



## **INVESTIGATIVE REPORT**

(Public per AS 24.55.200)

### FINDING OF RECORD AND CLOSURE

#### PUBLIC VERSION

Ombudsman Complaint A2003-0206  
September 22, 2005

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### **SUMMARY OF THE COMPLAINT**

*[Note: the names of the complainants and several other persons mentioned in this public report are represented by fictitious names to protect the complainants' privacy.]*

This complaint is against the Child Care Program, Division of Public Assistance, Department of Health and Social Services.<sup>1</sup>

The complainants, Joan West and Mary North (fictitious names), alleged that Child Care Program licensing workers harassed Ms. North on March 10, 2003, at their jointly owned and operated business, Mother Goose Day Care (MGDC), by inquiring into her medical history of

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<sup>1</sup> In May 2003 when the complaint was filed, the Child Care Program was located in the Division of Early Development, Department of Education and Early Development.

panic attacks in an improper manner. The complainants also alleged that a Child Care Program licensing worker improperly searched through personal papers at MGDC and read a confidential note from Ms. North's medical provider.

Ms. West and Ms. North also said it was unreasonable for the Child Care Program not to disclose to the public how it handled complaints about a licensing worker, and it was unreasonable for the agency not to disclose the names of persons who file complaints against licensed child care centers.

## ALLEGATIONS

The complainants' allegations, restated to conform with statutory guidelines for investigations by the ombudsman (AS 24.55.150), are as follows:

***Allegation 1: A Child Care Program investigation into the medical fitness of a facility administrator was conducted in an unreasonable manner.***

***Allegation 2: A Child Care Program licensing worker unreasonably read without permission a note from the complainant's medical provider discussing the complainant's medical history.***

***Allegation 3: The Child Care Program unreasonably fails to disclose the details of complaints against agency personnel.***

***Allegation 4: The Child Care Program unreasonably fails to disclose the identity of those who complain to the agency about a licensed child care facility.***

Assistant Ombudsman Tom Webster investigated this complaint. Mr. Webster issued formal notice of investigation to Division of Public Assistance Director Tony Lombardo on November 17, 2003. Mr. Webster reviewed several pages of documents submitted by Ms. West and obtained a copy of the complete Child Care Licensing Program file for MGDC. In addition, he researched legal standards and interviewed Ms. North and licensing program staff.

## INVESTIGATION

### The complaint

On May 30, 2003, the Office of the Ombudsman received Ms. West's complaint on behalf of both her and Ms. North against the Child Care Program, then located in the Department of Education and Early Development (DEED), Division of Early Development (DED). (In July 2003 the program was moved to the Division of Public Assistance, Department of Health and Social Services.) Co-owner Joan West, who handled the bookkeeping for MGDC, had been living in another state for several months when she filed this complaint. Co-owner Mary North lived in Alaska and served as the facility administrator.

Ms. West and Ms. North complained that division licensing staff harassed Ms. North on March 10, 2003, at the complainants' jointly owned/operated business, Mother Goose Day Care (MGDC), by inappropriately inquiring into Ms. North's history of panic attacks.

### Joan West

On the ombudsman complaint form Ms. West alleged that Child Care Program licensing worker Emily Forester (fictitious name) improperly searched through personal papers at MGDC and found a confidential "memo" from Ms. North's doctor. Ms. West wrote:

Emily Forester on a routine complaint follow-up visit went through Mary North's personal information on a filing desk area at our daycare center, found a memo from Ms. North's doctor and read information that was personal medical information. On a conference call, Ms. Forester let all involved in meeting know she had read this personal information (human rights violation) and to what its content was. Emily Forester & Jane [Urbanovsky] (supervisor for DEED Licensing . . .) harassed Ms. North about medical issues as noted in attached document in front of a minimum of 3 incoming parents, two employees. Ms. Forester went on in a conference call/meeting to let all know that if she were in Ms. North's position as administrator of a child care center, she would be so overwhelmed by being a parent of two children, going to school, & being an administrator that she would want to "Quit," and be overwhelmed & stressed!

In a paper submitted to a college class on child development, Ms. West, who was not present at the site visit, described this incident in more detail based on what Ms. North had told her. She attached this paper to her complaint:

Both officials interrogated our Administrator [Ms. North] for nearly five minutes regarding specific medical information. They requested medical definitions of what she suffered, and how this medical condition affected her body, the severity of her panic attacks, & the description of effects on her body when she was having these attacks. During this conversation, all this information was being requested in front of several different employees. The investigator harassed the administrator so fiercely, the Administrator asked both investigators if they were going to "turn her into DFYS," telling them she was unsafe due to her medical condition to care for her own children. . . .

The medical interview continued for about five minutes. They told the Administrator they could ask for a doctor's note. The Administrator told the investigators that her medical condition did not enable her to care [i.e., prevent her from caring] for children. She stated, "I have them with my own kids, I don't fear for my kids safety when I have the panic attacks." They again stated they were concerned about her panic attacks. "If ever I can't control it, I have medication to control it," she told them. "I felt like they were totally harassing me about my medical condition. I explained to them that everyone has panic attacks at all times, it is something that everybody has, not just me." She explained that it was the difference in control that was different. "I felt they were singling me out due to my medical condition. It seems like they had a preset agenda, too. They had questions written down on a yellow pad about my medical issues. They wanted me to give them an example of how I would react during a panic attack. They gave me a scenario for a situation where I was the only employee in the entire childcare center that employees up to five different people at a time, how I would feel, how I would act, and how I would handle it." When asked if her medical condition, "has a physical, health, mental health or behavioral problem to an extent [sic] that the problem poses a significant risk to the health, safety, or well-being of children in care," she stated no, that it doesn't pose a significant risk to the health, safety or well being of the children, nor her own children. "I feel they were trying to push me enough or upset me enough to try to cause me to have a panic attack in front of them." It was clear to me at this point that licensing overstepped its bounds. There [sic] responsibility was to if needed require a doctor's note stating that a person suffers no medical ailment [sic] that affects a person to work safely with children. Instead, they took it upon themselves to be the doctor, and to make their own medical analysis through a very painful, humiliating process, which was not done in a professional manner away from employees and parents views.

In a May 13, 2003 letter to regional licensing program supervisor Linda Raye (fictitious name), Ms. West wrote out a "formal complaint" based on this incident:

I would like to make a formal complaint of conduct regarding the incident of Mary North's medical interrogation. I did use this circumstance as a final project for my [college class]. After presentation of my paper, I am even more convinced that this was a direct invasion of privacy and that licensing staff is/was not medically or psychologically trained to make the determination of medical condition of an administrator for a licensed facility. I am also convinced that licensing personnel had no right to read Mary's personal medical information that was on the counter without asking permission first. This item was not a public document, it was private.

Many people throughout Alaska commented on this situation. Many of them have made verbal complaints regarding professional misinterpretations of Ms. Forester. The general consensus of the students and the instructor of this course is that DEED went to the extreme excess of safeguarding of children.

. . . I would like to see regulations re-written which will not allow this ever happen to any other licensed childcare administrator, employee or owner.

I would like to request the following during this process:

All interviews are done by appointment. This is not to say that licensing is still not able to come in to our facility at any time for observation.

All interviews are tape-recorded.

. . . I would like to reiterate that the reason for this complaint is that licensing representatives acted as a medical doctor in trying to determine whether an administrator had a medical issue that posed a risk to children. Licensing personnel should have only asked that a doctor provide a letter stating that this person had, "no medical condition that would affect her ability to safely care for children."

In a May 30, 2003 letter to Governor Murkowski, Ms. West alleged that actions by Child Care Program licensing worker Emily Forester showed that "'boundaries are overstepped' by power thirsty licensors":

In the example I have sent of this particular license regulator, she has already had several complaints against her regarding conduct to this sort but as Linda Raye, supervisor, states, all information regarding complaints, number of complaints made, follow up, and disciplinary action is confidential, and we as the licensee's are not allowed to know what the state is doing about continued complaints made."

