# **INVESTIGATIVE REPORT**

Final Finding and Closure

#### \*\*\*PUBLIC REPORT\*\*\*

(Edited to remove confidential information per AS 24.55.160)

Ombudsman Complaint J099-0212

February 15, 2000

# SUMMARY OF THE COMPLAINT

In 1999, James Tern and his wife, Vera, applied for jobs as house parents at McAuley Manor, a Catholic Social Services facility in Anchorage that houses troubled adolescents. They were hired as a couple, contingent on a clear background check with the Division of Family and Youth Services (DFYS). The agency said a background check, required by regulation for staff of state licensed youth facilities, revealed a substantiated allegation of child abuse against Mr. Tern dating back nine years. Mr. Tern protested that the incident cited as alleged child abuse was a spanking he administered to his son and that, after meeting with a DFYS social worker, he never spanked his son again. He further protested that he had never been notified that the alleged child abuse had been substantiated or that a substantiated finding could affect his ability to earn a livelihood.

Mr. and Ms. Tern complained to the Ombudsman, who began a preliminary investigation of the following allegation:

Allegation 1: The Division of Family and Youth Services unreasonably refused to approve the hiring of the complainant by a licensed care facility because of a minor incident of child abuse from nine years ago.

During the preliminary investigation, the Ombudsman added a second allegation:

Allegation 2: The Division of Family and Youth Services failed to support its disapproval of Mr. Tern's employment in a licensed care facility with an adequate statement of reasons.

Assistant Ombudsman Mark Kissel conducted the investigation. Written notice of investigation was mailed to Edward Sheridan, staff manager of

## **BACKGROUND**

# **McAuley Manor**

McAuley Manor is a long-term shelter for teenage girls. The shelter is operated by Catholic Social Services, a private non-profit agency. According to Sandy Hoffman, program manager at McAuley Manor, the shelter provides a place to stay for up to five girls at a time. Most of the girls, she said, have been forced out of their own homes, and McAuley Manor not only provides shelter and food, but injects stability back into their lives.

Because the shelter is a 24-hour home for girls, Ms. Hoffman said, state law requires an adult supervisor present at all hours. The position that Mr. Tern and his wife had applied for is a non-paid position that requires the incumbent to be at McAuley Manor each day between the hours of 10 p.m. and 9 a.m. In exchange, the incumbent receives free housing in a "nice three-bedroom apartment" on the first floor of the facility. The value of this housing is between \$850 and \$1000 per month, she said.

# **Facility License Laws**

7 AAC 50 regulates the licensing of residential childcare facilities like McAuley Manor. 7 AAC 50.210 is titled "Qualifications and Responsibilities of Persons Having Regular Contact with Children in a Facility." The regulation requires staff and adult residents of residential childcare facilities to pass a criminal background check. The regulation also requires:

- (a) An adult having regular contact with children in a facility and a caregiver of any age must be a responsible individual of reputable character who exercises sound judgment.
- (b) A caregiver in a full time care facility must have the capacity to deal with frustration and conflict and the ability to work with children who, because of the children's background and experience, might express themselves negatively toward the caregiver.
- (c) A person may not work, volunteer, or reside in the part of a facility where child care is provided or in any other part of the facility with direct access to the part of

the facility where child care is provided if the person

- (1) is the alleged perpetrator of an incident of child abuse or neglect in which the division found the evidence available substantiates the allegation;
- (f) The division will review its child protection records and previous licensing records and criminal justice information with respect to the designated administrator or foster parent, all adult members of the licensee's household, and any adult residing in any part of the facility, if that adult has direct access from the adult's residence to the part of the facility where child care is provided.

7 AAC 50.210(c)(1) is the citation DFYS used to prevent McAuley Manor from hiring Mr. Tern.

In AS 47.17.290, "child abuse or neglect" is defined as "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..."

## **INVESTIGATION**

#### James Tern

Mr. Tern submitted his résumé to the Office of the Ombudsman to demonstrate his fitness to work with young people. The following information was taken from the résumé.

Mr. Tern received a B.A. degree in psychology in California in 1982. He served in the U.S. Air Force from September 1982 through September 1992. He was honorably discharged with the rank of captain.

