

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

In the Matter of )  
 )  
L G ) OAH No. 19-0279-SAN  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

L G contests the substantiated finding of child maltreatment entered against her by the Office of Children’s Services (OCS) on March 16, 2019. This finding was based on an incident involving M T, Ms. G’ oldest child, which was partially captured on a home security video in Ms. G’ home. After an investigation, OCS substantiated a finding of physical abuse. Ms. G has appealed that finding.

A hearing was held on July 15-16, 2020 and supplemental post-hearing briefing was submitted on July 24, 2020. Based on the testimony and a careful review of the video and other evidence presented at the hearing, this decision concludes that OCS has not met its burden of proof in establishing that the conduct constituted substantial physical abuse as described in AS 47.10.011(6). As a result, the substantiated finding of child maltreatment is overturned. Accordingly, that finding should be removed from the child protection registry.

**II. Facts**

*A. Background*

L G is the mother of three children: M, J, and F.<sup>1</sup> M, the oldest child, and J are children from Ms. G’ prior marriage to X T. The G family had been involved in a prior protective services report (PSR), filed in 2017. This PSR arose out of M’s allegations that her stepfather, K G, had physically abused her. However, it was not substantiated.<sup>2</sup>

M was 11 years old and was at her mother’s home when the Incident, which occurred sometime between September 10<sup>th</sup> – September 12<sup>th</sup>, happened.<sup>3</sup> Ms. G was working as an R.N. at Business A Hospital at that time, a job which she described as “stressful.”<sup>4</sup>

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<sup>1</sup> In the record, Ms. G is variously referred to as A, B, or C.  
<sup>2</sup> Exh. 2; Agency Record (AR) pp. 4-5.  
<sup>3</sup> Exhs. 2 (AR, p. 4) & 15 (AR, pp. 79-80).  
<sup>4</sup> Testimony of Ms. G; Exh. 14 (AR, p. 79).

At the time of the Incident, Ms. G had primary custody of M and J, although Mr. T spent time with his daughters after school.<sup>5</sup> The G household was far more disciplined and structured than the T household.<sup>6</sup> Prior to the Incident, M had asked to spend more time with her biological father. Although Ms. G was agreeable, Mr. T told Ms. G that it was not convenient for him to have M more frequently.<sup>7</sup> However, after the Incident, Mr. T filed for a modification of custody and M moved to his household.<sup>8</sup>

M feels less loved than her younger siblings.<sup>9</sup> She also claims that her mother buys her sister J more things than she buys M, and that her siblings receive less discipline than she does.<sup>10</sup> About a year and a half before the Incident, M made suicidal and homicidal statements and began counseling.<sup>11</sup> She also has a fear of dying.<sup>12</sup> Her mother has described her as being defiant and having mood swings.<sup>13</sup>

*B. The Incident Described in Contemporaneous Accounts*

On September 14, 2018, M told her counselor that several days earlier she had been choked in the neck by her mother.<sup>14</sup> The counselor reported the incident to the Office of Children's Services (OCS,) resulting in Protective Services Report #123845.<sup>15</sup> The case was assigned to Officer Z of the City A Police Department (CAPD) who contacted Mr. T on September 14, 2018 and asked him to bring M and J to Alaska CARES Child Advocacy Center (Alaska CARES) for forensic interviews.<sup>16</sup> At that time, Officer Z learned that Mr. T was aware of the Incident and had told M that she could speak to her counselor about it.<sup>17</sup>

1. Mr. T's Interview

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<sup>5</sup> Testimony of Ms. G.

<sup>6</sup> Testimony of Ms. G; *see also* Exh. 14 (AR, p. 81).

<sup>7</sup> Testimony of Ms. G.

<sup>8</sup> Exhs. 3 & 19 (AR, pp. 6 & 105); *see also* Testimony of Ms. G.

<sup>9</sup> Exh. 14 (AR, p. 80).

<sup>10</sup> Exh. 7 (AR, p. 17).

<sup>11</sup> Exhs. 7 & 14 (AR, pp. 20 & 84). In May of 2018, M told a classmate that she wanted to die. *See* Exh. 36.

<sup>12</sup> Exh. 14 (AR, p. 82).

<sup>13</sup> Testimony of Ms. G.

<sup>14</sup> M never provided the exact date when the Incident occurred. *See* Exh. 14 (AR, pp. 80-82); *see also* G Exh. 6 (in her grand jury testimony, M said she did not remember the date of the Incident), p. 15. Her sister, J, said that it had happened on Tuesday (September 11, 2018) or Monday (September 10, 2018). *See* Exh. 14 (AR, p. 82). Other documents in the record suggest that the Incident may have occurred on September 11<sup>th</sup> or 12<sup>th</sup>. *See* Exhs. 2 (AR, p. 5), 3 (AR, p. 6) & 15 (AR, p. 88); G Exh. 2, p. 1.

