

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

In the Matter of	)	
	)	
Q.J & D.S	)	OAH No. 20-0463-CHC
	)	
In the Matter of	)	
	)	
Q.J	)	OAH No. 20-0523-SAN
	)	
In the Matter of	)	
	)	
D.S	)	OAH No. 20-0522-SAN
	)	

DECISION¹

I. Introduction

In these consolidated cases, the Office of Children’s Services (OCS) received a report of maltreatment stemming from the alleged use of zip ties to physically restrain the oldest of three foster children living in the home of Q.T.J and her husband, D.S. After an investigation, OCS also concluded that two younger children, placed in the home six months prior, were emotionally harmed and manipulated by Ms. J and Mr. S. Therefore, OCS determined that the substantiated findings of physical abuse and mental injury should be entered into the child protection registry maintained by OCS. Additionally, due to foster care program violations that included the substantiated allegations of physical abuse, OCS notified Ms. J and Mr. S of the intent to revoke their foster care license. Ms. J and Mr. S requested an administrative hearing to contest both the findings of maltreatment and the proposed revocation of their foster care license.

Ms. J and Mr. S faced difficult situations as foster parents and clearly intended for their home to offer a structured, disciplined environment for children placed in their care. However, this decision ultimately concludes that Ms. J and Mr. S more likely than not maltreated a child in their home by physically abusing him with zip tie restraints. Relatedly, because the preponderance of the evidence shows that the couple violated multiple foster care licensing

¹ This Decision was initially issued on June 15, 2022. It is reissued with grammatical errors on pages 1 and 20 having been corrected; the holding of the decision remains unchanged.

regulations, including the prohibitions on the physical restraint of children, and because they failed to exercise sound judgment, their foster care license is revoked.

II. Facts

A. General Factual Background

In March 2005, prior to her relationship with Mr. S, Ms. J was granted a provisional foster care license and briefly operated a therapeutic foster home for Family Services A. Just a few months later, in July 2005, allegations of physical abuse and neglect were substantiated against Ms. J based on evidence of her hitting the six-year-old foster child in her care and withholding his prescription medications. During that investigation, Ms. J agreed to relinquish her foster care license.² In 2009 Ms. J again applied for a provisional license and marked “No” on her application to the question, “Have you or any household members at any time ever been investigated for child abuse or neglect?” despite having been previously substantiated for both physical abuse and neglect in 2005. Her application was denied by OCS.³

In December 2018 Ms. J and Mr. S submitted a foster care licensing application to Family Services B, a child placement agency in Anchorage that predominantly works with children with histories of trauma, requesting a license for up to two children.⁴ They described themselves as a faith-oriented couple with good communication skills, supportive extended family, and a strong relationship of three years. Their home, a two-level single-family house in Anchorage with four bedrooms and three bathrooms, offered ample space for foster children.⁵ Regarding notable skills, Ms. J described herself as a gourmet chef, and Mr. S had insight as a former foster child himself.⁶ Both had already completed multiple hours of foster care training, and were aware that additional hours would be required in the future should they be approved.⁷ On January 8, 2019, OCS representative Allen Lewis interviewed the couple in their home and determined they were appropriate license candidates.⁸

Although her prior licensing history would have barred Ms. J from being approved for a foster care license, due to an administrative oversight by OCS on March 6, 2019, the agency

² SAN record, p. 28, CHC record p. 71.

³ CHC record p. 70.

⁴ CHC record p. 143.

⁵ CHC record p. 248.

⁶ CHC record p. 248.

⁷ Test. Edwards, S, J.

⁸ CHC record p. 278.

issued Mr. S and Ms. J a provisional foster care license.⁹ In the months that followed, OCS received several protective services reports regarding incidents in the home, but none resulted in substantiated findings of maltreatment. Another report in March 2020 resulted in the substantiated findings which are the subject of this appeal.

B. March 2019 report and investigation

On March 13, 2019, shortly after the provisional license was approved, OCS received a report that K.H., a 10-year-old foster child placed in the J/S household, was struck by Mr. S.¹⁰

When OCS receives a report of possible harm, a preliminary decision is made whether to “screen in” the report for investigation. The standard used in that decision is whether the allegations, if true, implicate a safety concern for the child or children. Here, OCS screened in the report as warranting investigation because of the risk to the children’s safety if the allegations of physical abuse were accurate. If a report is screened in, it is assigned to a protective services specialist to conduct an investigation and prepare an assessment. Here, OCS Protective Service Specialist (PSS) Wesley Manning was assigned to investigate the concerns in the report.

1. Interview with K.H.

On March 14, 2019, PSS Manning and Community Care Licensing Specialist (CCLS) Teresa Bell interviewed K.H., who had been living in the home for approximately two weeks with his brother, twelve-year-old EN.¹¹ K.H. described being “hit upside the head” by Mr. S while getting a haircut, and indicated that Mr. S had also struck his brother E.N. with his slipper for laughing at his saying “poop,” for clogging the toilet, and for not liking the haircut Mr. S gave him. He also said Mr. S hit them both with a belt when they were under a blanket in bed.¹²

2. Interview with E.N.

PSS Manning and CCLS Bell interviewed E.N., who also stated that Mr. S had hit him three times with a shoe when he laughed at Mr. S for saying “poop,” that Mr. S hit him with a belt, made him clean the upstairs, and slapped K.H. on the head during a haircut.¹³ E.N. believed he’d be in trouble with Ms. J and Mr. S if they knew the boys were discussing being hit.