Beginning in April 1994, Mr. Tern began a career of working with troubled youth. Until February 1995, he worked part-time as an on-call counselor with a local agency. From then until May 1998, he worked with the same agency as a night counselor at a facility for adolescents with substance abuse problems. According to the résumé,

Duties included: responsibility for night safety of 12 adolescents in a residential setting, securing the facility for the night, emergency nighttime response, cooking

breakfast for residents and ensuring they were prepared for the day's activities.

While working nights at the facility, Mr. Tern was able to work a day job as well. From November 1997 until September 1998, he worked as an activity therapist providing one-on-one "community-based activity therapy with emotionally disturbed 6-year-olds -- 18-year-olds transitioning from residential treatment."

From October 1998 to the present, Mr. Tern worked again as a counselor. His résumé describes the job:

Adolescent counselor for 13-18 year olds identified with substance abuse issues. Duties include managing a case load of up to 12 adolescents through individual counseling sessions, facilitating therapeutic groups daily, parental and outside agency conferences and all associated administration.

## McAuley Manor's Perception of Mr. Tern

Ms. Hoffman, McAuley Manor program manager, began searching for a replacement for the shelter's night supervisor during the summer of 1999. James and Vera Tern applied for the position and looked like ideal candidates, according to Ms. Hoffman. DFYS regulations at 7 AAC 50.210(k) require Ms. Hoffman to obtain "at least three positive written references on a prospective employee." She said she checked with previous employers and "heard nothing but good about them." They had appropriate experience and good attitudes. A criminal background check had turned up nothing, she said.

Ms. Hoffman said she submitted their employment forms to the childcare licensing section at DFYS and heard back that Mr. Tern could not work at a licensed facility because of a substantiated finding of child abuse in 1990.

"I was devastated when I found they weren't going to pass," she said. "My hands were tied, because DFYS does license us. I couldn't risk the whole program."

Ms. Tern, who did pass DFYS muster, agreed to fill in alone as night supervisor until Ms. Hoffman could find a replacement. Mr. Tern understood that he could not be at the shelter, Ms. Hoffman said, and he honored that.

Ms. Hoffman said she would have hired Mr. Tern even after DFYS told

her he was perpetrator in a substantiated incident of child abuse.

"He [Mr. Tern] explained what happened. I would be comfortable having them around," Ms. Hoffman said. "My heart and my gut tells me they are good people."

## Mr. Tern's Job Performance with Children

With Mr. Tern's consent, the ombudsman investigator obtained copies of his performance evaluations from an agency for whom he worked in several positions that involved contact with children.

The documents provided by the agency included Mr. Tern's probationary evaluation as night counselor, his performance evaluation for his first year on that job, and his probationary evaluation for his current job with the agency, substance abuse counselor. Throughout these evaluations, Mr. Tern was rated "acceptable," "exceeds acceptable," or "outstanding."

Of the jobs he held with the agency, the one most similar to the position he sought at McAuley Manor was that of night counselor. The narrative portion of his evaluation for that job, dated March 28, 1996, reads, in part:

[James] has been in the night asleep position for one year. He has demonstrated the ability to establish a positive rapport with residents in the very limited time he has with them. [James]'s effective milieu management skills are seen in his capacity to assist residents in completing their responsibilities in a timely manner with a gentle directive style. He uses motivation techniques to move the clients in a positive direction at the beginning of their day, and always ensures the clients safety in crisis situations.

Nothing in the evaluations was critical of his interactions with children, peers, or supervisors.

#### **Risk Assessment Tool**

The DFYS Risk Assessment Tool (RAT) helps social workers determine the on-going risks of abuse and neglect in a home. The RAT lists 12 predictors of child abuse and nine predictors of child neglect. The social worker assigns a score for each of the predictors and totals the scores within the abuse and neglect categories. The higher the score, the greater the perceived risk to the child.

For example, the seventh predictor in the abuse category reads: "Caretakers history of drug/alcohol abuse." The social worker can select "none" for zero points, "one caretaker" for one point, or "both caretakers" for two points.

The highest possible score for child abuse is 28, but DFYS places a family in its highest service level if the RAT score for abuse exceeds seven. The highest possible score for child neglect is 18. DFYS places a family in its highest service level if the RAT score for neglect exceeds 10.