<sup>15</sup> Exh. 2 (AR, at p. 4).

<sup>16</sup> G Exh. 6, pp. 27-28. Alaska CARES is a multi-disciplinary center which investigates alleged crimes against children.

<sup>17</sup> Exh. 14 (AR, p. 79).

Officer Z and Detective Y interviewed Mr. T. He said that M had told him that she was the child in the family who gets yelled at and he opined that Mr. and Mrs. G preferred J over M. Mr. T also reported that while he was taking his daughters to the Alaska CARES interviews, M told him that during the Incident, Ms. G “was actually squeezing her neck when she had her hands on her” and reported that Ms. G “had picked her off the stool by the neck.”<sup>18</sup>

## 2. M’s Forensic Interview

Q N, who works for OCS, conducted a forensic interview of M on September 14, 2018 at Alaska CARES.<sup>19</sup> M said that the Incident began around 7:20 a.m. when she was washing dishes – one of her daily chores -- in the kitchen of the G home before she went to school. Ms. G told M that if she wasn’t done with the dishes by 7:25 a.m., she would leave her. M responded by saying “OK” in a manner that her mother viewed as disrespectful, which angered Ms. G.<sup>20</sup>

M recounted that Ms. G got off the chair where she was sitting and “stomped over to the sink” where M was washing the dishes while standing on a step stool and began yelling at her. M said she was facing toward her mother when Ms. G picked M up by the neck off, lifting her up off the step stool by “squeezing her neck.” M claimed that Ms. G had “lifted her by the neck probably an inch.” She reported that it felt like her mom had “choked her 10 seconds at the most or maybe 30.” She also reported that her mom’s hands were “opening and closing.” After her mother picked her up off the stool by the neck, M said she put her down and she went back to washing the dishes for several minutes before her mother told her to “just get out of my face.”<sup>21</sup>

M reported that she was “kind of scared because I thought she was going to choke me to death,” explaining that Ms. G had once told her that she wasn’t home schooling M because “sometimes she gets so mad that she wants to kill me.” She also said that when Ms. G had grabbed her neck with two hands and squeezed it, which made her feel scared “like she was going to die.” M said that it was “kind of a relief” when her mom set her down as she knew she “wasn’t going to die” but that she was “still scared” and “in her head thought it only takes a minute of no air to die.”<sup>22</sup>

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<sup>18</sup> Exh. 14 (AR, p. 79); *see also* G Exh. 6, pp. 27-28.

<sup>19</sup> *See* Exh. 14 (AR, pp. 80-82). The interview is one-on-one in a room with the child. However, since the interview is audio and video recorded from an adjacent room, others can view the interview in the adjacent room as it is happening. In this instance, Officer Z was able to view Ms. N’s interview of M as it occurred. *See* G Exh. 6, p. 19.

<sup>20</sup> Exhs. 7 (AR, p. 17) & 14, p. 80; *see also* G Exh. 3.

<sup>21</sup> Exhs. 7 (AR, p. 18) & 14 (AR, pp. 80-81).

<sup>22</sup> Exh. 14 (AR, p. 80-81).

In describing the pressure applied to her neck, M said her mother's hands "were tight on her neck" and that her mother "was squeezing her neck tightly."<sup>23</sup> However, M wasn't sure how her mom's thumbs were positioned. M also said it gave her "a weird feeling in her stomach" when this happened, and that it felt like she "couldn't breathe" and "had choked up on air" and "couldn't inhale anything." M reported that this was the first time she, or anybody else in the family, had been "choked."<sup>24</sup>

During the Incident, M said she saw the candle on the stove and the fruit bowl and when she saw those things, "they looked normal." She also said she "felt normal when [her]mom was choking her and could hear her mom fine as she was yelling." She reported that "her body remained the same when it happened."<sup>25</sup> However, earlier in the forensic interview, M had stated that it was "kind of in the middle between normal and hard to breath[e]" after her mom "choked her" and said it was heavy breathing for 5 to 10 seconds afterwards "because she wanted to get a lot of air in."<sup>26</sup>

Numerous photographs were taken of M at the time of her forensic interview and at a follow-up session one week later. She had no visible marks on her neck, other than some hyperpigmentation on her neck at her hairline unrelated to the Incident.<sup>27</sup>

### 3. J's Forensic Interview

J also had a forensic interview with Ms. N on September 14, 2018 at Alaska CARES to determine what she knew about the Incident. J said that she could hear her mom yelling but had not seen what happened. After the Incident, J rode to school with M in Ms. G' car. When M got into the car, she told J that she felt bad "that she was talking back." A day later, when M and J were riding home with their biological father (Mr. T), M told J that Ms. G had "picked her up by the neck and that she couldn't breathe and it was kind of scary for her."<sup>28</sup>

### 4. APD Interviews with Mr. and Mrs. G

At 8:50 p.m. on the evening of September 14, 2018, Officer Z, Detective Y, and Ms. N arrived at the G home and interviewed Mr. G, who was cooperative. Mr. G had not been present during the Incident but had talked to his wife about it. He said that Ms. G had acknowledged

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<sup>23</sup> Exhs. 7 (AR, pp. 17-18) & 14 (AR, pp. 81-82).

