

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. M-12/20-771
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Appeal of)
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)

INTRODUCTION

Petitioner appeals the decision by the Department for Children and Families ("DCF" or "Department") substantiating him for sexual abuse. Petitioner was 15 years old at the time of events in question and the alleged victim was 14 years old. The following facts are adduced from an in-person merits hearing held on January 6, 2022. The alleged victim, her mother, petitioner and his mother testified at hearing. In addition to testimony, several exhibits were also entered into evidence. The issue is whether a preponderance of evidence establishes the Department's substantiation of petitioner.

FINDINGS OF FACT

1. Petitioner appeals from a Commissioner's Review decision dated November 16, 2020, upholding his substantiation for sexual abuse of a child. The report of abuse was made on December 10, 2019, although the allegations in question occurred during a period approximately 9-14

months prior, when the petitioner and alleged victim were in a dating relationship from approximately September 2018 through early March 2019. As noted above, petitioner was around 15 years old during this time period and the alleged victim was around 14 years old; correspondingly, petitioner was a first-year high school student while the alleged victim was in 8th grade.

2. The allegations against petitioner are that he sexually assaulted the alleged victim on numerous occasions over a four to five-month period during their relationship. This includes numerous allegations of the use of force by petitioner in continuing to engage in sexual intercourse after the alleged victim told him to stop, and a single incident of petitioner engaging in digital penetration of the alleged victim's vagina without consent, after she had told him to stop.

3. There is no dispute that petitioner and the alleged victim had a sexual relationship; credible evidence establishes that they began having sex in or around October 2018 and that they had sex approximately 50 times during the course of their relationship. This was the first sexual relationship for both of them.

4. Petitioner and the alleged victim stopped dating in late February or early March 2019. The alleged victim was the person who broke off their relationship. Following their breakup, petitioner and the alleged victim had several acrimonious interactions in school, which required the intervention of school officials. While the evidence establishes that petitioner was often the initiator of these interactions, in general the nature of their relationship following the break-up is not given significant weight as to the ultimate issues in this appeal.

5. In the fall of 2019, the alleged victim took a "health" class which included discussion and information regarding sexuality and issues of consent. During a class exercise - the written submission of questions to the class instructor - the alleged victim submitted a question about whether it was ok to have non-consensual sex if consensual sex has already occurred. This prompted her health teacher to talk with the alleged victim, who reported that petitioner had sexually assaulted her on numerous occasions. The teacher (a mandatory reporter) then reported this to the Department's Family Services Division. An investigation followed, leading to petitioner's substantiation for sexual

abuse.¹ A Commissioner's Review decision upheld petitioner's substantiation; this appeal followed.

6. As noted above there is no dispute that petitioner and the alleged victim were in a sexual relationship. Given their age and lack of access to their own transportation, evidence submitted by both parties is in accord that they were largely dependent on their parents to see each other at times when they were not in school. Their sexual interactions occurred at each other's homes at various times. Their respective parents eventually became aware of the fact that they were having sex, although this did not prevent petitioner and the alleged victim from continuing to have sex, albeit against the wishes of petitioner's mother and contrary to the "rules" she had established in their home.

7. The Department's central witness at hearing was the alleged victim. Her testimony initially focused on events that occurred on a single date, December 22, 2018. On that date, petitioner, his brother, and the alleged victim drove to the Burlington area with petitioner's parents. After shopping and having something to eat in the late afternoon, they returned home to central Vermont, stopping at a mall in

¹ Although not material to the issues or outcome here, petitioner also faced criminal and juvenile charges stemming from the report; those charges were eventually dismissed.

the area around 7:00 p.m. Petitioner's parents left the teenagers in their vehicle while the parents shopped at the mall.

8. The alleged victim's credible testimony establishes that, while the three teenagers were in the back seat of the vehicle and where it was relatively dark, petitioner began sticking his hand down her pants and persisted after she told him to stop, penetrating her vaginal area with his fingers - at which point, she "pushed" him off of her and began crying. A photograph was entered into evidence (a "selfie") showing the alleged victim crying, with petitioner kissing her on the side of her face, at 7:22 p.m. on December 22, 2018. This evidence is consistent with and corroborates the alleged victim's credible testimony that petitioner forcibly penetrated her vaginal area with his fingers after she told him to stop.

