BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of:	)	
	)	
L H	)	OAH No. 14-0725-CHC
	)	
	)	
In the Matter of:	)	
	)	
L A. H	)	OAH No. 14-0658-SAN
	)	

DECISION

I. Introduction

In these consolidated cases, the Office of Children's Services (OCS) seeks to substantiate a specific allegation that physical abuse was committed by L H (Case 14-0658-SAN) and to revoke the foster care license for the H home (Case 14-0725-CHC). The supposed incident of abuse is part of the justification for the proposed revocation, but the revocation case is broader in scope than the single incident at issue in the substantiation case. OCS has the burden of proof in both cases.

These cases were heard together over two days in August of 2014. The facts were extremely well presented on both sides, with OCS licensing and child protection programs separately represented by Assistant Attorneys General Kimberly Allen and Diane Foster, and Attorney Wallace Tetlow representing Ms. H. Resolution of the cases was subsequently delayed by a crisis in an unrelated area of the Office of Administrative hearings docket.

This decision concludes that the alleged incident of abuse was not proven. Nonetheless, the evidence showed that the H household has violated a requirement of the foster care program and is not well suited to the foster care role, and its license should be revoked. None of this negates the fact that S and L H took in foster children for admirable reasons, and they tried in good faith to provide a good home for two children in need.

II. General Factual Background

The facts in this section are not disputed. They are set out here, before the evidentiary rulings that have a bearing on the contested portions of the cases, because they will lay context for those rulings.

S and L H were married in 2005, and they have one biological son, A, born in 2006. Ms. H had a series of miscarriages after that. In 2012, they became interested in fostering one or

more children in state custody, with a view to eventual adoption through the "PARKA"[1] program. Mr. H had been adopted himself, and the couple hoped to do for other children what had been done for him. After taking classes, they applied for and received a provisional license to operate a foster home for up to two children.[2] In late July of 2013, OCS placed two children with them: W E, who was about to turn six, and her brother K E, who was about to turn three.

K was a challenging child to parent. One of his challenging behaviors was that he would occasionally have tantrums that went beyond the norm, even for special needs children his age.[3] The tantrums could involve hitting, kicking, spitting, throwing, and general loss of physical control over quite a long period. As one witness related, "he wasn't really throwing a tantrum, a tantrum was throwing him."[4]

The Hs were assisted with some aspects of child care by C N. She and Ms. H had met several years before when they were both enrolled in the same treatment program, and they were friends. Ms. N was, however, also working for the household for pay on a part-time basis. One of her duties was to pick up K at 8:00 in the morning and take him to No Name Program (NNP)—a preschool program for children with special behavior needs—while Ms. H got W and A ready to go to elementary school.

On the night of December 12, 2013, K had a particularly loud, violent and extended tantrum, disrupting the bedtime preparations of the other children. S H worked with K to calm him down. L H was unhappy with the amount of time S was spending with K and, after the children were in bed, the two parents had a serious quarrel.

The next morning, S H left before anyone else awoke. K and L were slow to awake and behind schedule. As will be discussed below in more detail, there came time when A, W, and C N were in the kitchen, while K and Ms. H were at the bottom of a set of stairs leading from the kitchen to the basement, out of view of the others. Something occurred, and K wound up on the floor of the landing, partway up the stairs. Ms. N said, "Not cool, L, not cool." Soon afterward, Ms. H made a remark to Ms. N that both of them understood to signal the end of the employment relationship.

However, Ms. N did take K to NNP that morning. When she arrived, she related that she believed Ms. H had pushed K to the floor and injured him, and that K had told her he had been

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1 Preparation of Adoption Readiness for Kids in Alaska.
2 The license is at Agency Record page 16.
3 Testimony of D K X (Allen cross).
4 Testimony of C N (Foster direct).

pushed. Two NNP workers made reports of harm. A police officer came to NNP. K made statements to NNP worker A U and to Police Officer D S. He was examined at Alaska Native Medical Center and diagnosed with a left foot sprain.

W and K went to their respite care provider, and ultimately were never returned to the H residence. There were no criminal charges. OCS investigations ensued, conducted by Child Protective Services and the Foster Care Licensing Program. Child Protective Services issued a closing letter substantiating one instance of physical abuse by L H against K E. The letter was dated February 24, 2014, but not signed until somewhat later and not provided in its final, signed form to Ms. H until April 5. The licensing program issued a notice of intended revocation on March 25, 2014, and sent it the following day. Ms. H promptly appealed both programs' decisions.

