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

In the Matter of:	)	
	)	
C L	)	OAH No. 15-1246-SAN
	)	

DECISION

I. Introduction

The Office of Children's Services (OCS) placed C L on the Child Protection Registry based on substantiated findings that Mr. L had abused and neglected his three minor children in April 2015. Mr. L requested a hearing to challenge those findings and his placement on the Child Protection Registry. The hearing was held at the Office of Administrative Hearings (OAH) on December 23, 2015 and March 1, 2016.

OCS's substantiations consisted of the following seven findings:

- one finding of maltreatment in the form of physical abuse of his daughter B;
- three findings of maltreatment in the form of causing "substantial risk of mental injury" for all three children, based on Mr. L having engaged in domestic violence against his wife in the presence of the children; and
- three findings of maltreatment due to neglect of all three children, based on the same allegations of domestic violence in the presence of the children.

OCS met its burden of establishing, by a preponderance of the evidence, that Mr. L committed the acts on which the substantiated findings of risk of mental injury were based, but did not meet its burden of proof as to the neglect and physical abuse findings. Therefore, Mr. L's placement on the Child Protection Registry due to the risk of mental injury substantiated findings is affirmed, and the neglect and physical abuse substantiated findings are reversed.

II. Facts

Mr. L represented himself at the hearing, with the assistance of his wife U-D L. Assistant Attorney General Rachel Van Patten represented OCS. OCS presented testimony from Anchorage Police Department (APD) officer J S and OCS Protective Services Specialist Ruben Reynaga-Pena. Mr. L presented his own testimony and testimony from Mrs. L.

Mr. L is the father of B, F, and E, who were ages eight, seven and one, respectively, at the time of the incident.[1] The Ls live in a two-story home. On February 14, 2015, APD Officer S responded to a dispatch call to the L residence, which had been prompted by a 911 phone call from Mrs. L. Mrs. L confirmed to Officer S that she had thrown lemonade at Mr. L, who then grabbed her, pulled her into the kitchen, sprayed her with the kitchen sprayer, and choked her while holding her down on the kitchen floor. Mrs. L stated that she managed to get him off of her and went into their living room, where he head-butted her, at which point she called APD.[2] Mrs. L told Officer S that their children had been upstairs during the incident.[3] Officer S testified that during her interview with Mrs. L, the children "were up and down the stairs"; she did not speak with the children, and she did not know if they had witnessed the incident between their parents.[4] Mr. L was arrested and charged with (a) committing domestic violence against Mrs. L and (b) committing domestic violence in the presence of the children.[5]

APD did not report the February 14, 2015 incident to OCS. On February 17, 2015, however, OCS received two reports regarding the incident from teachers at the elementary school attended by B and F. The teachers did not testify at the hearing, but two written reports from the teachers were made part of the record. The written reports stated:

> (1) B told me her Valentine's Day was terrible. ... She said she and F (sister) were playing hotel and heard mom & dad fighting, so they went to see if they were OK. Mom threw lemonade on dad, dad choked mom. F tried calling 911, but dad grabbed phone and pushed F. Dad also hit B on the face and left a bruise. Dad also hit the younger brother on top of the head. B said that mom called 911 and a police officer came to the house. ... [M]om & dad have continued fighting for the rest of the weekend. ... She also said that she does not feel safe at home and she only feels safe at school.[6]
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> (2) B stated that her mom & stepfather were arguing... . She witnessed her stepfather choking her mom, who threw a Mt. Dew soda on him. B said she & her younger sister tried to keep him away from their mom. She said the police were called & talked with them. Her stepdad left, returned, and according to B he

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1 B and F are Mrs. L's daughters from a prior marriage; Mrs. L's former husband has no parental rights as to B and F, and Mr. L recently adopted both girls. Mrs. L was a victim in domestic violence incidents with her former husband, some of which B and F apparently witnessed. (Mrs. L testimony; Mr. Reynaga-Pena testimony.)

2 Officer S testimony.

3 Mr. L was interviewed by another officer at the scene. His statement was very similar to Mrs. L's, except that he did not admit to head-butting her, stating instead that they were "tussling and bonked heads." Agency Record ("AR") p. 13.

