

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

In the Matter of )  
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 X Y ) OAH No. 15-0715-SAN  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

The Office of Children’s Services (OCS) placed X Y on the Child Protection Registry because it made a substantiated finding that Mr. Y had physically abused his minor son in April 2015. Mr. Y requested a hearing to challenge that finding and his placement on the Child Protection Registry. The hearing was held on September 21, 2015. Mr. Y was represented by attorney Carl Cook and testified on his own behalf, along with family therapist T S H. Assistant Attorney General Diane Foster represented OCS and presented testimony from OCS employees D B and E M, and from N N, an advanced nurse practitioner at No Name Organization (a multi-disciplinary organization that performs examinations and interviews of alleged abuse victims).

As discussed below, Mr. Y’s actions did result in physical injury to his minor son, but they were part of his exercise of reasonable parental discipline. Mr. Y’s placement on the Child Protection Registry due to a substantiated physical abuse finding, therefore, is reversed.

**II. Facts**

Mr. Y is the father of Z, who was ten years old at the time of the underlying incident. Z has three younger brothers, aged seven, four, and three at the time of the incident. On April 9, 2015 Mr. Y was packing a trailer with the family’s belongings, as the family was in the process of moving from temporary military housing to a new residence. He had just put all the boys on “time out,” outside of their residence, when he saw Z throw a rock or pebble “larger than a nickel” at one of his brothers, narrowly missing his brother’s head. He brought Z into the trailer (holding him by the arm and walking him into the trailer), and he attempted to talk to him about what he had done. Mr. Y admitted in his testimony that he was angry at that point in time. Z yelled at him that he hadn’t done anything wrong, and he attempted to push Mr. Y out of the way and get past him to leave the trailer. Mr. Y held Z by the front portion of his “hoodie” sweatshirt to prevent him from leaving and to attempt to continue talking to him about the rock throwing.<sup>1</sup>

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<sup>1</sup> X. Y testimony.

Z struggled to get away from his dad, and then his mother heard them yelling, came to the trailer and intervened.<sup>2</sup>

As a result of the incident, Z was injured in the form of a small abrasion on his upper left chest and a scratch underneath his chin. There were slight petechiae (micro hemorrhages) and bruising in the area of the chest abrasion. The injuries were still visible the next day when Z was interviewed by Ms. B at No Name Organization. Z told Ms. B that his father held him about a foot off the ground during part of the incident, that he had trouble breathing for some moments while his father was holding him, and that he didn't remember anything his father said to him either before or after he held him by the hoodie.<sup>3</sup>

In his testimony, Mr. Y denied lifting Z up off the ground or cutting off his air supply. Mr. Y explained that in the past when Z had been angry or "in denial about something," he would sometimes hold his breath as part of an "angry, teeth clenching, hold-his-breath kind of scream inward." Mr. Y testified that, based on Z's history and given his agitated emotional state, he likely would have broken windows to get out of trailer and would have "taken it out on his brothers." Therefore Mr. Y believed it was not in the best interests of Z or his brothers for him to go back out with his brothers – Z needed to stay away from them until he calmed down.

Z subsequently engaged in other violent behavior towards his brothers, culminating in an actual attempted hanging or strangulation of his youngest brother (three years of age) with a scarf. Z admitted to this incident, and in early August 2015 it resulted in Z being placed into a residential treatment facility, No Name, which is where he was living at the time of the September 21 hearing.<sup>4</sup> It should be noted that Z had received two weeks of in-patient and two weeks of out-patient treatment for mental health and behavioral concerns prior to the family's February 2015 move to Alaska.<sup>5</sup> Z apparently has been diagnosed with, among other things, Oppositional Defiant Disorder.<sup>6</sup> Mr. Y also testified that before the April 9 incident, Z had demonstrated assaultive behavior towards his brothers, and those issues "caused him concern" on the day of the incident. Mr. Y testified that on April 9, he viewed Z as "posing a threat" to the safety of his other boys.<sup>7</sup>

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<sup>2</sup> Z. Y statement during B interview.

<sup>3</sup> D. B testimony.

<sup>4</sup> X. Y testimony.

<sup>5</sup> *Id.*

<sup>6</sup> Agency Record ("AR") p. 2.

<sup>7</sup> X. Y testimony.

OCS substantiated the allegation that Mr. Y had physically abused Z. Although the “closing letter” providing notice to Mr. Y of the substantiation does not specify the basis for the substantiation,<sup>8</sup> testimony established that it was based upon Mr. Y causing “substantial physical harm” to Z in the form of the injuries to his chest and chin. OCS did not substantiate an allegation based upon Mr. Y causing “a substantial risk that [Z] will suffer substantial physical harm.”<sup>9</sup>

### **III. Discussion**

It is OCS’s burden to prove, by a preponderance of the evidence, that Mr. Y committed an act of physical abuse involving his minor son.