The RAT form also allows social workers to override the RAT score to place a family in a higher risk and service category if, in their professional judgement, that is appropriate. The RAT form contains a line for a supervisor's review and approval of the final risk level.

## **DFYS Computer Records**

Results of DFYS investigations are entered into a computer database known as PROBER®. PROBER® printouts show —without narrative —data regarding the report of harm and investigation. PROBER® printouts provided to the ombudsman investigator by DFYS contain dates, case type, DFYS staff assigned, outcome, whether the state took custody, the name and relationship of the alleged perpetrator, and scores that rate the child's risk for abuse and neglect, the RAT scores. Data entry into the PROBER® system is managed locally. Large offices, such as Anchorage, have a pool of data entry clerks entering the data. Other offices handle it differently.

The first report of harm involving the Terns was handled by the Eagle River office, which has since closed. Marti Thornton was a clerk at the Eagle River office from May 19, 1990, until September 1994, and during that time was responsible for entering data into PROBER®. Asked whether the Eagle River office had a system for checking the accuracy of PROBER® entries, Ms. Thornton responded:

My recollection is not clear —I may have sometimes printed the PROBER® closing screen and included it in the file before it was signed off by the supervisor. However, it's also possible that sometimes the files were closed, signed off and then given to me to enter findings into PROBER® and close out. The Data unit in Anchorage had access to all the PROBER® files and printed various reports for the workers, but whether this provided quality control, I couldn't say.

Edward Sheridan, staff manager of the Anchorage DFYS office, said that PROBER® entries are not systematically checked for accuracy.

## **Allegations Against Mr. Tern**

PROBER® turned up three cases for James Tern or his son, Jefford: a 1990 report of child abuse, a 1996 report of child abuse, and a 1997 report of child neglect. According to DFYS computer records, the two reports of child abuse were assigned to DFYS staff and investigated. The report of neglect was closed without investigation.

## First allegation -- child abuse, 1990

DFYS was unable to produce any original documents relating to the first report of harm alleging that Mr. Tern physically abused his son, Jefford. The only records regarding this incident are the PROBER® data and Mr. Tern's written recollection.

Mr. Tern provided his written recollection to DFYS in 1999 to persuade the agency to approve his employment at McAuley Manor:

My wife (now ex-wife), son [Jefford] and I had just moved to Alaska from overseas. My wife was having a hard time adjusting to life in Alaska and her relationship with [Jefford] deteriorated. She asked me to start spanking [Jefford] to control his behavior. I had not spanked [Jefford] before that time. [Jefford] told the school nurse that his dad was beating him. DFYS investigated and clarified the Alaska law around spanking to me. DFYS closed the case. I hated spanking [Jefford] in the first place and I never spanked [Jefford] again.

Mr. Tern told the ombudsman investigator that he, his former wife and son had recently returned from service in Okinawa and were living in Chugiak. Jefford was nine years old at the time. His wife asked him to discipline Jefford, he said, and he took a stick from the yard and hit Jefford once on the buttocks. Mr. Tern said this occurred three or four times in a two-week period. He said that Jefford told the school nurse that his father was beating him with a "log," which prompted a report of harm to DFYS. Mr. Tern said a DFYS social worker came to his home and talked to his wife, since he was not at home.

Mr. Tern said he went to the local DFYS office the next day and spoke with a social worker. He said the worker told him that, by Alaska law, one cannot spank with anything other than one's hand, and he agreed he

would never do that again. Mr. Tern said he was not told that the report of child abuse had been substantiated, only that DFYS was closing the case. He said he heard nothing further from the social worker and no one checked on him or Jefford again. He said Jefford suffered no bruising that he was aware of, and he did not think that anyone had examined Jefford for bruises.

"I thought at the time that this was a minor incident that was over in a day," Mr. Tern said.

DFYS' only record of the report of child abuse is its PROBER® computer record. The record shows that DFYS took the report of abuse on September 20, 1990, and closed it on November 11 that year. The record shows a "case type" of "physical abuse-child" and a finding of substantiated. The RAT scores for this incident were "1" for abuse and "0" for neglect. The record also shows that DFYS did not seek custody of the child.

