STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. V-07/13-534
	)	
Appeal of	)	

INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner appeals the decision by the Department for Children and Families (Department) in 2013 substantiating a report that she placed her children, D.A. and S.A., at risk of harm for sexual abuse by allowing her boyfriend, I.K., to be in her home with her children when he was not receiving treatment for sexually harmful behaviors. The issues are whether the Department's decision is supported by a preponderance of the evidence, and whether its decision should nevertheless be reversed based on petitioner's claim of equitable estoppel against the Department.

In June of 2013, the Commissioner's Registry Review Unit (CRRU) for the Department informed petitioner that it had upheld the substantiation of her for placing her children at risk of harm for sexual abuse, and petitioner timely appealed the Department's decision.

The Department filed a motion for summary judgment in November of 2013, asking the Human Services Board (Board) to

affirm the Department's decision based on the Department's allegation that petitioner violated the "Safety Plan Agreement for [D.A. and S.A.]" signed by petitioner and I.K. on March 1, 2012 (Safety Plan), which mandated that I.K. would not live in petitioner's household unless he was receiving treatment for sexually harmful behaviors. Petitioner filed a response to the Department's motion in January of 2014 and provided further argument in a telephone status conference in February. She claimed she had a conversation with someone in the CRRU who told her that I.K. could be in her household as long as he was supervised. In a Preliminary Ruling dated April 4, 2014, the Hearing Officer denied the Department's motion. A hearing was subsequently scheduled to take testimony on the substance of petitioner's conversation with the CRRU and whether that conversation had any legal effect on the requirements in the Safety Plan.

A hearing was held on June 3, 2014, during which testimony was heard from petitioner, C.M. (the administrative services coordinator for the CRRU), K.H. (an Investigations Supervisor for the Department), and I.K. Two Department

exhibits were entered into evidence.[1] The Department filed a post-hearing brief titled "Memorandum in Support of Substantiation" dated June 10, 2014, and petitioner filed a response by email dated June 19, 2014.

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

FINDINGS OF FACT

1. Petitioner is the parent of two children, D.A. and S.A., who currently reside with her, and have resided with her at all times relevant to this matter.

2. In September of 2011, the Department received a report that petitioner's boyfriend, I.K., had been present in petitioner's home with petitioner and her two children. I.K. has been substantiated twice by the Department for sexual

[1] The Department's exhibits consist of (1) the "Safety Plan Agreement for [D.A. and S.A.]" and (2) the Affidavit of K.H. signed and notarized on November 22, 2013.

abuse of children in 1999 and 2001[2] and for risk of harm, sexual, in 2009.[3]

3. The Department did not substantiate petitioner for allowing I.K. to be in her home with her children in September of 2011. Instead, the Department's Investigator Supervisor handling petitioner's case, K.H., prepared the Safety Plan and presented it to petitioner and I.K.

4. On March 1, 2012, petitioner and I.K. signed the Safety Plan, and in doing so they agreed to the following requirements as a condition for I.K.'s presence in petitioner's home:

> 1. [I.K.] shall have no unsupervised contact with any children.
>
> a. [A.D.] or another competent adult who is aware of [I.K.'s] sexual offending history and

[2]The affidavit submitted by the Department, supported by testimony from K.H. that the statements made in the affidavit were still accurate, states that I.K.'s second substantiation was for an incident in 2000. However, the June 21, 2013 Review of Substantiation now appealed by petitioner, which was previously submitted to the Board (but not introduced into the record during the hearing) indicates that the second incident took place in 2001. Accordingly, the Board treats the reference to 2000 as a clerical error, and corrects the record herein to reflect that the second substantiation was for an incident in 2001.

[3]In a separate proceeding, I.K. has appealed the 1999, 2001 and 2009 substantiations and he simultaneously petitioned to have the 1999 and 2001 substantiations expunged. Because I.K. filed these requests after he and petitioner signed the Safety Plan, the Board finds that his appeals do not alter the fact that petitioner had knowledge that I.K. was listed on Vermont's Sex Offender Registry for substantiations of sexual abuse to children in 1999 and 2001, and that she entered into the Safety Plan based on that knowledge. When they testified at hearing, neither petitioner nor I.K. disputed the basis for the Department's prior substantiations of I.K.

current risk will be present when [I.K.] is around children.

b. [I.K.] will not be alone in any room with any child, for any amount of time, no matter how brief the occurrence.

c. [I.K.] will not assume a parenting or supervisorial relationship with [D.A. or S.A.].

2. [I.K.] will resume treatment for sexually harmful behaviors.[4]

a. [I.K.] will participate in regular treatment until such a time a licensed provider specializing in treating these behaviors states in writing that he has "completed treatment."

b. [I.K.] will participate in any other therapeutic service or activity recommended by said provider.