3. Closure of March 2019 investigation

⁹ CHC record, p. 46.

¹⁰ CHC record, p. 67.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

PSS Manning and CCLS Bell interviewed Ms. J and Mr. S that same day, both of whom denied using any physical discipline with the children.¹⁴ Two individuals familiar with the boys, OCS employee PSS Bessie Binkowski and Tami Eller, Family Services B Licensing Supervisor, both indicated that K.H. and E.N. could be manipulative and untruthful.¹⁵ Neither child had any visible marks or bruises. Accordingly, although the boys gave consistent reports of corporal punishment, no findings were made regarding the reports of harm, and the investigation was closed. However, the boys were removed from the home and the relationship between Family Services B and Ms. J and Mr. S was terminated shortly thereafter.

C. March 2020 report and investigation

On October 31, 2019, the J/S foster care license was transferred to OCS. Two brothers, D.P.S. and D.C.S., ages 11 and 13, were placed in the J/S household. The agency's goal for children was for them to join their siblings and be reunified with their biological parents. Initially, things seemed to be going well. Then, on March 23, 2020, OCS was contacted by both the biological mother and the aunt of J.B.H., an 11-year-old child who arrived at the J/S home earlier that day.¹⁶ J.B.H. had reached out to his mother to report that he had been hit, kicked, and strangled by D.S, and he texted her photos of scratches on his arms which he claimed were from the altercation.¹⁷

The case was screened in for investigation and assigned to PSS Jamie Hillhouse. PSS Hillhouse responded to the J/S home the following day with APD Detectives Davies and Czajkowski and two uniformed patrolmen. J.B.H. was transported to Alaska CARES, a center used by OCS and law enforcement to conduct interviews regarding child abuse, along with D.C.S. and D.P.S, two boys who had been living in the home approximately six months.

1. Interview with J.B.H.

J.B.H. was interviewed by Detective Davies.¹⁸ Rather haltingly, J.B.H. described that he arrived at the J/S home feeling very upset, as that morning he had believed he was returning to his mom's home in Town A, not being taken to a foster home. Because he was upset, he wanted to eat dinner alone in his assigned room and talk to his mom on the phone, but his foster parents

¹⁴ CHC record, p. 67-68.

¹⁵ *Id.*

¹⁶ CHC record, p. 417-420.

¹⁷ *Id.*

¹⁸ This summary is based on the video recording of Det. Davies' interview with J.B.H, in the record as Exhibit 46.

told him no. He put his head down on a table, after which Mr. S “came up into his face” and placed his hands on him, leading him to fight back.

According to J.B.H, Mr. S then grabbed him by the neck and shoulder and, at one point, pulled his arm behind his neck, making it difficult to breathe and tearing a hole in his shirt. J.B.H. reported that Mr. S told Ms. J to take J.B.H.’s cell phone out of his pocket. At the time J.B.H.’s right leg was in a cast, and he began to strike out with his crutches, hitting Mr. S and trying to flip a table.

J.B.H. further reported that when the situation finally calmed, his foster parents gave him a crushed pill with water, and he fell asleep. When he woke up, his phone was returned to him, and he called his mom and aunt about being restrained by Mr. S.

Photographs taken during the investigation showed scrapes on the inside of J.B.H.’s bicep, on his back, and on the top of his foot.

2. Interviews with the foster parents

Ms. J and Mr. S were interviewed at different times by PSS Sharee Stollard and CCLS Todd Brown, as well as Detective Czajkowski. Throughout those interviews, they maintained that the incident as described by J.B.H. did not occur, and any injuries on J.B.H.’s body predated his arrival to their home.

Instead, the foster parents asserted that shortly after J. B.H. arrived at the home he struggled to navigate down a flight of stairs on his crutches. Mr. S put his hands on J.B.H to steady him, but J.B.H pulled away, not wanting to be touched, which caused him to fall. The foster parents further reported that J.B.H then began to hit and kick at Mr. S with his crutch and cast, and that Mr. S responded by embracing him to prevent him from hurting himself and others. He was released, but then J.B.H tried to flip over a table with his crutch, and again Mr. S physically restrained him by holding his wrists in an embrace as he learned in his foster care training. The struggle continued for about 15-20 minutes until J.B.H. calmed, at which point they gave him an Aleve for his complaints of leg pain. He was given permission to connect to the Wi-Fi and contact his mother, and there were no further issues the rest of the day.¹⁹

3. Interviews with the other residents in the J/S home

¹⁹ CHC record p. 426-429, SAN record p. 52.

The two foster children who had lived in the J/S household for over 6 months were also interviewed, but neither made any disclosures of physical abuse. Neither did 14-year-old T.S., although he had been placed in the home just a day prior.

The investigation concluded without a finding of physical abuse by Mr. S, as both he and J.B.H. had sustained injuries, J.B.H. had been removed from his previous placement due to volatile behaviors, and no other foster children made any disclosures of physical abuse. However, J.B.H. was removed from the home.

