

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-03/18-209
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Appeal of)
)

INTRODUCTION

Petitioner appeals her substantiation for risk of physical harm by the Department for Children and Families ("Department"). Prior to a hearing on the merits, the Department's Motion for Summary Judgment (based on collateral estoppel) was denied.¹ The following is based upon a merits hearing held June 5, 2019.

FINDINGS OF FACT

1. Petitioner was substantiated by the Department for placing a child at risk of physical harm based on reports made in May 2012. These reports were also the subject of a related criminal prosecution of petitioner. Following resolution of the criminal case, which resulted in

¹ The Department's motion was primarily denied on the grounds that the "issue" in the criminal matters upon which the Department was relying to argue for estoppel was not identical to the issue in the substantiation, and the documentary evidence was not specific enough to support certain factual allegations by the Department. However, the hearing officer denied the motion with the proviso that the Department was free to submit additional legal argument or documentary support (for more specific allegations of undisputed fact); as nothing further was submitted, the matter was scheduled for hearing.

petitioner's conviction and incarceration for several crimes, petitioner requested a Commissioner's Review of her substantiation. The Commissioner's Review decision upheld the substantiation by letter dated March 26, 2018.²

2. The child with respect to whom petitioner allegedly posed a risk of harm was her then-12-year-old stepson. The related criminal matter (among other things) included 33 counts of Domestic Assault against the child, as well as a charge of Unlawful Restraint of a Vulnerable Adult. One of the factual allegations in the Unlawful Restraint charge involved the same child.

3. In August 2013, Petitioner pleaded guilty to four (4) charges of Domestic Assault and no contest to one charge of Unlawful Restraint of a Vulnerable Adult; she also entered guilty pleas to several other charges not directly related to the substantiation allegations here. She was incarcerated on concurrent prison terms which amounted to a sentence of 3-8 years; and was released under Department of Corrections supervision during the pendency of this appeal.

² Although not material to the outcome, it is not clear why there was such a long period of time between the resolution of petitioner's criminal matter and the completion of the Commissioner's Review. It is possible that petitioner requested a postponement of the Review pending the resolution of her criminal charges, and only recently decided to restart that process (due to her release from incarceration).

4. Petitioner's plea agreements, a transcript of her plea colloquy in court, and charges and supporting police affidavits were admitted into evidence at hearing. This evidence establishes the following facts:

- a. Petitioner physically assaulted her stepson, who was living with her, on numerous occasions. These assaults occurred in September 2009, October 2009, November 2009, and January 2012. These assaults "recklessly caused bodily injury" to her stepson. There were times that the stepson would be struck 4 to 10 times in a single day. Often the assaults would occur on a weekend, so that if a mark was caused it would fade before the stepson had to go back to school.
- b. Petitioner also lived with and effectively provided housing to an adult with disabilities who is the above referenced "vulnerable adult." This individual was the victim of "unlawful restraint" for which petitioner was convicted. One of the tactics petitioner employed to keep this individual on the premises was to send other people living in the home to "chase" him when he attempted to leave. This included her 12-year old stepson, who was

regularly tasked with preventing this individual from leaving the premises.³

5. At hearing, the Department submitted the above evidence and also called petitioner and a DCF investigator to testify.

6. Petitioner denied all the allegations, suggesting that several individuals (for unclear reasons) had concocted the charges, and further asserting that she did not comprehend her plea agreement and that her attorney at the time had misrepresented her position and the proceedings at issue. Petitioner's testimony is deemed to lack credibility; in addition, the plea colloquy described above clearly establishes that petitioner was apprised of the charges against her and the factual basis for each charge.

7. The Department's investigator provided credible evidence of the course of his investigation of the substantiation allegations. Of note, the investigator explained that the incidents of physical assault of the

³ It initially appeared to the hearing officer that there was some ambiguity as to petitioner's plea agreement and underlying factual basis of the Unlawful Restraint charge. However, upon further review of the transcript of petitioner's plea colloquy, petitioner agreed that part of the factual basis for this charge included sending her stepson after the vulnerable adult to prevent him from leaving - it is therefore reasonable to conclude that this might cause the stepson to attempt to *physically* prevent this individual, a larger adult male, from leaving the property. The substantiation decision at issue alleged that the stepson was made to "tackle" the vulnerable adult to prevent him from leaving.

stepson were determined to be a "risk of harm" because of their pervasiveness and specific instances where the stepson was assaulted on the weekends, to avoid detection of marks while he was at school.⁴

8. The above evidence establishes that petitioner engaged in persistently assaultive and irresponsible conduct towards a minor child under her care and supervision which was reckless and exposed the child to a serious risk of physical harm.

ORDER

The Department's decision is affirmed.

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.

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

⁴ It is not known why the Department decided not to substantiate petitioner for physical abuse.

The pertinent sections of the law, for the purposes of petitioner's substantiation for physical abuse and risk of harm, are as follows:

(1) "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 and a child who has died as a result of abuse or neglect. . .

* * *

(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...

* * *

(14) "Risk of harm" means a significant danger that a child will suffer serious harm by other than accidental means, which harm would be likely to cause physical injury, or sexual abuse...

* * *

(17) "Serious physical injury" means, by other than accidental means:

(A) physical injury that creates any of the following:

(i) a substantial risk of death;

(ii) a substantial loss or impairment of the function of any bodily member or organ;

(iii) a substantial impairment of health;

(iv) substantial disfigurement; or

(B) strangulation by intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

33 V.S.A. § 4912.

Department policy provides the following guidance on making a "risk of harm" substantiation:

A significant danger that a child will suffer serious harm by other than by accidental means, which harm would be likely to cause physical injury. Risk of physical harm **includes, but is not limited to:**

- Engaged in a single, egregious act that has caused the child to be at significant risk of serious physical injury;
- Allowed the child to be present during the production or pre-production of methamphetamines;
- Failed to provide supervision or care appropriate for the child's age or development and, as a result, the child is at significant risk of serious physical injury;
- Failed to provide supervision or care appropriate for the child's age or development due to use of illegal substances, or misuse of prescription drugs or alcohol;
- Failed to supervise a child appropriately in a situation in which drugs, alcohol, or drug paraphernalia are accessible to the child; or
- Allowed a registered, convicted, or substantiated sex offender to reside with or spend unsupervised time with a child.

Considerations related to substantiating risk of physical harm include, but are not limited to, the alleged perpetrator's history of child maltreatment or

criminal history that poses a significant risk to children, the nature of the abuse or offense, and the history of treatment indicating he or she is still a risk to the alleged victim.

Unless the risk of harm is due to a single, egregious act, the steps taken by the individual to reduce or eliminate the risk shall be taken into consideration and evaluated against the overall pattern of behavior(s) in making the decision to substantiate.

DCF Policy 56, at p. 5 (emphasis in original).

The criminal plea agreements entered into by petitioner as to the related facts of her substantiation are competent evidence in Board hearings. 33 V.S.A. § 4916b(b)(4).

Coupled with the Department's remaining evidence, the record establishes that petitioner's assaultive, reckless and irresponsible conduct towards her minor stepson posed a risk of physical harm to him under the applicable statute and policies.

As such, the Department's decision is consistent with the applicable rules and must be affirmed. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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