



her face".

3. The caseworker stated that the boy was very active and running around during most of the interview, however, when he made the statements about the petitioner, he stood still, looked directly at her and was very serious. The caseworker testified that she believed the child to be credible based on this behavior.

4. The caseworker also interviewed the child's mother, who did not testify at the hearing. She did not interview the parents of any other children enrolled in the petitioner's day care facility.

5. On September 22, 1987, the case worker interviewed the petitioner in her home. The petitioner denied that she was involved sexually with any children, and offered to take a polygraph examination, which was never arranged.

6. According to the child who was allegedly abused, another child who was enrolled in the petitioner's day care facility was present at the time the alleged sexual abuse took place. The case worker did not interview this child.

7. Although the case worker initially indicated that the alleged incident took place in August, 1987, she testified on cross examination that her notes revealed that the child began to demonstrate premature sexual behavior in July of that year.

8. The caseworker testified that she reached the conclusion that the report was founded based upon the

statements of the child.

9. The petitioner testified that during 1987 she was a registered day care provider and the child who was the alleged victim of abuse was enrolled in her day care facility for several months. As she had done in the interview with the case worker, the petitioner denied that any child abuse had taken place.

10. The petitioner stated that on one occasion the alleged victim told her that another boy who attended the day care facility (the child who was present at the time of the alleged sexual abuse) pulled down the alleged victim's pants and touched his genitals.

11. The petitioner observed premature sexual behavior on the part of the alleged victim and reported to the child's mother that the child had grabbed her daughter and stuck his tongue in her mouth.

12. The petitioner testified that the child was at her day care facility from 6:00 a.m. to 5:00 p.m. and she would have to change his clothing several times a day. She stated that she would have the child remove his own underwear, clean himself and put his underwear back on.

13. During the course of the case worker's interview of the boy, he stated that another boy enrolled at petitioner's day care facility had been run over by a car and there was blood all over. The petitioner testified that no such incident occurred.

ORDER

An order expunging a finding of child abuse by the petitioner is entered.

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. § 686 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 685 unless the commissioner or his designee determines after investigation that the reported facts are unfounded, in which case, after notice to the person complained about, the unsubstantiated report shall be destroyed unless the person complained about requests within 30 days that the report not be destroyed. A report shall be considered to be unfounded if it is not based upon accurate and reliable information that would lead a reasonable person to believe that a child is abused or neglected.

. . .

(e) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him on the grounds that it is a unfounded 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. § 686(a); Fair Hearing No. 8110.

The board has often noted that in many cases of claimed child abuse, the only two people who will ever know what really happened are the alleged victim and the alleged perpetrator. In such cases, the finder of fact is faced with the difficult task of assessing credibility based on expert testimony and surrounding circumstances.

Although this case appears at first blush to present such a situation, in actuality it does not. The alleged victim told the SRS investigator that another child enrolled in petitioner's day care facility was present at the time of the alleged sexual abuse, yet the case worker did not interview this child, nor did the department offer any evidence as to the child's observations. This omission is particularly critical in light of petitioner's testimony that the alleged victim reported to her that this same child had touched his genitals.

The department also failed to introduce the testimony of the child's mother, who initially reported the alleged incident and the police officer who interviewed the child along with the department's investigator.

Careful consideration has been given to the investigator's assessment of the child's credibility in

light of her education and experience in working with children. However, the child's statements in the course of the same interview that another child in petitioner's care had been run over by a car and there "was blood all over" must also be considered in evaluating the evidence.

Petitioner's testimony that this did not in fact happen was uncontroverted. Although she did acknowledge that the child may have been referring to toy cars, this could not explain the child's statement concerning the blood.

The petitioner's testimony did not consist of a mere denial of the allegations made against her. Rather, the petitioner related several incidents involving the alleged victim which could lead to alternative explanations for the child's behavior and statements. For example, she indicated that the alleged victim told her that another child (who was present at the time of the alleged incident upon which the finding of child abuse was made) had pulled down his pants and touched his genitals. In addition, the petitioner testified that she observed premature sexual activity on the part of the alleged victim, which she reported to his mother.

It is also worthy of mention that the petitioner offered to take a polygraph examination, which was never arranged. In addition, she testified to a procedure she had adopted for changing the clothes of older children to avoid any possible allegations of impropriety.

Additionally, on cross examination, the department's investigator acknowledged that her notes reflected that the child's premature sexual activity began in July, although she previously testified that the alleged abuse took place in August. While none of these factors standing alone would be sufficient to warrant a conclusion that the finding of child abuse was in error, their existence in combination with the investigator's failure to interview another child who was present at the time of the alleged abuse leads to the conclusion that the report was not based upon accurate and reliable information which would lead a reasonable person to believe the child was abused.

This case is readily distinguishable from Fair Hearing No. 8110, which is relied upon by the department. In that matter the child was interviewed on two occasions by the SRS worker, and presented a consistent version of the essential facts of the incident to SRS, to her social worker as well as to the aunt with whom she initially discussed the events. On the other hand, in the present case, the child was interviewed by the SRS worker on only one occasion, and the testimony of others to whom the child may have spoken concerning the incident was not introduced.

Moreover, although both cases involve the testimony of an SRS investigator who had considerable experience in working with children, the investigation involved in Fair Hearing No. 8110 was determined to be thorough and complete in contrast to the investigation which is now under

consideration. In that matter, the finder of fact was not faced with the failure of the department to interview a potential eye witness, albeit that witness is a five year old child.

For the foregoing reasons, it is concluded that the department's finding of child abuse was not based on reliable and accurate information and is, therefore, expunged from the department's records.

# # #