

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. A-06/13-449  
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Appeal of )  
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INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner appeals the decision by the Department for Children and Families ("Department" or "DCF") substantiating a report that he sexually abused his daughter. The issue is whether the Department's decision is supported by a preponderance of the evidence.

A trauma hearing was held on June 26, 2014. In a Preliminary Ruling issued on June 30, 2014, the hearing officer found that petitioner's daughter would suffer trauma if required to testify at hearing, and that she did not need to be made available to testify at hearing in order for her statements - otherwise hearsay - to be admitted under Rule 804a of the Vermont Rules of Evidence. The merits hearing was held on July 24 and 25, and August 11, 2014. Petitioner attended the trauma hearing and the merits hearing and was represented by counsel.

Following the hearing, petitioner requested a stay while his case regarding the same events proceeded in the Family Division of Superior Court. In January of 2016, petitioner's counsel contacted the Human Services Board and indicated that petitioner would like a recommendation on his appeal. A telephone status conference was held on February 2, 2016, during which counsel reported that petitioner had stipulated to the termination of his parental rights ("TPR"), and indicated that he and petitioner would discuss whether to pursue his appeal before the Board. By letter from counsel dated February 17, 2016, petitioner requested a decision from the Board. During subsequent status conferences the hearing officer requested court records about the TPR, including the order to which petitioner had stipulated and any findings, or records from the Child in Need of Care and Supervision ("CHINS") proceedings in which petitioner had been a party. In response, the Department submitted a recording of petitioner stipulating to the TPR on the record, and indicated that there was no written stipulation or record of the Family Division making findings of fact (the court did not make any findings when petitioner entered his stipulation on the record). The hearing officer again requested that the parties try to locate any written findings related to the

CHINS or TPR proceedings from the Family Division, or rule out their existence, before the Board issued a decision in this matter. The Department subsequently reported that it had located a stipulation of the alleged victim's mother (petitioner's ex-wife) to a CHINS order and findings, along with the docket sheet for the case, and submitted those documents on February 6, 2017. Petitioner was not a party to this stipulated order, and the stipulation itself only notes that DCF had substantiated petitioner, but without mentioning his pending appeal before the Board. These documents, along with the Department's representations, are sufficient to rule out the possibility that the Board in this case could be bound by findings of fact from the Family Division through the application of collateral estoppel. Therefore, the Board may proceed to decide the merits of this appeal.

During the merits hearing the Department presented testimony from a DCF Family Services worker from DCF's Saint Albans office, the alleged victim's mother, a Detective Trooper from the Vermont State Police, a DCF Investigator from DCF's Saint Johnsbury office, and the alleged victim's therapist. The Department also offered evidence consisting of a video-recording of the DCF Investigator's interview of the alleged victim, and documentary evidence, including

reports from the Vermont State Police and anatomically correct drawings utilized by the DCF Investigator during the interview of the alleged victim.

Petitioner testified on his own behalf and presented testimony from his mother, father, and two friends, along with expert testimony by telephone from a forensic trial consultant (based out of state), and offered a recording of petitioner's interview by the Vermont State Police.

This decision is based on the evidence adduced at the merits hearing.<sup>1</sup>

#### FINDINGS OF FACT

1. The alleged victim is the biological daughter of petitioner. At the time of the events leading to petitioner's appeal in this matter, the alleged victim (now seven) was two years and ten months old, and resided with petitioner near Saint Albans.

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<sup>1</sup> The following exhibits from the Department have been admitted into the record: (1) DCF Review of Substantiation dated May 31, 2013; (2) a seven-page Vermont State Police report of the interview of petitioner on July 11, 2012 and two one-page follow up reports; (3) a DVD containing a video-recording of the DCF Investigator interviewing the alleged victim; (4) a Progress Note written by the alleged victim's therapist on July 17, 2013; (5-A) an anatomically correct drawing of a male; and (5-B) an anatomically correct drawing of a female. The following exhibit from petitioner was also admitted into the record: (1) a CD with the recording of the Vermont State Police interview of petitioner on July 11, 2012.