III. Evidentiary Rulings

At the hearing, there were a number of objections seeking to limit the use of certain potentially significant documents and testimony. As finally set out in the proposed decision below (prior to adoption), the formal evidentiary status of the testimony and documents at issue was only marginal to the outcome, but it could have been more significant under alternative routes of analysis. Rulings on the objections are included below for the benefit of the parties in framing any proposals for action to the final agency decisionmaker,[5] and to help that decisionmaker apply the correct evidentiary rules in evaluating those proposals.

A. Hearsay Limitation

In Alaska, some administrative appeals are covered by the Administrative Procedure Act (APA) and some are not. Cases subject to the APA have a special rule regarding hearsay evidence that is more restrictive than the rules for hearsay that apply to most other administrative proceedings. The APA hearsay rule is:

> Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action.[6]

In most non-APA cases, there is no special restriction on the use of hearsay; the tribunal may admit and rely upon any "evidence of the type on which a reasonable person might rely in the conduct of serious affairs."[7] The present case represents a consolidation—by consent of the

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5 *See* AS 44.64.060(e).
6 AS 44.62.460(d).
7 2 AAC 64.290(a)(1).

parties—of a substantiation case that *is not* subject to the APA and a formal licensing case under AS 47.32.150(a) that *is* subject to the APA.

A question arose during the hearing as to whether hearsay materials taken into the record would, in the context of the substantiation matter (14-0658-SAN), be subject to a hearsay restriction. The ALJ has listened to the entire recording of the case planning conference in which these two cases were consolidated for hearing. There was no discussion of evidentiary matters, and there was no stipulation to impose a more stringent evidentiary standard on the substantiation matter than would ordinarily apply by law. After the planning conference, the ALJ issued a consolidation order stating, "Because Case No. 14-0725-CHC falls under the Administrative Procedure Act, all proceedings in this case will be conducted under those procedures." Although this sentence was ambiguous,[8] its most natural meaning, and its intent, was to place both matters under APA *procedures,* so that, for example, the parties will have a right to move for reconsideration under AS 44.62.540 regardless of whether the issue they wish to revisit relates to substantiation, licensing, or a mixture of the two. However, the order did not change the evidentiary standard, which is not a procedure.

Accordingly, no items admitted at the hearing will be under an AS 44.62.460(d) restriction insofar as they are used to resolve case 14-0658-SAN. Of course, the fact that an item may include hearsay, and the fact that there may have been no opportunity to test the hearsay statement through cross-examination, is a consideration in assessing the weight the item should be given. In the context of reaching findings to resolve case 14-0725-CHC, on the other hand, the APA's restriction on use of hearsay will apply. It will limit the use of statements that are actually ruled to be hearsay and not within an exception.

B. Numbered Agency Record

At the beginning of the hearing, the entire agency record (a collection of documents submitted on May 29 and June 24, 2014 and numbered from 1 to 258) was admitted with the stipulation that every item in it is hearsay unless separately moved for admission. This was done by way of numbered and lettered exhibits, most of them taken from the agency record, which are addressed in Part C below.

[8] It is hard to tell if "this case" referred to case 14-0725-CHC, or to both cases. The ALJ intended the latter, but regrets to discover that he did not draft the order clearly.

C. Exhibits Admitted, Limited, and Excluded

With respect to numbered and lettered exhibits receiving a hearsay objection, the objection was not to the hearsay status of the document itself (in general, these were stipulated to be business records falling within the business records exception of the hearsay rule), but rather was to the hearsay-within-hearsay: the statements of third parties that the author of the document purported to repeat or summarize. The table below sets out the rulings on all exhibits offered at the hearing. Most of these rulings were made on the oral record, but a few elements of the disposition of hearsay objections were left to be ruled on post-hearing, and those subsequent rulings are reflected below. With respect to the handling of out-of-hearing statements by children, the disposition of the objections is more fully explained in Part D, below the table.

