BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF FAMILY AND COMMUNITY SERVICES

In the Matter of	)	
	)	
T. E.	)	OAH No. 22-0594-SAN
	)	

FINAL DECISION[1]

I. Introduction

T. E. requested an administrative hearing to challenge a finding by the Office of Children's Services (OCS) that he inflicted physical abuse upon his daughter, then 12-year-old L. E. (referenced in this order using her preferred middle name).[2] The fact T. E. used a belt to spank L. E. for incidents of perceived rule breaking is not disputed. The primary question presented is whether T. E.'s actions crossed the line between permissible corporal discipline under AS 47.06.030(1)(B), and child maltreatment as defined in the Alaska Child Protection Statute, AS 47.17 *et seq*.

In August 2023, OCS filed a motion for summary adjudication which argues that no disputed issues of fact exist regarding the alleged physical abuse of L. E., and that the substantiated finding that T. E. physically abused her should therefore be affirmed. No response to the motion was received from T. E., who is represented by counsel in this matter. T. E.'s failure to oppose OCS's motion did not automatically entitle OCS to prevail, however. Instead, Alaska law requires that this tribunal independently review the motion and determine whether OCS has established entitlement to judgment as a matter of law.

In September 2023, an order was issued granting OCS's motion to summary adjudication as to the finding of physical abuse against L. E. OCS then overturned the other substantiated findings that T. E. had disputed in this case. OCS's decision to overturn those findings alters the procedural posture of the case. Because the final decisionmaker in this matter is the Commissioner of Family and Community Services, the order granting summary adjudication is subject to review by the Commissioner under the procedures set out in AS 44.64.060(e) and its

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[1] In response to the proposed decision, both parties submitted proposals for action under AS 44.64.060(e). The designee of the Commissioner of the Department of Family and Community Services has revised the proposed decision to address an issue of concern identified by OCS. The relief requested in T. E.'s proposal for action is rejected through the issuance of this final decision.

[2] T. E. also challenged an additional finding about his other daughter. As OCS has now overturned that substantiated finding, it is no longer at issue here, and the only finding in dispute is the physical abuse finding as to L. E.

regulations. Accordingly, the factual bases and legal rationale for granting OCS's motion for summary adjudication are fully set out in this decision.

II. Facts

The following facts are drawn from police reports, interviews, and medical examinations that OCS cites in support of its motion. This evidence stands unrefuted due to T. E.'s failure to file any response to this motion.

On April 19, 2022, APD Officer K. H. was dispatched to No Name Elementary School in City A in response to reports that L. E. had been physically assaulted by her father. This report was initiated by school administrators after L. E. reported that she was afraid to go home for fear that her father would hurt her.[3]

Officer K. H. first interviewed L. E., who described incidents occurring the prior week where her father had repeatedly struck her hands, arms, back, buttocks, and legs with a belt. As L. E. related to Officer K. H., the troubles with her father began on April 12, 2022, when her father became angry at her for "back talking" during a discussion about L. E.'s grades. Eventually realizing that T. E. planned to spank her in response, L. E. tried running away from him. In response T. E. pushed L. E. to the floor, slapped her face, and struck her multiple times on her arms, hands, and legs with a belt.[4]

The next morning (i.e., April 13) L. E. awoke not feeling safe, so she left the family home without permission and went to the home of a nearby friend. After the friend's mother contacted the Es to advise where their daughter was, T. E. picked L. E. up and brought her home. Once inside the house, T. E. proceeded to punish L. E. by pushing and dragging her into a room where he struck her arms, buttocks, and legs with a belt. Afterwards L. E. was forced to sit in T. E.'s home office where he kept her under constant observation. L. E. was given only a small amount of food and a single bathroom break during this day-long vigil.[5]

After interviewing L. E., Officer K. H. contacted T. E., who confirmed that he had spanked L. E. with a belt the prior week. T. E. said that spankings were sometimes used to discipline his daughters, and that during a spanking the prior week L. E. had tried to fight him instead of remaining still and accepting her punishment. As a result, he had struck L. E. on various parts of her body as she struggled to get away from him.[6]

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3 Agency Record at 000095.
4 Agency Record at 000096.
5 Agency Record at 000096-103.
6 Agency Record at 000097.

