.'s attorney, objected to a substantial portion of the evidence as hearsay and was given a standing objection to evidence of this type. Hearsay is not admissible under the Rules of Evidence, except under the various exceptions recognized by those rules.[119] As discussed above the formal rules of evidence do not apply in these proceedings, "except as a guide."[120]

In administrative proceedings hearsay is admissible. The question is whether the particular type of evidence, including particular types of hearsay evidence, is nonetheless the kind of evidence on which reasonable people might rely in the conduct of serious affairs. The hearsay status of evidence can be relevant to that inquiry, but it is not dispositive. M.'s forensic interview is a classic example of hearsay evidence admissible in an administrative hearing. Attributes supporting its reliability include being conducted by a trained forensic interviewer, and that the video recording affords the factfinder the ability to view the speaker as the statement is made.

Of course, all of the ORCA notes[121], and counseling notes, are also out-of-court statements. Many of them are at least double hearsay, in that the author has recorded what another person ostensibly told them. Certainly, multiple layers of hearsay diminish the overall reliability of evidence, but typically that goes to the weight the evidence is given, not its admissibility. The admitted evidence in this case is the type of evidence that reasonable people would rely on in the conduct of serious affairs. Thus, despite its hearsay nature, the evidence OCS moved into the record is admissible in this proceeding. As discussed further below, while all the evidence submitted by OCS in this case was admitted, that does not mean all of it can be given the same weight.

2. Testimony of Raul Escobar[122]

PSS Escobar was the investigating case worker and was able to testify about OCS's investigation in this case. His testimony focused on his investigation and the reasoning behind

---

118 Substantiation of abuse and neglect cases are not subject to the Administrative Procedure Act (AS 44.62.330-AS 44.62.630) and there is no special restriction on the use of hearsay.

119 Alaska R. Evid. 802. In addition to the numerous hearsay exceptions identified in Rules 803 and 804, there are, of course, also numerous circumstances in which out-of-court statements are not considered hearsay at all (including, most obviously, when the statement is not offered "to prove the truth of the matter asserted."). *See* Alaska R. Evid. 801(c), (d).

120 2 AAC 64.290(b).

121 ORCA is OCS's automated case management system of record

122 Testimony of PSS Escobar.

OCS's decision to substantiate two maltreatment findings against Ms. S.. He testified following the receipt of the report of physical abuse, M. was interviewed at the City A CAC. PSS Escobar testified about the Child First Protocol used at Child Advocacy Centers.

PSS Escobar testified to his investigatory process and established the foundation for the statements from collateral contacts which were memorialized in his ORCA notes. He had conversations with one of M.'s previous counselors, N. J., and his collection of M.'s counseling records which were a part of the agency record in this case.

PSS Escobar also spoke with M.'s paternal grandmother, Ms. U., who provided him with information about M.'s prior therapy in State A. PSS Escobar did not have the opportunity to review any records from M.'s therapy in State A.[123] PSS Escobar's testimony was balanced, responsive, and informed. While PSS Escobar did not observe most of the allegations in this case firsthand, his testimony was helpful in establishing the foundation for most of OCS's record in this case.

3. Testimony of F. C.[124]

OCS called Ms. C. as a fact witness. Ms. C. presented herself as a therapist and a "marriage and family therapist by training" at the hearing[125] However, while Ms. C. does hold a master's degree in marriage and family therapy, on cross it became apparent that Ms. C. is not a licensed marriage and family therapist. She has been unable to pass the licensing exam, despite approximately ten attempts, across a decade, in Alaska, Florida, and North Carolina.[126] Ms. C.'s somewhat confusing testimony as to her qualifications is concerning.

Despite being aware that M. had been diagnosed with RAD by Dr. Rodriguez, meeting with Dr. Rodriguez once a month, and having the ability to review notes of Dr. Rodriguez's visits in Behavioral Health A's system, Ms. C. did not staff M.'s case with Dr. Rodriguez or discuss his diagnosis in any way.[127] Despite the lack of communication, Ms. C. concluded that Dr. Rodriguez was being "fed" information by Ms. S. and that the diagnosis had been planted in Dr. Rodriguez's head. Based on these conclusions, Ms. C. did not consider the diagnosis of RAD in concluding that M. should not return to Mr. D. and Ms. S.'s home. The records from Dr. Rodriguez submitted post remand, however, do not support Ms. C.'s conclusions. Instead, they show that Dr. Rodriguez's evaluation and resulting conclusions resulted from multiple meetings

[123] On remand PSS Escobar diligently attempted to obtain these records. Unfortunately, he was unable to obtain them.
[124] Testimony of F. C..
[125] Testimony of F. C..
[126] Testimony of F. C..
[127] Testimony of F. C..

with M., Mr. D., Ms. S., and even Mr. A.. Ms. C.'s willingness to completely disregard the diagnosis of Dr. Rodriguez, a board-certified child and adolescent psychiatrist, without so much as reviewing his notes or contacting him, deeply undermined her credibility.

During her in-person sessions with M., Ms. C. noted that M. was "stockpiling" snacks that were available in the office. In her testimony she concluded this was an indication that M. had been deprived food. However, Ms. C. did not become M.'s treating counselor until after she had been removed from Mr. D. and Ms. S.'s care. It's not apparent from the record exactly when Ms. C. first noted the stockpiling, but she did not meet in her office with M. until after she was already living with Mr. A.. As M. was described as slightly above average weight for her height and age, there is no medical evidence in the record to support a conclusion that she was malnourished, and the weight of the evidence indicates that M. was only restricted from consuming "junk" foods in the same manner as the rest of the children, this observation is given little weight.

Ms. C. also testified that while she could not recall the exact date, she recalled observing Ms. S. discussing M.'s behavior with another counselor, U. E., in front of M.. However, Ms. C. did not testify to exactly what this conversation entailed, but she did testify she discussed with Ms. E. that it was inappropriate professional behavior. While it may not have been professionally appropriate for Ms. E. to have that discussion with Ms. S. in front of M., there is nothing in the record to indicate this was maltreatment on the part of Ms. S..