Exhibit	Status in Case 14-0658-SAN	Status in Case 14-0725-CHC
1	Admitted	Admitted, but with hearsay limitation as to all third-party statements unless made by Mr. or Ms. H (the licensees). This limitation does not encompass Ms. Darbonne's observations as related in the document.
2 - 3	Admitted	Admitted
4	Admitted	Admitted, but with hearsay limitation as to all third-party statements unless made by Ms. H
5	Admitted	Admitted, but with hearsay limitation as to all third-party statements, including those relayed through the unidentified "reporter"
6	Admitted	Admitted, but with hearsay limitation as to all material[9]
7	Admitted	Admitted, but with hearsay limitation as to all third-party statements unless made by Mr. or Ms. H
8	Admitted	Admitted (objection withdrawn)
9	Admitted	Admitted
10	Admitted	Admitted, but with hearsay limitation as to all

[9] At first glance, this item appears to contain admissions/statements by the respondent that would be non-hearsay, but this is buried under two layers of hearsay. The first layer (H. H's ORCA entry) is within the business records exception, but the second layer (anonymous reporter's statements to H) is hearsay not within an exception.

		third-party statements unless made by Mr. or Ms. H
11	Admitted	Admitted, but with hearsay limitation as to the following: Activity Note 2595991 on pp. 3-4 Activity Note 2565253 on pp. 5-6 Paragraphs beginning "Later W-E disclosed …" and "PSS II" on p. 8 Pages 13-14 E Y statements on p. 15 Page 30 Paragraph beginning "On 12/13/13 J- …" on p. 33 and same paragraph where reprinted on p. 34[10] Page 37 except where reporting writer's personal observations Page 39 except where reporting writer's personal observations
12	Admitted	Admitted
A - F	Admitted	Admitted
G - I	Withdrawn	Withdrawn
J	Admitted	Admitted

D. Children's Statements

The record contains both documents and oral testimony that relate statements made to others by the three young children in the H home.

The most significant of these statements are statements by K E to A U (offered through her testimony and through a contemporaneous handwritten report she authored[11]) and to C N (offered through her testimony and various business records made by others). In both

[10] These statements may have been admitted elsewhere but are given a hearsay limitation where they appear here, due to the additional layers of hearsay.

[11] Ex. 11, p. 37.

statements, K indicated that his foster mother had pushed him. K did not testify, and there is a hearsay objection to K's out-of-court statements.[12]

K's statements were made outside the hearing and were offered to support an allegation that K was in fact pushed. They are hearsay under Alaska Rule of Evidence 801(c), and they would not be admissible over objection in a civil case unless they fit in one of the exceptions in Evidence Rules 803 or 804. The exception under which they have been offered is Rule 803(23), known as one of the "residuary" exceptions. As the Alaska Supreme Court has explained:

> Rule 803(23) entails five requirements for admissibility: (1) the statement which is the subject of the hearsay testimony must have circumstantial guarantees of trustworthiness equivalent to that possessed by the specific hearsay exceptions; (2) the statement must concern a material fact; (3) it must be more probative than any other evidence which the proponent can reasonably procure; (4) admission must best serve the general purposes of the evidence rules and the interest of justice; and (5) the opponent must have appropriate notice that the hearsay will be offered.[13]

For children's statements, the same court has indicated that the bar is quite high for the first of these criteria, devoting extensive analysis to whether the child's statement has strong guarantees of trustworthiness and placing particularly high value on whether the child's revelations were "spontaneous, made without undue suggestion."[14] This issue will be analyzed more fully when we turn to the merits, but K's first statement was not spontaneous, instead being made in response to a leading question. Moreover, as will be seen, part of K's statement to Ms. U simply cannot be true. Under the circumstances, I believe K's statements to U and N would be excluded in Superior Court, and therefore they will carry a hearsay limitation in the licensing case.

In making this ruling, I am mindful that the proponent of K's out-of-hearing statements was willing to have him testify live, as a cure for the hearsay problem. He did not testify only because I felt testimony from so young a child many months after the event would be of no probative value and would be potentially harmful to the child. I stand by that view, and will not reopen the evidence to allow the live testimony.

Let us turn now to the other out-of-hearing statements made by the various children. The residuary exceptions in Rules 803 and 804 operate only when the proffered evidence is more probative on the point for which it is offered than any other evidence the proponent could

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[12] Insofar as they appear in documents, the documents have two layers of hearsay. However, the documents are conceded to be business records falling within the exception in Evidence Rule 803(6), and the objection relates only to the bottom layer of hearsay: K's statement to the person he was speaking to.

[13] *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1218-9 (Alaska 1991).

[14] *Id* at 1219.

procure through reasonable efforts. Because of this principle, oral and written accounts of A's December 20, 2013 statement to O F[15] fall outside the scope of the hearsay exceptions. A's statement may have been videotaped,[16] and the proponent has not made any showing of an effort to obtain the video recording, which would be more probative than secondhand accounts of what the child said. Likewise, evidence of K E's statements to Officer S do not fall under the residuary exceptions, because K's statements were recorded[17] and the proponent has not made a showing of any effort to procure the recording. The secondhand accounts of these statements by children can be, and have been, admitted in both the substantiation and licensing matter, but in the licensing matter their admission is subject to a hearsay limitation.