2. At the time of the alleged abuse in July 2012, petitioner and the alleged victim's mother ("mother") were living in separate households, with petitioner maintaining full custody of the alleged victim and allowing visitation with her mother (who was living with her parents at the time) at his discretion. Petitioner was effectively sharing custody of the alleged victim with her mother by allowing visits with her mother for a week every other week.

3. The mother testified that on the evening of July 9, 2012, she tried to give the alleged victim a bath, and when she did so, the child reacted badly by kicking and screaming and wanting to get out. When the mother asked what was the matter, the alleged victim said that "mean daddy" had stuck his "pee pee" in her "who who" and pointed to her vaginal area. The mother explained that the alleged victim used the term "who who" for vagina and "pee pee" for penis. The mother struggled with her emotions while describing what the alleged victim had told her. She also noted that it was the first time the alleged victim had referred to petitioner as "mean daddy." Based on the mother's demeanor and the details

she provided of the alleged victim's statement and reaction to the bath, her testimony is found to be credible.<sup>2</sup>

4. The next day, on July 10, 2012, the mother reported to the Department that the alleged victim had complained of her vagina hurting when she tried to give the alleged victim a bath. The DCF Family Services worker in Saint Albans ("DCF worker") who received the report instructed the mother to take the alleged victim to a doctor for an examination and to DCF in Saint Johnsbury to be interviewed by a DCF Family Services investigator ("DCF Investigator"). The mother took the alleged victim to the hospital and then to DCF in Saint Johnsbury that day.

5. The DCF worker testified that after speaking with the mother, she called petitioner and spoke with him. During that call he told the DCF worker that he had spoken with the mother and was already aware of the allegations of sexual abuse. He said he was also concerned that the alleged victim had been sexually abused because she had regressed in potty training and was having nightmares, and that he had scheduled an appointment with a pediatrician. The DCF worker's testimony is found to be credible.

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<sup>2</sup> Petitioner did not raise any objection to the mother's testimony of the alleged victim's statements set forth in paragraph 3.

6. The DCF Investigator testified as follows.<sup>3</sup>

a. The DCF Investigator had worked for the Department for eighteen years doing investigations of sexual abuse of children. She has received training in this area, including training in interviewing young children, from the National Children's Advocacy Center, and her training is updated periodically. She has a bachelor's degree in human services.

b. The alleged victim had limited verbal skills, but the DCF Investigator has experience interviewing children of the alleged victim's age and with her verbal capacity.

c. The DCF Investigator asked the alleged victim if she had been to the doctor that day and whether she had a "boo boo." In response, the alleged victim clearly identified her vagina as the location of her "boo boo," by tapping the front of her diaper that covered her vaginal area.

d. When the DCF Investigator asked the alleged victim what caused her "boo boo," the alleged victim whispered, "daddy." The DCF Investigator repeated the

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<sup>3</sup> Petitioner did not raise any objection to the DCF Investigator's testimony of the alleged victim's statements set forth in paragraph 6.

answer because she believed the alleged victim's response would not be picked up by the recording (in fact the response is audible, see paragraph 8, *infra*).

e. The DCF Investigator used anatomically correct drawings when she interviewed the alleged victim. When she showed her a drawing of a female, the alleged victim pointed to the vagina to show the part of her body where she had a "boo boo." When the DCF Investigator asked her what "daddy" used to hurt her, the alleged victim pointed to the penis on the drawing of the male.

f. When the DCF Investigator asked her whether "anyone told her to say that about daddy," the alleged victim said "no."

g. The DCF Investigator acknowledged that asking the alleged victim if she had been to the doctor that day and if she had a "boo boo" were not open-ended questions, but she explained that a child as young as the alleged victim has a limited attention span and may not be able to give a detailed answer to an open-ended question. However, the DCF Investigator noted that "do you know what caused your 'boo boo'" is an open-ended question, and that there had been no mention of

petitioner during the interview before the alleged victim responded "daddy" to that question.

h. The DCF Investigator did not conduct any additional interviews of the alleged victim or anyone else. She noted that Department policy instructs that conducting multiple interviews about sexual abuse is not in the best interest of the child.

