Ombudsman Complaint A2013-0776

Contents

State of Alaska
Ombudsman

INVESTIGATIVE REPORT

(Public Report per AS 24.55.200)

Ombudsman Complaint A2013-0776

February 25, 2016

This report has been redacted to remove confidential information and other information that would identify the complainants per AS 24.55.160 and AS 24.55.200.

SUMMARY OF COMPLAINTS

The Ombudsman received more than a dozen separate complaints against the Department of Health and Social Services (DHSS) from 2012 through 2015 regarding the DHSS Background Check Program (BCP). The program, created by law in 2005[1], established background check requirements for persons and entities licensed or certified by DHSS, or eligible to receive payments from DHSS to care for individuals served by Department programs.

The complainants were employed as personal care assistants for the elderly and disabled, applying for such employment, or enrolled in college programs requiring field work with children in a licensed child care facility.[2] As a condition of employment or participation in class fieldwork, the complainants were required to submit to a DHSS background check.

The Department determined that each of the complainants had a "barrier condition" barring them from work with children and vulnerable populations in licensed care facilities. These barrier

[1] AS 47.05.300-390.

[2] A personal care assistant, or PCA, assists clients with functional disabilities to perform daily living activities such as bathing, dressing, eating, medication management, and toileting. The Alaska Division of Senior and Disabilities Services within DHSS administers the Alaska PCA Medicaid Program.

conditions resulted from past involvement in an Office of Children's Services (OCS) child protection case, or involvement in a Child In Need Of Aid (CINA) case in the court system. For each of the complainants, involvement in these cases had occurred well in the past – at least five and in some cases more than 20 years previously. The complainants assert that the Department unreasonably restricted their ability to obtain education and employment.

The Ombudsman determined that, for many of these complainants, there was probably no valid reason to limit their contact with children or vulnerable adults. Among other concerns, the Ombudsman determined that the manner in which the Background Check Program is being administered violates due process requirements, is unfair, overly broad, and unreasonably harsh.

The Ombudsman also found that the Department had failed to correctly apply statutes and regulations, and to consistently administer the program according to standards. As a result, affected individuals have found it difficult to understand and exercise their rights to challenge a barrier determination.

The harm suffered by the complainants and similarly situated persons is substantial: diminished educational and career opportunities, denial or loss of employment, damaged reputations, and the financial burdens of not being able to find or retain employment.

Because of the number of complaints and broad scope of issues, the Ombudsman opened an investigation on her own motion to collectively address the issues raised by the complainants, as well as related problems identified by the ombudsman.

Summaries of the individual complaints that prompted this investigation are included in Appendix A.

Method of Investigation

Assistant Ombudsman Charlsie Huhndorf-Arend and Assistant Ombudsman Kate Higgins investigated this complaint and gave notice of investigation to then-DHSS Commissioner William Streur on June 24, 2013. Assistant Ombudsman Denise Duff assisted in investigation of individual cases in this report and Assistant Ombudsman Dale Whitney assisted in production of this report.

The Ombudsman forwarded the preliminary report to DHSS Commissioner Valarie Davidson on October 9, 2015 with a requested response date of November 12, 2015. On November 2, 2015, Commissioner Davidson requested an additional two months to respond. The ombudsman granted the two months extension and the Department ultimately responded on January 15, 2016.

During investigation of this complaint, Ms. Huhndorf-Arend and Ms. Higgins reviewed Alaska law and division policies and procedures. In addition, the investigators requested and reviewed OCS and Division of Health Care Services (DHCS) case management and program records as well as relevant Office of Administrative Hearings case files. The investigators also discussed the complaint issues at length through in-person or telephonic interviews and/or numerous e-mails with the following individuals:

- Stacie Kraly, Chief Assistant Attorney General, Department of Law
- Carla [Raymond] Erickson, Chief Assistant Attorney General, Department of Law
- Ree Sailors, then-Deputy Commissioner, Department of Health and Social Services
- Jane Urbanovsky, Certification and Licensing Chief and Background Check Manager, Division of Health Care Services

- Tracey Marshall, Background Check Program Coordinator, Division of Health Care Services
- Teresa Narvaez, former Background Check Program Manager, Division of Health Care Services
- Naomi Harris, Social Services Program Officer, Office of Children's Services
- Karilee Pietz, Social Services Program Officer, Office of Children's Services
- Carol Downey, Medical Assistance Administrator, Division of Senior and Disability Services
- Shelby Larsen, former Division of Senior and Disabilities Services Variance Review Committee Chair

Ms. Huhndorf-Arend also interviewed most of the complainants presenting to the ombudsman or reviewed their cases for this report.

BACKGROUND

The DHSS Division of Health Care Services maintains and operates the Background Check Program, or BCP. Since its implementing regulations came online in 2007, the BCP has processed more than 148,000 background checks.

According to its website,

> The Department of Health and Social Services (DHSS) Background Check Program (BCP) provides centralized background check support for programs that provide for the health, safety, and welfare of persons who are served by the programs administered by the Department. The BCP program processes fingerprint-based criminal history checks for individuals associated with licensed and/or certified entities under the authority of DHSS or are otherwise eligible to receive payments, in whole or in part, from the Department.[3]

When a person or entity requests a background check from the Department, the subject of the check must sign a release authorizing the background check. The BCP then performs federal and state fingerprint-based criminal history records checks, civil court records checks, and civil abuse and neglect registry records checks from Alaska and those states where the individual has lived over the prior 10 years. The records searched by BCP during the background check process include:

- **Alaska Public Safety Information Network (APSIN)** – The state central repository for Alaska criminal justice information.
- **Alaska Court System/CourtView and Name Index** – The state civil and criminal court case record management system.
- **Juvenile Offender Management Information System (JOMIS)** – The state central repository for juvenile offense records.
- **Certified Nurse Aide Registry** – This is a professional registry containing the names of individuals certified to perform duties as a Certified Nurse Aide. This registry also serves as an abuse registry in some states.

[3] http://dhss.alaska.gov/dhcs/Pages/cl/bgcheck/default.aspx. Last visited October 6, 2015.

- **National Sex Offender Registry** – The federal central database of registered sex offenders from all 50 states, the District of Columbia, Guam, and Puerto Rico.
- **Office of Inspector General Exclusions Database** – A federal database of information relating to individuals who are excluded from participation in Medicare, Medicaid, and all federal health care programs.
- **Alaska OCS Central Registry** – The state central database of all investigated reports of child abuse and neglect, which is maintained by the Office of Children's Services.
- **Centralized Registry** – Not to be confused with the OCS Central Registry, the Alaska Background Check Program is supposed to maintain its own database of individuals who have been investigated and found by a state agency to have committed abuse, neglect, or exploitation of a child or vulnerable adult, or medical assistance fraud. Contrary to the legal mandate created by AS 47.05.330 this registry has never actually been created and maintained.

If no disqualifying information is found in any of the above databases, the Background Check Program clears the individual in its database and sends a letter to the individual and the employer stating the individual is cleared for work or to volunteer.

The subject will not be cleared if the background check shows that the subject has been convicted of a "barrier crime" or if the subject is saddled with a "barrier condition." A barrier crime is any offense listed in 7 AAC 10.905. A barrier crime may permanently disqualify an individual from working or volunteering with vulnerable populations, or it may result in a temporary disqualification period of one to 10 years, depending on the nature and severity of the offense.

At least in theory, a "barrier condition" is found when the subject has been found by an administrative agency or civil court in a decision, order, judgment, or adjudication to have abused, neglected, or exploited a child or vulnerable adult as described in AS 47.05.330 and 7 ACC 10.990. Although the law does not require it, the BCP considers people with barrier conditions to be permanently disqualified from ever working or volunteering in occupations with direct access to vulnerable populations. Unlike the case when a barrier crime is found, the BCP makes no evaluation of the nature and severity of the barrier condition. Even the most minor finding by a civil agency, once it is found to be a barrier, will permanently disqualify the subject from an array of occupations and business activities for the rest of his or her life.

Upon finding a barrier, the Background Check Program sends a letter to the individual explaining the reason for the decision, the specific nature of the barrier crime or condition, the applicable barrier disqualification time, and the available review processes. A letter sent to the employer merely states that a barrier crime or condition exists, states the applicable disqualification time, and provides an explanation of the variance process. Employer letters do not disclose the specific nature of the barrier crime or condition or the evidence used by the Department to make the decision.

A background check clearance remains valid for six years from the date of issuance. However, an individual is required to submit to a new background check through the Background Check Program if the individual leaves a job for more than 100 days or changes employment.

Individuals and employers both have the right to challenge barrier determinations. Individuals may request reconsideration under 7 AAC 10.950, while employers may request variances under

7 AAC 10.930. Reconsideration requests must be made in writing to the Background Check Program within 30 days of a barrier determination. The BCP has another 30 days to confirm or rescind the original determination. A decision by the Background Check Program to uphold the barrier determination is a final agency decision, unless an employer entity applies for and is granted a variance on behalf of the individual. Decisions on reconsideration may be appealed to Superior Court.

Historically, the BCP has only allowed individuals to use the reconsideration process to correct clerical errors, such as erroneous identifying information that results in misidentification. Contrary to regulation, the Background Check Program did not allow individuals to use the reconsideration process to show that a barrier should be cleared for other reasons, such as extenuating circumstances or relevancy of the barrier crime or condition to employment.

After discussions with ombudsman staff, the BCP agreed to allow individuals to request reconsideration for reasons other than mistaken identity.

Potential employers may seek a variance to hire an individual with a barrier crime or condition. However, the individual must first be willing to disclose the specific details of the barrier to the prospective employer. If the employer still wishes to hire the individual or allow them to volunteer, the employer is responsible for requesting the variance.

When an employer chooses to proceed with a variance request, it is responsible for completing and submitting the request to the division with oversight authority over the entity or employer. Individuals may not apply for variances on their own behalf unless they are also the owner, operator, or administrator of the licensed entity. A variance request must include copies of the records relied upon in making the barrier determination, which, theoretically, the individual applicant should have access to. The variance request must also demonstrate how the health, safety, and welfare of vulnerable populations will be protected.

The appropriate oversight division forwards the variance request to the Department's Variance Review Committee, which reviews the request and makes a recommendation to the commissioner to approve or deny the variance. The committee may also recommend conditions to a variance. The commissioner must issue a written decision within 30 days. A decision to deny the variance must state the reason for the denial and that the employer may request reconsideration. If the employer requests reconsideration, the commissioner has 30 days to issue a final agency decision, which may be appealed to superior court.

In May 2014, the Department proposed new regulations that would have, among other changes, allowed individuals to request a variance, rather than having to rely on their prospective employer to request one on their behalf. The Department failed to adopt that regulations package but issued another one in late December 2015. The Governor also introduced legislation in January 2016 that would change the statutory structure of the BCP. As of this writing, the outcome of both the proposed statutory and regulatory changes are yet to be determined.

INVESTIGATION

The Ombudsman opened a complaint file with the following allegations, stated in terms that conform to AS 24.55.150, which authorizes the Ombudsman to investigate complaints about administrative acts of state agencies:

Allegation One: Contrary to Law – The Department of Health and Social Services has failed to establish and maintain a Background Check Program Centralized Registry, as required by AS 47.05.330, of individuals who have been investigated and found by a state agency to have committed abuse, neglect, or exploitation of a child or vulnerable adult, or medical assistance fraud.

Allegation Two: Unreasonable – The Department of Health and Social Services has failed to consistently apply statutes, regulations, standards, and processes in administering the Department's Background Check Program.

Allegation Three: Unfair – The Department of Health and Social Services regards all barrier conditions arising from civil cases as a permanent bar to employment, while conviction of a barrier crime for more serious conduct may prevent employment for only limited periods of time.

Allegation Four: Contrary to Law – By regarding probable cause findings in Child In Need Of Aid cases as barrier conditions, DHSS violates 7 AAC 10.955(n) which establishes the correct standard as "preponderance of the evidence."

Allegation Five: Unfair – The Office of Children's Services regulations at 7 AAC 54.050 - .060 prohibit the release of child protection case records used by the Department in making a barrier condition determination to an affected individual seeking to review and challenge that decision.

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 **Ombudsman Policy 4060.3** 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.

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The ombudsman acknowledges the Department's responsibility and substantial interest in protecting vulnerable populations. At the same time, the ombudsman is mindful of the private interests at stake for implicated individuals, as the potential adverse consequences that flow from a barrier determination are severe and include the inability to pursue a chosen career or education path, loss of employment or educational opportunities, and reputational and financial harm.

These consequences may last for a significant portion of an individual's life, or in the case of a barrier condition, for a lifetime.

The Department can and must do a better of job of balancing these competing interests. Accordingly, the ombudsman has issued findings and recommendations below, some of which will require legislative action, to improve the Department's background check system.

Allegation One —Analysis

> ***Contrary to Law – The Department of Health and Social Services has failed to establish and maintain a Background Check Program Centralized Registry, as required by AS 47.05.330, of individuals who have been investigated and found by a state agency to have committed abuse, neglect, or exploitation of a child or vulnerable adult, or medical assistance fraud.***

The Office of the Ombudsman's Policies and Procedures Manual at 4040(1) defines *Contrary to Law* as:

> (A) failure to comply with statutory or regulatory requirements;
>
> (B) misinterpretation or misapplication of a statute, regulation, or comparable requirement;
>
> . . .

The Alaska Legislature enacted the background check statute in 2005. A portion of this statute, AS 47.05.330(a) states that

> The department *shall by regulation provide for a centralized registry* to facilitate the licensing or certification of entities and individual service providers, the authorization of payments to entities or individual service providers by the department, and the employment of individuals by entities and individual service providers. [Emphasis added]

The implementing regulation is located at 7 AAC 10.955 and took effect February 9, 2007. According to that regulation, "a centralized registry is established in the Department" and "an individual whose name appears on the centralized registry may not be associated with an entity or individual service provider in a manner described in 7 AAC 10.900(b) unless a variance is granted under 7 AAC 10.935." The manner of association described in 7 AAC 10.900(b) is an employer-employee relationship.[4]

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[4] (b) The provisions of 7 AAC 10.900 - 7 AAC 10.990 apply to an entity or individual service provider seeking licensure, certification, approval, or a finding of eligibility to receive payments from the department. Each individual who is to be associated with the entity or provider in a manner described in this subsection must have a valid criminal history check conducted under 7 AAC 10.900 - 7 AAC 10.990 if that individual is 16 years of age or older and will be associated with the entity or provider as
(1) an administrator or operator;
(2) an individual service provider;
(3) an employee, an independent contractor, an unsupervised volunteer, or a board member if that individual has
(A) regular contact with recipients of services;
(B) access to personal or financial records maintained by the entity or provider regarding recipients of services; or
(C) control over or impact on the financial well-being of recipients of services, unless the only recipient whose financial well-being is affected is a
(i) relative of the individual who has authorized that individual to make financial decisions for that relative;

The Background Check Program Centralized Registry was intended to contain a list of names of people who are not eligible to work as service providers to children and vulnerable adults because of conduct that showed them to be a risk or threat. The Centralized Registry was intended to collect disqualifying information from a variety of sources. Anyone who had committed a disqualifying crime, as defined by regulation, would have their name added to the registry. In addition, anyone found to have committed abuse, neglect, exploitation or medical assistance fraud in this state or another jurisdiction, either by a court or by "decisions, orders, judgments, and adjudications" from administrative agencies, would be added to the registry.[5]

The law further required any person or entity working for a covered program to self-report to the centralized registry if they had been found to have committed any specified misconduct, and it requires employers and volunteer agencies to report any knowledge of such acts.

Centralized Registry Statute Requires Due Process

The law provides:

> A person about whom information is placed in the registry shall be notified of the placement by the department and may request the department to delete or modify the information to correct inaccuracies. The department shall investigate the request and make necessary deletions or modifications if the department finds no relationship between the information placed in the registry and the risk of harm to the entity's clientele.[6]

Legislative history shows that legislators expected the centralized registry program to provide a process for people reported to the registry to have allegations investigated and deleted if they were lacking in merit.

In February 2007, DHSS adopted regulations to implement the background check statutes.[7] The regulations established procedures for DHSS background checks, and uniform definitions and

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(ii) recipient who has executed a power of attorney for that individual to make financial decisions for that recipient; or
(iii) recipient for whom a court has authorized that individual to make financial decisions;
(4) an officer, director, partner, member, or principal of the business organization that owns an entity, if that individual has
(A) regular contact with recipients of services;
(B) access to personal or financial records maintained by the entity or provider regarding recipients of services; or
(C) control over or impact on the financial well-being of recipients of services, unless the only recipient whose financial well-being is affected is a
(i) relative of the individual who has authorized that individual to make financial decisions for that relative;
(ii) recipient who has executed a power of attorney for that individual to make financial decisions for that recipient; or
(iii) recipient for whom a court has authorized that individual to make financial decisions;
(5) except as provided in (c) and (d)(10) of this section, an individual who resides in a part of an entity, including a residence if services are provided in the residence, if the individual remains, or intends to remain, in the entity for 45 days or more, in total, in a 12-month period; or
(6) except as provided in (c) and (d) of this section, any other individual who is present in the entity and would have regular contact with recipients of services

[5] AS 47.05.330(b)(1)
[6] AS 47.05.330(j)
[7] 7 AAC 10.900-990

standards for barrier crimes and barrier conditions. The regulations also further established the Centralized Registry.

