

Public Summary

Ombudsman Investigation J20190322

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

November 22, 2021

The Alaska State Ombudsman provides this public summary of the investigation of complaint J20190322, pursuant to AS 24.55.200.

Introduction

In April 2019, the Complainant contacted the Ombudsman with a complaint that the Office of Children's Services (OCS) had stopped adoption proceedings and was seeking to change the placement of a foster child based on incomplete and inaccurate information. The Complainant's wife was the foster parent and pre-adoptive permanent placement for her grandchild. The Complainant explained that, the day before the hearing at which his wife was to adopt her grandchild, OCS cancelled the adoption.

OCS based the decision to cancel the adoption on two protective services reports (PSR) made in December 2018 by OCS staff, about events known to OCS since 2010. Both PSRs were about a 2010 substantiation of harm against the Complainant – which OCS rescinded in 2011 to settle the Complainant's administrative appeal. In April 2019, OCS closed both PSRs as “not substantiated.” However, less than three weeks later, OCS issued a notice of change of placement of the child. The Complainant contacted the Ombudsman after that.

Assistant Ombudsman Kate Higgins investigated this complaint. Assistant Ombudsman Jacob Carbaugh reviewed the investigation and compiled the report. The Ombudsman hosted a consultation with OCS leadership on January 9, 2020.¹ A confidential preliminary report was

¹ AS 24.55.180 requires “Before giving an opinion or recommendation that is critical of an agency or person, the ombudsman shall consult with that agency or person. The ombudsman may make a preliminary opinion or

provided to OCS on June 8, 2021.² The agency responded on July 7, 2021. After careful consideration and additional research related to the agency's response, the Ombudsman provided her final confidential report to OCS on October 21, 2021.

Allegations

Based on the facts alleged in the complaint, the Ombudsman investigated the following allegation:

1. *Based on a Mistake of Fact:*³ The Office of Children's Services mistakenly considered a PSR from 2010 when conducting a final review of the adoption in December 2018.

In the course of the investigation, the Ombudsman also investigated the following allegations:

2. *Arbitrary:*⁴ The Office of Children's Services acted arbitrarily when it screened in PSRs regarding the Complainant and his wife in December 2018.
3. *Arbitrary:* The Office of Children's Services acted arbitrarily when it screened in PSRs based on a behavioral assessment that did not meet professional standards or provide credible findings.

Relevant Statutory, Regulatory, Policy Authority

OCS staff must follow the policies and procedures in the OCS Child Protective Services (CPS) Manual.⁵ OCS staff who receive information that alleges a child is being abused or neglected should forward it to the OCS Intake Unit, "making no prior judgments about whether the concerns

recommendation available to the agency or person for review, but the preliminary opinion or recommendation is confidential and may not be disclosed to the public by the agency or person."

² The Ombudsman did not provide her report to OCS until after the adoption at issue had been finalized, to avoid unintentional influence on the proceeding's outcome.

³ In an ombudsman investigation, "Based on a Mistake of Fact" means that the agency based its decision on a misperception or misunderstanding of relevant facts.

⁴ In an ombudsman investigation, "Arbitrary" means that the agency did not base its action or decision on intelligible or understandable public policies, or based its action or decision on a delegation of authority to the agency under inadequate standards (standards are "inadequate" if they are unrelated to the fundamental purpose of the program or statute under which the action or decision is taken), or treated the complainant differently than others without reasons recognized under law or related to the purpose of the law, or did not conscientiously consider all factors relevant to its decision or action.

⁵ See Alaska Office of Children's Services Child Protective Services Manual, (hereinafter CPS Manual) <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf> (last visited June 12, 2020).

should be assigned for initial assessment or screened out.”⁶ The OCS Intake Worker decides whether the report is a request for information and referral, an intake for services, or a PSR (also referred to as a report of harm).⁷

If the report is a PSR, it is “screened in” for “initial assessment.”⁸ The OCS Intake Worker must follow the procedures in CPS Manual Section 2.1 and 2.1.1.⁹ A PSR is “screened in” when the information indicates a child may be unsafe or at high risk of harm by a primary caregiver, parent, custodian, or guardian.¹⁰ The CPS Manual defines “high risk of child maltreatment” as the likelihood that parenting behavior is “harmful and destructive to a child’s cognitive, social, emotional, and/or physical development,” and the parent(s) are unwilling or unable to behave differently.¹¹

When screening in a report, the intake worker must “prioritize the report according to the present or impending danger or high risk to the child” and assign a priority level of 1, 2, or 3.¹² Priority 3, the lowest level priority, “are defined as reports where information available does not indicate the child is in present or impending danger but may be at high risk of maltreatment.”¹³

If a report is screened in as a PSR, a trained OCS Protective Services Specialist (PSS) conducts the initial assessment.¹⁴ The PSS identifies whether present danger exists and, if appropriate, develops a plan.¹⁵ Then the PSS assesses for impending danger, using the Impending Danger Assessment and Analysis, which should be completed in ORCA.¹⁶

The CPS Manual defines “Present Danger” as a “significant and clearly observable family condition occurring in the present tense, is endangering or threatening to endanger a child, and

⁶ CPS Manual, Section 2.1 Protective Services Reports, Policy C.

⁷ CPS Manual, Section 2.1 Protective Services Reports, Procedure B.

⁸ CPS Manual, Section 2.1 Protective Services Reports, Procedure D.

⁹ CPS Manual, Section 2.1.1 Protective Services Reports on a Licensed Foster Parent’s Foster, Biological, Adopted, or Guardian Child – Coordination with Foster Home Licensing, Procedure A(2)(a).

¹⁰ CPS Manual, Section 2.1 Protective Services Reports, Procedure E(1).

¹¹ See CPS Manual, Section 2.1 Protective Services Reports, Definitions.

¹² CPS Manual, Section 2.1 Protective Services Reports, Procedure E(2)(a)(5).

¹³ *Id.*

¹⁴ CPS Manual, Section 2.2.5 Conducting an Initial Assessment, Policy A.

¹⁵ CPS Manual, Section 2.2.5 Conducting an Initial Assessment, Procedures L.

