

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-07/21-450
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Appeal of)
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)

INTRODUCTION

Petitioner appeals a decision by the Department for Children and Families ("Department") substantiating a report that she placed a child in her care at risk of physical harm. The following is based upon a video hearing held on December 2, 2021.

FINDINGS OF FACT

1. The material facts at issue in this appeal revolve around events that occurred and were reported to the Department's Family Services Division on January 27, 2021. The events and report concern a child in DCF custody who was living in petitioner's home as a foster home placement.

2. The child in question was five (5) years old at the time of the incident. Petitioner served as a "kinship" foster placement, meaning she was related to the child - in this case, petitioner was related to the child's biological mother. At the time of the events in question, the child had

been placed in petitioner's home for approximately one (1) year.

3. In conjunction with becoming a foster home provider for the child, petitioner signed a "Vermont DCF-Family Services Caregiver Responsibilities" form dated March 25, 2020. One of the stated purposes of the form is "to assess the unique caregiving responsibilities required to support the safety and well-being needs of a specific child, over time." The form included the following information about the child:

a. "[Petitioner] has developed a highly structured routine for [the child] that is being carried out across environments. [The child] requires constant supervision and attention to maintain safety...[The child's] behaviors including [sic] hitting, biting, kicking, spitting, yelling, swearing, property destruction, bolting, soiling/wetting, and setting things on fire. [Petitioner] has needed to safety-proof her home, particularly due to his fire-setting behavior. [Petitioner] has put alarms on his bedroom door because he has left his room and become destructive at nighttime. [Petitioner] has developed a number of strategies that she implements when [the child] is escalated in addition to a positive/reward system."

b. "Due to [the child's] challenging and unsafe behaviors, [petitioner] is providing 1-1 supervision and instruction to him when in the community and engaged in activities with peers."

c. "[The child] has experienced multiple forms of abuse, neglect, and has lived with various caregivers throughout his life. [The child] displays significant behavioral and emotional difficulties. [Petitioner] has implemented an intensive routine and behavioral plan in

her home and his childcare to assist him in managing his day to day expectations.”

4. Due to the child’s many behavioral and emotional challenges, petitioner was paid an enhanced rate for providing a foster home. This is only relevant to the extent it supports the Department’s assertion that the child required a heightened level of constant supervision.

5. On the date in question, January 27, 2021, petitioner was returning home with the child and her daughter, after picking the child up from a visit with his biological mother. Petitioner’s mother was home when they arrived, sometime in the evening.

6. At some point in time, petitioner realized that the child was not in the home. The period between when the child left the home and when petitioner called the authorities to report him missing is at the heart of the dispute here. However, there is no dispute that the child was seen on a surveillance video tape (reviewed after the incident) leaving the home at 6:39 pm and that petitioner called law enforcement and the Department’s Family Services Division around 8 p.m., a period of around 80 minutes.

7. The following facts are determined with respect to the child's whereabouts after leaving petitioner's home unnoticed:

a. At some point after 6:39 pm, the child was seen by a passing motorist, who was driving west towards and just outside the town center of Alburgh, Vermont. The child was walking on the other side of Route 2, going in the opposite direction. Credible testimony established this was approximately .7 of a mile from petitioner's home and was near an intersection where Route 2 curves sharply. The speed limit of this section of Route 2 transitions from 35 to 40 miles per hour.

b. The motorist provided credible testimony at hearing. When he saw the child walking on the side of the road, he stopped out of concern for the child's welfare. Although he does not recall the specific time he stopped, at that time (he has since moved out of Vermont) he was normally driving to work on that section of the road between 6:30 pm and 7 pm. He also saw an older adult male walking in the other direction, and before approaching the child, the motorist asked the adult male whether he

knew the child (the adult male indicated he did not know the child).

c. The motorist then approached the child and asked him if he needed any help. Although the child was wearing boots, pants, a jacket, and a hat, the motorist noticed that the child's lips were purplish and almost blue. Because the child could not reasonably explain why he was walking on the side of a relatively busy section of Route 2 during the middle of the winter, the motorist invited the child to get in his vehicle, which the child agreed to do.

