

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

In the Matter of:)
)
 S S) OCS No.
) OAH No. 14-0060-SAN
_____)

DECISION

I. Introduction

S S was involved in an altercation with a friend’s twelve-year-old son, E. Based on that incident, the Office of Children’s Service (OCS) issued a substantiated finding of child abuse.

Mr. S filed a request for a hearing to appeal the substantiated finding, and the matter was referred to the Office of Administrative Hearings.¹ The assigned administrative law judge conducted a hearing. Assistant Attorney General Diane Foster represented OCS and Mr. S represented himself. Testimony was heard from Mr. S and the boy’s mother (B J), an OCS caseworker (E N), a nurse (S L), and the police officer who responded to the home on the date of the incident (B Q).

E incurred a physical injury as a result of intentional physical contact by Mr. S that was not in self defense. The substantiated finding is therefore sustained.

II. Facts

S S and B J have known each other since 2010, and for a time were in an intimate relationship.² They have maintained their friendship. Mr. S has four teenage or adult children living with him in addition to a young son, O (born in 2005).³ Ms. J lives with her other son, M (born in 2008), and a daughter T (born in 2009), in addition to E.⁴ The families socialize together frequently.⁵

¹ The Case Referral Notice states that the hearing was requested under 7 AAC 54.215. That regulation was repealed, effective September 7, 2013 (Register 207), and it was not in effect on the date of the incident that is the subject of this proceeding (September 23, 2013) or at the time Mr. S filed his request for a hearing (November 20, 2013). The regulation applicable to this matter is 7 AAC 54.255(b)(7), which provides that the department’s regulatory grievance procedure:

is not available to review or overturn a decision by the department that the person has a substantiated finding under AS 47.10 or AS 47.17; for a decision described in this paragraph, a person must make a request to the department for review by the office of administrative hearings (AS 44.64.010)[.]

² R. 56.

³ R. 71.

⁴ R. 71.

⁵ See, e.g., R. 56, 70.

E has been diagnosed with fetal alcohol syndrome, attention deficit hyperactivity disorder (ADHD), intermittent explosive disorder and oppositional-defiant disorder.⁶ Because of these conditions and assaults on other children, he has been barred from a number of day care provider facilities and he has a school shadow who assists him in maintaining his focus and behavior at school.⁷ At home, E's behavioral issues had led him, on more than one occasion, to assault his mother, breaking her nose and on another occasion causing an injury to her shoulder that required surgery.⁸ He has assaulted and injured his young siblings. Mr. S had, on one or two occasions, intervened to prevent E from assaulting his mother.⁹ E has a tendency, when frustrated, to escalate from vocal to tantrums, physical aggression or throwing things.¹⁰ Although he is not of large stature, when enraged E is difficult to restrain. Specialized training to restrain a child with these kinds of behavioral issues is available to professionals, but is not available to a parent whose child is not receiving institutional level of care or in the juvenile justice system.¹¹

On the evening of September 23, 2013, Mr. S and his son stopped by to visit. In addition to their own children, three young step siblings (L, G and Z) were at the house.¹² The gaggle of children was in the television room, a small room about ten by twelve feet off the kitchen, playing video games. That room was adjacent to but not wholly visible from the kitchen.¹³

E was irritated because his mother did not want him to play the video game that he wanted to play, which was inappropriate for the other children.¹⁴ Ms. J had called to E a couple of times to try to get him to settle down, but he did not quiet down.¹⁵ Mr. S, after also calling to E, went in to the adjacent room.¹⁶ E had the video game player in his hand, and Mr. S was concerned that E might throw it at the large flat screen television, possibly shattering it and

⁶ See R. 6, 70; Ex. A.

⁷ See R. 16; J Testimony.

⁸ J Testimony.

⁹ See R. 56, 65 (“[O]nce when [E] was going after B in anger...S intercepted by putting his hand on his chest and holding him against the wall telling him to cool down.”). At least one incident was investigated by OCS, and it did not substantiate abuse. See R. 94-102; S Testimony.