Ms. West further alleged that Ms. Raye "participated in this harassment," and said it was unfair of the Child Care Program not to disclose to the public the names of persons who file complaints against licensed child care centers. She also said regulations for the child care licensing program should be changed.

#### Mary North

In October 2003 Ms. North told the ombudsman investigator that Ms. West had sold MGDC, and the new owner had taken over operation of the facility at the end of September 2003. Ms. North said that although Ms. West filled out the Ombudsman complaint form, she had been living out of state during Ms. North's tenure as administrator of MGDC and her information was mostly second-hand from Ms. North and her boyfriend, Tim Souther (fictitious name), who also worked at MGDC.

Ms. North said that her complaint focused mainly on the site inspection on March 10, 2003, when licensing staff visited the facility and questioned her about her panic attacks and whether they would prevent her from taking care of children.

Ms. North's own children were among the children being cared for at the facility. She said the intense questioning about her history of panic attacks by the state licensing workers was extremely stressful and unfair.

They were just harassing me, because Tim noticed it right away as soon as he walked in the door. He was like, "Hey, you guys, what's going on?" I was totally backed up against a wall and had all these people standing around me talking to me, asking me the same questions over and over. I kept repeating myself.

Ms. North said she understood the licensing workers to be suggesting they thought her history of panic attacks might render her incapable of caring for children, even her own children. She said that's why she called out to them as they were leaving, "Are you going to turn me in to DFYS?"

Ms. North said the discussion as licensing staff were about to leave the facility became heated. She said, "At one point, Tim had to tell Jane [Urbanovsky] to quit yelling." Ms. North said this occurred near the front door but she could not recall whether everyone was still inside or outside. Ms. North said she did not think licensing staff were very sensitive about how they raised their concerns regarding her history of panic attacks. She also said she felt unfairly singled out about this: "Joan told them she has panic attacks, too, and they've never asked her for a doctor's note. They've never asked her any further about it. If they were that concerned, you'd think they would ask Joan, too."

Ms. North said her panic attack during a December 4, 2002 inspection was not due to provocation by licensing staff: "That was just the excitement. I don't think they were provoking it. All these people coming—oh my God, it's Licensing, they have the power to shut me down. And that didn't last long. They were like, we're ok, we're nice people, you know. That helped a lot."

However, Ms. North said she thought licensing staff's later concerns about her panic attack in December were exaggerated.

I handled it fine. You know, it's just a panic attack. If you were to see a big accident right in front of you and you had to slam on your brakes, you'd have a panic attack. At one point I couldn't control them, but I can now, and I haven't been on medication for six months now [in October 2003]. I've learned to control them. I've learned that it's okay, it's a panic attack, you're not dying, you're not having a heart attack.

Ms. North said she understood and accepted that it was reasonable for the licensing workers to inquire about her history of panic attacks, but she still believed they blew the issue out of proportion, perhaps even intentionally to see if they could provoke her into having a panic attack in front of them: "I don't blame them for asking at all. You've got children here. I would totally be concerned. But once the question's answered, you'd think it would just get dropped. I just believe that they were trying to make me have a panic attack to see what it's like." Ms. North pointed out that even though she felt harassed and anxious during the March 10 site inspection, she did not have a panic attack.

Ms. North said despite the difficulty she had had dealing with licensing staff, she still respected them. She said Ms. Raye had "always been pretty reasonable and pretty nice." She said she regretted most her "run-ins" with Ms. Forester. "Emily's good when it comes to her job. I give her that. She is very on top of things." However, Ms. North said, "I feel like Emily's very

opinionated when it comes to her job. She lets her opinions get in the way of what's really right or wrong."

Ms. North said if she were giving advice to licensing staff about how to handle a similar situation in the future, she would suggest a less aggressive approach:

Not to corner somebody, when asking them questions like that, don't make them feel attacked, make them feel like their answer is good enough. And don't keep repeating yourself. If you don't understand their answer, maybe just say so. It's almost like they were tricking me. They were asking me the same questions in a different way, and it was almost like they were tricking me to say something else. If they don't understand the question, just say so. Or ask them if they could go into more detail.

Don't bring a whole bunch of people into it when you asking somebody personal stuff. Do that yourself. Maybe call them and say this is what my concern is. Is there some time, somewhere we could meet, or can you come to my office? Give them some sort of warning. Doing it on the phone would be good. Maybe limit the number of people involved so it doesn't become a big group activity, or meet somewhere else that isn't in the place of business.

Ms. North said she did not think there were any parents present at the facility at the time of the December 4 incident, but there were one or two other employees working. She said the other employees "wouldn't have been able to see me. None of them were standing right there. They could probably hear a lot of what was going on if they tried." She said her boyfriend, Mr. Souther, witnessed the last part of the incident.

Ms. North said she understood the licensing workers could visit the facility at any time. She recalled that they spent some time on March 10 inspecting the facility, but her overall impression of that site visit was the intensity with which licensing staff questioned her about her history of panic attacks rather than the condition of the facility:

They can drop in anytime. That's in the law. That's not an issue. It's just they didn't act like they were there for anything else. They acted like they were there just for my panic attack. They probably did look at those other things. I'm sure they did, I just don't remember. All I can remember is being up against the wall explaining myself over and over again.

Ms. North said she thought it was Linda Raye who found the note from Ms. North's medical provider during a follow-up site inspection on March 12, 2003, two days after the discussion of her panic attacks. "I had the doctor's note on the counter; that's where I keep all my papers. We didn't have a file cabinet or a desk or anything. That's where I've always kept all my papers." Ms. North said the note was out in the open where a person could see it, though she did not expect that anyone would do so. "They walked up and they read it and went through it. I don't remember, they must have asked for a copy of it because they saw it there. You don't expect someone just to go up and start reading your papers."

Ms. North said she asked her medical provider for the note after licensing staff told her they could ask for one. "I thought it would be a good idea to get one." She said she had not offered the note to them yet, but said, "I was more or less waiting for them to ask for it. I just thought I'd have it in case they did. I felt, the way they were treating me, I wasn't going to give them anything if I didn't have to. I know that's stubborn. We've had so many run-ins with them."

Ms. North said some of the complaints against MGDC resulted from problems with facility employees. "I had a couple of pissed-off employees, and so they in turn would go straight to licensing to complain," she said.

Ms. North said when the licensing workers found the doctor's note she gave it to them to be placed in her licensing file. She said this seemed to satisfy the agency and the issue was not raised again except when she and Ms. West expressed their concerns about the March 2003 site inspections later with agency staff.

### **Agency Records**

A Child Care Center Compliance Evaluation form dated November 4, 2002 and "12/11/02 (revised date)" shows that Ms. Forester discussed licensing requirements with Ms. North. The Assessment and Summary Recommendation (p. 17) reads,

New administrator, Mary North, is learning about licensing requirements. Discussed regulations and requirements during application period and compliance evaluation discussion. Recommend initial provisional first-year license be issued.

The Compliance Evaluation Form also indicates that Ms. Forester discussed ("D") the requirement of 4 AAC 62.210(b)(2) that licensed child care facility staff not have a "physical, health, mental health, or behavioral problem to an extent that the problem poses a significant risk to the health, safety, or well-being of children in care." The section "Instructions for Compliance Evaluation" on page 2 includes a list of "Coding Responses"; "D" means "Discussed – Applicant is informed and agrees to cooperate."

Ms. Forester's Report of Contact (ROC) notes for the December 4, 2002 site visit discussed a variety of topics, including the reason for the visit—to follow-up on a parent's complaint against an employee of MGDC and to inquire how the facility dealt with an apparent case of "pink eye"—and described Ms. North's panic attack:

During our time talking with Mary, she began to be very anxious, and while she was printing out faxes and making copies, she explained she was having a panic attack. She said it had been over a year since it happened, and asked that we just take a break from discussing the complaint until Tim returned with her medication. Her other physical manifestations were that her fist was knocking on the countertop and she was tapping her foot.

Ms. Forester's February 26, 2003 ROC notes for MGDC state that "Mary dropped off some paperwork for her new employees. She briefly mentioned something about being downtown for something related to panic attack medication."

