

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. B-04/19-303  
 )  
Appeal of )  
 )

INTRODUCTION

Petitioner appeals his substantiation by the Department for Children and Families ("Department") for alleged sexual abuse. The following is adduced from a merits hearing held November 14, 2019. The alleged victim did not testify at hearing; the central issue is the admissibility of her statements to others - which would otherwise be hearsay - under 33 V.S.A. § 4916b(b) (3) (A). The Department presented testimony from a physician, a nurse, the putative victim's mother, and an investigator. Petitioner testified in his defense.<sup>1</sup>

FINDINGS OF FACT

1. Petitioner was substantiated by the Department for alleged sexual abuse of a child (his then 6-year-old daughter) which was initially reported to the Department on May 11, 2018 as an allegation of physical abuse; that report

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<sup>1</sup> A request by petitioner to submit testimony from several family members was denied by the hearing officer as irrelevant.

was amended (by the reporter, a medical professional) as a report of sexual abuse on May 17, 2018.

2. Petitioner is the non-custodial parent of his daughter and has, for a significant period of time, lived separately from the daughter and her mother. He left the household a few months after the daughter's birth (in October 2011) when he was incarcerated out-of-state for a violation of probation.<sup>2</sup> Petitioner returned to the household in early 2015 and left the household again in late summer or early fall of 2016.<sup>3</sup> Both petitioner and the daughter's mother describe their relationship as very difficult ("toxic"); they have two other (younger) children together, one of whom has a serious and chronic health issue, resulting in additional stress to the family.

3. Since leaving the household in 2016, petitioner has had intermittent and irregular contact with his daughter (up to the point the allegations at issue were made), including a half-day outing with her a few weeks before the allegations

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<sup>2</sup> Petitioner was incarcerated for about 3 years beginning in early 2012; the underlying charge was a theft-related crime.

<sup>3</sup> It is recognized that there is some dispute regarding the living arrangements between petitioner and the daughter's mother during this time; this description is based solely on the Department's evidence, taken at face value.

were reported (the allegations do not stem from this contact with the daughter).

4. There is somewhat varying evidence on the prelude to the allegations at issue being reported. According to an assessment by the physician and nurse who interviewed the daughter (hereinafter "M") on May 10, 2018 (and again on May 17, 2018), M's mother reported that approximately two (2) months prior, M had "out of the blue" stated that "she no longer wanted to see or talk to her father" and when asked why that was the case, M replied she "did not know." According to the same assessment, three (3) weeks prior, M reported "daddy's hitting me" (although M used the present tense, according to M's mother, petitioner had not seen or been alone with M for several years). In addition M's mother reported that, two (2) weeks prior, petitioner had taken M out for an outing which included going to his home for about an hour; and that M stated afterwards that "I don't want to see or talk to Daddy anymore." Finally, it is noted that the May 10, 2018 medical assessment provides that M also stated approximately three (3) years prior that she never wanted to see her father again - although the physician who made this note acknowledged at hearing that this appears to be

inconsistent with other information in the record (as recounted by M's mother).

5. In contrast to the above, M's mother testified that the first time M stated she did not wish to see her father because he was "hitting her" was following her recent visit with him (as referenced above, occurring about two weeks before the May 10, 2018 assessment). According to her mother, M had expressed no dissatisfaction or concern with seeing petitioner before that event.

6. Two (2) days before the May 10, 2018 assessment, M reportedly asked her mother if she should "tell everything" during the assessment. When her mother told M that she should do so, M responded "even about Daddy touching me?" When her mother asked M "where?", M reportedly responded on her "privates."

7. During M's subsequent (May 10, 2018) interview and assessment with the physician and nurse - both of whom were stipulated to as experts in child abuse - she reported the following:

a. That petitioner "was hitting me," she told him to stop, and he did not; the hitting was occurring in "inappropriate" places.

b. M reported that the "inappropriate" places were on her "butt and my privates" and occurred with a "flat" hand; when asked, she indicated it was on top of her clothes and petitioner's clothes were always on as well.

c. When asked where this occurred, M responded "at my house when my mother was at work" and "almost everywhere" in the house; when asked if it happened one (1) time or more, M responded "14 times or maybe more" (which the physician understood as "more than three (3)" occasions); when asked when this occurred, M responded when she was "4 or 5 years old, maybe 3."

d. M gave an indication during the interview that she perceived the "hitting" as some form of discipline.

e. When asked about her recent outing with petitioner, M expressed "excitement" about it because she was going to see some of her friends when she was with him, and that she and father "rode bikes together, which was fun."

f. At no point during the interview did M express any fear of petitioner or that she did not wish to see or visit with him anymore.