¹⁰ J Testimony. See also Ex. A.

¹¹ J Testimony.

¹² R. 70, 71.

¹³ See R. 70. J Testimony.

¹⁴ R. 62 (Reporter), 69 (Mr. S); J Testimony.

¹⁵ R. 55 (Ms. J), 56 (Mr. S), 70 (Ms. J).

¹⁶ R. 55, 56, 62 (Reporter), 70.

endangering the other children.¹⁷ Mr. S grabbed ahold of the back of E' shirt and pulled him to the ground.¹⁸ E flailed about as Mr. S held him down and swatted him once on the butt with his hand.¹⁹ When released, E went to his room and the confrontation ended.

The incident left E with petechia (bruising in the form of broken small blood vessels) on his neck where his bunched-up shirt had impacted and constricted his neck.²⁰

III. Analysis

A. Policy Background

The Alaska legislature has required certain individuals, such as health care providers, school teachers, and child care providers, to report to the Department of Health and Social Services instances in which they suspect that a child has suffered harm as a result of child abuse or neglect,²¹ “[i]n order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical injury....”²²

The Office of Children’s Services is required to investigate such reports of harm.²³ Before initiating an investigation, the office screens reports.²⁴ If an investigation is conducted, the office will determine whether the report was substantiated or not substantiated.²⁵ OCS’s written policy, which has previously been adopted by the Commissioner,²⁶ is to issue a

¹⁷ S Testimony. *See* R. 69 (Mr. S).

¹⁸ R. 56, 71 (O).

¹⁹ R. 56, 62.

²⁰ *See, e.g.* L Testimony.

²¹ AS 47.17.020(a).

²² AS 47.17.010.

²³ AS 47.17.025. *See generally*, Office of Children’s Services, Child Protective Services Manual, §2.2.5 (rev. 3/13/2009) (hereinafter, CPS Manual). The CPS Manual is available to the public online at dhss.alaska.gov/ocs/Pages/publications (accessed October 23, 2013). The administrative law judge takes official notice of the contents of the manual; either party may object by filing a proposal for action. *See* 2 AAC 64.300.

²⁴ CPS Manual, §2.1 at 2 (Policy D), 8 (Procedure D) (rev. 2/10/2010).

²⁵ CPS Manual §2.2.10.1 (rev. 6/1/2004).

²⁶ In Re R. & J. R., OAH No. 06-0021-CHC at 14 (Commissioner of Health and Social Services 2007), *citing* In Re M.S., OAH No. 06-0112-DHS (Commissioner of Health and Social Services 2007), p. 3. *See also*, In Re M.M., OAH No. 08-0531-DHS, p. 2 (Commissioner of Health and Social Services 2009); In Re K.S., OAH No. 07-0600-DHS (Commissioner of Health and Social Services 2007).

substantiated finding when “the available facts indicate a child suffered harm as a result of abuse or neglect as defined in AS 47.17.290.”²⁷

B. Applicable Law

AS 47.17.290(3) states:

“[C]hild abuse or neglect” means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby.

Prior to 2013, the Commissioner issued a number of adjudicative decisions in which the qualifying phrase “under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby” in AS 47.17.290(3) was treated as applicable to each type of abuse or neglect, including the antecedent compound noun, “physical injury.”²⁸ This interpretation was consistent with the legislature’s intent, as expressed in law, “to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical injury.”²⁹ Under this interpretation, OCS could consider a broad range of circumstances in determining whether to issue a substantiated finding of abuse in any given case.

However, in a decision issued in June, 2013 the Commissioner interpreted AS 47.17.290(3) in a new manner.³⁰ The new decision deems the qualifying phrase “under circumstances [*etc.*]” as applicable only to the antecedent noun “maltreatment.”³¹ Under that decision, it is not necessary to show that the circumstances are such that a child’s health or welfare is harmed or threatened in order to meet the statutory definition of child abuse, except

²⁷ CPS Manual §2.2.10.1 (*rev.* 6/1/2004) (“Policy: ...A substantiated finding is one where the available facts indicate a child suffered harm as a result of abuse or neglect as defined by AS 47.17.290.”); §2.2.4, p. 17 (*rev.* 3/13/2009) (“Substantiated: refers to a finding where the available facts indicate a child suffered harm as a result of abuse or neglect as defined in AS 47.17.290.”).