The PROBER® record of this incident contains Jefford's name, but not his father's. The space in the PROBER® database for the name of the alleged perpetrator is blank, as is the space indicating the perpetrator's relationship to the child.

The PROBER® record identified the social worker assigned to the case as Gail Stadig. Assistant Ombudsman Kissel phoned Ms. Stadig, who still works for DFYS. She said the name Jefford sounded familiar but she could not recall details of the incident or her investigation. She said she routinely notifies parents if her investigation substantiates a report of child abuse or neglect. She said that spanking is not in itself child abuse, but it could be found to be abuse if the perpetrator used an object to strike the child and if the spanking left bruises on the child.

## Second allegation - child abuse, 1996

DFYS was able to provide the investigator with a file relating to the second report of harm. On October 16, 1996, Mr. Tern and his 15-year-old son, Jefford, got into a dispute. Mr. Tern threw a boot toward Jefford but did not strike him. Jefford called the police, and the following day he reported to a school teacher that he was afraid his father would hurt him. Leana Wegant of DFYS investigated and advised counseling for father and son. On June 6, 1997, DFYS closed the case with a finding of "unconfirmed for physical abuse."

In her case assessment, Ms. Wegant wrote:

Interviewed father, son and school staff. Father and son

deny that father physical (sic) abuses him. [Jefford] is a difficult teenager and displays a lot of attention seeking behavior. He has been having difficulties in school. [James] uses timeout and restriction as discipline for his son. Father did not hit his son with a boot but did admit he threw one at him with no intention on hitting him.

In his attempt to persuade DFYS to approve his employment at McAuley Manor, Mr. Tern provided this recollection of the incident:

[Jefford] moved back to Alaska on 6/96 to live with [Vera] and I after 3 years absence from me. (Mr. Tern and Jefford's mother had since divorced, and Mr. Tern lived with his fiancée, Vera. - Ed.) We struggled as a family to gain some connection. After a particularly heated exchange between Jefford and I, Jefford called the police. The policeman talked with both Jefford and I about our relationship. We began counseling the next week and continued weekly family counseling until Jefford returned to Arizona 8 months later. DFYS felt we were on the road to healing as a family and closed the file.

Ms. Wegant completed a Risk Assessment (RAT) on June 11, 1997. The family's RAT score was zero for both neglect and abuse. This RAT was approved and initialed by the social worker's supervisor. The abuse score of zero, however, is not correct since Jefford had a prior report of abuse. His RAT score for abuse should have been one, which is still low by DFYS standards.

The PROBER® record on this 1996 incident lists the alleged perpetrator as "Swifte, James," and describes him as Jefford's father. This is an obvious mistake. Mr. Tern's middle name is Swifte.

## Third allegation -- child neglect, 1997

On April 10, 1997, DFYS received a report of harm concerning Jefford. The DFYS intake form described the report:

The reporter is concerned that ... the sewage pipe is broken in the basement and the basement smells bad. The reporter is concerned that [the boy] is exposed to broken sewage pipes.

The DFYS intake officer assigned the case a low priority "workload adjusted" status. This meant that DFYS would not investigate the case because of the need to investigate higher priority reports of harm.

## Standards for a Substantiated Finding

According to Mr. Sheridan of DFYS, bruising is one of the key indicators of child abuse, but it has to be looked at in conjunction with several other factors:

We take a number of factors into consideration when assessing for child abuse vs. discipline: the age of the child, prior history of violence in the home, and other factors to assess risk. We only substantiate when we have documented proof that discipline resulted in abuse. This is usually evidenced by bruises, marks, or welts that are present at the time the social worker interviews the child or if we have police photos.

We encourage parents to not use corporal punishment as a means to discipline. We often refer to parenting services that teach alternate forms of discipline. However, a general rule of thumb is--if parents spank then it should be on the bottom over the clothes with the hand so as not to leave welts, marks, or bruises. It should also be age appropriate. The use of objects such as shoes, brushes, sticks, etc., is not appropriate. Throwing objects at children is also inappropriate but may not constitute physical abuse if the child is not injured.

Mr. Sheridan said that normally, in a case like the 1990 report of harm, social workers would arrange a physical exam to determine whether the spanking left bruises or other marks.

Social workers always send letters to parents at the close of a case, he said, but not all social workers report the findings of the investigation.