<sup>24</sup> Exh. 14 (AR, pp. 81-82).

<sup>25</sup> Exh. 14 (AR, p. 82).

<sup>26</sup> Exh. 14 (AR, p. 81).

<sup>27</sup> See Exhs. 8 (AR, pp. 24-65), 12 (AR, p. 73) & 13 (AR, p. 76).

<sup>28</sup> Exh. 14 (AR, p. 83).

that she had “lost her control” and he admitted that Ms. G “may have lost her patience a bit.” Mr. G also told the investigators that when M gets upset, she exaggerates what she tells her biological father.<sup>29</sup>

Ms. G arrived home from work while APD was there. She was advised that she did not have to talk to Officer Z and Detective Y but was willing to do so. Ms. G stated that she lost control, got upset, and put her hands around M’s neck to gain her attention and then “let go.” She denied picking M up by the neck or putting her down and denied squeezing her neck. She said that M had apologized to her later that day for “talking back.” Ms. G also said that it was Mr. T who first told her that M said she had been choked.<sup>30</sup> Finally, Ms. G reported that M wanted to live with her father, that she had asked Mr. T to take her, but that he had refused. The interviews with Mr. and Mrs. G concluded at 10:17 p.m.<sup>31</sup>

*C. Ms. G is Charged with Criminal Conduct*

Following the investigation, an indictment was issued charging Ms. G with assault in the second degree (Class B felony) and assault in the third degree (Class C felony) for her conduct during the Incident.<sup>32</sup> A grand jury was convened and took testimony on November 27, 2018.<sup>33</sup> A video tape from a security camera inside the G home that Mr. T had given to Officer Z was also played for the grand jury.<sup>34</sup> Testimony established that Mr. G had discovered sometime in October that their home security system had recorded two 20-23 segments that depicted part of the Incident, as well as the interactions between M and Ms. G shortly after the incident.<sup>35</sup> M’s grand jury testimony, compared to her more contemporaneous statements at her forensic interview, was vague.<sup>36</sup> However, she again stated that she was washing dishes on the step stool in the kitchen when her mother came over to her and picked her up by the neck.<sup>37</sup> She did not

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<sup>29</sup> Exh. 36.

<sup>30</sup> Exh. 36.

<sup>31</sup> Exhs. 5 (AR, p. 8) & 36.

<sup>32</sup> Exh. 33 (AR, pp. 131-132)

<sup>33</sup> G Exh. 6, pp. 2-3.

<sup>34</sup> G Exh. 6, pp. 7-37. Mr. T’s grand jury testimony was focused on identifying the voices and the people in the security home video that was played to the grand jury. *See* G Exh. 6, pp. 21-26.

<sup>35</sup> Testimony of Ms. G. Mr. G had provided these clips to Mr. T during the custody hearing. *See* Exh. 14 (AR, p. 85).

<sup>36</sup> *See, e.g.,* G Exh. 6, p. 17 (M was unable to recall where Ms. G’s hands were on her neck). *Compare* G Exh. 6, pp. 15-20 *with* Exh. 14 (AR, pp. 80-82); *see also* G Exh. 2, p. 2 n. 1 (Dr. E observing that M gave a less detailed account and answered questions with less certainty during her grand jury testimony than in her Alaska Cares interview).

<sup>37</sup> G Exh. 6, p. 16.

report trouble swallowing, could not remember if her voice sounded funny, and said she did not feel dizzy or light-headed.<sup>38</sup>

The grand jury rendered a true bill on both counts, allowing the criminal case against Ms. G to proceed.<sup>39</sup> Ms. G subsequently pled guilty to a lesser charge of disorderly conduct under AS 11.61.110(b)(5), a class B misdemeanor.<sup>40</sup>

*D. OCS's Substantiation*

OCS's initial assessment summary, prepared by Ms. N, concluded that M had "disclosed physical abuse by her mother in the form of strangulation causing a substantial fear reaction." This summary further noted that Ms. G had denied strangling M during the Incident, that there were no visible injuries on M's neck, and that both parents had cooperated with OCS.<sup>41</sup> Ms. N then stated that: "The evidence collected to include injuries is consistent with [S]trangulation and physical abuse."<sup>42</sup> Ms. N also completed an OCS document known as the Maltreatment Assessment Protocol (MAP). In that document, she determined that M had been substantially physical abused, was at a substantial risk for physical harm, and had a substantial fear reaction.<sup>43</sup>

On March 16, 2019, OCS notified Ms. G that it had substantiated that M was a victim of child maltreatment in the form of physical abuse.<sup>44</sup> This substantiated finding resulted in the present appeal.

