

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

In the Matter of)	
)	
N N)	OAH No. 15-1224-SAN
_____)	Agency No.

DECISION

I. Introduction

When N N caught her 10-year-old son punching his little brother in the face, she struck her 10-year-old son in the face. Ms. N was immediately remorseful. The strike left marks or bruises on his face, however, and a mandatory reporter filed a report of harm with the Office of Children’s Services (OCS). OCS investigated the incident. It substantiated that Ms. N had in fact committed an act that falls within the definition of child abuse and neglect. OCS did not take any further child protection action. Ms. N requested a hearing to contest the substantiated finding. Although Ms. N was able to show that the incident was not as severe as first indicated, she could not refute that she struck her child in the face with sufficient force to leave a mark. Therefore, OCS’s substantiation of one count of child abuse or neglect is affirmed.

II. Facts

N and K N have three sons, B, F, and O. In March 2015 (the time of the incident in this case), B was 10, F turned six, and O was three.

K is active-duty Air Force, stationed at No Name A, just outside of No Name B. The family lives on base.

On Sunday, February 28, 2015, N and the boys attended a birthday party at a small ski hill located on No Name C, an army base not far from No Name A. K was in Guam on duty for the Air Force. The boys went sledding, and B crashed his sled. He may have slightly bruised or scratched his face during this crash.¹

Twelve days later, on March 12, 2015, OCS received a report of harm regarding B. The person providing the report was an employee of B’s school. The report stated that B had been absent from school on Tuesday and Wednesday of the previous week, March 3-4. When he returned to school on March 5, he had a bruise on the right side of his face. He told adults at

¹ J testimony.

school that he had injured himself sledding.² The following week, B was heard to say that he hated himself. This led to a meeting (apparently on Wednesday, March 11) with the person who later filed the report of harm. At the meeting, B was again asked about the bruise on the right side his face, which extended to his ear and was still blue. B confessed that his mother had told him to say that the bruise was from sledding. In fact, however, his mother hit him twice in the face. He demonstrated being hit with a closed fist.³

On March 13, 2015, OCS investigator Q J interviewed B, F, N, and K. She had a follow-up interview with K and N on March 19.⁴

B told Ms. J that about two weeks earlier he and his brothers were in the car watching a movie, waiting for his mother. His little brother O was being a brat. His mother saw him punch O in the face. She gave him a spanking in the face, telling him that she wanted him to know what it felt like to be hit by someone. She used her fist. He said that she hit and punched him, and demonstrated both an open and a closed hand. He told Ms. J that his mother had put makeup on his face to cover the bruising. After his mother saw the bruises, she was very sorry and told B that she would never hit him again.⁵

In his interview, F said that B is in trouble a lot. He said that his mom made B get a bruise when he hit O. He said her hand “looked like this,” showing both an open hand and then a closed hand. He said that she hit his head and made his ears blue and black. They were in the car when this happened.⁶

OCS did not record the interviews with the children.

When Ms. J interviewed K, K first stated that B’s injury was from the ski hill accident. He then admitted that when he was in Guam, N had called him, very upset, saying that she had smacked B. He was aware that N had kept B out of school because of his injuries. He explained that he did not approve of what N did. Family discipline involved timeouts or spanks on the butt for the smaller children.⁷

When Ms. J interviewed N, N said she left the children in the car for a very short interval when she went into an office for an errand. When she came out, she saw B hit O. She was

² Admin. Rec. at 2; J testimony.

³ Admin. Rec. at 2.

⁴ Admin. Rec. at 4.

⁵ J testimony.

