

investigation of the charges. The Department's investigators were joined by a detective from the local police department. One of the Department's investigators and the police officer were highly experienced in child abuse cases. The other Department investigator was well-trained, but inexperienced in actual investigations of child abuse.

Over a course of several days, the investigators interviewed seventeen children who were in the petitioner's classes at the day care. They also interviewed other day care staff members--ten in all--as well as some parents and other relatives of the children. The petitioner, on the advice of an attorney (not the one she had at the hearing), chose not to speak with the investigators.² Upon its investigation, SRS "substantiated" sexual abuse by the petitioner of three of the children it had interviewed. For purposes of this recommendation, these children will be referred to by their first initials, C., M., and N.

C. is one of the children whose mother first reported the case to SRS. (SRS did not "substantiate" any abuse of C.'s brother.) At the time (April, 1988) C. was two-and-three-quarters years old. C.'s mother told SRS that about a week before she made the report of abuse, C. had had a sudden severe stomach ache and that she had taken C. to the hospital emergency room. She told SRS that the doctor there had found redness on C.'s vagina and had questioned the

mother about possible abuse.

C.'s mother also told SRS that a week later she was bathing C. and again noticed redness on C.'s vagina. She said that C. became frightened by her questioning, but said C. had told her the petitioner had done it and that it had hurt. A friend of C.'s mother told SRS she was also present when C. made these alleged statements.

The same day it interviewed C.'s mother, the investigation team (the two SRS investigators and the police detective) interviewed C. at C.'s home. C.'s mother was present at the interview. C. was frightened and reluctant to speak. It was reported that when given an anatomically correct doll C. put her finger in the vagina. When the investigator asked if anyone had done that to her, C. said no. C.'s mother then told C. to tell the investigators what C. had told her. With considerable prodding, C. held up her index finger in response to being asked if anyone had touched her with their finger. C. then became angry and withdrawn, and the interview was terminated. C. did not mention the petitioner's name in this interview.

Three days later, the same investigators returned to C.'s home for another interview. C.'s mother again was present. Again C. was nervous and withdrawn. The interviewer asked her about the "secret" C. had told her mother, but C. was verbally unresponsive. The interviewer then told C. to nod her head yes or no in response to questions.

The interviewer asked C. if the petitioner was one of C.'s teachers. C. nodded yes. The interviewer asked if the petitioner hurt her. C. nodded yes. The interviewer asked if the petitioner hurt her with a baseball bat. C. nodded no. The interviewer asked if it was with her finger. C. nodded yes. The interviewer asked if the petitioner had touched her on the arm. Reportedly, C. answered verbally, "on my pee-pee". The interviewer then asked if it had happened at the petitioner's house. C. said, "yes". Except for saying that the petitioner had a cat and nobody else was there, C. refused to answer any further questions.

Another child of the seventeen interviewed by SRS was M., a boy who at that time was three-and-a-quarter years old. His demeanor at the interview was agitated and abrupt.

It was reported that M. said he had seen another male teacher at the day care lick the petitioner's vagina. He also stated that the petitioner had pulled his pants down and had touched his penis. He also spoke about seeing another child (male) lick a girl's vagina. He also stated that the petitioner had told him it was all right to lick a girl's vagina, and that the petitioner was a "bad person". The interview abruptly ended when M. refused to answer any more questions.

A few days later, M. was again interviewed. He was again reluctant to speak. He reportedly said that the petitioner licked his penis while he was on his bike outside at school. He also said the petitioner licked him all over-

-this happening two times, also outside at school. M. also talked about seeing his older brother lick his sister's vagina. Other family members admitted at the hearing that this may have, in fact, occurred.

At the hearing, M.'s mother testified that a month before the investigation she had removed M. and M.'s sister from the day care after an incident in which M. began "humping" his sister while they were playing. She stated that when she questioned M. about this behavior, he said that the petitioner had told him that people lick other people's "ginas", and that the petitioner had pulled his pants down. The mother stated she saw a "big" behavior change in M. at that time.

M.'s maternal grandmother worked with SRS and was aware of the complaint against the petitioner before M. was interviewed. It was she who brought M. to the SRS office for the interviews.