### **III. The Hearing**

The hearing was held on July 15-16, 2020 and took place using Zoom, a video conferencing platform which allows the parties and witnesses to be seen and heard by each other and the administrative law judge. Three witnesses testified: Dr. U E, Q N, and Ms. G. S P represented Ms. G; the Department of Health and Social Services, Office of Children's Services (DHSS/OCS) was represented by Assistant Attorney General Brian H. Starr.

In addition to the testimony presented at the hearing, the record in this case consists of 36 Exhibits from DHSS/OCS and 10 Exhibits from Ms. G.<sup>45</sup> These exhibits include videos from:

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<sup>38</sup> G Exh. 6, p. 19.

<sup>39</sup> G Exh. 6, p. 41.

<sup>40</sup> Exh. 34 (AR, pp. 132.1-133).

<sup>41</sup> Exh. 2 (AR, p. 6).

<sup>42</sup> Exh. 2 (AR, p. 6)(emphasis added).

<sup>43</sup> Exh. 4 (AR, p. 8).

<sup>44</sup> Exh. 1 (AR, p. 1).

<sup>45</sup> Exhibit 36, which is the audio recording of the APD interview with Mr. and Ms. G on the evening of September 14, 2018 was submitted after the hearing after being requested in an Order for Post-Hearing Briefing dated July 17, 2020.

(1) the security system in Ms. G' home at the time of the incident, (2) the Alaska Cares video of the forensic interview with M, (3) a slowed video of the Incident, and (4) a zoomed in video of the Incident<sup>46</sup> In addition, the exhibits include photographs of M taken at the time of her forensic interview at Alaska Cares on September 14, 2018 and at a follow-up visit one week later, and photographs that are still screen shots of the Incident depicted on the home security video.<sup>47</sup>

1. Dr. E's Testimony

Dr. E was Ms. G' well-credentialed expert witness.<sup>48</sup> She holds an M.D. from the University of Colorado School of Medicine and has worked in forensic pathology for over 20 years. Currently, Dr. E serves as the technical director of the Business A Crime Lab, an independent laboratory, in City B, California, where she is the forensic pathologist.<sup>49</sup>

Dr. E submitted an expert report, dated May 15, 2019.<sup>50</sup> In her report and in her testimony, Dr. E noted that discrepancies between M's account in her forensic interview versus what is depicted on the videos. She testified that she reviewed the videos about 12 times since it showed certain things relevant in determining whether strangulation had occurred.<sup>51</sup> Dr. E opined that, although Ms. G had placed her hands around M's neck, there was no evidence to show that pressure was applied to either her jugular or carotid arteries which would have compromised either her circulation or ability to breath.<sup>52</sup>

Dr. E supported her opinion by pointing out that there was the absence of symptoms associated with pressure to M's airway: there was no coughing, scratching at her throat, no

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<sup>46</sup> G Exhs. 3 (security videos of the Incident and shortly after the Incident), 4 (Alaska Cares Interview of M), 8 (slowed down video of the Incident) & 9 (zoomed in video of the Incident).

<sup>47</sup> Exhs. 8 (September 14, 2018 photographs of M) & 13 (September 21, 2018 follow-up photographs of M); G Exh. 5 (still photographs of the security video of the Incident).

<sup>48</sup> Dr. E is board-certified in anatomic, forensic, and neuropathology, has held faculty positions at the University of California and at Stanford University Medical Center, and has co-authored numerous medical journal articles, book chapters, and medical abstracts. *See* G Exh. 1, pp.1-7.

<sup>49</sup> G Exh. 1, pp. 1-9; *see also* Testimony of Dr. E. She has been employed by the crime lab since 2005 and has been retained in civil and criminal cases by plaintiffs and defendants. *See* Testimony of Dr. E.

<sup>50</sup> *See* G 2, p. 1. In preparing that report, Dr. E reviewed the following materials: (1) a video on multiple formats of the events comprising the Incident; (2) audio and video interviews with X T; (3) an audio of APD's interview with Mr. and Ms. G; (3) the audio and transcript of the grand jury, and (5) police reports, medical evaluations, and an e-mail from Ms. G. *See id.*

<sup>51</sup> G Exh. 2, p. 2.