On March 6, 2003, a parent who visited MGDC three weeks before complained to licensing staff about health and staffing issues at the facility. On March 7 Ms. Forester recorded in a ROC note, "Linda [Raye] and I discussed the complaint, and the need to ask questions of our concern about panic attacks."

The following week Jane Urbanovsky met with Child Care Licensing Program staff. On Monday, March 10 she accompanied licensing worker Emily Forester on a site inspection of MGDC. Ms. Forester's ROC notes describe the March 10 site inspection:

Jane [Urbanovsky] and I arrived at the entrance of the facility. Mary and Tim Souther drove into the driveway at the same time. Mary stated, "I don't know what it will look like, I've been gone." There was a cigarette butt burning on a chair seat on the front porch. Multiple handprint marks were on the outside windows of the solarium.

Carpet contained multiple large stains and Jane observed a smear on the wall in the preschool room.

Bleach-water for cleaning the diaper mat was not available in the infant room. (I was in the infant room while Jane was in the toddler room for a few minutes.) I did not observe any vomit on the floor (see Complaint Intake form.)

In the toddler room, a child's face was dirty and mucus was draining from their nose onto their face, and another child had a cut on his face, and had received observably poor first aid. Another child had crusted eyes, and her parents had not been called yet to pick her up; they were called once we asked. (We later learned that it was very likely that the child had pink eye, because the facility had a child leave recently with pink eye.) When we asked, we were told the toys that children mouthed were washed weekly, not in between users. The wood floors had spots of dried liquid, and Jane observed a sticky substance on the floor. All carpets in the facility were dirty, and needed vacuuming. While I was in the next room, Jane observed a young boy be teased "You look like a girl" by an adult male caregiver for wearing "girl's clothes" while playing dress-up. Walls of the toddler room were marked with marker streaks, dirty and unsanitary. One bottle, three "sippy" cups, and two pacifiers were in the toddler room on low shelves, the floor, etc. (all within reach of children). Also within reach were cigarettes. A caregiver needed prompting by licensors to wash their hands after they had been contaminated. A large stuffed animal appeared dirty, and its stuffing was coming out (choking hazard). The monitor heater in the room was malfunctioning (they said) and very hot to the touch (scald hazard for young skin), yet still accessible to children.

Jane and I then spoke with Mary in the kitchen/fax area, moving toward the front door (all children and caregivers were in the infant and toddler rooms). We discussed that our office was told in September 2002 that she had panic attacks, but that she hadn't had one in a few years because they were controlled by medication. However, when Linda, [a trainee], and I were at the facility for an investigation on December 4, 2002, Mary had a panic attack in our presence (see previous notes). Then, she mentioned picking up panic medication when she dropped off papers to our office in February (it was 2/26/03). Jane led the discussion while we asked questions about Mary's ability to safeguard children during the panic attack like "Could you attend to the needs of a child in the middle of a panic attack?" and "Could you perform first aid or evacuate a child during a panic attack?" to determine if we needed to request an evaluation of her condition from a medical provider. Mary said she would have another caregiver help them or she could help children if she needed to, and asked if we would like a note from her doctor. However, Tim joined the discussion and told her she didn't need to get us a note before we officially requested one. Mary repeatedly said she didn't have a problem offering to get us a note.

While we chatted, the one of the couples' children (who was coughing) was allowed to play outside by herself (inequitable treatment), without a coat. (Tim was watching her, while calling the other co-owner, Joan.)<sup>2</sup>

As we were leaving the facility, Jane noticed a cat scattering plant soil from the ficus tree onto the floor in the Preschool room solarium, We both looked further, and saw old, dried feces in the pot. Jane asked if Mary realized the cat had been using the plant soil as a litter box (were concerned that the preschool-aged children eat in that room). Mary said "no" and her affect was fairly flat and dismissive.

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<sup>2</sup> I.e., Joan West, who resided in another state at the time.



Finally, as we were walking out the gate, Mary called out to us and asked us if we were going to turn her in to DFYS. Jane said no, that we were just asking questions regarding how she manages her facility during a panic attack, not questioning how she parents her children.

On March 11, 2003, Ms. West, Ms. North, Mr. Souther, and three agency staff—Ms. Urbanovsky, Ms. Raye, and Ms. Forester—participated in a teleconference to discuss the inspection and findings of the previous day. Ms. Forester summarized the meeting in her ROC notes:

Joan stated that they had closed the facility for cleaning, and removed the fichus tree. We commended them for closing the facility to address the health and safety issues. We discussed Mary's qualifications as an administrator, and the fact that nothing that we saw at the facility seemed to concern her, because she took no direct action to fix problems that were observed and discussed. Mary said that if the staff doesn't do something, she takes care of the task herself. She also said Tim makes her staff listen to her, and that she is constantly getting training and improving her leadership skills. She said it's overwhelming at times, but she can do it. (I empathized with her, that it would be a big job.) Joan stated that she didn't like talking about Mary's qualifications, and reminded us that the facility has a variance for Mary to be the administrator while she receives the rest of her training.

They invited us to come back and verify the tree and other hazards had been removed, and the facility had been cleaned before making any determinations about possible license action.

Ms. Forester's ROC notes record staff discussion following the teleconference:

Jane, Linda, and I agreed that we could take license action based solely upon the health and safety concerns observed on Monday. However, we decided to give them another chance, and make determinations after re-inspecting the next day.

Ms. Forester's ROC notes for the March 12, 2003 site inspection stated that several violations noted in a previous inspection had been remedied, but she detailed several new violations. The ROC notes also state that Ms. North provided a medical provider's note concerning her panic attacks:

Linda and I went by the facility to check on items that had been corrected.

The walls were noticeably cleaner, carpet had been vacuumed, and the windows had been cleaned. Some non-compliance areas were noted. In the toddler room, a Windex bottle was on a low shelf, a bleach-water bottle was accessible on the sign-in counter, the mirror on the exer-saucer was smeared and dirty, and the stuffed shark was still dirty and had a rip that allowed the stuffing to be removed. Water (or some other clear liquid) was on the toddler bathroom floor near the toilet, and a pacifier was in the bathroom window, unlabeled. In the infant room, a caregiver was spraying cleaning chemicals near children in care, and an outlet needed to be covered. The infant caregiver was also observed telling a child that they could not come back to the facility if they continued to pull another child's hair. In the solarium, there was an uncovered outlet. When we told Mary, she found and inserted covers into both outlets that needed them. We noted that the fichus tree had been moved, and Mary stated there was a kitty litter box in the apartment-side of the facility.

The facility was cold, and Mary stated that they turned off the monitor heater instead of allowing it to be a burn hazard. I suggested various ways they could rearrange furniture to section the heater away, so that it could still be used, but not accessible to children. Mary was resistant to each. They decided instead to use the house's central heating system.

Mary explained that last semester, she took four classes at one credit each, and was enrolled in 6 credits this current semester. Mary also had a note dated 3/11/03 signed by her doctor, which she offered to give to us. I thanked her for going ahead and obtaining it for us. I also asked about the facility's orientation of caregivers, and Mary did not have orientation paperwork on file for [three employees]. Further, the facility did not have current emergency record information on many children. We reminded them that updates are required quarterly or more often if things change.

During the visit, both Linda and I noticed that the administrator's child was allowed to roam throughout the facility, though other children were not.

Ms. Raye also wrote ROC notes for the March 12 site inspection but did not mention the physician's note. This note, dated March 11, 2003, was hand-written on a small prescription form (approximately 4.25 in. by 5.5 in.) with a printed logo for a medical clinic and was signed by an advanced nurse practitioner. The note read, "Mary has a history of panic attacks. They are well controlled on medications and should not preclude her ability to care for children in daycare."

On March 17, 2003, Ms. Forester and Ms. Raye signed a letter of warning "in response to non-compliance issues" at MGDC but did not send it per instructions from Ms. Urbanovsky. On March 20 Ms. Forester sent MGDC an informal warning letter and a plan of correction listing violations noted on March 10 and 12.