With respect to statements by W E, there is a single statement in the record that might lend some support to the allegations against Ms. H: a remark related in the paragraph beginning "Later W-E disclosed …" on page 8 of Exhibit 11. This statement has layers of hearsay above the child's statement, and thus must carry a hearsay limitation in the licensing case regardless of whether W's own words, if reported directly, could fall within the residual exception. There is also a longer statement of W to O F.[18] It may have been recorded, having been taken by the same person who interviewed A. No foundation has been laid to admit this as non-hearsay. It is essentially favorable to Ms. H, but, since Ms. H has objected to it, it will be treated with a hearsay limitation in the licensing matter, at least insofar as it might be used against her.

IV. Substantiation

A. The Nature of Substantiation of Physical Abuse

OCS has issued a closing letter substantiating physical abuse for the incident that occurred on the stairs at the H home the morning of December 13, 2013. The sole issue in Case 14-0658-SAN is whether that incident constitutes physical abuse. The issue is addressed *de novo* in this forum, with the agency required to prove its case for an abuse finding from the ground up, and the respondent given a fuller opportunity to respond and challenge the evidence than is ordinarily available at the initial investigation stage. A determination that the allegation is unproven is not necessarily an indication that the OCS concerns were unfounded or that its preliminary conclusions were unreasonable, based on the evidence available at the time.

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15 The statement is summarized at Activity Note 2595991 on pages 3-4 of Exhibit 11, among other places.
16 Darbonne testimony (Allen redirect).
17 Testimony of Officer S (ALJ question after cross).
18 Ex. 10, p. 5 (Activity 2594238).

The precise definition of physical abuse for purposes of a substantiation case has been an area of difficulty for the Department of Health and Social Services. For a number of years, under more than one commissioner, it was well settled that

> [t]o substantiate a finding of physical abuse, there must be proof by a preponderance of the evidence that a child suffered physical injury "under circumstances that indicate that the child's health or welfare is harmed or threatened thereby."[19]

In 2013, a deputy commissioner, acting on behalf of former Commissioner Streur, changed a departmental interpretation of the underlying statute, such that the second element of the definition was dropped. Under this view:

> As the Department now interprets this statute, OCS may make a substantiated finding of physical abuse any time a child is injured. Such a finding must be upheld regardless of the circumstances that led to that injury. All that needs to be proven is that the child was injured in some way.[20]

The 2013 decisions did not lay out a reasoned basis for this change,[21] and the altered standard was problematic. For example, if a parent took her child to play on the swings and the child scraped her knee, the parent would be guilty of abuse, without further inquiry. Likewise, if a father played touch football with his sons and one of them got a bruise when the father was blocking him, the father would be an abuser under this one-dimensional definition.

However, the department's most recent revision of its Child Protective Services manual makes it clear that the 2013 interpretation has been abandoned. The manual makes no provision for a finding of abuse unless there are "circumstances that indicate that the child's health or welfare is harmed or threatened," the same additional inquiry required by the pre-2013 definition.[22] This decision will apply the pre-2013 definition of abuse. In the context of the present case, this means that OCS must not only prove injury to the child, but must prove that the injury was not accidental and involved the use or threat of physical force by Ms. H.[23] OCS

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[19] *In re K Doe*, OAH No. 06-0112-DHS (Karleen Jackson, Comm'r of Health & Soc. Serv. 2007) (citing AS 47.17.290(2) and section 2.2.10.1 of the Child Protective Services Manual); *see also, e.g., In re X & YZ*, OAH No. 09-0589-DHS (Dep. Comm'r Hefley for Comm'r Streur 2010).

[20] *In re F.T.*, OAH No. 13-0050-SAN (Dep. Comm'r Sailors for Comm'r Streur 2013).

[21] *In re F.T.* acknowledges that there was no "reasoned analysis" offered for the change. *Id* at 4. *Cf. May v. State*, 168 P.2d 873, 883 (Alaska 2007) ("Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

[22] The CPS Manual is found at http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf. While the current version of the manual does not formally apply to OCS activities prior to 2015, it does reflect a recognition that the underlying statutes and regulations cannot be interpreted or applied as suggested in the 2013 decisions.