D. April 2020 report and investigation

On April 6, 2020, OCS received a report of harm involving T.S, the 14-year-old boy placed in the J/S home approximately two weeks earlier. T.S. had reportedly run away from the placement the previous day after assaulting his foster parents. The police had detained him blocks from the home and charged him with two counts of felony DV Assault 3.²⁰ However, on April 8, 2020, PSS Sharee Stollard, CCLS Todd Brown, Officer Reid, and Detectives LaPorte and Childers responded to home to conduct a more thorough investigation.²¹

1. Interview with Mr. S

When the group arrived, Ms. J and the two brothers, D.P.S. and D.C.S., were not at home. Mr. S was interviewed by Officer Childers and PSS Stollard. He described an incident that began around 1:00 a.m. on April 5, with T.S. being very loud and disruptive and using foul language while playing an online video game in his room. When telling him to shut the game down was unsuccessful, Mr. S tried to physically remove the game controller from T.S.'s hands. According to Mr. S, this quickly escalated into a physical altercation: T.S. kicked Mr. S in the groin, Mr. S responded by wrapping his arms around T.S.'s upper torso and pulling his body close. T.S. continued kicking, so Mr. S pulled him onto the floor, attempting to restrain his legs.

At the time, Mr. S had zip ties in his pocket that he would later testify were left over from an earlier project. He told the interviewers that Ms. J entered the room and tried to help physically restrain T.S.'s legs, but fearful she would get hurt, Mr. S asked her to leave and get more zip ties from the garage. He then placed zip ties around T.S.'s arms loosely enough for him to be able to get out of them, and zip tied his legs. T.S. calmed down, and the foster parents

²⁰ AS 11.41.220(A)(1)(A).

²¹ CHC record p. 316 – 416.

left the room for approximately 15-20 minutes. When they returned, T.S. had removed all the zip ties.

Mr. S told the investigators that roughly six hours later, at 7:30 a.m., he went back into T.S.'s room to give him his daily medications. He noticed that T.S. had a zip tie tightly secured to his right wrist but presumed that was an extra zip tie that had fallen out of his pocket the night prior and that T.S. had tied on himself to self soothe. According to Mr. S, since T.S. was again becoming agitated, Mr. S provided him with more zip ties, which T.S. proceeded to tie around his hands and torso to calm himself. Then T.S. announced he wanted to leave, so Mr. S cut off the ties, and T.S. packed his bags and left the home.

Mr. S explained that both during the physical altercation hours earlier and in the days prior T.S. had made threatening comments about stabbing him, hurting the other children in the house, and wanting to burn the house down. He was also sneaking food from the pantry at night, and was possibly not being compliant with his medications. Mr. S stated that the zip ties were only used once, and just as means to calm T.S. when he was out of control.

2. Interview with Ms. J

While PSS Stollard and Officer Childers and the other members of the group were still present, Ms. J returned home and was interviewed about the April 5 altercation. Her version of these events mirrored her husband's. She told investigators that T.S. was acting out, and the altercation woke up and frightened the other two children in the home. Mr. S asked her to get more zip ties from the garage, but she "could only find the small ones."²² That night she and Mr. S set the electronic alarm they had installed near the top of the door frame in T.S.'s room prior to his arrival.²³

3. Interview with T.S.

T.S. was interviewed by Officer Childers at Alaska CARES.²⁴ Throughout the interview, he was visibly upset and seemed emotionally overwhelmed that he had been zip tied by caregivers. He came across as very credible, often making statements against his own interest as he openly acknowledged and explained his own behaviors.

²² Mr. S later showed the officers the tub where he stored the zip ties, all of which were the same size. CHC record, p. 351.

²³ *Id.*

²⁴ This summary is based on the video recording of Det. Childers' interview with T.S., in the record as Exhibit 40.

T.S. described three specific instances when Mr. S placed him in zip ties, with Ms. J present each time. The first time, Mr. S thought he was going to throw something, so he was restrained, and zip ties were placed around his arms. T.S.'s memory was hazy regarding this incident, but testimony offered at hearing suggests that the parents allowed him to speak to PSS Shane Denny by telephone and he deescalated. PSS Denny was not made aware that zip ties were being used.

The second time was the early morning incident on April 5, when he was playing a video game in his room and was slow to shut it off. T.S. reported that when Mr. S entered his bedroom and T.S. saw the zip ties in his back pocket, T.S. felt very anxious as he did not want to be restrained again. He became increasingly agitated, and Mr. S responded by getting closer and placing his hands on T.S.

According to T.S., Mr. S physically held him down, dragged him to the floor, pulled T.S.'s arm up around his own throat, and put his knee on T.S.'s torso. T.S. stated he was kicking and shouting threats, but clarified they were empty threats made in the heat of the moment. He described Mr. S placing zip ties around his wrist and arms, and two sets around his legs. He indicated that Ms. J was present, but at one point she left to get more zip ties. After all his limbs were secured with zip ties the foster parents set the alarm on his room, then left and shut the door. T.S. explained he was able to get out of all the ties but one; he tried to bite the zip tie off his right wrist but could not, as it was too tight, and his teeth were too sore.²⁵

T.S. described a third zip tie incident occurring later the same day. Mr. S entered the room several hours after the first incident, around 7:30 a.m., to give T.S. his regular medications. T.S. was resistant, as it was too early to take his daily medications, giving rise to another physical altercation that resulted in Mr. S again zip tying his wrists and waist. At that point T.S. told his foster parents he wanted to leave. Mr. S cut off the ties and T.S. packed his bags and left the home. T.S. explained that he did so because he knew that if he was a "runaway," then the police would be contacted, and he would be removed from the placement.