On April 16, 2003, there was a second teleconference to discuss the March 10 site inspection and questioning of Ms. North regarding her history of panic attacks. Participants included Joan West, Jane Urbanovsky, Linda Raye, and Emily Forester. Ms. Forester wrote in her ROC notes,

Joan, Jane, Linda, and I had a teleconference about the questions we had asked of Mary during the 3/10/03 investigation visit. Joan was concerned that we were asking medical history questions of Mary, and trying to make a medical determination.

Jane explained, "We can ask whatever we need to make a determination. We were within our own boundaries to ask the questions. Of course we didn't ask about her home, but only work and how her condition effects her work." Joan stated she was concerned with Mary's feelings during our conversation, and Jane stated Mary was agreeable, and even offered to get a doctor's note for us.

\* \* \*

On May 27, 2003, Ms. Forester and Ms. Urbanovsky exchanged e-mail messages regarding Ms. North's panic disorder in response to Ms. West's continued contacts about the matter. Responding to Ms. Urbanovsky's request for a detailed chronology, Ms. Forester wrote,

Here is the timeline of when we were aware of Mary's panic disorder:

9/5/02-ish - Joan mentioned that the administrator she chose to take over the facility took panic medication, but the disorder was controlled with medication like hers (Joan's) was

9/13/02 - Discussed 4AAC 62.210(b)(2) during Compliance Evaluation discussion, and Mary mentioned her medication-controlled panic disorder, that she hadn't had one in a couple of years

12/4/02 - Mary had a panic attack during the investigation of her staff member's conflict<sup>3</sup>

2/26/03 - Mary mentioned picking up panic attack medication briefly when dropping off some paperwork

3/10/03 - our investigation at the facility including discussion of panic disorder and how it affects work

Ms. Urbanovsky replied the same day, requesting more specific information. Ms. Forester provided more detailed information in two further messages. The first of these expanded on the timeline:

Licensed 11/4/03

11/27/02 - complaint #1 (investigated on site 12/4/02, finalized with Plan of Correction 12/9/02)

2/13/03 - Due Notice letter regarding continual non-compliance of first aid kit from initial licensure

3/6/03 - complaint #2 (investigated on-site 3/10/03 and 3/12/03, finalized with Warning letter 3/17/03)

4/2/03 and 4/11/03 - complaint #3 (investigated 4/11, 4/17, & 4/18/03) ready to be finalized when approval given.

Ms. Forester's third message on May 27, 2003, gave a more detailed description of Ms. North's December 4, 2002 panic attack:

I was told it was controlled with medication before that point and didn't delve further based on the information they gave.

On 12/4/02 when she had the attack, Linda, [a licensing trainee], and I were there to witness it. Tim Souther, her partner, also witnessed it.

When it happened, she told us she was having a panic attack while she was near the fax machine making copies of documents for us. She stayed at a distance and asked that we take a break for a few minutes until she sent Tim (after a brief argument) to drive off-site to get her medication. She turned pink, was teary eyed, her hands were shaking, and she tapped her foot incessantly and repeated that she was having a panic attack. Her lip/facial muscles were quivering and she covered her mouth, and she mentioned (again) that she was having a panic attack and was just very nervous and anxious. After she regained herself and we were discussing the incident a little more, she mentioned that the medication wasn't with her because she hadn't had a panic attack in a while - a year or

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<sup>3</sup> This refers to an incident that occurred on November 27, 2002, in which an employee and her cousin, a parent who brought her child to the facility, had a heated argument at the facility during which an object was thrown, which led the parent to complain to the Child Care Program. The investigative site visit took place the following week.

two. (Which is why it was interesting that she mentioned getting more medication to me when delivering paperwork in February.)

On the same day, Ms. Raye, who also witnessed the December 4 incident, commented on Ms. Forester's description in an e-mail message to Ms. Forester and Ms. Urbanovsky:

I think you covered it pretty well, Emily. I would agree with your description of her actions and movements.

At the time of the attack Mary appeared to be highly stressed out and unable to continue what she was working on, or continuing our conversation. Part of not continuing the conversation was her request that we take a break until she got her meds and us agreeing to do so. She did verbalize to us that she was having a panic attack and it was also obviously apparent from her physical reaction – tapping hands and feet, tears, flushed face, covering her mouth and possibly some lip biting, unable to finish what she was doing, etc.

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In an August 7, 2003 memorandum to the ombudsman, Emily Forester provided the following overview:

#### Timeline of Information regarding Mary's Medical History

Pre-9/13/03 (possibly 9/5/03) – Mary's history of panic attacks mentioned in passing. I was told that the attacks were controlled with medication, and they have not occurred for a couple of years.

9/13/02 – Discussed 4 AAC 62.210(b)(2) (Qualifications of a caregiver) at the licensing site visit with Mary.

12/4/02 – Mary had a panic attack during the investigation. See ROC [Report of Contact] for more details. She asked Tim Souther to go get her medication from home, and asked that we cease talking about the facility until she could get her medication.

2/26/03 – Mary stopped by our office and mentioned picking up medication for her panic attacks.

3/10/03 – Jane [Urbanovsky] and I discussed with Mary her ability to work with children during panic attacks at site visit. The questions we asked related to her practical ability to give care during attacks. No questions related to diagnosing were asked.

Note: The original information we had been given in September [2002] was that the attacks were entirely controlled with medication. However, since she exhibited one in December (albeit a stressful situation), and then also mentioned picking up medication (it wasn't said if the medication was for prevention or action once one had started), the original premise of the attacks not occurring (and therefore not relating to her job) had changed.

On October 21, 2003, Ms. Raye wrote to Mr. Webster, "[Emily] stated that the discussion regarding panic attacks occurred during a site visit [during the licensing process in September 2002] and was simply noted on the compliance evaluation as in compliance with no further notes. There is no phone log information regarding this, of course, since the discussion was in

person. We did not have any concern regarding the panic attacks until one was observed during the complaint investigation [on December 4, 2002].”

The licensing file for MGDC contains records of several complaints about the facility from parents, prospective customers, and employees related to a wide range of topics, including the condition of the facility, staff-to-children ratios, staff qualifications, alleged employment discrimination, policy on field trip permissions, and a confirmed incident of transporting more adults and children in a van than there were seatbelts. Ms. West sold the facility in September 2003, and the new owners took it over on September 29.

The licensing file is open for inspection by the public. The agency requires advance notice so it can redact information made confidential by law. 4 AAC 62.065. For example, the identity of children mentioned in complaints and reports is blacked out in copies of these records. The identity of persons who filed complaints about the facility became public information once investigation of each complaint was completed, in accordance with 4 AAC 62.065(a)(1)(B).

### **Agency Staff Interviews**

#### Linda Raye

Linda Raye is a regional licensing supervisor for the Child Care Program. Ms. Raye said she and licensing worker Emily Forester, whom she supervises, conducted the December 4, 2002 site inspection when Ms. North experienced a panic attack and both of them also participated in the March 10, 2003 site inspection. She said Mr. Souther, Ms. North’s domestic partner, was also there. Ms. Raye said when a health issue with a childcare facility worker or administrator comes to the agency’s attention, “we need to determine if there is a need for a medical clearance for this condition from a medical provider.” She said the March 10 discussion took place “in the context of a large complaint investigation. The facility was in poor shape at the time.”

It had been licensed effective November 1, 2002, and four complaints against the facility were filed in the following four months. Ms. Raye said that is “a high number of complaints,” and although another facility in the region had a similar number of complaints, in both cases it was “a higher incidence than normal.” She said licensing staff are required to investigate complaints and write a report with a plan of correction. There is a follow-up inspection to check whether the corrections have been made. If not, the agency issues a warning letter. Ms. Raye said the licensing worker drafted a warning letter, but Ms. Raye instructed her not to send it because the fourth complaint against MGDC was verbal, not written.