#### **Retention of Child Abuse Records**

Gudrun Bergvall, social services program coordinator for the Department of Health and Social Services, provided the ombudsman investigator with a copy of the records retention schedule for DFYS regional and district offices. This schedule was signed in 1983 and remains in effect, Ms. Bergvall said. She said DFYS is revising the schedule.

Non-custody juvenile social services case files, which describes the files pertaining to all of the reports regarding Mr. Tern and Jefford, are kept for four years after the case closes and then destroyed, according to the

records retention schedule. Cases in which the state moves for custody are kept longer: six years after the child involved reaches the age of majority. At that time, these records, too, are destroyed, according to the schedule.

According to Steve Rice, the agency's data processing manager, PROBER® computer records are kept indefinitely. He said no case records have been deleted from PROBER® since it came on line in 1989.

## The Decision Against Mr. Tern

Julia Winchell is the DFYS Licensing Supervisor in Anchorage. As such she is responsible for licensing day care facilities, foster homes, and residential facilities like McAuley Manor. Ms. Winchell said she feels a primary responsibility to safeguard the children in state-licensed facilities.

"If I'm going to err," she said, "it's going to be on the side of the safety of children."

Ms. Winchell said she denied permission for McAuley Manor to hire Mr. Tern based on 7 AAC 50.210(c)(1) and the data in PROBER®. She said that even though the PROBER® record of the 1990 incident did not name a perpetrator, Mr. Tern admitted that he had spanked Jefford.

Ms. Winchell said she found it troubling that Mr. Tern has more than one report of child abuse filed against him. Ms. Winchell said she considered the 1996 incident, in which Mr. Tern threw a boot at Jefford, when making her decision. She said she took into account Mr. Tern's good work history with troubled adolescents, but felt it did not outweigh the two reports of child abuse in the DFYS records.

Ms. Winchell added that Mr. Tern's written explanation of the 1990 event convinced her she had made the correct decision. In that explanation, Mr. Tern said that his wife "asked me to start spanking Jefford to control his behavior." Ms. Winchell said she was concerned that he was putting the responsibility for the spanking on someone else.

She said she could not explain how Mr. Tern was employed for more than three years without DFYS opposition at another state-licensed childcare facility. His job there was nearly identical to the one he applied for with McAuley Manor.

Ms. Winchell admitted she is "tough when it comes to licensing," and said she is still comfortable with her decision against allowing Mr. Tern

## **ANALYSIS AND FINDINGS**

#### Standards

The Ombudsman analyzes a complaint in relation to standards found in Alaska state regulations.

The first allegation is that DFYS acted unreasonably. The Office of the Ombudsman Policies and Procedures manual at 4040(2) defines unreasonable as:

- (A) a procedure adopted and followed by an agency in the management of a program is inconsistent with, or fails to achieve, the purposes of the program,
- (B) a procedure that defeats the complainant's valid application for a right or program benefit, or
- (C) an act that is inconsistent with agency policy and thereby places the complainant at an disadvantage to all others.

The second allegation is that DFYS took action unsupported by an adequate statement of reasons. The Office of the Ombudsman's Policies and Procedures Manual at 4040(13) defines unsupported by an adequate statement of reasons:

Unsupported by an adequate statement of reasons means:

- (A) the complainant's concerns are not addressed or explained in the decision directly and completely;
- (B) the decision of the agency does not plainly state the rule of law on which it is based;
- (C) there is insufficient support for the factual assertions and legal conclusions:
- (D) the reasons provided are not comprehensible;
- (E) documentation appropriate to the decision has not been included.

#### What DFYS Records Show

DFYS regulations at 7 AAC 50.210 prohibit alleged perpetrators of child abuse from working in a childcare facility. That same regulation requires DFYS to search its child protection records to identify any alleged child abusers who are being considered for employment in licensed childcare centers.

When DFYS disallowed Mr. Tern's employment at McAuley Manor, and when the ombudsman investigator made initial inquiries about his complaint, DFYS maintained that its computer records identify Mr. Tern as the alleged perpetrator in a substantiated report of child abuse. With this record of child abuse, DFYS argued, it was compelled by its regulations to reject Mr. Tern's employment at McAuley Manor. However, DFYS has no such record.

