

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-07/16-748
)
Appeal of)
)

INTRODUCTION

Petitioner appeals her substantiation by the Department for Children and Families ("Department" or "DCF") for an allegation of sexual abuse of her minor child. A Commissioner's Review upheld the substantiations by letter dated June 28, 2016, leading to this appeal. A merits hearing was held over the course of two days, June 20, 2017 and August 15, 2017. Post-hearing briefs were submitted by the parties, with the record closing as of September 13, 2017.

Testimony was taken in-person by several witnesses at hearing: two DCF investigators, a Vermont State Police officer, a housemate of petitioner, and petitioner. Statements from the putative victim, who was available to testify but not called by either party, were offered by the Department pursuant to Vermont Rule of Evidence 804a. These audio-taped statements were provided to the hearing officer in a digital format for review - as to admissibility -

following the hearing.¹ In addition, the parties stipulated to the admission of audiotaped interviews of the petitioner and (separately) the putative victim's father. The following is based upon the merits hearing and evidence submitted therein.

FINDINGS OF FACT

1. Petitioner's daughter (and only child) was around six-and-a-half years old during the events at issue. At the time, her father had primary custody of her and she made weekly overnight visits to petitioner's home, principally on the weekends, Friday through Sunday. The father has had primary custody of the daughter since she was around 15 months old.

2. Petitioner lives with her romantic partner who has an older child from another relationship. The father of the putative victim is remarried with a blended family including children of their own who (at the time of the events at issue) lived with them as well.

3. In or around September of 2015, a report of sexual abuse was made to DCF, pertaining to petitioner and her

¹ Any reference to the substance of these statements in the factual findings is for the purpose of determining their admissibility, and not for the substance/truth of those statements.

daughter. Her daughter was jointly interviewed by a DCF investigator and a Vermont State Police investigator on September 2, 2015. The interview was videotaped and a copy provided to the hearing officer. The allegations at that time - ultimately unsubstantiated - were distinctly different from the allegations leading to petitioner's substantiation currently under appeal. In summary, the allegations leading to the September 2, 2015 interview were regarding inappropriate touching of or around the daughter's genitalia.²

4. Petitioner was interviewed by the DCF investigator and police investigator on September 17, 2015, regarding the report and interview of her daughter, at that time. She denied engaging in any inappropriate behavior with her daughter. An audio copy of petitioner's interview was provided to the hearing officer and admitted by stipulation.

5. In October of 2015, petitioner's daughter came to school with what has been described as a handwritten "book"; in effect, a written description of several things that she allegedly experienced in petitioner's care that she "does not

² Much of the investigation of these allegations appeared to center around their context and circumstances, particularly as to the daughter's potential need for attention to hygiene or treatment of rashes around her genital area that may have been causing her pain.

like." The report made by the daughter included some similar to those already made, as well as new allegations.

6. The reported genesis of the daughter's book is that she came back from a weekend visit with petitioner and disclosed - to her father and stepmother - numerous incidents or actions by petitioner, leading her stepmother to tell her to "write everything down," which she did. The daughter brought the book to school and told her school principal about the allegations (the DCF records reflect that she was told to do so by her father). Although ultimately not relied upon in the substantiation (and therefore potentially immaterial), a copy of the writing was offered into evidence by the Department, but is not admitted on the basis that it lacks trustworthiness for the reasons stated below - as well as, under these circumstances, unauthenticated.

7. A report was made to DCF by the daughter's school. The DCF investigator and police investigator came to interview her at the school on October 15, 2015. This interview represented a continuation of the existing investigation as well as what ended up being the initiation of a new investigation into the new allegations made by petitioner's daughter. An audio copy of this interview was provided to the hearing officer and is the main area of

dispute regarding the admissibility of the daughter's (otherwise hearsay) statements pursuant to V.R.E. 804a.

8. The report made by the daughter that ultimately led to a substantiation (for sex abuse) was that petitioner had made her "breastfeed" on numerous occasions over an undefined (but sustained) period of time.³ While the daughter's October 15, 2015 interview is more fully summarized below, the breastfeeding allegation was one of many allegations made and discussed during the interview (none of which, apart from the breastfeeding, were ultimately substantiated).

9. The DCF investigator and police investigator met with the daughter's father following the interview, on the same day. Among other things, at the time they indicated to him that his daughter had not provided substantive answers regarding the first set of allegations (as to genital touching during baths or showers), and they had given her several open-ended opportunities to tell them about "things that mom does that makes her uncomfortable," to which she said "I don't remember" or referred them to her "book." The father answered that she was probably "shutting down," a

³ The term "breastfeed" has been used to describe the allegations against petitioner, although she is not lactating and weaned her daughter from breastfeeding several years ago, when she was 15 months old and the father took primary custody.

characterization that the investigator and officer appeared to disagree with, in effect responding that the daughter simply had not been able to remember the allegations or did not indicate anything had occurred. At that time, the breastfeeding allegation was characterized as a new issue. An audio copy of this interview was provided to the hearing officer and admitted without objection from either party.