Ms. C. drafted a letter dated July 15, 2021, in which she expressed her opinions about the appropriate placement of M..[128] In that letter it was Ms. C.'s "[t]herapist clinical impression that M. is not to return to that unhealthy environment. In order for this child to strive and achieve her developmental stages in a healthy manner she is in need of more positive support and nurturing in different environment than that of living with her biological father and his partner".[129] Somewhat perplexingly, the letter also included a brief description of RAD. Despite directly referencing RAD in her letter, Ms. C. testified she did not look up the symptoms of RAD in the DSM before writing her letter, and she did not know what the symptoms of RAD are. When further asked what M.'s diagnoses were, Ms. C. could not remember.

---

[128] While Ms. C. has professional counseling experience, she was only offered as a fact witness and OCS did not provide notice of Ms. C. as an expert. Accordingly, the letter was only reviewed for her observations.

[129] Ex. 16, AR 147-148.

The circumstances dictate caution in relying on Ms. C.'s conclusions. Ms. C.'s testimony is limited as a fact witness and, for a limited time as a treating counselor. As discussed above, those observations carry less weight than other parts of the record.

4. Letter from N. J.

On July 13, 2021 N. J. drafted a letter entitled "Safety Concerns Regarding M. D.".[130] Ms. J. was M.'s treating counselor for a period of time. That letter concludes,

> It is my clinical opinion that the living environment created by T. S., C. D., and T.'s mother has caused a very stressful atmosphere for M. to the point where she is literally physically hurting herself (as exhibited by her engagement in trichotillomania and excoriation behaviors) as a way cope with distressing emotions - emotions resulting from circumstances she should not have been subjected to in the first place - as the only way for her to find emotional relief. Moreover, it appears that most of the occasions during M. was grounded, the rationale appeared punitive as opposed to rehabilitative.[131]

Ms. J.' opinion in her letter is that the living environment created by Ms. S., Mr. D., and Ms. F. collectively caused a very stressful atmosphere for M.. While that is cause for concern, Ms. J.' opinion, does not go so far as to conclude that Ms. S.'s actions caused, or placed M. at substantial risk of, mental injury severe enough to present observable and substantial impairments in M. ability to function in a developmentally appropriate manner. Even if Ms. J.' letter had offered an opinion on mental injury or risk of mental injury, the letter itself cannot satisfy the requirement that OCS prove that Ms. S. caused mental injury or placed M. at substantial risk of mental injury through a qualified expert, as Ms. J. was never offered as an expert in this case.[132]

Finally, while the letter from Ms. J. was reviewed by Dr. G. and factored into Dr. G.'s opinion, several conclusions in Ms. J.' letter were not born out in the record, most significantly the conclusion that M.'s NSSI was directly caused by the atmosphere in the home with Ms. S., Mr. D., and Ms. F.. Dr. Rodriguez's letter and supporting notes, attribute these behaviors to M.'s RAD diagnosis and OCD. There is no indication in the record that Ms. J. ever consulted with Dr. Rodriguez or reviewed his notes, nor is there any reference to M.'s RAD diagnosis in Ms. J.' letter. This is despite M. directly informing Ms. J. during a session that she had seen a

---

130 Ex. 18, AR 324-326.
131 Ex. 18, AR 326.
132 *See CORA G. v. DEPT. OF HEALTH & SOCIAL SERVS.*, 461 P. 3d 1265 (Alaska 2020).

psychiatrist and was taking medication.[133] Additionally, as Ms. C. testified, as a counselor at Behavioral Health A Ms. J. would have had access to Dr. Rodriguez's notes and could have spoken directly to Dr. Rodriguez. Further a careful review of the therapy records, supplemented by Dr. Rodriguez's letter and clinical notes, show that M.'s NSSI behaviors ceased after M. began taking Prozac, which was prior to removal from Ms. S.'s care. This includes the records from sessions M. had with Ms. J. in April and May where Ms. J. documented that M.'s NSSI behaviors had ceased.[134] Taken together, the more supportable conclusion is that M.'s NSSI behaviors were caused by underlying mental health conditions, and that these behaviors ceased after proper medication. For these reasons, Ms. J. observations carry less weight than other parts of the record.

5. Testimony of Dr. G.[135]

Dr. O. G. was retained as an expert by OCS, property noticed, and admitted as a qualified expert witness to testify about Clinical Psychology and as an expert in child abuse and neglect. Dr. G.'s testimony was very balanced, responsive, and informed.

Dr. G. was initially retained by OCS to conduct a psychological evaluation and parental risk assessment of Ms. S. and Mr. D.. Dr. G.'s assessment focused on Ms. S.'s future risk for committing child abuse and OCS's concern that Ms. S. may be dealing with factitious disorder imposed on another.[136]

On 6/12/2023, OCS asked Dr. G. to provide an expert opinion on, "whether or not the actions or inaction on the part of Ms. S. and/or Mr. D. caused or contributed to mental injury/emotional maltreatment of [M.]."[137] In order to provide this opinion, Dr. G. reviewed many of the OCS records, BHS-A records, and Behavioral Health B records. Dr. G. was not provided with records or notes from M.'s visits with Dr. Rodriguez other than Dr. Rodriguez's June 30, 2021 letter.

While she was not provided with Dr. Rodriguez's complete records, Dr. G. was able to provide a definition of RAD. Dr. G. explained:

> Reactive attachment disorder occurs due to a failure in a parent child relationship early in a child's life where the parent is not consistently responsive to the child, so what happens is the child never develops a sense of trust, being able to trust other people, to be able to rely on other people, and they also fail to develop

133 AR 256.
134 AR 256-258.
135 Testimony of Dr. G..
136 Factitious disorder imposed on another was previously called Munchausen's syndrome by proxy.
137 OCS's Notice of Expert Witness and Filing of Expert Witness Report, p. 2.