DFYS admits that PROBER® entries are not checked for accuracy, and the two PROBER® records regarding reports of child abuse against Jefford Tern, by way of illustration, contain at least three errors. The first is the absence of an alleged perpetrator in the 1990 report, the second is the misidentification of James Tern as James Swifte in the 1996 report, and the third is the erroneous RAT score of zero entered also for the 1996 report. Yet, DFYS holds that the "S" in the 1990 report, signifying "substantiated," is accurate, although no other evidence corroborates it.

## **Choosing What to Believe**

Ms. Winchell said that, without an identified perpetrator in its record of the 1990 incident, DFYS relied on Mr. Tern's own memory of the nine-year-old incident to identify him as a child abuser. But DFYS disregarded the rest of Mr. Tern's memory. Mr. Tern recalled that the DFYS worker considered this a minor incident, that she cautioned him against using a switch to spank Jefford, to which he agreed, and that he never heard back from DFYS until the 1996 incident. Ms. Stadig, the child protection worker assigned to the 1990 investigation, said she routinely notifies parents if she substantiates a report of child abuse. Mr. Tern, who remembered far more about this incident than anyone else, did not recall such notification.

Bruising is one of the key indicators of child abuse. Mr. Tern said he does not believe that the spankings he administered to Jefford bruised him. Neither does he recall being told that Jefford had bruises or welts.

Ms. Winchell said she also considered that Mr. Tern was the subject of a second report of child abuse six years later when Jefford was a teenager. Although the finding in 1996 was unconfirmed, multiple reports of child

abuse, substantiated or not, are a warning sign to child protection workers. Since the original file still exists for this incident, we know a lot more about what happened. Child protection worker Wegand's case summary states that Jefford was "a difficult teenager and displays a lot of attention seeking behavior." She also wrote that Jefford denied that his father physically abuses him.

## The Weight of Experience

The Ombudsman believes that DFYS has a primary responsibility for the safety of children, regardless of other considerations. DFYS, having destroyed its file of the 1990 incident, had only an incomplete or possibly inaccurate computer record of child abuse in Mr. Tern's home. Ms. Winchell prudently investigated further. When she learned from Mr. Tern that he had spanked Jefford, precipitating the 1990 report of harm, she decided: Mr. Tern was the alleged perpetrator of a substantiated incident of child abuse. But believing doesn't make it so, and DFYS records still do not show that Mr. Tern is such an alleged perpetrator.

Lacking the records to deny Mr. Tern's employment based on 7 AAC 50.210(c)(1), DFYS should have looked at Mr. Tern in light of 7 AAC 50.210(a) and (b):

- (a) An adult having regular contact with children in a facility and a caregiver of any age must be a responsible individual of reputable character who exercises sound judgment.
- (b) A caregiver in a full time care facility must have the capacity to deal with frustration and conflict and the ability to work with children who, because of the children's background and experience, might express themselves negatively toward the caregiver.

This allows DFYS to look at Mr. Tern's entire record and weigh the evidence. Weighing against Mr. Tern are two reports of harm regarding his interactions with Jefford. We have Mr. Tern's admissions that he spanked Jefford with a stick and that he threw a boot in his direction. On the positive side we have Jefford's statement to a child protection worker that his father didn't physically abuse him and the low RAT scores recorded by two DFYS investigators.

The best predictor of a person's behavior or job performance is that person's past behavior or performance in a similar job. Mr. Tern has worked with troubled youth successfully without negative incident for five-and-a-half years. During that time, he spent 39 months in a position

nearly identical to the one he sought at McAuley Manor. In that time, Mr. Tern's employers evaluated his performance, scoring him high in the same characteristics required by 7 AAC 50.210(a) and (b): judgment, responsibility, and the ability to deal with conflict and with children who "may express themselves negatively toward the caregiver." If doubt remained as to Mr. Tern's fitness to work with children, DFYS could have exercised its discretion under 7 AAC 50.210(d):

A facility may and the division will, in its discretion, require that a person having regular contact with children in a facility provide an evaluation from a probation, health, or mental health professional affirming that the person is free from problems that can be detrimental to the health, safety, or well-being of a child in the facility.