¹⁶ CPS Manual, Section 2.2.5 Conducting an Initial Assessment, Procedures M. ORCA is the electronic case management system used by OCS.

requires a prompt response from the agency.”¹⁷ “Impending Danger” is defined as “a family situation in which a child is not in present danger but exists in a general state of danger because of what is happening within the child’s family.”¹⁸

The PSS must apply the safety threshold criteria before determining whether there is a safety threat in the home:

- a. Specific and Observable: the danger is real, it can be seen, it can be defined and explained, and it is evidenced in explicit and unambiguous ways;
- b. Immediate: it is likely that a threat to the child’s safety will occur within the immediate or very near future;
- c. Out-of-Control: the family condition is unrestrained, unmanaged, and without limits or monitoring. It is not subject to influence, manipulation, or internal power. It is out of the family’s control;
- d. Severe Consequences: the threat can result in pain, serious injury, and disablement; can cause grave or debilitating physical health conditions, acute or grievous suffering, terror, impairment, or death; and
- e. Vulnerable Child: a child who is dependent on others for protection, is susceptible to experience severe consequences based on the size of the child, mobility, social or emotional state. The child is generally under the age of six but also can include older children, especially those who are vulnerable to the authority and influence of adults within their family. The child has mental or physical disabilities, may be isolated from the community, or is in poor health or has limited physical capacity and robustness or is frail. A vulnerable child may also be a child who consciously or unknowingly provokes or stimulates threats and reactions by their parent or another adult caregiver.”¹⁹

“All five components of the safety threshold criteria must be met to have an identified safety threat. . .”²⁰ If the PSS decides there are no safety threats in the home, the child is determined to be safe.²¹

Federal law, 42 USC §5106(a), requires that states seeking grants to support their child protection systems ensure that findings substantiating child abuse or neglect are subject to an administrative

¹⁷ CPS Manual, Section 2.2.5 Conducting an Initial Assessment, Definitions.

¹⁸ *Id.*

¹⁹ CPS Manual, Section 2.2.5.1 Present and Impending Danger and the Child Safety Plan, Procedures D(1)(a)-(e).

²⁰ CPS Manual, Section 2.2.5.1 Present and Impending Danger and the Child Safety Plan, Procedures D(2).

²¹ CPS Manual, Section 2.2.5.1 Present and Impending Danger and the Child Safety Plan, Procedures D(3).

appeal process.²² In Alaska, appeals of OCS findings are referred to the Office of Administrative Hearings (OAH). A person can request an appeal of a substantiated finding by completing a form (06-9539) provided by OCS and submitting it to the Agency’s Community Relations Manager for a hearing and decision.

History

OCS initially became involved with the Complainant in 2000. The Complainant and his then-spouse had adopted two children. They relinquished their parental rights to one of the children due to the child’s significant behavioral problems and needs. In 2008, OCS received a report alleging physical abuse of a child by the Complainant. The PSR was closed as “not substantiated” by OCS.

In 2010, OCS received a report alleging sexual abuse of a child by the Complainant. The PSR alleged, among other things, that the Complainant had called his partner’s young daughter “sexy,” tickled her legs, patted her bottom, and kissed her head. OCS screened in the PSR and, later, substantiated the PSR as “sexual abuse.”

The Complainant appealed the substantiation. His appeal was referred to the OAH. The Complainant’s appeal was resolved when he and OCS entered into a settlement agreement in 2011. That settlement agreement provided that OCS would withdraw the substantiation for sexual abuse and substitute a finding of inappropriate interaction toward the child. The settlement agreement was confidential. OCS was not to release the settlement agreement or its contents to anyone without a court order.

Note: AS 24.55.160(b) provides that the Ombudsman “may not disclose a confidential record obtained from an agency.” The settlement agreement that resolved the Complainant’s administrative appeal is confidential and therefore cannot be disclosed or discussed in detail in this report, though it played a critical part in the investigation, findings, and recommendations.

²² See 42 USC 5106a(b)(2)(B)(xv)(II).

The Complainant has been licensed by an Alaska professional licensing board as a health care professional since 2008. There is no history of professional accusations or disciplinary actions listed on his license.

In 2015, the Complainant's wife applied for a foster care license. She listed the Complainant as a household member and her partner. The Complainant completed a Background Check Clearance Form. He checked the boxes indicating he had been investigated for child abuse or neglect, as well as convicted of a criminal offense listed as prohibited on the reverse of the form.

The Complainant had been charged with, but was not convicted of, a barrier crime described in 7 AAC 10.905. He supplemented the Clearance Form with a hand-written explanation of the historical child abuse investigation and his convictions for disorderly conduct²³ (arising from alleged domestic abuse incidents).

The Department of Health and Social Services (DHSS) Background Check Program (BCP) cleared the Complainant in June 2015. The clearance document noted specifically that the investigator had discussed the Complainant's criminal history with collateral references in the community. The BCP file included state and federal criminal searches, the 2008 OCS investigative summary finding allegations of physical abuse "not substantiated," and the 2010 OCS investigative summary finding allegations of sexual abuse "substantiated." The settlement agreement documenting OCS's withdrawal of the substantiation was not in the BCP file.

In October 2015, the BCP provided formal determinations of eligibility for the Complainant to OCS and the community foster care resource center. The determination was valid until April 2021. In May 2018, the BCP issued a clearance for the Complainant to work at the community hospital.

Later in 2018, a local social services agency completed an adoption home study. The home study report included a summary of the Complainant's criminal history. The agency recommended that the child be adopted by their grandmother (the Complainant's wife). The OCS Regional Permanency Planning Specialist signed the home study in June 2018.

²³ See AS 11.61.110(a)(5).

In October 2018, the BCP issued a clearance for the Complainant to work for an assisted living home. This was the third clearance issued by the BCP for the Complainant since 2015.

Agency Actions

In November 2016, OCS filed a child in need of aid (CINA) petition for the Complainant's wife's grandchild. The child was placed with the Complainant's wife, who was also the foster parent for the child's sibling. In July 2017, the child's mother relinquished her parental rights. The Complainant's wife and OCS began the process of adoption. The hearing to finalize the adoption was scheduled on or about December 13, 2018.

The OCS Family Services worker met with the child for the first time on November 30, 2018, more than two years after OCS first took custody of the child. The OCS worker documented that the child was smiling and talkative, happy with their grandparents, and thinking about an adoption party.

The OCS worker picked the child up from school 12 days later, on December 12, 2018, and transported them to the local child advocacy center.²⁴ The worker documented that the child was confused and asked if all children being adopted had to go to the child advocacy center. The OCS worker's notes contain no disclosures from the child of abuse or neglect.