> emotional regulation skills and that has pretty serious implications for them, long-term, if and it's not something that's easily treated. In a nutshell that's kind of a simplistic explanation of it. [138]

However, most of Dr. G.'s evaluation and testimony focused on Ms. S., her mental health, her personality traits, and Ms. S.'s perceptions of M., instead of on how specific actions of Ms. S. impacted M.. In the context of CINA proceedings, when determinations are forward looking and focused on the best placement for a child, determining the mental health of a placement and their perceptions of a child is vital. However, in the substantiation of abuse and neglect context, we are concerned with a specific moment in time. We must determine whether a particular action, or group of actions, caused mental injury or placed the child at substantial risk of mental injury – in the moment that those actions occurred.[139] Accordingly, determining if Ms. S. suffers from a factitious disorder imposed on another, or if Ms. S.'s personal suspicions that M. was engaging in sexually inappropriate behavior were accurate, carry little relevance. After all, even if Dr. G. had diagnosed Ms. S. with any mental health condition, that would not be proof of maltreatment by Ms. S. of M.. What matters is how Ms. S.'s specific behaviors impacted M.. Dr. G. made this point herself, when she testified that there was no diagnosis, in and of itself, that would make someone an unfit or abusive parent.[140]

Dr. G.'s expert testimony was required to establish that Ms. S.'s conduct caused mental injury in M..[141] On this front Dr. G.'s opinion was, "more likely than not that M. had suffered some mental injury as a result of Ms. S.'s emotionally abusive behavior."[142] She further clarified that, "at least some of M.'s clear mental health difficulties were the result of how she was being treated at home."

Setting aside the qualifier *some* and the difference between mental health difficulties and mental injury, the weight of Dr. G.'s opinion is reduced by some of the limitations she faced. Dr. G. never individually evaluated M., and she was missing records of M.'s visits with Dr. Rodriguez. Dr. G. admitted that reviewing these records may have had an impact on her opinion.[143]

To prove maltreatment by mental injury, OCS must do more than show M. suffered "a serious injury to the child as evidenced by an observable and substantial impairment in the

---

138 Testimony of Dr. G..
139 *In re BK,* OAH 15-1246-SAN (Commissioner of Health & Social Serv. 2016).
140 Testimony of Dr. G..
141 *See* AS 47.17.290(9).
142 Testimony of Dr. G..
143 Testimony of Dr. G..

child's ability to function in a developmentally appropriate manner." It also must show that Ms. S.'s actions caused the injury in a way that was not accidental.[144] To this point, Dr. G. was asked if she could determine to what degree M.'s mental injury was the result of Ms. S.'s conduct, or from other potential sources. Dr. G. concluded she could not say that it was Ms. S.'s behavior that caused mental injury but that instead it was, "Ms. S.'s behavior, in concert with some of the other factors."[145]

In reaching her ultimate opinion that Ms. S.'s behavior, in concert with other causes, caused mental injury, Dr. G. relied on the conclusion that because M.'s NSSI symptoms improved after she was removed from Ms. S.'s care, Ms. S.'s actions contributed to M.'s mental injury. This conclusion is not supported by the limited records Dr. G. had to review.

First, Dr. G. only had a narrow window of post-removal records to review, only about six weeks. It would have been preferrable to have records of M.'s condition over a longer period to confirm that the session of her NSSI continued. However, even if those records were available, the conclusion that M.'s NSSI ceased *after* the removal is contradicted by the record.

M.'s counseling records note that her last documented incident of NSSI was before she was prescribed Prozac, and there is no indication in her counseling records that these NSSI restarted before M. was placed with her uncle. Further, the records from Dr. Rodriguez submitted on remand further support the conclusion that M.'s NSSI behaviors ceased after M. was proscribed Prozac. Since these behaviors had already stopped months before M. was removed, one cannot rely on the fact that they did not return in the six weeks after removal to conclude that the NSSI was a result of Ms. S.'s behavior.

In addition to contracting Dr. G.'s primary assumption, Dr. Rodriguez's notes offer a new detail. In Dr. Rodriguez's notes M.'s GAF score fluctuates from 78-80, placing her at the higher end of a range that indicates she was suffering only a slight impairment in functioning. M.'s GAF score calls into serious question if M. experienced mental injury, either as the result of Ms. S.'s actions, or as a result of any of the other influencing factors. Not having access to an evaluation from a treating clinical psychiatrist, who evaluated M. as only having a minor impairment, significantly limits the reliability of Dr. G.'s assessment.

Dr. G. was also called as a witness to provide an expert opinion on if, by a pattern of "rejecting, terrorizing, ignoring, isolating, or corrupting" behavior, Ms. S. placed M. at

---

144 *In re KS*, OAH No. 14-1681-SAN (Commissioner of Health & Soc. Serv. 2015). Published at https://aws.state.ak.us/OAH/Decision/Display?rec=5958).

145 Testimony of Dr. G..

substantial risk of mental injury. To this point Dr. G. offered that, when a child is made to feel that something was wrong with them and is unfairly punished, they are at high risk of developing other mental health disorders like, "anxiety, depression, addiction, self-injury, cutting, hurting themselves."[146] However, when asked about the specific behaviors that placed M. at substantial risk of mental injury, things became murkier.

To prove that Ms. S. placed M. at substantial risk of mental injury OCS must also show it was by a pattern of "rejecting, terrorizing, ignoring, isolating, or corrupting" behavior. While Dr. G.'s testimony focused primary on actual mental injury instead of substantial risk, she did not testify that Ms. S.'s behavior was rejecting, terrorizing, ignoring, isolating, or corrupting in nature. Instead, while addressing actual mental injury Dr. G. identified the triggering behaviors as: Ms. S. being overly critical of M., the institution of "draconian" punishments, depriving M. of food, making M. sleep on the floor, singling M. out for punishments, placing the onus on a child to change her behaviors, and placing M. under constant surveillance with nanny cams placed.