3. [D.A. and S.A.] will have regular access to a mental health counselor, or a school based clinician/counselor. This individual should be aware of [I.K.'s] past offenses and current status in the household.

4. Should any of the above conditions not be met, [I.K.] will leave the household.

5. It is found that when petitioner and I.K. entered into the Safety Plan on March 1, 2012, they agreed that I.K. would leave petitioner's home, and would not return to her home, unless I.K. was either participating in regular treatment for sexually harmful behaviors or a licensed

[4]When they testified at hearing, neither petitioner nor I.K. disputed that I.K. should receive treatment for the sexually harmful behaviors for which he was substantiated in 1999 and 2001.

provider specializing in the treatment of such behaviors stated in writing that I.K. had completed such treatment.

6. As of March 1, 2012, I.K. was participating in regular treatment for sexually harmful behaviors, but he only did so for a couple of weeks before stopping his treatment.

7. When I.K stopped his treatment at some point in March, petitioner made him move out of her home.

8. I.K. and petitioner subsequently had a telephone conversation with C.M., the administrative services coordinator for the CRRU.

9. The evidence in the record does not establish whether the telephone call was in May, June, August, or September of 2012. Petitioner recalls only that it was during one of those months.

10. Petitioner testified that the conversation was initially only between I.K. and C.M., and that she later joined the conversation and spoke with C.M. on speaker phone.

11. Petitioner testified that during the conversation between I.K., petitioner and C.M., they talked about "[I.K.'s] expungement," and that when petitioner asked C.M. about "[I.K.] being in her home," C.M. told her as long as I.K. was supervised, "he should be fine" in petitioner's home.

12. Petitioner testified that she told C.M. about the Safety Plan, and that I.K. had moved out of her home because he had stopped his treatment for sexually harmful behaviors as required by the Safety Plan, but she does not recall whether she told C.M. that I.K. was not receiving treatment at the time of the telephone call.

13. After petitioner spoke with C.M., she did not contact K.H. to inquire about whether the Safety Plan allowed I.K. to be in her home while he was not receiving treatment.

14. I.K. testified that he had several conversations with C.M., and he recalls one call where C.M. told petitioner and him, "as long as [I.K.] was supervised around the kids, that was all right."

15. I.K. also testified that he talked with C.M. about expungement of his past substantiations, and he remembers calling C.M. about finding a different counselor since he had stopped receiving treatment in March of 2012, but he stated that these calls were separate from the call about his living with petitioner. I.K. does not remember the sequence of these calls.

16. I.K. does not recall whether he discussed the Safety Plan with C.M.

17. C.M. remembers a telephone call she initiated with I.K. in June of 2012, in response to receiving his application to have his previous substantiations expunged. She does not remember any other topic being discussed during that call, nor does she remember any other calls with I.K.

18. C.M. remembers a telephone conversation with petitioner, but she does not recall what they discussed during that conversation. C.M. does not remember when the call took place, but she agreed that it could have happened in May, June, August or September of 2012.

19. It is found that petitioner did not tell C.M. that I.K. was not receiving treatment for sexually harmful behaviors and that he had not completed such treatment when she inquired with C.M. about whether I.K. could be in her home.

20. It is found that petitioner had no basis to believe that C.M. was aware that I.K. was not receiving treatment for sexually harmful behaviors and that he had not completed such treatment when she inquired with C.M. about whether I.K. could be in her home.

21. At some point after petitioner's telephone conversation with C.M., petitioner allowed I.K. to move back

into her home, and allowed him to stay there until January of 2013.

22. On January 8, 2013, the Department received a report that I.K. was having unsupervised contact with petitioner's children.

23. As a result of the report, the Department opened up an investigation on whether I.K. was having unsupervised contact with petitioner's children.

24. As part of the investigation, K.H. called petitioner on January 8, 2013 to ask her whether I.K. was living in her home. Petitioner stated that he was living there, but that she thought he was allowed to be there as long as he was supervised when he was around her children.

25. Based on petitioner's disclosures, the Department determined that I.K. was again living in petitioner's home.

26. During its investigation, the Department also determined that I.K. was not in treatment for sexually harmful behaviors at that time, and that he had not completed such treatment.

27. Petitioner does not dispute that I.K. was living at her home in January 2013, and she does not dispute that he was not in treatment for sexually harmful behaviors at that time, and that he had not completed such treatment. Upon

being informed that, pursuant to the Safety Plan, I.K. was not allowed to be in her home under those circumstances, petitioner and I.K agreed that he would move out of her home.

28. Based on its investigation in January of 2013, the Department substantiated petitioner for risk of harm, sexual, to her children.

29. Following the issuance of the Commissioner's review decision upholding the Department's substantiation, petitioner timely requested a fair hearing.