The Background Check Program Centralized Registry is also referred to by the Department as the "employee misconduct registry."

The statute contemplates that employer reporting of misconduct would be a significant source of the information in the registry. As a condition of licensure or certification, or eligibility to receive payments from the Department, an entity or individual service provider must agree to timely report complaints of suspected abuse, neglect, or exploitation of child or vulnerable adult, or medical assistance fraud by an employee or volunteer to the Department.[8] In addition, entities and individual service providers are also required to timely notify the Department of adjudicated court findings that an entity or individual service provider or employee or volunteer committed of abuse, neglect, or exploitation of child or vulnerable adult, or medical assistance fraud.[9]

The Department is responsible for investigating employer reports of abuse or neglect to determine whether the complaint is substantiated. For substantiated reports, the Department is supposed to notify the individual of the finding, the Department's intent to place the individual on the Background Check Program Centralized Registry, and the available hearing process to challenge the finding. Following the opportunity for a hearing, the Department shall list an individual with a substantiated finding on the Background Check Program Centralized Registry.

BCP Centralized Registry Does Not Exist and Never Has

The ombudsman learned in June 2013, after months of discussion with both DHSS and the Department of Law about the ongoing complaints received by the ombudsman, that the Background Check Program Centralized Registry does not actually exist, and that it never has. Some eight years after the Legislature directed DHSS to establish the Centralized Registry, and six years after the implementing regulations took effect, there is still no Centralized Registry. There is no list, database, or spreadsheet anywhere that one could point to and say "this is the Background Check Program Centralized Registry."

Instead of maintaining a Centralized Registry as required by law, the Department performs background checks on prospective employees by simply referring the person's name to other agencies that do maintain registries and databases, with heavy reliance on the Office of Children's Services. The Department argues that there is a statutory basis for this practice. The argument is complicated and somewhat convoluted, but ultimately it fails.

The Department relies on AS 47.05.310, which addresses the licensing and certifying of *entities*, to justify finding barrier conditions for *individuals* seeking employment on a case-by-case basis. Reliance on this statute for this purpose is misplaced, as a person who is trying to get a job with an entity such as a daycare center is not the same as an entity such as a daycare center obtaining a license or certificate.

The statute in question, AS 47.05.310(c), reads:

> The department may not issue or renew a license or certification for an entity if an individual is applying for a license, license renewal, certification, or certification renewal for the entity and that

[8] AS 47.05.330(c) – (f), 7 AAC 10.925
[9] AS 47.05.330(c) – (f), 7 AAC 10.925

> (1) individual has been found by a court or agency of this or another jurisdiction to have neglected, abused, or exploited a child or vulnerable adult under AS 47.10, AS 47.24, or AS 47.62 or a substantially similar provision in another jurisdiction, or to have committed medical assistance fraud under AS 47.05.210 or a substantially similar provision in another jurisdiction; or
>
> (2) individual's name appears on the centralized registry established under AS 47.05.330 or a similar registry of this state or another jurisdiction.

Assistant Attorney General Stacie Kraly contends on behalf of the Department that AS 47.05.310(c)(1) applies to prospective employees because AS 47.05.310(h) states that "an individual service provider is subject to the provisions of (a) - (g) of this section as if the individual service provider were an entity subject to those provisions." The Department's position appears to be that every prospective employee of an entity is himself an individual service provider, and thus must be treated as an entity seeking a license or certification under AS 47.05.310(c)(1).

An "individual service provider" is defined as "an individual described in AS 47.05.300(a), and includes those listed in AS 47.05.300(b)."[10] The statutes referred to by the definition "apply to any individual or entity that is required by statute or regulation to be licensed or certified by the Department or that is eligible to receive payments, in whole or in part, from the Department to provide for the health, safety, and welfare of persons who are served by the programs administered by the Department," including public home care providers described in AS 47.05.017, providers of home and community-based waiver services [11]financed under AS 47.07.030(c), and case managers to coordinate community mental health services under AS 47.30.530.

Statutory Argument Fails Regarding Persons Seeking Jobs at Care Facility

The Department's statutory argument fails because a person applying for a job at a care facility is not an "individual service provider" according to the statutory definition. The employee is not required to be licensed or certified, and is not eligible to receive payments from the Department. If individuals decide to forgo looking for a job with an agency or entity and instead start their own businesses providing care services, then they become "individual service providers" who must apply for licenses, and may be denied licenses of their own.

However, the fact that these people might not be able to get their own licenses does not necessarily mean they should be unable to obtain employment with an entity. The correct action is to notify such individuals that the Department will be placing their names on the Background Check Program Centralized Registry, and to then afford them the process of law that the statutes and regulations provide for. The Department's position that it may effectively bar people from

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[10] AS 47.05.390(7)

[11] Home and community-based service providers provide an array of services to individuals who are enrolled in and eligible to receive Medicaid waiver services. These waivers are offered so that individuals can receive a high level of services in their home or in the community as an alternative to institutional care. Examples of services provided by these providers are nursing case management, care coordination, transportation, respite care, residential supported-living services, habilitation services, etc. The individuals working with this population would need to be certified or licensed by the state and be able to pass a background check. PCAs often provide services to this population.

employment without proper due process under the authority of AS 47.05.310 is a disingenuous excuse for the Department's failure to establish and maintain its own centralized registry system as the law requires.

The argument that employees are the same as individual service providers is further debunked by examination of the entire statutory scheme. For example, AS 47.05.330(a) requires a "centralized registry to facilitate the licensing or certification of entities and individual service providers . . . and the *employment of individuals by entities and individual service providers*." [Emphasis added] Additionally, 7 AAC 10.900(b) specifies that all individuals associated with an entity must have a valid background check:

> . . . if that individual is 16 years of age or older and will be associated with the entity or provider as
>
> (1) an administrator or operator;
>
> (2) an *individual service provider*;
>
> (3) an *employee*, an independent contractor, an unsupervised volunteer, or a board member . . . [Emphasis added]

If an "individual service provider" and an "employee" were intended to refer to the same thing, there would be no need to include both as separate terms in the statutes and regulations. Read together, it appears that individual service providers and employees were envisioned as being different and distinct from each other.

Further, AS 47.05.310(c)(1) refers to the Department "licensing or certifying" an entity or individual service provider. None of the complainants that were barred were attempting to be licensed or certified. With the exception of one complainant, who was submitting to a background check in order to complete coursework at University of Alaska Anchorage, all of the ombudsman complainants were personal care assistants desiring to work for, or already working for, a licensed direct care service provider agency.

The regulations covering personal care assistant programs are found at 7 AAC 125.010 – 7 AAC 125.199. Detailed specifications of qualifications for people employed as personal care assistants are found at 7 AAC 125.090. This regulation details a number of qualifications for a personal care assistant, including age, education, and detailed letters of recommendation from persons who have known the applicant for more than three years. People employed as personal care assistants must pass a criminal history check, which includes clearance by the Centralized Registry. Although personal care assistants are not required to be licensed or certified by the department in order to be employed by a licensed agency, the Department is preventing prospective employees from working because they do not meet the more stringent requirements for licensure.

The Office of Administrative Hearings (OAH) has considered a case that is similar to the complaints lodged with the Ombudsman's office. In *In The Matter Of B.B.*[12] an administrative law judge considered a personal care assistant's appeal of a Departmental determination that she had a barring condition stemming from a prior Child in Need of Aid (CINA) finding of neglect. The decision stated, in part:

[12] *ITMO B.B.*, OAH No. 12-0206-SAN

> The letter [Notice of Barring Condition] cites AS 47.05.310(c)(1) for the alleged barring condition. Pursuant to that statute, a person who has been found to have committed abuse or neglect may not have certain licenses or certifications issued or renewed. Ms. B was not seeking a license or certification.

The administrative law judge determined that DHSS had failed to follow its regulations because it did not notify the appellant of her right to a hearing prior to placement on the registry. After analyzing the specifics of the case, the judge proposed ordering the agency to remove the appellant's name from the Centralized Registry, and the DHSS commissioner adopted the proposed decision. The judge also discussed the notice the appellant received, citing AS 47.05.310(c)(1) as the reason for her permanent bar, and wrote that the notice should have cited 7 AAC 10.900, as it addresses "employability, rather than the statutory provision related to licensing."

Lastly, the Department refers to an employment prohibition based on AS 47.05.310(c)(1) as a "barring condition" or "barrier condition." 7 AAC 10.990 provides definitions for terms used in the background check regulations, including:

> (7) "condition" means a barrier to association under 7 AAC 10.900(b) that results from
>
> (A) a matter described in AS 47.05.330(b)(1)(A) involving the abuse, neglect, or exploitation of a child or vulnerable adult; *and (B) the entry of that information in the centralized registry*. [Emphasis added]

Thus, by regulation, potentially negative information does not rise to the level of a barring condition until it has been entered into the Centralized Registry, with the requisite due process steps. With no Centralized Registry actually in existence, it is legally impossible for the Department to notify prospective employees that a barring condition prevents them from working for a covered employer.

In short, the Department appears to be using AS 47.05.310(c)(1) as a basis to bar prospective employees without going through the trouble of establishing the Centralized Registry and providing due process as required by law. This method of barring individuals from certain types of jobs also allows the Department to avoid giving those individuals the notice and hearing rights they would be entitled to if the Department planned, instead, to place the individual on the Centralized Registry.

Employers are Supposed to Report to the Centralized Registry

Employer-based reporting was intended to be a large part of the centralized registry. As a condition of licensure, employers are required to report a "court decision, order, judgment, or adjudication" that an employee or volunteer committed abuse or neglect within 24 hours.[13] Similarly, employers must also report any allegations of suspected abuse or neglect against an employee or volunteer that was alleged to have occurred within the past 10 years.[14]

[13] AS 47.05.330(d)
[14] AS 47.05.330(e)

Further, by regulation, licensed entities are required to monitor their staff to ensure they continue to meet the employability requirements of the background check law.[15] Failure to report cases of abuse or neglect may result in enforcement action against the entity.[16]

It is clear from the legislative history that listing on the Centralized Registry was intended to originate mostly from employer reports of suspected abuse, neglect, and exploitation. Then-Division of Public Health Deputy Director Virginia Stonkus testified on SB 125 before the Senate Health, Education, and Social Services Committee on March 14, 2005:

> The registry was originally envisioned to prevent individuals suspected of having committed specific crimes and who had resigned from their caretaker jobs from being hired to similar caretaker positions.[17]

The apparent point of the Centralized Registry was to create a database to prevent employees suspected of abuse or maltreatment from hopping from job to job and continuing to harm the vulnerable populations served by daycares, assisted living homes, and the like. Then-Public Health Director Dr. Richard Mandsager testified before the committee on April 6, 2005. Committee minutes of that meeting stated in part:

> Cases need to be captured where people leave employment before they are reported to the police. The question is how to get that information. He would like regulations requiring employers to report [to] the Department if someone leaves in lieu of getting reported to the police because of some abusive act they had committed.[18]

In committee hearings for HB 193, the companion bill to SB 125, then-Director Mandsager explained:

> [A centralized registry] exists today with certified nurse aid[e]s, presently administered by the Board of Nursing and the registry concept that's in this bill is modeled very heavily on what exists today for certified nurse aid[e]s.[19]

The Certified Nurse Aide Registry maintained by the Board of Nursing contains the names of certified nurse aides that have been found to have "committed abuse, neglect, or misappropriation of property in connection with their employment by a facility participating in the Medicaid or Medicare program."[20] Nurse aides who have been listed on the registry can have their names removed if, after a hearing, the aide establishes that the listing was the result of mistaken identity or that the finding of abuse or neglect has been set aside.[21]

Director Mandsager also said:

> What is envisioned is a registry in which the employers would make reports but the Department would have to have findings to which an employee would be able to contest and have administrative findings, before their name would go in.[22]

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[15] 7 AAC 10.925(a)
[16] 7 AAC 10.925(c)
[17] SB 125, Committee minutes, Senate Health, Education, and Social Services Committee, March 14, 2005
[18] SB 125, Committee minutes, Senate Health, Education, and Social Services Committee, April 6, 2005
[19] HB 193, Committee minutes, House Health, Education, and Social Services Committee, April 7, 2005
[20] AS 08.68.333
[21] AS 08.68.333(e) and 12 AAC 44.865(d)
[22] HB 193, Committee minutes, House Health, Education, and Social Services Committee, April 7, 2005

And, during an exchange with then-Rep. Sharon Cissna, Director Mandsager explained:

> The provider's responsibility is to report a concern, a suspicion, or a known activity and the Department's responsibility is to investigate and conduct some kind of process to reach a finding.[23]

Additionally, employers are *required* to report suspected abuse, or risk enforcement action against their license but the Department is only given permissive authority to report to the centralized registry. AS 47.05.330(g) provides that "notwithstanding any contrary provision of law, the Department may also submit information described in this section to the registry." [Emphasis added] The drafting distinction indicates that the registry was primarily intended to be employer-report driven.

At this time, the ombudsman is uncertain whether the system of employer-driven reporting envisioned by the background check statutes is even being utilized. In speaking with Background Check Program Manager Jane Urbanovsky, she noted that some of the larger facilities are filing reports but that the smaller "mom and pop" facilities are not. Whether this is because of an absence of instances of suspected abuse or neglect or because the "mom and pop" employers are unaware of their duty to report is unclear. Even if employers do report instances of abuse or neglect involving their clientele, it is unclear what happens to those reports because the BCP does not actually conduct investigations to determine whether any reports it receives are substantiated and the Centralized Registry does not exist to list the outcomes of those reports.

Allegation One —Findings and Recommendations One - Three

The ombudsman therefore finds the allegation that the Department has failed to establish and maintain a Background Check Program Centralized Registry as required by AS 47.05.330 of individuals who have been investigated and found by a state agency to have committed abuse, neglect or exploitation of a child or vulnerable adult, or medical assistance fraud, ***justified.***

The ombudsman proposed the following recommendations to rectify the problems identified in Allegation One:

Recommendation One:

DHSS should take immediate action to create the centralized registry as required by AS 47.05.330 and 7 AAC 10.955.

Recommendation Two:

DHSS should immediately stop using AS 47.05.310(c)(1) as a means of barring prospective employees from taking employment where they will have contact with vulnerable children and adults.

Recommendation Three:

DHSS should conduct a survey of covered entities to see how aware they are of their mandatory reporting duties and, if necessary, implement training for those entities as part of the licensure process.

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[23] HB 193, Committee minutes, House Health, Education, and Social Services Committee, April 7, 2005.

Allegation Two – Analysis

> ***Unreasonable – The Department of Health and Social Services has failed to consistently apply statutes, regulations, standards, and processes in administering the Department's Background Check Program.***

The Office of the Ombudsman's Policies and Procedures Manual at 4040(2) defines *Unreasonable* as:

> (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

DHSS Changes the Standard for Making a Barrier Condition Determination

In 2007, after the implementing regulations took effect, the Department began running background checks on prospective employees using the new consolidated statutes.

Between 2007 and March 2012, DHSS permanently banned individuals from employment if that applicant had a substantiated finding of abuse or neglect by the Office of Children's Services (OCS), regardless of whether the agency took any further action or intervention with that family.

In March 2012, the Department decided to change its practice, acknowledging that citizens with a substantiated OCS finding were not always notified of the agency's decision and their right to appeal. Because of the due process concerns, the BCP decided that only court-adjudicated CINA findings should be used as a barrier to employment.

The agency, however, has not informed those applicants who were barred from employment between 2007 and March 2012 because of an OCS substantiated report of harm that the standard has changed. It is conceivable that at least some of the applicants who were screened and barred under the prior standard would pass the background check under DHSS's current practice. And, because they were told that the ban was permanent, it is unlikely that those applicants who were previously barred would learn that the standard has changed and, thus, submit a new application.

DHSS Provides Inconsistent Access to the Reconsideration Process

An individual has the right to seek review of a barrier determination. Regulations provide two mechanisms for an individual to challenge a barrier determination – the reconsideration and variance processes.

Regulations at 7 AAC 10.950 provide that an individual may request reconsideration of a determination that a barrier crime or condition exists:

> (a) A request for reconsideration of a department decision under 7 AAC 10.900 - 7 AAC 10.990 must be submitted within 30 days after the requester receives the notice of the decision. The request for reconsideration must include
>
> > (1) the requester's name, mailing address, telephone number, and, if available, electronic mail address and facsimile number;

(2) a clear description of the department's decision to be reviewed; and

(3) a clear and concise statement of the reason for the request, including

(A) a statement of the nature and scope of the requester's interests, and an explanation of how and to what extent those interests would be directly and adversely affected by the decision;

(B) the contested terms and conditions of the department's decision, and any proposed alternatives; and

(C) copies of any documents or other information that would assist the department in its review.