4 Officer S testimony.

5 AR p. 13.

6 AR pp. 9-10.

> slapped her on the face. She has a bruise under her left eye, on her cheek. B said her mom put frozen peas on the bruise. B said her stepfather also purposefully hit her younger brother on the head. She said her parents argue frequently and she does not feel safe at home.[7]

In response to these reports, OCS Protective Services Specialist (PSS) Ruben Reynaga-Pena visited the school and interviewed both B and F on February 18, 2015. During the interview, B reported to Mr. Reynaga-Pena that she had witnessed her parents fighting, including specifically that she saw her dad choking her mom, and that she saw her dad hit her brother E on the head. B also said that her dad struck her once on the face with an open hand.[8] B also apparently told Mr. Reynaga-Pena that she and her sister initially were upstairs, but they went downstairs when they heard their parents start to argue; she also reported that her brother E was already downstairs when the fight began.[9] Mr. Reynaga-Pena testified that at the time of the interview, four days after the incident took place, he observed a small bruise on B's cheek, but he did not consider it a "substantial injury."[10]

F reported to Mr. Reynaga-Pena that "mom told me I'm not allowed to tell anyone, she doesn't want anyone to know."[11] She later stated to him that her dad "choked my mom" and "head-butted my mom," and that "E got hit on the head."[12] F stated that the incident "made me feel sad."[13]

When Mr. Reynaga-Pena later interviewed Mr. and Mrs. L, they admitted that the domestic violence incident had taken place, but they denied that the children were present to witness any of it, stating that the children were upstairs the entire time.[14] Mr. L also denied hitting any of the children.[15]

On February 19, 2015, Mr. Reynaga-Pena was contacted by Mr. and Mrs. L, who asked that he interview the two girls again. They were brought into his office, and they told him that they "had not been truthful," that they had not witnessed the domestic violence incident and had

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7 AR pp. 7-8.
8 Mr. Reynaga-Pena testimony; AR pp. 59-60.
9 AR p. 67.
10 Mr. Reynaga-Pena testimony.
11 *Id.*
12 *Id.;* AR pp. 57-58.
13 Mr. Reynaga-Pena testimony.
14 AR pp. 42, 65. Mrs. L later testified at the hearing that the girls came downstairs and listened while she was interviewed by the police.
15 AR p. 42.

not been hit by Mr. L.[16] Mr. Reynaga-Pena testified that he was concerned that the girls "had been coached," but he did not inquire further with them regarding what had prompted them to change their story.[17]

Mr. L was criminally prosecuted based on the February 14, 2015 incident, and he was tried and convicted by a jury in state district court on two counts: (1) for "assault – recklessly cause injury" under Anchorage Municipal Code (AMC) 8.10.010(B)(1), denoted as a "DV offense per AS 18.66.990(3) & (5)"; and (2) for "family violence – assault in presence child" under AMC 8.10.050(B).[18] The criminal judgment was entered for these two convictions on September 17, 2015.[19] According to Mr. L, there was no evidence presented at the trial that the children actually were present to witness the domestic violence. Mr. L testified at the hearing that he was told by the judge during the trial that in order to be convicted of "family violence – assault in presence child," it was sufficient that the children were simply present somewhere in the home while the domestic violence took place.[20]

OCS subsequently sent Mr. L a letter making substantiated findings of maltreatment based on the February 14, 2015 incident: one finding of physical abuse for striking B; three findings of maltreatment for causing "mental injury" to all three children, based on engaging in domestic violence against Mrs. L in the presence of the children; and three findings of maltreatment due to "neglect" of all three children, based on the same allegations of engaging in domestic violence in the presence of the children.[21] Mr. L then requested a hearing to appeal the substantiated findings. At the hearing, both Mr. and Mrs. L testified that the children remained upstairs during the entire domestic violence incident.

III. Discussion

OCS maintains a central registry of all investigation reports.[22] Those reports are confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.[23] At the

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16 Mr. Reynaga-Pena testimony; AR p. 42.

17 Mr. Reynaga-Pena testimony. In her testimony, Mrs. L denied coaching the girls and insisted that she only instructed them to tell the truth to Mr. Reynaga-Pena.

18 AR 72-75.

19 *Id.* No transcript or pleadings from the criminal trial were made part of the record of this case; the only document from the criminal case in the record of this appeal is the criminal judgment.