Some of these behaviors are not supported by the record. M. was never denied food and was only limited from unhealthy or expensive snacks. M. was also never made to sleep on the floor, and always had her own bed. Additionally, it is difficult to support a conclusion, in this extremely wired world, where everyone is constantly under surveillance, that "nanny cams" fit within any reasonable definition of rejecting, terrorizing, ignoring, isolating, or corrupting behavior.

Turning to "draconian" punishments, labeling something as "draconian" is obviously a conclusion, and not a specific act. The primary non-physical punishments that OCS relied on were a prominently placed board titled "M. Safety Boundaries" and M.'s regular grounding. To determine if these punishments were appropriate parental discipline, it would be necessary to know exactly what behavior resulted in exactly what punishment. Also, for OCS to meet its burden to show Ms. S. was reasonable for maltreatment, we would have to know that Ms. S. was the one reasonable for these punishments, instead of M.'s father. Unfortunately, the record is hardly settled on who instituted these punishments, exactly what punishments occurred, and if these punishments were warranted.[147]

---

[146] Testimony of Dr. G..

[147] A large portion of the hearing and OCS's record focused on if Ms. S.'s concerns about behaviors she described as sexually inappropriate or sexually abusive, were based in reality. For the purpose of this decision, it is not necessary to determine if M. actually exhibited these behaviors. As discussed throughout this decision, Ms. S.'s mental health and her personal views of M. do not constitute abuse. Instead, OCS must show that Ms. S.'s actions

Given those limitations, OCS has not met its burden to prove that Ms. S. was responsible for all these punishments, that the punishments were inherently unwarranted, or that they were sufficient to fit the definition.

6. Testimony of K. A.[148]

Mr. A.'s credibility was strained by his unwillingness to admit facts that were not beneficial to him. When asked by Ms. Harbor if he and his wife had "…ever had a fight in M.'s presence" Mr. A. flatly answered no. When Ms. Harbor gave him a second opportunity and asked, "you've never had a fight, not New Year's Eve 2018" he again answered, "not that I know of, no." Mr. A. eventually admitted that he had been involved in an incident of domestic violence, but he continued to downplay the severity of the incident, deny M.'s exposure to the event, and deny that this incident was part of the reason he had reduced contact with his niece after this incident.

During her direct examination Ms. Test asked Mr. A. about M.'s Prozac prescription, and if he could "tell us how that came to be discontinued?" Mr. A. responded that Prozac would "make her sick", and that he had discussed discontinuing the medication with OCS but OCS declined. Then Mr. A. testified that, he took M. to the emergency room, because she was throwing up, had headaches, and felt weak. He further explained that he had been logging all of M.'s reactions to the medication and he conveyed this information to care providers at the ER. Mr. A. testified that based on this, a doctor at the ER took M. off Prozac. Mr. A. further testified that M.'s negative reactions stopped, and he noticed no negative changes in her behavior after she ceased taking Prozac.

However, Dr. Rodriguez's notes present a different timeline. On July 28, 2021 Dr. Rodriguez met with Mr. A.. In that meeting Mr. A. reported that M. had ongoing headaches, stomach queasiness, and one episode of diarrhea that Mr. A. attributed to Prozac. Mr. A. advised that he had removed M. from Prozac, without consulting a doctor or OCS. Mr. A. further advised when he restarted M. on Prozac a week later, the symptoms had returned. Dr. Rodriguez promptly returned M. to Prozac, all be it at lower dose, which both Mr. A. and M. agreed to continue. Dr. Rodriguez also cautioned Mr. A. against removing M. from medication without first consulting a doctor.

---

had a specific impact on M.. If Ms. S. had a documented pattern of calling M. a sexual predator with M. present, that action could potentially form the basis of a mental injury substantiation. However, the record does not support the conclusion that Ms. S. had that pattern of behavior.

[148] Testimony of K. A..

OCS notes, that because Mr. A. did not provide a timeline for the events he addressed in his testimony, it's possible that meeting with the ER doctor happened after the meeting with Dr. Rodriguez. While that is possibility, there is nothing in the medical record to support that M. ever visited an emergency room while in Mr. A.'s care. Nor is there anything in the record to document that Mr. A. ever had a conversation with OCS about removing M. from the medication. Finally, when Ms. Test asked Mr. A. how M.'s Prozac prescription came to be discontinued, his failure to mention a direct conversation he had with the prescribing Psychiatrist about M.'s reaction to Prozac, and a returning M. to the medication at a reduced dosage, is significant omission. Collectively this reduces the weight to give to this portion of Mr. A.'s testimony, that M.'s negative behaviors' ceased post removal, and that they did not return after removing her from Prozac.

Mr. A. also testified about the incident where M. disclosed to him an incident of alleged physical abuse. Mr. A. testified that M. had first denied any instances of substantial physical abuse by Ms. S.. He then recounted sharing a disturbing and extreme moment of his own childhood trauma with M.. Mr. A. explained that he had been removed from his home, severely and brutally abused by his grandmother, including her chaining him up outside and throwing bricks at him, and then was kidnapped by an unrelated adult and held in a cage with other children. Mr. A. testified that he was able to escape and lead the police back to where he had been held. Even after Mr. A. shared this part of his childhood, M. did not disclose any abuse. Then Mr. A. told M., "If I was afraid to say anything those kids would still be in danger, or worse." It is only after this that M. allegedly made disclosures to him. While he remembers this event with detail, he was unable to recall the date, season, or year this conversation occurred. Despite this disclosure, Mr. A. did not make a report to OCS or contact the police. When asked why he did not report, Mr. A. responded, "maybe it could have been something she's just saying because she's afraid" and that he "needed to see more" before he would report it. In short, even Mr. A., a witness who has had a close relationship with M. her entire life and is very protective of her, did not consider her report completely credible.