<sup>52</sup> Dr. E testified that 4 to 10 pounds of pressure was needed to compress the internal jugular vein and carotid artery, respectively. She said that compression of either of these vessels for about 10 seconds could result in a loss of consciousness. *See* Testimony of Dr. E; *see also* G Exh. 2, pp. 2-3.

rubbing of her throat, and no change in voice.<sup>53</sup> In addition, the video did not demonstrate a loss of consciousness, such as becoming flaccid or even dropping the towel or dish. Rather, the fact that M held onto the towel and dish during the Incident demonstrated, according to Dr. E, that there was no appreciable change in the flow of blood to her brain. These actions, in Dr. E's opinion, were inconsistent with strangulation. Dr. E further noted that individuals who are strangled report a change in hearing or vision, yet M had denied having such changes.<sup>54</sup>

According to Dr. E, had any significant force been applied to the airway, some swelling would have occurred, resulting in visible symptoms.<sup>55</sup> However, a physical examination of M at the time of her forensic interview had shown no injuries and, therefore, there were no physical manifestations of strangulation.<sup>56</sup> Moreover, if M had actually been lifted off of the stool for 30 seconds as she claimed, Dr. E testified that the force required to lift M by the neck would likely have resulted in external injuries.<sup>57</sup>

Finally, Dr. E was asked whether Ms. G' conduct during the Incident put M at risk for substantial harm. Her response was that since what M described had not happened, M was not at substantial risk for physical harm.<sup>58</sup>

## 2. Q N's Testimony

Q N was OCS's sole witness. She has worked in child protection at OCS since 2011 and investigated approximately 150 cases a year before becoming an initial assessment supervisor in 2019. Ms. N also has a forensic interview certificate, which she received after a week of training.<sup>59</sup>

In her initial assessment, Ms. N concluded that the Incident had resulted in: (1) substantial physical harm to M; (2) the substantial risk for physical harm given the degree of force used and physical environment in which the acts occurs; and (3) a substantial fear reaction in M.<sup>60</sup> Ms. N's testimony principally explained how she reached her conclusion to substantiate for physical harm. First, she noted that there was a non-accidental use of physical force in the

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<sup>53</sup> G Exh. 2, p. 2; Testimony of Dr. E.

<sup>54</sup> Testimony of Dr. E.

<sup>55</sup> G Exh. 2, p. 3.

<sup>56</sup> G Exh. 2, p. 1.

<sup>57</sup> Testimony of Dr. E.

<sup>58</sup> Testimony of Dr. E.

<sup>59</sup> Testimony of Ms. N.

<sup>60</sup> Testimony of Ms. N; *see also* Exh. 4 (AR, p. 7).



form of applying force to the M’s throat.<sup>61</sup> However, Ms. N never explained why she concluded that there was a “substantial physical harm” to M. Instead, her testimony solely focused on whether there had been a “substantial risk of physical harm” to M because Ms. G had admitted she had “lost control.” Finally, Ms. N pointed out that Ms. G’ actions had caused a “substantial fear reaction” in M.<sup>62</sup>

### 3. Testimony of Mrs. G

Ms. G only “vaguely remembers” the Incident and admitted that she has tried to suppress her memory of it. Ms. G reported that when she spoke to APD on September 14, 2018, she was tired after a long day at work. She did not know that there was a video of the Incident until October, when her husband told her about it.<sup>63</sup>

Ms. G claimed she grabbed M to get her attention and that she was not trying to hurt her. She admitted that M appeared shocked during the Incident. However, Ms. G stated that she did not lose control to the point of harming her daughter and maintained she did not apply any pressure to M’s throat. She further noted that M acted normal after the Incident. Ms. G, however, acknowledged that her behavior during the Incident was inappropriate.

Less credibly, Ms. G claimed that she placed her hands on her daughter’s shoulders rather than her neck and had no part of her fingers or hands on M’s neck. Ms. G was emotional when described how she lost custody of her daughters, lost her job, and has been unable to find work in her profession due to the Incident. Ms. G further noted that M had wanted to live with her father rather than at the stricter G household, implying that M may have had a motive for exaggerating what had happened during the Incident.<sup>64</sup>

## IV. Discussion

Alaska’s Child Protection statute, AS 47.17, was enacted to “prevent further harm to the child” and to “safeguard and enhance the general well-being of children” in Alaska.<sup>65</sup> AS 47.17 defines “child abuse or neglect” to mean “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[.]”<sup>66</sup>

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<sup>61</sup> Testimony of Ms. N; *see also* Exhs. 4 (AR, p. 7) & 35.

<sup>62</sup> Testimony of Ms. N; *see also* Exhs. 3 (AR, p. 6) & 4 (AR, p. 7).

<sup>63</sup> Testimony of Ms. G.

<sup>64</sup> Testimony of Ms. G.

<sup>65</sup> AS 47.17.010.

<sup>66</sup> AS 47.17.290(3).