⁶ *Id.*

⁷ *Id.*

angry, and, according to her version of events, she slapped B once. His head tilted to the side and hit the seat belt divider. N was emotional and remorseful during the interview. She was very fearful about the prospect of losing her children.⁸

OCS put a protective action plan in place that involved having a trusted friend check regularly on the family. OCS saw that the family had a support network of friends. In addition, the Air Force's Family Advocacy Program became involved and was a further source of support. In evaluating the situation, OCS was able to determine that the event was an isolated incident and that OCS did not need to take any further child protective actions.⁹

Ms. J described B's bruises on March 13, 2015, as a light bruise on the right temple, small scratches on his face (possibly just dry skin), a light colored bruise on his hairline, and bruises on his ears that were in the process of healing.¹⁰ Six pictures of B that she had taken on that day were submitted into the record. Ms. J testified that the bruising was more prominent in person than it is in the pictures. In the pictures, the bruises on both ears are visible purple marks, more so on the right ear. B's right cheek might be bruised, but the picture is not distinct.¹¹

Ms. N also offered a picture as evidence. The picture was of all three boys in bed. She said that she had taken the picture "that night" and posted it on Facebook. She also said that she had taken a close up of B's face, but she lost that photograph when her phone was water damaged. She explained that she had not backed up that photograph because at the time she did not have access to the internet.¹² In the photograph that she submitted, B's right cheek is reddened and slightly swollen. The redness and swelling only become apparent when enlarging the picture.

Ms. J testified that school officials had told her that B would at time act out and use profanity. The evidence in the record indicates that B has to deal with personal/psychological issues. On one drawing he wrote "you are dead" and then "I am talking to myself."¹³ In his conversation with her, however, Ms. J did not believe that B was embellishing or seeking

⁸ *Id.*
⁹ *Id.*
¹⁰ *Id.*
¹¹ *See* OCS unnumbered .jpg exhibits.
¹² N exhibits.
¹³ N exhibits.

attention. She acknowledged that she later learned that B could be dramatic, but at the time he was the opposite: very hesitant to talk about the incident.¹⁴

On the night after the incident, C T, a friend and neighbor, came to visit the Ns after receiving a call from Ms. N about the incident. Ms. T said that she saw some slight swelling on B's cheek, like a handprint from a slap, but did not observe any marks or welts. Nothing that could have come from a punch or that she would consider child abuse. Ms. T explained that she had a relationship with B, and was able to talk to him. She asked him what had happened, and he reacted as if nothing had happened. She then asked what had happened to his face, and B told her that his mother got mad and punched him. Ms. T said she reacted with surprise about the word "punch." Because she was confused about the timing of the conversation, it was not clear whether B corrected the "punch" comment on that day.¹⁵

On March 13 (after OCS had begun investigating), Ms. T accompanied her husband (who was appointed the trusted agent for the protective action plan) to the N home. On that day, she saw some light bruising on the top of B's ear, but no swelling or mark on his cheek. B told her that he was mad at himself and that he was hitting himself. She attributed the ear bruise to B's self-inflicted blows. He said he was mad about what had happened and how his mom had punched him. Ms. T again was surprised to hear the word punch, and repeated the word to B with a question mark. She said that B then corrected himself—he said that he had told the teacher (or nurse) that it was a punch, but he had made that up. Really, he explained, it was a slap.¹⁶

Mr. N confirmed to Ms. J that B does hit himself when he is upset. He mentioned that his in-laws had reminded him of that, and when he asked B, B said "yes, dad, when I do something really bad I slap myself."¹⁷ One of the exhibits submitted by Ms. N was a behavioral questionnaire regarding B. In the comments section of that form, the reviewer had written: "[B] has taken his frustrations and anger out on others. He also hits himself in the head when he doesn't get his way."¹⁸

¹⁴ J testimony.

¹⁵ T testimony.

¹⁶ *Id.*

¹⁷ Admin. Rec. at 13.

¹⁸ N Exhibit Labeled "N Court 1" at 8.

On July 14, 2015, OCS sent a notice to Ms. N that it had substantiated one count of maltreatment regarding her striking of B, and that she was placed on the Child Protection Registry.¹⁹ Ms. N appealed. A hearing was held on December 16, 2015.

