

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 9761
)
Appeal of

INTRODUCTION

The petitioner appeals the decision of the Department of Social and Rehabilitative Services (S.R.S.) "founding" a report of sexual abuse by her nine-year-old son against his four-and-a-half-year-old step-sister. The issue is whether the report should be "expunged" in accordance with 33 V.S.A. § 686. The petitioner also appeals the Department's proposal to revoke her family day care home registration based on the above "founding".

FINDINGS OF FACT

The facts in this matter are generally undisputed:

1. The petitioner has operated a registered family day care operation in her own home for four years. She currently cares for six children full-time and four children part-time. She and her husband rely upon the income from her day care business for a substantial part of their livelihood.

2. The petitioner's son, J., is nine-years-old and has been in therapy with a school counselor for some two years around several issues including the possibility that his father (who is no longer married to the petitioner) may have sexually abused him.

3. In the course of his therapy with the counselor, J. revealed that while his parents were gone one evening and he was with a baby-sitter, he took his four-and-a-half-year-old step-sister upstairs and tried to touch and kiss her in the vaginal area.

4. J.'s therapist, after confirming this event through an interview with the four-year-old, reported the incident to SRS pursuant to the mandatory reporting law, sometime in March of 1990.

5. The SRS investigator assigned to this case has had several years' experience in investigating reports of sexual abuse. He started his investigation by calling the petitioner and asking to speak with her son. He subsequently met with the boy privately (as the boy was under ten the police were not involved) and discussed the event. The boy quite openly described the same activity and also added that he had a sexual experience with another boy which involved "mutual fondling and some oral sex" (the investigator's words). No further details of the contacts were elicited from the boy.

6. Based on the boy's admission, the SRS investigator determined that he had sexually abused his step-sister and placed a founded report in the registry.

7. The petitioner and her husband were told of the "finding" and responded by saying they would continue his therapy with special regard to this problem. Because they were concerned about exposure to such behavior not only for

the children in their care, but also for their own daughter, arrangements were made for the boy to go to his grandparents' home nearby after school until the last of the day care children were gone at 5:00 p.m. J. is, however, in the house from 6:30-7:30 a.m. when other day care children are present but he is kept in the kitchen near his parents.

8. On March 27, 1990, the Department sent the petitioner a letter proposing to revoke her day care registration because a person who had a founded report of abuse against him, her son, was residing in her home. That letter is attached hereto as Exhibit No. 1 and is incorporated herein by reference.

9. The petitioner responded to that proposal by requesting a hearing with the Commissioner. The Commissioner was represented at the hearing by the Director of Licensing. The petitioner appeared with her husband and their attorney. At the review, the petitioner presented the precautions she had taken to the Commissioner's representative and also stated that for the coming summer the boy would not be in her home but would be spending it at his grandparents' camp. She also offered to make some arrangement for him for the first hour of the day and offered to restrict her registration to times when her nine-year-old was not in the house, she advised the representative that the report had heightened her awareness of a potential problem and that she did not allow her son and daughter or her son and anyone else to go to the

playroom or each others' bedrooms unsupervised. The child was still in counseling and the parents remained committed to continuing his sessions. She also stated that she had discussed the incident with her daughter and instructed her to report any similar incidents but there have been no further reports.

10. The information given to the Director was reviewed by the Commissioner who notified the petitioner by letter dated April 27, 1990, that the decision to revoke was reaffirmed because the Department felt it had no discretion to waive or bend the regulation which prohibited registration of homes in which "founded" child abusers resided. A copy of that letter is attached hereto as Exhibit No. 2 and incorporated herein by reference.

11. SRS agrees that the petitioner and her husband have been cooperative and responsible about dealing with this problem and that the therapist who is seeing the boy is competent to help him deal with his problems.

12. It is the Department's position that it does not have the authority to restrict registration certificates to certain hours, and that such solutions have proved impractical and ineffective in the past when SRS had more discretion and tried to place such restrictions on registrations.

ORDER

The Department's decision to "found" a report of sexual abuse is expunged as not meeting the statutory definition of

abuse. The Department's proposal to revoke the petitioners day care home registration on the basis of this now expunged "finding" is reversed.

REASONS

The petitioner has 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 section (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 nine-year-old boy touched or attempted to kiss his four-and-a-half-year-old sister's vaginal area. The boy himself revealed these

facts to both his therapist and the SRS investigator. His sister also confirmed that it happened. Beyond that, there was no description of the incident offered into evidence which could lead to the conclusion that force, coercion, threats, age, size or developmental differential was a significant factor in the events which occurred. Such a showing is crucial in cases which involve pre-adolescent children who are relatively close in age (4 1/2 years apart) since sexual exploration, as opposed to sexual abuse is not uncommon in this age group. See, e.g. Fair Hearing No. 8810.¹

It must be concluded that without this evidence the Department has failed to meet its burden of showing that it was reasonable to believe that the reported facts constitute sexual abuse rather than sexual exploration. As such, the finding must be expunged pursuant to 33 V.S.A. § 686.

As the basis for the proposed revocation of the petitioner's day care registration is removed by this decision, that proposal cannot now be upheld. The petitioner is advised, however, to continue with her child's therapy and the precautions she has taken in her day care home, as it appears that there is a potential for her child to become an abuser of younger children. If the child is found in the future to have engaged in truly "abusive" behavior toward another child, SRS may well be justified in refusing to register her day care home as long as the child resides there.

FOOTNOTES

¹The Board also held in Fair Hearing No. 8810 that even if it appears that the one child has been sexually abused by the other, the abusing child is not required by statute to be listed as a perpetrator if coercion is not specifically found.

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