## **Findings**

The first allegation in this complaint against DFYS is that the agency unreasonably refused to approve Mr. Tern's employment at McAuley Manor because of a minor incident of child abuse nine years ago.

In 7 AAC 50.210(c)(1), DFYS has a straightforward obligation. If the agency's records show that Mr. Tern was an alleged perpetrator of a substantiated report of child abuse, it must not allow him to work at a licensed childcare facility. Conversely, since the agency records do not show Mr. Tern to be such a perpetrator, it should not use section .210(c)(1) to disallow his employment.

In this case, the agency's procedures were inconsistent with the purposes of the program as laid out in 7 AAC 50.210(c)(1) and .210(f). The procedure defeated Mr. Tern's valid application for employment at a state-licensed childcare facility. Consequently, the Ombudsman finds Allegation 1 justified.

The second allegation in this complaint is that DFYS failed to support its disapproval of Mr. Tern's employment with an adequate statement of reasons. Without the original file, DFYS had insufficient support for its assertion that Mr. Tern was a child abuser and is unable to provide documentation appropriate to its decision. Consequently, the Ombudsman finds Allegation 2 justified.

## **Agency Response**

In its response to the Ombudsman's preliminary report, DFYS did not oppose these findings.

### RECOMMENDATIONS

The ombudsman investigator enjoyed excellent cooperation from DFYS staff throughout this investigation. Assistant Ombudsman Kissel wanted to acknowledge specifically the participation of DFYS staff in discussions of several of the recommendations presented below. Mr. Kissel discussed possible recommendations with Mr. Sheridan and later with DFYS Director Theresa Tanoury, Program Administrator Janna Stewart, and Development Specialist Tim Spengler.

#### **Records Retention**

The cause of this investigation is DFYS' records retention policy. If the records of the 1990 incident were still available, this investigation may have been unnecessary. The agency and Mr. Tern would have been able to know the facts of that 1990 investigation and the conclusions of the social worker. DFYS would not have been placed in the uncomfortable position of defending its action based on a partial computer record and selected portions of Mr. Tern's memory. Mr. Tern would have known for certain what the social worker determined and why.

DFYS regulations (7 AAC 50.210) are clear that anyone found to be the alleged perpetrator of a substantiated report of child abuse may not have access to children in a licensed childcare facility. Since the regulation contains no time limit, it is a lifetime ban. Yet the records of an incident leading to the ban are kept for a minimum of four years. At most they are kept for six years after the child involved reaches majority. This is not reasonable. A person denied employment or the opportunity to live at a childcare facility has a right to review and contest the facts precipitating the ban as long as the ban has effect. Consequently, the Ombudsman recommends:

Recommendation 1: DFYS should, by changing its regulations or its records retention schedule, or both, keep its records of substantiated child abuse reports as long as the alleged perpetrator is banned from licensed childcare facilities.

In her January 3 response to the Ombudsman's preliminary report, Director Tanoury agreed with this recommendation. She wrote:

In response to the problems illustrated in this investigation, the retention schedule will be amended to require extended retention periods of all substantiated reports of harm. This will ensure that documentation of any incident that affects an individual's eligibility to have access to children in a licensed facility must be

retained in hard copy for a period of time yet to be determined. The records would be retained in microfilm or in another electronic archival media for a period of time during which each individual's access to children would be proscribed based on those records.

#### **Review Procedures**

In her findings, the Ombudsman objected to DFYS' use of 7 AAC 50.210(c)(1) to ban Mr. Tern from childcare facilities, because DFYS had no record naming Mr. Tern as an alleged abuser. The Ombudsman also believed that DFYS should have reviewed Mr. Tern's qualifications using the rest of that section of the regulation. Consequently, the Ombudsman recommends:

Recommendation 2: DFYS should establish procedures for reviewing the qualifications of persons having regular contact with children in a licensed childcare facility. These procedures should limit the use of 7 AAC 50.210(c)(1) to cases where DFYS has a record naming the person as an alleged child abuser. The procedure should also encourage the use of 7 AAC 50.210(a), (b) and (d) where the reviewer has other concerns about the person.

Director Tanoury responded:

DFYS agrees that procedures for reviewing records under 7 AAC 50.210 are necessary, and will issue immediate instructions to staff regarding the review of records pursuant to this regulation. Ultimately these instructions will be incorporated into the Licensing Policy and Procedures Manual.