4. Physical exam of T.S.

T.S. was examined at Alaska CARES by ANP Yvette Dempsey, a forensically trained nurse practitioner who conducts physical examinations as part of the Alaska CARES evaluation process. She found that he had notable fresh ligature marks and patches of missing skin around

²⁵ No explanation was given as to why his teeth were sore.

his wrists that followed the curve of his hands, consistent with being tightly bound with zip ties.²⁶ There were significant bruises around the back of T.S.'s arms, his wrists, forearms, his neck and upper shoulder area - many in places where bruises could not be self-inflicted.

5. Interviews with D.P.S. and D.C.S.

The two brothers, ages 11 and 13, were individually interviewed at Alaska Cares.²⁷ Both were adamant that they loved their foster parents, and were very anxious about being able to return to the J/S home.

D.P.S. reported that he had not seen the altercations with T.S., but Mrs. J. had explained to him that T.S. had kicked Mr. S in the privates, bitten him on the hand, and that T.S. had been "given a couple chances." Ms. J told him that T.S. had threatened to kill him and his brother, so she and Mr. S had stayed up all night watching T.S.

D.C.S. similarly reported that Ms. J had told him that T.S. had threatened to beat him and his brother up when they went to sleep, had kicked Mr. J. in the leg, and had lied to the police. D.C.S. also clearly and accurately described zip ties, drew a picture of one, knew they were kept in the garage, and said he had seen the ties on T.S. He explained that the zip ties were put on T.S. because he was going to murder people in the house and because he ate food out of the cupboards at night.

D.C.S. was very worried about being removed from the J/S household, as he felt that Ms. J would help him get out of Special Education. He clearly did not want to return to his biological home, felt that his biological parents might try to kidnap him, and described his OCS case worker as "evil."

6. Conclusion of the investigation

On April 14, 2020, at the conclusion of the investigation spearheaded by Officer Childers, the criminal assault charges against TS were dropped. On April 17, 2020, Mr. S and Ms. J were both served with citations for child abuse charges pursuant to AMC 8.10.030(A).

On April 27, 2020 OCS notified the couple of the intention to revoke their foster care license.

E. Procedural History

²⁶ Test. Dempsey. See also photos (CHC record p. 463-476)

²⁷ The description of the boys' interviews are based on the videotaped recordings of those interviews.

On May 7, 2020, Ms. J submitted a request for an administrative hearing to challenge the proposed revocation of their foster care license. The foster care licensing division referred the matter to the Office of Administrative Hearings (OAH) on May 21, 2020.²⁸ It was assigned OAH Case No. 20-0463-CHC.

In the meantime, separate from the foster care licensing investigation, OCS was also concluding its investigation into the underlying protective services report. On May 5, 2020, OCS sent Ms. J and Mr. S notices of its substantiated findings of mental injury and physical abuse against each of them. On May 14, they requested a hearing to challenge those substantiated findings. OCS referred their hearing request to the OAH on June 8, 2020.²⁹ Mr. S's appeal was assigned case number 20-0523-SAN, and Ms. J's was assigned 20-0522-SAN.

A case planning conference was held on July 14, 2020, in all three matters, with Ms. J, Mr. S, OCS's lay representative in the substantiation matters and an Assistant Attorney General assigned to the licensing matter all participating. The parties agreed that the cases should be consolidated as permitted under 2 AAC 64.190(a). At the agreement of the parties, the consolidated matter was then held in abeyance until February 2022 due to the pendency of a related criminal matter.

On February 11, 2022, with the criminal charges having been dismissed, the parties submitted a mutually agreed upon proposed scheduling order, setting various prehearing deadlines and a set schedule in April for the hearing.³⁰

Shortly thereafter both OCS representatives filed prehearing briefs, as well as witness and exhibit lists, including the 329- and 742-page records in their respective cases. The licensing division's exhibit list also included all the emails, videos, and documents Ms. J and Mr. S provided to OCS regarding both the substantiation and the licensing cases. The foster parents submitted a witness list.

The hearing began as scheduled on April 7, 2022, although it was interrupted due to witness scheduling issues. The OCS licensing and child protection programs were represented respectively by Assistant Attorney General Kimberly Allen and Agency Representative Kimberly Ford. Ms. J and Mr. S represented themselves. Ultimately, six days of hearing were

²⁸ Pursuant to AS 44.64.060(b), OCS was required to have submitted this referral to OAH by May 18, 2020.

²⁹ Pursuant to AS 44.64.060(b), OCS was required to have referred these hearing requests by May 25, 2020.

³⁰ The parties asked that the hearing be held via Zoom.

held at which testimony was taken from Ms. J, Mr. S, their character witness N.N, OCS Protective Services Specialists Sharee Stallard, Shane Denny, Jean Ouellette, Wes Manning and Jenny York; OCS Community Care Licensing Specialists Jennifer Heikkila, Yuri Miller and Christine Edwards; Anchorage Police Department Detectives Bonnie Childers³¹ and Shawn Davies; and Forensic Nurse Practitioner Yvette Dempsey.