10. Petitioner was interviewed by the police investigator outside her home on the following day, October 16, 2015. When confronted with the allegation that she had breastfed her daughter, she initially appeared to deny it, but - when the officer utilized a ruse to convince her that the state had obtained physical evidence that her daughter's mouth had come into contact with a woman's breast - she acknowledged that she had allowed her daughter to breastfeed on one occasion. She indicated that this had happened once over the summer, in late summer, and it was in response to her daughter's persistent requests to see if her mother still had milk in her breasts, so she allowed her to try latching on to each of her breasts. Petitioner stated that she did so to "prove" to her daughter that she was no longer producing

milk, that it did not make her "feel good" or give her a "bonding" experience with her daughter.⁴

11. The following week, on October 20, 2017, petitioner's daughter came to school and reported that she had "remembered some things" that she had forgotten before, that her mother did that she [the daughter] "did not like." The DCF investigator and police investigator interviewed her at her school on the same day. This interview is summarized more fully below but petitioner's daughter did not say anything about the breastfeeding during the October 20, 2017 interview. An audiotaped copy of the interview was provided to the hearing officer.

12. Petitioner was eventually substantiated for breastfeeding her child (as well as charged criminally with Lewd and Lascivious behavior - a charge that was eventually dismissed for lack of proof of sexual intent under criminal standards). Petitioner requested a Commissioner's Review hearing, in which the substantiation was upheld, by decision dated June 28, 2016. The review decision concluded as follows (in pertinent part and emphasis in original):

⁴ Although the Department does not concede that an element of sexual gratification or intent could not be found from the *daughter's* report of the events, the substantiation was clearly not based on such an element. In any event, the evidence as a whole does not establish any sexual intent by petitioner.

DCF's decision to substantiate the allegations is supported. Though it is true that your relationship with [the child's] father has been contentious with many unfounded allegations, in the case under review [the child] was clear and consistent when interviewed by DCF that you made her suck on her [sic] breasts on more than one occasion and she did not like it. It is also true that the criminal case that arose from these same allegations was dismissed apparently because of the lack of proof of sexual intent. However, substantiation by DCF does not require sexual intent or gratification. [The child] was considered to be bright and credible by DCF and despite evidence that [she] misses contact with you, there is no evidence that she has recanted her allegations. In comparison your statements are not as credible. You stated in our meeting that you had to wipe your 6-year old and apply ointment to her genital area because she had "*never been taught how to clean herself.*" However, you also admit that you provided care to [her] from the time she was born and was [sic] not able to explain why she had "*never been taught.*" Your statement that you took showers with [her] only because of time pressure is also suspect as you stated you were not working during that period of time and did not have a convincing reason why you had so little time. DCF Social Workers familiar with your case noted that you were not often fully truthful with them.

13. As noted above, petitioner's substantiation was based solely on the allegation that she had made her child breastfeed on several occasions. At hearing, there was no evidence that petitioner was "often" not "fully truthful" with DCF workers or that she had no reason to be under a "time pressure." The reviewer's conclusions related to these

issues can only be construed as relating to the Department's view of petitioner's credibility.⁵

14. As referenced in the Department's review decision, petitioner's relationship with her daughter's father has been "contentious." Even more than contentious, the evidence established that the daughter's father has actively and persistently attempted to interfere and limit petitioner's relationship with her daughter. He has filed or caused to be filed at least 17 complaints of abuse (as to the daughter) against her, all of which (with the exception of the breastfeeding allegation) were determined to be unfounded. In the view of another DCF investigator assigned to investigate some of these allegations, he was pursuing charges against petitioner "vindictively," "relentlessly," and in a way that she (the DCF investigator) "had never seen" between parents in its "cruelty" and persistence. The father has attempted to limit petitioner's access to the daughter's school in an effort that was described by a court-appointed *guardian ad litem* (advising the DCF investigator) as a clear case of

⁵ To the extent relevant, the basis of the review decision vis-à-vis petitioner's credibility (as to issues other than the breastfeeding allegation) is questionable on its face and/or in relation to the evidence at hearing. It is undisputed that petitioner has not had primary care of her daughter since she was 15 months old. Likewise, the fact that petitioner was not working is not inconsistent with being rushed to leave the house for some other reason.

