

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 13,796

)

Appeal of )

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INTRODUCTION

The petitioner appeals a finding by the Department of Social and Rehabilitation Services that the petitioner physically abused his four year old son.

FINDINGS OF FACT

1. The petitioner is the father of S., a boy who is now five years old. The boy's mother, R., has never been married to the petitioner although they lived together for six years. During February of 1995, the time at issue here, the petitioner and R. had not been living together for some eight months. A complaint for establishment of parentage filed by the petitioner was pending in the family court. Each parent had temporary custody and visitation rights. According to the court's judgment entered April 11, 1995, the relationship between the parties was intensely hostile. 2. S. attended a day care in the mornings at that time which was owned by a woman who was a friend of both the petitioner and R. R. also worked in the day care and the petitioner had co-signed for the loan taken out by C. to operate the day care. On February 7 1995, a Tuesday, S. attended day care where he was brought by his mother, R. The petitioner was to pick him up at the end of the morning at the day care.

3. Late that morning, the owner of the day care, C., noticed a quarter sized bruise and a red streak on S.'s left cheek. She asked S. what had happened and he said, "My dad slapped me. I cried". C. told S. that she was sorry. She then went to her office to report her observations to SRS as she was required to do by the reporting laws. She was unable to reach anyone so she called again on February 8, 1995, to make the report. She informed R. that she had made the report. R. told her that she had already reported it herself and had taken S. to a pediatrician for an examination when she saw the bruises and red streaks.<sup>(1)</sup>

4. On Wednesday, February 8, 1995, the SRS investigator assigned to the case talked to S's pediatrician who had examined him on Monday, February 6. The testimony of the pediatrician was offered again at hearing and is found to be entirely credible. The pediatrician, who had been practicing for fifteen years, had seen many injuries on children. She has cared for S. since birth and has continued to be his pediatrician to this day. She was contacted by R. with regard to an injury she observed on her son

following his return from a visit to his father. She first examined S.'s cheek and saw two red marks, one in front of his ear and one below in front of the lower jaw which was a fading red color. There was also a higher larger oval mark that was red and looked like it was fading. The doctor said the marks were consistent with fingerprints and the probability that they were anything else was very low. It was not consistent with an injury from a car door because the edge would have left a different shape and more of a blue-black color from the impact. The marks were not burns or excoriations. They appeared to be superficial injuries but of sufficient severity that they had not cleared up readily.

She asked S. how he got the marks. He was at first hesitant and embarrassed and said he didn't know or maybe he had colored it with a marker crayon. But when the pediatrician encouraged him to tell her what he had told his mother, the boy looked at his mother and said: "Don't you remember, Mommy?" He then looked at the pediatrician and said, "Dad did it while we were slapping each other. He wanted me to quiet down and I wouldn't." The pediatrician knew S., though only four and a half at the time, to be an open and accurate reporter of facts and believed what he said. Following this exchange, the pediatrician called SRS because she was required to do so and wanted SRS to investigate to see if the child was at risk. This was the first time, however, that she had observed any sign that he might be an abused child.

5. The next day, the investigator went to the day care to interview S. After playing with him for about ten minutes, she asked S. whether people get angry around him. After no response he was asked whether his mom, the pediatrician or the day care provider ever got angry with him. He responded "no" to each of those questions then he spontaneously blurted out, "Daddy gets angry." He was asked "What does he do when he gets angry?" and the boy replied, "Slaps me." He was then asked where and the child put his hand to his cheek. The SRS investigator observed two bruises of quarter size on the boy's left cheek and a red mark near his temple of from 1 1/2 to 2 inches long.

6. The investigator had not expected to encounter R. at the center but when she did she interviewed her. R. appeared to be sad but made no personal remarks about the petitioner. She reported that the petitioner did get angry and sometimes punched holes in the wall or broke furniture but none of his anger was ever directed at S. She also reported that S. was in counseling because of his parents' estrangement and that he did not seem to be afraid of the petitioner and enjoyed being with him.

7. The investigator upon learning that the petitioner would be picking up S. from the day care waited for him and talked with him as well. When she confronted him with S.'s allegations, he denied hitting him and said that the child had been hit by a car door on the cheek. The petitioner was angry and began to say derogatory things about R. He became so aroused that the worker recommended that the boy go home with R. for the night. She also, with the petitioner's permission, talked on the phone with his counselor who stated he thought that the abuse was not a chronic situation, and that the child was not endangered. He was not shocked, however, at the level of animosity between the parties because they had had an entrenched, difficult relationship.