III. Discussion

OCS investigates reports of harm, and maintains a central registry of its investigation reports.²⁰ The registry is confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.²¹ The standard that must be met to make a finding of substantiated abuse or neglect is found in the definition of child abuse or neglect:

“child 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.²²

In this case, OCS has charged that Ms. N committed maltreatment when she struck B with sufficient force to leave bruises.²³ “Maltreatment” means

an act or omission that results in circumstances in which there is a reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.011, except that, for purposes of this chapter, the act or omission need not have been committed by the child’s parent, custodian, or guardian.²⁴

This definition cross-references the child-in-need-of-aid statute, AS 47.10.011, which has twelve paragraphs. Each paragraph identifies a different avenue that could constitute maltreatment.

OCS’s substantiation document in this case, however, identifies only one theory of maltreatment: substantial physical abuse, as described in AS 47.10.011(6). Under this theory, OCS must prove that

(6) the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child’s parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately.²⁵

¹⁹ Admin. Rec. at 30.

²⁰ AS 47.17.040.

²¹ AS 47.17.040(b).

²² AS 47.17.290(3).

²³ Admin. Rec. at 13.

²⁴ AS 47.17.290(9).

²⁵ AS 47.10.011(6).

In order to assist its staff with determining whether maltreatment has occurred, OCS has created a *Maltreatment Assessment Protocol* or “MAP” that breaks this definition into its component parts. The MAP creates a flowchart, under which staff must first determine that the person responsible for the child’s care either (1) used or threatened physical force (not by accident); or (2) failed to protect the child from physical force, threat of physical force, or exposure to dangerous conditions.²⁶ Then, staff must also determine that the act had a “substantial impact,” which, here, would be the allegation of substantial physical harm, through one or more of the following:

- *Any injury to the face or head*
- *More than superficial bruise(s) or cut(s)*
- *Swelling lasting at least 24 hours.*²⁷

Although the MAP is not adopted into regulation, OCS has agreed that it will be bound by the approach to maltreatment found in the MAP. If it cannot prove the elements set forth in the MAP, it has not substantiated maltreatment. OCS argues, however, that Ms. N’s action of hitting B twice in the face, once with a closed fist, and leaving a bruise or mark substantial enough for a mandatory reporter to report possible child abuse several days later, is substantial physical harm.

Here, Ms. N has disputed OCS’s version of the facts. She admits that she hit B, but asserts that she hit him only once, and that it was with an open hand, not a closed fist. She asserts that B is a storyteller and that he embellished the incident. She contends that F’s interview (in which he confirmed that Ms. N hit B twice, once with a closed fist) was not true—it was merely a very suggestible little brother restating what he had heard his big brother say. Further, in her view, her striking of B did not leave a substantial mark or bruise. She considers the mark to have been nothing more than superficial skin discoloration. The more serious bruising around B’s ears she attributes to his tendency to hit himself when he is angry. These arguments are discussed below.

A. Would a blow to the face that leaves a mark constitute child abuse?

As stated above, under the MAP, hitting a child in the head would constitute child abuse if it caused an injury to the face or head, resulted in more than superficial bruising or cuts, or

²⁶ Alaska Office of Children’s Services, *Maltreatment Assessment Protocol* (Jan. 2015) submitted posthearing by OCS.

²⁷ *Id.*

resulted in swelling lasting at least 24 hours. Although these standards are not adopted in regulation, they are reasonable, commonsense applications of the statutory terms “physical injury” and “substantial physical harm.” Given that a child’s face and head are delicate areas, striking a child in the face or head with sufficient force to leave a mark that lasts for several days is going beyond normal discipline, and would constitute substantial physical harm.²⁸ A light, glancing slap with an open hand that left only a superficial mark, however, might not be child abuse, especially if it occurred in circumstances that indicated the slap was administered at a time when discipline was appropriate.

B. Did Ms. N strike B with sufficient force to leave more than a superficial bruise?

We know that Ms. N hit B in the face. The question here is whether Ms. N’s action caused substantial harm.

In B’s case, we actually have three marks on his face—one on his left ear, one on his right ear, and one on his right cheek. The direct evidence of the photographs taken by Ms. J proves that the bruise on his right ear is more than superficial. It is a deep purple color. If that bruise was caused by Ms. N, then it would meet the evidentiary requirements for substantiation of child abuse and neglect.