Child abuse or neglect is statutorily defined:

“[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[.<sup>10</sup>]

In addition, and by way of contrast, parents have a statutorily-recognized right to “exercise reasonable corporal discipline.”<sup>11</sup>

At the hearing, Mr. Y and his attorney argued that during the incident in question, he was simply attempting to restrain Z so that he wouldn’t continue throwing rocks at his brothers. Mr. Y contended that Z’s injuries were caused by his own squirming and thrashing about as he tried to get out of Mr. Y’s grasp and leave the trailer. Mr. Y also argued that the injuries suffered by Z did not rise to the level of “substantial harm.”

OCS countered by pointing out that the incident took place behind the closed door of the trailer, so from OCS’s perspective, Mr. Y was not actually preventing an assault against his other sons when he injured Z. OCS argued that the actions that caused the injuries were actually done out of anger rather than in order to provide any sort of protection for the other boys. OCS also argued that the injuries did constitute substantial harm, because they were “more than superficial

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<sup>8</sup> AR p. 7.

<sup>9</sup> E. M testimony (Ms. M also testified that the facts of this case could have supported a “substantial risk” finding).

<sup>10</sup> AS 47.17.290(3).

<sup>11</sup> AS 47.05.065(1): “[P]arents have the following rights and responsibilities relating to the care and control of their child while the child is a minor: . . . (B) . . . the right to exercise reasonable corporal discipline.”

bruises or cuts,” they involved “loss of functioning” (referencing Z’s comment that he had trouble breathing), and they involved pain “felt . . . at least 24 hours after” the incident.<sup>12</sup>

This Decision finds that Z was injured in the course of the incident on April 9, 2015, and that the abrasion and bruising on his chest likely rose to a level approaching “substantial physical harm.”<sup>13</sup> It is not necessary to decide whether they actually met the standard of substantial physical harm loosely described in the MAP, however, because the injuries were incurred while Mr. Y was exercising his statutorily-recognized right to exercise reasonable corporal discipline.<sup>14</sup>

It is undisputed that Z had assaulted his brother on April 9 by throwing a rock “larger than a nickel” at him. It is also undisputed that Z had engaged in assaultive behavior towards his brothers in the recent past, and that prior to April 9, Mr. Y reasonably considered Z’s behavior to be a threat to his brothers’ safety. Mr. Y certainly was in a position, as Z’s parent, to be able to gauge whether Z posed such a threat.<sup>15</sup> Within this context, Mr. Y acted to protect the younger boys by bringing Z into the trailer and closing the door. OCS argues that after this point in the interaction, any actions by Mr. Y towards Z were the result of his anger rather than protection of the other boys. This argument, however, greatly oversimplifies the question of the extent to which a parent can physically restrain a child in the process of effecting discipline. Mr. Y has candidly admitted that he was angry during the incident on April 9, but that does not establish that he injured Z out of anger. Mr. Y was entitled to reasonably restrain Z to keep him from leaving the trailer, not just in order to keep him from again assaulting his brothers, but also in order to attempt to talk with him about, and discipline him for assaulting his brother. Z attempted to forcibly remove himself from his father’s presence in the trailer while being disciplined. His father was entitled to take reasonable steps to prevent that from happening.

Z’s injuries were caused by his own forcible resistance to his father’s reasonable acts to restrain him. It certainly was regrettable that Z was injured. And it may not have been the best parenting technique for Mr. Y to continue to forcefully hold onto Z to the point that he injured

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<sup>12</sup> The concept of substantial physical harm is not defined in statute or regulation, but examples of what OCS considers to constitute substantial physical harm are set out in OCS’s Maltreatment Assessment Protocol or “MAP.”

<sup>13</sup> Mr. Y persuasively argued that Z’s claim that he had trouble breathing was likely due to Z holding his breath while he essentially threw a tantrum.

<sup>14</sup> See AS 47.05.065(1).

<sup>15</sup> Mr. Y’s views on this issue were, unfortunately, later borne out by Z’s attempt to strangle his youngest brother, resulting in Z entering into a residential treatment program. Although obviously Z’s subsequent behavior cannot be viewed with hindsight to justify potentially abusive behavior by Mr. Y, it is not unreasonable to infer that, as of April 9, Mr. Y was aware of Z’s predilection to violence with his brothers.

himself, rather than at some point letting go of him prior to any injury being caused. But was it child abuse? No.

#### **IV. Conclusion**

OCS has not met its burden to establish, by a preponderance of the evidence, that on April 9, 2015 Mr. Y caused injury to Z out of anger, or that Mr. Y's actions towards Z exceeded "reasonable corporal discipline." Therefore, OCS's placement of Mr. Y on the Child Protection Registry due to a substantiated finding of physical abuse is reversed.

DATED this 4th day of January, 2016.

*Signed*

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Andrew M. Lebo  
Administrative Law Judge

### **Adoption**

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of February, 2016.

By: *Signed*

\_\_\_\_\_  
Name: Jared C. 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.]