20 Mr. L testimony.

21 AR 69.

22 AS 47.17.040.

23 AS 47.17.040(b).

conclusion of an investigation, OCS may find that an allegation has been substantiated. A substantiated finding is one where the available facts gathered from the initial assessment indicate that more likely than not, a child has been subjected to maltreatment under circumstances that indicate the child's health or welfare is harmed or threatened thereby.[24]

Alaska Statute 47.17.290(3) states that "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 the child's health or welfare is harmed or threatened thereby.[25]" The statutory definition of maltreatment (the primary focus of OCS's substantiations here) guides us to Alaska's "child in need of aid" provisions: "Maltreatment means an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.011."[26] A "child in need of aid," under AS 47.10.011, means a child who has been "subjected to ... conduct by or conditions created by the parent [that] have (A) resulted in mental injury to the child; or (B) placed the child at substantial risk of mental injury as a result of ... (ii) exposure to conduct by a household member [that constitutes certain enumerated criminal offenses]."[27] "Neglect" is defined differently from "maltreatment" to mean "the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child."[28]

OCS's burden is to prove, by a preponderance of the evidence, that Mr. L committed the acts of abuse and neglect involving his children that are the basis for OCS's seven substantiated findings in this case.

A. Mental Injury and Risk of Mental Injury

OCS's "closing letter" to Mr. L stated that OCS made substantiated findings that he had caused "mental injury" to the children as a result of the February 14, 2015 incident.[29] Prior to the hearing on Mr. L's appeal, however, OCS clarified that its substantiated findings regarding mental injury to the children were in fact intended to be findings of causing "substantial risk of

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[24] OCS Child Protection Manual, CH. 2.2.10.1 (Rev. 5/16/15), *available at*: http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf

[25] AS 47.17.290(2).

[26] AS 47.17.290(9).

[27] AS 47.10.011(8)(A), (B)(ii).

[28] AS 47.17.290(11).

[29] *Id.*

mental injury" to the children.[30] This distinction is significant, because the statutory definition of "mental injury" requires that such a finding be "supported by the opinion of a qualified expert witness."[31] OCS took the position that the statutory definition of "substantial risk of mental injury," on the other hand, does not mandate that expert witness testimony be provided in order to support the substantiated finding.[32]

An important issue was raised as a result of the discrepancy in OCS's closing letter – whether OCS provided adequate notice to Mr. L regarding its substantiated findings that Mr. L caused risk of mental injury to his children, rather than mental injury *per se*. Accordingly, at the close of the first day of the hearing, OCS was asked to submit a written brief on this question, which it filed prior to the second day of the hearing. The notice issue was then discussed on the record prior to additional testimony being taken. Part of the discussion focused on OCS's assertion in its brief that, to the extent that the question of notice is a due process issue, "OAH lacks jurisdiction to . . . declare the Department's notice invalid such that it is unconstitutional."[33] OCS is incorrect in this assertion. While OAH cannot negate or invalidate a statute or regulation on constitutional grounds, it clearly has the authority to find that a particular agency action may have caused a procedural due process violation.[34]

In this instance, however, Mr. L was not denied procedural due process. He testified that prior to the hearing, he was not aware that OCS would be required to put on expert witness testimony to establish a mental injury finding; therefore, he could not have relied to his detriment upon the inaccurate statement in the closing letter.[35] Nor did Mr. L prepare for the hearing any differently than he would have if he had been informed before the hearing began that the

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30 Mr. Reynaga-Pena later testified that OCS's computer-generated form letter did not allow him to specify "risk of mental injury" in the letter rather than just mental injury.

31 AS 47.17.290)(10) (incorporated by reference at AS 47.10.990(21)).

32 AS 47.10.011(8)(B)(ii) describes "substantial risk of mental injury" as "exposure to conduct by a household member ... against another household member that is a crime under AS 11.41.100--11.41.220, 11.41.230(a)(1) or (2), or 11.41.410—11.41.432 [or] an offense under a law or ordinance of another jurisdiction having elements similar to [the previously enumerated crimes]... ." The enumerated crimes are all crimes of violence ranging from murder and manslaughter to assault. Mr. L was convicted of assault under AMC 8.10.010(B)(1), a municipal ordinance with elements similar to AS 11.41.230(a)(1).

33 OCS Brief Regarding Notice, at 1.

34 "Procedural due process requires that benefit recipients be given timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend before their benefits are reduced or terminated, in order to afford them protection from agency error and arbitrariness." *Pfeifer v. State, Dept. of Health & Social Services*, 260 P.3d 1072, 1084 (Alaska 2011) (citations omitted).

