STATE OF VERMONT

HUMAN SERVICES BOARD

In re	) Fair Hearing No. R-09/08-444
	)
Appeal of	)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Family Services Division substantiating a report of child sexual abuse by her son, who was thirteen years old when the incident that is the subject of these proceedings took place. The issues are whether a preponderance of evidence establishes that the alleged incident took place and, if so, whether the incident meets the pertinent statutory definition of sexual abuse.

Following an initial Recommendation by the hearing officer dated February 10, 2009, the Board, on March 6, 2009, remanded the matter to the hearing officer to take further evidence regarding the mental capacity and maturity of the petitioner's son at the time of the alleged incident. The petitioner subsequently submitted additional evidence in the form of written statements from her son's pediatrician and his school's special education director. The following findings of fact are based on the testimony presented at the hearing on January 20, 2009 and on the additional evidence submitted by the petitioner upon remand.

FINDINGS OF FACT

1. In June 2007 the Department received a report that the petitioner's son, who was thirteen years old at the time, had sexually abused a classmate while he was at school. The other boy had reported to school officials and the police that the petitioner's son had grabbed him by the penis while he was at a urinal.

2. A Department investigator interviewed the two boys at the school, and later spoke with the petitioner and with her son's grandmother, with whom her son was living at the time (and with whom he still lived at the time of the hearing). Following a lengthy delay, during which the matter remained unresolved, the investigator concluded that the incident constituted sexual abuse. In a decision dated September 18, 2008 the Department, following a Commissioner's review, determined that the incident should be substantiated as sexual abuse.

3. Following several continuances, during which the petitioner tried unsuccessfully to obtain legal representation, a hearing was held on January 20, 2009. The Department introduced the testimony of the alleged victim, who at the time of the hearing was fifteen, and its investigator of the incident. The petitioner and her son testified in their own behalf.

4. The alleged victim testified that he and the petitioner's son were "off and on" friends, but that on the day in question they were not getting along, and that on that

day the petitioner's son had followed him into the bathroom, come up behind him, and grabbed his penis. The alleged victim stated he told the petitioner's son to stop, but that he had to forcibly break away from him. He then promptly left the bathroom and told school officials.

5. The petitioner's son, who was also fifteen at the time of the hearing, testified that he was "mad" at the alleged victim that day (for reasons he could not recall), and that he had followed him into the bathroom. He denied actually fighting with the alleged victim, and denied having grabbed his penis.

6. The Department's investigator testified that the alleged victim's testimony at the hearing was consistent with the version of the event that he had separately related to her, school officials and the police in September 2007. She also stated that school officials had reported to her that the petitioner's son gave inconsistent statements to them following the incident.

7. Of the two boys, the hearing officer deemed the alleged victim to be the more credible witness at the hearing. There was no indication at the hearing that he bore the petitioner's son any ill will, or that he had any motive or inclination to testify if his prior allegations had been fabricated or exaggerated.

8. By contrast, the petitioner's son was vague and confused about most of the details he gave at the hearing

regarding the events of that day.

9. There is no dispute, however, that both boys were on IEP's at the time due, at least in part, to emotional and behavioral problems. The petitioner testified that she feels the school is to blame because both boys were supposed to have "shadow" aides with them at all times, and shouldn't have been allowed the opportunity to be in the bathroom at the same time. The petitioner also feels her son is too immature and mentally and emotionally delayed to be held accountable for the incident, if it occurred.

10. At the hearing the petitioner submitted her son's May 2008 IEP and the report of a psychological evaluation he underwent, pursuant to his IEP, in April 2008. The incident in question is not mentioned in the documents. Although his IQ of 59 was found to constitute a significant learning impairment, and his social skills were rated "extremely low", these documents are inconclusive as to whether the petitioner's son was capable of understanding the inappropriateness of the behavior in question. His demeanor at the hearing was deemed to be similarly inconclusive in this regard.

11. Following the Board's remand, the petitioner submitted the following statement from her son's ("T"'s) pediatrician, dated July 10, 2009:

> (T) has been a patient of mine at Rutland Primary care for many years. It is my opinion that (T) does suffer from developmental delays.

12. In a letter to the Department's attorney dated July 21, 2009, the special education director of the petitioner's son's school (where the incident occurred) provided the following:

> I am responding to your letter dated July 14, 2009. Attached please find a copy of [T's] Psychological Evaluation completed by [name] on April 4 & 7, 2008. I have highlighted several passages for you to review. In this evaluation [T's] IQ score was 59 which made him eligible for special education services as a student with a learning impairment.
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> An IQ score of 59 falls within the mild range of mental retardation. Mild Mental Retardation is diagnosed in individuals who have an IQ score of 50 to 75. Individuals with mild mental retardation, including [T], have trouble learning academic skills and typically reach an educational plateau at about the sixth-grade level. They have lower social skills then their same age peers and may have more difficulty learning and generalizing unspoken social rules that govern society. [T] certainly struggles within this area and often needs to have social norms repeated and reviewed with him. It is questionable whether he retains some of the rules of conduct while at school. It is also questionable whether or not he understands the severity of behavioral infractions or appropriate social norms. He struggles with maintaining proper social distance and, in general, demonstrates delayed socialization skills.
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> In my opinion, [T's] disability definitely impedes his ability to judge social situations, make socially appropriate decisions in those situations and understand the severity of the consequences. He is developmentally delayed and socially immature.
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> I hope this information will be helpful. I have also attached a copy of [T's] Evaluation Plan and Report. On page 5 you will be able to review [T's] achievement test scores. They are all low, in the 1st percentile. This page also refers to his Terra Nova scores, a standardized test administered in our district. He was given the third grade level test in 2007, indicating his

need for out-of-level testing due to his learning impairment.

13. Based on the above, it cannot be found that the actions of the petitioner's son were motivated by any sexual desire or intent on his part. The incident was extremely brief in duration, and there is no evidence that the alleged victim was in any way harmed or traumatized by it. There is also no evidence that the incident was anything but a single isolated occurrence. Considering the developmental delays and immaturity of the petitioner's son (and, it appears, the alleged victim as well) it cannot be concluded that the incident was anything more than innocent horseplay.

ORDER

The Department's decision substantiating the report in question as sexual abuse is reversed.

REASONS

The Department is required to investigate reports of child abuse, neglect, or sexual abuse and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or neglect against them. 33 V.S.A. § 4913 and 4916. A report is substantiated when it 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).

Any person against whom a report of abuse is substantiated by DCF may appeal to the Human Services Board. In such cases the burden of proof is on the Department. 33 V.S.A. § 4916b.

The statutory sections relied upon by DCF in this matter include the following:

> (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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> (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. Sexual abuse also includes the 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 a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

In this case, although there was unquestionably an element of physical force involved, and certainly no “consent” on the part of the “victim”, there is no evidence that the incident was sexual in nature, rather than horseplay. Thus, it cannot be concluded that the evidence supports a finding of sexual abuse or “molestation” within

the meaning of the above statute. Therefore, the Department's decision substantiating the report as one of sexual abuse committed by the petitioner's son must be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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