

Public Report - Ombudsman Investigation

Department of Health and Social Services, Office of Children's Services

J20180209

July 17, 2019

The Ombudsman provides this public report of the investigation of complaint J2018-0209, pursuant to AS 24.55.200.

Introduction

The Alaska State Ombudsman has concluded our investigation of a complaint filed by a foster family about the Office of Children's Services (OCS) in August 2018. The foster parents alleged that OCS inappropriately removed a pre-adoptive foster child from their home. The foster parents explained that OCS placed a child, G., with their family at birth in 2015.¹ At the time of the complaint, the foster parents planned to adopt G. However, in August 2018, OCS moved G. to another foster home. The foster parents requested a placement review hearing, but the court denied the request. They asked the Alaska State Ombudsman for assistance in addressing their complaint about the child's allegedly improper removal from their home.

The Ombudsman investigated whether OCS abused its discretion in deciding to move G. from the complainants' home to another foster home. Assistant Ombudsman Kate Higgins reviewed OCS's online case management system for information relating to the child's case, as well as the foster parents' foster care license. She interviewed the OCS caseworker, with two supervisors present. Ms. Higgins requested and reviewed documentation from OCS's regional adoption manager and OCS's foster licensing specialist. She also reviewed relevant hearings from the Child in Need of Aid (CINA) proceedings. Alaska State Ombudsman Kate Burkhart and Ms. Higgins also interviewed OCS's legal counsel regarding OCS's opposition to the foster parents' request for a placement review hearing.

¹ This report uses initials to refer to the children as to not reveal their identities.

Based on a preponderance of the evidence, the Ombudsman found the allegation that OCS abused its discretion in the placement decisions related to the child *not supported*. However, in the course of the investigation, the Ombudsman opened an investigation of a second allegation related to how OCS participated in drafting the pleadings in this CINA case. Based on a preponderance of the evidence we reviewed, the Ombudsman found the allegation that OCS's opposition was unsupported by an adequate statement of reasons to be *justified*.

On April 25, 2019, OCS Director Natalie Norberg met with Ombudsman Kate Burkhart and Ms. Higgins to discuss the Ombudsman's preliminary findings and recommendations. Ms. Norberg provided several actions that her agency intended to take to rectify the complaint. After the consultation, the Ombudsman provided an additional opportunity for OCS to formally respond to the findings and recommendations. On June 10, 2019, Ms. Norberg responded that she did "not disagree with the findings or the recommendations."

Allegations

Based on the facts alleged in the complaint, the Ombudsman investigated two allegations:

1. OCS abused its discretion when it moved G from one foster home to another.²
2. OCS's opposition to the foster parents' motion for a placement review hearing was unsupported by an adequate statement of reasons.³

Background

The complainants are experienced foster parents. They have previously adopted several former foster children. G. was placed in their home in January 2015, after being released from the hospital at birth. In August 2015, G.'s older sibling, W., was placed in the complainant's home. W.

² AS 24.55.150(a)(2) provides the Ombudsman authority to investigate whether an administrative act by an agency is an abuse of discretion.

³ AS 24.55.150(a)(5) provides the Ombudsman authority to investigate whether an administrative act by an agency is unsupported by an adequate statement of reasons. Ombudsman Policy and Procedure 4040(13)(C) defines "unsupported by an adequate statement of reasons" as "the agency's factual assertions and legal conclusions lacked sufficient support."

remained in the home until May 2017, when W. asked to be moved to another foster home where G. and W.'s oldest sibling was also placed.

In June 2017, a home study was begun to evaluate whether the complainants should be approved to adopt G. The home study identified several areas of concern, including:

- the foster parents' reluctance to help their adopted children understand their histories or contact their biological families;
- use of forced exercise and spankings as discipline; and
- making the children re-pay "stolen" food.

The home study recommended adoption but stipulated that the foster parents should be required to take additional training. The foster parents subsequently completed the required training, but OCS's records indicated that the adoption worker was concerned whether to formally approve the home study and move forward with adoption.

Based on the concerns raised in the home study, OCS Licensing investigated the foster parents' use of corporal punishment. OCS substantiated the violation but determined that the foster parents had already self-corrected by ending the use of corporal punishment and seeking new skills to change their parenting style. The investigation report commended the foster parents for making changes and for their willingness to work with OCS.