"parental alienation." It is also demonstrated from the record that these efforts by the daughter's father were ongoing prior to and during the events at issue. Although he was among the first adults to hear the allegations at issue, the father was not called to testify.⁶

15. As noted above, the daughter did not mention the allegation of breastfeeding during her September 2, 2015 interview with the DCF investigator and police officer. The first time it was reported was during the October 15, 2015 interview. During this interview, the daughter states that her mother makes her breastfeed, it is something she doesn't like, and it happens at night. When asked what it means to breastfeed, she refers the DCF investigator and police investigator to her "book" - a writing of "all the bad things" that her mom makes her do - which was her stepmother's idea to put in writing. Later during the interview she indicates in more detail that she latched on to her "boobs."

16. When the daughter is asked about when the last time the breastfeeding occurred, she indicates it was "last

⁶ The daughter was eventually removed from the father's home and placed in DCF custody based on allegations of physical abuse and neglect in a CHINS (Child in Need of Supervision) proceeding, which concluded in 2016. The DCF disposition plan has the goal of reunification of the daughter with petitioner.

Sunday." She also states - in response to questioning - that it has been happening since "before and after" her last birthday, which was in December, about 11 months before the interview.

17. On two occasions during the interview, the daughter spontaneously reports that her mom and mom's partner "smoke out of "a glass thing" containing something that also goes in "spaghetti or goulash," although she does not indicate she feels uncomfortable or disturbed by this, or that it has any meaning to her whatsoever. She spontaneously states about her mom (petitioner) that "she lies" but that her romantic partner "never lies" because he told her father and stepmother about her mother getting pulled over by the police [apparently for speeding].

18. The daughter also reported that her mom "touches other children," and she thinks that her mom "touches" an infant who sometimes visits her (petitioner's) home with the infant's mother. The daughter reported that she believes these things because her father and stepmother "called her in" to show her something about her mom on the computer. It is clear from the record that what the daughter saw on the computer was from a previous court case and substantiation involving petitioner when she was a juvenile. No credible

allegation or suspicion has been raised that petitioner inappropriately "touched" the infant referred to above, or any other children during the time at issue.

19. As described above, following this interview, the DCF investigator and police investigator spoke with the daughter's father, and informed him that she had seemed to not fully remember or be able to recount certain allegations.⁷ Within just a few school days - October 15 being a Thursday and October 20 being a Tuesday, the daughter came to school and indicated she had other things she wanted to report that she had "remembered," leading the school to call DCF and to another interview by the DCF and police investigator.

20. During the October 20, 2015 interview, the daughter recounted some of the same allegations she had made before, and made some new allegations,⁸ but did not say anything about being forced to breastfeed. Although the investigators

⁷ It is also noted that the father indicated that his daughter had happened to come upon him and his spouse while they were looking at petitioner's old court case and saw what was on the computer, so they felt compelled to explain it to her. This account of how the daughter came to know about this prior court case lacks credibility on its face.

⁸ She reported (newly) that on one occasion, her mother had asked her to remove a hot pan from the stove, which she was unable to hold up, and the edge of the pan had burned her. She also stated that when she asks her mother for help in the bathroom "wiping," her mother wipes too hard, which hurts.

inquired into certain allegations, they did not ask the daughter anything about the breastfeeding allegation or otherwise attempt to ascertain whether petitioner's account of what occurred was true. During both the October 15 and October 20 interviews, the daughter informed the investigators that several allegations (including the breastfeeding) occurred "last Sunday" or "Sunday."

21. It is undisputed that the daughter's father - to whom the breastfeeding allegations were initially reported - has made numerous unfounded allegations of abuse against petitioner.⁹ He furthermore informed his daughter about or showed her a prior court case involving petitioner (from around 25 years ago, when she was a juvenile), which led the daughter to report that petitioner was touching other children, an allegation that (to no fault of the daughter's) was not taken as credible. As described above, the father has been "cruel" and "vindictive" in his attempts to alienate his daughter from her mother/petitioner.

22. It is under these circumstances that the daughter's report of allegations of abuse and the interviews by investigators occurred. Of the three interviews, the

⁹ During cross examination, the police investigator acknowledged that this would be a "concern," had he been aware of so many false reports made by the father.

daughter reports the breastfeeding allegation in just one interview. She makes spontaneous and what can only be described as out-of-place references to petitioner and/or her partner smoking from a "glass thing," having nothing to do with the abuse allegations (under the circumstances it is reasonable to conclude that she was encouraged to report this information, which suggests drug use). On two occasions, in two separate interviews, she spontaneously states about petitioner that "she lies," without context or explanation, a statement that can reasonably be viewed as a conclusion of a third person, that the daughter has heard, rather than a conclusion of the daughter herself.

23. The underpinning of the October 20 interview is also highly questionable, given that it followed upon the father learning from investigators that his daughter had not been able to remember much about certain events, and the daughter coming to school a few days later and reporting that she was now able to remember things that she wanted to disclose.¹⁰

¹⁰ There was also testimony and a reference in the written record as to the father failing to follow through on counselling for the daughter, which was recommended by DCF, to discuss what she was reporting and work through what she may have trouble remembering.