7. Testimony of B. F.[149]

Ms. F. is Ms. S.'s mother, and like most mothers, she would have a natural bias in her child's favor. Taking this into account, Ms. F. still came across as calm, even tempered, and was

[149] Testimony of B. F..

able to testify in easy-to-follow linear narrative. Her testimony was also internally consistent at the hearing and with statements she previously made to OCS.

As the only witness, other than Ms. S., who physically lived in the home with M., her testimony was helpful in dispelling some of the allegations and providing important context. Ms. F.'s testimony that M. had not been made to sleep on the floor, that M. had her own room, that M. was never forced to clean the bathroom with a toothbrush on her own, and that chores in the household were distributed appropriately based on age and physical ability, came across as very credible.

Additionally, her report of the events on New Year's Eve and New Year's Day that ended in a physical fight between Mr. A. and his wife was significantly more reliable than Mr. A.'s account. Accordingly, even acknowledging that Ms. F. may have an incentive to give testimony in her daughter's favor, her credibility as a witness is very strong.

8. Testimony of T. S.[150]

Ms. S.'s testimony was internally consistent at the hearing with statements she previously made to OCS and Dr. G.. Ms. S. is a woman who in the space of a year, went through a difficult and unexpected pregnancy, gave birth to twins with health challenges, had her partner go through a traumatic and disabling accident, and found herself the sole breadwinner for a household of seven while caring for twin infants. Ms. S. sat through three days of hearings where, at times, her behavior during that period was heavily criticized and her mental health was questioned. During the hearing, Ms. S.'s reactions were viewable on video.

Many witnesses, faced with a similar situation, might have reacted explosively or defensively. In contrast, Ms. S. was always calm and collected. She was able to give direct denials to the allegations of substantial physical abuse, while also freely admitting facts against her own interest. Primarily, her admission that she and Mr. D. had tried corporal punishment with M. in the past. Ms. S.'s explanation that they had found corporal punishment to be ineffective with M. and had instead relied on non-physical punishment was credible.

In addition, Ms. S. was able to provide context to allegations that she disliked M.. While disliking a child would not necessarily constitute maltreatment, Ms. S.'s explanation that while she disliked some of M.'s behavior, she never disliked M., was also credible. Especially when viewed in the light that Ms. S. was the one who originally got M. into counseling in City A and after Mr. D.'s accident, she sought out other resources to help M. deal with the trauma.

[150] Testimony of B. F..

Eventually this led to the evaluation and diagnosis from Dr. Rodriguez. While some testimony and exhibits had cast this as Ms. S. over pathologizing M., there is nothing in the record to discredit the diagnosis of a board-certified child and adolescent psychiatrist. Even Dr. G. testified she was not critical of Dr. Rodriguez's diagnosis. The additional records from Dr. Rodriguez provided on remand, further support his diagnoses. Instead of being proof of Ms. S.'s emotionally damaging behavior, the weight of the evidence is that Ms. S.'s efforts to seek out more help for M. were not only beneficial to M.'s ability to function, but that Ms. S. was acting out of true concern for M..

While Ms. F. was helpful in providing support for Ms. S.'s testimony about how M. was treated, and the conditions in the home, a much more important factor is that Ms. S. was subject to cross-examination by OCS. Generally, one way we test for truth is to probe a witness's testimony during cross-examination. As the Alaska Supreme Court has noted, "cross-examination has been described '…as beyond any doubt the greatest legal engine ever invented for the discovery of truth.'" To that end, it is the vehicle by which the credibility of adverse witnesses is tested."[151] Here, if Ms. S. was lying, it is likely that some weaknesses or inconsistencies in her testimony might be revealed by the cross-examination. None were.

Accordingly, even acknowledging that Ms. S. would have an incentive to give testimony in her favor, she was a credible witness.[152]

---

[151] *Evans v. State*, 550 P.2d 830, 836 (Alaska 1976) (quoting 5 J. Wigmore, Evidence s 1367, at 32 (Chadbourn rev. 1974)).

[152] To be clear, this decision is not establishing a rule of law that a respondent who does not crack under cross-examination will not be substantiated for abuse. In this case, the absence of evidence corroborating the child's version, and with a respondent who gave believable direct testimony, the fact that OCS had an opportunity to cross-examine the respondent and did not reveal any weakness in her version of events becomes a significant factor.

9. Is M. a reliable witness?

When evaluating the statement from a child, we first look to whether the statement was "made without undue suggestions by someone else."[153] While there is no suggestion that M. was directly coached, the circumstances surrounding M.'s first disclosure and her lack of detail do raise the significant possibility that her initial disclosure was a response to her uncle sharing a very traumatic and extremely graphic personal story of childhood trauma. A likelihood that is further increased, as when she did not disclose abuse, Mr. A. encouraged her to be brave because, "if I was afraid to say anything those kids would still be in danger, or worse"[154] While the situation surrounding her initial disclosure does not inherently mean it cannot be relied on, it casts a seed of doubt.

Next, we look at the lack of specificity. While M. said the incident occurred one to two years after she returned to City A, she was unable to be specific.[155] While it's not unusual that a child would not remember the exact date an event occurred, M. did not even describe the season or year this allegedly happened. We don't know if this incident happened during the school year, or over the summer. We don't know if it happened in the morning, or at night. We don't know if it happened before the twins were born, or after. We don't know if it happened before Mr. D.'s accident, or after. This, standing alone, would not invalidate her report but it does make it less reliable and extremely difficult to confirm.