7. At hearing, the Department played the video-recording of the DCF Investigator interviewing the alleged victim (approximately four minutes in length) after which the Department offered it into evidence. The video-recording was admitted into the record without objection from petitioner.

8. It is found that the video-recording corroborates the DCF Investigator's testimony because it shows the alleged victim making the statements and gestures described by the DCF Investigator (and it is noted that the alleged victim's first response of "daddy" when the DCF Investigator asked her what caused her "boo boo" is audible). The video-recording shows that when the alleged victim was asked to indicate where her "boo boo" was on a female drawing, she spontaneously pointed to the vagina, and when the DCF Investigator circled it and asked "that's the picture of the boo boo," the alleged victim clearly said "yeah." The video-

recording also shows that the alleged victim twice responded "daddy" when the DCF Investigator asked her what caused her "boo boo," and when she was asked what part of "daddy," she pointed, spontaneously and without hesitation, at the penis on the male drawing. Then when the DCF Investigator circled the penis and asked "that part," the alleged victim again clearly said "yeah." Finally, when the DCF Investigator asked "did anyone tell you to say that about daddy," at the end of the interview, the alleged victim shook her head and said "no."

9. Based on the DCF Investigator's detailed explanation of her interview of the alleged victim, her experience in interviewing young children, and the corroborating evidence in the video-recording of the DCF Investigator interviewing the alleged victim, the DCF Investigator's testimony in paragraph 6, *supra*, is found to be credible.

10. A Vermont State Police Detective Trooper ("Detective Trooper") testified that he and a colleague interviewed petitioner in Saint Albans in the afternoon on July 11, 2012. During the interview petitioner initially denied any contact between his penis and the alleged victim's vagina. However, after the detectives presented petitioner

with a "ruse" by telling him that they had laboratory results (which they did not) showing penis cells of a relative in the alleged victim's vagina, petitioner eventually acknowledged that there might have been such contact. He described it as inadvertent because she ran away from the tub while he was giving her a bath, he was only wearing boxers, his penis fell out of his boxers, and there could have been penis to vagina contact when he put the alleged victim on his lap while she was naked and while his penis was still out of his boxers.

11. The parties stipulated to the admission of the recording of the detectives' interview of petitioner (introduced by petitioner) and the Detective Trooper's written report of the interview (introduced by the Department).<sup>4</sup> The recording and the report both show that, at the beginning of the interview, petitioner was told that he was not under arrest and that he could end the interview and leave at any time. The Detective Trooper's testimony in paragraph 10, *supra*, as corroborated by his report and the

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<sup>4</sup> Attached to the Detective's report was another brief report on the results of a polygraph test administered to petitioner. The Department stipulated to the admission of the polygraph report but objected to the hearing officer and the Board considering the contents of the report. The objection is sustained because the Board has previously excluded the results of a polygraph test because they have not been accepted as reliable evidence in Vermont courts, and because the probative value of the test is redundant in that the hearing officer makes the determination of a petitioner's veracity. See Fair Hearing No. H-08/14-695 at 5, n. 4.

recording of the interview, as well as petitioner's testimony in paragraph 17.g, *infra*, is found to be credible.

12. The alleged victim's therapist ("therapist") testified as follows about the alleged victim's statements and gestures during two therapy sessions in July 2013.<sup>5</sup>

a. The therapist is employed as a children's coordinator and therapist at a mental health services organization in northeast Vermont. She has a Masters Level Psychology license. At the time of the hearing she testified that she had obtained her masters degree almost twenty years earlier, and that she had been licensed for approximately fifteen years.

b. The therapist started treating the alleged victim in the autumn of 2012.<sup>6</sup> She noted that the alleged victim had language disabilities and was receiving services for those disabilities.

c. From the autumn of 2012 through early July 2013, the alleged victim did not make any disclosures about sexual abuse.

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<sup>5</sup> Petitioner did not raise any objection to the therapist's testimony of the alleged victim's statements set forth in paragraph 12.