L. E. was transported to Alaska CARES where she was again interviewed and given a physical examination. The interview L. E. provided was consistent with the accounting of events she provided to Officer K. H.[7] Her physical exam revealed 31 marks and small bruises on her hands, arms, and legs. L. E. attributed a large dark bruise on her left thigh, abrasions on her left hip, and bruises on her knees to skateboarding falls. L. E. said the remaining bruises and marks were caused by her father spanking her, or from being pulled or pushed as she tried to get away from him or protect herself.[8] Marks around the large bruise on L. E.'s left thigh were consistent with her claim that T. E. had struck this pre-existing injury with a belt while spanking her.

T. E. was arrested immediately following his interview with Officer K. H. and charged with misdemeanor abuse of a child.[9] OCS also filed a child in need of aid (CINA) proceeding and obtained an emergency order for temporary custody.[10] Both of those proceedings were ultimately dismissed without any judicial findings being made against T. E.[11]

III. Procedural History

On May 6, 2022, OCS sent a written notice to T. E. advising that four substantiated findings of child abuse or neglect had been made against him on account of these events.[12] A timely appeal of these findings was submitted on behalf of T. E. by attorney Steven Priddle. Thereafter the parties agreed to hold this appeal in abeyance pending the outcome of T. E.'s criminal and CINA proceedings. After those matters were eventually dismissed, a hearing was scheduled for August 22-23, 2023, with associated pre-hearing deadlines for submittal of exhibits, exhibit lists, witness lists, and optional pre-hearing briefs. OCS fully complied with those deadlines; nothing was filed by either T. E. or his attorney.

T. E.'s attorney appeared at a pre-hearing conference held on August 18, 2023, where he requested a continuance of the hearing and a resetting of the previously expired pre-hearing deadlines. This request was granted, with the hearing postponed to October 16 and the deadline for filing pre-hearing materials reset for September 8.

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7 Agency Record at 000103.
8 Agency Record at 000103-112.
9 Agency Record at 000098.
10 Agency Record at 000312-322.
11 The agency record does not include documents regarding the dismissal of these matters, but this information was verbally reported during a status conference by the OCS hearing representative.
12 All four of these findings related to allegations that T. E. inflicted physical abuse and mental injury upon L. E., and mental injury to her younger sister, through his actions on April 12 and 13, 2022. After the order granting summary adjudication as to the finding that L. E. had been physically abused, OCS withdrew the other three findings. J. Test email, 10/1/2023,

OCS filed its motion for partial summary adjudication on August 22, 2023. Under the OAH rules of procedure T. E.'s response was due on or before September 6.[13] That deadline passed without anything being filed by T. E. or his attorney. The September 8 deadline for the filing of T. E.'s exhibits, exhibit list, witness list and pre-hearing brief also passed without anything being filed.

On September 12 the ALJ issued a notice advising he would rule on OCS's motion considering only the arguments and evidence offered by OCS unless a response was filed by September 15. Again, that deadline passed with nothing being filed by T. E. or his attorney.

Though the absence of any filings by T. E.'s counsel over an extended period suggests a breakdown in the attorney-client relationship, in the context of non-opposed motions for summary judgment the Alaska Supreme Court has noted that "[c]ourts should not save a litigant from his choice of lawyer."[14] This means OCS's motion must be resolved based on the presumption that T. E. has full awareness of it, and made the informed decision to file nothing in response.