In evaluating hearsay statements by children, the Court has emphasized the importance of evidence that corroborates the child's accusations.[156] In her statement at the CAC, M. does not allege that this incident left any marks or bruises, or other physical indica of a strangulation. Even when asked if "*anything* that has ever happened" *ever* left marks or bruises, M. only mentions an incident that occurred within the last three days, where she alleges that Ms. S. and Mr. D. hit her with a belt 27 times. [157]

M.'s description of that incident further undermines her credibility, as it also lacks corroboration. After M. finishes explaining the situation, the interviewer asks again, "and did

---

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

154 Testimony of K. A..

155 CAC with M. 30:12

156 *Cf., e.g., A.S.W.*, 834 P.2d at 806 (ruling that "completely uncorroborated hearsay evidence" will not satisfy high evidentiary standard for CINA adjudications). Although the court's discussion of corroborating evidence was in an entirely different context not applicable here, it provides useful guidance.

157 Ex. 12.

that leave a mark", to which M. replies "I don't really think it did."[158] M. then explains she has some pain in her legs and feels like there may be a bruise. She also attributes some of this pain to running. Despite being interviewed at a CAC, and the allegation that she had been hit with a belt well over 20 times, the record does not indicate that any bruising or red marks were observed.

Finally, we look at other points in the record where M. has made statements that later proved to be inaccurate. At times, M. claimed that she was forced to sleep on the floor, deprived of food, forced to clean the bathroom with a toothbrush on her own, made to do all the laundry, and do all the dishes. The weight of the record is that these are false or exaggerated statements. While it is not uncommon or at all unusual for a child her age to exaggerate, it is still another element weighing against her credibility as a witness. In conclusion, while none of these points alone would support a conclusion that M. was not a reliable witness, taken as a whole, they cast significant doubt on M. statements that led OCS to conclude she was the victim of maltreatment by Ms. S..

C. OCS did not meet its burden of proof

1. Did OCS meet its burden to prove physical injury?

The standard to apply here is that set by AS 47.17.290(3) and AS 47.10.011(6), which collectively focus on the question of whether Ms. S. caused substantial physical injury to M. under circumstances indicating her health or welfare was harmed or threatened. OCS alleges several incidents rose to the level of causing substantial physical injury. OCS alleges that Ms. S. and Mr. D. forced M. to kneel with her arms in the air for extended periods of time, that Ms. S. and Mr. D. struck M. repeatedly with a belt, and that Ms. S. made threats of violence against M..

Taking these allegations individually, M.'s report that she had been struck with a belt on her bottom, 27 times, with the incident leaving no red mark or bruises where she was struck, is not credible. Next, while the allegation that it was Ms. S. who forced M. to kneel with her arms in the air for extended periods of time is disputed in the record, it is not necessary to determine the reliability of this account.

To constitute maltreatment, this form of punishment would have to cause or expose M. to the risk of substantial physical harm. In this case M. describes this punishment as occurring on

[158] Ex. 12.

the carpet.[159] When asked, immediately after describing the kneeling, if "*anything* that has ever happened" *ever* left marks or bruises, M. only mentions the incident with the belt. Definitions of substantial physical harm differ, and the interplay of these definitions is imperfect, but this allegation is not so nuanced as to turn on those imperfections. While recognizing the ambiguous nature of the word "substantial" as used in this statutory context, it does not support a standard where *any* type of discernible physical discomfort is sufficient for a substantiated finding of physical abuse by OCS. Even if this form of punishment had caused bruising or left a mark, it still would not constitute abuse.

Parents have a statutory right to use reasonable corporal punishment.[160] While it is clear parents do not have an unlimited right to utilize corporal discipline,[161] with extreme forms of punishment deemed impermissible,[162] kneeling on the carpet is a punishment with a long history of accepted use. There are not any reported Alaska cases holding that a parent's use of kneeling on the carpet as a punishment, by itself, sufficient to support a substantiated finding of physical harm.[163]

As to the allegation that Ms. S. threatened M. with potential future harm, it is not necessary to determine the reliability of this account. As discussed elsewhere, substantiation of abuse and neglect cases are not forward-looking, instead they are concerned with whether a particular action – in the moment that it occurred – caused physical harm or placed the child at substantial risk of substantial physical harm. A threat to do future harm, even if it occurred, is not sufficient as it would necessarily require future action to expose the child to substantial physical harm.[164] It could be relevant to mental injury in some circumstances, but it would never be physical abuse.

OCS's most serious allegation, however, is that Ms. S. shoved M. up against a wall and used her hand to prevent M. from being able to breathe. When evaluating the allegation that Ms. S. caused substantial physical injury to M., the evidence is most notable for what it does not

---

159 Ex. 12.

160 AS 47.05.065(1): "[P]arents have the following rights and responsibilities relating to the care and control of their child while the child is a minor: . . . (B) . . . the right to exercise reasonable corporal discipline."

161 *In re D.C.,* 596 P.2d 22, 23 (Alaska 1979) (upholding termination of parental rights for mother and father who repeatedly – and unapologetically – spanked their children in a manner that caused extensive bruising).

162 *Burke P. v. DHSS, Office of Children's Services*, 162 P.3d 1239, 1241 (Alaska 2007) (kicking, hitting, and burning a child with a butane candle lighter "went well beyond corporal discipline").

163 While M. explains she was made to kneel as a form of punishment, she does not describe what conduct let to this punishment. As there is no evidence in the record connecting this specific instance of kneeling that M. describes to specific conduct, it's not possible to determine the punishment was unreasonable.

164 While some types of assault are sufficient to constitute substantial physical harm, they all require actual injury or fear of imminent physical injury. Here, even if true, the threat lacked imminency.

show. First, while M. describes a serious situation that can be interpreted as a strangulation,[165] she does not report that it caused any marks, bruises, a raspy voice, vomiting, petechial hemorrhaging, or any of the physical evidence that experts tend to look for in strangulation cases. Physical contact of the type alleged by OCS, throwing M. against a wall and using a hand to cut off oxygen and blood flow, likely would have resulted in some type of marks or bruising. Despite M. being in school, regularly attending therapy, and having a very protective extended family, no one reported observing any physical indications that M. had been strangled.