<sup>6</sup> At the time of the merits hearing in 2014, the alleged victim was still receiving treatment from the therapist.

d. At some point in June 2013, petitioner indicated that he wanted to reconnect with the alleged victim, so the therapist suggested that he start with sending letters and pictures.

e. During a therapy session in early July, after obtaining the agreement of the mother, the therapist asked the alleged victim if she would like to have a letter from petitioner read to her, but the alleged victim said "no."

f. The following week, on July 17, 2013, the therapist had another session with the alleged victim. At the beginning of the session, the mother reported that the alleged victim had been having nightmares and talking about "mean daddy" at daycare. Because the mother had a new romantic partner whom the alleged victim called "daddy [D]," the therapist asked the alleged victim what daddy she was talking about. She responded, "my mean daddy, before." The therapist then asked if "he hurt you," and the alleged victim nodded and then lay on the floor, lifted her legs in the air, pointed at her vulva, pointed at her rear end, and then pointed at her vulva again. The therapist then showed her a photograph of family members that included

petitioner and the alleged victim and asked her who was in the picture. The alleged victim first pointed to herself and said, "me." The therapist then pointed to petitioner in the photograph and asked "who's that," and the alleged victim said "he my mean daddy."

g. The therapist testified that she did not have any reason to believe that the alleged victim had been coached to make a statement identifying petitioner as her "mean daddy" in the photograph or to point at her genitals and rear end to show where she had been hurt.

13. The Department offered the therapist's Progress Note (written on the same day as the therapy session on July 17, 2013) which included the alleged victim's statements testified to by the therapist, and the Progress Note was admitted into the record without objection by petitioner.

14. The therapist's testimony, as supported by her Progress Note, that the alleged victim identified petitioner as her "mean daddy" and clearly pointed to where he had hurt her, is found to be credible.

15. Petitioner offered the testimony of his mother, his father, his best friend since fourth grade, and his best friend's mother. Each of these witnesses testified that they observed the alleged victim with petitioner prior to the

events in July 2012, and that she appeared happy and relaxed with petitioner. While these witnesses all appeared credible, their testimony is assigned no weight because their observations happened prior to the events at issue in this case in July 2012.

16. Petitioner offered the expert opinion of a forensic trial consultant ("trial consultant") by telephone. The trial consultant testified that he has a Masters of Science in psychology and the law in child forensic studies, twenty years of experience in forensic trial consulting, and that his opinions are based on thirty years of reviewing interviews of children. He acknowledged that his review of this case was limited to reviewing DCF records and the therapist's notes, watching the video-recording of the DCF Investigator interviewing the alleged victim, and speaking with petitioner once or twice. He testified to his opinion that the statements and gestures of the alleged victim indicated that she had been rehearsed to identify petitioner as the cause of her "boo boo." In support of his opinion, he suggested that the DCF Investigator prompted the alleged victim to point to the male and female genitals in the anatomically correct drawings. However, the video shows that the alleged victim pointed to the genital areas on the

drawings on her own and without hesitation (see paragraph 8, *supra*). He also suggested that "false memories" could be reinforced in a child through multiple interviews, but it is undisputed (and he acknowledged) that DCF conducted only one interview of the alleged victim. He also tried to undermine the DCF Investigator's testimony by saying a child should be asked directly if the child's mother told her "to say something bad about her daddy." But the DCF Investigator effectively did that when she asked the alleged victim "did anyone tell you to say that about daddy" (see paragraphs 6 and 8, *supra*). In sum, the trial consultant relied on evidence to support his opinion that was either absent from the record or contradicted by credible testimony and the video-recording, and as such, his opinion is rejected.

17. Petitioner testified on his own behalf as follows.

a. Petitioner was in a relationship with the alleged victim's mother from October 2008 through February 2009. The mother did not inform petitioner that she had become pregnant during that time, nor did she inform him when the alleged victim was born in September 2009, so he did not meet her until May 2010.

b. Petitioner and the mother resumed their relationship in February 2011, married in May, and moved

to Florida in June because the mother planned to undergo medical treatment there. The mother developed a substance abuse problem while they were in Florida, so petitioner brought the alleged victim back to Vermont in December 2011 and obtained a court order in January 2012 granting him temporary full custody of the alleged victim for one year.