Based on OCS records, interviews of OCS staff, and the consultation with OCS leadership, the basis for the caseworker actions on December 12, 2018, was that a senior OCS staff member brought the 2010 substantiation to the caseworker's attention, without also telling the caseworker that the substantiation had been withdrawn in 2011.

OCS documented multiple activities that occurred on December 13, 2018, in an activity note entered four months later, on April 11, 2019. According to that note, the OCS worker and a supervisor discussed a plan for the Complainant to be excluded from the home at a meeting that

²⁴ Child advocacy centers are safe, child-focused settings in which a child can be interviewed by trained experts about whether they are experiencing child abuse. Child advocacy centers prevent the need for repeat interviews of children, reducing the risk of re-traumatization. Child advocacy centers rely on a team of professionals from the child protection agency (OCS), law enforcement, mental health providers, and family support services.

day to talk about the adoption. The note also documents that OCS staff made reports of harm on the three other children placed in the grandmother's home on December 12, 2018.

OCS records showed a PSR, with the OCS worker listed as the reporter, that alleged that the worker had just learned of a substantiation from 2010. (The information was available in OCS's records and electronic case management system throughout the OCS worker's tenure as the child's caseworker.) This PSR alleged, without additional facts or evidence, sexual abuse by the Complainant of all four children in foster care with his wife. OCS records show a second PSR, with the same OCS worker as the reporter, based on the substantiation from 2010. This PSR alleged, without additional facts or evidence, sexual abuse and neglect of the child awaiting adoption. The OCS intake staff classified both PSRs as a "Priority 3" (the lowest priority).

The BCP revoked the Complainant's clearance on January 2, 2019. The reason given was the relinquishment of parental rights in 2000. Relinquishment of parental rights is a permanent civil barrier pursuant to 7 AAC 10.905(f)(3).

On January 3, 2019, the regional OCS supervisor modified the narrative of its Initial Assessment regarding the 2010 PSR against the Complainant. The modified narrative expressly noted that the substantiation was overturned through a mediated settlement agreement in 2011, and that the OCS records should have been changed back then to reflect that.

The Complainant submitted a variance request to DHSS. The BCP denied the request. In March 2019, the Complainant appealed the denial. On March 18, 2019, the DHSS Commissioner's Office granted variances to the Complainant to care for the children placed with his wife, to work at the community hospital, to work in an assisted living home (operated by his wife in their home), and "for the specific children named in the adoption subsidy."

Despite the DHSS Commissioner's decision to clear the Complainant to live with and care for the children in his home, and to continue to work as a health care professional, the next day, OCS Licensing issued a "Report of Investigation/Notice of Violation" to the Complainant's wife. The investigation was for one allegation: that, on December 13, 2018, OCS received information that the Complainant had not accurately reported his past OCS and criminal history, which placed the

children in the home at risk. This notice was issued more than 60 days after the regional supervisor had updated OCS records to accurately reflect that the past substantiation had been rescinded. In the end, the licensing investigators recommended no additional action be taken.

On March 22, 2019, the BCP issued a clearance for the Complainant to work with a local social services agency.

The OCS case worker met with the child at school on March 27, 2019. This was the first face-to-face contact with the child documented by the worker since December 2018.

On April 8, 2019, OCS closed the PSRs from December 2018 as “not substantiated.” Two days later, OCS held a meeting with the Complainant and his wife. OCS presented a case plan requesting the Complainant complete a sex offender evaluation, a psychological assessment, and a behavioral assessment. The Complainant and his wife did not agree to the case plan at that meeting.

OCS issued a notice of change of placement for the child later in April 2019. The OCS worker met with child at school the next day. The OCS worker met with the child at school again on May 2, 2019. OCS records document that the worker discussed the child’s change of placement with the child.

OCS held a Team Decision Meeting (TDM) on May 3, 2019. OCS referred the Complainant to a clinical psychologist for assessment in May 2019.

A status hearing was held on June 5, 2019 in the CINA case. OCS informed the court that placement had not changed despite the notice of intent to change placement being sent to the Complainant’s wife two months prior.

On July 10, 2019, the OCS worker visited the child at home. This was the first documentation of a visit to the child in the home since OCS took custody in 2016.

On August 6, 2019, OCS issued a Community Care License to the Complainant and his wife. The license specifies that the home is dually licensed as a foster care home and an assisted living home²⁵ through July 10, 2021.

The OCS worker met with the child at school on August 28, September 18, and October 30, 2019. The worker did not document any disclosures or reports by the child of abuse or other issues with their grandparents. The OCS worker met with the child and their guardian ad litem at school on December 17, 2019. The OCS worker met with the child on January 29, 2020 and March 2, 2020 – both times at a court proceeding.

OCS transferred the child’s case to a new adoption worker and supervisor on April 14, 2020.

Psychological Assessments

OCS required the Complainant to undergo a psychological assessment if he was to continue living in his home (OCS had required him to temporarily live outside of the home in December 2018, and again in 2019 before the DHSS Commissioner’s variance was granted). The OCS caseworker arranged for him to be evaluated by a clinical psychologist. The Complainant went to his scheduled evaluation in July 2019. The clinical psychologist provided their report to OCS in August 2019.

The clinical psychologist conducted a lengthy interview and administered several tests to complete the evaluation. After gathering and interpreting the testing data, the clinical psychologist concluded, based on the testing, data, and interview of the Complainant, that:

1. the Complainant did not appear to exhibit personality features associated with sexual or domestic violence;
2. while the Complainant did show traits of explosive or impulsive anger, he was not temperamentally or characteristically angry and does not use violence to control others; and
3. the Complainant did not show the characteristics of an abusive or neglectful parent.

²⁵ The Complainant’s wife provides full-time care for three severely disabled young adults in the home.

As noted above, the child made no disclosures of abuse or neglect during visits by the OCS worker in July-October 2019. There is no record of any other reports or allegations of harm to the child during that time. However, OCS referred the Complainant for a second assessment at a local behavioral health agency.

The Complainant met with a licensed clinical social worker and licensed professional counselor on October 29, 2019, for a “Behavioral Risk Assessment.” The Behavioral Risk Assessment was signed by the licensed clinical social worker (LCSW) and dated and distributed on or about December 1, 2019.