[23] In other contexts, it may be that failure to *protect* a child from a known physical force or danger would also constitute physical abuse, but the facts of this case do not present that kind of issue.

implicitly accepted that burden in its presentation of this case, setting out to prove both that K was injured and that his injury was inflicted deliberately.

B. The December 13 Incident

The context of the December 13 incident begins with the night before.

The H household routine was that dinner would be served at six; children would bathe at seven, followed by getting ready for bed and being read to; K and W (who shared a room) would have lights out at 8:30; and A would have lights out at nine. One of S H's duties in this routine was to get K to bed.[24]

On the night of December 12, K resisted being taken out of the tub and began having a tantrum at 7:30. The tantrum ebbed and flowed, but at times it involved flailing, kicking furniture, kicking the wall or closet door in his room, scratching, and biting. Above all, it was loud. S H attempted to settle K down in his room, but eventually the ruckus so interfered with getting W to bed that S had to leave that to L, moving K to his basement office. Finally, K calmed down. He was in bed by 8:45.[25]

L H did not like it when one family member required a lot of attention. She felt that the result was that "all of us kind of get cheated out of time, family time together."[26] She was angry, and she confronted her husband about the situation after the children were in bed. She told him, "We're going to have to do something about this. You're spending too much time with K."[27] There was a heated argument for about 45 minutes that had some physical contact, although probably nothing that could be called domestic violence by either participant. They went to bed in separate places at about midnight.[28] S left the house early the next morning, before anyone else awoke.

The routine for the household on school mornings was for Ms. H to get up at about 7:15. She would get K and the other children up and dressed, but not feed K breakfast because he would get that at NNP. C N was supposed to arrive at 8:00 to take K to that program, while the other children got their breakfast.

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[24] Testimony of S H (Allen cross).

[25] *Id.* (direct examination and Allen cross).

[26] Testimony of L H (direct).

[27] Testimony of S H (direct).

[28] This impression of the altercation is drawn from the testimony of both parents. Statements taken close to the time confirm that it was an intense and serious quarrel.

On the morning of the 13th, L H was tired and did not awake until 7:45. K and A were still sleeping; she woke the older child, but not K. She remembers, quite precisely, that C N arrived late at 8:04, while A and W were eating in the kitchen.

All accounts agree that Ms. H told Ms. N that she did not want to deal with K that morning. C N recalls that L H said she was afraid she would kill him, although the babysitter hastens to add there is no doubt Ms. H was kidding, using this only as a figure of speech (regrettably, this remark made it into some later documentation as though it were spoken literally). N was sent upstairs to get K up. She found him sleepy and in a strange state, saying odd things like "Tell dad not to poop on me." After she got him downstairs, she had some difficulty locating his winter boots. They were in the garage, a floor below, and K was sent down to get them. There was credible evidence that Ms. H, who was quite frustrated and annoyed by this time, ordered K to "get your fucking boots."[29]

The stairway to the basement goes down from the kitchen to a landing, and then doubles back down to the garage, with the two flights separated by a half wall. K was not getting his boots, and Ms. H went down to the garage to retrieve him and the boots. Ms. N was still in the kitchen.

By Ms. N's account, she could hear Ms. H talking loudly to K. She heard two thuds and crying downstairs. She walked over to the top of the stairs, and when she got there, she looked down to the landing[30] and saw K crash hard to the floor of the landing, as if he had been pushed from the other side of the landing. She went quickly down the stairs and looked over the half wall.

Although she has not always described it quite this way, she now says she saw Ms. H on the other side of the landing holding a stick that is used to block drafts under the garage door. Both women's accounts agree that Ms. N leaned over the half wall and said "Not cool, L, not cool." Both agree that they made their way upstairs with K, and when they arrived Ms. H said something like "Get the fuck out of my house,"[31] which they both seem to have understood to mean that Ms. N was not going to be working for the Hs anymore.

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[29] Ex. 4, p. 5; Ex. 11, p. 39 (both relaying N accounts from shortly after the event); testimony of C N (Allen direct). I recognize that Ms. H denies speaking to K this way, but there is little doubt from the overall record that she could be quite profane in front of the children, and Ms. N's description of the event was the more credible on this point.

[30] Her view can be seen in Exhibit C.

[31] Ms. N's version is "I don't need your fucking judgment C. Get the fuck out of my house." Ms. H recalls that she was indeed angry about the implied accusation in N's comment, and recalls saying "Get the fuck out of here."