. . . . .

During this investigation, the ombudsman learned the Department had only been allowing individuals to use the reconsideration process if they argued mistaken identity. If an individual did not seek reconsideration on this ground, the Department either dismissed or summarily denied their request.

The ombudsman found that this practice was inconsistent with the regulation, which appears to allow an individual to challenge a barrier determination through the reconsideration process for reasons other than mistaken identity.

The ombudsman discussed the apparent misapplication of regulations as well as concerns that individuals may have wrongfully been denied access to the reconsideration process with the Department. The Department acknowledged that the regulation allows for a more substantive review and agreed to change its practice.

In March 2014, the Department implemented changes to the reconsideration process. Individuals may now use the reconsideration process to challenge a barrier determination based on more substantive reasons such as extenuating circumstances or relevancy of the barrier crime or condition to employment. The Department also revised the *Notice of Barring Condition* letter to incorporate these changes.

The Department did not, however, notify individuals who were wrongfully denied access to the request for reconsideration process of this change or give them the opportunity to ask for reconsideration under the new standard.

And then, only two months after agreeing to expand the reconsideration process, allowing applicants to substantively challenge a barrier determination, the Department changed course again. On May 14, 2014, the Department issued draft regulations for public comment. One proposed change will codify its previous practice of only allowing reconsideration in cases of mistaken identity because the proposed regulation limits a request for reconsideration to "an error or mistake in fact of a Department decision."

The Department failed to adopt that regulatory change, however, and is now in the process of taking public comment on regulatory changes that would allow individuals to request a variance, instead of having to rely on a prospective employer to submit a request on their behalf.

DHSS Fails to Provide Notice of Opportunity to Challenge a Barrier Condition

7 AAC 10.955 (e) provides that

> . . . the department will notify any entity or individual service provider that made the report, and the individual who is the subject of the investigation, that the department has made a substantiated finding and that it intends to place the finding in the centralized registry. In the notice, the department will
>
> (1) describe the nature of the substantiated finding;
>
> (2) identify each statute or regulation that supports the finding;
>
> (3) state the effective date for placement in the registry; and
>
> (4) advise that the individual who is the subject of the investigation may request a hearing under (f) of this section.

However, rather than giving affected individuals advance notice and an opportunity to request a hearing, the Department simply bars individuals from employment based on their appearance in some other agency's database, most often the OCS Central Registry. Individuals receive no advance notice that the Department considers them unfit for employment because of their involvement in some past proceedings, such as a CINA case.

Throughout the legislative hearings for SB 125, which eventually became the background check law, and its companion bill, HB 193, however, the Department assured the Legislature that the registry would be replete with due process protections.

In a hearing for HB 193, the companion bill to SB 125, several legislators raised concerns about protecting employees from being placed on the registry due to personality conflicts with an employer or actions by a vindictive employer. Responding to those concerns, then-Deputy Director Stonkus explained:

> The issue of the registry would be, if there is a report . . . they would report to us, a concern for abuse, neglect, or exploitation, but that would be part of our investigation . . . to substantiate, and assure, that we found enough information based on that investigation to support a concern . . . the individual would be notified that we have come up . . . with substantial findings . . . they would have an opportunity to request a full review . . . making sure that it wasn't just a personality issue . . . if they declined . . . then the decisions would be made that they would be eligible for their name going on that registry. If they chose to do the hearing and we went through that process and that finding was upheld, then we have the adjudication, and the support . . . to put that individual's name on the registry.
>
> Throughout the whole process . . . [there would be] . . . the chance to go back and challenge that there was a finding that they thought was done in error . . . I think our concern and consideration, here, is wanting to be respectful of the folks who would be on that registry. [Ellipses in original][24]

In speaking for the Department, AAG Kraly said that "the name doesn't go on the registry until all of the adjudicatory due process provisions have been met."[25]

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[24] HB 125193, Committee minutes, House Health, Education, and Social Services, April 7, 2005
[25] HB 193, Committee minutes, House Health, Education, and Social Services, April 19, 2005

Contrary to their representations to the Legislature that the Centralized Registry would provide due process protections to individuals barred from employment, the Department is instead doing an end run around those very due process provisions established in both statute and regulation.

DHSS Does Not Conduct Relevancy Assessments as Required by Statute

When an individual challenges a barrier determination, the Department does not assess whether the conduct that led to the barring condition is relevant and substantially related to the employment and the individual's suitability to perform the job.

The Centralized Registry statute contemplates just such a review:

> A person about whom information is placed in the registry shall be notified of the placement by the department and may request the department to delete or modify the information to correct inaccuracies. The department shall investigate the request and make necessary deletions or modifications if the department finds no relationship between the information placed in the registry and the risk of harm to the entity's clientele.[26]

A barrier determination adversely impacts an individual's employment and education opportunities. In an effort to increase the due process protections for affected individuals, the Department should conduct a relevancy assessment during the barrier determination review process as contemplated in statute. For example, a person who has a barrier condition because they engaged in Medicaid fraud may not pose a risk to the public while working in a position that does not handle finances, such as providing direct services to clients. Yet that individual is permanently barred and, in order to work for a DHSS licensed entity, must wade through the cumbersome variance process.

DHSS Screening Practices are Under-inclusive of Valuable Information

In conducting a background check, the BCP is supposed to look for certain types of civil misconduct in addition to criminal history. Regardless of whether the agency is using AS 47.05.310(c)(1) or AS 47.05.330 to screen applicants, the Department is supposed to review for civil misconduct findings involving abuse, neglect, and exploitation involving children and vulnerable adults, as well as medical assistance fraud.

The Department, however, is only reviewing the applicant's child protection history. This means that, in screening and approving individuals to work with vulnerable populations, it may be missing valuable information about whether that person has ever been found by Adult Protective Services, the Long-Term Care Ombudsman, or the Medicaid Fraud Unit to have abused, neglected, or exploited an individual within the applicant's care.

The Department may argue that cases of Medicaid fraud would be uncovered during the criminal history portion of the background check. However, not every case of Medicaid fraud is, in fact, prosecuted and the Department misses all non-prosecuted cases of Medicaid fraud by failing to check with the state's Medicaid Fraud Unit when running a background check.

In a genuine effort to protect vulnerable populations from potential predators, it makes no sense for the Department to pick and choose which information to use when determining whether a potential employee is considered safe. This is especially true when the statutes require that

[26] AS 47.05.330(j)

findings from Adult Protective Services, the Long-Term Care Ombudsman, and the Medicaid Fraud Unit findings be included in the Centralized Registry.

OCS Fails to Notify Individuals of Substantiated Finding Consequences

The Central Registry is the OCS-maintained database of all investigated reports of child abuse and neglect. The registry is a civil registry and an individual does not have to be convicted of a crime in order to be listed as a possible perpetrator of child abuse or neglect. Rather, a person is listed on the registry when OCS substantiates, based on "reasonable cause to suspect," that the individual committed child abuse or neglect. Even if OCS substantiates a report of harm and places an individual on the Central Registry, the agency may not necessarily take any further action with the family such as providing services or initiating a Child in Need-of Aid case.

By law, Central Registry records are to be used only for child protective services purposes. AS 47.17.040(b) limits the permissible use of Central Registry records to use by governmental agencies with child-protective functions in connection with investigations or judicial proceedings involving child abuse or neglect. However, under the current background check program, these records are now routinely being used to screen individuals for health care, social service, and child care jobs. The Department's use of Central Registry records to make employment screening decisions is arguably an impermissible use of that information. Additionally, neither of the statutes that control which findings must be used to determine a barrier allow for the use of findings made under AS 47.17.[27]

From 2007, when the Department began running background checks under the statutes at issue, until March 2012, the Department used Central Registry records to make a barrier determination. If there was an OCS substantiated finding of child abuse or neglect, then the applicant was permanently barred from employment.

In March 2012, the Department changed its practice after considering the due process concerns involved for affected individuals. Now, only court-adjudicated findings in a CINA case create a barrier condition. While an OCS-substantiated finding and subsequent listing on the Central Registry alone do not presently create a barring condition, it could in the future if the Department again decides to change the standard used to make a barrier determination. And, in fact, the Department has proposed such a change in a bill currently before the Legislature.

When OCS substantiates a finding of child abuse or neglect against an individual, it is supposed to send a Perpetrator Closing Letter to them. The letter notifies the individual of the finding and their right to an appeal.

Up until recently, the Perpetrator Closing Letter did not include notice to the individual of their placement on the Central Registry. OCS updated the letter in June 2015 to include this notice. However, the revised letter still does not include an explanation of the potential adverse consequences of registry placement such as barriers to becoming a licensed foster parent or child care provider.

The subject line of the revised letter reads, "Notice of Alleged Maltreatment Decision and Placement on the Child Protection Registry." There is also a paragraph at the end of the letter stating:

[27] See AS 47.05.310 and AS 47.05.330

> If you do not request a hearing within 30 days of this letter, the substantiated finding will becomes [sic] a final department decision, which will be placed on the child protection registry. Please be aware that information on the child protection registry may be shared with other governmental agencies with child protection functions inside and outside of Alaska.

The individuals who complained to the ombudsman were not aware they had been listed on the Central Registry as a perpetrator of child abuse or neglect. Nor were they aware of the adverse impact it could potentially have on their employment and education prospects.

While the Central Registry is distinct from the Centralized Registry, the Central Registry has previously been used as a component of the Department's background system to screen individuals for health care, social service, and child care jobs. Thus, a listing on the Central Registry potentially carries the same harmful consequences as a listing on the Centralized Registry – to adversely impact an individual's ability to pursue a chosen career or education path for their lifetime.

Given the substantial ramifications of a listing on the Central Registry, the Perpetrator Closing Letter should provide a more detailed explanation of the potential adverse consequences of being placed on the registry.

DHSS Uses Different Time Standards to Bar Individuals from Employment

AS 47.05.330(e) requires employers to report allegations of abuse or neglect committed within the past 10 years, yet the Department is using CINA findings older than that to permanently bar individuals from unemployment.

The statutes establishing the Centralized Registry require employers to report instances of abuse or neglect involving their employees. Entities, individual service providers, employees, and unsupervised volunteers are required to self-report, within 24 hours, any findings that would trigger placement on the Centralized Registry under AS 47.05.330(d).

Similarly, if an employer finds out about a situation involving potential abuse or neglect by an employee or former employee within the past 10 years, AS 47.05.330(e) requires the employer to report it to DHSS. Beyond 10 years, employers need not be concerned.

In discussing SB 125, which eventually became the background check statutes, then-Division of Public Health Director Mandsager explained:

> The federal government has a requirement for any providers that are providing care to women or children to be subject to a federal set of barrier crimes. In that system, there is a 100 percent lifetime ban for committing one of those crimes.
>
> Having experienced that system during my federal career, my experience is that there are some crimes – say for example, a nineteen year old gets drunk and gets into a bar fight and has an assault and battery conviction and twenty years later, that person has been a responsible member of society, has had a job. I would argue that, at that point, that person has been rehabilitated and should be able to be employed.[28]

And in presenting HB 193, a companion bill to SB 125, AAG Stacie Kraly provided the rationale for the 10-year look-back:

[28] Committee minutes, Senate Health, Education and Social Services Committee, March 14, 2005.

> "We wanted . . . a time sensitive period with respect to these findings that would allow for a good, current picture of an individual . . . if we're going to go back further than 10 years we felt that, like, under the criminal registry . . . there's a discretionary and a mandatory bar, depending on how old the offense is. We felt that 10 years was an appropriate time to look at these sort of civil abuse issues to determine whether or not they should be included on the registry." [Ellipses in original][29]

Although employers are not required to report allegations that are more than 10 years old, DHSS has been using CINA-related findings to permanently bar citizens from employment, regardless of how long ago the alleged conduct occurred.

For example, ombudsman complainant B.N. was notified in 2012 that she could no longer work as a PCA because of CINA proceedings from 1989, a 23-year gap. C.O. was barred in 2012 because of CINA proceedings in 1998. E.Q. was notified in October 2012 that she failed to pass the background check due to CINA proceedings from 1999. F.R. was barred in 2012 for CINA proceedings from 1998. G.S. was barred in 2013 because of 1998 CINA proceedings. Out of the nine complaints identified in this report, five of them involve citizens barred for conduct that occurred well over 10 years prior.

The Department's practice is inconsistent with the employer-reporting requirements. In legislative hearings, the Department indicated that it wanted to focus on getting a current picture of applicants and, as such, limited the employer-reporting requirement to 10 years. The Department itself acknowledged that old information may not provide an accurate representation of a person's current behavior. But the Department has been and is using child protection findings that are significantly more than 10 years old to permanently bar individuals from positions in the caregiver fields.

We realize that the text of the statute only limits *employers* from having to report allegations over 10 years old and, as such, does not impose any similar limitation on the Department's ability to use information older than 10 years when screening applicants. But neither is the Department required to use old information. The Ombudsman questions whether using very old information furthers the purpose of the background check program. Is the fact that a person was involved in child protection proceedings 23 years ago truly valuable information in assessing whether that person can be considered safe to care for vulnerable populations today? Does it provide the most accurate snapshot of a person's current behavior and any potential risk to the public?

Further, using old findings is difficult from an evidentiary standpoint – memories fade, state employees move on or retire, records get lost, witnesses pass away. It is difficult to test the accuracy of events that happened 10, 15, or 23 years ago, particularly when the individuals barred by the Department are unable to access records being used to justify their exclusion from entire fields of employment. The Department's own attorney testified that events more than 10 years old did not provide a good picture of an individual's current capacity to work with vulnerable populations.

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[29] Committee minutes, House Health, Education, and Social Services Committee, April 19, 2005.

Allegation Two – Finding and Recommendations Four - Nine

For the reasons outlined above, the Ombudsman finds Allegation Two that the Department has failed to consistently apply statues, regulations, standards, and processes in administering the Background Check Program, ***justified***.

The Ombudsman proposed the following recommendations to rectify the problems found in Allegation Two.

Recommendation Four:

The Department of Health and Social Services should notify all those who failed a background check solely because of an OCS-substantiated finding of abuse or neglect that they may reapply for a new background check under the current standard. Alternatively, the Department should issue redeterminations for all of the applicants barred under the pre-March 2012 standard.

Recommendation Five:

The Department of Health and Social Services should notify individuals who were wrongfully denied access to the reconsideration process of their right to reapply for reconsideration under the new standard.

Recommendation Six:

The Department of Health and Social Services should include a relevancy assessment during the barrier determination review process to ensure that the conduct causing the potential barrier is relevant to the safety of the population that the applicant intends to serve.

Recommendation Seven:

The Department of Health and Social Services has both the statutory authority and an obligation to screen individuals through Adult Protective Services, the Long-Term Care Ombudsman, and the Medicaid Fraud Unit. The Department should begin screening individuals through these agencies to ensure that applicants with adverse findings involving vulnerable adults are prohibited from working, just as it does for those individuals with adverse child protection findings.

Recommendation Eight:

The Office of Children's Services should further modify the Perpetrator Closing Letter to include a more detailed explanation of the potential adverse consequences of being placed on the Central Registry.

Recommendation Nine:

The Department of Health and Social Services should consider whether the use of very old CINA findings to permanently bar individuals from employment actually makes sense. The employer reporting provision sets a limit of 10 years; the Ombudsman recommends the Department utilize the same limit when permanently disqualifying individuals from employment for civil misconduct.

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Allegation Three – Analysis

> ***Unfair - The Department of Health and Social Services regards all barrier conditions arising from civil cases as a permanent bar to employment, while conviction of a barrier crime for more serious conduct may prevent employment for only limited periods of time.***

The Office of the Ombudsman's Policies and Procedures Manual at 4040(3) discusses and defines *Unfair as:*

> An administrative act violated some principle of justice.
>
> Procedurally, a complaint that an administrative act was "unfair" usually will involve an examination of one or more of the following elements:
>
> (A) adequate and reasonable notice of the matter was not provided to the complainant;
>
> (B) adequate opportunity was not given for a person having an interest in a decision to be heard or, if applicable, to conduct an examination or cross-examination to secure full disclosure of the facts;
>
> (C) the decision maker was not without bias or other disqualification;
>
> (D) the decision was not made on the record: the action or decision was made without consideration of pertinent facts and circumstances, or the testimony, evidence, or point of view of those having a legitimate interest in the decision was disregarded;
>
> (E) the decision was not supported by reasons or by a statement of evidence relied on; or
>
> (F) the agency applied standards or principles inconsistently in making a decision

The Department's background check law identifies barrier crimes and barrier conditions that limit an individual's ability to work or volunteer in health care, social service, and child care occupations with direct access to children, the elderly, and the disabled.

A barrier *crime* is a criminal offense as described in 7 AAC 10.905. The consequences for a barrier crime vary depending on the nature and severity of the offense and may result in a permanent, ten-year, five-year, three-year, or one-year disqualification period. Only the most serious and violent crimes create permanent barriers to employment. The standard of proof required for a conviction in a criminal proceeding is proof beyond a reasonable doubt, the highest standard of proof used in the American legal system.