The LCSW administered an Adverse Childhood Experiences Study (ACES) questionnaire, the Alaska Screening Tool (AST), the Ontario Domestic Abuse Risk Assessment (ODARA), and Behavior Inventories. The LCSW concluded, without describing the basis for the conclusion, that children who have lived with the Complainant would have “an ACE score that is minimally between 4-7.” The LCSW concluded that, contrary to what the Complainant reported through the AST, he had behavioral health and brain injury issues. The LCSW also concluded that the Complainant was at high risk of repeated domestic violence.

The LCSW made three recommendations:

1. Their assessment be included in the Complainant’s “permanent record” at the Department of Health and Social Services;
2. The Complainant be excluded from all custody and contact with children and vulnerable adults; and
3. Their assessment be sent to the child advocacy center and Alaska State Troopers for further investigation and to decide whether criminal charges should be made against the Complainant.

OCS held a TDM on December 18, 2019, at which the agency announced that it had determined that the Complainant was “unsafe” to live with his wife and the children. OCS documented that it told the grandmother that it would be contacting other relatives to find a permanent placement for the child.

Based solely on the second assessment, OCS screened in two new PSRs alleging neglect by the Complainant's wife of the children in her care. The second PSR was closed as "not substantiated" on February 18, 2020. The first PSR was also closed as "not substantiated," but not until May 1, 2020.

Court Proceedings

After OCS gave notice it intended to change the child's foster placement, the Complainant's wife requested a placement review hearing. The court granted the request, and a hearing was held on March 2, 2020. OCS asserted its position that the child could not remain in the home if the Complainant continued to live there.

The court heard substantial testimony during the hearing, including testimony from the agency, the Complainant, his wife, and the child (who was represented by an attorney). OCS did not offer the LCSW as a witness in support of their position. The judge ruled that the evidence did not show there was any danger or risk to the child living with their grandmother and the Complainant. The judge specifically found that the child's placement with their grandmother could continue and that the Complainant could return home.

According to documentation in ORCA, adoption remained the permanency goal for the child, and a new permanency plan was created on May 4, 2020. OCS requested a second home study. According to ORCA, OCS completed and approved the home study on July 23, 2020.

In the Report for Permanency Hearing prepared in September 2020, OCS stated that it was waiting for confirmation of a "variance" allowing the Complainant to remain in the home. However, DHSS had already granted the Complainant a variance, on March 18, 2019, for "the specific children named in the adoption subsidy." That variance expressly states that it is valid for the "duration of subsidy."

On December 1, 2020, the Ombudsman emailed OCS leadership requesting the status of the adoption. OCS responded on December 2, 2020 that "the adoption will likely be finalized within the next couple of months."

The Complainant's wife adopted her grandchild on May 24, 2021 – more than 29 months after OCS initially cancelled the scheduled adoption on December 13, 2018.

Analysis – Allegation 1: OCS mistakenly considered a PSR from 2010 when conducting a final review of the adoption in December 2018.

This investigation arose from a complaint that OCS was blocking the adoption of a child based solely on a substantiation that had been rescinded years before. OCS had entered into a settlement agreement to resolve the Complainant's administrative appeal. The terms of the agreement are clear. The substantiated finding of sexual abuse was rescinded. However, OCS did not document its rescission of the substantiated finding until more than seven years later, in January 2019.

OCS cancelled the adoption in December 2018, based on a mistake of fact, because the decision was based solely on a finding that OCS had rescinded nearly eight years prior. Based on a preponderance of the evidence, the Ombudsman proposed to find the allegation *justified*.²⁶

Agency Response

OCS responded that it “does not agree that this allegation is justified.” OCS disputed this finding on the basis that information contained in the 2010 investigation and settlement agreement was vital to the agency's assessment and placement of vulnerable children into a foster home and consent for permanency through adoption.

OCS argued that, when the agency “enters an alternate resolution” in an appeal, the outcome does not change the agency's finding of whether maltreatment of a child occurred. A settlement agreement will only “dissolve the barrier condition,²⁷ reportable to the civil history background check, based on mitigating risk factors through negotiated and agreed upon terms and course of action.” OCS argued that a substantiation overturned through a settlement agreement is still a valid

²⁶ The standard of proof used to evaluate all ombudsman complaints is the *preponderance of the evidence*: if the evidence indicates that, more likely than not, the administrative act took place and the criticism of it is valid, the allegation should be found justified.

²⁷ Barrier conditions are set by state regulation, 7 AAC 10.905.

substantiated report of harm – the only change is that there is no longer a civil barrier to licensure or certification.²⁸

The Ombudsman appreciates that OCS should use all information available to it in assessing a potential foster home and prior to consenting to the adoption of a child in OCS custody. However, the Ombudsman is not persuaded that the successful administrative appeal of a final decision by OCS does not actually overturn that decision.

OCS acknowledged “the ill timing of the revelation of the information that was not previously identified by the Division or provided by [the Complainant].” This is not accurate. There was no “revelation” of new information. OCS was continuously aware of this information from 2010 until 2019, though the agency did not correct the information in its case management system until more than seven years after the 2011 settlement agreement.

The evidence does not demonstrate, and OCS offers no explanation, why this information was not used in assessing the foster placement in 2016. It was not until another OCS staff member told the case worker of the substantiation (but not the 2011 mediated agreement to rescind it), around December 12, 2018, that OCS acted.

The agency offered no explanation for the contradictory events of approving the grandmother’s foster care license in 2015 and placing the child with her in 2016, all while the 2010 substantiation was still (incorrectly) documented in the OCS case management system.

The Ombudsman recognizes and understands that OCS has an obligation to ensure children committed to its custody are placed in a safe home, and that OCS case workers are often understaffed and overworked. Sometimes information may be overlooked when assessing homes for placement of children in OCS custody. However, the evidence demonstrates that the Complainant’s history was known to the agency for the entirety of OCS’s custody of the child, and

²⁸ The Ombudsman notes under 42 U.S.C. 5016(a)(b)(2)(B)(xv)(II) states seeking federal grants in support of their child protection systems must have “provisions, procedures, and mechanisms [...] by which individuals who disagree with an official finding of child abuse or neglect can appeal such finding.” The Ombudsman questions whether OCS considering a substantiation that has been overturned through an administrative appeal a “valid substantiated report of harm” complies with the federal regulation.

the actions taken in December 2018 and afterward were based solely on incorrect and incomplete information about a substantiation that had been rescinded.