The direct evidence of the bruise on the left ear and the right cheek is less vivid. The swelling and redness of the right cheek seen in the picture taken by Ms. N could be evidence of either substantial or superficial bruising—the picture is too indistinct to say for sure. The picture of his left ear is also ambiguous as to where it falls on the substantial/superficial scale. The ambiguity of these photographs is not surprising however, and does not mean that the bruising was not substantial. These pictures were taken by amateur photographers. Ms. N’s photo was of all three boys, with B not close to the camera. Ms. J’s photo was taken about nine days after the incident. The initial bruising may have been more substantial than it was nine days later. In addition, Ms. J testified that in person the bruises were much more vivid. On the other hand, Ms. T testified that she saw no significant bruising on the day after the incident—just some swelling. In short, other than the right ear, the direct evidence on the extent of the bruising is ambiguous.

²⁸ Cf., e.g., *In re CX*, OAH No. 12-0761-SAN (Dep’t Health and Soc. Servs. 2013). In *In re CX*, the Department substantiated abuse when a father hit a three-year-old child and “caused bruising to the left side of T’s face and his left ear.” *CX* is of little or no precedential value here, however, because in that case the child was treated at a clinic and the father convicted of child abuse.

As for whether Ms. N caused the bruises, the evidence does support that she caused whatever swelling/redness B had on his right cheek. The sledding incident was not seriously put forward at the hearing as a possible cause of the right cheek inflammation. Thus, with the right cheek, the only question is whether its bruising is substantial.

The ears, however, present a different situation. We know from at least three different sources in the record (four if we were to consider the triple hearsay of K N's report to Ms. J of what he was told by his in-laws) that B does hit himself in his head when he is angry.²⁹ Ms. T testified that she directly asked B what had happened to his ear, and that he told her that he had hit himself.

This evidence, however, is not reliable. We already know that B has been coached to lie about the cause of his bruises—he told Ms. J (and the initial reporter) that he had been instructed to say that his bruises were caused by a sledding accident. Further, one of Ms. N's main lines of defense is that B is a storyteller. Thus, even if not coached to lie about the punch, he may or may not have been telling the truth when he recanted his statement that his mother had punched him.

The most difficult aspect of this record for OCS, however, is the difficulty in accounting for *both* ears being bruised. Under OCS's theory, Ms. N hit B twice in the head, once with an open hand, and once with a fist. That would account for the cheek and one ear. It would not account for both ears. Therefore, even under OCS's theory, the bruising on at least one of the ears was caused by some source other than Ms. N. This significantly increases the likelihood that B was the source of some of the bruising, and that ears were the target of his self-inflicted punishment. If he was responsible for one ear, he could be responsible for both.

Ms. J, however, offered her opinion that the bruise on the left ear was older than the bruise on the right ear. If this is correct, it could mean that the two ears were bruised from different causes, one of which may have been from Ms. N's striking him.

Another piece of evidence in support of OCS's theory is the testimony of the two boys. Both B and F told Ms. J that Ms. N struck B twice, once with a fist. F specifically mentioned that his mother made B's ear turn blue.³⁰ If Ms. N struck B twice, that makes it somewhat more likely that Ms. N is accountable for two different bruises, which could account for the right ear and the right cheek. Moreover, hitting a child in the face/head with a fist goes beyond ordinary

²⁹ T testimony; Admin. Rec. at 13; N Exhibit Labeled "N Court 1" at 8.

³⁰ Admin. Rec. at 10.

discipline, and even if both blows landed on the right cheek, it increases the likelihood that the injury to that cheek was serious. (This conclusion is not inevitable—both blows could have landed softly on the right cheek as B jerked away, leaving only a minor/superficial bruise.)

Ms. N, however, denies that she hit B twice. She says it was one slap, with an open hand. She argues that B and F are not being truthful. She also cites the testimony of Ms. T, who was told by B that although he told a teacher that his mother punched him, it was not true.