By contrast, a barrier *condition* is based on an administrative agency or civil court decision, order, judgment, or adjudication finding that an individual abused, neglected, or exploited a child or vulnerable adult, or committed medical assistance fraud. Thus, a barrier condition results from a non-criminal offense. The standard of proof required in a civil proceeding is much lower than in a criminal proceeding. Depending on the kind of proceeding, the standard of proof could be "probable cause," "preponderance of the evidence," or "clear and convincing evidence." As of

February 2, 2015, the standard of proof required for an OCS substantiated finding of child abuse or neglect is "preponderance of the evidence."[30] Prior to that, however, the standard used by OCS was "reasonable cause to suspect" a very low standard of proof. All of these standards are lower than the standard used for a criminal conviction.

Severity of Offense Does Not Change Penalty for Barrier Condition

Unlike barrier crimes, the Department does not differentiate between offenses that constitute a barrier condition and the consequence for all barrier conditions is the same – a permanent bar to employment. The disqualification period does not vary based on the nature and severity of the offense. Instead, under this "all or nothing" approach, individuals with even minor cases of maltreatment are grouped together with those who have committed serious acts of abuse or neglect, and the result for both is the same. Under this system, the Department deems individuals with a barrier condition permanently unfit to care for children, the elderly, and the disabled regardless of the incident or act that led to the finding of maltreatment.

The lack of differentiation among civil cases means that a parent with an administrative finding of abuse for spanking a child and leaving a slight bruise is treated the same as a person who has been convicted of murder. The standard of proof in both of these cases is different as well. In the case of the parent who spanked their child, a probable cause finding is sufficient to permanently bar them from employment. Please note that this is not even a finding that the parent committed physical abuse but rather a finding that the child in question might be a Child In Need of Aid. In the case of the convicted murderer, the court is held to the highest standard of proof – beyond a reasonable doubt – in order to convict the individual. In this instance, it is not unreasonable to conclude that the parent with a barrier condition poses a much lesser risk to the safety of vulnerable populations than does the individual with the barrier crime. However, under the Department's background check system, the penalty for the parent who has not been convicted of a crime is the same as the parent who has been criminally convicted - a permanent bar to employment.

In instances of other less serious or violent crimes or a property, fraud, drug, or alcohol related offense, an individual with a barrier condition is treated more harshly than an individual with a barrier crime. To illustrate, a parent who has a civil court finding of neglect because they left a young child unsupervised in the car while they shopped for groceries is permanently barred from employment. Conversely, a parent who has been convicted of Endangering the Welfare of a Child in the Second Degree because they were pulled over in a traffic stop with their young child in the car and were found to be in possession of heroin and drug paraphernalia is disqualified for only a five-year period. Unarguably, the parents in both scenarios made poor choices that put their children at risk. However, the reality is that in many instances the penalty for a non-criminal parent is disproportionate compared to that of a criminal parent.

Parents sometimes make mistakes and exercise poor judgment when caring for their own children. The most serious acts of child abuse and neglect are addressed in criminal court. An OCS barrier condition involves a parenting mistake that falls into the non-criminal category. Under the Department's background check system, an individual who makes one unfortunate parenting mistake may find himself with a barrier condition that impedes and restricts his ability to work or to participate in an education program for the balance of his lifetime.

[30] Child Protective Services Manual, Chapter 2, Section 2.2.10.1

Many of the individuals who complained to the ombudsman had made a one-time parenting mistake, most of which involved parental discipline or neglect. In all of these cases, except one, OCS returned the children to their parents' care and custody and dismissed the CINA and child protective services cases. For this to happen, OCS must have determined that the safety threats had been mitigated and the parents were able to ensure their children's safety. Yet, the Department now assumes these individuals pose a permanent risk to children, the elderly, and the disabled, and deems them perpetually unfit for employment. Should these individuals be penalized so harshly for a non-criminal incident that is more than 5, 10, 20, or even 25 years in their past?

The Ombudsman believes it is unlikely that all individuals with a barrier condition pose so grave a threat as to warrant an absolute and permanent bar to employment in the care industry. Further, the ombudsman finds the disparate treatment of an individual with a barrier condition compared to that of an individual with a barrier crime to be both remarkable and significant. A permanent bar to employment due to a barrier condition that is based on an administrative agency or civil court finding and that does not consider the nature and severity of the offense that resulted in the finding is excessive and overbroad.

Rather than a lifetime ban, the Ombudsman believes that a more balanced and nuanced approach is needed in which barrier conditions are categorized and the disqualification period is proportionate to the nature and severity of the offense.

Allegation Three – Finding and Recommendation 10

For these reasons, the Ombudsman finds Allegation Three that the Department regards all barrier conditions arising from civil cases as a permanent bar to employment, while conviction of a barrier crime for more serious conduct may prevent employment for only limited periods of time, ***justified***.

The Ombudsman proposed the following recommendation to rectify the problems found in investigation of Allegation 3.

Recommendation 10:

The Department of Health and Social Services should eliminate the permanent disqualification period for a barrier condition and consider implementing a tiered response system in which the length of the barrier disqualification period varies depending on the nature and severity of the offense.

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Allegation Four – Analysis

> ***Contrary to Law – By regarding probable cause findings in Child In Need Of Aid cases as barrier conditions, DHSS violates 7 AAC 10.955(n) which establishes the correct standard as "preponderance of the evidence."***

While DHSS has never created the Background Check Program Centralized Registry that it is required by law to maintain, it checks names against other agency databases through the Background Check Program as a substitute. The legal standard of proof required for listing on the Centralized Registry, if it existed, would be "preponderance of the evidence," which means that a person's name may only be placed on the registry when, after an investigation, the information available shows it is more likely than not that abuse, neglect, or exploitation

occurred.[31] If allegations against a person have not been proved to this standard, the person should not be barred from employment with children and vulnerable adults.

One of the agencies that the Background Check Program consults and relies on heavily is the Office of Children's Services. OCS maintains a database that is, unfortunately, almost identical in name to the Centralized Registry: the Central Registry. The OCS Central Registry is distinct from the legally-mandated but nonexistent DHSS Centralized Registry. The two registries serve different purposes and should not be confused.

In order to place an individual on the Central Registry, OCS must make a substantiated finding of abuse or neglect. Prior to February 2015, the standard that OCS applied when making a substantiated finding was "reasonable cause to suspect." Reasonable cause to suspect is cause "based on all the facts and circumstances known to the person that would lead a reasonable person to believe that something might be the case."[32] Note that this standard of "proof" is really nothing more than mere suspicion that something "might" be the case. As of February 2, 2015, OCS must find that it is "more likely than not" that maltreatment occurred in order to substantiate a report of harm. This standard is also known as the preponderance of the evidence.

Prior to March 2012, the Background Check Program used OCS substantiated findings of abuse or neglect to determine whether a barrier condition existed. OCS changed the barrier condition determination standard in March 2012 based on advice from the Attorney General's Office. OCS and the Attorney General's Office said the change was prompted by due process concerns and a reevaluation of the background check statutes and regulations.

Assistant Attorney General (AAG) Stacie Kraly explained that a barrier condition under the background check law contemplates a finding of abuse or neglect made in a court forum where an individual has been given notice of the proceedings and the opportunity to be heard. In basing a barrier condition determination only on an agency substantiated finding of child abuse or neglect, the Department could not be assured individuals had been given proper notice of the finding and their right to appeal.

Federal Lawsuit Settlement Related to Barrier Condition Determination

AAG Kraly further explained that the reason the BCP stopped using OCS substantiated findings as the basis for a barrier condition is related to the settlement of a federal lawsuit in 2006. In *Ruby v. Gilbertson et al*[33], parent Mark Ruby filed a lawsuit in U.S. District Court asserting OCS had denied him due process on a number of different grounds, including failure to properly notify him of a substantiated finding of child abuse and his right to an appeal. The lawsuit led to a settlement in which OCS agreed to adopt regulations to provide increased due process protections, including a formal appeal procedure to contest a substantiated finding of child abuse or neglect. OCS implemented these regulatory changes in December 2006. Prior to this, the Department acknowledged that OCS had not consistently provided individuals with notice of a substantiated finding and their right to appeal.

AAG Kraly said that because in the past OCS did not consistently provide individuals with proper notice of a substantiated finding and their right to appeal, the Department was not confident that individuals with an agency substantiated finding made prior to the *Ruby* settlement

[31] 7 AAC 10.955(n)
[32] AS 47.17.290(9)(15)
[33] No. 3:05-cv-00171 (D. Alaska)

in 2006 had received sufficient due process. AAG Kraly told the ombudsman investigator that, "If these checks were going to have detrimental effects on individuals, then due process has to attach and they need to have gotten notice and the opportunity to be heard."

During this investigation, the ombudsman asked BCP and the Attorney General's Office what had been done to address the issue of erroneous barrier condition determinations that were based on the pre-2012 standard. AAG Kraly replied the Department was aware some individuals may have been incorrectly identified as having a barrier condition under the old standard, but the Department had not yet addressed that problem. AAG Kraly said, "Figuring out how to deal with the retrospective problems is on the agenda but the current priority is dealing with the here and now cases . . . We know we need to address this but our priority is current and prospective cases."

While the Background Check Program no longer considers an OCS substantiated finding of abuse or neglect to be a barring condition, the program still uses any court finding regarding an individual in a child in need of aid, or CINA case, as a barring condition. In some instances findings in CINA proceedings may be based on a lower standard than preponderance of the evidence, and in some cases the court's findings are not even based on any misconduct by the individual.

A CINA case is a civil proceeding in superior court. The standard of proof in a CINA case varies depending on the stage of the case. The first stage of a CINA case is the initial temporary custody hearing, where the court determines whether there is "probable cause" to believe the child is in need of aid because the child has been subjected to conduct or conditions described in AS 47.10.011 that include abandonment; failure to provide care; physical abuse, sexual abuse, or mental injury; neglect; or harm caused by addictive or habitual use of drugs or alcohol. Probable cause means the evidence establishes that there is a "fair probability or substantial chance" that an incident of abuse or neglect occurred.[34] This is a higher standard of proof than "reasonable cause to suspect," the standard used by OCS to substantiate a report of harm, but a much lower standard than "preponderance of the evidence," the standard that is supposed to be used for placement on the DHSS Centralized Registry. Much later in the case, at an "adjudication hearing," the court finally determines by a preponderance of the evidence whether the child is a "child in need of aid." If the case goes far enough, the court may terminate a parent's rights based on "clear and convincing evidence," a standard that is a step higher than preponderance of the evidence.

CINA Proceedings Poor Substitute for Placement on Centralized Registry

CINA proceedings are a poor substitute for proceedings based on placement on the Centralized Registry, because the proceedings serve different purposes. CINA cases are focused on the needs of the child, not necessarily on the alleged misconduct of the parents. As a practical matter, in many cases OCS and the parents agree to cooperate to resolve cases without ever answering the question of whether the parent did anything wrong; both parties will agree that so long as the future safety of the child is assured, it serves no good purpose to determine whether the parents committed any act that could be regarded as neglect or abuse. It is routine for parents to stipulate to probable cause at the initial temporary custody hearing on the advice of attorneys. In these

[34] See *Matter of J.A.*, 962 P.2d 173 (Alaska 1998)

cases OCS will assume legal custody, but often place the children back in the homes of the parents, with supervision until whatever problems might exist are resolved.

It is easy to imagine examples. OCS might initiate a CINA case based on a report that a young, low-income family's physical home is in such a state of disrepair that it is unsafe. The parents might strongly disagree that the children are in danger, but with equal wholeheartedness desire to upgrade their home or find a better one. In such a case the parents might stipulate to probable cause and enthusiastically work with OCS to obtain subsidized repairs to the home or to find a better home. Once the home is safe, OCS would let the case expire. Although the court would have never made a finding in such a case by a preponderance of the evidence that either parent had mistreated the children, both parents would be barred, for the rest of their lives, from obtaining employment working with children or vulnerable adults.

Although it is uncommon, responsible parents in some cases might even support a finding that their child is in need of aid. For a teenage child in need of expensive services that the parent cannot provide, such as inpatient substance abuse treatment, parents might demand that OCS take legal custody in order to access services for the child, and the court might in turn find at an adjudication hearing, by a preponderance of the evidence, that the child is a child in need of aid because the parents, by their own admission, are unable to keep the child from harm, despite their best efforts and excellent parenting skills. In this case, the most selfless and responsible acts of the parents would bar them from future employment, because the court's decision was not whether the parents were abusive and neglectful, but whether the child needed aid.

Further, when a court makes a probable cause finding in a case involving two parents, the court may not make specific or separate findings regarding each parent's culpability or role in any abuse, neglect, or exploitation that occurred. Thus, an innocent parent may be unfairly tagged with a barrier condition. For ombudsman complainant E.Q., although she stipulated to adjudication, the court found that her children were in need of aid because of physical and emotional abuse by their father, who was also abusive to E.Q. until she reported his abuse of her and the children to authorities. E.Q. subsequently left her husband and was awarded sole custody of her children while the CINA case was ongoing.

Regardless of whether the Department bars individuals under AS 47.05.310(c)(1) or under the statute pertaining to the centralized registry, AS 47.05.330, the Department is required to find that the individual either "neglected, abused, or exploited a child or vulnerable adult"[35] or "committed abuse, neglect, or exploitation."[36] This finding is focused on the acts of the alleged perpetrator. CINA cases, in contrast, are concerned with and focused on the needs of the child, not the misdeeds of any one adult. While a court may make findings that a child is in need of aid, that finding might not necessarily include a finding that the parent actually neglected or abused that child. In the case of ombudsman complainant J.V., a child who was the subject of a CINA case was removed from his care. The child in question, however, was not J.V's, and J.V. was not even a party to the CINA case. Yet, the BCP determined that he had a barrier condition and permanently barred him from employment.

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[35] AS 47.05.310(c)(1)
[36] AS 47.05.330(b)(1)(A)

Allegation Four – Finding and Recommendation 11

For the reasons stated above, the ombudsman finds Allegation Four that by regarding probable cause findings in Child In Need Of Aid cases as barrier conditions, DHSS violates 7 AAC 10.955(n) which establishes the correct standard as "preponderance of the evidence" ***justified***.

The ombudsman proposed the following recommendation to rectify the problem found in Allegation Four.

Recommendation 11

The Department should reconsider its use of probable cause findings to permanently bar individuals from employment. We suggest that the Department utilize adjudication findings because, at that phase of a CINA case, the judge must find by a preponderance of the evidence that the child is a Child In Need of Aid.

*

Allegation Five – Analysis

> ***Unfair – The Office of Children's Services regulations at 7 AAC 54.050 - .060 prohibit the release of child protection case records used by the Department in making a barrier condition determination to an affected individual seeking to review and challenge that decision.***

An individual has the right to challenge a barrier determination through the reconsideration process. Individuals must submit a request for reconsideration in writing within 30 days of receipt of the decision and provide copies of the records that led to the barrier condition. The Department's *Notice of Barring Condition* letter advises the individual to contact the BCP if they wish to review the records used in making a barrier condition determination. The letter reads:

> If you wish to review the records relied upon by the BCP in making a barrier determination decision that your background check contains barring condition(s), you must contact the BCP at (907) 334-4475 in order to make appropriate arrangements for the review of these confidential records.[37]

When an individual with a barrier condition based on an OCS or CINA action contacts the BCP to request review of these records, the BCP advises them to contact OCS directly. However, child protection case records maintained by OCS are subject to statutory and regulatory confidentiality provisions and access is restricted. These confidentiality provisions are intended to protect the privacy rights of the child and the parents or guardians by keeping the records from public disclosure.

OCS regulations at 7 AAC 54.050 and .060 do not permit the release of child protection case records acquired while a child was in state custody and the subject of a CINA petition to a parent after the child protective services and CINA case is closed. There are limited exceptions to this rule, which are generally prefaced on obtaining release via a court order.

[37] A2014-1237 Documents received from Complainant 9/17/2014

These regulations have not been amended since the Department's background check law went into effect, nor do they specifically address the release of records for the purposes of challenging a BCP barrier condition determination.

OCS Cites Regulations to Deny Records Needed to Challenge Barrier Conditions

Citing these regulations, OCS routinely and correctly denies requests for copies of child protection case records from individuals who are seeking to challenge a barrier condition that is based on their past involvement in a closed child protective services and CINA case. Instead, OCS advises them to contact the court directly to request copies of the CINA case file, or to obtain a court order allowing OCS to release the child protection case records. OCS also advises them to contact the attorney who represented them in the CINA case to try to get copies of the records, whether it be a court-appointed or private attorney.