Ms. J and Mr. S presented oral closing arguments on May 4, 2022. Both OCS representatives submitted written closing arguments as to their respective cases, and the record closed on May 16, 2022.

F. Evidentiary Issues

1. De novo review

As is the case in most Alaska administrative appeals, the decision made as a result of this hearing is made with new evidence. Indeed, the parties here presented six days of new testimony. Therefore, this is a *de novo* review of both whether Ms. J and Mr. S committed child maltreatment, and whether their foster care license should be revoked.

If the proposed decision differs from OCS’s initial determination, the difference may not stem from any “errors” by OCS when it made its initial decision. Instead, what follows from an administrative hearing is a new decision typically made with a more complete, body of evidence. The purpose of an administrative appeal process is to make the best decision possible at the executive branch level.

In the course of making the best decision possible, the Commissioner may, for a variety of reasons, find it appropriate to defer to judgments made by the investigatory or licensing staff, particularly those that are based on specialized expertise or administrative experience in the field.³² A commissioner is never bound to defer to subordinates in this context, however.³³

³¹ At the time she investigated issues arising in this case she was an officer but has since been promoted to Detective.

³² See, e.g., *Quality Sales Foodservice v. Dep’t of Corrections*, OAH No. 06-0400-PRO (Commissioner of Administration, Sept. 21, 2006) at 11, 16 (“While there is no automatic deference . . . , the commissioner may, in appropriate circumstances, wish to extend some practical latitude to the judgments of agency staff,” giving deference “in recognition of the need to give procurement staff some latitude to manage a complex procurement”).

³³ See *Blasting v. New Jersey Dep’t of Labor & Workforce Dev.*, 2005 WL 3071509, *4-5 (N.J. Super. App. Div. 2005) (under New Jersey’s standard administrative process, similar to Alaska’s, deference to staff’s preliminary decisions is not required in administrative appeal process; administrative appeal is not like court review, where deference is indeed required); *Baffer v. Dep’t of Human Serv.*, 553 A.2d 659, 662-3 (Maine 1989) (“the Commissioner [is] the final repository of discretion,” where final administrative decisionmaker thinks he “must defer” to prior exercises of discretion, “[t]his thwarts the purpose of the hearing procedure”); *In re Service Oil Delta*

2. Hearsay limitation

As was recognized from the outset, one complication in consolidating the foster parents' appeals of the licensing determination and the substantiation determination is that the two types of appeals are governed by different procedural rules. In Alaska, some administrative appeals are covered by the Administrative Procedure Act (APA) and some are not. The present case represents a consolidation - by consent of the parties - of a substantiation case that is not subject to the APA with a formal licensing case under AS 47.32.150(a) that is subject to the APA.

Cases subject to the APA have a special rule regarding hearsay evidence that is more restrictive than the rules governing most other administrative proceedings. The APA hearsay rule, known as the residuum rule, provides:

Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action.³⁴

In most non-APA cases, including substantiation appeals, there is no special restriction on the use of hearsay; the tribunal may admit and rely upon any "evidence of the type on which a reasonable person might rely in the conduct of serious affairs."³⁵

Prior to substantive testimony being offered in this case, the ALJ issued a Notice Regarding Hearsay Limitations clarifying that the restrictions of the residuum rule would not apply to any evidence admitted insofar as that evidence was used to resolve the substantiation matters (20-0522/0523-SAN).³⁶ In the context of reaching findings to resolve the licensing dispute, on the other hand, the APA's restriction on use of hearsay would apply, and would limit the use of statements actually ruled to be hearsay and not within an exception.

Ultimately, however, the hearsay testimony at issue was of comparatively small significance given the overwhelming amount of compelling non-hearsay evidence presented. Few hearsay objections were raised by any party throughout the hearing. However, all the children placed at the J/S home were interviewed during the investigations of reports of harm. Their statements were admitted, which merits explanation, as no child testified at the hearing.

Fuel Co. (Commissioner of Administration, May 26, 1998), at 4 ("the Commissioner is not obligated to defer to the interpretation advanced by [the Division of General Services]").

³⁴ AS 44.62.460(d).

³⁵ 2 AAC 64.290(a)(1).

³⁶ Of course, the fact that an item might include hearsay, and the fact that there may have been no opportunity to test the hearsay statement through cross examination, would be consideration in assessing the weight the item should be given.

The most significant of these statements is the videotaped interview of T.S. at Alaska CARES, during which he described being zip tied at the J/S household by his foster parents. His statements were made outside the hearing and were offered to support an allegation that he was, in fact, zip tied. They are hearsay under Alaska Rule of Evidence 801(c), and they would not be admissible over objection in a civil case unless they fit in one of the exceptions in Evidence Rules 803 or 804.

T.S. did not testify at the hearing as PSS Oullette did not approve to let OCS request a subpoena. PSS Oullette testified that T.S. was doing well in his current placement and having him testify about the events at the J/S household would risk jeopardizing his mental stability. Therefore, T.S. was unavailable under Evidence Rule 804(a)(4), and his statements would be admissible in a civil case. Accordingly, the residuum rule does not preclude their use for any purpose here.