Ms. Raye said Ms. North disclosed her history of panic attacks to Ms. Forester in September 2002 but said she had not had one in a long time and controlled it with medication. When Ms. Raye and Ms. Forester were conducting a site inspection after the first complaint in December 2002, she said, the second month the facility’s license was in effect, Ms. North grew agitated while making copies at a fax machine and told them she was experiencing a panic attack and asked them to stop their interview. Ms. North did not have her medication with her, but asked Mr. Souther to go retrieve it from their home.

This incident did not result in any licensing action regarding Ms. North’s health, Ms. Raye said, but then Ms. North mentioned during a visit to the agency office the following February that she had to come downtown to pick up some panic attack medication. Ms. Raye said this led licensing staff to conclude that there might have been a change in Ms. North’s health—because she had told them the previous September she had not experienced an attack in more than a year—and that this might be a medical issue that warranted further inquiry to be sure that children under Ms. North’s care at the state-licensed facility would not be at risk if Ms. North experienced an attack in an emergency situation.

Ms. Raye said when agency staff conducted a site inspection on March 10, 2003, the facility was “filthy” and had several health and safety issues to correct.

She said that following the incident that day with Ms. North and Ms. West’s complaint about Ms. Forester, Ms. Raye discussed the complaint with Ms. Forester. She said despite Ms. West’s allegation that there had been several complaints about Ms. Forester, only Ms. West had ever complained to Ms. Raye about her. “If they have issues, someone needs to call me. No one else has called me about Emily except Joan. She said others had complaints, but I don’t know about them if no one calls.” Ms. Raye said state law prohibits her from disclosing to the public what if any personnel action she has taken regarding an agency staff member.

Ms. Raye said that during the inspection of March 12, 2003, she saw a note face-up on the counter top on prescription stationery headed with the printed logo of a medical clinic and asked Ms. North if she had obtained this note for them, as she had told the licensing workers two days previously she would be willing to do. Ms. North said it was, and Ms. Raye took the note, dated March 11, and added it to the licensing file for MGDC. After that, she said, Ms. North’s panic attacks were no longer an issue for licensing program staff.

Ms. Raye said the agency received more complaints about MGDC after March 2003 while Ms. North was the administrator, including a complaint that she transported children in her van without an adequate number of seatbelts for the number of children in the van. She said that Ms. West sold MGDC sold to another owner and the facility was re-licensed effective September 29, 2003.

#### Jane Urbanovsky

Jane Urbanovsky is field services manager for the Child Care Program. She told the ombudsman investigator she was unaware that her staff had concerns about Ms. North’s history of panic attacks until late February 2003, nearly three months after licensing staff had witnessed Ms. North experiencing an attack during a site visit on December 4, 2002. Ms. Urbanovsky defended her agency’s inquiry into the matter.

I thought the panic attacks merited further discussion only because she was the administrator of the facility. And my concern was her ability to be able to manage the panic attacks and care for children. Usually the care of children excites a certain amount of anxiety.

Ms. Urbanovsky said the time lag between December panic attack during a site inspection and the March 10 questioning of Ms. North about her panic attacks was due to the uncertainty of licensing workers over whether this was a legitimate area of inquiry. “The specialists perhaps didn’t think they had the authority to look into something like that,” she said, but because the health of a facility administrator might impact the safety of children, “It should have happened quicker.”

Ms. Urbanovsky said the fact that one of the owners of MGDC lived in another state had contributed to some miscommunication between the owners and Child Care Program staff. She attributed much of the friction between her agency and MGDC to Ms. West.

It’s always been a concern of mine that we’ve had an administrator in another state who incites these incidents between our licensing specialists and Mary [North]. The two days I was there and met with Mary and her significant other and with our staff, we had easy communication, the expectations were clear. There was a lot of collaborating on what needed to be done, what we could do to assist and help. And the next day we were slammed because we didn’t include Joan. The issue was not an issue until she shared it

with Joan, and Joan said we have no right to do that. I'm sure regulations were cited in terms of safety of children, ability to care for children. That was the first time I had run into a care administrator who had an anxiety disorder. Because if I was a physician I'd say, "You're in the wrong business."

Asked about Ms. North's statement that the exchange was heated rather than easy, Ms. Urbanovsky responded, "She has an anxiety disorder, which I would say probably accelerates when you're under any kind of stress like that." Ms. Urbanovsky said she did not have adequate background in psychological disorders to assess the effect Ms. North's disability might have on her capacity to administer a child care facility, nor had she or other licensing staff researched the topic of panic attacks to gain some perspective on the issue.

That's why we asked her to get a note from the doctor. We're not the experts. My question was, is she capable of maintaining child care if she should have an attack? And that we should have something in writing from her physician.

I think it would be prudent judgment, common sense, if she exhibited the attack during one of our visits, given what we know about interaction with young children. We could have asked her to get an evaluation. We wanted to ensure that the doctor felt that she would be able to provide safe care and had her attacks maintained through medication.

Ms. Urbanovsky said one of the recurrent licensing issues with MGDC was the shortage of adult supervision due to the ratio of children to care givers in that facility. One concern she had was, if Ms. North happened to be at the facility alone with the children, "what would happen if she had an attack and couldn't get to her medication, and there were infants and children? I think that's a solid concern."

Ms. Urbanovsky said that Ms. Forester had described Ms. North's December panic attack as resulting in flushed face and teary eyes. "I'm not sure what that means," she said, adding that Child Care Program staff's "lack of education or information" about the nature of panic attacks led them to request that Ms. North submit a medical opinion by her physician. "That's a big child care center, and she was the administrator."

Ms. Urbanovsky said Ms. North was cooperative during the March 10 on-site visit, and that while the interaction during that visit was stressful for both Ms. North and licensing staff, including Ms. Urbanovsky, they had "a good conversation" during a meeting the following day at the Child Care Program office.

Ms. Urbanovsky said she was "struggling, being a new manager with the licensing folks, on how far do you go with your regulations. How can we meet a middle ground? We don't have enough good quality child care providers in the state as it is. And then we issue regulations that we expect folks to abide by." She said licensing staff try to explain the child care regulations and reasons for various requirements in layman's terms, emphasizing that the main concern is the safety and welfare of the children. Ms. Urbanovsky said she and her staff had several teleconferences regarding MGDC.

Emily wanted to take a little more adverse action. It was my philosophy that Mary was trying very hard to meet expectations and we would ultimately find out whether she had the potential or not. But we weren't going to do it by adverse action; we were going to do it with plans and corrections.

Ms. Urbanovsky said the March 10, 2003 site visit had an unexpected outcome. "I do think this was misconstrued to the point where, if we had it to do all over again, we would do it differently." She said she was "surprised that it took this direction." The issue of panic attacks

came up during the on-site visit, she said. “Mary was open and free to discuss with us but later said it should have been done in a private setting. But she made no request” to that effect. Ms. Urbanovsky said that during on-site inspections “we frequently direct attention to non-compliance issues and we talk about it.”

Ms. Urbanovsky said she understood Ms. North’s concern about privacy but did not see any parents during the time licensing staff were at the facility. She said there was one or possibly two staff in adjacent rooms, when the discussion of panic attacks took place in the kitchen area as she and her colleagues were on their way out. She said Child Care Program staff try to be careful in dealing with confidential information. “In the normal course of business we would never discuss anything confidential in an open setting where there would be people that would hear.” In retrospect, Ms. Urbanovsky said, the adjacent rooms did not have doors and the discussion did take place where others “could have overheard” them discussing Ms. North’s panic attacks. It was “an open setting.”

The discussion happened, and Mr. Souther became aggravated with our request, and I do believe it got heated. If we had it to do over, we would want to go into a closed room and talk about that particular issue. Because it is a sensitive issue, and after it was over Mary probably felt like she would rather have had it discussed in a different manner.

Ms. Urbanovsky said not too much should be made of Mr. Souther witnessing the discussion, because he and Ms. North were living together, and he obviously already knew about the matter. “It was just the four of us. It was Emily and myself and Mary and Tim. And we were in a group, we were facing one another talking. We were standing, because we were on our way out.”