Finding

Based on the preponderance of the evidence, and having considered the agency's response, the Ombudsman finds Allegation 1 *justified*. The decision to cancel the adoption was based on incomplete and inaccurate information – the initial substantiated finding but not the outcome after the administrative appeal and settlement agreement. There was no additional information or precipitating event indicating a safety threat to the child.

Analysis – Allegation 2: The Office of Children's Services acted arbitrarily when it screened in PSRs regarding the Complainant and his wife in December 2018.

The Complainant has been in a relationship with his wife since 2013. He has been listed as a household member on her foster care license since June 15, 2015. They married on September 5, 2015. The Complainant was cleared no less than three times by the BCP.

OCS has a duty to ensure the safety of children in their custody.²⁹ The first documented contact between that worker and the child was two years after the child was placed in foster care with their grandmother. Just 12 days later, the OCS worker took the child to the child advocacy center, where the child made no disclosures of abuse, sexual or otherwise, of themselves or any of the other children in the home. Nevertheless, the OCS worker filed two PSRs based solely on another OCS staff member's (incomplete) report about the rescinded 2010 substantiation.

OCS policy requires that staff report allegations of maltreatment without drawing conclusions as to their merit. On the same date that the OCS worker filed the two PSRs, they had a supervisory staffing, which concluded that the Complainant must be excluded from the family home. Evidence showed that the OCS worker had already cancelled the adoption and developed a plan to exclude

²⁹ See AS 47.05.065(3).

the Complainant from the home. This indicates that the worker had made prior judgments, in violation of OCS policy, that the PSRs should be assigned for investigation.

Sexual abuse of a child is an allegation of immense urgency, a Priority 1 matter according to the CPS Manual. However, both PSRs filed were screened in as Priority 3, the lowest level priority for OCS response. Given the historic nature of the allegations upon which the PSRs were made, and the lack of any current disclosure or allegation of maltreatment or neglect, the decision to screen in the PSRs at the lowest level priority was appropriate. This contradicts the immediate and extreme intervention (cancelling the adoption, excluding the Complainant from the family home) by OCS.

The CPS Manual lists five safety threshold criteria, including: Specific and Observable, Immediate, Out-of-Control, Severe Consequences, and Vulnerable Child. All five components of the safety threshold criteria must be met to have an identified safety threat. OCS records contained no documentation demonstrating that the safety threshold criteria were applied, or how each of the five criteria were met.

In the end, the PSRs were both closed as “not substantiated.” Despite the lack of substantiation, or information of current maltreatment, the Initial Assessments recommended in-home services.

Based on the preponderance of the evidence, the Ombudsman proposed to find Allegation 2 *justified*.

Agency Response

OCS responded that it “does not agree and refutes Allegation #2 as justified.” The agency explained that Priority 3 PSRs are defined as reports where the information available does not indicate the child is in present or impending danger but may still be at high risk of maltreatment. OCS offered no evidence or explanation as to how the five components of the safety threshold criteria, as required by the CPS Manual, were met in making the decision to screen in the PSRs.

OCS argued that the evidence upon which the Ombudsman relied in making her finding “actually supports the agency action on screening in the PSRs when the new information was learned.” However, this was not “new information” to OCS, as detailed above.

OCS argued that the Complainant had not been forthcoming about his history with the child protection agency. However, the evidence showed that he had disclosed it. Evidence also showed that OCS previously acknowledged these barriers when it granted the foster care license in 2015. OCS asserts that the settlement agreement had the effect of dissolving the barrier condition in its response to Allegation 1. It is not fair for OCS to argue that the sole effect of the settlement agreement was to dissolve the barrier condition, and then to accuse the Complainant of not being forthcoming about the dissolved barrier condition over seven years later.

OCS denied that the OCS worker who made the PSRs had authority or responsibility to make the screening decision. The Ombudsman appreciates the clarification that the OCS worker who made the PSRs in 2018 was not the employee who screened them in for investigation. However, the Ombudsman maintains her concerns that the agency – OCS – made a report to itself about information the agency had full knowledge of for years.

The Ombudsman also maintains her concerns that more senior OCS staff did not give the OCS worker a full and accurate explanation of the 2010 substantiation and the 2011 settlement agreement to rescind the substantiation. OCS failed to properly document the rescission of the substantiated finding. This incomplete and inaccurate internal communication and record keeping led the OCS worker to file the PSRs, and presumably led to the decision to screen them in.

It is also noteworthy that the regional supervisor corrected OCS records related to the 2010 substantiation on January 3, 2019. The worker screening the two PSRs recommended the case be opened for in-home services on or about April 8, 2019, referring to the 2010 substantiation (which had been corrected by then). OCS offered no explanation as to why the rescinded finding was still considered over three months after the error was corrected in OCS’s case management system.

The preponderance of the evidence shows that OCS acted arbitrarily when it only provided the caseworker with half of the story about the Complainant’s child protection history. OCS acted

arbitrarily by refusing to abide by the agreement it entered into in 2011 to settle the Complainant's administrative appeal. OCS created the situation in which the OCS worker was required to make the PSR, and the intake worker was required to screen it as if it were new information. Therefore, the Ombudsman finds Allegation 2 *justified*.

Analysis – Allegation 3: The Office of Children's Services acted arbitrarily when it screened in PSRs based on the second behavioral assessment.

The rescinded substantiation against the Complainant was corrected in OCS's case management system on January 3, 2019. The December 2018 PSRs were closed as "not substantiated" on April 8, 2019. Despite having no evidence or credible report of current child maltreatment, OCS asked the Complainant to complete a sex offender evaluation, a psychological assessment, and a behavioral assessment in April 2019. The Ombudsman could not locate any evidence in the agency's records that would support OCS's decision to require these evaluations.

The Complainant agreed to an evaluation with a clinical psychologist. That practitioner administered a series of evidence-based and validated tools and tests, and spent four hours interviewing the Complainant. Testing by the clinical psychologist included the:

- Hare Psychopathy Checklist (PCL-R), a 20-item scale for the assessment of psychopathy in research, clinical, and forensic settings;
- the Sexual Violence Risk-20 (SVR-20), developed primarily to assess risk of sexual violence conducted in criminal and civil forensic contexts;
- the Personality Assessment Inventory (PAI), using 344 items to objectively measure personality factors;
- the Child Abuse Potential (CAP) Inventory, a 160-item questionnaire designed to assist in screening parents/caregivers suspected of physical child abuse; and
- the State-Trait Anger Expression Inventory-2 (STAXI-2), a 57-item self-report developed to provide precise measures of the experience, expression, and control of anger.