On September 29, 2023, an order was issued granting OCS's motion as to the finding of physical abuse against L. E. on the bases set out in this decision. This was followed by OCS notifying the tribunal and T. E. that it was overturning the remaining substantiated findings, which means that all of the findings at issue in this administrative appeal have been resolved.[15] Since the final decisionmaker in this case is not OAH but the Commissioner of Family & Community Services or her designee, the prior order granting OCS's dispositive motion as to the finding that L. E. was physically abused became a proposed decision which requires the final decisionmaker's review.[16]

After the proposed decision was transmitted to the parties and the Department of Family and Community Services, both OCS and T. E. submitted proposals for action under AS 44.64.060(e). In its proposal for action, OCS expressed concern that a portion of the proposed decision evaluated a legal argument that it did not actually make. T. E.'s proposal for action asked for the proposed decision to be overturned, with the matter remanded back to OAH for a

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[13] 2 AAC 64.270.

[14] *Bauman v. State, Div. of Fam. & Youth Servs*., 768 P.2d 1097, 1099 (Alaska 1989), *quoting Jacobsen v. Filler*, 790 F.2d 1362, 1364-65 (9th Cir. 1986).

[15] Test email, October 1, 2023 ("The Office of Children's Services does not intend to move forward on the remaining findings and will be changing them to Not Substantiated as they will no longer be necessary as the substantiation of physical abuse as to L. E. (subject to the Commissioner's review) will serve the purpose of protecting a vulnerable population as barring condition in a civil history check.")

[16] AS 44.64.060(e).

hearing. In response to the concerns expressed by OCS, some revisions were made to the legal discussion of Section IV(D) below as permitted by AS 44.64.060(e). The relief sought by T. E. is denied.

IV. Discussion

A. Child Abuse Substantiation Hearings

The Alaska legislature has enacted several statutory schemes designed to protect children from abuse, maltreatment, and neglect.[17] In addition to the powers and duties set out in the CINA statutes, OCS is empowered to investigate reports of child maltreatment and to make findings as to whether those reports are "substantiated." OCS maintains a confidential child protection registry of all its investigative reports, with limited disclosure permitted to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.[18] Additionally, findings in this registry that have been deemed "substantiated" by OCS may be disclosed during the civil history checks required for individuals who are employed in positions or facilities that are funded or licensed by the Department of Health or Department of Family and Community Services.[19] Federal law also directs states to forward substantiated reports of child abuse to the United States Department of Health and Human Services for inclusion in a nationwide registry.[20]

Given the impact that substantiated findings can have on an individual's employment and career prospects, AS 47.17.040(c) provides that a substantiated finding cannot be entered against a person without first providing notice of that finding, and an opportunity to appeal it.

Here, T. E. challenges the substantiated findings that he physically abused L. E. Identifying the statutory standards to be applied here is not a straightforward exercise. While AS 47.17.290(3) generally defines the term "child abuse or neglect" as "physical injury…. 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," the practice of OCS is to reference AS 47.10.011 – a statute which sets out the circumstances when a minor can be deemed a child in need of aid – when entering findings into the database created under AS 47.17.

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17 *See* AS 47.10.005 - AS 47.10.990 (CINA statutes); AS 47.17.010 - AS 47.17.290 (child protection).

18 AS 47.17.040(a).

19 AS 47.05.300 (defining individuals and entities subject to background check requirements) and AS 47.05.330(a)(3) (providing that substantiated findings are disclosable during civil history checks).

20 34 U.S.C. § 20990

The path for using AS 47.10.011 as the basis for substantiated findings goes through AS 47.17.290(9), which defines the term "maltreatment" to mean "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."[21] Under AS 47.10.011 there are twelve separate paragraphs, each of which sets out a distinct circumstance under which a child may be found to be "in need of aid" for purposes of CINA proceedings. Here, OCS made a finding that T. E. had physically abused L. E. as that term is defined by AS 47.10.011(6).[22]

Through this appeal T. E. challenges OCS's decision to classify that allegation as substantiated. OCS accordingly has the burden to prove, by a preponderance of the evidence, that T. E. committed the acts OCS alleges, and that those facts appropriately give rise to a finding of maltreatment under AS 47.17.[23] "Preponderance of the evidence" means that a disputed fact is shown to be more likely true than not true.[24]

To satisfy this burden, OCS may rely on recorded statements and other documents that would ordinarily be excludable hearsay under the Alaska Rules of Evidence so long as it meets the standard of being "evidence of the type on which a reasonable person might rely in the conduct of serious affairs."[25] This means substantiation hearings can, and typically are, conducted without any in-person testimony from child witnesses. Instead, to meet its burden of proof OCS can rely upon recorded police and forensic interviews, written statements and affidavits, medical records, and photographs of injuries. OCS may accordingly rely upon this type of evidence in a motion for summary adjudication.

