

that money had been offered, but the investigator could not clarify which boy had offered it to the other. The investigator then attempted to speak with the alleged victim, himself, but the boy was too nervous and reticent to speak about the incident.

A few days later, the investigator and the police officer went to the home of the alleged victim and his sister. The sister took them outside and showed them where the incident had occurred. She said that J.C. had asked her to hold up a plastic swimming pool to hide what he and the younger boy were doing. The sister said J.C. had told her not to look, but that she had. She also said J.C. had offered her brother a dollar before the incident took place.

The investigator then attempted to speak again with the alleged victim. He was still extremely reticent and the "interview" had to be conducted by the boy nodding his head in response to the interviewer's yes-or-no questions. In this manner, the following was recorded:

SRS: Did anything happen between J.C. and you?

Boy: Nods yes.

SRS: Did you make J.C. do anything to you?

Boy: Nods no.

SRS: Did J.C. make you do anything to him?

Boy: Nods yes.

SRS: Did you offer J.C. any money?

Boy: Nods no.

SRS: Did J.C. offer you any money?

Boy: Nods yes.

SRS: Was what happened good or bad?

Boy: "Bad."

SRS: Did anybody remove their clothes?

Boy: Nods yes.

SRS: Did you remove your clothes?

Boy: Nods no.

SRS: Did J.C. remove any of his clothes?

Boy: Nods yes.

SRS: Can you tell me in your own words what happened?

Boy: Nods no.

At this point [Boy] began crying and was clinging to his mother. Because he was very upset, [SRS] concluded the interview.

On the same date, the interviewer went to J.C.'s home to speak with J.C. and his parents. At first, J.C.'s father was not cooperative, but he eventually consented to have J.C. speak with the interviewer alone in the kitchen. J.C. told the interviewer that the younger child had sucked his (J.C.'s) penis and that the younger child had offered J.C. money to do it, but that no money had actually been exchanged.

The interviewer then prepared a report of his investigation and, after conferring with his supervisor, he concluded that the younger child had been sexually abused. At the hearing, the investigator admitted that in his

investigation he did not explore the "degree of coercion" between J.C. and the younger child. However, based on the younger child's response to his questions (see supra), the fact that J.C. had the younger child's sister hold up the swimming pool, and the age and size difference between the boys, he concluded that J.C. was the "perpetrator" of sexual abuse of the younger child.

After the hearing, the parents of J.C. offered to produce evidence that J.C., himself, had been the victim of sexual abuse both before and after the incident. The department admits it has verified sexual abuse against J.C. subsequent to this incident, but asserts that even if J.C. was sexually abused prior to the incident, this fact would be "irrelevant" to its decision to found sexual abuse by J.C. against the child in question here.²

The department did not attempt to have either J.C. or the younger child evaluated by a mental health professional.

At the hearing, the neighbor who had witnessed the incident stated that he could not detect any coercion by J.C. over the younger boy.

ORDER

The department's decision is modified in that any mention in the report of sexual abuse identifying J.C. as the "perpetrator" is expunged from the department's records.

REASONS

The petitioners have made application for an order expunging the record of the alleged incident of child sexual

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 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 Nos. 9247, 9112, 8110 and 8646.

"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 its "Casework Manual", provided to all its social workers and investigators, SRS has attempted to define further the requirements of the above statutes. Pertinent sections (see Manual No. 1215) include the following:

- C. Sexual Abuse - The statutory definition is quite explicit and all-encompassing, but provides little clarity around abuse by children and by adolescents on children. The Department differentiates sexual abuse by adolescents and children from other types of sexual exploration according to the following criteria:
1. The perpetrator used force, coercion, or threat to victimize the child, or
 2. The perpetrator used his/her age and/or developmental differential and/or size to victimize the child.

In this case there is no doubt that the incident in question took place. An adult witness, a child witness, and J.C. himself all described the incident in essentially the same terms. Although there is no evidence that J.C. was the sole initiator of the incident, the tender age of the younger child and the nature of the incident itself make it difficult to conclude that the younger child was an equal partner in simple sexual "exploration" with J.C. Keeping in mind the purposes of the abuse reporting statutes, see 33

V.S.A. § 681,³ and the definitions contained in 33 V.S.A. § 682(8), supra), it must be concluded that the department was reasonable in determining that the incident that occurred constituted "sexual abuse" of the younger child.

This does not mean, however, that the evidence supports the department's conclusion that J.C. was the "perpetrator" of this abuse. Given his young age and the fact that he himself has been identified by the department as a victim of sexual abuse (by an adult not involved in this case), it cannot reasonably be concluded that "accurate and reliable" information established that he "forced", "coerced", or "used his age and/or size to victimize" the younger child. Again keeping in mind the purposes of the abuse reporting statutes (supra), there appears to be little, if any, rationale for identifying J.C. as a "perpetrator" of sexual abuse--in fact, it strikes the hearing officer and the board as somewhat perverse.⁴

33 V.S.A. § 685 sets forth the duties of the department in child abuse investigations. It includes a provision that "to the extent it is reasonable" (emphasis added) the department is required to include in its investigation "the identity of the person responsible for such abuse or neglect." Id. § 685(b)(4). Thus, it is clear that the department is not required, as a matter of law, to include the name of the "perpetrator" in every reported case of child abuse.⁵ Given the grievous lack of evidence in this

case regarding any coercion by J.C. over the younger child, it must be concluded that it would be neither "reasonable" within the meaning nor consistent with the purposes of the statues to identify J.C. as the "perpetrator" of the sexual abuse of the younger child.

The department's decision is, therefore, modified accordingly.

FOOTNOTES

¹On her picture, the sister described J.C.'s penis as "nuts", and drew them coming in contact with her brother's mouth.

²Criminal charges are pending against the adult identified as the perpetrator of the sexual abuse of J.C. The parents' attorney alleges that the state's evidence in the case includes incidents both before and after the incident at issue in this matter.

³33 V.S.A. § 681 provides:

The purpose of this chapter is to: protect children whose health and welfare may be adversely affected through abuse or neglect; to strengthen the family and to make the home safe for children whenever possible by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse and neglect, investigation of such reports and provision of services, when needed, to such child and family.

⁴Somewhat disturbing is the department's characterization of information that J.C., both before and after the incident at issue herein, was himself sexually abused as "irrelevant" to the question of whether he should be considered a perpetrator of sexual abuse. Would not a thorough and sensitive investigation insist on exploring this information before reaching conclusions regarding a 10-year-old boy's culpability?

⁵Tellingly, the statute uses the term "to the extent . . . reasonable" rather than "to the extent . . . known".

#