8. The SRS investigator was aware that reports of abuse are more frequent in the context of a custody dispute situation. However, she determined that the report of the child was credible because there was a physical mark and because he repeated the same story in a spontaneous, consistent and clear way to four people -- his mother, his doctor, his day care provider and herself. She rejected the petitioner's explanation of the car door as the cause of the bruise because it was inconsistent with the doctor's observation of hand marks and inconsistent with the child's own statements. However, she did not ask the child directly if the incident had occurred as the result of the car door hitting it. Neither did she make any determination as to whether the circumstances surrounding the slapping incident indicated that the

child was at risk of being harmed in the future. She concluded that the incident was most likely an isolated incident brought about by the emotional stress of the custody dispute.

9. The original finding was appealed through two levels of internal review which finally concluded on June 23, 1995, when the Commissioner affirmed that abuse had occurred with regard to the child based on the confirmation of the slapping incident alone.

10. The petitioner does not dispute that the child had marks on his cheeks or that they occurred while in his custody. Rather he claims that the child got the marks from being hit by a car door on February 2. He called two witnesses to corroborate his allegations. One, a woman friend, stated that she saw a red mark on S.'s cheek on Thursday, February 2 and that S. was crying and told her he had hit his head on the car door. The second, the petitioner's mother, stated that she saw S. on February 5, which she later changed to February 2, and that S. was crying and told her that "Dad hit me with a car door." She saw a red mark on his face.

The petitioner also seeks to discredit the testimony of the day care operator on the basis of bias by calling as a witness a friend (the daughter of the woman friend who testified above) who testified that, C., the day care operator would not let her pursue an internship at the day care center in the Spring of 1995, because she feared that she might get information regarding S. and R. which would be carried back to the petitioner.

11. Following this incident, R. filed a request for relief from abuse on behalf of her son with the Court as a part of the parentage proceeding. SRS was not a party to the proceeding. The Court dismissed the complaint because R. failed to put on any evidence showing how the red marks got on S.'s cheek. The Court also found on April 11, 1995, that both parents were loving and affectionate and both were able and disposed to providing a safe environment for S. However, custody was awarded to the petitioner primarily because he indicated "a greater readiness and disposition to foster a positive relationship and frequent and continuing contact with [R.] by [S.] and "a greater readiness and disposition to communicate and cooperate with [R.] on matters concerning [S.] than does [R.] toward [the petitioner]."

12. Based on the above testimony, it is found that the petitioner intentionally slapped his four and a half year old son, S., on or about February 2, 1995, leaving red marks on his face as described above by the pediatrician which were severe enough to have lasted for at least one week. This finding is based on the credible testimony of the pediatrician, the day care operator and the SRS investigator all of whom observed the marks and who interviewed the boy with regard to their cause. The remarks of the boy as reported by these three were spontaneous, consistent, clear and believable and showed no evidence of rote memorization from coaching or confusion which might throw suspicion on them. There is no evidence that in spite of the poor relationship between the child's parents that the child's mother coached him to make false statements regarding the origins of his injury. The evidence also makes it more probable than not that the injury was caused by the slap of a hand than by any other means.

The petitioner's evidence regarding the origins of the marks was not persuasive. The testimony of the petitioner's witnesses regarding the origin of the accident did not contain any detail of their observations with regard to the injury nor did it contain any detail of their conversations with the boy. There is no evidence that any probing was conducted with regard to the child's alleged statements about the car nor any details surrounding those statements from which it might be possible to conclude that the child was speaking spontaneously or truthfully. It is also problematic that both of these witnesses were either a close relative or friend who, unlike the witnesses for SRS, had no independent neutral role to play with

regard to the boy, like the pediatrician and SRS investigator. Finally, the petitioner's allegation of bias on the part of the day care operator cannot be credited. The day care operator certainly could have legitimate business reasons for not hiring an intern who was a close friend of the petitioner to work at the day care center while the parents were in the midst of a custody dispute.

### ORDER

The decision of the Department substantiating abuse is upheld.

### REASONS

The petitioner has made application for an order to expunge a substantiation of abuse placed by SRS in its registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Under the statute's definitions, a report is substantiated when "the commissioner or the commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected". 33 V.S.A. § 4912(10). Abuse and neglect are specifically defined in the regulations which are set out in pertinent part 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.

(3) "Harm" can occur by:

(A) Physical injury or emotional maltreatment;

...

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

...

33 V.S.A. § 4912

The bruises and red marks left on the child's face from the slapping meet the definition of a "physical

injury" as it is defined in the statute because they are a temporary disfigurement. See Fair Hearing No. 10,687. "Harm" can occur under the statute when a physical injury occurs. The Department's decision that harm occurred in this case because the petitioner slapped his son with such force as to leave a mark on his cheek for a week is consistent with the statute. Thus the substantiation of abuse must be upheld. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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1. SRS confirmed that R. did, in fact, report the incident on Monday, February 6. However, the report was not investigated and SRS could offer no reason for that lapse.