A little strangely, the firing does not seem to have been effective immediately, because Ms. N continued with K to NNP. Ms. N was unsure what had happened on the stairs. This is shown by the fact that she reports that she asked K, "Did your mom push you?" or something to that effect, and K said "My mom pushed me." On the other hand, it is equally clear that Ms. N was genuinely troubled by what she had seen and heard. There was some suggestion at the hearing that Ms. N may simply have been a disgruntled employee angry about being fired, but at least some of her dismay preceded the firing. We know this because Ms. H agrees that Ms. N said "Not cool, L, not cool" *before* the firing took place.

In short, without resolving any credibility issues it is clear (1) that Ms. N did not directly witness a push; and (2) that Ms. N heard and saw things that made her think Ms. H *might well* have pushed K. Two other things are quite clear as well. First, K did not say he was pushed until the idea was suggested to him; there is no evidence at all that he volunteered the account without prompting. Second, the recent mention of the stick in Ms. H's hand is a red herring. Ms. N has never said, even at the hearing, that she thought K might have been hit with the stick. She did not ask K whether he had been hit, only about pushing, and she did not mention the stick or any concerns about it in the reports she made on December 13.[32] Thus, while Ms. H may or may not have had the stick with her, the scene Ms. N saw certainly did not suggest that the stick had been used on K.

Once they got to NNP, Ms. N told the NNP teacher—with K listening—that she had just seen something bad happen.[33] K, when asked what happened, repeatedly said "My mom pushed me down the stairs."[34] It is notable that this cannot quite be true: K and his foster mother were going *up* the stairs, and at most he fell or stumbled horizontally. Thus, the three-year-old's version of the event, while of concern, is weakened by having been started with a suggestive question and by being repeated in a way that is at least somewhat fanciful.

There is an alternative version of the events on the stairs, supplied by Ms. H. She says when she got to the garage, she found K playing with a toy instead of getting his boots. She was firm with him and started getting his boots on, and he started to escalate. In her testimony at the hearing, she said they proceeded up the stairs, with him plopping down a couple of times and starting to have a tantrum, and her "scooting" him up with a hand under his butt to "assist" from behind. She says that he then "walked on his own to the landing, where he melted down,"

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[32] The injuries are also inconsistent with being hit by a stick.

[33] Testimony of A U (cross).

throwing himself to the floor, flailing, and crying very loudly. This, she says, is the point at which Ms. N's head appeared and she made the reproachful remark.[35]

Ms. H's version would be plausible enough, except that it is different from what she said in December of 2013, when she mentioned no flailing, screaming tantrum. Instead, at that time she described K as "whining" and "weeping a little bit."[36] In December, she also allowed that K had hit the wall a little bit as she boosted him up the stairs.[37]

In the aftermath of this incident, K was definitely injured. He was limping, owing to a minor ankle sprain. Some caregivers thought they saw swelling and redness on the ankle, but a medical examination soon afterward showed none whatsoever.[38] He seemed to recover quickly over a period of hours; the police officer found that "he was walking around fine."[39] K also had a very small cut or split on his upper lip, with no associated swelling or redness.[40]

While it is conceivable that the hurt ankle came from an earlier event, such as the violent flailing during the previous night's tantrum, no one had noted the problem before the trip to the basement, and thus it likely came about on the stairs. The small split in his lip is harder to associate with a particular event, since minor splits of this nature can result from many causes, particularly in the winter, and can reopen spontaneously.

The sore ankle and the opening or reopening of a slightly cut lip are injuries K could have given himself in throwing himself, stumbling, or flailing on the stairs and landing, but on the basis of her earlier accounts, I am wholly unconvinced by Ms. H's recent description of a violent tantrum on the landing. It is undisputed that he flew violently to the floor of the landing, and Ms. H's impatient "boosting" under his butt is by far the most likely explanation for his fall. Moreover, she was angry at the time, a state that would increase the likelihood of applying excessive force.

As licensing investigator Robin Darbonne explained at the hearing,[41] there is a continuum, with some overlap, between corporal punishment and physical abuse. Rough handling of a child who is being uncooperative is a form of discipline and corporal punishment.

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34 *Id.*; Ex. 11, p. 37.

35 Testimony of L H (direct).

36 Ex. 4, p. 5; *see also* Ex. 11, p. 5. The first appearance of the tantrum version appears to be in February of 2014 (Ex. 8, p. 6).

37 Ex. 11, p. 5.

38 Ex. J, p. 6 ("no swelling, no abrasion, no erythema").

39 Testimony of Officer S (Allen direct).

40 It is shown in the photo at Ex. 12, p. 7. The split is at the center of his upper lip; the larger lesion on the left side of the photo is a cold sore.