d. The motorist then drove approximately 1 to 1.5 miles on Route 2 east, stopping at a market and gas station, where he purchased the child something to drink and then called 9-1-1 at around 7:10 pm.

e. Two (2) police officers with the Grand Isle County Sherriff's Department arrived at the gas station and interviewed the child as well as the motorist. They remained with the child in the vicinity of the gas station while trying to ascertain the child's identity and living circumstances. In the officer's (credible) view,

anyone passing by would have noticed the police cruisers and flashing lights, and no one approached them looking for the child during the approximately 30 minutes they were at that location.

f. Eventually, because petitioner contacted law enforcement at around 8 pm, the police officers made the connection between the child and petitioner, and they brought the child back to petitioner's home.

g. When they brought the child to petitioner, one of the officers (who testified at hearing) credibly described petitioner as appearing "nonchalant" about the incident. Petitioner informed the officer that it was not uncommon for the child to disappear from the home. Petitioner further indicated that she had attempted to track and find the child using cell phone location services and when she could not find him, they started "walking out, driving out" into the community to find him.

h. Following this interaction, the officer reported the incident to the Department's Family Services Division and an investigation ensued,

ultimately leading to petitioner's substantiation for risk of harm (physical).

8. The Department's investigator testified at hearing. Her investigation, which commenced on January 28, 2021, included an interview of the two police officers involved, the motorist, petitioner's mother, the child, and petitioner. The investigator made a site visit in the area where the motorist picked the child up and made a site visit to petitioner's home (when she also interviewed petitioner). During the interview of petitioner, petitioner agreed - after she and the investigator reviewed surveillance video at the home - that the child had left the home at 6:39 pm. Petitioner stated further that she initially believed that the child may have taken her daughter's cell phone and that they tried to locate the phone to potentially find the child.

9. During her site visit to petitioner's home, the Department's investigator noted the snowy conditions around the home. The investigator later checked the temperature in the area on the previous day (26 degrees F). There is no dispute that the outside conditions were wintry and cold during the relevant time period.

10. The testimony of the Department's investigator is deemed credible, and the above description of her testimony

is adopted as fact - as to the course of the investigation, along with her direct observations as well as the statements made to her by petitioner.

11. The Department's investigation determined that petitioner's conduct had placed the child at a physical risk of harm based on two independent policies/criteria: one, that petitioner's conduct amounted to a "single egregious act" which resulted in the risk of harm, and two, petitioner failed to provide supervision or care "appropriate for the child's age and development" resulting in a risk of harm.¹ In the Department's view (as explained by the investigator) petitioner should have alerted the authorities immediately as to the child's disappearance, given his age and behavioral-emotional issues, as well as the outdoor weather conditions. This, coupled with the Department's view that petitioner failed to adequately supervise the child by allowing him to leave the home unnoticed, forms the basis of the Department's substantiation.

12. In addition, and also in relation to the Department's substantiation determination, the Department viewed petitioner as having a heightened duty of supervision

¹ These criteria are both included in Vermont's "Abuse of Children" statute, see 33 V.S.A. § 4912(14), further discussed below.

and care towards the child, especially given his risk of "bolting," engaging in self-harm, and engaging in behavior (i.e. fire-setting) that was a risk to others. As a point of fact, petitioner's care arrangement for the child with the Department's Family Services Division called for highly structured supervision of the child and the allegations against petitioner here would contravene the requirements of that arrangement. Although the Department indicated the petitioner's heightened obligation of supervision was not required to substantiate her for risk of harm - in this case the Department considered this as a factor in the substantiation.