The result was a detailed report explaining the data and information collected, as well as the clinical psychologist's conclusions that the Complainant did not exhibit characteristics of someone who engages in sexual or domestic violence, neglect or abuse of children, or substance abuse. The clinical psychologist did not recommend any further assessment or treatment.

OCS insisted that the Complainant undergo a second evaluation. There is no evidence in the agency's records supporting this decision or referral. The second evaluation was conducted by an LCSW using tools not designed or validated for the purpose of sex offender evaluation, psychological assessment, or behavioral assessment.

It is not clear how long the LCSW spent with the Complainant. The assessment included three screening instruments – the ACES, the AST, and the ODARA. None of these tools were designed to diagnose a behavioral health disorder or predict risk of perpetrating child sexual abuse. The manner in which the ODARA was used limited the values of its results.

The LCSW described the ACES study as an ongoing research project between the Centers for Disease Control and Prevention and the Kaiser Permanente Fund. This is not accurate. The original ACES study was conducted with over 17,000 insured adults at Kaiser Permanente from 1995 to 1997, with two waves of data collection through confidential surveys administered at the time of a physical exam.³⁰

The LCSW did not document which questions were used in administering the ACES questionnaire, how many questions were asked, or what scales of validity, if any, were used. It is important to note that the questionnaires developed in the original ACES study were for research purposes, and not for clinical or diagnostic purposes. The ACES questionnaire developed by the leaders of the ACES study, the Family Health History Questionnaire and a Health Appraisal Questionnaire,³¹ uses a point system to determine how many adverse childhood experiences occurred in a patient's

³⁰ See "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study," Felitti, V., Anda, R. et al. Am. Jour. of Prev. Med. Vol. 14, Issue 4 (May 1, 1998).

³¹ See Centers for Disease Control and Prevention, Adverse Childhood Experiences Study, Study Questionnaires, <https://www.cdc.gov/violenceprevention/childabuseandneglect/acesstudy/about.html> (last visited June 19, 2020).

early years. An ACES score has no predictive value as to whether a person is likely to abuse children.

The LCSW documented that the Complainant reported an ACES score of one, but cast doubt on the credibility of the score. The LCSW did not explain what scoring system they used or the significance of a score of one in their report. The LCSW did not document anywhere in the report how they relied on the ACES results in reaching their conclusions.

The LCSW described the AST as “a diagnostic instrument” that uses a person’s self-reported answers to determine whether that person is at risk for mental health, substance use, or brain injury issues. This is not accurate. The AST is not a diagnostic tool. The AST was developed by the Alaska Division of Behavioral Health (DBH) for use by community behavioral health centers in the lengthy intake process, to help new clients self-report symptoms of depression, anxiety, self-harm, substance abuse, fetal alcohol spectrum disorders, and brain injury.

The AST has 37 questions and is available on the DBH website.³² DBH also provides a Clinical Guidance Document related to the AST.³³ “This document describes how information provided by consumers in the Alaska Screening Tool 2011 (AST2011) may be used to inform the screening and assessment process.”³⁴ Screening “determines the likelihood that a client has a behavioral health disorder. *The purpose is not to establish the presence or specific type of such a disorder, but to establish the need for an in-depth assessment.*”³⁵ (Emphasis added.)

The LCSW did not document anywhere in their report the number of questions on the AST, the scoring system used, its scientific validity, or what the Complainant’s score was. The LCSW did state that the Complainant’s score was “inconclusive,” but based on information from other

³² See Alaska Department of Health and Social Services, Division of Behavioral Health, AK Screening Tool (AST), <http://dhss.alaska.gov/dbh/Documents/PDF/Training/Resources/AST%202010.pdf> (last visited June 19, 2020).

³³ See Alaska Department of Health and Social Services, Division of Behavioral Health, Clinical Guidance Document, <http://dhss.alaska.gov/dbh/Documents/PDF/Training/Resources/AST%20CSR%20Clinical%20Decision%20Making%202011%20slw%206%2030%2011.pdf> (last visited June 19, 2020).

³⁴ *Id.* at 2.

³⁵ *Id.*

sources “would be conclusive” of behavioral health issues, and conclusive for brain injury. This indicates that the LCSW did not administer with AST with fidelity or for its intended purpose.

The LCSW described the ODARA “as an empirically sound tool for predicting the likelihood that physical re-offense by a male offender on a female partner within a domestic relationship.” According to Waypoint Centre for Mental Health Care, the creators of the tool, the ODARA is **not** a diagnostic tool:

The ODARA is a single assessment that is available for use in policing, victim support services, health care, and corrections. It is an actuarial risk assessment, and the information it provides about how an offender’s risk compares with others enables policy-level decisions about how to assign available resources to offenders according to their level of risk.³⁶

The ODARA is not a gendered tool, as described by the LCSW. It is not predictive of future domestic violence. The purpose of the ODARA is to assess risk in order to better connect offenders to resources.

The LCSW did not document the number of questions or the scoring system used. An internet search for “Ontario Domestic Abuse Risk Assessment” reveals the ODARA to be a 13-point scoring system. The LCSW wrote that the Complainant had an “adjusted score” of 7, but did not report the raw score, how the score was adjusted, or the tools utilized in adjusting the score.

The LCSW concluded that the Complainant was likely to commit “another physical assault on their current partner or another partner.” However, the LCSW did not account for the fact that there was no “index assault” by the Complainant on his wife or any other current household member against which to evaluate his current behavior. The LCSW did not interview his wife or any past partners. Therefore, it is unclear how the LCSW arrived at the score of 7 based on the scoring guidance provided by Waypoint Centre for Mental Health Care for the ODARA.³⁷

³⁶ “The Ontario Domestic Assault Risk Assessment (ODARA),” Waypoint Centre for Mental Health Care (2016).

³⁷ See ODARA Scoring Form and Scoring Criteria, Waypoint Centre for Mental Health Care (2016) (at http://waypointcentre.ca/UserFiles/Servers/Server_9960/File/Research/Odara/ODARA_Item_Summary.pdf, last visited August 24, 2020).

