

January 30, 2018

Senator David Wilson, Chairperson
House Health and Social Services Committee
State Capitol Room 115
Juneau, Alaska 99801

Re: Senate Bill 81 – DHSS Background Check Program

Dear Senator Wilson,

The Alaska State Ombudsman's office has developed an understanding of the Background Check Program managed by the Department of Health and Social Services (DHSS), and offers these comments to inform your committee's deliberations on HB 162. I appreciate the importance of rigorous vetting of people seeking to work with children, elders, and people experiencing disabilities. I also appreciate how these sorts of programs can affect Alaskans' employment opportunities and families, when they are not consistently and fairly applied.

In February, 2016, Ombudsman Linda Lord-Jenkins released a [public report of a complex investigation of complaints related to the DHSS background check program](#) (BCP).¹ The impetus for the investigation was a series of more than a dozen complaints received from Alaskans between 2013-2015. These Alaskans had been found to have barrier conditions preventing them from working with children or vulnerable adults, and felt the findings were unreasonable, unfair, or otherwise in error.

The Ombudsman investigated five allegations related to the BCP:

- the lack of a discrete “centralized registry,” which was contrary to AS 47.05.330;
- inconsistent application of statutes, regulations, standards, and processes in administering the BCP;
- unfairly imposing a permanent bar to employment for civil barrier conditions, when criminal convictions for barrier crimes may prevent employment for only limited periods of time;
- using a “probable cause” finding for civil barriers related to Child in Need of Aid cases, when 7 AAC 10.955(n) required a “preponderance of the evidence” standard;² and
- unfairly prohibiting release of child protection records used to find a barrier condition to the affected person seeking to challenge the decision.

¹ A copy of the report is enclosed.

² DHSS repealed 7 AAC 10.955 in the BCP regulations adopted in 2017.

The Ombudsman made twelve (12) recommendations for addressing those allegations. DHSS agreed to implement three of those recommendations (but has not yet done so).

HB 162 is offered “to clarify and amend current statutes to fix those gaps” which have been identified in the existing BCP statutes.³ The ombudsman investigation of the BCP identified several areas in which management of the program was found to be unreasonable, unfair, or contrary to law. HB 162 may provide an opportunity to resolve those issues.

BCP “Registry”

The ombudsman investigation determined, and DHSS has acknowledged, that there is in fact no separate “centralized” registry for the BCP. HB 162 would change statutory references from a “centralized registry” to a “civil registry” (Section 1). This still implies that there is a specific registry associated with the BCP, when there is not now, nor is there intent to create, such a registry. While the previous Ombudsman recommended the creation of a “centralized registry” to bring the BCP into compliance with AS 47.05.330,⁴ another solution would be to make clear in HB 162 that DHSS manages a **background check program** which makes use of specific existing registries – removing references to any singular registry associated with the BCP.

We would further urge the committee to identify, in statute, the registries the Department should review to determine whether an individual has a civil barrier condition. HB 162 Section 10 would authorize the Department to specify in regulation each registry it will review “to identify and list individuals.” Currently, the registries are identified in several regulations, which could lead to confusion and potential mis-application of the standards being used.⁵ HB 162 could provide a clear list that gives Alaskans certainty as to what information sources will be consulted when they are screened by the BCP for caregiving employment or relative foster placement.

Standards for Civil Barriers

Between 2007 and March 2012, DHSS permanently banned individuals from caregiving employment if they had a substantiated finding of abuse or neglect by OCS, regardless of whether the agency took any further action or intervention with that family. It is important to note that a report of child maltreatment is substantiated by an OCS protective services specialist and is not automatically subject to any sort of judicial process or review. A parent can appeal the substantiation to the Office of Administrative Hearings and, if successful, the individual would no longer be barred. Only if OCS seeks to remove the child and files a Child in Need of Aid (CINA) action is there any automatic judicial review of the caseworker’s decision.

In March 2012, DHSS changed 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 court findings in a CINA case should be used as a barrier to employment. HB 162 would return to the use of a non-judicial substantiation of a report of child maltreatment as the basis for a civil barrier under the BCP (Section 10, page 6, line 31), as well as allow the court’s probable cause finding (which is subject to a much lower burden of proof) to be used.

³ Governor’s Transmittal Letter, March 7, 2017 at 1.

⁴ Ombudsman Complaint A2013-0776, Public Report at 16.

⁵ See 7 AAC 10.905(f) and 7 AAC 10.915(a).

It is not unusual for OCS to substantiate a report of harm without moving forward with a CINA action or removal of a child. For example, a report of harm that a child was exposed to domestic violence may be substantiated against both the offending and non-offending parents – but OCS may not take further action if the non-offending parent takes action to protect the child from the offending parent. OCS may substantiate a report of harm related to an incident in which a parent was intoxicated, but not take further action because the parent has engaged in treatment.