As discussed above, M.'s account of the incident also lacks the detail that might lend it more credibility. With an event as violent as OCS alleges, one might expect the incident to be an impactful event in the moment or in her memory. Yet, the record is devoid of M. disclosing this incident to any of her teachers or counselors.

Certainly, an adult strangling a child would be extremely concerning behavior that would constitute substantial physical harm. It is hard to imagine a circumstance where strangulation could ever fall within reasonable parental discipline. Yet, the first person to whom M. allegedly reported this to, her Uncle K. A., did not think it was significantly concerning or reliable to contact the police or OCS. When asked on cross why he did not immediately report that M. had been strangled, he gave multiple reasons why he had doubts about the reliability of M.'s disclosure, and that he was "doing his homework" before reporting.[166] So even for Mr. A., there was a distinct lack of believability to M.'s initial report.

The concerns with the credibility and reliability of M.'s account must also be balanced against the direct denial that Ms. S. gave, which was unshaken on cross examination. For these reasons, and those discussed in detail above, OCS has not met its burden to prove Ms. S. caused M. substantial physical harm, or that her conduct created a substantial risk that M. would suffer substantial physical harm.

2. Did OCS meet its burden to prove mental injury

The standard to apply here is that set by AS 47.17.290(3) and AS 47.10.011(8), which collectively focus on, (1) the existence or substantial risk of that mental injury; and (2) Ms. S.'s responsibility for causing it. Mental injury in this context requires OCS to show a serious injury as evidenced by an observable and substantial impairment in the child's ability to function in a

[165] M., herself, never refers to this incident as a strangulation or a choking.

[166] "…maybe it could have been something she's just saying because she's afraid" and he "needed to see more" and was "doing his homework." Testimony of K. A..

developmentally appropriate manner and the existence of that impairment must be supported by the opinion of a qualified expert witness.[167] Here, OCS fails to meet either prong.

While Dr. G. never had access to notes from Dr. Rodriguez, she did admit that they might change her opinion. It's hard to imagine that an assessment by M.'s treating psychiatrist, which evaluated her as only having a minor impairment, would not have impacted Dr. G.'s opinion. Further, a GAF score in M.'s range has already been addressed by the Alaska Supreme Court.

In *Theresa L.* the child, Zane, received a GAF score of 80.[168] The Court held that, "[t]he same therapy notes with Zane's PTSD diagnosis also consistently show a score of 80 on the global assessment of functioning (GAF) scale. A GAF of 71 to 80 indicates that '[i]f symptoms are present, they are transient and expectable reactions to psycho-social stressors (e.g., difficulty concentrating after family argument); no more than slight impairment in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork).' 80 is the high end of the scale from 71 to 80, so even if Zane's PTSD diagnosis was linked to Theresa's conduct, the only evidence showing the diagnosis also indicates that Zane had only a slight impairment in functioning, not that he was suffering 'an observable and substantial impairment in [his] ability to function in a developmentally appropriate manner,' as the statute requires."[169] Just as in *Theresa L.* M.'s GAF score casts significant doubt on if M.'s mental health conditions, whether they were the result of Ms. S.'s conduct or others, are severe enough to substantially impair her ability to function in a developmentally appropriate manner.

Even if Dr. Rodriquez's GAF score did not call into question if M. had experienced a mental harm severe enough to meet the statutory definition of mental injury, OCS would still have to prove causation.[170] To make this determination, a previous decision of the Commissioner used the concepts of "proximate cause" and "superseding cause" as analytical tools to determine if OCS met its burden to prove a parent "caused" mental injury.[171] While these are not elements OCS is required to prove in and of themselves, they are helpful in determining whether Ms. S. caused or exposed M. to mental injury.

Proximate cause relates to the idea that some actions, even though they may be a contributing factor in the chain of causation, are too attenuated from the resulting harm to attach

---

167 *Theresa L. v. State, Dept. of Health and Social Serv*., 353 P.3d 831 (Alaska 2015).

168 *Theresa L. v. State, Dept. of Health and Social Serv*., 353 P.3d 831, 842 (Alaska 2015).

169 *Theresa L. v. State, Dept. of Health and Social Serv*., 353 P.3d 831, 842 (Alaska 2015)(internal citations omitted).

170 *CORA G. v. DEPT. OF HEALTH & SOCIAL SERVS., 461 P. 3d 1265, 1285 (Alaska 2020).*

171 *In re KS*, OAH No. 14-1681-SAN (Dep 't of Health & Soc. Serv 2015)(available at https://aws.state.ak.us/OAH/Decision/Display?rec=5958).

legal liability to the action. This concept is often discussed in terms of foreseeability.[172] When a superseding cause exists the original causative event may, in some circumstances, no longer be considered a cause.[173] Here, the record is painfully full of sources of trauma for M. unrelated to Ms. S..

M. was exposed to domestic violence, both by her mother as a small child and by her Uncle K. A.. There is little question that exposure to domestic violence is itself a cause of mental injury.[174] Additionally, M. was left in the care of unknown adults when she was under two years old, and there is some suggestion in the record she may have experienced sexual abuse during this time. Regardless of what occurred in those first two years, the result was that M. was effectively abandoned by her biological mother, a fact she was continually reminded of as, despite living in the same small community as her mother, she still had infrequent visitation with Ms. N.. While Mr. D. was more involved in M.'s young life, he also had a distant and limited relationship with M. during her time in State A. Once Mr. D. returned to City A, M. was disconnected from both of her biological parents. While her relationship with Ms. U. appears to have formed a strong bond, being removed from the only stable parental figure she had ever known, was almost certain to result in some trauma.