For these individuals, this sideways method of obtaining the records needed to effectively challenge a barrier condition determination is problematic. Requesting a copy of a court case file entails contacting the clerk of court where the CINA case was filed and completing the correct forms. Additionally, the court charges .25 cents per page for copies. Requesting a court order for the release of the OCS child protection case records requires filing the proper documents with the court. Individuals may have difficulty completing the court filings on their own and may not have money to retain an attorney to help them with this process. Further, individuals only have 30 days to request reconsideration from the Department. Even if individuals manage to successfully request a copy of the court case file or obtain a court order for the release of the OCS records, it is unlikely they would receive this information in time to adequately prepare their request for review or meet the BCP filing deadline. These individuals need the information in these records in order to make a thoughtful and reasoned decision about whether and how to challenge the decision and to be able to present evidence in support of their request.

In the case of ombudsman complainant C.O. (A2012-1113), OCS identified her as having a barrier condition due to her involvement in a child protective services and CINA case back in 1998. C.O., through her employer, requested a variance and needed the child protection case records to provide to the Department's Variance Review Committee. When OCS denied her records request, she contacted the court where the CINA case was filed in 1998 and requested a copy of the court case file. However, the judge only authorized the release of a few of the documents from the file to her. C.O. provided these documents to the Variance Review Committee, but the committee said it needed her to provide additional records in order to process her variance request. She then contacted the ombudsman for help.

After the ombudsman investigator consulted with staff from OCS and the AGO, they agreed to release the child protection case records directly to the Variance Review Committee so that it could move forward in processing C.O.'s variance request. The Department did not, however, release the records to C.O.

Ombudsman complainant D.P. (A2012-1371) had a similar experience. She also requested, and was denied, a copy of her records from OCS. She was also able to obtain a couple of documents from the court's CINA file but the Variance Review Committee deemed them insufficient. After ombudsman intervention, OCS agreed to release the records directly to the Variance Review Committee but refused to release them to D.P.

Although the Department ultimately released the required child protection case records to the Variance Review Committee in these cases after the ombudsman intervened, the complainants experienced unnecessary delays in the processing of their variance requests. Also, they were not allowed to review the records used by the Department in making the barrier condition determination, a significant disadvantage. How can a person effectively argue against a permanent employment ban if they can't even look at the records being used against them?

Records Denial Hampers Variance Review Committee Determinations

The ombudsman investigator contacted then-Variance Review Committee Chair Shelby Larsen to discuss the difficulties faced by individuals in trying to obtain copies of their child protection case records in order to challenge a barrier condition determination. Mr. Larsen acknowledged this was a problem. He said the majority of individuals with an OCS barrier condition had not been able to access and provide the committee with the records needed to conduct a thorough and complete review of their variance requests. Mr. Larsen said, "This does hamper our ability to do an effective job. We may recommend a denial if we don't have enough information and that is not necessarily fair and the applicant isn't afforded due process . . . There's a liability issue there for the state."

The Ombudsman believes that requiring individuals to use this method to obtain copies of their child protection case records is burdensome, bureaucratic, and clearly places them at an unfair disadvantage. These individuals have a direct and legitimate interest in the records and they would otherwise have access to the records if the child protection and CINA case was open. The Department appears to be denying these parents access to the underlying child protection case records using the same statutory and regulatory confidentiality provisions that were meant to protect them. This process creates an uneven playing field for individuals and hinders their ability to effectively challenge a barrier condition determination and protect their own private interests.

Further, routing these individuals to their former attorney to try to obtain copies of the child protection case records may not be practicable or reasonable. Both the Public Defender Agency and the Office of Public Advocacy, who provide court-appointed counsel in CINA cases, are already overburdened agencies struggling to keep up with their current caseloads. Putting the onus on these agencies to assist former clients, some of whom have cases that were closed decades ago, seems misguided, and statutory limits on representation may even prohibit these agencies from helping. Even if these agencies did agree to assist individuals in obtaining these records, it is unlikely that digging up old case records would rise to the top of their priority list.

There also may be issues regarding the availability of these records due to agency record archiving and retention schedules, which could further impact the ability of these individuals to timely access these records or even access them at all. The same holds true for a private attorney.

Also, private attorneys might no longer be practicing, or they may require fees for obtaining the records that the individual might not be able to pay. The results for individuals pursuing the underlying child protection case records through these avenues would likely be hit-and-miss at best.

The principles of due process and fairness require that individuals have meaningful and timely access to the underlying child protection case records when seeking a review of a barrier condition determination. Under the Department's current system, that is not happening.

Allegation Five – Finding and Recommendation 12

For the reasons explained above, the Ombudsman finds Allegation Five that OCS regulations unfairly prohibit the release of child protection case records used by the Department in making a barrier condition determination to an impacted individual seeking to review and challenge that decision to be ***justified*.**

The ombudsman proposed the following recommendation to rectify the problems revealed in Allegation 5.

Recommendation 12:

The Department of Health and Social Services should amend regulations to provide the release of child protection case records to an individual seeking to challenge a BCP barrier condition determination without a court order.

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Department's Response to Preliminary Report

On January 15, 2016, after requesting and receiving a two-month extension to respond to the preliminary report, the Department submitted the following response:

THE STATE of ALASKA
GOVERNOR BILL WALKER

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January 15, 2016

Linda Lord-Jenkins
Office of the Ombudsman
333 W. 4th Ave, Ste. 305
Anchorage, AK 99501

Dear Ms. Lord-Jenkins:

Thank you for the time and energy spent on this investigation. As was mentioned in your report, my Department and the Department of Law have been working with your office for several years on these complex and important issues. The report mentions some positive changes that were implemented during the course of your investigation as a direct result of our discussions. We have both initiated and fully implemented some of the recommendations that you provided, and as discussed below, we will continue to work on others in the coming months.

Despite the brevity of this letter, the Department has spent considerable time reviewing this report. While we disagree with many of the findings in the report, we do not believe that it is the best use of precious time and resources to draft a lengthy point-by-point rebuttal to those findings. However, we believe it is important that we respond here as to Allegation 1 and 4. We believe that we are interpreting the statute correctly. Specifically, as to Allegation 1, while an argument can be made that a stand-alone database was contemplated, the argument can also be made that using already-existing registries and databases to fulfil the intent of the Centralized Registry is both legally supportable and fiscally sound. Finally, if your logic was followed as to Allegation 4, no finding of a CINA proceeding would go on the registry, which obviously undermines the intent of the statute.

So, conceding nothing as to the other allegations and arguments made in your report and reserving the right to present counter positions in the future, the Department responds directly to the following recommendations as follows:

We believe that Recommendations 8 and 12 have been implemented and been in place since 2012.

We agree with Recommendations 4 and 5 and will be addressing those in the next 6 months.

As to recommendation 6, to the extent that we can make an adjustment to this process via regulations, we will do so. We agree that relevancy analysis is a part of the process at the decision point and that the current regulations and soon-to-be-noticed regulations will make our policy clear on what we think is relevant and what is not. We will wait further public comment to evaluate any changes that may be necessary as to what conduct should be considered relevant and thus a barring condition and what is not. We do note that the 'relevancy' consideration you identify has always been a part of the variance process and also a part of the individual reconsideration process we implemented since 2012.

We agree in principle with Recommendation 3 although there is no requirement for a survey and training and such activities would require funding, which may be difficult to find in this fiscal environment.

Recommendations 9 and 10 are being evaluated now to see if they can be addressed through a regulatory amendment. If it is concluded that they can't be addressed in regulation, it would require a statutory fix. As you know, statutory fixes are outside of the exclusive control of the DHSS.

We believe that Recommendation 7 also requires a statutory fix. Specifically, it is our opinion that the way the statute is drafted, DHSS is limited in what it can review. For example, the statute limits findings to those who have abused, neglected or exploited under AS 47.10, AS 47.26 or AS 47.62. Thus, DHSS is limited to finding a barring condition for abuse and neglect under AS 47.10 despite those being only 2 of the 12 ways a child can be found to be a child in need to aid. Similarly, the statutory reference and limits to similar findings of abuse or neglect under AS 47.24 and 47.62 mean that there is nothing for DHSS to look at because unlike a CINA proceeding there are no "perpetrators" in actions taken by APS or the LTCO and therefore no findings of abuse or neglect in under those statutory references. Thus, absent statutory change, these types of review are not possible.

As to Recommendations 1, 2, and 11, we disagree that we are interpreting the statute incorrectly.

Again, we appreciate the time and effort you have put into this process. We look forward to making any necessary changes to this process keeping in mind the over-arching goal to protect vulnerable children and adults who are receiving services paid for by the State of Alaska.

Sincerely,

Valerie Davidson
Commissioner

Department Proposes New Statutes and Regulations

On January 14, 2016, the Department published proposed regulation changes for public comment. The following day, the commissioner responded to the Ombudsman's preliminary report and included mention of "soon-to-be-noticed regulations." The Ombudsman is currently reviewing the 58-page regulations document and plans to make formal comments on the proposed changes.

Shortly thereafter the Ombudsman discovered that the Governor had transmitted proposed legislation amending the Background Check Program. The Governor's transmittal is dated January 18, 2016, just three days after the Department's responded to the Ombudsman's preliminary report, yet the Department failed to mention the impending legislation in its response. After reviewing the Department's bill (introduced as Senate Bill 151 and House Bill 270), the Ombudsman has submitted comments to the Alaska Legislature regarding our concerns with the bill.

To the extent that the Department's proposed regulations and legislation touch on the findings and recommendations contained in this report, we have addressed those issues in our reply below.

Department's Response to Investigative Report and Ombudsman's Reply

At the outset, we must first correct an apparent misconception of the Department's. In her response, Commissioner Davidson wrote "conceding nothing as to the other allegations and arguments made in your report and reserving the right to present counter positions in the future." There is no provision under The Ombudsman Act that allows an agency to reserve a right to respond to a report in the future. AS 24.55.180 requires that the Ombudsman provide an agency with a confidential preliminary opinion or recommendation before issuing a report that is critical of an agency's actions. In this case, the Ombudsman initially provided 30-days for the Department to respond to the report, as is custom. Then, at the Department's request, the Ombudsman extended the response deadline for two additional months. The Department ultimately chose not to respond to the findings, stating that it was not "the best use of precious time and resources to draft a lengthy point-by-point rebuttal." That was the Department's choice and the Ombudsman believes it is not in the public's interest to afford the Department another bite at the apple at some vague date "in the future while this case remains open."

For ease of reference, the following is a summary of all of the Ombudsman's findings and recommendations, followed by the Department's response, and the Ombudsman's reply:

Allegation One: Contrary to Law – The Department of Health and Social Services has failed to establish and maintain a Barrier Crimes Program "Centralized Registry," as required by AS 47.05.330, of individuals who have been investigated and found by a state agency to have committed abuse, neglect, or exploitation of a child or vulnerable adult, or medical assistance fraud.

> **DHSS Response:** "Specifically, as to Allegation 1, while an argument can be made that a stand-alone database was contemplated, the argument can also be made that using already-existing registries and databases to fulfil the intent of the Centralized Registry is both legally supportable and fiscally sound."

Ombudsman Reply: The Department contends that an argument "can be made that using already-existing registries and databases is legally supportable." However, it did not elucidate what that argument might be, but merely offered an assertion. The Ombudsman's reading of the applicable statutes and regulations has led us to the conclusion that the Legislature intended the creation of a stand-alone registry. Without an explanation of why the Department believes our interpretation is wrong, we will not amend this finding.

The Department also argues that using existing databases is a fiscally sound alternative. The Department's assertion appears to be a direct play on the current fiscal crisis as an excuse for not creating the registry that was mandated by the 2005 legislation creating the Background Check Program. However, it is our understanding that the department received $3.4 million through a Medicare pilot program that ended in 2007 to implement the Background Check Program. Conceivably, the department could have or should have used some of those funds to create the Centralized Registry.

The Department's argument does not convince the Ombudsman to change her finding as to Allegation One. This allegation is found to be ***justified.***

Recommendation One*: DHSS should take immediate action to create the Centralized Registry as required by AS 47.05.330 and 7 AAC 10.955.*

DHSS Response: "As to Recommendations 1, 2, and 11, we disagree that we are interpreting the statute incorrectly."

Ombudsman Reply: The ombudsman notes the Department's rejection of this recommendation. However, both the Department's proposed statutory and regulatory changes still refer to the centralized registry. It is unclear if the department actually intends to create such a registry when and if either the legislation is passed or the regulations adopted, or if the department intends to keep relying on the child protection registry and other databases as a substitute. We question why the department would retain references to the Centralized Registry in its proposed bill and regulatory changes if it believes that its current practice is legally supportable.

Recommendation Two*: DHSS should immediately stop using AS 47.05.310(c)(1) as a means of barring prospective employees from taking employment where they will have contact with vulnerable children and adults.*

DHSS Response: "As to Recommendations 1, 2, and 11, we disagree that we are interpreting the statute incorrectly."

Ombudsman Reply: The Ombudsman notes that, although the Department rejected this recommendation, its proposed legislation would alter the standards for determining whether a civil barrier condition exists and may moot this recommendation.

Recommendation Three: *DHSS should conduct a survey of covered entities to see how aware they are of their mandatory reporting duties and, if necessary, implement training for those entities as part of the licensure process.*

DHSS response: "We agree in principle with Recommendation 3 although there is no requirement for a survey and training and such activities would require funding, which may be difficult to find in this fiscal environment."

Ombudsman reply: The Ombudsman is sympathetic with concern about unfunded mandates but not with the apparent argument that the Department can write off its obligation to train licensees about their reporting obligations. Presumably the Department's licensing staff maintains regular contact with their licensees. It doesn't seem a far stretch for Department licensing staff to develop a short required survey to determine existing licensees' knowledge of their reporting requirements. Nor does it seem such an onerous task to incorporate at the very least a brief training for prospective licensees on their reporting obligations.

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Allegation Two: Unreasonable – The Department of Health and Social Services has failed to consistently apply statutes, regulations, standards, and processes in administering the Department's Background Check Program.

Ombudsman note: DHSS did not respond to this finding and, as such, the finding will stand as j***ustified***.

Recommendation Four: *DHSS should notify all those who failed a background check solely because of an OCS-substantiated finding of abuse or neglect that they may reapply for a new background check under the current standard. Alternatively, the Department should issue redeterminations for all of the applicants barred under the pre-March 2012 standard.*

DHSS Response: "We agree with Recommendations 4 and 5 and will be addressing those in the next 6 months."

Ombudsman Reply: The Department's response on this point seems disingenuous. Commissioner Davidson says the Department agrees with our recommendation to notify individuals who were barred from employment based on an OCS substantiated finding that they may be eligible under the post-March 2012 standard. However, the Department's proposed statutory amendments seek to codify an OCS-substantiated finding as a basis for a barrier condition. Why would the Department agree to notify individuals who were barred due to an OCS-substantiated finding that they should reapply if it is actively trying to codify those findings as a civil barrier to employment?

Recommendation Five: *DHSS should notify individuals who were wrongfully denied access to the reconsideration process of their right to reapply for reconsideration under the new standard.*

DHSS Response: "We agree with Recommendations 4 and 5 and will be addressing those in the next 6 months."

Ombudsman Reply: It is unclear from its response how the Department intends to implement this recommendation. The Department's pending legislation would allow individuals to request a variance so, possibly, if the legislation passes the Department intends to notify individuals who were told they could only request reconsideration that they may now request a variance. However, without an explanation of how the Department plans to address this recommendation, the Ombudsman is left guessing.

Recommendation Six*: The Department of Health and Social Services should include a relevancy assessment during the barrier determination review process to ensure that the conduct causing the potential barrier is relevant to the safety of the population that the applicant intends to serve.*

DHSS Response: "As to recommendation 6, to the extent that we can make an adjustment to this process via regulations, we will do so. We agree that relevancy analysis is a part of the process at the decision point and that the current regulations and soon-to-be-noticed regulations will make our policy clear on what we think is relevant and what is not. We will wait further public comment to evaluate any changes that may be necessary as to what conduct should be considered relevant and thus a barring condition and what is not. We do note that the 'relevancy' consideration you identify has always been a part of the variance process and also a part of the individual reconsideration process we implemented since 2012."

Ombudsman Reply: We understand that the Department is, and has been, assessing for relevance when determining whether to grant a variance. However, the existing statute (AS 47.05.330(j)) specifies that, after placement on the Centralized Registry, an individual is entitled to request that the Department delete or modify the information in the registry. The Department is required to make the deletions or modifications if it "finds no relationship between the information placed in the registry and the risk of harm to the entity's clientele." This provision does not contemplate that an individual should have to utilize the cumbersome variance process in order to have information removed from the registry if that information bears no relationship to the type of care they provide in the course of their employment. Assessing for relevance during a variance request is no substitute for the ability, already codified in statute, to ask that the department delete information that has no bearing on the work that the individual intends to do.

However, we note that the Department has removed AS 47.05.330(j) from its proposed legislation on the Background Check Program, which may moot this recommendation altogether.