The statute then defines one of these terms – “maltreatment” – to mean “an act or omission that results in circumstances under which there is reasonable cause to suspect that a child may be a child in need of aid,” as defined under the separate Child in Need of Aid (CINA) statute, AS 47.10.011.<sup>67</sup> The CINA statute has twelve paragraphs, each of which identifies a different avenue that could constitute maltreatment. OCS’s substantiation 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.<sup>68</sup>

As explained in prior decisions of the Commissioner of Health and Social Services, proof of “reasonable cause to suspect that a child may be a child in need of aid” is a necessary, but not sufficient, basis to sustain a substantiation under the maltreatment prong of AS 47.17.290(3).<sup>69</sup> OCS must still show that the child’s health or welfare *was harmed or threatened* by an act or omission of the accused. Consequently, the issue here is whether: (1) M suffered substantial physical harm; or (2) whether there is a substantial risk that M will suffer physical harm. The statute is silent regarding any requirement of a “substantial fear reaction” on the part of the child.<sup>70</sup>

A. *Did M Suffer Substantial Physical Harm?*

In previous cases, it has been established that there must be some degree of physical injury in order to substantiate maltreatment under the “physical harm” prong of AS 47.10.011(6).<sup>71</sup> Here, the initial assessment summary for the Incident states that the “evidence collected to include injuries is consistent with strangulation and physical abuse” and “therefore the allegation is substantiated.”<sup>72</sup>

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<sup>67</sup> AS 47.17.290(9).

<sup>68</sup> AS 48.10.011(6).

<sup>69</sup> *See, e.g., In re K.L.*, OAH No. 16-1145-SAN (Comm’r of Health & Soc. Serv. 2017), at 7.

<sup>70</sup> *See* AS 47.10.011(6).

<sup>71</sup> *See In re E.W.*, OAH No. 17-0737-SAN (Dep’t Health Soc. Servs. 2018)(father squeezed the child in the neck leaving significant red marks denoting pressure of his fingers and thumb on the child’s neck); *In re N.N.*, OAH No. 15-1224-SAN (Dep’t Health and Soc. Servs. 2016)(child struck in the face with enough force to leave a mark);

<sup>72</sup> Exh. 3 (AR, p. 6)

M was given a medical evaluation shortly after she reported the incident to her counselor and there were no visible signs of injury.<sup>73</sup> She had no marks on her neck from the Incident and no indicia, such as petechiae, that she had been strangled or choked.<sup>74</sup> Moreover, Ms. N in her testimony failed to explain why substantiated for actual physical harm. Consequently, OCS has not met its burden of proving that M suffered *substantial physical harm*.<sup>75</sup>

*B. Was There A Substantial Risk of Substantial Physical Harm to M?*

It is a much closer question regarding whether Ms. G' conduct during the Incident created a substantial risk of substantial physical harm – the other prong of AS 47.10.011(6) -- to M. OCS has relied on three theories to justify its substantiated finding in this regard: (1) that Ms. G strangled M even if it did not result in any physical injury to her; (2) that Ms. G admitted that she was “out of control” and thus could not have been aware of the pressure she was applying to M’s neck; and (3) that Ms. G’ conduct created a “substantial fear reaction” in M.<sup>76</sup>

1. OCS’s Strangulation Theory

Dr. E defined strangulation is actual pressure applied to the neck.<sup>77</sup> The evidence in the record suggesting that Ms. G choked M or applied pressure to her neck comes from two sources: (1) M’s account of the Incident through her statements to Alaska Cares and her grand jury testimony; and (2) Officer Z’s account of his interview with Ms. G.

However, Dr. E persuasively testified that she did not consider M to be substantial risk of physical harm because M’s account that she was choked or strangled during the Incident was not corroborated by more objective evidence.<sup>78</sup> First, M’s statements to Alaska Cares and her grand jury testimony that her mother picked her up off a stool by the neck are flatly contradicted by the home security videos, as Dr. E also noted in her report and in her testimony.<sup>79</sup> The video shows that:

- M was not on a stool and was standing on the floor continuously through the event;
- M was not standing on or close to the stool;

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<sup>73</sup> Exh. 14 (AR, p. 78)(APD report stating that no “visible marks or injury were evident”); *see also* Exh. 7 (AR, pp. 16-23) & G Exh. 2, p. 1. A follow-up medical examination a week later also showed no visible signs of injury. *See* Exh. 12 (AR, pp. 69-73).

<sup>74</sup> Exh. 14 (AR, p. 78); Testimony of Dr. E.

<sup>75</sup> Although Ms. N indicated on the MAP form that there was substantial physical abuse, she did not address this in her testimony and instead solely focused on the “substantial risk of physical harm” prong of AS 47.10.011(6).

<sup>76</sup> *See* Testimony of Ms. N; *see also* Exh. 4 (AR, p. 7).

<sup>77</sup> Testimony of Dr. E.

<sup>78</sup> Testimony of Dr. E.

<sup>79</sup> *See* G Exh. 2, pp. 1-2; Testimony of Dr. E.