Dr. Rodriguez's diagnosis of RAD is M.'s most severe mental health diagnosis and is potentially severe enough to require inpatient treatment. It is also a diagnosis that has supported a finding of mental injury in other cases.[175] While we do not have expert testimony about the cause of this disorder in M., Dr. G.'s testimony is instructive. She explained RAD occurs "…due to a failure in a parent child relationship early in a child's life where the parent is not consistently responsive to the child." In M.'s case, as she was already eight by the time she moved back to City A, outside of early childhood, whatever contributed to this diagnosis

---

172 *Cf., e.g., Vincent by Staton v. Fairbanks Mem'l Hosp.,* 862 P.2d 847, 851-52 (Alaska 1993) ("Two distinct prongs are encompassed in the concept of legal cause in negligence: actual causation, and a more intangible legal policy element.").

173 Winschel v. E, 171 P.3d 142, 148 (Alaska 2007).

174 It has been well established in other decisions that exposure to domestic violence is a cause of mental injury. E.g., Martin N v. State, Dep 't of Health & Soc. Serv., 79 P.3d 50, 55 (2003) ("We have previously held that witnessing domestic violence is mentally harmful to children"). *A.H. v. State, Dep't of Health & Soc. Servs.,* 10 P.3d 1156, 1161-62 (Alaska 2000) ("[B]ecause witnessing domestic violence has a `devastating impact' on children, domestic violence need not be directed toward the child or signify a significant risk of physical harm to a child to support a CINA finding."); *Borchgrevink v. Borchgrevink,* 941 P.2d 132, 140 (Alaska 1997) ("It is well documented that witnessing domestic violence ... has a profound impact on children. There are significant reported psychological problems in children who witness domestic violence, especially during important developmental stages." (alteration in original) (quoting *Custody of Vaughn,* 422 Mass. 590, 664 N.E.2d 434, 439 (1996))).

175 *RALPH H. v. STATE, DEPT. OF HEALTH,* 246 P. 3d 916, 924 (Alaska 2011).

happened before Ms. S.'s time with M.. This is further supported by the fact that M.'s primary observable impairment, her NSSI, ceased once she began treatment with Dr. Rodriguez, well before she left Ms. S.'s care. Therefore, M.'s early childhood trauma, entirely unconnected to any of Ms. S.'s conduct, was the proximate cause of her most serious mental health diagnosis and her only observable impairment.

Tragically M. was subsequently subjected to a severe subsequent series of calamities. M. endured the trauma of her father's nearly fatal accident, his multiple surgeries, his extended recovery, and his continued disability. Being disconnected from your most stable parental figure and being faced with the real possibility your father may not even survive, let alone recover, would be traumatic for almost anyone, let alone a child. For M., the weight of the evidence indicates she was dramatically impacted. This potentially makes her father's accident a superseding cause. For these reasons, and those discussed above, OCS did not meet its burden to prove Ms. S.'s conduct caused M., "a serious injury… as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness."

While OCS's case focused almost entirely on actual mental injury, proving that Ms. S. placed M. at substantial risk of mental injury through a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting behavior would be sufficient to substantiate a finding of maltreatment.

The vast majority of Dr. G.'s testimony focused on actual mental injury and Ms. S.'s mental health. Dr. G.'s testimony as to risk of mental injury was vanishingly brief and difficult to parse out from her testimony addressing actual mental injury. Yet, Dr. G. still supported her opinion as to M.'s risk of mental injury with the incorrect assumption that M.'s NSSI behaviors went away after removal, instead of before removal. As discussed, thoroughly above, the record directly contradicts this assumption.

Dr. G. was also asked, hypothetically, would constantly being criticized, belittled, shamed, and punished unreasonably, place any ten- or eleven-year-old child, one without a mental health diagnosis, at risk for mentally injury. To this hypothetical, Dr. G. answered yes. Obviously, the opinion that a hypothetical ten or eleven-year-old child, without any mental health diagnosis, would be at risk for mental injury has little bearing on the question of if Ms. S.'s actions placed M. at substantial risk for mental injury. Further, the hypothetical illustrates a fatal flaw in OCS' case. Unlike actual mental injury, where any conduct that causes a mental injury can be sufficient to meet OCS' burden, risk of mental injury requires a specific pattern of

conduct. To that point, Dr. G. never characterizes Ms. S.'s conduct as a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting behavior. In other cases, behavior sufficient to meet this pattern of conduct involved extremely violent criminal behavior, over the course of decades.[176] Ms. S.'s conduct, while far from perfect parenting, was not a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting behavior.

For these reasons, and those discussed in detail above, OCS has also not met its burden to prove Ms. S. placed M. at substantial risk of mental injury.

IV. Conclusion

This decision does not conclude that Ms. S.'s parenting choices with M. were ideal or even advisable. Past decisions of the Commissioner are replete with examples of overreactions, poor judgement, and ineffective or excessive punishments. However, substantiations of abuse and neglect are not designed to determine if a parent made the best decisions in a given circumstance. Instead, to affirm OCS's substantiation OCS must prove that a particular action, or group of actions– in the moment that those actions occurred, constituted maltreatment. In this case, OCS has not met its burden to establish, by a preponderance of the evidence, that Ms. S.'s actions inflicted a mental injury on M. or exposed her to substantial risk of mental injury. OCS has also not met its burden to establish by a preponderance of the evidence, that Ms. S. physically abused M.. Therefore, OCS's placement of Ms. S. on the Child Protection Registry due to a substantiated finding of physical abuse and mental injury is reversed.

DATED: April 5, 2024.

SIGNED
Eric M. Salinger
Administrative Law Judge

[176] *See* WINSTON J. v. DEPT. OF HEALTH & SOC. SERVS., 134 P. 3d 343 (Alaska 2006); *See also* MARTIN N. v. STATE, DHSS, DIV. OF FAMILY, 79 P. 3d 50, (Alaska 2003)

Adoption

The undersigned, by delegation from the Commissioner of Family and Community 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 16th day of April, 2024.

By: SIGNED
Name: Chrissy Vogeley
Title: Senior Policy Advisor

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