There is no indication of any level of risk the Complainant may pose to children found in the results of any of the tests administered in the second assessment. There were no valid clinical assessment results unfavorable to the Complainant. There is no evidence in the LCSW's report, or in OCS's administrative record, that the Complainant ever engaged in violent behavior toward his wife, the child, or anyone else in their household. Without any credible basis, the LCSW recommended, among other things, that the Complainant never have contact with children or vulnerable adults³⁸ and that he be investigated by law enforcement.

After receiving the results of the second assessment, OCS held a TDM on December 18, 2019. The meeting notes do not document whether or how OCS staff critically reviewed the methods and outcomes of the two assessments. The meeting notes state that OCS determined that the Complainant was unsafe to live with the children. It appears that determination was based solely on the (unsupported) conclusions in the second assessment.

On December 23, 2019, OCS screened in two new PSRs alleging neglect by the grandmother, based solely on the (unsupported) conclusions in the second assessment. The second PSR was closed as "not substantiated" on February 18, 2020. The first PSR was closed as "not substantiated" on May 1, 2020.

There is no documentation or evidence in OCS's records explaining what OCS did with the clinical psychologist's evaluation after receiving it. There is no documentation or evidence explaining why OCS required a second assessment. There is no documentation or evidence explaining how OCS considered the scientifically valid testing and conclusions in the first evaluation compared to the screening tools (used inappropriately for diagnostic purposes) and unsupported conclusions in the second assessment. There is no documentation or evidence supporting OCS's decision to make and screen in two PSRs based on the second assessment.

Based on the preponderance of the evidence, the Ombudsman proposed to find Allegation 3 *justified*.

³⁸ The Ombudsman found no record of any allegation of neglect or harm of a vulnerable adult being made against the Complainant.

Agency Response

OCS responded that it “agrees that the additional PSR’s stemming from the behavioral assessment conducted by [the LCSW] should not have been screened in as it did not constitute a new maltreatment incident requiring an investigation and **affirms the finding of justified.**” Accordingly, the Ombudsman finds Allegation 3 *justified*.

Proposed Recommendations

Recommendation 1: OCS should implement formal policies and procedures, in the CPS Manual, to ensure that the agency complies with the findings of administrative appeal decisions overturning substantiations of harm and/or agreements made to settle appeals of substantiations of harm.

The investigation of this complaint showed that OCS did not properly document the agency's agreement to rescind the substantiated finding against the Complainant in ORCA. This resulted in decisions being made related to the child's placement and adoption based on inaccurate information.

This investigation revealed that OCS management does not believe it is bound by settlement agreements such as the one reached in the Complainant's administrative appeal. During the January 9, 2020, consultation, OCS leadership explained to the Ombudsman that “it doesn't matter” if the substantiation of the report was overturned or rescinded — “it happened.”³⁹

Despite the agency's agreement to rescind the substantiation, OCS continued to make decisions and take actions based on the substantiation, including forcing him to leave his home. This caused undue financial and emotional hardship on the family.

³⁹ January 9, 2020 Consultation with OCS Management and Staff.

It is also important to note that OCS disclosed the settlement agreement, despite a clear and express confidentiality clause. There is clear evidence that OCS shared the settlement agreement with the clinical psychologist, and likely that it was OCS who shared it with the LCSW.

OCS should develop and adopt specific policies that:

- recognize and affirm that the agency must abide by the results of administrative appeals of substantiations of harm, whether issued by an administrative law judge or arrived at by agreement with the appealing party;
- provide for clear and specific consequences to OCS staff for disclosing confidential agreements settling administrative appeals; and
- provide clear and easy-to-follow procedures for documenting in ORCA when a substantiation is overturned or rescinded pursuant to administrative order or settlement agreement, preferably in such a way as to prevent intake and case workers from seeing any information other than the final decision on the PSR.

Agency Response

OCS responded that it **agrees** with this recommendation. In support of this recommendation, OCS informed the Ombudsman that it has created a centralized unit to represent OCS in OAH appeals.

Based on the agency's response, the ombudsman investigator contacted the supervisor of the OCS administrative appeals unit. They reported that OCS was previously represented by the Attorney General's Office for appeals of substantiations to the OAH, but this resulted in substantial variations in outcomes for parents and OCS based on how different OCS regions were operating. They described the appeals unit, consisting of four OCS staff, as operating very well after two years, yielding more consistent results for appellants and OCS.

The OCS administrative appeals unit has the authority to negotiate settlement terms with an appealing party. When deciding what to offer and how to negotiate, the appeals unit uses the OCS

Maltreatment Assessment Protocol (MAP). The MAP outlines the steps an OCS worker should take in evaluating the presence of maltreatment for each of the 12 subsections of AS 47.10.011.

OCS agreed that policy and procedures need to be developed and added to the OCS Child Protection Manual. Specifically, OCS proposed a plan to develop and implement policy and procedures for substantiated maltreatment appeals by December 1, 2021.

Recommendation 2: OCS should ensure that decisions related to children in custody and parties engaged in child protection proceedings are based on credible evidence and reliable psychological and behavioral health assessments.

There is no evidence in the administrative record showing that the Complainant harmed, or is at risk of harming, any child in the home. The child repeatedly denied any violence or harm by the Complainant. They were taken to the child advocacy center – where no evidence of sexual abuse or other harm was found. Despite the lack of evidence, OCS continued to take action against the Complainant and his wife.

The Complainant went through extensive background check processes several times prior to and after he joined his wife’s household. These background checks were conducted by Health Care Services, a division of the same agency (DHSS) in which OCS resides. They documented close review of his past, including the 2000 relinquishment of parental rights. The Complainant was granted a variance for that barrier by the Commissioner. He was licensed by the state licensing board to work as a health care professional without any complaints or concerns.

There is no evidence in the administrative record showing why OCS chose to ignore the clinical psychologist’s assessment and recommendations. OCS leadership explained during the consultation on January 9, 2020, that the first evaluation was insufficient because it “ignored the substantiated report” because it had been overturned. Given that the clinical psychologist should not have received the confidential settlement agreement at all, the fact that they did not give the rescinded substantiation more weight than the other evidence from the assessment was appropriate.