- M was not lifted off the floor;
- The length of physical contact between M and her mother as depicted on the video was approximately 3 seconds, not 10 to 30 seconds;<sup>80</sup> and
- Ms. G was standing perpendicular to her, not in front of M as M claimed.<sup>81</sup>

Although OCS’s records state the allegation of physical abuse was being substantiated because M had “injuries consistent with Strangulation and physical abuse,” this statement is contradicted by evidence in the record.<sup>82</sup> First, there were no visible marks, bruises or other physical injuries indicating that Ms. G applied significant pressure to M’s neck.<sup>83</sup> Moreover, as Dr. E noted, physical injuries would most likely resulted had pressure been applied to her neck for 10-30 seconds.<sup>84</sup> Second, M had none of these other symptoms associated with strangulation: she did not lose consciousness; did not drop the dish towel or dish she was holding during the incident; did not have incontinence or a change in hearing or vision; did not lose consciousness or feel dizzy or light-headed; and did not cough or describe a change in her voice.<sup>85</sup> In addition, M said she “felt normal when her mom was choking her” and that “her body remained the same when it [the choking] happened.”<sup>86</sup>

With regard to M’s statement that she was breathing “normal . . . hard . . . in the middle” for 5 to 10 seconds after the Incident, Dr. E aptly noted that this could simply be an emotional response to her mother’s conduct, which clearly frightened her.<sup>87</sup> Strikingly, M’s conduct after the Incident as captured on the security video appeared “normal” as she was not rubbing her throat and simply returned to washing the dishes.<sup>88</sup>

A fair reading of the evidence shows that M’s account of the Incident, like her previous unsubstantiated report of physical abuse by Mr. G, is exaggerated.<sup>89</sup> Ms. G suggests that this

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<sup>80</sup> Testimony of Dr. E; G Exh. 2, p. 2; G Exhs. 3, 8 & 9.

<sup>81</sup> See G Exhs. 3, 5, 8 & 9.

<sup>82</sup> Exh. 3 (AR, p. 6).

<sup>83</sup> See Exhs. 3 (AR, p. 6), 8, 13, 14 (AR, p. 78); Testimony of Dr. E.

<sup>84</sup> Testimony of Dr. E.

<sup>85</sup> See Exh. 7 (AR, p. 18); G Exh. 2, p. 2; G Exh.6, p. 19. It is unclear whether M suffered a loss of voice or had difficulty swallowing, as she gave conflicting accounts. Compare G Exh. 6, p. 19 (M “not sure if she had trouble swallowing”) with Exh. 7 (AR, p. 18)(M “couldn’t really swallow when her mother was choking her”); see also G Exh 6, p. 19 (M stating she didn’t know if her voice sounded funny); Exh. 14 (AR, p.81)(M states that “her voice couldn’t talk at all”).

<sup>86</sup> Exh. 14 (AR, p. 82).

<sup>87</sup> G Exh. 2, p. 3.

<sup>88</sup> Testimony of Ms. E; G Exh. 3.

<sup>89</sup> See Exh.2 (AR, pp. 4-5) & 7 (AR, p. 17); see also Exh.36 (Mr. G explaining to APD that when M gets upset, it gets blown out over proportion because she tells [her] dad something else that is not all that true).

exaggeration stemmed from M's desire to live with her biological father.<sup>90</sup> However, an equally plausible reason is M's fear of death and dying.<sup>91</sup>

There were two statements in the record by Officer Z which also implied that Ms. G squeezed, or applied pressure to, M's neck. The first statement, in his APD report notes that "C stated that she did not squeeze M's neck hard." The second is in his grand jury testimony, where Officer Z testified that Ms. G had "said that she didn't squeeze *very* hard." However, both statements are contradicted by the audio tape of the APD interview. *Ms. G said nothing about squeezing M's neck on that audio tape.*<sup>92</sup> Furthermore, Ms. N's notes of that interview -- which Ms. N also attended -- state "*C denied picking her [M] up by the neck and squeezing.*"<sup>93</sup> Although Ms. G admitted to APD that she got upset and put her hands around M's neck to get her attention, she said she "let go" and denied lifting M, who weighs 66 pounds, up by the neck.<sup>94</sup> At no time has Ms. G admitted squeezing or applying pressure to M's neck.

Placing hands on the neck of a child, especially when a parent is yelling at the child, is inappropriate, as Ms. G has acknowledged. However, merely placing hands on a child's neck alone does not rise to the level of a "substantial risk of physical harm," unless there are marks on the child, physical or behavioral indicia of strangulation or choking, or the child's account is credible. Here, none of those factors are present. M's account of the incident, when compared to the home security video, is clearly exaggerated and there were no other indicia corroborating that she was strangled. For these reasons, OCS has not demonstrated by a preponderance of the evidence that M was choked or strangled by Ms. G.

*a. Ms. G' Loss of Control*

The underlying question is whether Ms. G, who admitted that she had "lost control" at the time of the Incident, created a substantial risk of physical harm to M when she placed her hands on her neck. Dr. E testified that it takes four pounds of pressure to the internal jugular vein and 10 pounds of to the carotid artery for ten seconds to cause consciousness to be loss.<sup>95</sup>

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<sup>90</sup> Testimony of Ms. G.

<sup>91</sup> Exh. 7 (AR, p. 17).

<sup>92</sup> See Exh. 36. On the audio tape, one of the officers interviewing Ms. G acknowledges that she has denied squeezing M's neck.