In April 2018, the court held a permanency hearing for G. The OCS caseworker and the guardian ad litem (GAL) provided the court with updates on G.'s case. The caseworker indicated that G. was currently placed in a pre-adoptive home (the complainants'), but that there were some concerns raised in the adoption home study. She said that the foster parents had completed the additional training required by the home study and that OCS was evaluating whether to approve the adoption. She also stated that G. was visiting with W. "pretty regularly." The GAL indicated that she was "on the fence" about G. remaining in the complainants' home because she wanted G. placed with siblings. The caseworker was unsure whether she would recommend a placement change because G. had been in the home since birth. The judge commented that it sounded like there were competing concerns at play, to which the GAL agreed.

In May 2018, the caseworker documented instructing the foster parents to better facilitate visits between G. and W. Subsequently, the foster parents ensured that G. had weekly, all-day visits with W. These visits generally occurred at W.'s foster home.

In June 2018, W. began making disclosures to OCS about things witnessed or experienced in the complainants' home. These disclosures were similar to the allegations that OCS Licensing had already investigated in July and August 2017, but OCS policy requires that all OCS staff relay potential child mistreatment to the OCS Intake Unit for evaluation.⁴ OCS's Intake Unit declined to investigate the disclosures because the incidents were historical.

On June 26, 2018, OCS opened a joint Licensing and Child Protection investigation after G. fell off a stool while talking on the phone with W. G. was taken to the emergency room for a cut to the head; G. received a staple for the cut. The report of harm also alleged that G. had a healing burn that had been unaddressed. OCS Licensing issued its report on August 6, 2018, finding no violations of statute or regulation.

On July 23, 2018, the court held another permanency hearing. At that hearing, the caseworker indicated that OCS was likely going to move G. due to "concerns" with the placement and so that G. would be placed with W. The GAL shared her perception that OCS had been diligent in assessing the placement issue, to the point of "feet-dragging," and that her preference would be for G. to be moved that day due to the injuries that had occurred in the complainants' home.

On August 10, 2018, four days after OCS's licensing investigation regarding G.'s fall was closed as unsubstantiated, OCS mailed notice to the parties that it intended to change G.'s placement.⁵ On August 16, 2018, OCS held a team decision making meeting regarding placement. At this meeting, the complainants were notified that OCS intended to change placement. G. moved to a new foster home four days later, on August 20, 2018.

⁴ OCS CPS Policy 2.1 Protective Services Reports states:

Any OCS staff person who receives information that alleges child maltreatment will forward it to the intake unit for documentation, decision-making, and determination, making no prior judgments about whether the concerns should be assigned for initial assessment or screened out.

⁵ OCS CPS Policy 3.7.1 requires OCS to notify parties of a non-emergency placement change at least 10 days in advance when possible.

The complainants asked the court for a placement review hearing. OCS opposed the request, arguing that state law only provides parties to a CINA action the right to request a placement review hearing.⁶ OCS's opposition also provided several reasons for the placement change, including W.'s disclosures, concerns about injuries that G incurred while in the home, and lack of sibling contact. The court denied the foster parents' request for a placement review hearing

OCS's Proffered Reasons for Placement Change

In its opposition, OCS outlined several reasons why it decided to change G.'s placement. According to OCS's legal counsel, she obtained the factual background from the caseworker during a meeting on either August 23 or 24, 2018. The attorney further explained that, while OCS had requested G.'s medical records, the documentation had not arrived prior to the deadline to file OCS's opposition. The attorney told the Ombudsman that she relied on the caseworker's statements about G.'s health and safety when preparing OCS's opposition to the request for a placement review hearing.

On November 2, 2018, Ms. Higgins spoke with the caseworker, with two supervisors present, about each basis for the removal decision included in OCS's opposition. During that interview, the caseworker and her direct supervisor repeatedly emphasized that the main reason for the placement change was to keep G. and W. together and maintain the sibling relationship.

W.'s Disclosures

OCS's opposition averred that, beginning in June 2018, W began making disclosures about corporal punishment in the foster parents' home. W. also disclosed that older children in the home were tasked with caring for G. The evidence showed that these disclosures were relayed to the Intake Unit, as required by OCS policy, but were declined for investigation due to the length of time that had passed.

⁶ See AS 47.10.080(s) Foster parents are not usually parties to a child-in-need-of-aid proceeding.

G.'s Injuries and Lack of Supervision

OCS's opposition stated that, while in the complainants' home, G. suffered multiple injuries, including: a broken arm, a broken leg, gouges on the arm from a stick, a dog bite, and a cut to the head requiring a staple to close it. The foster father acknowledged that some of these injuries occurred, but not all of them.

The foster father denied that G. had ever had a broken arm. He explained the circumstances behind each of the other listed injuries. He stated that G. had broken a leg when G. was about a year old, while climbing down from a bed during a family camping trip. He reported that the gouges on G.'s arm happened while climbing on a hill and were not serious. He reported that the dog bite happened while G. was at another resource family's home. The foster father said that OCS had investigated the cut to G.'s head when G. fell most recently and had not found any violations. He did not believe that the injuries were significant enough to remove G. from his home.