24. Under these circumstances, the statements of the daughter in the interviews lack reliability and trustworthiness and as such are not admitted as evidence. The sole evidence admissible about the breastfeeding is comprised of the statements made by petitioner, both to the investigators (described above) and at hearing. At hearing, petitioner reiterated that the incident occurred on one occasion, after persistent request of her daughter, and submitted additional evidence that an infant who was nursing was living in her home for period of time, including at times that the daughter made visits - leading petitioner to conclude that may have made her daughter curious about breastfeeding.

25. Although the Department argues that this evidence would be sufficient by itself to substantiate petitioner, the record is clear that the decision on appeal specifically rejects petitioner's explanation and instead adopts the daughter's reporting of events. This includes - as crucial

facts - that the breastfeeding was forced and occurred on numerous occasions over a sustained period of time.¹¹

ORDER

The Department's substantiation of petitioner is reversed.

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 physical abuse as defined by the statute. See *In re R.H.* 189 Vt. 15, 14 A.3d 267, 2010 VT 95, at ¶16; Fair Hearing No. B-01/12-69.

¹¹Thus, it cannot be concluded, based on this record, that the Department would have substantiated petitioner on this basis alone. While it is not out of the realm of possibility if the Department were to have considered that question, the substantiation determination on appeal is clearly based on a range of factors that petitioner's admission does not reach - such as whether her daughter was made to breastfeed and how often it occurred. To assume here that petitioner would have been substantiated *for sexual abuse* based solely on the remaining evidence - which varies materially from the decision on appeal - would be inappropriate and fundamentally unfair.

The pertinent sections of 33 V.S.A. § 4912 define sexual abuse as follows:¹²

- (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:

- (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

¹² These are the statutory definitions in effect at the time of the incidents in question, as well as petitioner's substantiation. The statute was amended effective July of 2016. These amendments do not affect the outcome here.

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. § 4912.¹³

Petitioner's appeal presents the threshold question of the admissibility of her daughter's statements, which would otherwise be considered hearsay. The Vermont Rules of Evidence (V.R.E.) create a hearsay exception when the putative victim of sexual abuse is twelve years old or younger; the exception also extends to putative victims who have a mental illness or development disability. 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, . . .

¹³ This is the statutory language as amended in July of 2016, after the events at issue. The amendments do not affect the outcome here.

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.

V.R.E. Rule 804a; *see also* 33 V.S.A. § 4916b.

Here, the daughter was available to testify, although neither party called her to provide evidence. The Department otherwise proceeds under V.R.E. 804a to seek admission of her statements to the investigators. The primary question is whether "the time, content, and circumstances" of her statements "provide substantial indicia of trustworthiness."

The Vermont Supreme Court has dealt with several challenges to admissibility of hearsay under V.R.E. 804a. Case precedent gives latitude and significant deference to the trier of fact. *See, e.g., State v. Reid*, 2012 VT. 66, 192 Vt. 356 (2012); *State v. Tester*, 2006 Vt. 24, ¶17, 179 Vt. 627 (2006).

Here, the general circumstances can only be described as poisonous - concerning the parents' relationship - and specifically the attempts by the daughter's father to undermine petitioner's relationship with her daughter, the putative victim (there is no evidence that petitioner attempted to interfere with the father's relationship with the daughter). As the allegations were first reported to the father (who was not called to testify), this casts a critical shadow on the daughter's subsequent disclosures to others. 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).

This problem is reflected in the interviews themselves, where the daughter makes unrelated allegations of what is purported to be drug use by petitioner and/or her partner, as well as unfounded allegations of petitioner molesting other children, due directly to the father's discussion with the daughter of a decades old substantiation case against petitioner. And, it is reasonable to conclude from the record that the daughter's October 20, 2015 report of "remembering" certain things - as being spontaneous and self-initiated - is highly doubtful, given the context and the

father's interference. The breastfeeding allegations themselves are not consistently reported by the daughter over the course of her three interviews, despite the characterization of the breastfeeding as persistent (the daughter, in contrast, does consistently report other allegations, although those allegations were not substantiated).

For these reasons, and based on the factual findings above, the offered statements from the daughter are excluded from evidence as lacking substantial indicia of trustworthiness with respect to "the time, content, and circumstances." V.R.E. 804a. What remains is petitioner's acknowledgment that she allowed her 6-year old daughter to "breastfeed" on one brief occasion. Given the nature of the Department's decision under appeal, which specifically rejects petitioner's account and adopts the daughter's report as evidence of persistent and forced breastfeeding over a sustained period of time, the preponderance of evidence does not support affirming the Department's decision.

As such, the Department's determination must be reversed by the Board. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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