B. Summary Adjudication Standard

Summary adjudication, which is the administrative law equivalent of summary judgment, is a means by which a party can obtain a ruling in its favor without an evidentiary hearing.[26] To obtain summary adjudication, the moving party must show there is no genuine dispute of

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21 AS 47.17.290(9).

22 OCS's use of the phrase "physical abuse" can engender confusion since that term is neither defined nor referenced in AS 47.10.011(6). The statute instead references circumstances where a child "has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm" due to conduct by a child's parent. Consistent with OCS's practice, use of the phrase "physical abuse" in this order should be understood as a shorthand reference to the standard set out in AS 47.10.011(6).

23 *In Re K.C.G.*, OAH No. 13-1066-SAN (Dep't Health & Soc. Serv. 2013) (published at https://aws.state.ak.us/OAH/Decision/Display?rec=5952).

24 2 AAC 64.290(e).

25 2 AAC 64.290(a)(1).

26 *Smith v. State, Dept. of Revenue*, 790 P.2d 1352, 1353 (1990) ("A statutory right to a hearing does not require development of facts through an evidentiary hearing in the absence of a factual dispute.").

material fact, and that it is entitled to prevail as a matter of law.[27] In considering a motion for summary adjudication, all reasonable factual inferences must be taken, and all evidence viewed, "in the light most favorable to the non-moving party."[28]

In the context of civil lawsuits, Alaska law makes it extremely difficult for a party to obtain summary judgment since there is a "long-standing [and] lenient standard for withstanding summary judgment."[29] A party opposing summary judgment "need not prove that it will prevail at trial, but only that there is a triable issue of fact."[30] "Any evidence sufficient to raise a genuine issue of material fact, so long as it amounts to *more than a scintilla of contrary evidence*, is sufficient to oppose summary judgment."[31]

Even when the moving party submits compelling evidence that would be extremely difficult for the non-moving party to overcome at trial, a summary judgment motion must be denied so long as "a reasonable person could believe the non-moving party's assertions and… could conclude those assertions create a genuine dispute as to a material fact."[32] This means judges must deny summary judgment motions even if a moving party demonstrates to a very high degree of probability that it will ultimately prevail. If more than a scintilla of contrary evidence can be found anywhere in the record, a disputed question of fact exists that prevents summary judgment from being granted.

The Alaska Supreme Court has quite intentionally made it difficult for parties to obtain summary judgment. As noted in *Christensen v. Alaska Sales & Serv., Inc*.:

> We reiterate that ours is a lenient standard for withstanding summary judgment. The low standard for surviving summary judgment serves the important function of preserving the right to have factual questions resolved by a trier of fact only after following the procedures of a trial.[33]

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[27] *Alborn Constr., Inc. v. Dep't of Lab. & Workforce Development,* 507 P.3d 468, 473 (Alaska 2022) (holding that motions for summary adjudication before OAH are the equivalent of summary judgment motions in a civil lawsuit).

[28] *Samaniego v. City of Kodiak,* 2 P.3d 514, 521-522 (Alaska 2014).

[29] *Beardsley v. Robert N. Jacobsen & Darlene F. Jacobsen Living Trust*, 472 P.3d 500, 505 (Alaska 2020) (internal quotes omitted).

[30] *Indus. Commercial Elec., Inc. v. McLees*, 101 P.3d 593, 597 (Alaska 2004).

[31] *Beal v. McGuire*, 216 P.3d 1154, 1161 (Alaska 2009) (emphasis added; internal quotation omitted).