41 Testimony of Robin Darbonne (Allen redirect).

I find it more likely than not that Ms. H did handle K roughly on the stairs. I infer from the violence with which he sprawled to the landing that the handling was intended to be at least somewhat painful, and thus was corporal punishment. It is not certain that this occurred, but it is more likely than not that it did.

That being said, with no direct adult witness to the "boost" or push, I am unable to say that it is more likely than not that the surrounding circumstances of this incident rise beyond corporal punishment to the level of child abuse. Ms. H may have intended to correct rather than injure, and the small injury K suffered may have been fundamentally an accident. OCS has the burden of proof in the substantiation case. It has shown that ill-advised and improper physical discipline probably occurred, but as to the slightly higher threshold for child abuse, the state of the evidence does not quite satisfy the burden OCS must carry.

V. Foster Care License

A. Procedural Status

Case 14-0725-CHC was initiated by a Report of Investigation/Notice of Violation[42] seeking to revoke the provisional foster care license of the H home. L H filed a request for hearing.[43] Although her co-licensee, S H, was nominally listed as a co-respondent and did not file a hearing request, the parties have stipulated that the whole license will be revoked if the accusation is sustained, and that if it is not the license will be in good standing in all respects. Since the license has lapsed through passage of time, this would presumably mean that it would be eligible for reinstatement or conversion to a regular license.

As is the case in most Alaska administrative appeals, the decision on the proposed revocation is made with new evidence (in this case, consisting largely of new testimony), and therefore it is effectively a *de novo* review of Foster Care Licensing's (FCL's) assessment that revocation is appropriate. If the decision at the end of the hearing differs from FCL's recommendation, the difference may not stem from any "errors" in the initial round. Instead, it is simply a new decision made with a different, and often more complete, body of evidence. The task is to make the best decision possible at the executive branch level.

In the course of making the best decision possible, the Commissioner may, for a variety of reasons, find it appropriate to defer to judgments made by the licensing staff, particularly

[42] This document functions as the Accusation under AS 44.62.360.
[43] This document functions as the Notice of Defense under AS 44.62.390.

those that are based on specialized expertise or administrative experience in the field.[44] A commissioner is never bound to defer to subordinates in this context, however.[45]

B. Violations Alleged

FCL has alleged that the H home is not in compliance with the following requirements:

1. 7 AAC 50.210(a), requiring that any adult having regular contact with the children in the foster home be responsible, have reputable character, and exercise sound judgment;
2. 7 AAC 50.210(e), requiring among other things that any person having regular contact with the children in the foster home not abuse the children;
3. 7 AAC 50.210(j), requiring among other things that caregivers prevent exposure of children to physical hazards and act as a positive role model for children;
4. 7 AAC 50.430(d), requiring that "a foster parent shall treat foster children equitably with the foster parent's own children;"
5. 7 AAC 50.435(c), requiring that a foster home not use discipline or behavior management techniques that are cruel, humiliating, or damaging;
6. 7 AAC 50.435(d)(6), prohibiting the subjection of a child to verbal abuse, derogatory remarks, or threats to expel the child; and
7. 7 AAC 50.435(f), prohibiting corporal punishment.

The second allegation must be discarded, since abuse has not been demonstrated by a preponderance of the evidence. The others remain potentially viable as grounds for revocation.

C. Findings and Analysis

Because the fundamental concern is the suitability of the H home for a foster care role, the licensing case turns more on broad themes and characteristics of the home than on the very specific events that drive a substantiation case.

A strong impression from the testimony of L and S H is that L H loathed chaos. She wanted things to happen exactly on schedule. A tantrum that delayed K in getting to bed by 15 minutes, from 8:30 to 8:45, was enormously upsetting. C N's arrival the next morning at 8:04, rather than 8:00, was highly aggravating ("her coming late on a day that was stressful, I really

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[44] *See, e.g., Quality Sales Foodservice v. Dep't of Corrections*, OAH No. 06-0400-PRO (Commissioner of Administration, Sept. 21, 2006) at 11, 16 ("While there is no automatic deference . . . , the commissioner may, in appropriate circumstances, wish to extend some practical latitude to the judgments of agency staff;" giving deference "in recognition of the need to give procurement staff some latitude to manage a complex procurement").