There is no evidence in the administrative record as to why a second assessment was needed. Whatever the reason for the second assessment, it is clear that OCS staff did not look critically at how the LCSW arrived at their conclusions. OCS simply accepted them because they aligned with OCS's position (as described by OCS Leadership and staff on January 9, 2020).

When presented with the Ombudsman's concerns about the agency's reliance on the second assessment, and the use of screening tools instead of appropriate psychological testing tools to arrive at the conclusions, OCS management replied that case workers rely on the fact that a practitioner is licensed as evidence that their work product is sound. If that is the case, OCS staff should have relied on the clinical psychologist's findings from the Complainant's first assessment. They did not.

Ombudsman staff are not mental health professionals. However, inquiry into the tools used by both providers was easily conducted by ombudsman investigators, using internet resources and experts at the DHSS Division of Behavioral Health. It is not beyond the skills and capacity of OCS case workers to conduct a similar critical review of an outlier report (which is how OCS staff described the second assessment compared to other reports received from that provider agency).

Understanding how overburdened many caseworkers are, another option would be for the licensed mental health professionals OCS has on staff to review and explain complex psychological reports to caseworkers. They could provide training or checklists for what to look for in a clinical assessment. OCS can also establish a list of acceptable psychological testing to be conducted by contractors, based on the issue of concern (domestic violence, substance abuse, mental health disorder, sexual abuse, etc.). This would alert caseworkers to anomalous aspects of psychological reports and assessments, so they could seek more expert review.

Agency Response

OCS responded that it **partially accepts** this recommendation. The agency agreed that decisions made related to children in custody should be based upon reliable and credible information. However, OCS disagrees with the Ombudsman's recommendation to establish a list of acceptable

psychological testing to be conducted by contractors, based on the issue of concern. OCS wrote in response:

OCS does not intend to create a list of providers or evaluations that can be solely used as acceptable because there is a myriad of needs and complexities that individuals may present that could not be conceivably contained to a list and sometimes results in expertise not found in Alaska.

OCS offered to encourage PSS staff to consult with the single OCS Mental Health Clinician staff or regional Nurse Consultants in cases with complex mental or physical health needs as a remedial effort. However, this approach would not avoid the arbitrary screening in of PSRs in routine cases, as happened in this investigation.

The Ombudsman agrees that creating a list of providers would not be practical. However, the universe of behavioral, emotional, and cognitive screening, diagnostic, and assessment tools that have been validated through research and evaluation is not infinite. OCS could create – or adopt from another jurisdiction – a list or framework for evaluating the relevance of tools based on the child’s or parent’s presenting needs and safety concerns. This would provide consistent guidance to caseworkers and reduce the need for consultation with the only Mental Health Clinician at OCS.

The Ombudsman researched policies of child protection agencies from other states to determine if lists of acceptable testing are found in child protection policy. One such example is the Indiana Department of Child Services standard for substance use disorder assessments. The standard provides:

II. Service Delivery

F. A multi-axial system must be used to develop a comprehensive bio-psychosocial assessment that will include a mental status examination at the time of the initial appointment.

III. Comprehensive Bio-Psychosocial Assessment

B. Substance Use History:

2. One of the following standardized assessment tools for drug-alcohol use shall be administered to accurately determine if further substance use assessment is indicated.

a) Providers should utilize a nationally accepted drug/alcohol screening instrument.

b) It is strongly encouraged for providers to utilize Addiction Society of Addiction Medicine Criteria (ASAM).

c) Examples of other acceptable screening tools include:

- (1) Substance Use Subtle Screening Inventory (SASSI and SASSI-A2)
- (2) Addiction Severity Index (ASI)
- (3) Teen Addiction Severity Index (T-ASI)
- (4) ASI Lite
- (5) Drug Use Screening Test (DAST and DAST-20)
- (6) CRAFFT Screening Test
- (7) Brief Screener for Tobacco
- (8) Alcohol and other Drugs (BSTAD)
- (9) Drug Use Screening Inventory Revised (DUSI-R)
- (10) Other standardized tools may be used to best assess the specific needs of the client.⁴⁰

While not all-inclusive, the Indiana policy provides for testing tools acceptable to the agency, and includes a provision that allows for additional standardized tools not specifically identified in the policy.

Without training and a checklist for caseworkers, or without a list of acceptable/unacceptable testing to be conducted by contractors based on the issue of concern, OCS staff will not be equipped to discern if an assessment is providing reliable and credible information.

Additional Agency Proposed Plans

In addition to the response to the Ombudsman's recommendations, OCS offered three plans to provide remedial efforts in response to this investigation. The agency proposed:

1. to develop and implement policy and procedure for administrative appeals of substantiated maltreatment by December 1, 2021;

⁴⁰ See Indiana Department of Child Services, Service Standard, Substance Use Disorder and Assessment.

2. the Director will direct the Mental Health Clinician and Nurse Consultants to encourage consultation and staffing on complex mental and physical health cases by August 1, 2021; and
3. provide training to the Central Intake Unit about how to analyze information in reports from open cases and discuss how to screen in or out reports by August 1, 2021.

The ombudsman investigator contacted OCS Director Kim Guay to learn the status of the three plans proposed by OCS. Director Guay replied that OCS has implemented the third proposed plan and has developed a draft policy for the first proposed plan. However, due to staff vacancies and the COVID-19 pandemic, OCS has not yet been able to formalize a memorandum to address the second plan, but hoped to have this completed soon.

The Ombudsman thanks the agency for its willingness to create policies and procedures for substantiated maltreatment appeals, as well as for encouraging consultations with the Mental Health Clinician and for providing training regarding appropriate screening of PSRs.

Conclusion

OCS has a critical role in protecting Alaska’s children from abuse and neglect. It is a difficult and demanding responsibility, which taxes the resources and energy of individual caseworkers, foster families, and entire communities. The Ombudsman recognizes that the agency and its employees would rather be too careful, than to allow any child to suffer harm or neglect. However, in this case, OCS used its authority, power, and resources to pursue a “gut feeling” – even after over two years of interactions with the family and other service providers resulted in no evidence of harm or risk of harm from the Complainant.

Recognizing that the safety and well-being of Alaska's children is of paramount importance, the Ombudsman offers recommendations designed to ensure that the agency is considering clear and credible evidence when making decisions about the placement, care, and adoption of children in OCS’s custody, and to provide OCS caseworkers with the requisite tools needed to properly interpret the results of complex clinical assessments.