

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. H-12/20-786
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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 two minor females. 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 November 17, 2020¹. A video hearing was held on August 27, 2021. This decision is based on the evidence adduced at hearing and exhibits introduced by the parties.

FINDINGS OF FACT

1. In 2014, petitioner moved into his female partner J.B.'s home in Bradford which she shared with her two

¹The Commissioner's review decision dated November 17, 2020, substantiated petitioner for sexual abuse of two minors, A.B. and C.B. The reports were referenced in one Departmental "intake report" and were identified as "incident #1 involving A.B. and "incident #2" involving C.B. However, in this appeal to the Board the Department proceeded only on the substantiation involving C.B.; no evidence was presented regarding the substantiation involving A.B.

daughters, A.B. and C.B. At that time, the younger daughter C.B. was in second or third grade. C.B. had visitation with her father B.B., who lived in Lyndonville. Petitioner's daughter was also sometimes at the home for visitation. C.B. lived with her mother and petitioner until she was a freshman in high school. After the incidents that are outlined below, C.B. went to live with her father, where she resides today.

2. In June 2019, the Department received a report from a counselor at C.B.'s school. As a result of that report the Department conducted an initial investigation. The Department interviewed, among other people, C.B.'s mother, petitioner, C.B.'s father, C.B.'s therapist, and C.B. A subsequent interview of C.B. was conducted on November 26, 2019. As a result of its investigation, the Department substantiated petitioner for sexual abuse of C.B.

3. C.B. testified at hearing; by agreement, her father was present with her as a support person. C.B. testified that while she lived with her mother, her mother did not typically work outside the home, but sometimes she was a caregiver for seniors; she did not believe that petitioner was ever employed while she was living with him. C.B., now age 16, testified at hearing. She testified that over a

period of two years, from when she was approximately 12 years old to age 14, while she would be sitting in the living room with the petitioner "weird things happened that made me uncomfortable." C.B. stated that they would be in the living room, usually watching T.V. and that these things would happen when she was sitting on the couch. C.B. testified that "he (petitioner) would sit down and start rubbing my feet." She said this did not happen at her request. On a few occasions, when she was wearing underwear and shorts, his hand would touch her upper thigh and then brush her vaginal area over her clothing. Other times, petitioner would place her foot on his erect penis. C.B. testified that it was "nothing intense, just uncomfortable." C.B. testified that, while sitting in her presence in the living room, petitioner would also "adjust himself" over his clothes; he would touch his penis over his clothes and move his penis. C.B. did not talk to petitioner about what was happening because she had grown up with him, he was her mother's partner, and it was awkward. C.B. testified that during the two-years, these behaviors might happen a few times a week. At some point in 2019, a few weeks before she stopped living at her mother's house, C.B. stated that she told her mother about petitioner's actions. She testified that she did not give

her mother details but told her that she didn't feel comfortable with petitioner but that her mother "kinda brushed it off." After that report, there was a family meeting with her mother, petitioner, and her father.

Subsequently in June 2019, after the report to the Department, petitioner moved to her father's house to live.

4. C.B.'s mother J.B. testified at hearing. When first contacted by the Department, J.B. acknowledged that C.B. had spoken to her about not being comfortable in the home because of petitioner's behavior. The mother reported that they had held a family meeting and she believed that all concerns were addressed. When J.B. learned the specific allegations about petitioner's behavior with C.B., she did not believe that the events had occurred. She testified that she was typically present in the living room with C.B. when petitioner was present, which was typically "family time" after dinner. And, even if she were in the kitchen, she testified that you could see into the living room from the kitchen, though not the full living room; the living room was 20 to 25 feet from the kitchen. She also acknowledged that in the winter, there are curtains hung in the doorway between the kitchen and living room to retain heat in the living area. The mother testified that she had witnessed petitioner rub both of her

daughters' feet frequently, but there was never any inappropriate touching between C.B. and petitioner when that was happening. J.B. testified that C.B. disclosed more information in the second interview with the Department in November 2019, which she believed to be suspicious, and she believes that C.B. made up these accusations because she wanted to live with her father.

5. Petitioner testified at hearing that when he sat in the living room when C.B. and A.B. were living there he always sat on a mat on the floor that was "his space." He testified that he only massaged the girls' feet if they asked him to, typically after they came home from playing sports, and only when J.B. was present in the room. He denied any inappropriate touching of C.B.

6. C.B. was interviewed twice by the Department and her reports on petitioner's behavior were found to be credible by the Department leading to petitioner's substantiation. At hearing, C.B.'s testimony was consistent with her reports to the Department, and she was highly credible. While C.B. was initially a bit nervous and embarrassed, she became more comfortable as her testimony progressed. In comparison, the petitioner's testimony was less credible. Thus, a preponderance of evidence establishes

that petitioner committed the acts described by C.B. in her testimony.

7. In its "Review of Substantiation" decision dated November 17, 2020, in addition to substantiating petitioner for sexual abuse of C.B., the Department also substantiated petitioner for sexual abuse involving minor female A.B. However, at hearing before the Board's Hearing Officer the Department did not proceed with that part of the substantiation; no evidence was presented regarding sexual abuse of A.B.

ORDER

The Department's decision substantiating petitioner for sexual abuse is affirmed in part and reversed in part.

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).

C.B.'s statements at hearing were consistent with her reports to the Department. Based upon C.B.'s credible testimony, the petitioner acted in a deliberate and inappropriate way when, he repeatedly and over a period of time, touched her upper thighs and genitals and placed her foot on his erect penis. See Fair Hearing No. Y-10/16-974 (adult stepfather's repeated touching of minor female's body in intimate ways and locations established that lewd and lascivious conduct occurred).

Based on the above Findings, the Department produced sufficient evidence to meet its burden of showing by a

preponderance of the evidence that the petitioner sexually abused C.B. by committing lewd acts involving a child.

However, regarding the Department's substantiation of petitioner for sexual abuse of A.B., the Department did not present any evidence regarding that substantiation. Absent presentation of evidence on that matter, that substantiation must be reversed. See Fair Hearing No. M-12/16-1077 (in appeal of substantiation of an individual for multiple incidents of sexual abuse/assault of a minor, while evidence supported individual's substantiation for specific instances of sexual abuse, absent evidence in the record establishing petitioner's substantiation for one specific incident, the substantiation regarding that once incident must be reversed).

Therefore, the Board must uphold the Department's decision to substantiate petitioner for sexual abuse of C.B. and reverse the Department's substantiation of petitioner for sexual abuse of A.B. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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