Recommendation Seven: *DHSS has both the statutory authority and an obligation to screen individuals through Adult Protective Services, the Long-Term Care Ombudsman, and the Medicaid Fraud Unit. The Department should begin actually screening individuals through these agencies to ensure that applicants with adverse findings involving vulnerable adults are prohibited from working, just as it does for those individuals with adverse child protection findings.*

DHSS Response: "We believe that Recommendation 7 also requires a statutory fix. Specifically, it is our opinion that the way the statute is drafted, DHSS is limited in what it can review. For example, the statute limits findings to those who have abused, neglected, or exploited under AS 47.10, AS 47.26 [should read AS 47.24] or AS 47.62. Thus, DHSS is limited to finding a barring condition for abuse and neglect under AS 47.10 despite those being only 2 of the 12 ways a child can be found to be a child in need of aid. Similarly, the statutory reference and limits to similar findings of abuse or neglect under AS 47.24 and AS 47.62 mean that there is nothing for DHSS to look at because unlike a CINA proceeding there are no "perpetrators" in actions taken by APS or the LTCO and therefore no findings of abuse or neglect in under those statutory references. Thus, absent statutory change, these types of review are not possible."

Ombudsman Reply: First, the Ombudsman finds it interesting that the Department acknowledges that it is limited under the current statute to only finding a barring condition for two of the 12 ways that a child can be found in need of aid. Yet, for the past

nine years, the Department has been violating that limitation by barring individuals from employment for *any* finding in a CINA case.

Second, the Department asserts that neither Adult Protective Services nor the Long-Term Care Ombudsman makes findings of abuse or neglect and, as such, neither agency creates pertinent information for the Background Check Unit.

AS 47.24.015(a) requires APS to investigate whether a vulnerable adult "suffers from undue influence, abandonment, *exploitation, abuse, neglect*, or self-neglect" upon receiving a report of harm. [Emphasis added] Additionally, AS 47.24.015(b) requires APS to prepare a "written report of the investigation, including findings" after investigating a report of harm involving a vulnerable adult. Further, AS 47.24.015(g) requires APS to report instances of abuse or neglect involving certified nurse aides to the Board of Nursing. In reviewing complaints filed with the ombudsman against APS, we have had the opportunity to review APS investigation reports, which contain lines for the APS investigator to identify the alleged perpetrator and include findings against that person. Just because APS may not identify a perpetrator in every investigation that it conducts, does not mean that it doesn't happen. APS clearly has the statutory authority to make findings and, in the case of certified nurse aides, is *required* to report findings of abuse and neglect to the Board of Nursing. We fail to understand why the Department would choose not to include APS findings substantiating abuse or neglect of vulnerable adults to bar individuals from working with vulnerable populations served by entities licensed by the department.

With regard to the Long-Term Care Ombudsman, however, we understand that while the LTCO used to investigate complaints about long-term care facilities and issue reports it has recently begun referring complaints for investigation to the department's Licensing and Certification division. As such, the department may be correct that the LTCO no longer produces investigative reports that the department could use as the basis for a civil barrier.

Third, a review of the Department's proposed legislation removes reference to the APS and LTCO findings as the basis for a barrier condition. While the LTCO recently switched gears and does not issue findings now, that does not guarantee the LTCO role might not one day change to again include issuing findings which were part of its historical responsibilities. The Ombudsman thinks it an error for the Department to remove APS findings or LTCO findings from the list of barrier conditions.

Recommendation Eight: *The Office of Children's Services should further modify the Perpetrator Closing Letter to include a more detailed explanation of the potential adverse consequences of being placed on the Centralized Registry.*

DHSS Response: "We believe that Recommendations 8 and 12 have been implemented and been in place since 2012."

Ombudsman Reply: The Ombudsman has a copy of the OCS substantiated finding letter that was last revised in June 2015. While this letter does notify an individual that they will be placed on the child protection registry (also known as the Central Registry), if they fail to appeal the department's finding, it does not notify them of the potential consequences of being placed on the registry. Because the Department is not advising

individuals of the potential consequences of placement on the child protection registry, especially in the face of possible statutory changes that would make placement on that registry a permanent barrier condition, we do not agree that the Department has implemented this recommendation.

***Recommendation Nine**: DHSS should consider whether the use of very old CINA findings to permanently bar individuals from employment actually makes sense. The employer reporting provision sets a limit of 10 years; the Ombudsman recommends the Department utilize the same limit when permanently disqualifying individuals from employment for civil misconduct.*

DHSS Response: "Recommendations 9 and 10 are being evaluated now to see if they can be addressed through a regulatory amendment. If it is concluded that they can't be addressed in regulation, it would require a statutory fix. As you know, statutory fixes are outside the exclusive control of the DHSS."

Ombudsman Reply: Currently, licensed entities are required to report activity that would be cause for inclusion in the Centralized Registry – this includes activity that has just occurred and activity that has happened up to 10 years ago but that the employer has just learned about. Under the pending statutory amendments, entities would simply have to report "information required to be on the centralized registry." It is unclear whether this change will mean that entities will only have to report activity as it occurs and not old activity that they find out about. However, nothing in the proposed statutory and regulatory changes would limit the Department's ability to submit very old incidents of civil misconduct to the Background Check Program. As such, it appears that the Department has rejected this recommendation.

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Allegation Three: Unfair – The Department regards all barrier conditions arising from civil cases as a permanent bar to employment, while conviction of a barrier crime for more serious conduct may prevent employment for only limited periods of time.

Ombudsman Note: DHSS failed to respond to this allegation and, as such, the ombudsman's finding of ***justified*** will stand.

***Recommendation 10**: The Department of Health and Social Services should eliminate the permanent disqualification period for a barrier condition and consider implementing a tiered response system in which the length of the barrier disqualification period varies depending on the nature and severity of the offense.*

DHSS Response: "Recommendations 9 and 10 are being evaluated now to see if they can be addressed through a regulatory amendment. If it is concluded that they can't be addressed in regulation, it would require a statutory fix. As you know, statutory fixes are outside the exclusive control of the DHSS."

Ombudsman Reply: It is clear from the Department's proposed statutory and regulatory changes that the Department has rejected this recommendation. Neither of the Department's proposals includes a tiered system for civil misconduct that is similar to the tiered system for barrier crimes. A barrier for civil misconduct will remain permanent regardless of the severity of the misconduct.

*

Allegation Four: Contrary to Law – By regarding probable cause findings in Child In Need Of Aid cases as barrier conditions, DHSS violates 7 AAC 10.955(n) which establishes the correct standard as "preponderance of the evidence."

> **DHSS Response:** "Finally, if your logic was followed as to Allegation 4, no finding of a CINA proceeding would go on the registry, which obviously undermines the intent of the statute."
>
> **Ombudsman Reply:** The Ombudsman is confused by the Department's response. While we did note that using CINA findings as the basis for a barrier condition is problematic because the statutes establishing the Centralized Registry currently require that there be a finding of "abuse or neglect" whereas the judge in a CINA case may not make specific findings of that nature. But we did not go so far as to state that *no* finding of a CINA proceeding should go on the registry, if such a registry actually existed. We simply recommended that the BCP utilize adjudication findings, rather than probable cause findings, as the basis for the barrier because the standard of proof for adjudication is higher and matches the standard of proof found in the applicable background check regulation, 7 AAC 10.955(n), for placement on the Centralized Registry.

The Department's argument does not convince the Ombudsman to change its finding as to Allegation Four. This allegation is found to be ***justified.***

Recommendation 11*: The Department should reconsider its use of probable cause findings to permanently bar individuals from employment. We suggest that the Department utilize adjudication findings because, at that phase of a CINA case, the judge must find by a preponderance of the evidence that the child is a Child In Need of Aid.*

> **DHSS Response:** "As to Recommendations 1, 2, and 11, we disagree that we are interpreting the statute incorrectly."
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> **Ombudsman Reply:** The Ombudsman notes the Department's rejection of this recommendation and we have urged the Legislature to prohibit the use of probable cause findings as the basis for permanently barring individuals from employment with entities licensed by the Department.

*

Allegation Five: Unfair – The Office of Children's Services regulations at 7 AAC 54.050 - .060 prohibit the release of child protection case records used by the Department in making a barrier condition determination to an affected individual seeking to review and challenge that decision.

> **Ombudsman Note:** The Department did not respond to the finding on this allegation and, as such, the finding of ***justified*** will stand.

Recommendation 12*: The Department of Health and Social Services should amend regulations to provide the release of child protection case records to an individual seeking to challenge a BCP barrier condition determination without a court order.*

> **DHSS Response:** "We believe that Recommendations 8 and 12 have been implemented and been in place since 2012."

Ombudsman Reply: A review of 7 AAC 54.050 - .060 reveals that neither regulation has been revised since 2005 so it is unclear why the Department would believe that this recommendation has been implemented and in place since 2012. The Department's proposed statutory changes would explicitly allow OCS to release its records to the Background Check Program but its proposed regulations would add a new section prohibiting the Department from disclosing information obtained under the Background Check Program to anyone outside the Department. As such, it appears that individuals will still not be able to access child protection records that the Department intends to use in barring individuals from working for a covered entity, or in considering a variance request.

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FINDING OF RECORD AND CLOSURE

The Department flatly rejected Recommendations 1, 2, and 11.

The Department agreed in theory with Recommendation 3 but declined to implement it.

Commissioner Davidson wrote that the Department would be addressing Recommendations 4 and 5 in the next six months but offered no explanation of how the Department plans to address them and, frankly, the Department's statutory and regulatory proposals leave the Ombudsman skeptical of the response.

Commissioner Davidson agreed to Recommendation 6 but, in fact, the Department's proposed statutory changes would remove the "relevancy analysis" that currently exists in AS 47.05.330(j).

Commissioner Davidson responded that Recommendation 7 requires a statutory fix but the Department has subsequently proposed legislation that would remove Adult Protective Services and Long-Term Care Ombudsman findings from inclusion in the Centralized Registry. We think this is an error and will recommend that the Legislature address this issue.

Commissioner Davidson wrote that Recommendations 8 and 12 have been implemented since 2012 but that is inaccurate.

Commissioner Davidson wrote that Recommendations 9 and 10 need to be addressed in either statute or regulation but ombudsman review of the Department's proposed statutory and regulatory changes shows that the Department does not actually intend to address either of these recommendations.

In conclusion, the final finding of record in Ombudsman Investigation A2013-0776 will be entered as ***justified*** and ***not rectified***.

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Appendix A

SUMMARY OF DHSS BACKGROUND CHECK SYSTEM COMPLAINTS

Beginning in 2012, the Office of the Ombudsman received multiple complaints against the Department of Health and Social Services regarding its background check system.

All of the individuals who filed complaints were either applying to work or were already working as personal care assistants (PCA) for the elderly or disabled; or, were enrolled in a college child education program that required course fieldwork with children in a licensed child care facility. All of the complainants were barred after submitting to a DHSS background check as a condition of their employment or participation in class fieldwork.

During the background check process, the Department determined the complainants had a barrier condition that permanently barred them from employment or contact with children in a licensed child care facility due to their past involvement in an Office of Children's Services (OCS) child protective services and Child In Need Of Aid (CINA) civil court case concerning their children. For all of the complainants, the events that caused the barrier conditions had occurred well in their past - more than 5, 10, 20, or even almost 25 years ago. They complained that the Department was unreasonably restricting their ability to obtain employment or to participate in an education program.

Summaries of each complaint follow:

A2012-0803 / B.N.

Summary: In June 2012, B.N. complained that DHSS had recently determined she was barred from employment as a personal care assistant (PCA) due to an OCS substantiated finding of neglect made against her in 1989. Prior to receiving the barring condition notice, B.N. had been working as a PCA for many years. When she applied for a new job with a different home health care agency, she was required to submit to a background check under the post-2007 regulations. The BCP notified B.N. then that an OCS barrier condition had been identified and that it was a permanent bar to employment.

B.N. contacted the BCP and OCS for guidance on how to challenge the barrier condition determination. OCS advised her to file an agency grievance, which she did. OCS later forwarded her appeal to the Office of Administrative Hearings (OAH) for adjudication. B.N.'s employer also applied for a variance, which the Department denied.

B.N. told the ombudsman that OCS had been involved with her family for only a short time before returning her children to her and then closing its case. She said, "This issue isn't serious enough to keep me from employment. This is ludicrous. They wouldn't have given me my children back if it was that serious." B.N. was frustrated that an incident with her children that had occurred more than 23 years in her past was now impacting her ability to obtain a job as a PCA.

The ombudsman contacted the Attorney General's Office, OCS, and the BCP in response to B.N.'s complaint and reviewed relevant OCS case records. The ombudsman learned OCS had substantiated four reports of neglect against her in 1989. The reports alleged B.N.:

- had not believed a daughter had been sexually abused by her estranged husband;
- chased a daughter with a belt;
- displayed an inability to control her anger; and
- allowed her house to become filthy.

OCS took custody of B.N.'s children, placed them in out-of-home care, and filed a CINA petition. The court found probable cause to believe B.N.'s children were in need of aid. B.N. later stipulated to adjudication of her children as children in need of aid without admitting to the neglect allegations. The court adopted the stipulation without specific findings of fact. A short time later, OCS returned the children to B.N.'s care and custody and dismissed the child protective services and CINA cases.

The ombudsman questioned the accuracy of the barring condition notice sent to B.N. as it cited the OCS substantiated finding, rather than the CINA findings, as the reason for the barrier condition. The Department acknowledged this was an error and confirmed that the CINA findings had created the barrier condition.

The ombudsman also questioned the appropriateness of referring B.N. to the OCS grievance and OAH appeal processes for the purposes of challenging the barrier condition determination. This was problematic because while an OCS grievance and OAH appeal could result in an OCS substantiated finding being overturned, the CINA findings that had created the barrier condition were not subject to administrative review. The Department conceded it had referred B.N. to the OCS grievance and OAH appeal processes in error and confirmed that the only method available for B.N. to challenge the barrier condition determination were the reconsideration or variance processes. Alternatively, the Department said B.N. could file an appeal in court to have the CINA findings vacated, which would result in the removal of the barrier condition.

While this complaint was pending, OCS overturned all of the substantiated findings of neglect that had been made against B.N. in 1989. OAH subsequently dismissed the appeal of the substantiated findings as moot but left open the possibility of B.N. challenging her placement on the Centralized Registry due to the CINA findings. Additionally, B.N. requested reconsideration of the Department's decision to deny her employer's request for variance and the DHSS commissioner approved her request.

Although the OCS substantiated findings were overturned, B.N. still has a barrier condition due to the fact that the CINA findings have not been vacated. In order for B.N. to change employment within her field of work, any prospective employer would have to apply for and receive a variance to have her on staff.

A2012-1113 / C.O.

Summary: In August 2012, C.O. complained that DHSS barred her from employment as a PCA due to an OCS substantiated finding of abuse made against her in 1998. She complained to the ombudsman that she had been unable to obtain her child protection case records, which she needed in order to challenge the barrier condition determination. C.O. had recently applied for a PCA position with a home health care provider and submitted to the required BCP background check. The BCP notified C.O. that she had been identified as having an OCS barrier condition and that it was a permanent bar to employment.

C.O. contacted the BCP to inquire about the reconsideration process but was told it was not available to her as hers was not a case of mistaken identity. Her employer agreed to apply for a variance on her behalf.

C.O. also contacted OCS for specific information regarding the barrier condition and to request a copy of her child protective services case records because the Department's Variance Review Committee had advised her it needed the records in order to process her variance request. OCS denied C.O.'s records request stating it was unable to release the records without a court order and advised her to contact the attorney who represented her in the CINA case for assistance.

C.O. contacted the court where the CINA case was filed in 1998 to request a copy of the court case file. However, the judge authorized the release of only a few documents from the file to her.

The ombudsman contacted the Attorney General's Office, OCS, and the BCP to discuss C.O.'s complaint and reviewed relevant OCS case records. The ombudsman learned OCS had substantiated two reports of harm against her in 1998. OCS took custody of C.O.'s son, placed him in out-of-home care, and filed a CINA petition. The OCS case records show the court found probable cause to believe C.O.'s son was a child in need of aid and later adjudicated him as such.

The ombudsman questioned the accuracy of the barring condition notice sent to C.O. as it cited the OCS substantiated finding as the reason for the barrier condition. The Department acknowledged that the notice should have cited the CINA findings, rather than the OCS substantiated findings, as the basis for the barrier condition. The Department said the only method available to C.O. to challenge the barrier condition determination was through the variance process or she could file an appeal in court to have the CINA findings vacated, which would result in the removal of the barrier condition.

The ombudsman also discussed the fact that C.O. had been unable to obtain the OCS child protection case records needed to provide to the Variance Review Committee. The Department said OCS could not release the records to C.O. without a court order but conceded this created a dilemma for her.

During the review of this complaint, the Attorney General's Office and Department ultimately agreed to release the child protection case records directly to the Variance Review Committee so that it could move forward in processing C.O.'s variance request. The Department did not, however, release the records to C.O. to help her seek a variance.

The Department subsequently granted C.O.'s variance request.

A2012-1371 / D.P.