[45] *See Blasting v. New Jersey Dep't of Labor & Workforce Dev.*, 2005 WL 3071509, *4-5 (N.J. Super. App. Div. 2005) (under New Jersey's standard administrative process, similar to Alaska's, deference to staff's preliminary decisions is not required in administrative appeal process; administrative appeal is not like court review, where deference is indeed required); *Baffer v. Dep't of Human Serv.*, 553 A.2d 659, 662-3 (Maine 1989) ("the Commissioner [is] the final repository of discretion;" where final administrative decisionmaker thinks he "must defer" to prior exercises of discretion, "[t]his thwarts the purpose of the hearing procedure"); *In re Service Oil Delta*

had, I had had enough").[46] While a regular and predictable schedule can be good for children, a parent's inability to adapt to disruptions must be considered in evaluating the parent's suitability to take foster children. Another strong overall impression is a certain lack of insight into children's behaviors. When K, at age two, hit and stole toys from seven-year-old A, Ms. H told another adult that K was "bullying" A, imputing a level of premeditation to K's behaviors that is odd and troubling.[47] When W retrieved some hair bows that had been taken from her as punishment, then lied about having retrieved them, Ms. H was confounded that a six-year-old would lie to her.[48] Perhaps relatedly, she seemed to regard the children as peers in some respects, illustrated by feeling jealousy that K was taking so much of S's attention and unselfconsciously dropping the word "fuck" into a conversation with a licensing worker while one of the children was present.[49]

At the same time, there are disturbing indications that Ms. H did not truly place the foster children, or at least K, on an equal footing with her biological son. A told a licensing investigator that his mother did not like or love K.[50] While the Administrative Procedure Act prevents this hearsay statement from being relied upon for its own truth (*i.e.,* as proof that she in fact did not either like nor love K), it is evidence that something was amiss or unequal in the interactions he observed, such that he would have that impression, whether rightly or wrongly.[51] Robin Darbonne, a highly experienced foster home inspector, likewise formed a firsthand impression after multiple interactions with Ms. H that Ms. H did not place the foster children on an equal footing with A.

Against this background we can return to the incident of December 13. That incident has been determined above to be, most likely, an application of rough handling as a form of discipline for being slow and uncooperative.[52] It fits the definition of corporal punishment,

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Fuel Co. (Commissioner of Administration, May 26, 1998), at 4 ("the Commissioner is not obligated to defer to the interpretation advanced by [the Division of General Services]").

[46] Testimony of L H (direct).

[47] Testimony of Robin Darbonne (Allen direct).

[48] *Id.*; testimony of S H (direct).

[49] Testimony of Robin Darbonne (Allen direct); testimony of both Hs; testimony of C N (Allen direct).

[50] Ex. 11, p. 4.

[51] There are some things in A's statement that have the ring of fantasy (*e.g.,* a tale that his mother whacked K all over his body with a plastic chainsaw, even though A never saw it happen). But this does not take away from the significance of his belief that K was disliked and unloved, in contrast to himself.

[52] The finding that the incident on the stairs on December 13 was most likely an instance of discipline can be reaffirmed here in the context of the slightly tighter evidentiary standards of a licensing case. That finding relied, albeit only slightly, on the hearsay statements of K E, but it did so to supplement and explain direct evidence (primarily testimony and admissions). That use is permitted by the Administrative Procedure Act.

which is "the infliction of bodily pain as a penalty for a disapproved behavior."[53] Although corporal punishment is legal in Alaska in some contexts, it is flatly forbidden in foster homes.[54]

A single proven instance of corporal punishment might not, in some circumstances, call for the revocation of a foster home's license. Here, however, the investigation of the incident has revealed that, specific violations aside, this home is not well suited to the foster care role. One must bear in mind that, in the context of foster homes, revocation is not a punishment. It is simply a regulatory act to be exercised for the benefit of the child's welfare, which is the whole purpose of foster care. A violation has occurred for which the department has discretion to terminate the license, and that discretion should be exercised here to bring the Hs' foster care experiment to a close.

VI. Final Disposition

The substantiation of physical abuse against L A. H, as set forth in the Closing Letter dated February 24, 2014, is withdrawn. The provisional Community Care License for the home of L and S H, provider number 517565, is revoked.

DATED this 6th day of November, 2015.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned, on behalf of the Commissioner of Health and Social Services and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 14th day of December, 2015.

By: *Signed*
Name: Jared Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

[This document has been modified to conform to the technical standards for publication.]

[53] 7 AAC 50.990(15).
[54] 7 AAC 50.435(f).