A civil barrier under the BCP restricts Alaskans' liberty interests in employment and family roles for up to ten (10) years. A more rigorous standard for what sorts of administrative findings give rise to a civil barrier is warranted. Relying on a court's CINA findings adjudicating a child to be in need of aid when deciding whether a civil barrier condition exists would give far more confidence that the alleged child maltreatment occurred, and that the parent had a meaningful opportunity to dispute the allegations.

Due Process

A major component of the ombudsman investigation was the lack of adequate due process (notice and hearing) to individuals who, as a result of a child protection finding, could later be prohibited from engaging in caregiving employment or becoming relative caregivers for children in Office of Children's Services (OCS) custody. HB 162 presents an opportunity to require that DHSS provide specific notice of the ramifications of being placed on the Child Protection Registry so that people can make more informed decisions as to whether to challenge the substantiation of a report of child maltreatment.

In 2016, the Ombudsman recommended that the "perpetrator closing letter" be changed to include a detailed explanation of the consequences of being included in the registry.⁶ As of November 2017, OCS is providing the following boilerplate notice in its letter to individuals being placed on the Child Protection Registry (one of several registries consulted by the BCP):

"If an allegation against you has been substantiated you have the right to appeal the decision. You may request a hearing regarding the department's decision to substantiate the above-allegation within 30 days from when this letter was sent. . . If you do not request a hearing within 30 days . . . the substantiated finding will become 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."⁷

Nothing in the current notice statement provides the individual with any idea that:

- a) inclusion on the Child Protection Registry will result in a civil barrier to employment and relative caregiving for up to ten years; or
- b) information will be provided to governmental agencies (i.e. the BCP) for purposes other than child protection.

In the situation where OCS has substantiated a report of harm but has decided not to intervene with the family (i.e. file a CINA petition), it is not unreasonable that the parents would not seek to

⁶ See Ombudsman Public Report at 24.

⁷ See Attachment 1, a redacted notice letter provided by OCS in November, 2017

challenge the substantiation of the report of harm. They may be satisfied with the fact that OCS is not seeking to remove their children. Further, in the case of a parent facing both a substantiated report of harm and a CINA action, it is reasonable that the parent may not appeal the substantiation while they focus on the court case. However, by not challenging the substantiation, the parent is now subject to a civil barrier to certain kinds of employment as well as relative caregiving for children in OCS custody. Further, because HB 162 would allow the Department to bar an individual for either a substantiated report of harm or a CINA finding, that would also mean that if parent prevailed in his CINA case but failed to appeal the substantiated report of harm, he or she would still be barred from caregiving employment for 10 years.

Additionally, HB 162 would extend civil barriers to anyone who has “had a professional license, certification, or similar professional designation revoked, suspended, or denied, or a request to renew a professional license, certification, or similar professional designation denied” (Section 10, page 7, lines 8-11). If HB 162 extends the reach of civil barriers to include the loss of any professional license/certificate (not just health care related professions), the state professional licensing boards (Department of Commerce, Community, and Economic Development) and the Teacher Certification Office (Department of Education and Early Development) should also be required to provide clear and specific notice that action taken against a licensee/certificate holder could result in a civil barrier under the BCP that would prevent them from engaging in employment involving child care or vulnerable adults.

Access to Information

The ombudsman investigation of the BCP program also reviewed the issue of individuals’ access information in long-closed child protection files, in order to request a variance for their barrier condition. 7 AAC 54.060 limits a parent’s ability to access child protection information held by DHSS after a case is closed. There are several narrow exceptions to this rule, none of which apply to individuals seeking a variance under the BCP. This limitation of access conflicts with the BCP’s requirement, found in 7 AAC 10.930, to provide information regarding the circumstances that led to the barrier condition.

In several of the complaints that were investigated by our office, individuals were advised to seek a court order allowing them access to child protection information, or to contact the attorney who represented them during the CINA case for copies of the file.⁸ In two of the complaints that our office investigated, OCS agreed to release the files directly to the BCP Variance Review Committee for use in determining whether to grant a variance – but still denied the complainants access to view the documents that OCS provided to the BCP, leaving them unable to adequately rebut or address whatever information the documents held.⁹

HB162 is an opportunity to close this gap and expressly allow individuals seeking a variance based on child protection information access to that information so they may have meaningful access to the variance process.

⁸ See Ombudsman Public Report at 32-34.

⁹ *Id.*

Relevancy Determination

Rigorous vetting of the people who care for Alaska's children, elders, and vulnerable adults is good public policy. However, that screening process should be tailored so that people who pose no credible risk of harm to others are not inadvertently prohibited from providing care. HB 162 creates a very broad suite of civil barriers under the BCP (Section 10).

Loss of a professional license, regardless of the reason, creates a civil barrier. Denial or nonrenewal of a child care program license, again regardless of the reason, creates a civil barrier. There should be some connection between the decision to suspend, revoke, or not renew a license and the employment being sought by the person subject to the BCP.

The Ombudsman recommended a relevancy assessment during barrier determination review to ensure that there was a connection between the behavior giving rise to the barrier and the employment or relative placement being sought.¹⁰ HB 162 could include a relevancy assessment requirement, which would ensure that qualified individuals who pose no reasonable risk of harm are not unnecessarily prevented from working in the caregiving fields.