Summary: In October 2012, D.P. complained that DHSS had recently barred her from employment as a PCA due to her involvement in child protective services and CINA cases concerning her two teenage daughters back in 2003. She complained she had been unable to obtain her child protection case records, which she needed in order to challenge the barrier condition determination.

D.P.'s employer filed for a variance and the Variance Review Committee required her to provide the child protection case records. OCS, however, denied D.P.'s records request stating it was unable to release the records without a court order. D.P. contacted the court where the CINA case was filed in 2003 and requested a copy of the court case file but the judge only authorized the release of a few documents to her. Those documents included the OCS petition to release

custody of D.P.'s daughters and the court's subsequent order granting the release. D.P. provided these documents to the Variance Review Committee, but the committee told her she needed to provide additional child protection case records in order for it to process her variance request.

The ombudsman contacted the Attorney General's Office, OCS, and the Department's Variance Review Committee regarding D.P.'s complaint.

The Attorney General's Office and the Department subsequently agreed to release the child protection case records directly to the Variance Review Committee so that it could move forward in processing D.P.'s variance request. The Department did not, however, release the records to D.P.

The Department ultimately denied D.P.'s variance request.

A2012-1419 / E.Q.

Summary: In October 2012, E.Q., a state certified middle and high school teacher, complained the DHSS had recently determined she was barred from contact with children in a municipal or state-licensed child care facility due to her involvement in a child protective services and CINA case. E.Q. explained she was expanding her teaching certification to include preschool through third-grade children and had recently enrolled in a University of Alaska Education Early Childhood Program. The program required her to complete fieldwork at a licensed child care facility. In order to participate in this fieldwork, E.Q. was required to undergo a routine background check through the municipality's Child Care Licensing Program (CCL).[38]

E.Q. learned of the OCS barrier condition during the background check process when OCS notified the child Care Licensing Program that it had identified a previous CINA case from 1999 involving E.Q.'s daughters. The court had adjudicated her children as children in need of aid, which created a permanent barrier condition for E.Q. and barred her from contact with children in a state-licensed child care facility. After being notified of the barrier, UA suspended her from participating in the Education Early Childhood Program.

The ombudsman contacted the Attorney General's Office, OCS, the BCP, and the CCL and reviewed relevant OCS case records. The ombudsman learned E.Q. and her then-husband were the subjects of a protective services report in late 1999. E.Q. had called OCS and law enforcement to ask for assistance and report her then-husband had physically abused and injured their oldest daughter during an incident at the family home. OCS subsequently substantiated findings of physical and sexual abuse of the girls against their father. OCS also substantiated a finding of neglect against E.Q. for failing to protect her daughters from domestic violence and abuse by their father. It is relevant to note E.Q. was also a victim of domestic violence by her then-husband.

OCS took custody of the girls, placed them in out-of-home care, and filed a CINA petition. E.Q. later stipulated to adjudication and the court found her children were children in need of aid due to physical and emotional abuse by their father. The adjudication order noted that E.Q. had been unable to protect the children from harm by their father based on her own fears of his violence.

[38] The DHSS has delegated the CCL the authority to regulate child care licensing facilities within the Municipality of Anchorage. As part of its duties, the CCL is required to ensure individuals having contact with children in these facilities submit to and pass a mandatory background check that meets the requirements of the department's background check law.

Following the incident, E.Q. filed for a protective order against her then-husband and separated from him. OCS then promptly placed the children back in her care.

E.Q. also filed for divorce and custody. After protracted and contested civil proceedings, the court awarded her sole legal and physical custody of their youngest daughter. The oldest daughter had turned 18 before the divorce case was finalized so her custody was not at issue. The court granted only limited, therapeutically supervised visitation between E.Q.'s ex-husband and their youngest daughter.

The CINA case was a companion case to the divorce and custody case. Superior Court Judge Mark Rindner presided over both cases and he ruled that it was appropriate for the CINA case to remain open concurrently until the divorce and custody case was finalized. Once the divorce action was complete, Judge Rindner dismissed the CINA case. While the civil custody case was pending, Judge Rindner ordered that the children be placed in the legal custody of OCS and the physical custody of E.Q.

In discussing E.Q.'s complaint, the Department confirmed that the CINA findings had created the barrier condition. The Attorney General's Office advised that E.Q. could challenge the barrier condition through the reconsideration or variance processes or she could file an appeal in court to have the CINA findings vacated, which would result in the removal of the barrier condition.

While the ombudsman was reviewing E.Q.'s complaint, she filed an appeal with OCS seeking to overturn the agency substantiated finding of neglect made against her in 1999. In addition, she filed a motion with the court in her closed divorce and custody case in an attempt to address and resolve the matter of the OCS barrier condition determination.

Judge Rindner held a hearing in her divorce and custody case in 2012. E.Q. said although Judge Rindner was very sympathetic to her predicament, he could not offer her the remedy she was seeking in the forum of the divorce and custody case. Instead, Judge Rindner suggested she file a motion in the CINA case to have the adjudication finding vacated.

The ombudsman later requested and listened to a copy of the audio CD of this hearing. The ombudsman noted during the hearing that Judge Rindner recalled E.Q.'s former divorce and CINA cases. He opined:

> I'll just state for the record that it is my clear belief [that] E.Q. was the victim in the cases. The children in the CINA case were, after investigation, returned by OCS to her and it was Mr. Q that was the perpetrator. There was some domestic violence between Ms. and Mr. Q perpetrated by Mr. Q and it's my firm belief that if she had any fault in anything it was that she was timid and unable to easily stand up to a domineering husband.
>
> . . . . .
>
> I think she was a victim and is being further victimized by this bureaucratic situation. I understand what the statutes are designed to accomplish. I understand the reason the statutes exist and most of the time they are going to be used appropriately. But, like I say, they use the same brush on the victims in a CINA case who are parents as they do on the perpetrators in a CINA case and that bothers me a lot.

Regarding E.Q.'s OCS appeal, OCS overturned the agency substantiated finding of neglect made against her in 1999. Although the OCS substantiated finding was overturned, E.Q. still has a barrier condition because the CINA finding has not been vacated.

The ombudsman closed E.Q.'s 2012 complaint because it appeared that the only method to have the barrier condition removed was by reopening the CINA case and because E.Q. told the ombudsman she was seeking a pro bono attorney to help her resolve the matter in court.

In 2013, E.Q. filed a second Ombudsman complaint related to the DHSS background check system. E.Q. explained she had recently submitted to another background check through the Child Care Licensing Program but this time the results of her OCS records check came back as "clear." E.Q. was puzzled because, although the OCS substantiated finding of neglect made against her in 1999 had recently been overturned, she had not been back to court to challenge the CINA adjudication finding that formed the basis of the October 2012 barrier condition. E.Q. asked the ombudsman to contact the Department to inquire about the results of her most recent background check and confirm her clearance.

The ombudsman contacted the Attorney General's Office, OCS, the BCP, and the Child Care Licensing Program and learned that several errors had been made in the processing of E.Q.'s most recent background check and that the "clear" result was incorrect.

The ombudsman discovered that the first mistake occurred when the Child Care Licensing Program routed the background check screening request for E.Q. through OCS instead of through the BCP. The BCP conducts background checks for programs and individuals subject to the licensing and certification authority of DHSS or who are eligible to receive payments from the Department. These background checks must meet the statutory requirements of the Department's background check law. This is significant because the BCP background check process is more comprehensive and requires screening individuals for criminal history as well as other barrier conditions such as an agency or court finding of abuse or neglect.

In E.Q.'s case, the Child Care Licensing Program did not route her most recent background check request through the BCP. Instead, the Child Care Licensing Program contacted OCS directly to request a child abuse and neglect background check screening.

The Child Care Licensing Program told the ombudsman that it has been the agency's practice since before the Department's background check law went into effect in 2005 to route all background check screening requests directly through OCS and not the BCP. The Child Care Licensing Program said DHSS had notified the Licensing Program that it was incorrectly routing these requests.

The ombudsman discovered that in responding to the Child Care Licensing Program's background check screening requests, OCS had only been reviewing the Central Registry for and reporting agency substantiated findings of abuse and neglect. OCS had not been reviewing its records for and reporting CINA findings to the Child Care Licensing Program. That is because historically OCS child abuse and neglect background checks had not been used to identify barriers to employment or licensing certification for individuals or to determine their suitability for contact with vulnerable children or adults in a municipal or state-licensed facility. Rather, they were used primarily for child protective services purposes such as screening prospective foster and adoptive parents for placement of a child and responding to out-of-state child protective services agency inquiries. Thus, in responding to child abuse and neglect background

checks screening requests from entities other than the BCP, OCS had been reviewing its records only for and reporting on agency substantiated findings.

When processing the second background check screening request from the Child Care Licensing Program for E.Q., OCS reviewed its records only for any agency substantiated findings of abuse and/or neglect. And, because OCS had recently overturned its prior substantiated finding of neglect made against E.Q. in 1999, OCS notified the Child Care Licensing Program that E.Q.'s background check was "clear." OCS did not review its records for any CINA findings. If the Child Care Licensing Program had routed E.Q.'s background check screening request through the BCP for processing, OCS would have reported the existence of the CINA findings in her case, and the results of her background check would not have come back as "clear."

During the review of this complaint, the Department acknowledged errors had occurred in the processing of E.Q.'s most recent background check and agreed to work to resolve those issues with OCS and the Child Care Licensing Program.

The Department also confirmed that the CINA findings which served as the basis for the barrier condition for E.Q. still existed and suggested she continue to seek relief through the court.

A2012-1676 / F.R.

Summary: In late 2012, F.R. complained that DHSS barred him from employment as a PCA due to an OCS substantiated finding of abuse made against him involving his daughter in 1998. He received notice of the barrier condition in June 2011 after applying for a new PCA position with a different employer. Prior to that, F.R. had been working as a PCA for many years.

F.R. applied for reconsideration to the BCP, which the Department denied. The letter denying his request for reconsideration read in part:

> A recent review of information in the OCS database indicates that the substantiated finding of child neglect remains in your file and therefore remains a barrier condition. You may contact the OCS office to file a grievance or appeal if you wish to see if the information can be amended. If the information in the OCS database is amended you may feel free to contact me to submit another request for reconsideration.
>
> This decision on your request is a final agency decision under 7 AAC 10.950(c). You may appeal the Department's decision by filing an appeal with the superior court within 30 days of receipt of this letter. Additionally, if you are willing to disclose to your employer the nature of the above referenced barrier crime, the employer may request a variance within 30 days of the date of your receipt of this notice.

F.R. then contacted OCS for specific information regarding the barrier condition and to request a copy of his child protective services case records. OCS denied F.R.'s records request stating it was unable to release the records without a court order and advised him to contact the attorney who represented him in the CINA case for assistance.

The ombudsman contacted the Attorney General's Office, OCS, and the BCP to discuss F.R.'s complaint and reviewed relevant OCS case records. The ombudsman learned OCS had substantiated a report of neglect against him in 1998. The OCS records show the report alleged F.R. left his eight-year-old daughter home alone and locked in the house. F.R. told the ombudsman that this was a misrepresentation of facts that he later addressed and cleared up in court. According to F.R., the report was about his "housing conditions" and "homesteader"

lifestyle. He said he was a single parent and due to his financial circumstances, he and his daughter lived in a home with no running water or sewer, called "dry cabins" by some Alaskans. F.R. explained they used the washing facilities at his mother's, hauled water to their home, and used a "honey bucket." F.R. said his daughter's needs were not being neglected and that they were simply living a lifestyle according to what he could afford.

Based on this report, OCS took custody of F.R.'s daughter, placed her in out-of-home care, and filed a CINA petition. The court found probable cause to believe F.R.'s daughter was a child in need of aid. Although the court found probable cause, it dismissed the CINA case within a couple of months and short of adjudicating the daughter to be in need of aid. F.R.'s daughter was returned to his care and custody.

The ombudsman questioned the Department's use of the probable cause finding in the CINA case as the basis for F.R.'s barrier condition. That is because the court had found only probable cause to believe F.R.'s daughter was a child in need of aid and had not made an adjudicatory finding based on a preponderance of the evidence that she was a child in need of aid or that F.R. had abused or neglected his daughter. The Attorney General's Office said the background check statute contemplates that <u>any</u> CINA finding or order creates a barrier condition.

The ombudsman found the Department's interpretation of statute and its application of the above standard to be problematic and questioned whether a probable cause finding in a CINA case was in fact sufficient to establish a barrier condition. The Attorney General's Office said it would consider the concerns identified by the ombudsman and would re-evaluate the application of this standard. However, the Department is still using probable cause findings to bar individuals from employment.

A2013-0188 / G.S.

Summary: In early 2013, G.S. complained that DHSS had recently determined she could not work as a PCA due to an OCS substantiated finding of neglect involving her son in 1997. Prior to receiving the barring condition notice, G.S. had been working as a registered nursing assistant in the State of Washington. She moved back to Alaska to care for a friend who was receiving in-home PCA services through a home health care agency. She was required to submit to a BCP background check when she applied to be her friend's PCA. The BCP notified G.S. then that an OCS barrier condition had been identified and that it was a permanent bar to employment.

After receiving the notice, G.S. contacted the BCP for additional information about the reconsideration and variance processes and to request a copy of the OCS records relied upon to make the barrier condition determination. G.S. said the BCP told her the reconsideration process wasn't available to her because she was not arguing mistaken identity. The BCP also told her it could not help her with her records request and referred her to OCS.

G.S. then contacted OCS for information on how to have the barrier condition removed. OCS advised her that she needed to file an appeal with the OAH to challenge the barrier condition determination and gave her an OAH appeal form to complete, which she did. OCS then forwarded her appeal to the OAH for adjudication.

G.S. also asked OCS for a copy of her child protection case records, which OCS denied. OCS stated it was unable to release the records without a court order and advised her to contact the court where the CINA case had been filed. G.S. then contacted the court to request a copy of the court case file and was told the copies would cost her $120, which she said she could not afford.

The ombudsman contacted the Attorney General's Office, OCS, and the BCP to discuss G.S.'s complaint and reviewed relevant OCS case records. The ombudsman learned G.S. and her then-husband had been the subjects of several substantiated reports of neglect of their son from 1993 through 1997. Based on a 1997 report, OCS took custody of G.S.'s son, placed him in foster care, and filed a CINA petition. The court adjudicated her son as a child in need of aid due to neglect related to the parents' substance abuse and domestic violence in May 1998. The Department later filed for termination of parental rights. During the termination trial, G.S.'s son died while in foster care. The court then dismissed the CINA case.

The ombudsman questioned the accuracy of the barring condition notice sent to G.S. as it cited an OCS substantiated finding as the reason for the barrier condition. The Department acknowledged the error and instead argued that the CINA findings had created the barrier condition.

The ombudsman also questioned the appropriateness of OCS referring G.S. to the OAH appeal process for the purposes of challenging the barrier condition determination because the CINA findings that had created the barrier condition were not subject to administrative review. The Department acknowledged it had erred in referring G.S. to the OAH appeal process. The Department said that the only method available for G.S. to challenge the barrier condition determination were the reconsideration or variance processes. Alternatively, the Department said G.S. could file an appeal in court to have the CINA findings vacated, which would result in the removal of the barrier condition.

A2013-0787 / H.T.

Summary: In Spring of 2013, H.T. complained the DHSS had recently determined she was barred from employment as a PCA due to her involvement in a CINA case concerning her children in 2005. Prior to receiving the barring condition notice, H.T. had been the long-term caregiver of her live-in adult brother who has a handicap. Her brother is a Medicaid recipient and receives in-home personal care assistance services through a home health care agency. H.T. needed the background check for her application to become her brother's PCA but was instead notified that her previous CINA case permanently barred from work as a PCA.

After receiving the barring condition notice, H.T. contacted the BCP to inquire about the reconsideration process but was told it was not available to her as she was not arguing mistaken identity. She said BCP staff told her it was useless for her to apply for reconsideration because it would be denied. H.T. told the ombudsman that she was reluctant to apply for a variance because the variance process required her to release child protection and CINA case information to her potential employer and she believed this was a violation of her and her now-adult children's privacy rights.

H.T. also asked the BCP for a copy of the OCS records relied upon to make the barrier condition determination. The BCP told her it could not help her with her records request and referred her to OCS. H.T. said she then contacted OCS to request copies of the child protection case records, which OCS denied. Instead, OCS inexplicably referred her back to the BCP for the records.

The ombudsman contacted the Attorney General's Office, OCS, and the BCP to discuss H.T.'s complaint and reviewed relevant OCS case records. The ombudsman learned OCS had substantiated a report of mental injury against her and her husband in 2005. The report alleged H.T. and her husband, [the children's stepfather] used excessive discipline on H.T.'s three

children – boys aged 14 and 11 and a daughter aged 13. Based on the report, OCS took custody of the children, placed them in foster care, and filed a CINA petition. The court found probable cause to believe H.T.'s children were in need of aid. The couple later contested adjudication of the children and a trial was scheduled. In the interim, OCS released custody of the two boys and returned them to H.T.'s care and custody. At the adjudication trial, the court found H.T.'s daughter was a child in need of aid.