8. The physician and nurse performed a physical exam of M and found no bruising, marks or abnormalities which would be a sign of abuse (of any kind). The physician opined at hearing that this would not be uncommon or inconsistent with abuse, for a variety of reasons (if such abuse had occurred).

9. The physician and nurse ended the assessment with the conclusion that M had reported possible or suspected physical abuse; they informed M's mother of this finding and also made a report to the Department.

10. On the afternoon on the same date, M's mother called the forensic nurse and stated that M had - in the car ride home - told her that she had "not told them everything" with the medical note from that conversation reflecting that M allegedly reported to her mother that petitioner had "put his hands inside her underpants." According to M's mother in her testimony at hearing, during the car ride home M had reported that she had "not told the whole truth" because "the doctor was a boy" and she had not told them "about Daddy touching me." When she asked M "where," M did not say anything but showed her a rubbing motion in her vaginal area.

11. The physician and forensic nurse made a follow up appointment to meet with M regarding this additional report

on May 17, 2018. In the interim, the Department's investigator (a woman) interviewed M on May 15, 2018. This interview - while recorded - was not submitted into evidence - but the parties agree that M did not report any instance of petitioner touching or rubbing her genitalia. According to the investigator's testimony at hearing, the interview was more consistent with what M reported to the physician and nurse on May 10, 2018 (that had initially been reported as physical abuse).

12. On May 17, 2018 the physician and nurse conducted a second interview of M. During the first part of that interview (which was with M alone), M did not report anything about petitioner touching or rubbing her genitalia and effectively repeated the statement about petitioner "hitting" her. This continued despite the nurse asking her "anything else [you want to tell us] about Dad's touching?" - to which M replied "he hit me on the back. It was 3 times."

13. The physician and nurse then spoke with M's mother (alone), and in the words of the physician "coached" her to ask M some additional questions, along the lines of "you told me something more happened?" M's mother then said to M - in the presence of the physician and nurse - "you told me about Dad touching your privates." M then replied that "he touched

me and rubbed me.” What followed was a 6-question interview of M by the forensic nurse regarding that statement, in which M stated this had happened in her living room at her home, sometimes at the same time as “the hitting” and sometimes at a different time, and “indicated” it was inside her pants but not inside her underpants (it is not clear from the record in what manner M indicated this, whether verbally or otherwise).

14. The physician and nurse performed a physical exam of M and found nothing abnormal or remarkable. They informed M and her mother that they would report M’s report as sexual abuse to the Department and that M may need to be interviewed by the investigator again.

15. Based on the testimony of the physician and nurse taken together, their role in assessing reports of alleged abuse is not to determine “the truth” of the allegations but instead to determine whether *what is reported* by children would be abuse, whether physical or sexual. As indicated by the nurse, M’s statements constituted “possible” or “suspected” abuse, which led to the report to the Department. The nurse reports 100 percent of such cases as abuse based solely on the statements of the child - she does not see her role (or the role of the clinic that includes the physician also conducting the interview) as making a credibility



determination as to a child's statements. There is no evidence (to the extent there is even a claim) that the physician and nurse perform an "investigative" function, although their interviews are information utilized within the investigative process.

16. No further interview of M by the Department's investigator occurred.<sup>4</sup>

17. The precise time that the allegations at issue are said to have occurred is unclear. In his testimony, the physician acknowledged that he could not determine a time period for the events reported by M. The Department investigator pursued the investigation based on a timeframe for the events as occurring sometime when M was "4 or 5". The Commissioner's Review upholding petitioner's substantiation suggests the events occurred two years prior to M's interview with the physician and nurse (meaning the events would have occurred mid-2016). As noted above, M said the events occurred (at least in the first interview) when she was "4 or 5 years old, maybe 3." M's mother has asserted throughout this process that the events occurred during a two

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<sup>4</sup> The Department indicated that a second interview was not conducted out of concern for the welfare of M and it was sufficient to rely on M's report to medical professionals. There is no evidence to support that M was troubled or distressed by the interview process, and in fact was described throughout as showing no sign of fear, discomfort or distress during the process.

to three-week period in the summer of 2015 (M was 3 years old), when she was working and had no childcare for M, and petitioner was living with them.<sup>5</sup>

18. As described above, this was initially reported as a case of physical abuse. Following the May 17, 2018 interview, it was then reported as a case of sexual abuse. The physician conducting the interview of M opined that it was not unusual to see a report of sexual abuse unfold in this fashion. What is taken from the physician's testimony is that he - ultimately - viewed this as a case involving sexual abuse and that the initial allegation of "hitting" was part of how M's report evolved, and not inconsistent with an overarching allegation of sexual abuse.