Ms. Urbanovsky said that site reviews are usually conducted in a very “hands-on” manner, pointing things out and discussing appropriate remedies. “It’s very advantageous, especially if you can even draw attention from the other caregivers in the facility, especially if it’s a center, because all those folks need to know. And usually it’s a cordial visit.” Ms. Urbanovsky said the number and detailed nature of child care regulations are difficult to follow and difficult to enforce. “There’s a lot of regulations. I personally feel we’re over-regulated in terms of expectations for providers. That’s why it’s a philosophy of mine that we do the very best we can to not only educate ourselves but the providers as well.” She said site reviews are typically scheduled during the work day when parents are at their jobs and there are enough care givers at a facility to free up the administrator to tour the facility with licensing staff. Usually the walk-throughs are “very informal,” she said. “We give them a checklist prior to going in so they can prepare themselves as well.” Ms. Urbanovsky said the agency only does unscheduled visits when it receives a complaint, due to limited staff.

Ms. Urbanovsky said the number of complaints about MGDC was “over the norm in terms of the type of complaints and the trend—it was repetitive, things that we had done previously to improve and correct, and we would go back out and they weren’t corrected.” She said after the most recent investigation of MGDC,

We were going to take adverse action on the license, and then Mary let us know that she was leaving and there was a new administrator/owner of the facility. So we will put a letter of warning in her file in case she should apply again, because there were some serious infractions.

Ms. Urbanovsky said licensing staff are the Office of Children’s Services investigators for reports of harm in child care facilities. “When there’s abuse and neglect allegations that come in within a center, we’re the ones that have to do those investigations.”



Ms. Urbanovsky said she and licensing staff discussed the interaction with Ms. North and discussed ways it might have been handled better.

After this particular incident and after our teleconference with Joan and Tim and Mary, Linda, Emily and myself, I came back and we teleconferenced, and I said, you know, we could have done it differently. Once it became heated we probably should have either redirected—left and said we would come back and talk about it again—or—  
unfortunately, I don't think there is a closed area in the facility that has doors, so that wasn't really a possibility then. I would not have wanted to take them both outside because they were part of the staffing. Those things are going to happen. Those are sensitive issues, and people feel they have a right to keep things private. So it's the way we approach things, too. We have to be very careful, definitely emphasizing that it's not a personal issue, it is an issue of protecting children and ensuring that they're safe. Just get us that note. Let us know that your doctor feels there is no issue.

I remember saying, we probably could have done that differently. You don't feel good having those types of meetings where there is no resolution but hurt feelings, and we still have an administrator at the facility that has to do her job. And now there's a different type of relationship because this has happened.

Ms. Urbanovsky said there is a shortage of childcare in Alaska, especially since the time that welfare reform required parents to seek employment. "There are not enough providers," she said, "which is why we try to work with them to help them comply."

## STANDARDS

### *Qualifications of staff at a child care facility*

#### **4 AAC 62.210. Qualifications and responsibilities of individuals having contact with children in a child care facility**

...

(b) An individual may not work, volunteer, or reside in a child care facility or in any other part of the premises housing a child care facility if the individual has the opportunity to gain access to the child care facility and

...

(2) has a physical, health, mental health, or behavioral problem to an extent that the problem poses a significant risk to the health, safety, or well-being of children in care; . . .

(c) A child care facility and the department may require that an individual having contact with children in a child care facility provide an evaluation from a probation, health, or mental health professional affirming that the individual is free from problems that pose a significant risk to the health, safety, or well-being of a child in the child care facility. . . .

(e) A licensing representative will review the following available records of each caregiver, employee, and individual, age 16 and older, having contact with children in a child care facility:

...

(3) an evaluation, if requested under (c) of this section; . . .

**American Psychological Association**, "Answers to Your Questions About Panic Disorder."  
<http://www.apa.org/pubinfo/panic.html>, 2003

### *Public access to state personnel records*

#### **2 AAC 07.910. Personnel records.**

(a) This section applies to the records of applicants for state employment and to the employment records of current and former classified and partially exempt employees.

(b) As provided in AS 39.25.080, the following information, if available, is open for public inspection:

- (1) names and position titles of all current state employees;
- (2) the position held by a state employee or a former employee;
- (3) the prior positions held by a state employee;
- (4) whether the employee or former employee is, or was, in the classified, partially exempt, or exempt service;
- (5) the dates of appointment and separation of a state employee; and
- (6) the compensation authorized for a current state employee.

(c) All other records of applicants for employment and employees in the classified and partially exempt service, including applications and resumes, are confidential and will be released only under the following conditions:

- (1) to a state agency, for personnel related activities; . . .
- (2) to the child support services agency created under AS 25.27.010 or the child support agency of another state; . . .
- (3) to a state agency for any other purpose; information maintained in personnel records will be released upon receipt of a written authorization from the employee, former employee, or applicant for employment whose records are requested; . . .
- (4) to the public, upon receipt of a written authorization from the employee, former employee, or applicant for employment whose records are requested, or upon receipt of an order of a court of competent jurisdiction;
- (5) a request for records not covered by paragraphs (1) - (4) of this subsection will be addressed to the director; the director or director's designee shall review the request and may approve the release of information if that release would be in the best interests of the state and can be accomplished without violation of the employee's, former employee's, or applicant's right to privacy.

### ***Licensing agency authority to receive complaints and investigate child care facilities***

#### **AS 14.37.120. Monitoring; investigation.**

...

(b) To encourage parents of children in child care facilities to become involved in day-to-day monitoring of the care provided by the facilities, the department shall require licensees to give to parents of children in child care in the licensee's facility a summary of the regulatory requirements that apply to the facility and the department's or department representative's telephone contact number for reporting a concern regarding child care. The department also may provide notice of the telephone contact numbers for reporting child care concerns.

(c) The department may conduct an investigation, including announced or unannounced on-site inspections, for ongoing monitoring or to assist in its review of an annual self-monitoring report.

...

#### **AS 47.35.105. Complaints.**

(a) A person who believes that a provision of this chapter, a regulation adopted under this chapter, or a condition of a license issued under this chapter has been violated may file a verbal or written complaint with the department.

(b) The department shall investigate all complaints filed under this section unless the department reasonably concludes that the complaint is without merit.

(c) After an investigation under this section, the department shall prepare a written report of investigation and shall mail a copy to the licensee or other person who is the subject of the complaint, and to the complainant if requested. If the department determines that a violation of this chapter, a regulation adopted under this chapter, or a condition of a license issued under this chapter has occurred, the department's report of investigation must contain the following:

- (1) a description of the violation;
- (2) a citation to the provision of this chapter or the regulation that has been violated, if applicable; and
- (3) either
  - (A) a date by which the violation must be corrected and a verification of compliance submitted to the department; or
  - (B) a plan of correction.
- (d) A licensee may submit to the department a written response regarding a report of investigation relating to that facility or agency. The department shall retain the written response in the licensing file.
- (e) A licensee may not take retaliatory action against a person who files a complaint. A complainant against whom retaliatory action has been taken may recover treble damages in a civil action upon a showing that the actions were taken in retaliation for the filing of a complaint.

***Public access to child care licensing records and complaints***

**4 AAC 62.065. Disclosure of department licensing records**

- (a) The departments licensing records for a licensed child care facility are public unless
  - (1) otherwise made confidential by AS 14.37.110, including
    - (A) material made confidential by state or federal statutes or regulations;
    - (B) material that is part of an incomplete licensing or complaint investigation;
  - (2) the records are protected by a privilege or principal recognized by the courts;
  - (3) the records disclosure would interfere with law enforcement proceedings.
- (b) The department will ensure the security of confidential records by providing
  - (1) adequate procedures and facilities to protect confidential information from unauthorized access and from accidental or deliberate damage;
  - (2) procedures for screening, supervising, and disciplining agency personnel in order to minimize the risk of security violations;
  - (3) training to employees working with or having access to confidential information; and
  - (4) systems for and encouraging the public to review licensing records that are legally open, without disclosing confidential material.
- (c) The department will follow the procedures contained in 6 AAC 96 for disclosure, denial, reconsideration, and appeal regarding agency records for verbal and written requests for licensing records under this section.