J.B.H. was also interviewed at Alaska Cares, and he was asked about the altercation between him and Mr. S on March 23, 2020, the day he arrived at the placement. While the physical events that occurred between him and Mr. S minutes after he arrived did not result in a finding of maltreatment, foster care licensing cited the incident as an example of the foster parents' overall poor judgment. To that extent, Mr. S was forthright in his admission of his placing his hands on J.B.H. moments after his arrival, J.B.H.'s negative response to being touched, and Mr. S then physically restraining him as J.B.H. became increasingly upset. Therefore, not only did Mr. S's description of the events mirror J.B.H.'s such that his words were adopted by reference, but J.B.H.'s interview was also not offered to prove a fact, but to provide a greater contextual description of the J/S home. Accordingly, the use of J.B.H.'s interview in the licensing case does not implicate the residuum rule.

Finally, the brothers D.C.P and D.C.S. were also interviewed at Alaska CARES. No objections were raised regarding their statements, as they both spoke very favorably about the J/S household and wanted very much to remain living there. The residuum rule does not apply to their interviews as used in the licensing case because their interviews are not used in this decision except to support or explain other non-hearsay evidence.

III. Discussion

A. OCS's Substantiated Findings of Maltreatment

1. Findings at issue in this appeal

OCS's May 5, 2020 letters to Ms. J and Mr. S identified three maltreatment findings against both of them. As to each, OCS made one finding of physical abuse of T.S. and separate findings of mental injury as to D.C.P. and D.C.S. As described below, the letter also set forth a statutory definition pertaining to each finding. As to each finding, OCS has the burden of proof in this proceeding to prove, by a preponderance of the evidence, that the finding is warranted.

2. Applicable legal definitions

Alaska's Child Protection statute, 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[.]"³⁷ 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 47.10.011.³⁸

Under AS 47.10.011(6), a child can be found to be "in need of aid" under the CINA statute if "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."³⁹

The CINA statute further allows a child to be found to be "in need of aid" if the parents or caregivers are found to be responsible for causing mental injury to a child, or place a child at substantial risk of such injury by "a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting behavior that would, if continued, result in mental injury."⁴⁰ Mental injury is defined as "a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness."⁴¹

3. Findings and analysis

a. Physical abuse finding

³⁷ AS 47.17.290(2).

³⁸ AS 47.17.290(8).

³⁹ AS 47.10.011(6).

⁴⁰ AS 47.10.011(8)(A), AS 47.10.011(8)(B)(i).

⁴¹ AS 47.17.290(9).

As to the physical abuse findings, OCS's burden at hearing was to prove by a preponderance of the evidence that the couple substantially physically injured T.S., as the agency alleged.⁴² Although the two parents' substantiation appeals were consolidated for hearing, OCS must separately meet its burden as to whether each foster parent's actions rose the level of physical abuse.

There is no dispute that in the early morning hours of April 5, 2020, a dispute stemming from minor household rule compliance escalated into a physical altercation between Mr. S and T.S., a 14-year-old foster child. Similarly, there is no dispute that T.S. was pulled from his bed to the ground, that Mr. S physically restrained him with his arms, and then affixed zip ties to the child's arms, wrists and legs. Ms. J was present and complicit, at one point helping restrain T.S.'s legs, then leaving to get more zip ties at Mr. S's direction. The physical exam of T.S. both then and several days later showed significant bruising on the boy's arms and neck, and deep cuts, scrapes and missing skin around his wrists in the shape and pattern of ligature marks.

Based on the testimony of the parties, the photos taken of T.S. by the police, then later by PSS Stollard and ANP Dempsey, and the thorough investigations conducted by OCS and the police, OCS met its burden of proving by a preponderance of the evidence that Ms. J and Mr. S inflicted substantial physical harm on T.S. due to their wholly inappropriate use of physical violence and zip ties to control the child. Accordingly, the substantiated findings of physical injury are upheld as to both parents.

b. Mental injury findings

Regarding the allegations of mental injury regarding the brothers D.P.S. and D.C.S, both of whom have special needs, OCS must prove by a preponderance of the evidence that the couple either mentally injured the brothers, and/or placed them at risk of such injury. Again, although the two substantiation appeals were consolidated for hearing, OCS must separately meet its burden as to whether each foster parent's actions rose the level of mental injury as to each child.

In their interviews at Alaska CARES, both boys were very aware of incidents of violence in the household. While they were not privy to the specific altercations involving J.B.H. and

T.S., both were able to later describe hearing shouting, sounds, swearing, hearing Mr. S say “ow.” They were forthright that Ms. J had told them all about J.B.H. and T.S.; threats they had made, lies told to the police, injuries they had inflicted on Mr. S. Both boys had developed strong negative opinions that mirrored those of the foster parents regarding J.B.H. and T.S. One boy identified zip ties and described seeing T.S. being bound in them twice, but both brothers seemed very sure that any discipline administered by the foster parents was warranted and appropriate. They were deeply concerned about being taken away from their foster parents, and were increasingly negative about OCS and their biological parents.

