

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-01/12-69
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate her for risk of harm to two of her children. The petitioner is one of the adoptive parents of three special needs children, (1) CBM presently age twelve years and in residential treatment, (2) KBM, presently age eight years, and (3) MBM presently age four years.

CBM sexually molested both KBM and MBM from the period of Christmas 2010 to April 2011. The Department alleges that petitioner placed KBM and MBM at risk of sexual harm from CBM. The issue is whether the Department can show by a preponderance of evidence that petitioner's actions rose to the level of risk of harm as contemplated by the statute.

The petitioner filed for fair hearing on January 27, 2012. A telephone status conference was held on March 5, 2012. Hearing was held on April 23, 2012.

The Department offered testimony from (1) petitioner (called as hostile witness), (2) SE-B, investigative social

worker employed by the Department, and (3) TC, investigative social worker employed by the Department.

The following exhibits were entered into evidence: (1) September 23, 2010 Notice of Substantiation of CBM sexually abusing JMR and KBM and (2) Notice of Substantiation of CBM sexually abusing KBM and MBM (date obscured).

The decision is based on the evidence adduced at hearing and supplemental materials filed by the parties.

FINDINGS OF FACT

Background

1. The petitioner is the adoptive parent of three special needs children. She adopted the children with AM, who was her partner at the time of adoptions.

2. Petitioner and AM adopted CBM and KBM when they were four years old and one and a half years old respectively. CBM and KBM are half brothers.

3. CBM lived with his biological mother for two years and then with his grandmother before being placed in foster care with petitioner and AM when he was three years old. CBM experienced severe abuse and neglect. He is diagnosed with ADHD, reactive disorder, autism spectrum disorder, and severe learning disabilities. CBM was placed on an IEP

(individualized education plan) in either 1st or 2nd grade. CBM received services through the Baird Inclusion Program including a one to one aide in school. At the time of hearing, CBM was undergoing an evaluation at Jarrett House, a residential program, through NFI.

4. KBM was exposed to in utero drug use and is blind in his left eye. Petitioner described KBM as a very sensitive child. He is a co-dependent sleeper who comes into petitioner's bedroom on many occasions.

5. MBM was placed with petitioner and AM when she was an infant and adopted when she was eighteen months old. MBM was a shaken baby. MBM has bilateral hip dysplasia that may have been caused by trauma.

6. The petitioner is the director of a pre-school program and has been in this position for many years. She supervises a staff of twenty people. In her professional capacity, petitioner has received training regarding sexual abuse of children including recognizing the signs of abuse.

7. This case cannot be understood without looking at the family history between petitioner and AM and without looking at the 2010 substantiation of sexual abuse by CBM while he was in AM's home.

8. After their separation, petitioner and AM shared and continue to share custody of their three children. At the time in question, the children alternated between petitioner's and AM's house. AM had a new partner S who, in turn, was the adoptive parent of a special needs child JMR, who lived in AM's household. JMR has emotional difficulties.

September 2010 substantiation of CBM

9. Petitioner and AM separated during the end of 2009. They split physical rights and responsibilities of the children. Petitioner had the children Wednesday and Thursdays and alternating weekends.

10. CBM and KBM shared a bedroom with JMR when they were at AM's home until March or April 2010 when CBM was moved to a basement bedroom.

11. Relations between petitioner and AM were strained after their separation. Transfers of children took place at petitioner's home. Petitioner found that AM was not forthcoming in sharing information.

12. During the summer of 2010, CBM was ten years old, KBM was six years old and MBM was three years old.

13. During June 2010, CBM disclosed to his counselor, JF, that he inappropriately touched KBM as well as JMR while he was at AM's home. JF made a report to the Department.

14. It appears that CBM's actions took place during the winter of 2009 until the spring of 2010.

15. AM informed petitioner that a report had been made to the Department about CBM. The specifics of the report were not shared with petitioner.

16. SE-B is an investigative social worker employed by the Department. She was assigned to the investigation of CBM on or about July 1, 2010. SE-B was in touch with AM on or about July 1, 2010 to check into the children's safety and see if the 72-hour rule could be waived. SE-B waived the 72 hour rule after learning from AM that the children were returning to her home the next day, CBM had a separate bedroom, there were baby monitors in the bedrooms, and the adults would ensure supervision.

