

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. H-02/18-135
)
Appeal of)
)

INTRODUCTION

Petitioner appeals her substantiation by the Department for Children and Families ("Department") for alleged physical abuse of her minor child M. W. The following facts are adduced from a merits hearing held on December 28, 2018 and documents submitted before, during and after the hearing, with the record closing on January 14, 2019.

FINDINGS OF FACT

1. On January 31, 2017, DCF received a call from a school counselor, stating that a fifteen-year-old female student had made a report that she had been physically abused by her mother, the petitioner, resulting in scratches on her cheek, bruising on her clavicle and tenderness to the back of her head. The alleged abuse was the result of an incident that had occurred on January 30, 2017, the afternoon before.
2. On June 28, 2017, DCF substantiated the petitioner for physical abuse of her daughter. A review of this

determination was held by the Commissioner's Registry Review Unit on October 27, 2017 and the Commissioner upheld DCF's decision in a letter issued on January 24, 2018. On February 26, 2018 petitioner filed this appeal.

3. The following facts were stipulated by the parties at the commencement of the hearing:

- On January 30, 2017, petitioner picked up her children M. W., R. W., P. P. and B. P. from school in the afternoon while it was still daylight.
- Petitioner drove the children to K. P.'s residence (step father of M. W. and R. W., father of P. P. and B. P.).
- During the ride to K. P.'s residence, petitioner was arguing with her daughter M. W.
- Petitioner parked her car at the bottom of the driveway because of snow conditions and asked the children to walk up the driveway.
- M. W. refused to close her car door and used profane language about the state of the vehicle.
- Petitioner pinned M. W. to the ground.
- The physical contact occurred for approximately a few minutes.

4. At hearing petitioner testified that she and M. W. had been engaged in a heated argument on the ride over to the home of M. W.'s stepfather where all four of petitioner's children were to stay that night. The cause of the argument was that M.W. did not want to stay at her stepfather's home and was very upset that she was not permitted to reside full time with her biological father.

5. Petitioner explained that when she and her children arrived at the stepfather's home, M. W. would not stop yelling and cursing and that after M. W. got out of the car, she slammed but refused to properly close the car door. In response, petitioner had gotten out of the car and once out, she had grabbed M. W. by the lapels of her winter coat and attempted to restrain her. Petitioner acknowledged that she had pushed M. W. but cannot recall exactly how she and her daughter ended up on the ground together. Petitioner testified that at the time of the incident she was pregnant, and that M. W. was taller than her and outweighed her.

6. Petitioner stated that M. W. did not hit her head and further testified that she recalls being astride her daughter on the ground and tried to slap her but did not succeed. She was quite certain that did not strike her, or put her hands around her daughter's neck, or choke her or

harm her in any way. Petitioner states that after a very short period, she simply stood up and watched M. W. walk up the driveway to the house.

7. The Department submitted two photographs, taken by school personnel on January 31, 2017, showing scratches on M. W.'s face, and depicting what was characterized as bruising on M. W.'s shoulder, which were admitted as evidence into the record of this case.

8. M. W., now 17 years old, testified at the hearing that she had lied about the details of the argument with her mother, the petitioner. She stated that on the night of January 30, 2017 she had overreacted and exploded in anger at her mother, and that she had misrepresented the facts of what had occurred with respect to suffering any injuries. She admitted slamming the car door and using profanity and acknowledged that petitioner put her hands on her shoulders and pushed her with the consequence that they ended up on the ground but acknowledged that petitioner never slapped her or tried to choke her.

9. M. W. also testified that she lied to the school authorities about the incident the next morning and was not truthful when she told them that she banged her head and was in pain. M. W. stated plainly at hearing that petitioner had

not harmed or injured her and testified that she lied because she was angry at petitioner for not letting her live with her biological father. M. W. further testified that petitioner did not cause the scratches on her face, indicating that they were self-inflicted and that she had made them herself later that same night, with a tree branch to make it look like petitioner had hit her. M. W. also stated that she had lied to the police about the incident. While M. W.'s testimony differed substantially from her initial report of the events at the time they occurred, with respect to the existence of any physical injury, her testimony at hearing was credible.

10. With respect to the photos of the bruising submitted as evidence, M. W. was tentative and uncertain in her testimony about whether she had suffered bruising as a result of the incident, proposing without conviction, that perhaps bruising could have been a result of when petitioner 'kind of shook me'. Petitioner on the other hand, suggested, in her closing comments, that any bruises on M. W. could have been the result of any number of circumstances, including M. W. playing basketball and expressed disbelief that her grabbing M. W. by her coat lapels could have caused any injury.

