

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 9112
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) "founding" a report of child sexual abuse against her, and seeks to have that report expunged from SRS records. The issue is whether there is accurate and reliable information that would lead a reasonable person to believe that the petitioner abused the child in question.

FINDINGS OF FACT

In early December, 1989, SRS received a report from the Vermont Achievement Center (V.A.C.) that the parent of a V.A.C. resident had alleged that a V.A.C. staff member had sexually abused that resident. The resident in question, H.C., is a mentally retarded girl. At that time, she was twelve years old.

Upon receiving the report, SRS assigned the manager of its special investigations unit for licensed facilities to conduct an investigation. This individual has considerable training and extensive experience in investigations concerning child abuse. Although a substantial portion of his prior casework (approximately 10% of his investigations) involves

children who are mentally retarded, it does not appear that he has received any specific education or training in dealing with children who are mentally handicapped--especially adolescents.

The investigator interviewed H.C. at her home in the presence of her mother. He estimated H.C.'s "mental age" to be between 6 and 7 years old. The investigator stated he was at the home for about an hour and a half, and he estimated the actual interview with H.C. lasted 45 minutes to an hour. In the course of the interview, the investigator used standard truth-assessment techniques for children and an anatomically-correct doll.

During the interview H.C. told the investigator that she had been touched on her breasts and genitals in a way she didn't like. She stated the touching occurred primarily while she was bathing, but also while she was in bed. She stated that the perpetrator was a female staff-member at V.A.C. of whom she only knew the first name--the same as the petitioner's. Based on his experience and what-he-took-to-be the truthful demeanor of H.C., the investigator determined that H.C. was being truthful in her description of the incidents.

The investigator then interviewed the petitioner and some other V.A.C. staff members. The petitioner denied that she was ever alone with H.C. "privately" from other V.A.C. staff members. However, the investigator determined that

the petitioner, during the course and nature of her work, would have had the opportunity, unobserved by others, to be essentially alone with H.C. Based on this perceived "discrepancy" in the petitioner's defense, the investigator determined that the petitioner was the one who had sexually abused H.C. in the manner H.C. had described. At all times, the petitioner has vigorously denied the allegations.

The investigator made no audio recording of his interview with H.C., and he destroyed his contemporaneous notes of the interview after he had made his formal "report" to his supervisors at SRS. At the hearing, H.C. did not appear, and the department offered no corroborative evidence as to the veracity of the allegations as related by the investigator.

The petitioner testified, however, that H.C. was a troubled and homesick girl who, in addition to being autistic and aggressive, had significant problems at V.A.C. with masturbatory behavior. The petitioner testified that these latter problems were detailed in V.A.C.'s case notes concerning H.C., and that she and other staff members who worked with H.C. at V.A.C. were specifically instructed to "correct" H.C. regarding this behavior--which, the petitioner states, she had to do on several occasions.

The investigator, in his testimony, made no mention of these problems. He did not know if H.C. had ever been seen by a psychologist--either before or after the alleged incident. There is no indication that the police ever

followed up on the allegations (the police accompanied the investigator to interview the petitioner and the other V.A.C. staff members, but were not present during his interview of H.C.). There is also no indication that SRS offered or provided any "services" to H.C. or her family as a result of this reported incident.

ORDER

The report of abuse against the petitioner is expunged from the department's records in that it is "unfounded".

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 Nos. 8110 and 8646.

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. The board has held that it will not require the actual testimony of allegedly-abused children, but that it can and will rely on other indicia of the accuracy and reliability of allegations made by children. Fair Hearing No. 8816.

In this case, however, it must be concluded that the department's investigation was seriously incomplete and deficient. Uncontroverted evidence establishes that H.C. had significant behavior problems very likely related to her mental inability to comprehend or cope with her oncoming pubescence. She also had a compelling motive (homesickness) to fabricate or exaggerate a claim of "abuse" at V.A.C. There is no evidence, however, that the SRS investigator was

even cognizant of these potential conflicts. Even if he was, the evidence does not establish that he had the experience or training to evaluate them.

Other than the investigator's assessment, SRS presented no corroboration whatsoever of H.C.'s "truthfulness". No recording was made of the interview, and all contemporaneous notes were destroyed prior to hearing. Also, one would assume that H.C.'s parents, other V.A.C. staff persons, and other professionals involved in H.C.'s education and development could have offered some information as to H.C.'s ability and propensity to accurately and truthfully report an alleged incident of sexual abuse. It also would have been helpful to the board (and probably to H.C.) if H.C. had been evaluated by a trained therapist. However, not only were none of these individuals offered as witnesses, there is no indication that SRS even considered them as potential sources of insight into H.C.'s veracity. SRS's investigator, though sincere and generally experienced, simply did not have enough expertise and information to evaluate whether a mentally retarded girl in H.C.'s circumstances was truthfully reporting an actual incident of "sexual abuse". (See 33 V.S.A. § 682(8).)

In light of the above, it cannot be concluded that the report in question was based on accurate and reliable information that would lead a reasonable person to conclude that the petitioner sexually abused H.C. For these reasons the report of alleged sexual abuse that is the subject of

this appeal should be expunged from SRS's records.

COMMENTS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
SUBMITTED BY SRS PURSUANT TO HUMAN SERVICES BOARD RULE 17.

Paragraph 1) The evidence indicates that the department's investigator did not identify the petitioner as the perpetrator until he interviewed H.C.

Paragraphs 2-30) These are generally supported by the investigator's testimony as to what H.C. told him during the interview.

Paragraph 31) The evidence establishes that the petitioner alleged only that the rooms where she and H.C. were in at V.A.C. were accessible to other staff and that she would not have had "privacy" with H.C. Though other staff members told the investigator that the petitioner and H.C. could have been alone, the hearing officer did not deem this "discrepancy" very significant.

To the extent that SRS's "finding" of the report in question was not based on accurate and reliable information which would lead a reasonable person to conclude that the petitioner sexually abused H.C., the department's decision is in conflict with law and is reversed. 33 V.S.A. § 686, 3 V.S.A. § 3091(d) and Human Services Board Rule No. 19.

FOOTNOTES

¹Based on the investigator's testimony, it appears his interviews of other V.A.C. staff persons focused on the petitioner's credibility (concerning whether or not she was ever alone with H.C.)--not H.C.'s.

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