²⁸ In re A.B., at 7, n. 64, OAH No. 10-0157-DHS (Commissioner of Health and Social Services 2010); In Re X & Y.Z., at 4, OAH No. 09-0958-DHS (Commissioner of Health and Social Services 2010); In Re R. & J.R., at 14, OAH No. 06-0021-CHC (Commissioner of Health and Social Services 2007) (*citing In Re John Doe*, at 3, OAH No. 06-0112-DHS (Commissioner of Health and Social Services 2007)). *See also*, In Re M.M., at 2, OAH No. 08-0531-DHS (Commissioner of Health and Social Services 2009); In Re K.S., OAH No. 07-0600-DHS (Commissioner of Health and Social Services 2007).

²⁹ AS 47.17.010 (*emphasis added*).

³⁰ In Re F.T., OAH No. 13-0050-SAN (Commissioner of Health and Social Services 2013).

³¹ In Re F.T., at 4, OAH No. 13-0050-SAN (Commissioner of Health and Social Services 2013) (“Under this new rule, the phrase “by a person under circumstances that indicate that the child’s health or welfare is threatened thereby,” only applies to claims of maltreatment....The last part of this statutory clause does not apply to injury, neglect, sexual abuse, or sexual exploitation.”).

for maltreatment. The practical effect of the new interpretation is to eliminate consideration of the surrounding circumstances in determining whether child abuse as defined in AS 47.17.290(3) has occurred. Under the new interpretation of AS 47.17.290(3), all that needs to be shown is that a child incurred a physical injury as a result of another person's conduct ("physical injury...of a child...by a person").³²

The term "physical injury" has not been defined in statute or regulation for purposes of AS 47.17.290(3).³³ Accordingly, as in prior decisions, the term will be applied in its ordinary meaning³⁴ that is, "anything that causes some damage to a person's body, even if slight."³⁵ A visible bruise constitutes a physical injury within that meaning.³⁶ As noted above, the Commissioner has previously adopted OCS's express written policy that a substantiated finding will be issued when abuse as defined by AS 47.17.290(3) occurred and the child is thereby harmed.³⁷ In effect, as the Commissioner presently interprets AS 47.17.290(3), the existence of physical injury establishes that there has been "harm" within the meaning of OCS's written policy.³⁸

C. Mr. S' Conduct Was Child Abuse

1. *Mr. S Physically Injured E*

Mr. S did not dispute that E was bruised as a result of his actions. As previously explained, a visible bruise is a physical injury, and a physical injury is harm for purposes of a substantiated finding.

2. *Other Circumstances Identified By Mr. S Are Not Considered*

Mr. S argued that his conduct did not constitute child abuse, because he was acting in defense of the young children in the room (to prevent the possibility of injury to them in the

³² In Re F.T., at 4, OAH No. 13-0050-SAN (Commissioner of Health and Social Services 2013); In Re N.M., at 2, OAH No. 12-0423-SAN (Commissioner of Health and Social Services 2013).

³³ For purposes of proceedings under AS 47.10, the term "physical injury" means "a physical pain or an impairment of a physical condition." AS 47.17.990(26); AS 11.81.900(b)(46).

³⁴ See, e.g., In Re John Doe, at 3, OAH No. 06-0112-DHS (Commissioner of Health and Social Services 2007).

³⁵ In Re N.M., at 2, note 2, OAH No 12-0423-SAN (Commissioner of Health and Social Services 2013).

³⁶ *Id.* See also, In Re F.T., at 4 (bruise from being struck with a belt "demonstrates there was physical injury").

³⁷ See *supra*, note 22.