19. The Department's investigator reviewed the reports and allegations as falling under two areas - one, for risk of harm-physical, and the other as sexual abuse. The investigator testified that her report (which was not entered into evidence) referred to both areas for substantiation, but that the risk of harm-physical was "unsubstantiated." Overall, the Department's position is that all of M's

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<sup>5</sup> M's mother has maintained that this was the only time period petitioner was ever "alone" with M, a claim which the Department investigator and the physician cast doubt upon in their testimony - frankly undermining the overall credibility of the mother's recollection.

disclosures - including those initially reported as physical abuse - are effectively supportive of the allegation of sexual abuse, relying principally on the physician's testimony.

20. Even accepting the physician's opinion, however, the evidence establishes that the core and material facts alleging sexual abuse stem from the statements made by M during the second part of her interview on May 17, 2018. These are the statements that are ultimately determinative of the allegations of sexual abuse when considering whether they are admissible under the statutory exception to hearsay.<sup>6</sup>

21. The basic content of these statements are that petitioner "touched and rubbed [M's] privates," meaning her vaginal area. The only time that M made this disclosure was following a prompting by her mother which - in the estimation of the hearing officer - was suggestive of the answer i.e., it was in response to her mother's statement or question that "you told me about Dad touching your privates." M did not make this disclosure in the prior interview, the interview with the Department investigator, or during the first part of

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<sup>6</sup> It is not necessary to reach whether M's prior statements about "hitting" are admissible, whether they are consistent or not with an overarching allegation of sexual abuse, because those statements by themselves are not determinative of whether sexual abuse occurred here.

the interview with the physician and nurse (despite their repeated and persistent prompting).

22. In addition, because there was no follow up interview of M by the Department, the first interview of M by the investigator must stand on its own as the only opportunity for the investigator to directly evaluate M's report - which, at the time, is notable for its absence of the information which forms the core of the allegations against petitioner for sexual abuse. What remains in evidence is a brief exploration between the nurse and M of what allegedly occurred - the purpose of which was not to determine the truth of the report. In this respect (while no fault of the physician or nurse) no effort was made to ascertain the circumstances of M's prior disclosure to her mother, which is noteworthy given that the second portion of the interview occurred in the mother's presence (and M never made this report outside of her mother's absence). Nor was there a thorough effort to ascertain when the alleged sexual abuse occurred, which is another significant factor given the lack of precision in the timeline for these events based on the existing evidence.<sup>7</sup>

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<sup>7</sup> Even if admissible, the M's statements are subject to a credibility determination by the hearing officer. The limited exploration following

23. Furthermore, the extent to which statements by M (and other events) reported or recollected solely by M's mother were never reported by M to others creates a material inconsistency in the overall circumstances of these disclosures. Apart from the report of her mother, M never told anyone else that she never wanted to see petitioner again and, for that matter, never exhibited any fear or distress about petitioner (if anything, in talking about her last visit with petitioner, M was described as being "excited" about the visit and saying it was "fun" to the physician and nurse during her first interview). As outlined above, there are differences in the timing and instances of M's statements as reported by her mother to the physician and nurse, in comparison to her testimony at hearing. Even the Department's other witnesses cast doubt on certain assertions by M's mother (see note 5, *supra*). This only further undermines the reliability of M's reported statements, based on the circumstances of those statements.

ORDER

The Department's decision is reversed.

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M's May 17, 2018 report unfortunately undermines the credibility of her statements.

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. See 33 V.S.A. §§ 4914, 4915, and 4916.

The pertinent sections of 33 V.S.A. § 4912 define abuse and harm 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.

