

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-04/17-177
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Appeal of)
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INTRODUCTION

Petitioner appeals the decision by the Department for Children and Families (Department) substantiating a report that he sexually abused his daughter, D, when she was between the ages of seven and fifteen. The issue is whether the Department's decision is supported by a preponderance of the evidence.

The petitioner filed a timely notice of appeal from the Substantiation Review Decision dated April 14, 2017. There were many telephone status conferences held in 2017 and the case was continued at the parties' request. A merits hearing was held on May 3, 2018. This decision is based on the evidence adduced at hearing to include testimony from D, from petitioner, petitioner's father, and the Department social worker who was the investigator in the case. The Department submitted case records and photos which were admitted as evidence. Following the hearing, Petitioner's counsel submitted Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In May 2016, D's mother and petitioner had separated and were in the process of obtaining a divorce. She obtained a Relief from Abuse Order from the Vermont Superior Court requiring petitioner to stay away from the family residence. D and her two siblings remained living with the mother. D was sixteen at the time.

2. After the Relief from Abuse Order was issued, on May 13, 2016, D reported to her school guidance counselor that there were other things that her father (petitioner) did that bothered her and that these issues were not addressed in the restraining order. The guidance counselor is a mandated reporter and reported this conduct to the Department.

3. On June 15, 2016, the Department received another report from D's therapist. This was reported to the Department.

4. The Department visited the home and interviewed D's mother.

5. D was interviewed by a Department social worker and police officer on two occasions due to the multiple reports.

6. D was present at the hearing and represented by counsel. She testified credibly at hearing that the

petitioner had done the following things to her between the ages of seven and fifteen that made her uncomfortable

(i) when she was seven, petitioner reached into the shower through an outside window and grabbed at her;

(ii) from age seven through sixth grade, petitioner would frequently come into the bathroom while she was showering. Sometimes he would reach his arm into the shower and take an item from the shower. There were two bathrooms in the home available for use. She testified that by around sixth grade, she would ask her mother to stand guard at the door so that he would not come into the room while she showering;

(iii) petitioner encouraged her and her younger sister to walk around the house in underwear;

(iv) petitioner walked around the house in underwear;

(v) petitioner would make comments to her of a sexual nature, such as "your butt looks good in those pants," and "don't wear that bra, it flattens your chest" and "your future husband would like that," and petitioner would tell her that she looked sexy and that "Whomever I was with would be lucky to be with me with a sexy body like that."

(vi) starting at age seven and until he moved out of the house when she was 15, on multiple occasions her father would hug her, typically from behind, and would cup or fondle her breasts and buttocks when he was hugging her. D reported that by the time she was in sixth grade (approximately at age 11-12), she realized this conduct was not appropriate and she began pushing her father away.

7. On cross examination she was asked whether the fondling of her breasts and buttocks could have been accidental and she responded that it had happened on too many occasions over the years for it to be accidental. She was

also asked if she had said to the police investigator “[I]m here so that bastard doesn’t get custody of us.” She agreed that she had said something to that effect as she was extremely concerned about she or her siblings having to spend time with him. Her testimony was credible on these points.

8. The social worker testified that D’s testimony at the hearing was consistent with the information that had been reported to the Department from her guidance counselor and therapist and in her interviews with the Department and the police. She testified that the reports occurred during a time when petitioner was in his forties and D was between 7 and 14 (or 15). He was larger in physical size and was her caretaker and parent.

9. D’s father testified at hearing that he had given D bear hugs over the years but had never touched her in a sexual manner. He denied walking around the house in his underwear or suggesting that D do so, although he indicated that D would frequently walk around the house without pants on and he would tell her to get dressed. He denied putting his arm into the shower through the outside window. He denied entering the bathroom on frequent occasions when she was showering; he did say that he would help her wash her hair in the shower when she was seven or eight. He testified

that D went through a phase in which she didn't want to shower. He denied making any comments to her of a sexual nature. He stated that he and D "clashed" and didn't get along.

10. In her interview with the social worker, D's mother confirmed that the incident of reaching into the shower through the outside window when D was seven had occurred. She also confirmed that petitioner encouraged the girls to walk around in their underwear, saying it was the "European" way and that it was appealing.

11. The petitioner's father testified that he did some work on petitioner's house for a period of days when D was approximately eight years old and that she would walk around without wearing pants.

ORDER

The Department's decision is affirmed.

REASONS

Appeals of substantiated reports are reviewed by the Board *de novo* and the Department has the burden of proving by a preponderance of evidence that petitioner's conduct constitutes sexual abuse as defined by the statute. See *In re R.H.*, 189 VT 15, 14 A.3d 267, 2010 VT 95, ¶ 16; *In re*

Selivonik, 164 VT 383, 670 A.2d 831 (1995), Fair Hearing No. B-01/12-69.

The Department is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The pertinent subsections of 33 V.S.A. §4912 provide the following definitions that apply to a determination of "sexual abuse" of a child:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . .

(15) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child included but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. . .

33 V.S.A. § 4912.

The Department's Policy Manual provides the following definition of "lewd and lascivious conduct"

Committing a lewd or lascivious act upon or with any part of the body of a child. . .when such conduct violates community standards of morality and decency.

This definition only applies when there is (1) a significant difference in age, size or development, and (2) a lack of ability to consent and the behavior would not be considered developmentally normal during childhood or adolescence. . .

DCF Family Services Policy Manual, Policy 50.

"Lewd and lascivious" conduct is "the term used to describe the repeated and continued behavior that is indecent in nature." Black's Law Dictionary (9th ed. 2009). Under Vermont criminal statutes, lewd and lascivious conduct has been interpreted to mean an act or acts that are, by intent, lustful and sexual in nature. See 13 V.S.A. § 2602; State v. Squires, 179 Vt. 388 (2006). See Fair Hearing No. S-08/11-469 (substantiation of abuse for lewd and lascivious conduct for sexual touching female child).

Based upon D's credible testimony, the petitioner acted in a deliberate and inappropriate way when he repeatedly and over a period of years, fondled his young daughter's breasts and buttocks, made sexual comments, and repeatedly entered the room and reached into the shower when she was showering, and on one occasion reached into the shower and grabbed at her.

D's statements during the contacts with her counselor, therapist, social worker and police officer were all consistent with her testimony at hearing.

Based on the above Findings of Fact it must be concluded that the Department produced sufficient evidence to meet its burden of showing by a preponderance of the evidence that the petitioner sexually abused D by committing lewd acts involving a child.

Therefore, the Board should uphold the Department's decision to substantiate petitioner for sexual abuse. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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