Ms. Higgins reviewed the available evidence from OCS regarding the injuries. The caseworker confirmed that the broken leg occurred two years prior to the placement change. There was no evidence that an incident report regarding the broken leg was made, nor was there any evidence that OCS investigated the injury in either the child protection or licensing records. The caseworker was unable to locate any evidence in G.'s medical records confirming the broken arm, but she told Ms. Higgins that she recalled seeing G.'s arm in a sling at some point. Ms. Higgins reviewed the incident reports for both the arm gouges and the dog bite. Neither of these reports led to child protection or licensing investigations. The cut to the head was investigated jointly by child protection and licensing staff. The investigation concluded that the fall occurred while G. was in sight of the foster mother and one of their children, that G. was promptly taken for medical care, and the incident was immediately reported to OCS. No violations were found.

Sibling Placement and Lack of Visitation

OCS asserted that it decided to move G. to ensure contact between G. and W., who was already placed with, and subsequently adopted by, the prospective foster parent. OCS also planned to place G. and W.'s oldest sibling in the same home.

OCS averred in its opposition that, after W. was moved from the complainants' home, visitation between the siblings was "sporadic at best." The record does not support this claim. Ms. Higgins specifically asked the caseworker if she had provided either the complainants or W.'s foster placement with specific instructions regarding sibling contact after W. was moved out of their home in May 2017. The caseworker acknowledged that she had not done so until a year later, in May 2018, when there was documentation in OCS's case management system of her instruction. The caseworker also confirmed that, after she provided the families directives on facilitating visits, the foster parents complied and that visits occurred on a weekly basis. The assertion that visitation was sporadic also contradicts the caseworker's own statements to the court during the April 2018 permanency hearing: specifically, that G. was visiting with his siblings "pretty regularly."

Adoption Home Study

In its opposition, OCS also stated that one reason it decided to move G. was because it was not going to approve the complainants' adoption home study. The documentation Ms. Higgins reviewed indicates that the home study raised serious concerns and recommended additional training. OCS had legitimate reservations about approving the home study due to those concerns, as well as the protective services reports regarding the use of corporal punishment.

Relevant Statutory, Regulatory, Policy Authority

When OCS is granted custody of a child in need of aid, OCS's responsibilities include "the determination of where and with whom the child shall live."⁷ Additionally, OCS "may transfer a child, in the child's best interests, from one placement setting to another."⁸ Parties may request a hearing to challenge a placement decision, but "must prove by clear and convincing evidence that the transfer would be contrary to the best interests of the child for the court to deny the transfer."⁹ The Alaska Supreme Court has held that, because the Alaska Legislature has vested OCS with the authority and discretion to make placement decisions, those decisions may only be reviewed by a

⁷ AS 47.10.084(a).

⁸ AS 47.10.080(s).

⁹ *Id.*

court to determine whether OCS has exceeded, or abused, its discretion.¹⁰ Further, a party who is opposed to a placement decision must meet a high burden of proof in order to have a court reverse the agency's decision.¹¹

AS 47.14.100 outlines placement preferences for children in state custody:

- (e) When a child is removed from a parent's home, the department shall place the child, in the absence of clear and convincing evidence of good cause to the contrary,
 - (1) in the least restrictive setting that most closely approximates a family and that meets the child's special needs, if any;
 - (2) within reasonable proximity to the child's home, taking into account any special needs of the child and the preferences of the child or parent;
 - (3) with, in the following order of preference,
 - (A) an adult family member;
 - (B) a family friend who meets the foster care licensing requirements established by the department;
 - (C) a licensed foster home that is not an adult family member or family friend;
 - (D) an institution for children that has a program suitable to meet the child's needs.¹²

AS 47.14.100(r) addresses sibling placement:

The department shall make reasonable efforts to place siblings in the same placement if the siblings are residing in the same home when taken into the custody of the department. If siblings are not placed together after reasonable efforts have been made, the supervisor for the division with responsibility over the custody of children shall document in the file the efforts that were made and the reason separating the siblings for placement purposes is in the best interests of the children. In this subsection, "sibling" means two or more persons who are related by blood, adoption, or marriage as a child of one or both parents.

¹⁰ See *In the Matter of B.L.J.*, 717 P.2d 376, (1986).

¹¹ AS 47.10.080(s) requires the party opposed to a placement change prove "by clear and convincing evidence that the transfer would be contrary to the best interests of the child."