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(15) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child, including:

(A) incest;

(B) prostitution;

(C) rape;

(D) sodomy;

(E) lewd and lascivious conduct involving a child;

(F) aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts

sexual conduct, sexual excitement, or sadomasochistic abuse involving a child;

(G) viewing, possessing, or transmitting child pornography, with the exclusion of the exchange of images between mutually consenting minors, including the minor whose image is exchanged;

(H) human trafficking;

(I) sexual assault;

(J) voyeurism;

(K) luring a child; or

(L) obscenity.

33 V.S.A. § 4912.

The Department has the burden of proving that petitioner's conduct constitutes sexual abuse as defined by the statute. See *In re R.H.* 2010 Vt. 95, ¶¶ 15-16, 189 Vt. 15, 23.

Chapter 49 of Title 33, governing substantiations, includes an exception for the admissibility of statements by children who are the putative victims:

(3) (A) Article VIII of the Vermont Rules of Evidence (Hearsay) shall not apply to any hearing held pursuant to this subchapter with respect to statements made by a child 12 years of age or under who is alleged to have been abused or neglected and the child shall not be required to testify or give evidence at any hearing held under this subchapter. Evidence shall be admissible *if the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.*

33 V.S.A. § 4916b(b) (emphasis added).

Before what would otherwise be hearsay can be admitted in this case, there must be a determination that the statutory criteria are met - that the "time, content, and circumstances" of the statements provide "substantial" indicators of trustworthiness.

The Vermont Supreme Court has dealt with challenges to admissibility of hearsay under what is an identical standard contained in Rule 804a of the Vermont Rules of Evidence. The Court gives latitude to the trier of fact, as well as guidance regarding the type of evidence admitted at hearing that would support a finding of trustworthiness. See *State v. Tester*, 2006 Vt. 24, ¶17, 179 Vt. 627, 631 (disclosure made to trusted adult in a place where child felt safe and subsequent statements consistent with initial disclosure); *State v. Willis*, 2006 VT 128, ¶¶13-20, 181 Vt. 170, 176-77 (spontaneous disclosure to respite worker, consistent details in interviews with police and DCF investigator), *In re M.B. and E.B.*, 158 Vt. 63, 68 (1992) (statements made to trusted adults in unpressured settings, statements were consistent, and were corroborated by other evidence including medical evidence).



In *State v. LaBounty*, 168 Vt. 129 (1998), the defendant was convicted of aggravated sexual assault on two preschool age children who attended his wife's day-care facility. The defendant objected to hearsay statements made to the children's parents and to hearsay statements made the following day to the SRS investigator and detective. The Court noted the statements "freshness, spontaneity, internal consistency, and accuracy with respect to surrounding detail". *Id.* at 136. The initial disclosure was spontaneous. The children gave detail regarding not only what happened to them and where in the daycare the abuse occurred but also detail regarding the defendant's appearance, his clothing, the location of other children, and the interior of the day-care. The children were interviewed the following day by investigators who did not know the details of the allegations, and, as a result, had no preconceptions about what happened. *Id.* at 137.

The statements of the putative victim submitted into the record here fails the "substantial" test of trustworthiness based on their "time, content and circumstances" and the above precedent. The statements to the physician and nurse conducting the May 17, 2018 interview are bare; primarily stemming from a 6-question interview with a nurse whose

purpose and role was not investigatory, and prompted by a leading question from M's mother (after a pronounced but unsuccessful attempt by the nurse to elicit additional information from M). The statements were never repeated in any other interview or the Department's own investigatory interview, and never occurred outside the presence of M's mother. M's report of May 17, 2018 was never the subject of an investigative interview by the Department; while not in and of itself determinative of the admissibility of M's statements, this is a limitation in this case for reviewing the overall trustworthiness of the statements vis-à-vis the "substantial" requirements of the hearsay exception.<sup>8</sup>

Moreover, the mother's report of statements made by M and the timeline of those statements, along with her testimony at hearing, raised significant questions of consistency in "time and circumstances," in turn undermining the trustworthiness of M's statements as reported by her mother. Finally, the allegations themselves have a broadly inconsistent timeline. There is no additional corroboration of the statements. For all of these reasons, M's statements

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<sup>8</sup> To the extent relevant, the factual basis is unclear for the Department's decision not to conduct an interview of M following the May 17, 2018 report by the physician.

to her mother and to the physician and nurse are deemed inadmissible under 33 V.S.A. § 4916b(b) (3).

As these statements form the sole basis of the allegations against petitioner for sexual abuse, the Department has failed to meet its evidentiary burden and petitioner's substantiation must be reversed. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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