17. After petitioner learned about the investigation, petitioner telephoned SE-B on July 2, 2010 to find out information. Petitioner requested a written safety plan from SE-B.

18. On July 8, 2010, SE-B planned to interview the children at AM's home. Petitioner and AM were at AM's home as were JMR's two parents. All three boys were present; MBM was not present.

19. SE-B started questioning JMR. SE-B stopped the interview when JMR started to disclose being bullied and touched by CBM. According to SE-B, the protocol included stopping the interview in order to contact the Chittenden Unit for Special Investigations (CUSI) in order to schedule a videotaped interview with law enforcement.

20. On July 8, 2010, SE-B spoke to parents two at a time so the other parents could supervise the children.

21. The parents, children, and SE-B spoke on July 8, 2010 about safety planning. SE-B testified that the safety plan included keeping the children in separate bedrooms and maintaining supervision over the children so the children could not be alone with each other. The safety plan was not reduced to a written document to share with the parents although there are undated notes in the Department file setting out actions.

22. SE-B and petitioner spoke outside after the July 8 meeting. SE-B remembers that petitioner was upset after the meeting, in part due to the challenging relationships among the adults, the small size of her home, and concerns about long term separation of the children's sleeping arrangements.

CBM and KBM were sharing a bedroom. Petitioner has a three-bedroom house for herself and the three children.

SE-B came away from that conversation with the sense that petitioner questioned the long-term separation of the children's sleeping arrangements but would ensure separate sleeping arrangements for the time being.

23. Petitioner moved KBM from the bedroom he shared with CBM and moved him into her bedroom.

24. When petitioner and SE-B spoke on July 8, 2010, petitioner asked SE-B to come to her home. Petitioner wanted input given the house's layout and the challenges she would face as a single parent.

According to petitioner, SE-B said a home visit was not necessary because CBM's behaviors occurred in AM's household, not petitioner's household. SE-B testified that she did not come because they had talked through a safety plan. A home visit did not occur. Both testified credibly on this point based on their memories.

25. Petitioner was not told to use room monitors or alarms to monitor children at night. AM had monitors, but she had these monitors in place prior to this investigation. There was no testimony why AM used monitors prior to the investigation.

26. The Department did not request the petitioner and/or AM to have a psychosexual evaluation done for CBM.

27. During August 2010, petitioner contacted SE-B to find out how long SE-B felt the petitioner should keep the boys apart. This conversation happened on or about August 2, 2010.

Petitioner had questions about the safety plan that caused concern for SE-B whether all parties had the same understanding.

Petitioner testified that she was told to keep the plan in place to ensure that CBM's actions did not happen again. She testified that SE-B said something to the effect of do what you want because no one will know.

SE-B testified that petitioner told her she was concerned that moving KBM from his bedroom was unsettling and that she had questions whether CBM was a perpetrator. SE-B testified that she told petitioner the boys needed to stay in separate bedrooms. SE-B agrees that she said keep the children's bedrooms separate to assure that never happens again; there is no disagreement about this statement. SE-B does not remember the statement that petitioner can do what she wants because no one would know but denied she would make this type of statement.

Petitioner's attributing a statement to SE-B about doing what she wants is troubling. Petitioner is now interpreting

part of her conversation with SE-B to include this statement. But SE-B indicated that she would not make that type of statement, and it is unlikely that an investigative social worker would leave a parent with this type of understanding given the allegations.

28. Petitioner indicated she would continue to separate the boy's bedrooms until she knew what happened. One month later, CBM was substantiated for sexual abuse.

29. Petitioner did not receive a letter from the Department that CBM was substantiated for sexual abuse. She was informed by AM. The crux of the substantiation was that CBM bullied the boys into touching each other's penises and into punching each other. The substantiation did not implicate any behavior by CBM to his sister, MBM.

30. Petitioner was not informed by the Department that the Department closed its case on CBM. Petitioner found this out from AM. After finding this out, petitioner called SE-B to find out what was in place for CBM. The Department had nothing further in place for CBM.