[32] *Kalenka v. Infinity Ins. Cos*., 262 P.3d 602, 607 (Alaska 2011).

[33] *Christensen v. Alaska Sales & Serv., Inc*., 335 P.3d 514, 521 (Alaska 2014) (Internal quotes omitted).

These rules and restrictions apply with equal force to administrative law judges when presented with motions for summary adjudication.[34] An agency's contention that no material dispute of fact exists is not entitled to deference.[35]

When a motion for summary judgment goes unopposed, a judge is not required to advise the non-moving party of the importance of filing an opposition, or the type of information and evidence required to properly oppose the motion.[36] However, "a movant does not have a right to summary judgment merely because the non-moving party fails to respond," and the tribunal "retains some degree of discretion in deciding whether to grant summary judgment in cases where there is no response to the filing of the summary judgment motion."[37] This means OCS's motion can be granted only if the uncontradicted evidence it offers demonstrates there is no issue of material fact, and that OCS is entitled to the requested rulings as a matter of law.[38]

C. Does the presence of visible marks left by a spanking mandate a finding of "physical harm" under AS 47.10.110(6)?

Alaska Statute 47.06.030(1)(B) provides that parents have "[t]he right and responsibility to protect, nurture, train, and discipline the child… and the right to exercise reasonable corporal discipline." The key word here is "reasonable." While judges and juries routinely determine during trials and hearings whether people acted reasonably in a given set of circumstances, it is a difficult standard to apply on summary adjudication since "some degree of imprecision inevitably attends the use of a reasonableness standard."[39] While it is not *per se* impossible for a party to obtain summary judgment in cases hinging on the reasonableness of actions taken by the non-moving party, it requires unique circumstances where a reasonable fact finder "could only conclude that the challenged conduct must be characterized in one way."[40]

Here, OCS contends there is no need to evaluate the reasonableness of T. E.'s actions since there is evidence in the record showing that he spanked L. E., and that L. E. had documented bruising for some days afterwards. In support of this argument, OCS cites to a

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34 *Alborn Constr., Inc.,* 507 P.3d at 473.

35 *See, e.g., State, Dep't of Revenue v. Merriouns*, 894 P.2d 623, 625 n.2 (Alaska 1995) (determinations of legal sufficiency involve questions of law to which an agency's determination receives no deference).

36 *Bauman v. State, Division of Family & Youth Services*, 768 P.2d 1097, 1099 (Alaska 1989); *see also Capolicchio v. Levy*, 194 P.3d 373, 379 (Alaska 2008) (holding that "the superior court is not required to notify a pro se litigant of his right to file an opposition to a motion for summary judgment where the litigant has filed nothing").

37 *Rockstad v. Erikson*, 113 P.3d 1215, 1220 (Alaska 2005).

38 *Capolicchio,* 194 P.2d at 379.

39 *Peratrovich v. State*, 903 P.2d 1071, 1075 (Alaska Ct. App. 1995) (internal quotes omitted).

40 *Hillman v. Nationwide Mut. Fire Ins. Co*., 855 P.2d 1321, 1325 (Alaska 1993).

series of past Commissioner decisions which held that "hitting a child hard enough to leave a visible mark constitutes physical abuse."[41] The decisions cited by OCS held that a substantiated finding of child abuse should be entered under AS 47.10.011(6) whenever a parent's use of corporal discipline leaves any type of visible mark thereafter – without regard to the parent's intentions, the scope or severity of those marks, the events preceding the corporal discipline, or other surrounding circumstances.