13. Petitioner testified at hearing and also provided a written statement that she had been sent to the Department's Family Service's Division on January 27, 2021, just following the incident. Petitioner's statement was emailed to the Family Services Division and contained the following explanation (inadmissible portions not included):

[Child's name] ran away tonight. As soon as we got home, he somehow slipped out the front door. We searched frantically, inside, outside...He's never left the property before and never thought he would at night because hes [sic] so afraid of nighttime. I also thought

he had stolen my daughter's cell phone and we were tracking the phone through the app and it was jumping around the property, from the back yard to the front to the neighbors [sic] house...and then I found her cell phone in the car...and must be our wifi service is just so poor that it couldn't properly track the phone.

[O]nce I found the phone, I went into a straight panic attack and called 911 because he had never disappeared before...I can only do so much and [the child] is so sneaky, the level of concern I have for his safety has reached a new level...He's worked through an extreme amount of challenging behaviors, but running away, in the night time, on main roads ?? ...my heart may not be capable of going through this again, it was terrifying.

14. Petitioner's testimony at hearing is summarized as follows. Petitioner knew the child and his biological parents before he came into her care, and she expressed a deep concern for and emotional connection to the child. When the child first came into her care, she witnessed him engage in acts of self-harm, aggression, fire-setting, and other unsafe behaviors. The child, in petitioner's view, started to "grow out" of these behaviors during the time he lived with her (about one (1) year), and she saw this as a positive

outgrowth of building a strong relationship with him.

However, petitioner also indicated that she had seen the

child be "easily triggered" into aggressive behavior.

Petitioner had alarms on the child's room - because of his many behavioral issues affecting his and others' safety - as well as a surveillance camera in the home.

15. On the day of the events at issue, the child had a visit with his biological mother and petitioner had just picked him up from that visit when she (along with her daughter) returned home. Petitioner, her daughter and the child all went into the home when they arrived. As noted above, video evidence established that the child left the home at 6:39 pm. While it is not entirely clear when petitioner realized the child was no longer in the home, she testified at hearing that she initially went outside to see if she could find her daughter's phone (which was missing) and then, when they could not locate the phone, she searched the home "up and down" for him, believing that he might have taken her daughter's phone and was hiding with it. Petitioner stated that it was "not uncommon" for the child to take someone else's phone to try to contact his mother. Petitioner indicated that the search of her home took approximately 20 minutes.

16. Petitioner then decided to see if she could locate the child by tracking her daughter's phone using GPS. She indicated that she pulled a program up on a laptop ("find my iPhone") to track the phone, and saw it represented by a dot "moving slowly around the house, backyard, around the pool, to the neighbors." Petitioner characterized her response to this discovery as "I got him" and that she was "not too concerned." When petitioner initially testified about this, she did not mention that she ever went outside to track the phone. It was only on cross-examination that she responded - adamantly - that she and her daughter "followed" the dot all around the back of their property - which was about an acre in area, with a backyard, pool, trampoline, and garage - using the laptop. Petitioner also testified that the child was terrified of the dark and had never left her home by himself at night (by the time of the events in question, it was well past sunset).

17. If it is presumed (in petitioner's favor, to an extent) that she discovered the child missing shortly after he left the home, then she would have ended her search of the home, and began tracking the phone, around 7 pm. Petitioner testified that when the child had still not appeared anywhere, she "thought to check the car" again for her

daughter's phone and found it "in a crevice under the seat." At that point, petitioner indicated she "lost her stomach" and called 9-1-1 as well as Family Services. Petitioner called the authorities at 8 pm. When the police arrived with the child, she asserts she was "still in a panic" and when asked whether she was "nonchalant" as described by the officer who brought the child home, petitioner testified that she felt like she was "screaming on the outside" and "couldn't breathe."

18. Although petitioner's testimony is summarized and recited in part above, her testimony as to the events at issue does not reasonably or credibly explain why she initially failed to prevent the child from leaving her home and subsequently failed to alert the authorities during the time the child was missing. Petitioner's explanation has several inconsistencies. Petitioner indicated that the child was plagued by night terrors and never went out in the dark alone, yet when she discovered that he was outside the home at night, alone in the middle of winter, she stated she was "not too concerned." Likewise, petitioner remained unconcerned that the child could not be found after as much as 80 minutes searching for him with the (presumed) knowledge that he was outside and alone for almost all of that time.