31. Petitioner did not receive the same quality of information from the Department as AM received from the Department. The difficult relations between petitioner and

AM compounded this lack of information. The Department was aware of these difficulties.

32. Petitioner did not question the children about what occurred at AM's home.

Over time, petitioner learned from AM that she saw all three boys in their bedroom exposing themselves and giggling. Petitioner was told that some touching happened outside and told that the children, especially JMR, kept changing their stories. Petitioner did not have a clear sense of the allegations during the time periods in question.

Petitioner, as well as AM and CBM's counselor, believed that the children were curious and exploring their bodies.

Petitioner had a difficult time accepting that CBM was a predator. Her beliefs played into her decision during December 2010 to allow KBM and CBM to share a bedroom again.

Incidents leading to petitioner's substantiation by the Department

33. The petitioner's home is two stories with a cathedral ceiling. The three bedrooms are upstairs along with an open play area (large hallway) overlooking the downstairs living room area. The play area has an open railing.

According to petitioner, she can hear what is happening upstairs from the downstairs area except from the downstairs bathroom. The kitchen is under the open railing of the play area.

34. During December 2010, KBM repeatedly asked petitioner if he could return to the bedroom he shared with CBM. The boys had been separated for about five months.

35. The petitioner was aware of the warning signs for sexual abuse and the signs of grooming. Petitioner did not see any warning signs or problematic behaviors. CBM was doing well at this time.

36. Petitioner allowed KBM to return to the bedroom. She did not confer with anyone regarding the advisability of this decision.

37. She is not sure of the date but believes that KBM returned to his bedroom sometime between December 13 and Christmas. Certain ground rules remained in place including no roughhousing, no sharing of beds, and no closed doors. Petitioner knew there would be nights when KBM would come to her bedroom and sleep there.

38. Petitioner explained that KBM and CBM slept in a bunk bed. She placed KBM in the top bunk. Petitioner

described the top bunk as being high; she stood on a stepstool to see KBM when he was in the bunk. The room had Christmas lights that were on during the night so the room was not dark.

39. The petitioner and the children followed a nighttime routine that included petitioner reading to children on the floor. Sometime CBM would be allowed to read on his own. She would wait for MBM to fall asleep and then read to KBM while he was in the top bunk until he fell asleep. Petitioner then stayed upstairs.

40. On or about April 4, 2011, after dinner, petitioner was downstairs clearing the dishes. CBM was reading in the upstairs hallway. KBM was downstairs. MBM was downstairs and asked petitioner if she could read with CBM in the hallway. Petitioner assented to MBM's request.

KBM went upstairs and then came downstairs saying someone is jumping on the bed. Petitioner went upstairs and saw MBM in the hallway. CBM was in his bedroom with the door shut.

MBM went to petitioner and told petitioner that she peed on the floor and that CBM shone a flashlight on her vagina and touched her vagina. Petitioner asked MBM to show her where she peed on the floor and it was just inside CBM's

bedroom. There was an area rug over the spot. Petitioner reassured MBM that she is not in trouble.

42. MBM only made this one disclosure to petitioner. Through the CUSI investigation, petitioner learned that CBM disclosed that he went into MGM's bedroom when everyone was asleep and touched her.

43. KBM disclosed to petitioner that CBM touched his penis and behind. This was later confirmed through the CUSI investigation.

44. That night, petitioner kept KBM and MBM in her bedroom with her. She spoke with AM in morning.

45. Petitioner called the Department on or about April 5, 2012 to report that CBM sexually touched KBM and MBM.

46. The case was assigned to TC, a Department investigator, on April 5, 2012. Petitioner told TC that the boys were sharing a bedroom. The 72-hour rule was waived because petitioner put safety provisions in place.

47. On the recommendation of CUSI, the parents changed parent/child contact so that one parent had CBM in the house while the other parent had KBM and MBM with her.

48. The Friday after reporting the abuse, petitioner bought a door alarm to put on CBM's door upon the Department's recommendation.

49. According to TC, petitioner admitted using poor judgment when she let the boys share a bedroom again. TC found during her investigation that the petitioner, AM, and members of CBM's treatment team shared the view that the 2010 incident was based on curiosity, not predation.