35 Hypothetically, a person in Mr. L's position might be aware of the statutory requirement of expert testimony to prove mental injury, and he might then plan his strategy for the hearing based on OCS's failure to list an expert witness on its pre-hearing witness list.

substantiated findings were for risk of mental injury. In addition, the relatively long delay between the first (December 23, 2015) and second (March 1, 2016) days of the hearing gave Mr. L ample time, after OCS had confirmed that the findings at issue were for "risk of mental injury," to further prepare his defense and offer additional evidence pertinent to those findings. Based on all of these considerations, the ALJ ruled that the notice provided to Mr. L was adequate, and OCS was allowed to proceed with presenting its case in support of the risk of mental injury findings.

B. Substantiated Findings for Risk of Mental Injury

AS 47.10.011(8)(B)(ii) describes "substantial risk of mental injury" as "exposure to conduct by a household member ... against another household member that is a crime under AS 11.41.100-11.41.220, 11.41.230(a)(1) or (2), or 11.41.410-11.41.432 [or] an offense under a law or ordinance of another jurisdiction having elements similar to [the previously enumerated crimes]... ." The enumerated crimes in AS 11.41 are all crimes of violence ranging from murder and manslaughter to assault. It is undisputed here that Mr. L was convicted of assault under Anchorage Municipal Code ("AMC") 8.10.010(B)(1) (defined as when a "person recklessly causes physical injury to another person"), which has elements similar to assault in the fourth degree under AS 11.41.230(a)(1) ("person recklessly causes physical injury to another person").

Thus, regarding the findings of "substantial risk of mental injury," OCS must prove that during the February 14, 2015 incident, Mr. L caused the children to experience "exposure to conduct by a household member . . . against another household member" which constituted domestic violence.[36] There is no dispute that Mr. L perpetrated domestic violence against Mrs. L during the incident. The only issue is whether the children were "exposed" to it. As noted above, Mr. and Mrs. L both testified emphatically that the children were upstairs during the entire incident and therefore could not have been "present" to witness it. In response, OCS pointed to the fact that Mr. L was convicted of family violence, which under AMC 8.10.050 means that "the person commits the crime of assault as defined in section 8.10.010 with knowledge or reckless disregard of the presence of a child or children." But Mr. L's criminal conviction is not dispositive of the question, because it is also undisputed that there was no testimony at Mr. L's criminal trial that established that the children actually witnessed the incident. Apparently, Mr. L was convicted of family violence after the jury was presented with a

[36] AS 47.10.011(8)(B)(ii).

scenario of the domestic violence having taken place while the children were in the home but remained upstairs, unable to actually view the violence between their parents.

OCS also cited other evidence that the children were physically present and saw at least a portion of the February 14, 2015 incident, including both girls' hearsay statements to PSS Reynaga-Pena, and B's hearsay statements in the written reports of her schoolteachers, which recorded the statements she made to them at school. The evidentiary value of the girls' statements to Mr. Reynaga-Pena, however, is somewhat lessened by the fact that the girls subsequently recanted those statements. The schoolteachers' reports are important evidence, in that they corroborate the statements that B made to Mr. Reynaga-Pena; but the schoolteachers did not testify at the hearing, so Mr. L was unable to cross-examine them about their conversations with B that were recorded in their reports.

OCS also argued at the hearing that even if the children were upstairs during the incident, Alaska Supreme Court decisions establish that children need not be physically present in order to be exposed to a substantial risk of mental injury from domestic violence in the home. However, neither of the cases cited by OCS (*Martin N. v. State*, 79 P.3d 50 (Alaska 2003), and *A.H. v. State*, 10 P.3d 1156 (Alaska 2000)) are directly applicable to Mr. L's appeal of OCS's substantiated findings. *Martin N.* involved a child in need of aid (CINA) proceeding where the Court was focused on whether the children were at risk of <u>future mental injury</u> as a result of domestic violence that had taken place outside of their physical presence. *See Martin N. v. State*, 79 P.3d at 55 (father's acts towards mother "create a significant risk of mental injury to [the child] if continued"). In other words, the Court was concerned with whether Martin N.'s children were "in need of aid" and required future protection from mental injury that would result from continued domestic violence by Martin N.