## ANALYSIS AND FINDINGS<sup>4</sup>

### ***Allegation 1: A Child Care Program investigation into the medical fitness of a facility administrator was conducted in an unreasonable manner.***

The Office of the Ombudsman Policies and Procedures Manual discusses and defines *abuse of discretion* at section 4040(2):

“Unreasonable” means:

- (A) the agency adopted and followed a procedure in managing a program that was inconsistent with, or failed to achieve, the purposes of the program,
- (B) the agency adopted and followed a procedure that defeated the complainant’s valid application for a right or program benefit, or
- (C) the agency’s act was inconsistent with agency policy and thereby placed the complainant at a disadvantage relative to all others.

Ms. West and Ms. North complained that Child Care Licensing workers harassed Ms. North on March 10, 2003, at MGDC by inappropriately inquiring into her history of panic attacks. In a May 13, 2003 letter to regional Licensing Program supervisor Linda Raye, Ms. West described this inquiry in terms suggesting why she and Ms. North considered it unreasonable: “licensing representatives acted as a medical doctor in trying to determine whether an administrator had a medical issue that posed a risk to children.”

Based on a review of the documents submitted by Ms. West, the agency licensing file on MGDC, and interviews with Ms. North and agency staff, it appears that the actions complained about were authorized by a section 4 AAC 62.210 of the Alaska Administrative Code that required the agency to evaluate whether a licensee or prospective licensee “has a physical, health, mental health or behavioral problem to an extent that the problem poses a significant risk to the health, safety, or well-being of children in care.” The relevant parts of that section are quoted in the Standards section above. This regulation authorizes licensing staff to request and review an evaluation from a health provider “that the individual is free from problems that pose a significant risk to the health, safety, or well-being of a child in the child care facility.”

State agencies adopt regulations in accordance with the Administrative Procedures Act (Alaska Statutes 44.62). Once adopted, regulations have the force of law. The section of the administrative code quoted above requires child care licensing staff to inquire into a broad range of personal information about licensees, potential licensees, and child care staff to screen out

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<sup>4</sup> AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous. “The ombudsman may investigate to find an appropriate remedy.”

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency’s actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* “if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant’s criticism of the administrative act is valid.” Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is *justified* and that the complainant’s action or inaction materially affected the agency’s action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient “to determine conclusively” whether criticism of the administrative act is valid.

those whose behavior or health or mental health might reasonably be expected to potentially compromise the safety of children in a state-licensed child care facility. The Alaska Supreme Court held in a foster care licensing case involving a regulation nearly identical to the one quoted above that the state has “a compelling interest” in protecting children and that the regulation restricting eligibility for licensure based on personal information about prospective licensees legitimately furthers this goal. *Wilkerson v. State of Alaska, Division of Family and Youth Services*, 1999. In short, the Child Care Licensing Program was authorized by law to inquire into Ms. North’s health history.

The panic attack Ms. North experienced during a licensing site inspection on December 4, 2002, which Ms. North told the ombudsman investigator was *not* the result of improper actions by licensing staff, interfered with her ability to function as administrator to the extent that she could not continue discussions with licensing staff until Mr. Souther retrieved her medication from another location. This occurred during a licensing inspection in response to a complaint against the facility. The inspection took place during regular business hours (early afternoon on Wednesday, December 4, 2002), with children present at the facility. Ms. North said licensing program workers were considerate and waited patiently until Ms. North was able to resume the discussion.

The record shows that licensing program staff took no action following the December 4, 2002 incident until Ms. Forester understood Ms. North to say in the course of a visit to the licensing program office nearly three months later, on February 26, 2003, that she was “downtown for something related to panic attack medication.” Ms. Forester discussed this with her supervisor, Linda Raye, and they agreed on “the need to ask questions of our concern about panic attacks.” The licensing program field manager, Ms. Urbanovsky, who had not heard about the December 4 incident up to that point, agreed there should be further inquiry.

Despite Ms. North’s assertion that “everyone has panic attacks at all times, it is something that everybody has, not just me,” the disorder does not appear to be so common as that. The American Psychological Association Internet website states, “Panic Disorder is a serious condition that around one out of every 75 people might experience.” The website lists typical symptoms—racing heartbeat, difficulty breathing, “terror that is almost paralyzing,” etc.—and comments, “You probably recognize this as the classic ‘fight or flight’ response that human beings experience when we are in a situation of danger. But during a panic attack, these symptoms seem to rise from out of nowhere.”

Parents who take their children to a child care facility licensed by the state expect that the facility and its staff will meet minimum standards set out in Alaska law. In light of the circumstances, it does not seem unreasonable that licensing staff might want to inquire further into the nature of Ms. North’s panic attacks. The regulation clearly gives them that authority, however uncomfortable such scrutiny might make a licensee. Ms. West’s complaint that this inquiry was a violation of the Americans with Disabilities Act is unfounded, and the characterization of this as “harassment” and “extreme excess of safeguarding of children” is not one likely to be shared by many parents of young children. Moreover, once Ms. North gave licensing workers a note from a medical provider stating that her condition would not hinder her from performing her duties as administrator of the facility, this ceased to be an issue for the agency.

On March 10, 2003, Ms. Forester and Jane Urbanovsky of the agency’s main office visited the facility and in the course of an inspection asked Ms. North to clarify the nature of her panic attacks. Ms. North had indicated to Ms. Forester during the license application process that she controlled these with medication and had not experienced an attack in more than a year. Yet licensing staff had witnessed Ms. North experiencing a panic attack during their site inspection of December 4, 2002, when Ms. North became extremely agitated while operating a fax/

photocopy machine. And Ms. Forester had understood Ms. North to say she was obtaining additional medication just two weeks before the March 10 inspection.

In light of these circumstances, it seems reasonable for them to have questioned whether Ms. North was experiencing panic attacks more frequently than in the past, whether she had not been taking her medication, and whether the medication was effective and was readily available when she was running the child care facility. They wondered how she would react to the stress of a fire or earthquake emergency or a medical emergency involving one of the children—would she remain calm enough to ensure the safety of the children in her care? This is not too much to ask of a child care licensee. Ms. North conceded that it was reasonable for the licensing staff to ask about this, though she would have preferred advance notice and a more private setting for such a discussion.

Licensing staff and Ms. North told the ombudsman investigator there were no parents present during this part of their interaction, and MGDC employees other than Mr. Souther, with whom Ms. North lived, were in other rooms supervising children. Ms. West's allegation that the discussion took place "in front of a minimum of 3 incoming parents and two employees" is not supported by the evidence. The record shows that Mr. Souther was not present until near the end of the incident and adopted a combative attitude toward licensing staff when he walked in on the discussion. This was perhaps understandable, because he apparently entered the room at the point when Ms. North had begun to find the interaction extremely stressful, and he perceived that she was feeling under "attack." Knowing her well, he probably interpreted Ms. North's state of mind better than licensing staff could have done. Ms. North and licensing staff agree that Mr. Souther spoke up in defense of Ms. North. As licensing staff were preparing to leave the facility, an already uncomfortable situation was made worse when they noticed a cat scattering soil from a potted ficus tree and found the cat had been using it for a litter box in an area used by the children.

Ms. Urbanovsky said she thought she and other agency staff were following state law and agency policy in this matter, and that such inspections and interviews are a routine part of their work. She said site inspections are always carried out during business hours, but licensing staff purposely schedule them for the middle of the day when parents are away and the administrator is more likely to have time to answer questions and discuss compliance issues. Ms. Urbanovsky said she was surprised by the harsh feelings that surfaced during the March 10 inspection, and she regretted that Ms. North experienced this interaction as stressful. Ms. Urbanovsky said she discussed with her staff how they might handle such a situation better in the future. The ombudsman investigator reviewed with Ms. Urbanovsky how this interaction looked from Ms. North's perspective, and relayed Ms. North's suggestions for conducting this sort of inquiry into personal health issues more privately.