The third child SRS "substantiated" abused of was N., a girl who was three-and-a-half years old at the time. N. did not have good verbal skills, but she reportedly told the interviewers that the petitioner touched her body. When asked where, N. placed her hands on her vagina. N. said it happened outside at school, lots of times, and that her clothes were off. N.'s mother told the investigators that within the last week, N. had not liked going to day care as she had before.

Of the fourteen other children interviewed by SRS, none

gave information that led SRS to conclude that the petitioner had abused them.

SRS also interviewed ten staff members of the day care, including the petitioner's supervisors and co-workers. They were unanimous in their support of the petitioner and their disbelief that she would have abused any of the children at the day care. It did come to SRS's attention, however, that on a fairly regular basis the petitioner would take groups of children from the day care across the street to her house.

None of the children testified at the hearing. The hearing officer has carefully reviewed the testimony of the seventeen witnesses who did testify and the SRS and police reports of the investigation. Several factors do weigh against the petitioner. More than one child alleged that the petitioner had "touched" them and, given the unfortunate practice (since prohibited by the day care) of staff being allowed to take children to their homes, the petitioner may have had the "opportunity" to be with children unobserved by other staff members. On the whole, however, it is found that the Department's evidence was entirely insufficient to establish that the petitioner "abused" any of the children within the meaning of the statute (see infra).

C. was interviewed by SRS after her mother had reported "abuse". The hearing officer deemed C.'s mother to be less than credible. Her testimony that the doctor had told her C. might have been abused was particularly suspect. The

hospital record of C.'s visit contains no mention of possible abuse. (Hospitals and physicians are mandated by law to report suspected child abuse.) The investigating police officer testified that he later interviewed the doctor in question who said that he had found no evidence of abuse. (The SRS investigators did not interview the doctor.)

It appears that, almost immediately, C.'s mother had concluded in her mind that the petitioner had "abused" her children. The mother was present throughout SRS's interviews of C. The interviews were conducted in a leading manner and were lacking in any detail whatsoever as to the context and extent of the alleged "touching". As the petitioner and several other knowledgeable witnesses pointed out, there are any number of reasons and circumstances in which a day care worker can come in physical contact with the genital area of a two-to-three-year-old child. There was also credible evidence that C. often needed help toileting, and, from time to time, soiled her clothes. In light of this, the evidence is simply inadequate to conclude that the petitioner "abused" C.

Similarly, the evidence regarding M. is highly suspect and inconclusive. Some of M.'s allegations were preposterous. (Even the SRS investigators did not believe that the petitioner had licked his penis while he was riding his bike or that he had seen the petitioner and another teacher engaged in oral sex.) What is more troubling with

M., however, is the evidence that he had previously witnessed his older brother and younger sister engaging in oral sex. The hearing officer finds it puzzling that both SRS and M.'s family appear to have virtually ignored the impact this event may have had on M.'s behavior and his reliability as a "witness". M. also denied that any of the incidents had taken place at the petitioner's house--the only credible "opportunity" the petitioner would have had to commit the alleged acts (see infra). Also, despite the fact that M. was well "toilet trained", credible evidence establishes that he needed help reaching the toilet at the day care--sometimes he used a stool, other times a staff member picked him up.

The evidence regarding N. is also highly problematic. The sum and substance of her statements and demonstrations to the investigators were that the petitioner touched her genitals, "lots of times", while she was "outside" at school, with her clothes off. Again, considering the existence of reasonable explanations for such touching (credible evidence establishes that N. frequently needed help toileting and often soiled her clothes) and the lack of credibility as to the place and circumstances (her clothes being off, outside, in April) it cannot be found that the petitioner sexually abused N.

All the children's alleged statements, even if credible, were utterly lacking in detail and context. Although "expert" witnesses testified that children of this

age cannot be expected to provide the details and context of abuse, the Department made only minimal effort to try to obtain such evidence. The interviews with all the children and their parents were brief--almost to the point of cursoriness. Even though the children were not forthcoming, the Department made no apparent attempt to explore with them, their parents, or other knowledgeable witnesses (day care staff) circumstances (such as toileting or clothes changing, see supra) that may have provided an alternative explanation for the "touching" they had reported. Moreover, it is clear that the Department made no effort whatsoever to explore with any witness other significant factors that may have colored the children's statements (see infra).