c. Petitioner and the mother lived apart (the mother had moved in with her parents in Saint Johnsbury after returning from Florida) during the first half of 2012. During that time, petitioner allowed the alleged victim to visit her mother with increasing frequency, and by May 2012 she was staying with her mother for a week every other week. However, in early July 2012 the mother informed petitioner that she had started a relationship with someone else.

d. Petitioner testified that the alleged victim had been having nightmares in June and early July. He further testified that he discussed the alleged victim's nightmares with her pediatrician by telephone, that the pediatrician advised that the nightmares could be because of sexual abuse, and that in June he had

scheduled an appointment with the pediatrician for a check-up on July 13<sup>th</sup>.

e. On July 10<sup>th</sup>, while the alleged victim was staying with her mother, petitioner received a call from the mother informing him that the alleged victim had said she had a "boo boo" on her "who who," and that they were going to the doctor. Petitioner immediately drove to Saint Johnsbury, but upon arriving at the home of the mother's parents, he learned that the mother had left with the alleged victim to go to the doctor.

f. While in Saint Johnsbury, petitioner received a call from the Saint Albans DCF worker who explained the allegations against petitioner based on the mother's report and the DCF interview of the alleged victim. At the end of this conversation petitioner agreed to leave the alleged victim in the custody of the mother and her parents.

g. Petitioner acknowledged that he was interviewed by the Vermont State Police detectives in Saint Albans on July 11, 2012. When asked if he had eventually admitted that there had been contact between his penis and the alleged victim's vagina, petitioner acknowledged that he had, but he asserted that because

the detectives had told him they had evidence of a relative's penis cells in the alleged victim's vagina, he gave them "whatever bogus story to rule me out, so that they would investigate who really would have done that." Petitioner did not dispute that he said there could have been penis to vagina contact when he put the alleged victim on his lap while she was naked and while his penis was out of his boxers after she ran away from her bath. See paragraph 10, *supra*.

h. When asked about his testimony that he had made an appointment with the alleged victim's pediatrician because he had concerns about the possibility of sexual abuse, petitioner said he never really thought there had been sexual abuse, and that "the only thing that ever made me think that sexual abuse ever happened, was when the State Police told me that they had evidence." Petitioner's testimony conflicts with the DCF worker's credible testimony that he told her, *before* his interview with the State Police, that he was concerned about sexual abuse (see paragraph 5, *supra*). In addition, petitioner sounded very nervous when he testified on this point because he hesitated and stammered frequently.

i. Petitioner denied that he had any inappropriate sexual contact with the alleged victim.

18. Petitioner's accounts of events regarding his relationship with the mother and their custody arrangement for the alleged victim prior to July 10, 2012 are consistent with the mother's testimony and are found to be credible. However, based on petitioner's demeanor, along with his inconsistent and changing explanations about contact between his penis and the alleged victim's vagina and his concern that she might have been sexually abused, petitioner's testimony denying that he had inappropriate sexual contact with the alleged victim is deemed not credible.

ORDER

The Department's decision to substantiate petitioner for sexual abuse should be 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 a reasonable person would find 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 at ¶16; *In re Selivonik*, 164 Vt. 383, 670 A.2d 831 (1995); Fair Hearing No. B-01/12-69.

The pertinent subsections of section 4912 of Title 33 provide the following definitions that apply to a determination of "sexual abuse" of a child:

(1) 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.

. . . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. . .

33 V.S.A. § 4912.<sup>7</sup>

With respect to the testimony regarding the alleged victim's statements, V.R.E. 804a creates a hearsay exception

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<sup>7</sup> These statutory definitions were in effect at the time of petitioner's substantiation in 2012. The statute has been amended since 2012, but the amendments do not affect the outcome here.

when the putative victim of sexual abuse is twelve years old or younger. The pertinent sections state:

(a) Statements by a person who is a child 12 years or under . . . at the time the statements were made are not excluded by the hearsay rule if the court specifically finds at the time they were offered that:

(1) the statements are offered in a civil, criminal or administrative proceeding in which the child . . . is a putative victim of . . . lewd or lascivious conduct with a child under 13 V.S.A. § 2602, . . . or wrongful sexual activity and the statements concern the alleged crime or wrongful sexual activity. . .