9. On cross-examination, the alleged victim was asked about her report that petitioner had forced her to have sex on numerous occasions during their relationship. Out of the estimated 50 times they had sex, the alleged victim estimated that petitioner forced himself on her approximately 20 times. Her testimony credibly established that on those occasions, petitioner would initiate sex, she would tell him to stop,

and he persisted anyway, holding her arms down above her head and at times covering her mouth (so as to prevent her from protesting or making any other noise) with his other hand.

10. On cross examination, the alleged victim agreed that she had not told anyone in authority (i.e. parents, her older sister, or school officials) about petitioner's sexually assaultive behavior when it was occurring or in the months after they broke up; however, she credibly explained that while she was upset about the behavior, it was her first sexual relationship and she did not understand how "wrong" it was at the time, that she loved petitioner, wanted to stay in the relationship, "pretended" it was not an issue, and was also "embarrassed" by the topic. The alleged victim testified credibly and persuasively about how petitioner's assaultive behavior had affected her ability to form relationships, be physically touched, and trust other people. She furthermore credibly explained that she did not understand the issue or concept of "consent" in sexual interactions until she learned about it in her health class in Fall 2019, which led to her report of petitioner's conduct. The fact that the alleged victim's report initially stemmed from a *question* about whether sex was non-consensual

after a couple had already had consensual sex only strengthens her account of the timing of her report.

11. Evidence was admitted that the alleged victim went on at least two (2) overnight trips with petitioner and his family while all of this was occurring, as well as took other day trips together such as apple picking. Photos were admitted from these trips showing the alleged victim with petitioner in various situations in which the alleged victim agreed she was "having fun." However, this evidence - to the extent it has material relevance or weight - does not undercut or otherwise affect the persuasiveness and credibility of her testimony described above.

12. After petitioner and the alleged victim broke up, petitioner sent her a "Snapchat" message with the following text: "I'm sorry [name]. I'm sorry for everything. Being mean to you when we fought the other day, not respecting your boundaries, helping you to [sic] much. I'm sorry for everything. I wanted to take a break but I didn't think it would do anything. I'm willing to try anything at this point. I'm sorry if I'm being to [sic] clingy I just love you so much. And I can't say goodbye. I need you."

13. Petitioner testified at hearing and denied ever forcing the alleged victim to have sex, and in particular

ever "pinning her down" or covering her mouth to keep her from saying anything while they were having sex. Petitioner denied ever penetrating the alleged victim's vaginal area with his fingers. He did not recall a specific reason the alleged victim was crying on the date she testified this one event occurred, but described it as "spontaneous" and indicated that she was often "sad" and would cry "a lot" to "get her emotions out."

14. Of specific note, petitioner explained his statement to the alleged victim that he was "sorry" for "not respecting your boundaries" as resulting from a school basketball game they had recently attended, during which he tried to hug her and she "pushed him away" because she was not comfortable with public displays of affection. Petitioner further testified that the alleged victim had never reported any unhappiness or distress about their sexual interactions.

15. Petitioner's testimony as to the allegations against him is determined to lack credibility, as well as persuasiveness when weighed against the testimony of the alleged victim. His explanation that photos of the alleged victim crying on December 22, 2018, were the result of her "sadness" and frequent crying to "get her emotions out" does

not undercut the alleged victim's credible and specific recollection of the events that day - which, in turn, was only further supported by the photo of her crying and upset on the same evening.