It is unreasonable to expect that state employees will never make mistakes or errors of judgment. On the other hand, agencies should review their procedures when unexpected difficulties arise and look for ways to improve agency performance in the future. It appears that this incident has probably helped the child care licensing program to achieve that goal.

It should not be forgotten that the March 2003 inspections took place in response to one of several complaints about the facility, and that the inspections revealed a substantial number of items of non-compliance with child care licensing regulations. Ms. North and her staff probably felt like they were under a microscope, but that is a normal condition of operating with a state license. Ms. North conceded that the inspectors were knowledgeable and were generally considerate. Licensing program staff would have been negligent not to enforce compliance with standards set out in state law.

On a related matter, the complainants questioned why it was not an issue for licensing staff that Ms. West also had a history of panic attacks. This overlooks the point that licensing staff were not concerned about Ms. North's history of panic attacks until they witnessed one during a site inspection. Because Ms. West was not present at the facility caring for children on a regular basis—indeed, she lived in another state—and because she did not experience an attack in the presence of licensing staff, it is not surprising that this was not an issue for them. Regardless, in the ombudsman's judgment it would have been reasonable and within the law for them to have inquired into this further if they thought Ms. West would be interacting with children at the facility.

### ***Finding on Allegation 1***

The evidence shows that licensing program staff had authority to inquire into Ms. North's health history, that they had good reasons to do so, and that once Ms. North gave them a note from her medical provider, they were satisfied that her health history did not disqualify her from serving as administrator of the child care facility.

The evidence also shows that the interaction on March 10, 2003, became stressful in a way that none of the participants anticipated. Ms. North is the best authority on her own state of mind, and she experienced the interaction as abusive. All parties agree that this was unfortunate, but even granting that the interaction might have been planned and conducted better, it was not inherently unreasonable for licensing staff to inquire into the history of panic attacks as one issue during a site inspection during regular business hours at which other compliance issues were evaluated and discussed.

On balance, then, the ombudsman finds Allegation 1 ***not supported*** by the evidence.

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### ***Allegation 2: A Child Care Program licensing worker unreasonably read without permission a note from the complainant's medical provider discussing the complainant's medical history.***

On this point there were inconsistencies between Ms. West's written complaint and Ms. North's comments during interviews. On the ombudsman complaint form Ms. West, who was not an eye-witness, alleged that licensing worker Emily Forester improperly searched through personal papers at MGDC, read a document from Ms. North's doctor, and disclosed its contents to others during a meeting. Ms. West attached to her complaint form a paper she had submitted to a college class on child development describing this incident in more detail based on what she understood from talking to Ms. North and Mr. Souther.

Ms. North recalled that it was probably Ms. Raye who found the note, but she was not certain. Ms. North also said the papers were out in the open on a shelf where anyone might have seen them, not in a drawer or file cabinet.

Ms. Raye said that during the inspection of March 12, 2003, she saw a note face-up on the counter top on stationery headed with the printed logo of a medical clinic and asked if Ms. North had obtained this note for them, as she had told the licensing workers two days previously she would be willing to do. According to Ms. Raye, Ms. North said it was, and Ms. Raye took the note, dated March 11, and added it to the licensing file for MGDC. After that, Ms. North's panic attacks were no longer an issue for licensing program staff. This account agrees with Ms. North's account and contradicts what Ms. West said in her complaint.

Licensing staff are trained to make a minute inspection of child care facilities for compliance with health and safety regulations. Leaving confidential papers out in the open under such circumstances may well result in disclosure of private information. Regardless, by law licensing program staff were entitled to request this information. Ms. North obtained a statement from her medical provider to give them.

While it might not seem right for Ms. Raye to have picked up the note and looked at it without being invited to do so, it appears that Ms. North had obtained the note expressly to give to licensing workers on this date. Ms. Raye expected Ms. North to have such a note ready, though it seems that Ms. North had not yet offered it to licensing staff. Agency records show that Mr. Souther urged Ms. North not to give licensing workers the note unless they formally asked for it, and Ms. North later said she held back from offering it to them until they asked about it. This suggests that MGDC staff were less forthcoming with licensing workers than perhaps they should have been. Nonetheless, licensing staff recalled that Ms. North had volunteered to obtain the note and was very cooperative on this point.

On a related issue, Ms. West and Ms. North complained of a breach of Ms. North's privacy, alleging that licensing program staff made her medical condition known to others: "Ms. Forester went on in a conference call/meeting to let all know that if she were in Ms. North's position as administrator of a child care center, she would be so overwhelmed by being a parent of two children, going to school, & being an administrator that she would want to 'Quit,' and be overwhelmed & stressed!" Everyone can agree that state employees should be discrete in handling private health information. However, the record shows that the participants in the March 11, 2003 teleconference at which this allegedly took place was attended only by agency staff, the two complainants, and Mr. Souther, all of whom had legitimate reasons to know this information. On the other hand, Ms. West disclosed this information in letters to the governor, to her college classmates and instructor, and to various elected representatives. This part of the complaint seems unfounded.

In addition, Ms. West's characterization of Ms. Forester's comments in the meeting is one possible interpretation, but it is equally possible that Ms. Forester was sympathizing with the number of Ms. North's responsibilities as parent, administrator, and part-time student simultaneously. Interpersonal communications are frequently open to misinterpretation, and it is possible that the complainants misunderstood these remarks during a contentious discussion of their other concerns. As noted above, this discussion took place in the context of several complaints about the facility, and inspections had led to write-ups for non-compliance with licensing regulations.

There was a second teleconference on April 16, 2003 in which three agency staff and Ms. West participated at which Ms. West again expressed concern about the March 10 discussion of Ms. North's history of panic attacks. Again, all present had good reason to know this information.

### ***Finding on Allegation 2***

In light of the evidence, the ombudsman finds Allegation 2 **not supported** by the evidence.

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### ***Allegation 3: The Child Care Program unreasonably fails to disclose the details of complaints against agency personnel.***

Ms. West and Ms. North complained that the licensing program does not disclose to the public a state employee's personnel record, including complaints against the employee by the public and any disciplinary or training actions imposed by supervisors as a result. Ms. Raye said only Ms.



West had complained about Ms. Forester, and Ms. West did not provide details to support her allegation that “many people” had made “numerous complaints.” Regardless, the reason that the agency does not disclose such information to the public is that it is confidential by law. See 2 AAC 07.910.

### ***Finding on Allegation 3***

The ombudsman finds Allegation 3 ***not supported*** by the evidence.

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### ***Allegation 4: The Child Care Program unreasonably fails to disclose the identity of those who complain to the agency about a licensed child care facility.***

The complainants also questioned why the licensing program does not disclose the identity of those who file complaints against licensed child care facilities. Such information is confidential by law until investigation of the complaint has been completed. 4 AAC 62.065(a)(1)(B). Then this information becomes part of the public record. State law prohibits retaliation against persons who file a complaint about a child care facility and provides that “A complainant against whom retaliatory action has been taken may recover treble damages in a civil action upon a showing that the actions were taken in retaliation for the filing of a complaint.” AS 47.35.105.

### ***Finding on Allegation 4***

The ombudsman finds Allegation 4 ***not supported*** by the evidence.

### **Overall Finding**

The ombudsman finds Allegations 1-4 ***not supported***. Therefore, the ombudsman finds this complaint taken as a whole ***not supported*** by the evidence. Because the agency appears to have acted reasonably and within its authority, no ombudsman recommendations are warranted.

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Ms. West said she believed there should be changes in the Child Care Licensing Program regulations. Under the Administrative Procedures Act, citizens may petition a state agency to change its regulations by following the directions in AS 44.62.220:

#### **AS 44.62.220. Right to petition.**

Unless the right to petition for adoption of a regulation is restricted by statute to a designated group or the procedure for the petition is prescribed by statute, an interested person may petition an agency for the adoption or repeal of a regulation as provided in AS 44.62.180 - 44.62.290. The petition must state clearly and concisely

- (1) the substance or nature of the regulation, amendment, or repeal requested;
- (2) the reasons for the request;
- (3) reference to the authority of the agency to take the action requested.