³⁸ See *supra*, note 24; In Re U.H., at 7-8 OAH No. 12-0099-DHS (Commissioner of Health and Social Services 2013).

event E shattered the video screen), in defense of property (to protect the video screen and the video game player), and in E' own best interests (to avoid an escalation of his conduct).

These arguments parallel an argument made in a prior case, In Re U.Z.. In that case, OCS issued a substantiated finding of abuse against a parent who was found, following a hearing, to have been acting in self-defense. The parent's argument that self-defense justified her conduct was rejected in the proposed decision, on the ground that under the department's interpretation of AS 47.17.290(3), self-defense was not available as justification. The Commissioner adopted the proposed decision and on appeal the superior court reversed.³⁹ Because OCS did not appeal the superior court ruling in In Re U.Z., it is binding on OCS in this case.

The only difference between this case and In Re U.Z. is that rather than self-defense, the justifications asserted are defense of property, defense of third persons and E' own welfare. Under the department's prior interpretation of AS 47.17.290(3), these kinds of circumstances, which could be a defense against criminal charges for the conduct at issue (*i.e.*, self-defense,⁴⁰ defense of property⁴¹ or others,⁴² the child's own welfare⁴³) could have been considered and might have been applied to avoid a finding that child abuse as defined in AS 47.17.290(3) had occurred.⁴⁴ But under the department's current interpretation of AS 47.17.290(3), none of these circumstances, including self-defense, may be considered in determining whether child abuse as defined by the statute occurred.

The court in In Re U.Z. did not rule that the department's current interpretation of AS 47.17.290(3) was an incorrect reading of the statute, and that the prior interpretation is the correct reading of the statute. Rather, the court ruled that it is unreasonable to rule out, in an unwritten policy, one specific circumstance (self-defense) as a consideration in determining

³⁹ See In Re U.Z., OAH No. 13-0422-SAN (Commissioner of Health and Social Services 2013), *reversed*, [U.Z.] v. State, Department of Health and Social Services, No. 3AN-13-00000CI (Third Judicial District, June 3, 2014).

⁴⁰ AS 11.81.330.

⁴¹ AS 11.81.350(a).

⁴² AS 11.81.340.

⁴³ AS 11.81.430(a)(1). See also, AS 47.05.065(1).

⁴⁴ See, *e.g.*, In Re U.Z. at 4 (“Under the agency’s prior interpretation of AS 47.17.290([3]), something akin to the parental discipline exception may have been *implicit*, in that reasonable parental discipline might cause injury, but would not ordinarily ‘threaten’ a child’s health or welfare.”); In Re F.T., at 4, note 18, OAH No. 13-0050-SAN (Commissioner of Health and Social Services 2013).

whether to issue a substantiated finding of abuse.⁴⁵ Thus, the court's ruling does not mandate any change in the department's interpretation of AS 47.167.290(3), although reverting to the prior interpretation would eliminate the basis for the court's decision. However, the court's ruling does suggest that OCS's express written policy is unreasonable, insofar as it does not expressly address self-defense. In effect, the court's ruling is that "harm" within the meaning of OCS's written policy does not include harm incurred as the result of actions taken in self-defense (absent a written policy to the contrary).

Absent a ruling that the department's current interpretation of AS 47.17.290(3) is incorrect, or that any specific circumstances other than self-defense must be addressed in a written policy governing the issuance of a substantiated finding of abuse, the circumstances identified by Mr. S are not considered by the department in determining whether to issue a substantiated finding of abuse.

IV. Conclusion

The undisputed facts (Mr. S caused a physical injury to E) establish child abuse under the department's current interpretation of AS 47.17.290(3). Mr. S did not act in self-defense and therefore under the department's written policy a substantiated finding is in order. The substantiated finding is sustained.

DATED July 2, 2014.

Signed

Andrew M. Hemenway
Administrative Law Judge

Adoption

The undersigned, adopts this decision as final under the authority of AS 44.64.060(e)(1).

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of August, 2015.

By: Signed

Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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

⁴⁵ [U.Z.] v. State, Department of Health and Social Services, supra, at 3-4.