11. R. W. also testified at hearing. He is the sixteen-year-old son of petitioner and the brother of M. W. He was present during the events of January 30, 2017. He stated that M. W. was 'out of control' during the argument and 'getting up in (petitioner's) face'. He had observed that petitioner was trying to restrain M. W., who resisted by pushing petitioner away. He also observed M. W. swinging her arms at petitioner but said that petitioner prevented M. W. from striking her by grabbing M. W.'s arms. He recalls hearing his sister hit the ground and heard her screaming. R. W. also testified that he did not see scratches on M. W.'s face until after they were both in their stepfather's home, and after M. W. had spent five minutes in the bathroom.

12. R. W. stated that he was interviewed the next day by school officials and a DCF social worker after M. W. reported the incident. He said he was nervous, uncomfortable, scared and surprised. He does recall saying that petitioner was attempting to restrain M. W. but does not recall stating that petitioner was swinging her arms at M. W. and felt that the DCF social worker was cutting him off from saying what he wanted to say during the interview. R. W.'s testimony was credible.

13. The DCF social worker testified at hearing. He stated that he had observed a forensic interview (via video) of the victim, M. W., conducted by the police on February 9, 2017, approximately 10 days after the incident. He testified that M. W.'s statements during the forensic interview about having an argument with petitioner were the same as her testimony at hearing on the subject. However, he noted that M. W.'s testimony at hearing, about whether she had suffered physical injury or harm from the incident, was different from what she stated during the February 2017 interview that he had observed via video. During that interview, he recalled that M. W. had asserted that petitioner had pushed her to the ground and wrapped her hands around M. W.'s neck, causing M. W. to have difficulty breathing and that M. W. had hit her head during the fall, and suffered scratches and bruises, and had experienced pain from the altercation.

14. There was no testimony from any witness indicating that M. W. had been struck by petitioner, nor was there any testimony about how M. W. got the scratches on her face, other than M. W.'s testimony that they were self-inflicted.

15. The social worker also interviewed petitioner, but not until March 6, 2017. The statement he obtained from petitioner during that interview matched petitioner's

testimony at hearing: including that there had been an argument, that petitioner had grabbed M. W.'s coat and pushed her during an effort to restrain her, that she and M. W. had ended up on the ground, that she had sat on top of M. W. on the ground, but that she had neither slapped nor choked M. W. and that she believed M. W.'s report to school authorities was motivated by anger toward petitioner related to the fact that M. W. was not permitted to live with her biological father.

16. On cross examination, the DCF social worker acknowledged that he had worked on other investigations involving members of petitioner's family, including a prior report made by M. W. against the petitioner that had been closed as unfounded, and that while he was not happy about the outcome of that matter, he was not biased against petitioner.

17. A preponderance of all the evidence above indicates that while a heated argument occurred between petitioner and M. W. on the night of January 30, 2017 and there was physical contact between M. W. and petitioner, M. W. incurred no physical injury as a result of that contact.

ORDER

The Department's decision is reversed.

REASONS

The Department for Children and Families 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 sections of 33 V.S.A. § 4912 define abuse and harm as follows:

(1) 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...

(6) "Harm" can occur by: (A) Physical injury or emotional maltreatment. . .

(11) "Physical injury" means death or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

Appeals 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 physical abuse as defined by the statute. See *In re R.H.* 189 Vt. 15, 14 A.3d 267, 2010 VT 95, at ¶16.

The preponderance of evidence in this case does not establish that M. W. experienced harm in the form of physical

injury as a result of the physical encounter with petitioner. As such, the Department has not established that petitioner engaged in physical abuse towards M. W. under the above-cited statute.

This matter is complicated by the putative victim's contradictory versions of what happened. However, her testimony at hearing did not support the Department's substantiation nor did her prior statements (which she indicated were lies motivated by anger at petitioner) undermine this testimony. The physical contact that occurred during the argument is concerning, but that alone does not support a finding of abuse.

This case ultimately comes down to an assessment of witness credibility. Consideration of the testimony of all witnesses, including petitioner, M. W. and R. W., who were found to be credible, along with a review of all the evidence submitted in this case, taken as a whole, does not warrant a finding of physical injury to M. W. and consequently does not support the conclusion that petitioner's actions constituted physical abuse of M. W.

For these reasons, the Department's substantiation of petitioner for physical abuse is inconsistent with the

applicable rules and must be reversed. See 3 V.S.A. §
3091(d), Fair Hearing Rule No. 1000.4D.

#