TC recommended substantiating petitioner for risk of harm based on the prior substantiation of CBM, the safety plan that was put in place during July 2010, and petitioner's knowledge and training regarding child sexual abuse.

ORDER

The Department's decision is affirmed in terms of the substantiation for risk of harm to KBM. The Department's decision is reversed in terms of the substantiation for risk of harm to MBM.

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.

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

(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.

. . .

(4) "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.

. . .

The issue is whether a reasonable person would believe based on the findings of fact that petitioner placed KBM and MBM at substantial risk of sexual abuse by CBM when she allowed KBM to once again share a bedroom with CBM.

The petitioner argues that the standard is whether the petitioner's actions can be deemed gross negligence or reckless behavior based on her knowledge at the time she made her decision. The petitioner points to a number of Board decisions incorporating the standard set out in Rivard v. Roy, 124 Vt. 32 (1963). However, the Vermont Supreme Court recently ruled otherwise finding that the Department's policies and/or regulations provide statutory interpretation when determining whether risk of harm has occurred. In re

R.H., 2010 VT 95 (2010). See also In re D.McD., 2010 VT 108 (E.O. 2010).

The pertinent policy is found at Family Services Policy No. 56, effective July 1, 2009, in which risk of sexual abuse is defined as:

Risk of sexual abuse is substantiated when:

1. the alleged perpetrator's history of sexual abuse or offenses, the nature of the abuse or offense and the history of treatment indicate that he or she is still a substantial risk to the alleged victim, and/or,
2. the person responsible for the child's welfare is unable or unwilling to protect the child from harm.

The perpetrator is considered to be the person whose behavior or history poses a risk to the child. However, the person responsible for the child's welfare may also be substantiated as a perpetrator of risk of sexual abuse if through his or her acts or omissions he or she knowingly places the child at substantial risk of sexual abuse.

The Board has affirmed substantiations for risk of sexual harm in cases where the parent ignores the risk of allowing an adult sexual offender, including offenders on the public Sex Offender Registry, into his/her home or allows contact between the offender and the parent's children. Fair Hearing Nos. Y-11/11-661 and B-01/11-54.

Petitioner's case is a bit different. Her oldest child, CBM, was substantiated for sexual abuse in 2010 for actions

when he was ten years old. The sexual abuse involved his brother and another boy in AM's household. The sexual abuse did not involve his sister, MBM. The incidents forming the basis for the substantiation for risk of harm by petitioner occurred when CBM was eleven years old.

The evidence shows that the communication between petitioner and the Department regarding the 2010 incident was not optimal. There was information she did not have. Petitioner reached out for a home visit and a written safety plan; both were denied. Both may have helped petitioner. The Board questioned what the policy was for informing parents who are separated. The better practice is keeping separated parents in the communication loop on an equal basis.

The evidence also shows that petitioner did not fully believe the seriousness of the 2010 substantiation. Petitioner was not alone in thinking CBM's actions had more to do with curiosity rather than predation. The evidence shows corroboration through TC's testimony that AM and members of CBM's treatment team including his therapist and a nurse practitioner thought CBM's behavior reflected curiosity, not predation.

However, petitioner decided to allow KBM to return to the bedroom he shared without any consultation with any of the professionals involved in CBM's care. Petitioner relied on her feelings and observations and took a risk.

The crux of the Department's case is that petitioner allowed KBM to share a bedroom with CBM placing both KBM and MBM at risk of harm.

When petitioner placed KBM back in his shared bedroom, she intentionally ignored the Department's directive that the boys not share a bedroom. Doing so also placed KBM and CBM in a situation where they were unsupervised. The Department has met its burden that the petitioner placed KBM at risk of sexual harm by CBM.

Placing the boys together in the same bedroom did not place MBM at risk based upon the information petitioner had at that time. MBM had her own bedroom. CBM's 2010 substantiation dealt with his behavior to his brother and another boy; there was no documentation the CBM was a risk to sexually abuse girls. There is not sufficient evidence in the record that petitioner placed MBM at risk of harm by CBM.

Based on the foregoing, the Department is affirmed for its substantiation of petitioner for risk of harm to KBM but is reversed for its substantiation of petitioner for risk of

harm to MBM. Petitioner can apply for expungement when the statutory timelines are met.

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