While OCS is correct in noting that some past commissioner decisions support this simplified approach, those arose from shifting agency definitions for the term "physical abuse" as used in AS 47.10.011(6). For a number of years, under more than one commissioner, it was well settled that:

> To substantiate a finding of physical abuse, there must be proof by a preponderance of the evidence that a child suffered physical injury "under circumstances that indicate that the child's health or welfare is harmed or threatened thereby."[42]

In 2013, however, a deputy commissioner acting on behalf of former Commissioner Streur changed the departmental interpretation of the underlying statute, such that the second element of the definition was dropped. Under this view:

> As the Department now interprets this statute, OCS may make a substantiated finding of physical abuse any time a child is injured. Such a finding must be upheld regardless of the circumstances that led to that injury. All that needs to be proven is that the child was injured in some way. [43]

There were readily apparent problems with this new standard, since it meant that any type of injury that a child suffered while interacting with a parent – such as a bruised knee suffered while playing a game of touch football – could justify a substantiated finding of child abuse.[44] When this standard was applied to corporal discipline cases, it meant that any action by a parent leaving some type of visible mark was automatically deemed physical abuse. This led to a series

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41 OCS Motion at p. 5.

42 *In re J. Doe*, OAH No. 06-0112-DHS (Comm'r of Health & Soc. Serv. 2007) (citing AS 47.17.290(2) and sec. 2.2.10.1 of the Child Protective Services Manual) (available at https://aws.state.ak.us/OAH/Decision/Display?rec=5934); *see also, e.g., In re X. & Y.Z.*, OAH No. 09-0589-DHS (Comm'r of Health & Soc. Serv. 2010) (available at https://aws.state.ak.us/OAH/Decision/Display?rec=5937).

43 *In re F.T.*, OAH No. 13-0050-SAN (Comm'r Heath & Soc. Serv. 2013) (available at https://aws.state.ak.us/OAH/Decision/Display?rec=5950).

44 This problem was discussed in some depth in *In re L.H.,* OAH Nos. 14-0725-CHC/14-0658-SAN (Comm'r of Health & Soc. Serv. 2015) (https://aws.state.ak.us/OAH/Decision/Display?rec=5957).

of cases where parents engaging in seemingly reasonable disciplinary measures were placed on the OCS registry as child abusers.[45]

Within a few years Commissioner decisions began walking back from this inflexible standard in cases where parents were found to have used reasonable corporal discipline despite the presence of visible marks afterwards.[46] While OCS accurately points out that references to the old 2013 standard can still be found in some recent decisions not available on the OAH website, the common thread in all those matters was credible evidence introduced during hearings showing that parents had used manifestly unreasonable levels of force in alleged efforts to discipline their children.[47]

This trend away from a simplistic approach where any visible mark or bruise is sufficient to support a substantiated finding of physical abuse finds considerable support in OCS's governing statutes. The definition of "child abuse or neglect" in AS 47.17.290(3) specifically references "physical injury… under circumstances that indicate the child's health or welfare is harmed or threatened thereby."[48] To support a child in need of aid finding under AS 47.10.011(6), proof is required of either "substantial physical harm," or the "substantial risk that the child will suffer substantial physical harm." While recognizing the ambiguous nature of the word "substantial" as used in this statutory context, it does not support a standard where *any* type of discernible physical injury is sufficient for a substantiated finding of physical abuse by OCS.

To be clear, the presence of bruises or other marks caused by a spanking can be important evidence in assessing the reasonableness of a parent's actions. But in and of itself, such evidence

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[45] *See, e.g., In re: N.M.,* OAH No. 12-0423-SAN (2103) (Comm'r of Health & Soc. Serv. 2013)(unremarkable spanking of a 7-year-old boy which left a small bruise on his right thigh deemed "physical abuse") (available at https://aws.state.ak.us/OAH/Decision/Display?rec=5946); *In re: U.Z.*, OAH No. 12-0422-SAN (Comm'r of Health & Soc. Serv. 2013) (mother committed child abuse when she bit and scratched her 16-year-old son after he grabbed and pinned her down) (available at https://aws.state.ak.us/OAH/Decision/Display?rec=5945).

[46] *See, e.g., In re: X.Y.*, OAH No. 15-0715-SAN (Comm'r of Health & Soc. Serv. 2016) (finding reasonable corporal discipline despite child suffering abrasions and scratches when being held down by father) (available at https://aws.state.ak.us/OAH/Decision/Display?rec=5962); *In re: L.H., supra* (reasonable corporal discipline found notwithstanding 3-year-old boy suffering a cut lip and bruised ankle during a mother's efforts to control a violent temper tantrum).