The *A.H.* case also involved a CINA proceeding where domestic violence had occurred between the parents; there, however, the primary acts of violence took place in the physical presence of the children but were directed at the mother rather than at the children themselves. The main holding in *A.H.* that is relevant to OCS's position in Mr, L's case is the following: "domestic violence need not be directed toward the child or signify a significant risk of physical harm to a child to support a CINA finding." *A.H. v. State*, 10 P.3d at 1161-62. That holding in the *A.H.* decision is of little help here. In addition, as in *Martin N.*, the *A.H.* case was also focused on protection against future injury that would result from continued domestic violence

by the children's father. Thus, neither of the cases cited by OCS stands for the proposition that domestic violence that takes place within the home but outside of the physical presence of the children, in and of itself, constitutes maltreatment in the form of causing a substantial risk of mental injury.[37]

A substantiated finding of abuse is distinct from a CINA case in that it is not a forward-looking finding – it is concerned with whether a particular action constituted an act of abuse in the moment when it occurred. So the question in Mr. L's case is, did the incident of February 14, 2015 constitute "exposure" to domestic violence that satisfies the requirements of AS 47.10.011(8)(B)(ii)? Based on a careful consideration of all of the evidence in the record and the arguments presented by both parties, I conclude that the answer is yes. First, one must consider Mr. and Mrs. L's testimony regarding whether the children were "present." Mr. and Mrs. L were in the middle of engaging in a physical fight that caused injuries to both of them,[38] and under such circumstances their certainty that the children remained upstairs for the entirety of the incident carries relatively little weight. It is highly unlikely that two adults engaged in a physical fight would be in a position to assess whether their children might be watching them do it. In addition, although B and F may have recanted their statements to Mr. Reynaga-Pena that they saw their parents fighting, they also told Mr. Reynaga-Pena that they heard the fight from upstairs. So even if Mr. and Mrs. L's testimony that the children generally remained upstairs were accurate, it is extremely unlikely that the children would not have heard what was going on downstairs and at least peek to see what was going on. And even if the children didn't take a peek to see any of the fight, the mere fact that they heard it taking place would be enough to constitute "exposure" to domestic violence that caused a substantial risk of mental injury.

Under different factual circumstances, an incident of domestic violence that took place in a manner that children inside the home were completely unaware of it might not constitute maltreatment in the form of causing risk of mental injury. Under the facts of this case, however, OCS met its burden of proving by a preponderance of the evidence that the Ls' children at least

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[37] In its pre-hearing brief, OCS also cited *Winston J. v. State*, 134 P.3d 343 (Alaska 2006) for the proposition that "the child need not have even been born for there to be a finding ... that the child faced a substantial risk of mental injury." (OCS's pre-hearing brief at 10.) *Winston J.*, however, was also a CINA case that was concerned with whether the children were at substantial risk of future harm "should they be placed with" their father. *Winston J.*, 134 P.3d at 348. *Winston J.*, therefore, is not directly applicable here.

[38] Mr. and Mrs. L each had knots on their foreheads "the size of a quarter"; Mrs. L had a slightly bloody nose and scratch marks on her neck; and she told the police that she "got dizzy and saw black spots" when Mr. L head-butted her. AR 11-12, 16.

heard Mr. L assaulting Mrs. L and very likely saw some of the assault as well. Therefore, Mr. L's actions caused a substantial risk of mental injury to the children. OCS's findings of risk of mental injury are affirmed.

C. Need for an Expert Witness

An additional legal issue that is raised in this case is whether a substantiated finding of causing substantial risk of mental injury can be affirmed without the expert witness testimony that would be statutorily required in order to prove actual mental injury. As explained above, OCS has given Mr. L notice that it is charging him with "maltreatment," not mental injury. Under AS 47.10.011(10), maltreatment can be established when a person creates a risk of mental injury in a child by exposing a child to domestic violence. OCS argues that the requirement of an expert witness applies only to a person charged with causing mental injury, not to a person charged with causing a risk of mental injury by exposing a child to domestic violence

In support of its position, OCS's pre-hearing brief cited decisions of the Alaska Supreme Court that strongly emphasize "the devastating impact that witnessing domestic violence can have on children."[39] Given this recognition of the potential impact that domestic violence can have on children, the law allows us to conclude that the person who committed the assault against a family member put the child at risk of mental injury. Depending on the facts of the case, in some cases, a proceeding under AS 47.10.0111(10) may well require expert witness testimony. Here, however, where OCS has proved that Mr. L was the perpetrator of a significant event of domestic violence in the presence of the children, OCS is not required to put on expert witness testimony to substantiate the findings.