ORDER

The Department's decision to substantiate petitioner for risk of harm, sexual, is 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.

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.
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> . . .
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> (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.
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> . . .

In addition, the pertinent policy for determining whether children have been put at risk of harm from sexual abuse is found at Family Services Policy No. 56, effective July 1, 2009, and provides in relevant part:

> Risk of sexual abuse [is] substantiated when:
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> 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.
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> 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.[5]

[5]The Vermont Supreme Court has ruled 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 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 or 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.

The Department has the burden of showing that the evidence supports a finding that petitioner's actions constitute a significant danger of sexual harm to a specific child or children. *In re R.H.*, 2010 VT 95, ¶ 16 (2010). Here, the Department has established that petitioner entered into the Safety Plan to protect petitioner's children because they were at risk of sexual abuse by I.K., and that petitioner understood that I.K. had a history of sexually harmful behaviors for which he needed to be in treatment, or for which he needed to have completed treatment, if he were living in petitioner's household. In addition, there is no dispute that I.K. was living in petitioner's home when he was not receiving and had not completed such treatment in January of 2013. Thus, the Department has met its burden to establish that petitioner allowed I.K. to be in her household in violation of the Safety Plan, and that in doing so, she

knowingly placed her children at substantial risk of sexual abuse.

The burden then shifts to petitioner to show that estoppel against the government would apply here if C.M.'s statements effectively terminated the requirement that I.K. receive treatment for sexually harmful behaviors. To succeed in a claim of equitable estoppel, petitioner must establish all of the following: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct shall be acted upon on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *In re Lyon*, 2005 VT 63, ¶ 17, 882 A.2d 1143, 1148 (Vt. 2005). In considering these elements, the Board must be guided by the Vermont Supreme Court's instruction that "estoppel, which is 'based upon the grounds of public policy, fair dealing, good faith, and justice,' is rarely invoked against the government." *In re Letourneau*, 168 Vt. 539, 547, 726 A.2d 31, 37 (Vt. 1998), *citing Agency of Natural Resources v. Godnick*, 162 Vt. 588, 592, 652 A.2d 988, 991 (Vt. 1994). In addition, the party seeking to estop the government must demonstrate that "the injustice that would ensue from a

failure to find an estoppel sufficiently outweighs any effect upon public interest or policy that would result from estopping the government in a particular case." *Id.*, *citing Godnick*, 162 Vt. at 593, 652 A.2d at 991.

Petitioner has not met her burden to establish the first and third elements of estoppel. Starting with the third element, petitioner was not ignorant of the true facts because she knew that I.K. was not receiving, and had not completed, treatment for sexually harmful behaviors at the time she inquired whether I.K. could be in her home. And because petitioner did not inform C.M. of I.K's lack of treatment, she cannot establish the first element of estoppel; that the Department knew the facts. Thus, even if C.M. had expressly told petitioner that I.K. could be in petitioner's home if he were supervised, C.M., as a Department representative, was not informed of the relevant facts that I.K. was not receiving and had not completed treatment for sexually harmful behaviors. Without that information, C.M. could not have known that petitioner and I.K. would not be in compliance with the Safety Plan even if I.K. was supervised. *Letourneau*, 168 Vt. at 548, 726 A.2d at 38, *quoting In re Barlow*, 160 Vt. 513, 523-24, 631 A.2d 853, 859-60 (Vt. 1993) (estoppel against government agency

inappropriate where it "had an incomplete knowledge of the relevant facts").

If petitioner was confused about I.K.'s ongoing treatment requirement in the Safety Plan, as a signatory of that plan it was incumbent upon her to seek further clarification from the Department as to whether the requirement was still in effect. Instead, petitioner stopped complying with a major component of the Safety Plan based on one conversation, and she did so without checking with the investigator who had required her to enter into the plan in the first place. Under these circumstances, "estoppel will not be invoked in favor of a party whose own omissions or inadvertence contributed to the problem." *Letourneau*, 168 Vt. at 548, 726 A.2d at 38, *citing Godnick*, 162 Vt. at 593, 652 A.2d at 991. Moreover, where petitioner's omissions and inadvertence in this case contributed to her violation of the Safety Plan, it cannot be concluded that any injustice resulting from substantiating petitioner would outweigh the significant public interest in protecting children from sexual abuse.

In conclusion, the Department has met its burden to show that petitioner allowed I.K. to be in her household in violation of the Safety Plan in place to protect her children

from sexual abuse, and petitioner did not prove two of the four elements of equitable estoppel needed to excuse compliance with the Safety Plan. Therefore, the Board must affirm the Department's decision to substantiate petitioner for placing her children at risk of harm for sexual abuse. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.[6]

# # #

[6]Petitioner may apply for expungement of this substantiation when the statutory timeline in 33 V.S.A § 4916c is met.