[47] OAH No. 19-0278-SAN (mother hit 7-year-old girl in face causing a bloody nose or split lip, stuck her on the head with a clothes hangar, and drug her across the floor causing a rug burn); OAH No. 22-0177 SAN (injuries suffered by teenage girl in a fight with her mother included a bite mark with visible teeth indentations, scratches on the ribs, and bruising around her left eye); OAH No. 22-0252-SAN (father punched preteen son 10-15 times); OAH No. 20-0487-SAN (mother whipped preteen son with a set of jumper cables).

[48] Consistent with this statutory language, Chapter 2.2.6.1 of OCS's Child Protection Services Manual advises that substantiated findings require evidence of "maltreatment under circumstances that indicate the child's health or welfare is harmed or threatened thereby." The current version of this manual is available online at http://dpaweb.hss.state.ak.us/training/OCS/cps/index.htm#t=CPS_Policy_Manual.htm.

does not mandate a substantiated finding of physical abuse – particularly in the context of a motion for summary adjudication.[49]

D. OCS has established that T. E.'s actions toward L. E. constituted "physical abuse."

OCS summarizes the evidence supporting its substantiated findings of physical abuse of L. E. as follows: (1) T. E. admitted to hitting L. E. with a belt; (2) in two separate recorded interviews L. E. disclosed in great detail how T. E. repeatedly struck her with a belt on April 12 and 13, 2022, in addition to slapping, pushing and dragging her at various points; (3) an examination by Forensic Nurse Practitioner K. Q. documented numerous small areas of bruising on many parts of L. E.'s body, many of which appeared to have been cause by an object such as a belt; and (4) in recorded interviews L. E.'s younger sister advised that she was home one of the days when L. E. was spanked and could hear much of what happened.[50] Working from the assumption that any corporal discipline leaving visible marks on a child constitutes physical abuse, OCS contends the totality of this evidence justifies entry of summary adjudication as to the physical abuse of L. E.

The medical evidence regarding the bruises and marks on L. E.'s body is mitigated to a small extent by the fact both L. E. and her mother reported that the most noticeable bruise, which was located on L. E.'s left thigh, was caused by her falling while skateboarding.[51] However, L. E. also reported that T. E. struck her with a belt on top of this bruise in a manner that was especially painful.[52] The medical exam performed by K. Q. found areas of more recent bruising around this injured area which corroborated L. E.'s recounting of events.[53]

The request for a formal hearing filed by T. E.'s counsel includes an allegation that *most* of L. E.'s documented injuries were caused by her falling while skateboarding.[54] However, mere allegations like this are insufficient to defeat a motion for summary adjudication. Instead, the non-moving party must set forth specific facts showing that there is a genuine issue of material fact.[55]

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[49] In its proposal for action, OCS acknowledges that the Commissioner decisions cited in its motion do not set out the correct standard, and that its staff instead relies upon an internal *Maltreatment Assessment Protocol* in evaluating whether allegations of physical abuse justify a substantiated finding under AS 47.10.011(6). This protocol provides that "more than superficial bruise(s) or cut(s)" are required to support a substantiated finding.

[50] OCS Motion, pp. 4-5.

[51] Agency Record at 000013, 000098 and 000472.

[52] Agency Record at 000013.

[53] Agency Record at 000106.

[54] Agency Record at 000091.

[55] *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

Here, OCS has provided L. E.'s statements that most of the documented injuries were caused by T. E.'s actions on April 12 and 13, 2022, and an affidavit from a medical professional who opines that many of the bruises and marks noted during L. E.'s examination were "consistent with being struck by a belt." Since the interviews, photographs and medical evidence provided by OCS in support of its motion are not challenged or refuted by T. E., it must be presumed that most of the observable injuries documented during L. E.'s physical exam were caused by T. E. striking her repeatedly with a belt, or by T. E. pushing, pulling, and grabbing L. E. while she struggled to protect herself.