The instructions will reflect the caution required when using PROBER® records to limit individuals from working, volunteering, or residing in child care facilities pursuant to 7 AAC 50.210. The data entry for those records must be complete, the abuse or neglect must be substantiated, and the individual must be identified as the perpetrator. If there is no substantiation or identification, or if no documentation exists from which an inaccurate or incomplete PROBER® entry can be supplemented, the entry should not be used as the basis for a 7 AAC 50.210(c)(1) prohibition. Instead, as discussed below, the assessment of the individual's suitability should proceed, as appropriate, under 7 AAC 50.210(c)(2), (c)(3), (c)(4), or (c)(5), or under 7 AAC 50.210(a), (b), or (d).

Additional guidance regarding the examination of the quality of the information relevant to those alternate subsections will also be provided. For example, identification must be confirmed, and there must be adequate documentation of the problem...which may be related to "capacity" or "ability" under subsection (b); to physical, mental health, or behavioral problems under (c)(2) or under (d); to domestic violence or substance abuse under (c)(3); to prior adverse licensing action under (c)(4); or to criminal justice records under (c)(5).

#### The Value of PROBER®

Although Recommendation 1 can correct future problems, DFYS still has at least six years of computer records lacking corroborative documentation. The ombudsman investigator learned that DFYS does not control PROBER® records for accuracy or even completeness, making these records a weak foundation for decision making. Still, the records are critical as a database of alleged child abusers, and it would be irresponsible to disregard them. Consequently, the Ombudsman recommends:

Recommendation 3: DFYS should establish procedures for using the uncorroborated PROBER® data in relation to 7 AAC 50.210. The procedures should provide that DFYS not base decisions made under this section solely on uncorroborated PROBER® data that is contested by the alleged perpetrator.

In response, Director Tanoury wrote:

DFYS agrees with this proposed recommendation. As described above, the use of existing PROBER® data will be clarified. Cases in which PROBER® data entry is flawed or there is a failure of underlying documentation, will be assessed in their totality, in order to evaluate risks to children and to provide fair notice and due process to applicants. Continuity and accuracy in regard to ongoing PROBER® data entry and data use practices, particularly in regard to the identity of perpetrators in substantiated cases, will be ensured though division policy and procedure.

#### Relief for Mr. Tern

DFYS led Mr. Tern to believe that he was identified in DFYS records as a child abuser. Similarly, DFYS told the ombudsman investigator that its records showed that Mr. Tern was an alleged perpetrator of

substantiated child abuse. The Ombudsman does not believe this deception was intentional but rather the result of imprecision either in language or logic, mixing together parts of an incomplete computer record with parts of Mr. Tern's own recollection.

Ms. Winchell, the DFYS licensing supervisor in Anchorage, indicated that she had concerns about Mr. Tern's qualifications to work in a licensed childcare facility that went beyond the incomplete computer record. She had concerns about the 1996 unconfirmed report and about Mr. Tern's explanation of events, which she characterized as an attempt to shift the blame for the 1990 incident to his ex-wife. If Ms. Winchell had examined Mr. Tern's proposed employment at McAuley Manor under 7 AAC 50.210(a), (b) and (d) as the Ombudsman recommends, she may still have denied approval for him. In such a case, however, Mr. Tern would at least have been accurately informed about the reason for the denial and could have made a knowledgeable choice about whether to appeal Ms. Winchell's decision through the DFYS grievance procedure.

Fortunately, this incident did not destroy Mr. Tern's career. He was hired recently to work with troubled young people in another area. Still, the Ombudsman believes DFYS should acknowledge that it made mistakes in reviewing Mr. Tern's qualifications to work at a childcare facility. Consequently, the Ombudsman recommends:

Recommendation 4: DFYS should apologize to Mr. Tern for misleading him about its computer record of the 1990 incident and for inappropriately applying 7 AAC 50.210(c)(1) to disqualify him from the job at McAuley Manor.

In her response, Director Tanoury agreed with the proposed recommendation and said DFYS would write an apology to Mr. Tern.

DFYS agreed with the Ombudsman's findings and recommendations and began remedial actions. As a consequence, the Ombudsman closed this complaint as rectified.