Other Comments

Based on ombudsman investigations of state employee actions across the executive branch for decades, I would suggest that HB 162 is too narrow in creating a civil barrier only for DHSS employees terminated for or found to have committed "assaultive, abusive, neglectful, or exploitative behavior or action" (Section 10, page 7, lines 5-7). The Departments of Public Safety, Corrections, Military and Veterans Affairs, Administration, Transportation, and Revenue all have positions which are responsible for the care and/or safety of others. To achieve the goal of screening out individuals who have engaged in unacceptable workplace behavior, the BCP should coordinate with the Division of Personnel to determine individuals' termination history for those agencies as well as DHSS.

Conclusion

Thank you for the opportunity to share these comments. DHSS's Background Check Program is a critical program, and HB 162 provides the opportunity to strengthen and refine it.

Sincerely,



J. Kate Burkhart
Alaska State Ombudsman

Enclosures

¹⁰ See Ombudsman Public Report at 24.

STATE OF ALASKA
DEPT. OF HEALTH AND SOCIAL SERVICES

Bill Walker, GOVERNOR

Office of Children's Services

Date: 11/22/2017

Mat-Su Field Office
695 E. Parks Hwy, Unit 3
Wasilla, AK 99654

Phone: (907)357-9780
Fax: (907)357-9763

Re: [REDACTED]
Case ID: [REDACTED]

Re: Notice of Alleged Child Maltreatment Decision and Case Status and Placement on the Child Protection Registry.

**IMPORTANT - THIS LETTER MAY CONTAIN TIME SENSITIVE INFORMATION.
BY NOT READING THIS AND TAKING ACTION NOW, YOU MAY NOT BE ABLE TO
APPEAL.**

Dear [REDACTED]:

A report was received on [REDACTED] alleging the child(ren) listed below were alleged victims of child maltreatment under Alaska Statute (AS) 47.17.290(9) and described in AS 47.10.011. You were named as an alleged perpetrator of the maltreatment listed below.

Alleged Victim	Alleged Perpetrator	Allegation	Finding	AK Child Protection Statute 47.17.290(9) as described in:
[REDACTED]	[REDACTED]	Neglect	Substantiated	AS 47.10.011 subsection (9) conduct by or conditions created by the parent, guardian, or custodian have subjected the child or another child in the same household to neglect AS 47.10.011 subsection (10)) the parent, guardian, or custodian's ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child; if a court has previously found that a child is a child in need of aid under this paragraph, the resumption of use of an intoxicant by a parent, guardian, or custodian within one year after rehabilitation is prima facie evidence that the ability to parent is substantially impaired and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child as described in this paragraph

Case Status: No further intervention

***No matter where you live in Alaska 2-1-1 is your one-stop resource for connecting with a wide variety of vital resources such as emergency food and shelter, counseling, healthcare, child care, drug and alcohol programs, legal assistance, transportation needs, educational opportunities, and much more. Call 2-1-1 or 1-800-478-2221 Monday through Friday from 8:30 am to 5:00 pm or go to: www.alaska211.org**

If an allegation against you has been substantiated you have the right to appeal the decision. You may request a hearing regarding the department's decision to substantiate the above-allegation within 30 days from when this letter was sent. A copy of the Request for Administrative Hearing under Alaska Statute 44.64 is enclosed. Your request for a hearing must include the reasons you believe the department's finding to be in error, and must be accompanied by any relevant documentation to support those reasons.

If you do not request a hearing within 30 days of this letter, the substantiated finding will become 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.

Any request for a hearing must be submitted to:

**Community Relations Manager
Department of Health and Social Services
Office of Children's Services
P.O. Box 110630
Juneau, AK 99811-0630**

If you have questions regarding this notice or the procedure for requesting a hearing, you should contact the OCS communications manager at hss.occommunications@alaska.gov or by phone at (907) 465-3548.

Enclosure: Request for Administrative Hearing under Alaska Statute 44.64

Request for Appeal of a Substantiated Child Abuse or Neglect Finding

(Through the Office of Administrative Hearings)

In accordance with Alaska Statute 44.64.060, I request a hearing to be scheduled with the Department of Administration's Office of Administrative Hearings for the purpose of appealing a substantiated finding of child abuse or child neglect against me as determined by the Office of Children's Services.

Today's
Date: ____/____/____

Approximate Date of
Substantiated Finding: ____/____/____
Investigating OCS Office _____

Requestor (Appellant)

Name:	
Address:	
Telephone:	Fax:
Email:	

Requestor's Attorney/Representative (if applicable)

Name:	
Address:	
Telephone:	Fax:
Email:	

Statement of complaint:

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Signed _____

Print name and Relationship to Agency

Please mail or fax this request attention to:
Office of Children's Services, State Office
Community Relations Manager
130 Seward Street, Suite 400
Juneau, AK 99811
Fax: (907) 465-3397
Ph: (907) 465-3170