As discussed above, the presence of visible marks caused by a spanking is not, by itself, sufficient to substantiate a finding of physical abuse. There is no statute, regulation, or provision in the OCS Child Protection Services Manual explicitly prohibiting a parent from utilizing a belt when administering corporal discipline. Nor are there any reported Alaska cases holding that a parent's use of a belt when spanking a child is, by itself, sufficient to support a substantiated finding of physical abuse.

While it is clear parents do not have an unlimited right to utilize corporal discipline,[56] with extreme forms of punishment deemed impermissible,[57] the line between reasonable corporal discipline and child abuse has not been clearly drawn by the Alaska Supreme Court. A review of cases from outside jurisdictions does not offer useful guidance here, aside from holdings by various appellate courts that the presence of marks or bruises after a spanking does not automatically demonstrate that child abuse has occurred.[58]

The correct standard to apply here is that set by AS 47.17.290(3) and AS 47.10.011(6), which collectively focus on the question of whether T. E. caused physical injury to L. E. under circumstances indicating her health or welfare was harmed or threatened thereby. Here, OCS has presented unrefuted evidence that over a two-day period T. E. repeatedly struck L. E. with a belt

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[56] *In re D.C.,* 596 P.2d 22, 23 (Alaska 1979) (upholding termination of parental rights for mother and father who repeatedly – and unapologetically – spanked their children in a manner that caused extensive bruising).

[57] *Burke P. v. DHSS, Office of Children's Services*, 162 P.3d 1239, 1241 (Alaska 2007) (kicking, hitting, and burning a child with a butane candle lighter "went well beyond corporal discipline").

[58] *See, e.g., J.C. v. Department of Children & Families*, 773 So.2d 1220 (Fla. App. 2000) (presence of bruising did not conclusively show that corporal punishment was excessive or abusive); *Hildreth v. Iowa Dep't of Hum. Servs.*, 550 N.W.2d 157, 160 (Iowa 1996) (mere presence of "welts, bruises or similar markings" caused by a spanking was not, by itself, evidence of child abuse under Iowa law); *Woodson v. Commonwealth*, 871 S.E.2d 653, 656 (Va. App. 2022) (transient bruises and marks caused by spanking 12-year-old with a belt insufficient to show that mother committed child abuse); *In re J.L.*, 891 N.E.2d 778, 791 (Ohio App. 2008) (bruises and welts caused by parent spanking a 3-year-old child on the back of her legs insufficient to justify child protection agency's decision to take custody).

using a level of force that inflicted numerous bruises on L. E.'s hands, arms and lower body that were still plainly visible one week later. T. E. even struck L. E. on top of a pre-existing injury on her left thigh. L. E. described additional injuries suffered when T. E. slapped her and pushed her to the floor as she was trying to protect herself.

When taken together, the documented injuries L. E. suffered were more consistent with a one-sided brawl than a reasoned effort to discipline a defiant 12-year-old girl. In this regard, T. E. striking L. E. on top of a prominent bruise is a particularly telling fact; striking a previously injured area is strong evidence that a parent acted without due regard for a child's health and welfare. While T. E. had the right to utilize reasonable corporal discipline, he crossed the line with the intensity and duration of his disciplinary efforts here.

Accordingly, even applying a standard that is less stringent than that argued by OCS, the unrefuted evidence is sufficient to show that, as a matter of law, OCS has demonstrated that it is entitled to summary adjudication upholding the substantiated finding that T. E. physically abused L. E. under the standards established by AS 47.17.290(3) and AS 47.10.011(6).

V. Conclusion

Based on the uncontradicted evidence offered by OCS, summary adjudication is granted. The substantiated finding that T. E. physically abused L. E., as described in the OCS notice dated May 6, 2022, is therefore affirmed.

DATED: November 20, 2023.

By: *Signed*
Chrissy Vogeley
Special Assistant II[59]

APPEAL RIGHTS

This decision is 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.

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

[59] By delegation from the Commissioner of Family and Community Services.