(2) the statements were not taken in preparation for a legal proceeding. . .

(3) the child . . . is available to testify in court or under Rule 807; and

(4) the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

Trauma to Putative Victim of Sex Abuse

33 V.S.A. § 4916b creates an exception to (3), the third requirement under V.R.E. 804a(a) (*supra*), that in substantiation hearings before the Human Services Board a child under 12 need not be made available to testify if "the hearing officer determines, based on a preponderance of evidence, that requiring the child to testify will present a substantial risk of trauma to the child."

In this case, the hearing officer made a preliminary finding that the alleged victim would suffer trauma if required to testify at hearing, and thus she did not need to be made available to testify in order for her statements to be admitted under Rule 804a. This preliminary ruling is attached and incorporated herein by reference.

Reliability of Hearsay Statements

The Department presented the alleged victim's hearsay statements through the testimony of the mother, the DCF Investigator and the therapist. As noted in the Findings of Fact, *supra*, petitioner did not object to this testimony, and it is found to be credible. As explained herein, this testimony establishes that the "time, content, and circumstances" of the alleged victim's hearsay statements are trustworthy under V.R.E. 804a(a)(4).

The Vermont Supreme Court has addressed the question of admitting hearsay under V.R.E. 804a. The Court gives latitude to the trier of fact, and their decisions give guidance regarding the specificity of the evidence admitted at hearing that supports a finding of trustworthiness.

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 assaults occurred when defendant was left in charge. 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. In upholding the trial court's admission of these statements, the Court noted the statements' "freshness, spontaneity, internal consistency, and accuracy with respect to surrounding detail". *Id.* at 136. *See also, State v. Tester*, 179 Vt. 627 (2006) (disclosure made to trusted adult in a place where child felt safe and subsequent statements consistent with initial disclosure).

In this case, the alleged victim's statements and gestures indicating that petitioner had hurt her vagina with his penis meet the "indicia of trustworthiness" criteria. Her first report to her mother, a trusted adult, when she experienced discomfort while taking a bath was spontaneous and not prompted. The next day she repeated her report, and she was consistent in identifying petitioner and how he caused her "boo boo" through gestures and answers to questions from the DCF Investigator. The video-recording of the interview shows that, without prompting, the alleged victim identified petitioner when asked what caused her "boo

boo." She also pointed spontaneously and without hesitation at the penis on the male drawing when asked to indicate what part of petitioner had caused her "boo boo," and then she verbally confirmed it. The interview was conducted within 24 hours of the alleged victim's report to her mother, and her statements and gestures were clear and direct as to what she was saying.

A year later, after her therapist asked if she wanted to hear a letter from petitioner, the alleged victim identified petitioner as "my mean daddy, before." Then when she was asked if "mean daddy" had hurt her, she used clear gestures to show where she had been hurt, and after doing so, she identified petitioner as her "mean daddy" in a photograph. The alleged victim's reports to her therapist were credibly testified to, and the circumstances of those reports did not show any evidence of prompting her to identify petitioner as "mean daddy."

As there was no credible evidence admitted that undermined, altered or otherwise rebutted the testimony of the mother, the DCF Investigator and the therapist, it must be concluded that the alleged victim's reports were truthful and not the result of coaching. Thus, the "time, content, and circumstances" of the alleged victim's statements and

gestures testified to at hearing and contained within DCF's video-recording of the interview meet the criteria of V.R.E. 804a for establishing the trustworthiness of those statements and they are admitted.

In contrast, for the reasons stated in the Findings of Fact, *supra*, petitioner's testimony as to the events in July 2012 lacked credibility. The Department therefore has met its burden of establishing by a preponderance of the evidence that the incidents as reported by the alleged victim occurred. Moreover, these facts meet the definition of sexual abuse as defined in the statute. The sexual contact established by the Department between the petitioner and the alleged victim - the contact of his penis with her vagina - is clearly "sexual molestation or exploitation of a child." 33 V.S.A. § 4912(8).

The Department has met its burden of establishing that sexual abuse occurred and therefore its substantiation of petitioner must be affirmed. 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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