Ample examples of the brothers being exposed to very disturbing behaviors in the foster home were presented by OCS at the hearing, and the testimony of D.C.S. and D.P.S. suggested they were inappropriately emotionally manipulated by their foster parents. But OCS failed to call a qualified expert witness to testify that the brothers suffered serious injury as evidenced by an observable and substantial impairment in their ability to function in a developmentally appropriate manner, as required by the child protection statute.⁴³ Accordingly, the substantiated findings of mental injury are overturned.

B. OCS’s Foster Care Licensing Actions

1. Procedural Status and Violations Alleged

On April 8, 2020, the Department issued an instant suspension of the J/S foster care license pursuant to AS 47.32.130, which permits immediate enforcement action if there is reasonable cause to believe a violation of an applicable statute or regulation or statute has occurred that presents an immediate danger to the health, safety or welfare to children in the home. On April 27, 2020 a more detailed Report of Investigation/Notice of Violation issued, notifying the foster parents of the Department’s intention to formally revoke their foster care license pursuant to AS 47.32.140(d)(6). Ms. J and Mr. S filed a request for a hearing to challenge the revocation.⁴⁴

The Division alleges that the J/S home was not in compliance with the following four foster care licensing requirements:⁴⁵

⁴³ AS 47.17.290(9).

⁴⁴ This document functions as the Notice of Defense under AS 44.62.390.

⁴⁵ The April 8, 2020, Report of Investigation initially also included a violation under AS 47.32.200(b)(2), Notice of Changes from an Entity. OCS withdrew this charge on the record during the hearing.

- 7 AAC 50.210(a), requiring that any adult having regular contact with the children in the foster home be responsible, have reputable character, and exercise sound judgment;
- 7 AAC 50.210(j), requiring that a caregiver must be able to (4) use strategies to prevent aggressive behavior and to deescalate volatile situations;
- 7 AAC 50.435(c), requiring that a foster home not use discipline or behavior management techniques that are cruel, humiliating, or otherwise damaging to the child;
- 7 AAC 50.435(d), providing that a child in care may not be (9) mechanically restrained, except for a protective device such as a seatbelt.

2. *Findings and Analysis*

Because the fundamental concern is the suitability of the J/S home for a foster care role, the licensing case turns more on broad themes and characteristics of the home than on the very specific events that drive a substantiation case. To that end, perhaps the most striking aspect of this hearing is that parties' descriptions of the events as set forth in the March 23 and April 6, 2020 Protective Services Reports are remarkably similar. The disagreements lie largely in differing opinions regarding appropriate means of establishing a structured environment for children in care.

a. Mechanical restraints

T.S. and his foster parents all agree that on April 5, 2020, around 1:00 a.m. he was playing a video game in his room past bedtime hours. Mr. S became angry, came into T.S.'s room, tried to grab the controller from his hands, and pulled T.S. to the floor; a physical altercation ensued. He testified that the 14-year-old was a "big kid, a Samoan" and was "hard to control."⁴⁶ He bound TS's wrists, arms, and legs with zip ties to restrain him and to "help him calm down." T.S. admitted yelling various empty threats out of angry and frustration in response to being bound. He was kicking his legs, prompting Mr. S to ask Ms. J to get more ties from the garage.

Ms. J testified for the first time at hearing that she complied so as not to disobey her husband, but only to the extent she walked down the stairs and returned, and that she did not actually retrieve any zip ties. At the hearing she also recounted for the first time that after all the zip ties were fixed on T.S. and he was lying on the floor, she laid next to him, talked to him

⁴⁶ Robinson testimony.

soothingly until he drifted off, covered him with a blanket, and left the room. In contrast, during an emotional, very tearful interview, T.S. described being bound in ties, his foster parents setting the door alarm, then leaving the room, and further described having been able to break out of all the ties except one that was tightly bound around his wrist.

It is undisputed that the following morning, T.S. had a zip tie on his wrist, and that he and Mr. S had further conflict. It is undisputed that at some point T.S. told his foster parents he wanted to leave, that Mr. S cut off the zip ties, and that T.S. then left the residence.

Again, both T.S. and the foster parents similarly describe this incident beginning with T.S. playing a video game after bedtime hours. All agree that Mr. S tried to seize the controller, T.S. fought against being physically restrained, that he was zip tied in multiple places, and that Ms. J was present and left to get more ties at Mr. S's direction. These mutually agreed upon facts alone are sufficiently concerning to raise questions about respondents' suitability for licensure.

Testifying at the hearing two years after the events, the foster parents still fail to understand that their use of zip ties was wholly inappropriate. They likened the zip ties to seat belts, legally sanctioned safety restraints. They claimed they weren't properly trained. Despite the amount of foster care training both have received, neither exhibit any awareness that the physical discipline of a foster child is simply not permitted.

b. Improper behavior management techniques

At the hearing Ms. J and Mr. S both presented as being very committed to their faith and expressed wanting to create a structured, loving home for foster children. However, a review of the placements in their home shows that structure was consistently established by Mr. S exerting complete and immediate control. Any form of resistance or disobedience from a child was met with a smack from a slipper, a slap upside the head, or being wrestled to the ground, zip tied, physically restrained. Ms. J was habitually present, ready to comply with his directives, take away a child's cell phone, retrieve more zip ties, and otherwise endorse her husband's disciplinary decisions.