¹² Placement preferences are also reiterated in OCS Child Protective Services Policy 3.5.4.

Analysis

The Ombudsman evaluates complaints objectively and bases her findings upon the preponderance of the evidence. This means the evidence must show that it is more likely than not the agency made a mistake before we can make a critical finding or recommendation to the agency.

Allegation 1: OCS abused its discretion in its decision to move G from one foster home to another.

OCS has statutory authority and discretion to determine where children in its custody will reside. OCS must follow placement preferences outlined in statute and policy, including placing siblings together whenever possible. Courts will only review OCS's placement decisions to determine whether the agency has abused its discretion, which means that the agency has wide latitude in making placement decisions.

In this case, OCS asserted several reasons for changing G.'s placement. When interviewed, OCS staff emphasized that maintaining the sibling bond was the main reason for the move. Additionally, the court hearings reflected that the GAL also wanted G. and W. placed together. Because the main reason offered by OCS for changing placement – continuity of the sibling bond – is a legitimate one, it does not appear that OCS's actions were unreasonable.

Therefore, the Ombudsman finds that the allegation that OCS abused its discretion when it removed G. from the pre-adoptive placement with the complainants is *not supported* by a preponderance of the evidence.

Allegation Two: OCS's opposition to the foster parents' motion for a placement review hearing was unsupported by an adequate statement of reasons.

After reviewing the evidence — documents from OCS's child protection and licensing sections, court records, and interviews of OCS and Department of Law staff — it appears that several assertions in OCS's opposition to the foster parents' motion for a placement review hearing were at best misleading and, in some cases, false.

OCS's opposition stated that the foster parents had not facilitated visits between the siblings. This is inaccurate. First, OCS did not express any concern about sibling contact for approximately a year after W. was moved from the complainants' home to another foster home. In fact, at the April 2018 permanency hearing, the caseworker advised the court that G. was having sibling contact "pretty regularly." When subsequently directed to increase the sibling visitation, the complainants did. The resulting visitation schedule, one full day per week, indicates a good faith effort to meet the concern once OCS raised it. The general statement that the complainants did not facilitate sibling contact was clearly not supported by OCS's own records or testimony in the case.

OCS's opposition falsely alleged that G's injuries included a broken arm. OCS provided no evidence to support that allegation, other than the caseworker's vague memory of G.'s arm in a sling. OCS also incorrectly attributed to the foster parents a dog bite that occurred at another family's home. Further, with the other injuries involved, OCS Licensing either did not investigate (the broken leg and arm gouges) or did not substantiate the report (the cut to the head). To later assert that these injuries were grounds for denying the motion for a placement review hearing was disingenuous.

The Ombudsman is particularly concerned that OCS's sworn pleading to the court (based on the representations of the caseworker) stated as fact that G. had experienced an injury for which there does not seem to be any medical record or other evidence that it actually happened. Of equal concern is that OCS provided inaccurate information about other injuries, and deliberately omitted the critical fact that OCS had either decided not to investigate reports of G.'s prior injuries or had investigated and found them unsubstantiated. These sections painted the foster parents as neglectful and provided an inaccurate picture of the complainants' performance as foster parents. Therefore, the Ombudsman finds the allegation that OCS's opposition was not supported by an adequate statement of facts *justified* by a preponderance of the evidence.

In this case, OCS made a difficult decision. The decision about where to place G. was clearly within the agency's discretion. The prioritization of the sibling bond is a valid consideration in deciding what is in the best interests of the child. It is also understandable that the complainants would object to OCS's decision to move G. They cared for G. from birth and hoped to adopt the

child. It is unacceptable that OCS would defend its decision to move G. with inaccurate information and the dismissal of the foster parents' commitment to the child.

The Ombudsman notes that, when OCS chose to characterize the complainants as “simply foster parents who have entered into a contractual relationship with the state” in its opposition, it cast doubt upon the efforts of the agency to recruit, support, and express appreciation for the services that foster parents provide for children in need and for the State of Alaska. While legally accurate, this statement does not appear to reflect OCS's values related to the families that partner with it to care for children who have been abused or neglected.

In speaking with OCS's legal counsel, they shared that they could “totally understand how [the foster parents] felt diminished” by the opposition they filed on OCS's behalf. The Ombudsman appreciates that acknowledgement. However, the choices OCS made in responding to the foster parents' hearing request could have an impact on OCS's investments and ongoing effort to recruit foster parents.¹³

Recommendations

When the Ombudsman and investigator met with Director Norberg on April 25, 2019 to discuss the preliminary findings and formulate possible recommendations, Director Norberg explained that OCS has worked hard to encourage an inviting and welcoming attitude toward resource families. Some offices in particular show this ideal toward foster families, hosting events and coordinating additional resources for foster families.