D. Substantiated Findings for Neglect

OCS also made three substantiated findings of neglect based on the same set of facts of Mr. L engaging in domestic violence in the presence of the children. Early in the hearing, OCS's counsel stated that OCS had considered withdrawing the neglect findings as duplicative of the risk of mental injury findings; counsel implied that OCS had made the neglect findings as a backup in case the risk of mental injury findings were not affirmed. OCS did not, however, withdraw the neglect findings.

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[39] *In re J.A.*, 962 P.2d 173, 178 (Alaska 1998), *citing Borchgrevink v. Borchgrevink*, 941 P.2d 132, 140 (Alaska 1997); *see also Martin N. v. State*, 79 P.3d 50, 55 (Alaska 2003 ("witnessing domestic violence is mentally harmful to children"). OCS also pointed out that it "need not wait to enter a substantiated finding [until] after the child has suffered actual mental injury." OCS Pre-hearing Brief, at 10.

To establish that Mr. L's actions constituted "neglect" of his children, OCS needed to prove that Mr. L failed to provide the children with "necessary food, care, clothing, shelter, or medical attention."[40] At the hearing, OCS supported these neglect findings through the testimony of Mr. Reynaga-Pena, who asserted in essence that engaging in domestic violence in the presence of the children constitutes neglect in the sense of a failure to provide care to the children; this is because if the parents are fighting with the children present, they aren't supervising the children and are putting them at risk of injury. OCS then pointed to the evidence of "somatic symptoms" that B and F exhibited as a result of witnessing the incident (B said she did not feel safe at home and she became emotionally upset while being interviewed by Mr. Reynaga-Pena; F told him the incident made her sad). OCS, however, did not point to any specific elements of parental care that Mr. L failed to provide to his children.

This decision has already found that OCS's substantiated findings of risk of mental injury should be affirmed. OCS's additional neglect findings appear to be an attempt to fit a square peg in a round hole, i.e., is a failure to supervise children for a minute or two really "neglect?" In the absence of any allegation by OCS that Mr. L failed to provide any specific element of necessary care to his children, and under the particular factual circumstances presented here, OCS did not meet its burden of proving by a preponderance of the evidence that Mr. L engaged in neglect of his children. OCS's substantiated findings of neglect, therefore, are reversed.

E. Substantiated Finding for Physical Abuse

OCS made one substantiated finding of physical abuse, based on the allegation that Mr. L struck B with his open hand during the February 14, 2015 incident. B told her school teachers that her dad struck her, and she repeated that allegation to Mr. Reynaga-Pena when he interviewed her at the school. B, however, then recanted that statement in her second interview with Mr. Reynaga-Pena, who did not question her regarding why she had changed her story, or why she may have previously lied about her dad striking her on the face. Mr. L, on the other hand, testified emphatically and credibly that he did not strike B. Mrs. L testified that she thought B may have been confused during the interviews at her school and may have been speaking about a previous incident of domestic violence with her biological father, when he struck her.[41]

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[40] AS 47.17.290(11).

[41] Mrs. L testimony.

Importantly, Mr. Reynaga-Pena testified that when he interviewed B four days after the February 14, 2015 incident, he did not believe the bruise on her face constituted a "substantial injury."[42] In addition, because B did not testify at the hearing, she was not available to explain her change of story or to explore whether she may have been confused when she made her prior statements about Mr. L striking her. Taking into account Mr. Reynaga-Pena's assessment that the bruise on B's cheek was not a substantial injury, and weighing B's recanted statements against Mr. L's credible testimony that he had not struck her, I find that OCS did not meet its burden of proving by a preponderance of the evidence that Mr. L engaged in physical abuse of B.

IV. Conclusion

OCS's substantiated findings that Mr. L caused substantial risk of mental injury to his children are affirmed. OCS's findings that Mr. L neglected his children and physically abused B are reversed.

DATED this 28th day of April, 2016.

Signed
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 25th day of May, 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.]

[42] Mr. Reynaga-Pena testimony.