

experienced in such investigations, arranged to interview the girl at the Department's district office.

On March 14, 1989, the girl came to the district office accompanied by her mother. The girl's mother was agitated and insisted on staying with the girl during the interview. The Department's investigator gave the girl a choice of whether she wanted to be interviewed alone or with her mother present. The girl chose to be alone, at which point her mother angrily left the room, slamming the door behind her.

The interview was taped and later transcribed. At the hearing (held on September 22, 1992) the Department introduced a copy of the transcript and the testimony of the SRS investigator and the police officer who had conducted the interview. The girl, who is now twelve, was not present. The hearing officer admitted the transcription of the interview over the objection of the petitioner.

A few weeks after the interview the girl's mother called the SRS investigator to say that the girl had "recanted" her accusations and that she would no longer cooperate with the Department or the police in any further investigation. The investigation was then concluded, and no criminal charges were ever filed in connection with the allegations. Based on the interview the girl had given, however, the Department determined that the alleged abuse had, indeed, occurred; and it entered the report in its

registry. Unfortunately, however, the petitioner did not learn until recently that the report had been substantiated and was being maintained by the Department in its registry.¹

At the hearing the petitioner, who was represented by legal counsel, testified in his own behalf and also offered the testimony of his older brother and his mother. At the time of the alleged incident the petitioner was twelve years old. He is now sixteen and resides at a state juvenile facility, having been adjudged a delinquent for reasons other than and unrelated to the allegations in this matter.

Both he and his brother (who is also implicated in the girl's allegations but who has not yet sought formal expungement himself--he being presently incarcerated at a state corrections facility for crimes also unrelated to this matter) absolutely deny the allegations.² They and their mother testified that they were close friends of the girl and her family, and that the petitioner and his brother often baby-sat for the girl and her siblings. They stated that the girl was very affectionate with the petitioner--to the point of being a nuisance--and would act "jealous" when the petitioner had a "girlfriend" over at the house. They also maintained that the girl's mother had been devastated by the charges of abuse brought against her husband (the girl's stepfather) and that she had probably put the girl up to accusing the petitioner and his brother in order to protect her husband.³ They state that even after the

alleged incident the girl's mother frequently asked the petitioner to baby-sit for the girl and her siblings.

The petitioner struck the hearing officer as a sincere young man who is making a serious effort to turn his life around. A counselor at the juvenile facility where the petitioner has been placed testified as to the petitioner's commitment to his rehabilitation and to his trustworthiness.

The petitioner admitted, however, that at the time of the alleged incident he was becoming increasingly involved with alcohol and drugs, and that he baby-sat for the girl and her siblings primarily to get money to buy drugs.

Although the girl's allegations as contained in the transcript do not, on their face, appear to be fabricated or coerced, the evidence as a whole (or lack thereof) reveals that the Department's overall "investigation" of these allegations was woefully inadequate. The hearing officer concludes that he failed to properly weigh this inadequacy in making his original findings and recommendation. Based on the evidence presented at the hearing the following additional findings and observations are therefore necessary and appropriate.

At the hearing the Department's investigator admitted that the allegations made by the girl against the petitioner were not as specific and detailed as those the girl had made a few months earlier against her stepfather. Despite this, the Department did not attempt to obtain any specific information from individuals it knew the girl had spoken to

previously about these allegations--i.e., the girl's mother and her day care provider. Nor did the Department attempt to interview the mental health counselor who had been seeing the girl regularly since the abuse by her stepfather had come to light.

The Department also admitted that there was no "physical evidence" that the girl had been sexually abused by the petitioner. Indeed, despite her belief that this eight-year-old girl had suffered forced sexual intercourse, the Department's investigator could not specifically recall at the hearing if the girl had even undergone a physical examination.

The transcript indicates that the girl's siblings were present in the house, and/or even in the same room, with the girl when the alleged incidents occurred. Despite this, the Department made no attempt to either visit the girl's home or speak with any other members of her family. Moreover, after the girl had reportedly "recanted" her allegations, the Department made no attempt to interview her again--or any other individuals (e.g., her therapist or day care provider) who may have been able to shed some light on the situation.

Shortly after the interview with the girl at SRS the police officer made a brief attempt to interview the petitioner and his brother at their home, but left after the boys' mother protested. At no time did anyone from SRS attempt to contact the petitioner to confront him with the

girl's allegations.

Based on this near-total lack of any "investigation" by the Department once it had heard the girl's allegations, it cannot be concluded that there was (or is) "accurate and reliable information" that would lead a reasonable and fair-minded person to conclude that the petitioner actually committed an act or acts of sexual abuse against the girl in question.

ORDER

The petitioner's application to expunge the report of sexual abuse made against him is granted.

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.

The Board has consistently held that under the above statutes, but also as a matter of basic due process and fundamental fairness, the Department has a duty to pursue and develop sufficient factual evidence before it "substantiates" a report of child abuse. See Fair Hearing Nos. 9112, 8837, and 8646. In this case the evidence shows that the Department, upon interviewing the girl, simply chose at that point to credit her allegations and made virtually no effort thereafter to "investigate" the matter further. Under the above statutes this is not sufficient to sustain the Department's burden of proof.

33 V.S.A. § 4915 requires the Department, as part of its "investigation", to at least attempt to visit the home of an alleged victim of child abuse as well as the place where the alleged abuse took place. That statute also specifically allows the Department to interview an alleged

victim even without parental approval. Therefore, the Department cannot claim in this case that parental noncooperation precluded any further investigation of the girl's allegations, either before or after her reported "recantation".

The Department's failure to interview non-family members is even less tenable. Despite its admitted concern regarding the lack of detail in the girls allegations, the Department did not see fit to check for verification or consistency with an individual--her day care provider--who the Department already knew had some direct knowledge of the girl's allegations. Nor did the Department attempt to speak with the girl's therapist about the allegations, despite the fact that the girl was in therapy specifically because of prior sexual abuse she had suffered. Under 33 V.S.A. § 4913(a) all mental health professionals are required to report suspected child abuse of their patients. In light of this, the Department's excuse that it would have been futile to attempt to talk with the therapist because of "confidentiality" seems cynical and disingenuous.

The evidence clearly shows that other than its one, relatively brief, interview with the alleged victim, the Department's "investigation" in this matter was virtually non-existent. Therefore, it cannot be found that the allegations were "based upon accurate and reliable information that would lead a reasonable person to believe" that the alleged victim was sexually abused by the

petitioner. Thus, it must be concluded that the report in question was not "substantiated"; and the petitioner's application to "expunge" it from the SRS "registry" is granted.⁴

FOOTNOTES

¹The Department maintains that it has since instituted a policy of promptly notifying all individuals who have had a report of abuse against them "substantiated" by the Department. This case again illustrates the patent unfairness and abuse of due process that occurred prior to this change in SRS policy.

²This decision makes absolutely no findings or conclusions regarding the petitioner's brother.

³The stepfather later pleaded guilty to criminal charges of sexually abusing the girl.

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