<sup>93</sup> Exh. 5 (AR, p. 8).

<sup>94</sup> Given that Ms. G did not expect to be interviewed by APD when she got home from work on September 14, 2018 yet fully cooperated with that interview, her statements more likely than not represent the most accurate account of her conduct during the Incident; Exh. 36 (audio tape of the APD Interview with Ms. G).

<sup>95</sup> Testimony of Dr. E; see also G Exh. 2, p. 20.

Ms. N testified that because Ms. G had lost control, the force that she was using *could* have increased and Ms. G *might not* have been able to regulate the pressure she was applying to M’s neck.<sup>96</sup> Ms. G, however, disputes that she squeezed M’s neck, claims she “let go” after putting her hands on M’s neck, and maintains that she put her hands on M’s neck in order to get her attention.<sup>97</sup>

Anytime a parent is angry and “loses control,” the situation has the possibility of spinning out of control. However, the mere *possibility* of that occurring, without more, does not create a “substantial risk of physical harm.” Here, M had no bruising, no red marks, did not display any conduct suggesting she was deprived of oxygen during the brief Incident, and her account of the Incident – when compared to the security video – is exaggerated.<sup>98</sup> Certainly, M’s report of the incident several days later to her father, with whom she wanted to reside, coupled with the discrepancies in her account when compared to the clip on the home security video, call into question the overall credibility of her account. Moreover, M’s behavior immediately after the Incident was seemingly normal.<sup>99</sup> Accordingly, OCS has not met its burden of showing that the M was at substantial risk of substantial physical harm because there was the *possibility* that the situation could have deteriorated.

b. *M’s Substantial Fear Reaction*

Ms. N’s final justification for OCS’s substantiation for substantial risk of substantial physical harm was that M exhibited a “substantial fear reaction” to her mother’s conduct.<sup>100</sup> The home security video establishes that any eleven-year old child would have been very scared by Ms. G’ conduct. Mrs. G literally dashed from her chair and began screaming at her daughter while, by her own admission, she put her hands on her daughter’s neck, and possibly even shook her by the shoulders.<sup>101</sup> Indeed, this fear reaction may have caused M’s heavy breathing for a few seconds after the Incident.<sup>102</sup>

M has said that she felt “scared because I thought she was going to choke me to death” and “felt scared like she was going to die.” These concerns may also been underscored due to a

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<sup>96</sup> Testimony of Ms. N.

<sup>97</sup> See Exh. 35.

<sup>98</sup> See G Exhs. 2 & 3; Exhs. 2 (AR, p. 5) & 14 (AR, pp. 78 & 80-82).

<sup>99</sup> See G Exh. 3.

<sup>100</sup> Testimony of Ms. N.

<sup>101</sup> See G Exh. 3; Exh. 14 (AR, p. 82).

<sup>102</sup> See G Exh. 2, p. 3.

previous comment by Ms. G that M reported in her forensic interview: her mother said she didn't want to home school M because "sometimes she [her mother] gets so mad she wants to kill me"<sup>103</sup> Certainly, it is reasonable that M, who has previously expressed concerns about death and dying, would have been terrified when her mother was angry and put her hands on M's neck, even if only to get her attention.<sup>104</sup> Although the Incident was clearly an emotional and troubling event for M, OCS did not issue a substantiation for mental injury or risk of mental injury.<sup>105</sup>

The substantiation at issue here is child maltreatment arising from physical abuse pursuant to AS 47.10.011(6).<sup>106</sup> However, AS 47.10.011(6) contains no language suggesting that the victim's fear reaction alone results in a substantial risk of substantial *physical* harm.<sup>107</sup> Consequently, OCS has not met its burden of showing that M's substantial fear reaction translates into a substantial risk of physical harm, even though M was affected emotionally by the Incident.

## V. Conclusion

OCS has not met its burden of proof in establishing that Ms. G caused physical harm to her daughter M or that Ms. G' conduct placed M at a substantial risk of substantial physical harm. Accordingly, OCS's finding of child maltreatment is overturned.

Dated: April 8, 2021

Signed  
Kathleen A. Frederick  
Administrative Law Judge

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<sup>103</sup> Exh. 14 (AR, pp. 80-82).

<sup>104</sup> See Exhs. 7 (AR, pp. 14 & 20), 14 (AR, p. 84) & 36 (audio tape of APD's interview with Ms. G).

<sup>105</sup> See Exh. 36 (in the APD interview with Ms. G, Ms. G was told that there had been "mental damage" to M from the Incident even though there had been no visible outward injury).

<sup>106</sup> Exh. 1, p. 1.

<sup>107</sup> See AS 47.10.011(6).

## 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 14<sup>th</sup> day of May, 2021.

By: Signed \_\_\_\_\_  
Name: Jillian Gellings  
Title: Project Analyst  
Agency: Office of the Commissioner, DHSS

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