Some evidence in the record supports the claim that B will make up things. Mr. N said that was the case, and he cited a time when B had told people that he (K) had died in Iraq.³¹ The record contains an email from a teacher who had been told by B that Mr. N had left home to look for work, which was not true.³²

Yet, in this case, Ms. J testified that she did judge B to be a reluctant witness. She thought he was truthful. Ms. J has training in interviewing techniques with children, and she did not believe that B was embellishing his story. Moreover, B was highly motivated to not embellish—he did not want his mother to get in trouble. Given that Ms. N was instructing B to deny that he had been struck, and to say that the bruise was the result of the sledding accident, Ms. N’s credibility is much lower than her two sons’. On this record, more likely than not, B’s statement to Ms. T that he had not been punched by his mother was also coached. He told the other version (that he had been hit twice, once with a closed fist) at least four times—once to the mandatory reporter, once to Ms. J, and twice to Ms. T (before changing his story to conform to his mother’s version of events). The most credible statement from B is the version that he was hit twice, once with a fist.

F confirmed that he had seen B get hit twice, once with a fist. Ms. N argues that F could not see into the front seat of the car, and so he would not know whether she used a fist. Even if he could not see the moment of impact, however, he likely had a view of his mother. He would know whether she took two swings or one, and he could probably see whether her hand was doubled up into a fist. He also was able to hear the impact. F’s confirmation makes B’s version more likely.

Finally, we turn to the circumstantial evidence, and ask whether this evidence makes it more likely that the cheek bruise was significant and that Ms. N caused the ear bruise.

³¹ Admin. Rec. at 13.

³² N Exhibit.

The circumstantial evidence in question is the following:

- A mandatory reporter asked B about the bruise twice. Once immediately after it happened and then a follow-up question a week later. This makes it more likely that the bruising in question (whether ear or cheek or both) was significant.
- Ms. N took the following actions to keep the fact that she had struck B in the face from being discovered
 - Putting makeup on B to cover his bruises.
 - Telling B to say that the bruising was caused by a sledding accident.
 - Keeping B out of school on the day after she struck him. (He was out for two days, but she explained that the first day was to visit the orthodontist, and that the incident occurred later on that day.)

Ms. N asserted that she kept B out of school only because she felt badly for having hit him. In her view, it had nothing to do with trying to keep anyone from seeing his bruises. I do not believe this testimony. I believe that she kept B out of school deliberately so that the mandatory reporters would not see his bruises. This is confirmed by B's statements, Mr. N's statements, Ms. N's use of makeup to cover his bruises, and her instructing B to lie about having been struck.

A person would not normally put makeup on, instruct a child to lie about, or keep a child out of school to hide an insignificant facial abrasion. Each of these incidents makes it more likely that Ms. N caused a bruise that was significant.

Thus, taking all of the evidence in this record, and carefully weighing it to determine what version of events is most likely, we conclude that Ms. N did hit her son B in the face or head twice apparently on March 3, 2015.³³ The blows left marks that were more significant than mere superficial marks. Therefore, OCS has substantiated one count of child abuse or neglect by Ms. N.

We will close this decision with the following observations. By all accounts, N is a good mom. B is a complex child, and not easy to parent. B is now receiving help, and both N and K intend to protect B (and F and O) from harm, so the prospects for the family are promising. At the hearing, OCS explained that placement on the central registry is something that should and must take place when a parent strikes a child in the face with force, without regard to intent. The

³³ Ms. N disputes the dates of the days that she kept B out of school. That issue is not material, however.

finding entered in this case, however, may not be an issue for Ms. N unless she applies for certain licenses such as foster care or child care. It will not be relevant, we were told, to N's proposed career path of becoming a teacher. N stated her intention to forgive herself, put this behind her, and focus her attention on doing what is best for her children. Nothing in this decision should stay her resolve to follow that path.

IV. Conclusion

The Office of Children Services has substantiated that N N committed one count of child abuse or neglect.

DATED this 27th day of January, 2016.

By: Signed
Stephen C. Slotnick
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 9th day of March, 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.]