H.T.'s daughter remained in state custody until Fall of 2008 when OCS dismissed the child protective services and CINA cases and returned her to her mother's care and custody. While she was in state custody, H.T.'s daughter ran away from foster care several times, began abusing alcohol and drugs, and became pregnant. Shortly after her release from state custody, H.T.'s daughter gave birth to a child. H.T.'s daughter eventually died of an accidental drug overdose at the age of 18. H.T. adopted and is now raising her grandchild.

The adoption home study writer, wrote a letter of support in 2013 regarding H.T.'s PCA application. The letter read in part:

> In fall 2011, I completed an adoption home study for the H.T. family. My investigation for the assessment required a thorough review of the adjudication in the Child In Need Of Aid case reflected in your background check. This included a detailed review of the Office of Children's Services (OCS) files and interviews with the three primary OCS social workers involved in the case. In my review, I found no evidence that [H.T.] or her husband had committed criminal offenses or actions consistent with child neglect or abuse. In fact, their two sons were returned to the home. I did, however, find extensive information suggesting that [H.T's] teenaged daughter was rebellious, uncontrollable and persistent in pursuing high risk behaviors, and that these behaviors continued while she was in state custody. It is also clear, from both files and interviews, that the [H.T. family] were vocal and proactive in challenging case workers regarding the lack of supervision and services their daughter received while in state care, and that this conflict negatively affected how OCS worked with the family. Notably, when the [H.T.'s] daughter became pregnant, OCS returned custody and she rejoined the family. In the course of my review, I also read psychological assessments that were completed for the [H.T.'s] and their children. In those findings, the psychologist stated that neither [H.T.] nor her husband presented a danger to their children. He further noted that the children were struggling with issues related to divorce and blended family relationships.
>
> My home study assessment also included direct interviews with the [H.T. family], their children, and observations and interactions with [H.T's sibling], the subject of [H.T.'s] PCA application. At the time of the home study, the [H.T. family] had three highly dependent family members in the home: H.T.'s [sibling], her [grandchild], and her [parent].
>
> All of the above noted inquiries, interviews, reviews and observations resulted in a positive and unconditional recommendation for child placement and my conclusion that [H.T.] was a safe and loving parent, grandparent, and caregiver. Further, H.T.'s husband appeared to be a strong support and partner in the successful functioning of the family constellation. Regarding [SIBLING], specifically, I noted that he expressed being happy in the H.T. home, was socially engaged with the family, and enjoyed his environment and activities.

> I strongly advocate for reconsideration of [H.T.'s] PCA application and, based on my 2011 home assessment, I believe that [sibling] is fortunate to have [H.T.] and her home and family as long-term resources.

The Department confirmed that the CINA findings created the barrier condition and that it was a permanent bar to employment.

The ombudsman questioned the accuracy of the BCP advising H.T. she was not eligible for the reconsideration process because hers was not a case of mistaken identity. The Department acknowledged that it had misinformed H.T. and agreed to accept a request for reconsideration from her challenging the applicability of the CINA findings and seeking an exception to the barrier condition.

A2013-0795 / I.U.

Summary: In June 2013, I.U., a PCA and a single mother of two teenage daughters, complained that DHSS had recently barred her from employment as a PCA due to her involvement in a CINA case concerning her two daughters back in 2004. Prior to receiving notice of the barring condition, I.U. had been working as a PCA for several years when her long-term client decided to switch to a different home health care agency. The client asked I.U. to move to the new home health care agency with her so that I.U. could remain her PCA. So, I.U. applied for a PCA position with the new agency and was required to submit to a BCP background check. The BCP notified I.U. then that an OCS barrier condition had been identified and that it was a permanent bar to employment as a PCA.

After receiving the barring condition notice, I.U.'s prospective employer requested a variance, which the Department denied.

The ombudsman contacted the Attorney General's Office, OCS, and the Background Check Program to discuss I.U.'s complaint and reviewed relevant OCS case records. The ombudsman learned OCS had substantiated a report of neglect against her and her then-husband in 2004. The report alleged the couple was neglecting their daughters due to substance abuse. OCS took custody of I.U.'s children, placed them in foster care, and filed a CINA petition. The court found probable cause to believe I.U.'s children were in need of aid. I.U. and her then-husband stipulated to adjudication of the children as children in need of aid due to neglect related to their substance abuse.

I.U. told the ombudsman that OCS's removal of her children was a wake-up call that prompted her to clean up her life and regain custody of her children. She left her then-husband within a few months of the children's removal because he continued to use drugs. She later divorced him.

The OCS records show that while I.U.'s children were in state custody, she successfully completed intensive-outpatient substance abuse treatment and aftercare treatment; participated in counseling, visitation, and urinalysis testing services; and she maintained full-time employment and obtained appropriate housing. OCS later returned the children to I.U.'s care and custody and dismissed the child protective services and CINA cases in 2006. There have been no subsequent OCS reports involving I.U. and her children.

I.U. told the ombudsman that she has been clean and sober ever since. She said she is the sole caretaker of her children and sole supporter for them as her ex-husband is now incarcerated and

does not pay child support. I.U. told the ombudsman her job as a PCA is her livelihood and how she supports her family. She said:

> I don't understand why this is coming up now . . . I was abusing substances back then. I went to rehab. I worked hard and fixed my life. I have been clean and sober since . . . I am not a bad person. I never beat my kids. I have never been arrested. I made mistakes, yes. I am not that person anymore . . . My life and livelihood shouldn't be at stake this much later – nine years. I am fighting for my job and to support my kids… I did parenting classes and everything else they [OCS] recommended. I have worked full-time since I left him [ex-husband]. I got my own place and a car. I have good credit. I worked really hard to get where I am today. I deserve this chance. This isn't right.

In discussing I.U.'s complaint, the Department confirmed that the CINA findings had created the barrier condition and that it was a permanent bar to employment for her.

During the review of this complaint, the Department agreed to accept a variance request from I.U. allowing her to challenge the applicability of the CINA findings and seek an exception to the barrier condition.

The Department subsequently decided to grant I.U.'s variance request with conditions.

J2013-0317 / J.V.

Summary: In December 2013, J.V. complained that DHSS had recently determined he had a barrier condition due to a CINA case concerning his daughter in 2007. J.V. explained he had recently started a new job at a medical facility and was required to submit to a background check. When the results of the background check came back several months later, the BCP notified J.V. that a barrier condition had been identified and that it was a permanent bar to employment. As a result, the hospital terminated his employment.

J.V. applied for reconsideration but, shortly after filing, J.V. said he received a phone call from the BCP advising him that the reconsideration process was not available to him because his was not a case of mistaken identity.

J.V. said he would have filed for a variance if the choice had been his. However, his employer advised him it was their internal policy not to seek a variance for a barrier condition that was child related.

The ombudsman contacted the Attorney General's Office, OCS, and the BCP to discuss J.V.'s complaint and reviewed relevant OCS case records. The ombudsman learned that OCS had received a report of neglect involving J.V.'s six-month-old child back in 2007. The report alleged the child's mother was suicidal and intoxicated and had abandoned her baby with a neighbor in the early morning hours on a Sunday. J.V. and the child's mother were not a couple and were not living together at the time of the report. The neighbor was unwilling to care for the baby and called Anchorage Police Department (APD). APD went to the mother's home to investigate and called J.V. to ask if he could pick up and care for his daughter. J.V. told APD that he had drank 6-9 beers over the course of a few hours and that he was unable to drive to come pick her up. Because neither of the parents or extended family members were immediately available to care for the baby, APD placed her at a shelter for the night and OCS took emergency custody at 1:31 a.m. the next day. OCS filed a CINA petition which read in part:

> APD had determined that the timeframe that [J.V.] had consumed the reported amount of alcohol was not sufficient to be sober to provide care for the infant…
>
> At this time, the Department believes it is in this infant's best interest to remain in the legal and physical custody of the State until further information can be gathered to assess the parent's ability to ensure that this infant receives her basic needs and adequate supervision with a sober caregiver.

OCS substantiated findings of neglect against both J.V. and the mother. The mother was also arrested and charged with child neglect.

The court found probable cause to believe the baby was a child in need of aid in early 2007. The court log notes show the judge stated at the hearing, "The court will find that the child's welfare was in danger at the time… the child had no ability to fend for itself… these findings may be subject to being re-argued at a continued probable cause hearing."

At the continued probable cause hearing later that year, the mother stipulated to probable cause without admitting to the facts. J.V. did not yet have an attorney. The order also stated:

> The father takes no position on probable cause without counsel. Due to the parents' agreement to DHSS having temporary custody in the interim until another hearing can be set, the court makes the following ORDER:
>
> 1) The department shall have temporary legal custody of the above named child throughout adjudication . . .
> 2) It was not reasonable under the circumstances that preventative services be provided to prevent the removal of the child from the parents' custody . . .
> 3) It is contrary to the welfare of the child to remain in the home at the present time due to the allegations of the petition.
> 4) The above findings may be contested by the father at a temporary custody hearing . . .

The court hearing log notes show the judge stated, "I will make provisional probable cause findings today. . . Give [his attorney] a week if she wants to reopen probable cause." The court had just approved a public defender for [J.V.] but she was not present at this hearing. Thus, J.V. did not have any representation during the probable cause hearings.

Several months later, OCS dismissed the child protective services and CINA cases prior to adjudication and released custody of J.V.'s daughter to him. The Order of Dismissal and Release from Custody read in part:

> Based on the agreement that [J.V.] will provide a safe and appropriate home for the child and there being no child protection issues in regards to the father.
>
> IT IS HEREBY ORDERED that the child in need of aid case is DISMISSED and the child named above is RELEASED from the department's custody into the custody of [J.V.]…

J.V. was troubled by the results of his BCP background check because he was not the parent responsible for his daughter at the time she was taken into state custody. She was not in his care, custody, or possession when the incident that resulted in her removal from her mother's care had occurred. J.V. said that immediately after the OCS and CINA cases were dismissed, he filed for

custody and the court awarded him full custody of his daughter. Since then, he has been the primary caretaker and sole supporter of his daughter as well as a younger daughter he now has. J.V. said the OCS barrier condition was impacting his livelihood and ability to support his children.

During the review of this complaint, the Department agreed to accept and consider J.V.'s original request for reconsideration, which would allow him to challenge the applicability of the CINA finding and seek an exception to the barrier condition.

Also, during the review of this complaint, J.V. filed an appeal with OCS seeking to overturn the OCS substantiated finding of neglect made against him in 2007. OCS overturned the substantiated finding in January 2014 stating, "There is no evidence of harm to the child as a result of his actions."

Although the OCS substantiated finding was overturned, J.V.'s barrier condition still exists because the CINA finding has not been vacated.

The Department subsequently made a discretionary decision to allow J.V. to apply for a variance as an individual. His variance request was granted with conditions and his former employer rehired him.

The Department told the ombudsman that J.V.'s case was the first time it had granted an individual a variance. The Department explained that while the existing regulations don't allow for an individual to apply for a variance without being associated with an entity, it has proposed new regulations that will.

A2014-0795/ K.W.

Summary: K.W. complained in 2014 that the BCP determined that the revocation of her child care license constituted a barrier condition. She further explained that the incident that caused the revocation did not involve her.

The complainant was a licensed child care provider through the Municipality of Anchorage Child Care Program and previously provided child care in her home. The complainant is also a currently licensed foster parent for the Office of Children's Services. She adopted two children who were foster placements in her home. At the time of the complaint, she was moving to adopt a sibling group of four children who were placed in her home.

In 2005, during the time the complainant provided child care, the complainant self-reported an incident that occurred between her biological child and a foster-adopt child to the Municipal Child Care Office. OCS investigated the incident as a protective services report but it was not substantiated. Even though OCS did not substantiate the report of harm, the municipality moved to revoke K.W.'s child care license. Despite the complainant's attempts to resolve the licensing issue through the administrative process, the Municipality revoked the complainant's child care license in late 2005/early 2006. The Municipality entered the license revocation into the Integrated Child Care Information System (ICCIS). ICCIS is a computer management system which contains licensing actions taken against licensed child care providers.

After the revocation, the complainant enrolled in a program through the University of Alaska Anchorage to earn a teaching certificate. In May 2011, the University performed a routine background check which revealed a barrier condition – the revocation of her Municipal Child Care license. The complainant needed to access the University's children's early learning facility

to complete the program so she provided details concerning the revocation to the University. After the University reviewed the information, they allowed her to continue with the program with modifications. In February 2012, the complainant applied for a foster care license through OCS. The BCP issued a provisional criminal history clearance. It is not clear why the barrier condition reported in May 2011 did not prevent the provisional clearance from initially being issued, but at some point BCP discovered the barrier condition and made a note in the complainant's record that they withdrew the provisional criminal history clearance. However, the database required that BCP manually withdraw the provisional clearance, which they failed to do. As a result, OCS was not aware of the barrier condition and issued a provisional foster care license to the complainant.

According to the BCP, they reviewed K.W.'s record in early 2014. BCP staff said that the complainant contacted them because she was going to graduate from the University and she wanted to check on her criminal history clearance. BCP said this is when they discovered that the withdraw status was not manually processed and the criminal history check was in provisional status when it should not have been. Therefore, in early 2014, the BCP sent a notice of revocation of a valid criminal history check to K.W. The notice was also sent to the OCS Licensing Office. It stated that the decision to revoke the valid criminal history check was due to the permanent barrier condition created by her Municipal Child Care license revocation. The notice from the BCP explained the process to request reconsideration of the agency's decision to revoke her valid criminal history check. The complainant submitted a request for reconsideration in early 2014. The BCP denied her request for reconsideration on three months later. Two months after that, the complainant contacted the ombudsman after the OCS told her she had a barrier condition that would prevent her from adopting the sibling group currently placed in her home.

Shortly after the complainant contacted our office, she contacted the Division of Public Assistance, Child Care Program Manager. The Child Care Program Manager contacted the Municipal Child Care Program Manager to discuss the circumstances of the child care license revocation. The Municipal Child Care Program Manager conferred with Municipal legal counsel and they made the decision to change the complainant's revoked status to closed in ICCIS. As a result of the change made in ICCIS, the Background Check Program was able to issue a valid criminal history check and the complainant's issue was resolved.

A2014-1237 / L.X.

Summary: L.X., a personal care assistant, contacted the ombudsman with a complaint against the DHSS in 2014. L.X. complained that OCS had determined he had a permanent barrier condition to employment as a direct care service provider due to his involvement in an OCS case that also became a CINA case.

L.X. said that he had just learned OCS had substantiated a finding of physical abuse against him and that he had a barrier condition after he applied for a new job as a PCA through a different home health care agency. He received a Notice of Barring Condition letter from the BCP notifying him of the existence of the barrier condition. The notice read in part:

> On [Date Redacted], the Superior Court of the State of Alaska entered a probable cause finding in a CINA (Child In Need Of Aid) proceeding under AS 47.10. This constitutes a permanent barrier under AS 47.05.310(c)(1).

L.X. said that although the child in the OCS case had lived with him, the child was not his and he had not been a party to the CINA case. The child was a 10-year-old boy who had significant behavioral and mental health problems. L.X. explained that the boy's mother, a long-time friend of his, had asked him to take care of her child while she went out of state to search for employment. L.X. agreed and he said the arrangement was supposed to only be temporary – maybe one to two months. However, more than a year passed and the mother had not returned to Alaska to retrieve her son nor did she send for him.

In response to L.X.'s complaint, the ombudsman contacted the BCP Program Manager and reviewed the relevant OCS case management and CINA court case file records.

The ombudsman learned that L.X. had been the subject of a protective services report in September 2013. The report alleged physical abuse of the child because of scratches on his face and neck. OCS investigated the report and substantiated the allegation of physical abuse of the child by L.X. OCS also substantiated an allegation of neglect due to abandonment by the mother.

During the investigation of this report, L.X. admitted to OCS that he had caused the scratches on the boy. L.X. explained that he had been clipping his fingernails when he saw the boy doing something he wasn't supposed to be doing. L.X. said he went to redirect the child by physically moving him but the child pulled away from him and tried to run, which resulted in the scratches. L.X. also told OCS that he could no longer care for the boy because of his out of control and unsafe behaviors in the home, which included starting fires and hurting animals.

Due to the circumstances of the case, OCS took emergency custody of the boy. The mother later stipulated to probable cause and adjudication in the CINA court case for abandonment and neglect of the child.

The ombudsman questioned the validity of the barrier condition determination made against the complainant and whether the complainant had received due process. Although OCS had substantiated a finding of physical abuse against L.X., he was not a party to the CINA case and the court did not make any findings related to the complainant or the allegations of physical abuse of the child by the complainant in the CINA court case.

The BCP consulted with OCS and the Attorney General's Office and determined that the barrier condition determination for the complainant had been made in error. The BCP rescinded the OCS barrier condition determination, changed the complainant's status in its computerized case management system to show a clear background check, and sent the complainant and his employer notice of the error and change.

The ombudsman then closed L.X.'s complaint as resolved.