In any event, petitioner did not credibly explain how it have been reasonable to refrain from calling the authorities after failing to find the child on her property after the sustained period of time that petitioner indicates she was tracking him outside her home. Petitioner's testimony that she was "screaming on the outside" and "in a panic" when the police arrived with the child is also not adopted; it is directly countered by credible testimony of the officer who brought the child home.

19. Even accepting petitioner's testimony as credible, there are two basic conclusions which must reasonably and alternatively be drawn. Either petitioner immediately discovered the child missing and commenced a search of her home for 20 minutes and then a search of her backyard for nearly an hour and took no action to alert the authorities. Alternatively, petitioner failed to realize that the child was missing for an extended period of time before looking for him. Under either scenario, petitioner failed to adequately supervise a 5-year-old child with significant emotional needs, with a propensity to "bolt," who faced serious risks to his safety without adequate supervision. Correspondingly, given the length of time the child was unaccounted for

without alerting the authorities, the situation here cannot reasonably be understood as "accidental."

20. There is and can be no dispute that the child was actually exposed to a significant risk of serious physical injury, or other types of risk (i.e., being picked up by a stranger with malicious intent) when he ended up wandering down a state highway at night in the wintertime and was easily convinced to enter the vehicle of a stranger (who, fortunately, wanted to assist the child). While petitioner argues that the "actual" risk to which the child was exposed is irrelevant, it is more than reasonable to find (as the Department did here) that either failing to realize a 5-year-old child with serious behavioral issues and emotional-developmental needs is missing, or failing to alert the authorities when that child *is* missing for an extended period of time, when you are that child's primary caregiver, exposes the child to a significant risk of serious harm.

21. Furthermore, while not necessary to find that petitioner's conduct exposed the child to a risk of harm, the child's heightened needs and petitioner's heightened responsibility of supervision of the child, makes petitioner's conduct under these circumstances egregious.

ORDER

The decision of the Department substantiating the petitioner for risk of physical harm is affirmed.

REASONS

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 statute provides an administrative review process for individuals challenging their placement on the registry. 33 V.S.A. § 4916. At an administrative review, a report is considered substantiated if it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912 (16). If the substantiation is upheld at the administrative review level, the individual can request a fair hearing under 33 V.S.A. § 4916b(a). Appeals from a substantiation determination are heard de novo and the Department bears the burden of establishing the substantiation by a preponderance of the evidence. See *In re R.H.* 189 Vt. 15, 14 A.3d 267, 2010 VT 95, at ¶16; *In re Selivonik*, 164 Vt. 383, 670 A.2d 831 (1995); Fair Hearing No. B-01/12-69.

Pertinent sections of Vermont's Child Protection Statute that defines mandated reports of child abuse and neglect 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. . .

. . .

(6) "Harm" can occur by:

. . .

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

(A) a single egregious act that has caused the child to be at significant risk of serious physical injury;

. . .

(C) failing 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;

. . .

(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; or
- (iv) substantial disfigurement . . .

33 V.S.A. § 4912.

Department policy also outlines what may constitute risk of physical harm:

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;

. . .

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...

DCF Family Services Policy 56 (emphasis in original).

The factual record establishes that petitioner was the child's primary caregiver and failed to provide "supervision or care appropriate for the child's age or development" such that the child was exposed to a significant risk of serious physical injury. In addition, the child's heightened needs, petitioner's heightened responsibilities of supervision, and the time of night and wintry conditions under which these events occurred make the risk of harm a "single egregious

act" under Vermont law and the Department's policies. This event cannot be understood as "accidental" given the length of time petitioner was aware that the child was not in her home and the risky circumstances, particularly given the child's heightened level of need.

As such, the Department's decision to substantiate the petitioner for risk of harm is consistent with the applicable rules and must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule 1000.4(D).

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