Much of the Department's evidence in this matter consisted of the reported observations by family members of alleged "behavioral changes" in the children both before and after the time of the investigation. Both they and the Department appear to have reflexively attributed these changes to the alleged "abuse" by the petitioner. However, at the hearing, knowledgeable and credible witnesses (day care staff) described all three of the children in question as having serious emotional problems and stresses in their homes. Despite this, there is no evidence that any of the children was examined by a qualified psychologist.³ From the evidence presented, there is simply no credible basis to attribute any alleged behavioral observations of the children to anything that occurred at the day care, as

opposed to any number of plausible alternative explanations (which appear to be myriad) for such behavior.

Another major problem with the children's statements implicating the petitioner is that in all three cases the probability of parental influence was high. Although this may be a harsh judgement, none of the parents (and, in M.'s case, the grandparents) of these children struck the hearing officer as credible in their denials that they discussed with their children the charges against the petitioner prior to the SRS interviews.⁴ The parents of all three of these children were in a position to have learned of the charges against the petitioner before the interviews with SRS took place--C.'s mother initiated the charges, M.'s grandmother worked for SRS, and N. was interviewed late in the course of the investigation, six days after the petitioner had been abruptly suspended from working at the day care and after all the day care staff and all the other parents and children had been interviewed by SRS.

As noted above, all of the petitioner's supervisors and co-workers were incredulous of the charges. Several of them testified at the hearing, and they uniformly spoke in glowing terms of the petitioner's care and concern for the children at the day care.⁵ They also stated that neither the petitioner nor any other teacher at the day care would have had enough "privacy" anywhere on the premises of such a busy facility to sexually abuse a child.

The hearing officer also had the opportunity to observe

the petitioner's demeanor throughout six days of tense and sensitive testimony, and to weigh the petitioner's testimony in her own behalf. He found the petitioner to be an uncomplicated, sincere, and credible individual. Her denial of the allegations rang true.

Even if it is found that the petitioner "touched" the children as they reported, there is simply no credible evidence that the touching was an act of "molestation" or "exploitation" by the petitioner. Only one child, C., allegedly reported that the petitioner "hurt" her. Even if this is found to be credible, it is hardly conclusive that C. was "abused". As to the other children, M. and N., their statements are too lacking in credible detail and context to be viewed as reliable evidence that the petitioner "abused" them.

ORDER

The Department's decision that the reports of abuse in question were "substantiated" is reversed, and the record containing these matters shall be expunged from the Department's registry.

REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

- (a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations

initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

. . .

- (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.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that the report is based upon accurate and reliable information, but also that the information would lead a reasonable person to believe that a child has been abused or neglected. 33 V.S.A. § 4912(10) and Fair Hearings No. 10,136, 8646, and 8110.⁶

"Sexual abuse" is specifically defined by 33 V.S.A. § 682 as follows:

(8) "Sexual abuse" consists of any act 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.

In this case there is no credible or reliable evidence that the petitioner molested, exploited, or otherwise sexually abused any of the children in question. At most, it can be found that she may have "touched" them on their genitals. However, it cannot be concluded that this was anything other than routine and innocent contact commonly engaged in by day care workers responsible for the care of two and three year olds. The Department's decision is reversed, and all the reports of alleged abuse by the petitioner shall be expunged from the Department's registry.

FOOTNOTES

¹This case consumed six separate days of hearing over a two year period. Substantial delays occurred while the petitioner attempted to retain an attorney.

²The petitioner later gave an interview to the police and took lie-detector test. The hearing officer excluded all evidence pertaining to the results of that test. However, no criminal charges were ever filed against the petitioner.

³The evidence at the hearing was that neither the SRS investigator nor the investigating police officer knew if any of the children had been examined by a mental health professional. The parents, themselves, were not asked. Therefore, it cannot be found that the parents decided not to seek counseling for their children--and no inferences as to the parents' credibility can be drawn from this aspect of the evidence.

However, the fact that the Department did not know if there had been counseling calls into further question the adequacy of its investigation of the allegations against the petitioner.

⁴The testimony of the friend of C.'s mother that she was present when C. allegedly told her mother that the

petitioner had touched her was not credible.