Within approximately one year of the J/S household being issued a provisional foster care license in 2019, four children placed in their care at varying times, K.H., E.N., J.B.H., and T.S. reported being physically abused by Mr. S. While not all the reports of harm were screened in, every child was removed from the home. The only children that the couple found non

problematic were D.C.S. and D.P.S., who were younger and developmentally disabled, and who seemingly were emotionally manipulated.

c. Failure to properly deescalate situations

When J.B.H. initially arrived at the J/S home, all parties agree that something happened that caused Mr. S to place his hands on J.B.H., and that J.B.H. reacted poorly to being touched. Mr. S testified that to calm the child, who then began trying to strike with him with his cast and crutch, he opted to physically restrain J.B.H. The boy escalated in response, and an altercation ensued, very much the way the events transpired with T.S.

At the hearing, however, neither parent had developed any insight that perhaps they lacked skills in de-escalation techniques. The first time T.S. was zip tied because he reportedly was “about to throw something,” and all parties agreed that he calmed after he spoke on the phone with PSS Denny. Instead of learning from this example, or later talking to PSS Denny about his techniques, the parent remained steadfast that the problem was T.S. and J.B.H., two volatile and dangerous boys. Regarding the two altercations with T.S. and J.B.H., in retrospect neither parent considered that a child’s escalation should be received with more compassion and space, not heightened aggression and restraint.

d. Failure to exercise sound judgment

Although the allegations of metal injury were not substantiated, the experiences of D.P.S. and D.C.S., two developmentally disabled brothers who lived at the J/S household for less than 8 months, are very disturbing. During this time they were counseled about other bad and dangerous foster boys living in the home. They heard multiple physical altercations involving foster children and their foster parents. The police came to their home more than once. One boy saw another child in ligatures. They became increasingly hostile to their biological parents, overly attached to their foster parents, and otherwise exhibited behaviors that indicated healthy boundaries were not being observed in the home. This resulted in their being removed from the home, which was profoundly upsetting for both boys and directly caused by the poor parenting skills of their foster parents.

Further illustrating poor judgment, OCS also points to administrative obfuscation by Ms. J regarding misleading responses on prior foster care applications. At hearing Ms. J expressed shock and confusion regarding findings of maltreatment substantiated against her in 2005, despite very compelling evidence that she was informed of the findings and the subsequent

denial of her licensing reapplication in 2009. But for an acknowledged administrative oversight by OCS of a failure to review her history, her application in 2020 should have been denied. Nevertheless, at the hearing Ms. J continued to maintain her insistence that any prior substantiated findings were in error, and therefore her applications were never falsified.

3. *Foster Parents' Arguments*

In response to the allegations of poor judgment and overall lack of fitness as foster parents, Ms. J and Mr. S raised several arguments at hearing. They were unfairly given children by OCS that they were not equipped to handle, with little advanced warning. J.B.H. and T.S. were dangerous and volatile boys with difficult behaviors who posed a threat to D.P.S. and D.C.P., two much more docile children with special needs. Alternatively, they were victims of negative concerted conspiracies by OCS involving racism, manipulation of their electronic files within the agency, and surveillance of their home. Finally, they described being new, “green” foster parents, deserving of another chance now that they were more informed about handling child placements.

The arguments of Ms. J and Mr. S are unconvincing. When the couple applied to be foster parents and attended the requisite trainings, they became aware that children placed in their care could be volatile, emotionally fragile, have histories of trauma or abuse. To assert that they were not “equipped” to handle T.S. or J.B.H. is disingenuous, especially since even the most heightened behaviors exhibited by both were in response to completely inappropriate physical intervention by Mr. S. Regarding the sabotage or conspiracies of OCS, nothing was submitted to substantiate these theories.

Ms. J and Mr. S presented as kind and well-meaning at the hearing, and their friend N.N credibly testified that her children adored the couple. Clearly the two want to help children succeed, and to that extent their desires are admirable. But they do not have the necessary good judgment to operate a foster home. Neither has shown an understanding that a child is deserving of respect equal to that owed an adult, including honoring boundaries that include physical autonomy and personal space. In the short period of time that the couple operated as a foster care placement they violated multiple licensing requirements by exercising exceptionally poor judgment, showing little to no ability to handle conflict or confrontation, and relying on physical and mechanical restraints to “control” children in their care.

IV. Conclusion

OCS met its burden of showing that both Q.J and D.S physically abused T.S. and the inclusion of findings to that effect on OCS's child protection registry is AFFIRMED. OCS did not meet its burden of showing that Q.J and D.S mentally injured D.P.S. and D.C.S. and the findings to that effect are OVERTURNED.

OCS also met its burden of proving that Q.J and D.S violated the foster care licensing requirements by demonstrating that the couple lacked both the sound judgment required of foster care providers, as well as the ability to manage aggressive behaviors and deescalate volatile situations. Furthermore, Ms. J and Mr. S violated foster care licensing requirements by subjecting children in their care to discipline that was cruel and humiliating by way of both physical and mechanical restraints. These violations are sufficiently severe to warrant the revocation of the J/S foster care license.

Accordingly, the foster care license for the home of Q.J and D.S, license number 507104, is REVOKED.

Dated: Nunc pro tunc June 15, 2022

Signed

Danika B. Swanson
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Family and Community 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 29th day of July, 2022.

By: Signed

Name: Chrissy Vogeley

Title: Special Assistant II

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