16. Likewise, petitioner's explanation for acknowledging he had not "respected" the "boundaries" of the alleged victim because of her discomfort with "personal displays of affection" does not credibly explain that acknowledgement - which is broadly couched - under the circumstances. It is reasonable to understand petitioner's acknowledgement as supporting the alleged victim's account of their sexual interactions, rather than petitioner's account.²

17. Both petitioner's mother and the alleged victim's mother testified at hearing. Petitioner's mother testified to her "hands on" involvement in petitioner's academic, extracurricular and personal life (particular during the timeframe at issue), the values that she believed she has conveyed to him (including those around dating, sexuality and consent), her lack of observation of anything amiss or wrong

² There was some questioning on cross-examination of the alleged victim as to why she did not report being assaulted if she was aware at the time that something was wrong, or she was upset about it. However, the evidence establishes that the alleged victim told petitioner to stop on numerous occasions following which he forced her to have sex; that this was against her wishes should have been apparent to petitioner and of course was apparent to the alleged victim. That petitioner crossed interpersonal boundaries is a substantially separate issue from the reason the alleged victim eventually reported these incidents.

in the interactions between petitioner and the alleged victim (which she viewed as overall having a "positive dynamic" and without seeing any sadness, distress or discomfort from the alleged victim),³ and her considerable distress that petitioner and the alleged victim were having sex. While the testimony of petitioner's mother was genuine, her testimony does not materially affect the credibility of the testimony and weight of other evidence as to the allegations against petitioner. Likewise, the testimony of the alleged victim's mother regarding her discussions of sex with her daughter as well as her interactions with petitioner's mother does not have material bearing on the factual determinations in this appeal.⁴

18. In consideration of all the evidence in the record, petitioner committed multiple acts of forced sex or and one act of forced sexual molestation or assault, all without consent, against a child.

³ It is noted that this contrasts to some extent with petitioner's description of the alleged victim as frequently "sad" and susceptible to spontaneous "crying" in attempting to explain the photo of her from the December 22, 2018 incident.

⁴ There was some focus in the evidence on a meeting between petitioner, his mother, the alleged victim and her mother that was initiated by petitioner's mother when she became aware the teenagers were having sex. The evidence from each party is in agreement that issues such as birth control and sexually transmitted diseases were discussed, although not the specific issue of "consent." The fact that alleged victim did not raise any issues with petitioner's conduct towards her during this meeting does not undercut her credible account of events or the facts established by the evidence as a whole.

ORDER

The Department's substantiation of petitioner 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.

The pertinent sections of the statute 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.

...

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

...

(C) rape;

...

(I) sexual assault;

33 V.S.A. § 4912.

In addition, the Department's policy rules in effect at the time provide the following regarding sexual abuse allegations between individuals under 18:

Sexual abuse is substantiated when a reasonable person would believe that one of the following has occurred: sexual molestation or exploitation of a child including, but not limited to, incest, prostitution, rape, sodomy, any lewd and lascivious conduct involving a child or the 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.

...

Sexual abuse by one child on another child is substantiated when:

1. The victim is being exploited, or prostitution is involved;
2. force, coercion or threat is used to sexually victimize the child, or the victim did not have the ability or opportunity to consent; or,
3. a significant difference in age, size or developmental level is used to sexually victimize the child.

Vt. Admin. Code 12-3-503:2010, § 2010.05 (Substantiating Sexual Abuse).⁵

There can be no reasonable dispute that the acts reported against petitioner here meet the definition of "sexual abuse" according to the applicable statute and policy. The report against petitioner included allegations of use of force in numerous sexual interactions against the victim which any reasonable person would understand as sexual assault. The Department presented credible testimony that established by a preponderance of evidence that petitioner used force in compelling a child to have sex, even after she

⁵ These rules were amended effective March 1, 2019. See Vt. Admin. Code 12-3-503:2001. There is no substantive difference between the DCF policy currently in effect and the rules previously in effect, as they apply to this case, because they apply the same approach to sexual abuse allegations between minors of the ages of the petitioner and alleged victim. See *id.* at subsection 20 (definition of sexual abuse).

said no, on numerous occasions, and on one occasion sexually assaulted her after she resisted him, putting his hands down her pants and into her vagina when she had no opportunity to consent. In addition to credible testimony, the Department presented corroborating evidence that reasonably supported that testimony. Either allegation--that of numerous acts of unconsented and physically forced sexual intercourse, or one act of digital penetration of a child's vagina without consent - meets the above definition of sexual abuse.

As such, the Department has met its burden of proof and the substantiation of petitioner for sexual abuse must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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