⁵The hearing officer and the board recognize that child abusers are frequently able to avoid detection and are often people held in high esteem by their friends and community. This does not mean, however, that such esteem is irrelevant to assessing whether abuse, in fact, occurred--especially where, as here, it is alleged that the abuse occurred in such close proximity to other children and co-workers. At any rate, in light of all the evidence presented in this case neither the hearing officer nor the board view the opinions of the petitioner's co-workers as particularly crucial in determining whether the allegations of abuse have been substantiated.

⁶For the reasons set forth by the board in Fair Hearing No. 10,136, the Department's contention that the hearing is anything but de novo is rejected. Also, the petitioner's objection that the reported statements of the children in this case are inadmissible as hearsay under the board's rules (No. 14) is overruled. See Fair Hearing No. 10,136.

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COMMENTS ON DEPARTMENT'S PROPOSED FINDINGS OF FACT

Paragraphs 1 - 13 are supported by the evidence.

14) Not supported by the evidence. C.'s mother was not a credible witness. Her hearsay statements are accorded little, if any, evidentiary weight.

Paragraphs 15 - 22 are supported by the evidence.

23) It cannot be found that the parents of the children were without knowledge of the allegations against the petitioner prior to being interviewed by SRS.

24) It cannot be concluded that none of the parents had a reason to make or support a false allegation of abuse against the petitioner. (This is not to say that it is found that any of them did so.)

- 25) Supported by the evidence as to what C.'s mother told SRS. Not supported by credible evidence as to what C. had told her mother.
- 26) Supported by the evidence as to C.'s mother's testimony at the hearing. Not supported by credible evidence as to what C. or the doctor told C.'s mother.
- 27 and 28) Supported by the evidence as to what C. said and did before the investigators.
- 29) V.C.'s hearsay testimony was not deemed credible.
- 30) Accurate as to the essence of V.C.'s testimony at the hearing.
- 31) Supported by the evidence.
- 32) Accurate as to the essence of M.'s mother's testimony at the hearing.
- 33 and 34) Narrative and nonspecific forms of these proposed findings do not lend themselves to specific comment. They are generally accurate as to the essence of the testimony offered at the hearing.
- 35) Supported by the evidence.
- 36) Supported by the evidence (but it does not mean that the report is true either).
- 37) Same as No's 33 and 34, supra, except that credible evidence also establishes M. needed help to use the toilet at the day care.
- 38) M.'s paternal grandmother did not come forward

with her "information" until more than three years after it allegedly occurred. Her testimony was deemed not credible.

- 39) Supported by the evidence.
- 38) (Paragraph misnumbered by Department.) Accurate as to the essence of N.'s mother's testimony, except that credible conflicting testimony as to N.'s toileting skills was offered by the day care staff.
- 39) (Paragraph misnumbered). Supported by the evidence.
- 40 - 43) Supported by the evidence as to what was told to the SRS investigators.
- 43) (Paragraph misnumbered) Support by the evidence.
- 44 - 49) Supported by the evidence.
- 48) (Paragraph misnumbered) Supported by the evidence.
- 49) (Paragraph misnumbered) Accurate as to Officer's testimony, but not relevant to issue herein.
- 50) Supported by the evidence.
- 51) Supported by the evidence.
- 52) Accurate as to SRS's report of interviews.
- 53) Accurate as to SRS's report of interviews.
- 54) Supported by the evidence.

- 55) Supported by the evidence.
- 56) Supported by the evidence except that parents,

children, and staff could, and did, enter the petitioner's classroom at any time. Staff didn't believe abuse could have occurred at the day care.

- 57) Supported by the evidence.
- 58) Not supported by the evidence. Only C. reportedly alleged that the petitioner "hurt" her. All the children needed assistance with toileting.
- 59) Not supported by credible evidence.
- 60) Not supported by the evidence.
- 61) Not supported by the evidence.

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COMMENTS ON THE PETITIONER'S PROPOSED FINDINGS OF FACT

Paragraphs 1 - 90, 92 - 208, and 210 - 225 are supported by the evidence.

- 91) Other than M.'s family being eligible for "family support services" from SRS, it is not clear why M. was at day care.
- 209) The hearing officer does not recall that this fact was adduced at the hearing, but it does not appear to be controverted.