Director Norberg commented that a contributing factor to this complaint may have been that, at the time of the events around G's change in placement, the caseworker was carrying a much larger caseload. She explained that OCS has invested in resources to prevent and mitigate problems that arise from overworked and overburdened staff. After the passage of HB151 in 2018, OCS was able to increase staff, leading to lower caseloads for frontline caseworkers.

¹³ See 2015 Foster Parent Survey, reflecting respondents' highest-ranked reason for discontinuing foster children as lack of support from OCS (http://dhss.alaska.gov/ocs/Documents/Publications/pdf/2015_FosterParentSurvey.pdf).

Director Norberg identified several steps that OCS would take to resolve this complaint and to help prevent the reoccurrence of similar complaints in the future:

- OCS drafted an apology for the foster family;
- OCS amended its opposition on May 16, 2019 to correct facts that were inaccurate and/or misleading;
- All OCS staff were invited to and many attended a webinar on May 14, 2019, about how to cultivate relationships with resource families; and
- All staff in the office where this complaint arose will attend training with attorneys from the Department of Law about reporting and testifying to the court in CINA cases.

The Ombudsman commends OCS for this proactive response and believes these steps are critical to resolving the complaint. In addition, the Ombudsman makes the following recommendations.

Recommendation 1: OCS should host training for its attorneys from the Department of Law to ensure that legal counsel have a clear understanding of OCS’s values, especially regarding foster families.

OCS strives to foster relationships with resource families in its day-to-day operations. Just as critical to these relationships is how OCS communicates about and toward foster parents in court proceedings. Understanding that OCS should assert its positions and support its requests of the courts always with the best interests of the children it serves in mind, the Ombudsman recommends that OCS work with its attorneys to ensure that the manner in which the agency is represented in legal proceedings is aligned with its values — even in cases requiring difficult decision such as this one.

Recommendation 2: The Department should seek amendment of AS 47.10.080(s) to allow people who are pre-adoptive placements for children in OCS custody standing to request a placement review hearing if OCS decides to change a child’s placement.

As it is currently written, AS 47.10.080(s) only allows a “party” to request a placement review hearing if they are opposed to a placement decision made by OCS. Pre-adoptive foster parents are

not considered parties to a CINA case. In this case, G.'s parent's rights had long since been terminated. When OCS decided to move him, the only other party to the case with legal standing to oppose the move was the GAL. Even though the complainants had cared for G. for his entire life, they were not entitled to oppose the move and ask the judge to make a decision about what would be in G.'s best interests.

Contemporaneous with the events at issue in this complaint, a similar complaint was lodged with the Ombudsman. In that case, the foster parents moved to stay a placement change by OCS. The motion was opposed by OCS, the guardian ad litem, and the child's biological father. Even so, the court granted the foster parents standing to intervene and held an evidentiary hearing on the motion to stay the placement change. At the conclusion of the hearing, the court issued oral findings of fact and an oral order preventing change in placement by OCS.

Given the facts of this complaint, and the courts' disparate handling of similar requests by foster parents, the Ombudsman recommends that, in the very narrow situation in which parental rights have been terminated and the foster parents have begun the process of adopting the child, the pre-adoptive foster parents have legal standing to request a placement review hearing before the court. The court would still be the final arbiter of what is in the child's best interests. The pre-adoptive foster parents would still have the burden of showing "by clear and convincing evidence" that the placement change proposed by OCS would be contrary to the best interests of the child. The court would make the decision, accounting for relevant law, such as the placement preferences required by the Indian Child Welfare Act, and other considerations, such as the child's specific circumstances or special needs.

Granting pre-adoptive foster parents standing to intervene would not diminish OCS's discretion to make placement decisions or the role of the parents or tribes. It would not create an additional preference in favor of foster parents. Instead, it would recognize that foster parents who have longstanding caregiving relationships with children — to the extent that they have begun the adoption process after biological parents' rights have been terminated — have an important role in advocating for the best interests of those children.

Conclusion

The Ombudsman notes that in the substantial documentation and court records reviewed by the investigator, there was no evidence that OCS staff acted deliberately or in bad faith toward the foster parents. Even so, the impact of OCS's unsupported statements about the complainants in its opposition to their request for a placement review hearing cast the foster parents in an unfairly negative light and dismissed their commitment to caring for G. and other foster children. OCS has identified effective ways to resolve this complaint and prevent similar situations in the future. The Ombudsman believes that her additional recommendations complement OCS's remedies and support system-wide improvements.