

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 11,705
)
Appeal of)

INTRODUCTION

The petitioner seeks to expunge a finding by the Department of Social and Rehabilitation Services (SRS) that he sexually abused three children at an elementary school where he was teaching.

FINDINGS OF FACT

1. On October 7, 1992, SRS received a call from a principal of an elementary school reporting that two fourth graders, B.O. and R.B., had written notes to each other indicating that the petitioner, a third grade teacher, had touched them in a manner which they felt was inappropriate.

2. An experienced SRS investigator was assigned to the case and first contacted the principal and guidance counselor for background information on the reports. Her interviews with them indicated that the information had been passed to the guidance counselor and then to the new principal for action. The petitioner had been apprised by the principal that there had been complaints and asked if he could respond to the complaints by meeting with the families of the children. He was told by the principal that the allegations would be referred to SRS for investigation. The petitioner was suspended with pay from his job pending the outcome of the

SRS investigation.

3. Within a week or two of the commencement of the interviews, rumors of the allegations spread through the fourth grade and then into the fifth grade. Five other children made similar allegations which were briefly investigated and dismissed. A sixth student, E.P., a fifth grader, made an allegation which was considered worthy of further investigation.

3. All three children, E.P., B.O., and R.B., were interviewed by the SRS investigator in the presence of a police officer and those interviews were taped. Prior to and after the interviews, the parents of the children were also interviewed. The interviews with the three children were transcribed and a copy of those transcriptions are attached hereto and incorporated herein by reference as Exhibits One (E.P.), Two (B.O.), and Three (R.B.), as statements made by each child on that day. Handwritten additions were made by the hearing officer after listening to the tapes. (Copies of the original interview tapes were also placed into evidence and were reviewed by the hearing officer.)

4. During the course of the investigations, the petitioner approached SRS and asked to be interviewed about the incidents. Prior to and during his interview, the petitioner was told only the identity of E.P. because her statements had possible criminal penalties involved. He was not told the identities of the other two girls who had

complained based on a decision by SRS that such information should be concealed to protect them from the petitioner. The petitioner was told the nature of some of the allegations against him but the allegations were not grouped together to reflect which unnamed source had said them. Although the petitioner was confused by this lack of information, he denied that he had inappropriately touched any child at any time. He also claimed that E.P. was a troubled child who had a reputation for exaggerating in order to get attention. He urged the SRS worker to contact his colleagues both for the purposes of confirming his statements about E.P. and to confirm his own credibility and appropriate treatment of children.

5. During the following weeks, teachers, PTA members, and School Board members contacted SRS with opinions about the matter, mostly to comment upon the fairness of the process but also to comment on the lack of credibility of the children and the credibility of the petitioner. The School Board initiated its own investigation into the matter to determine whether the petitioner had acted inappropriately in his position as teacher.

6. Bowing to this pressure, the SRS investigator physically met with two colleagues to discuss their concerns. Those colleagues who knew the petitioner and the children well told the investigator that E.P. had a reputation for exaggerating and not telling the truth in order to get

attention. In addition, the investigator was told by colleagues that the petitioner had a reputation for credibility, that they had never observed any inappropriate behavior by the petitioner and that they felt the reports of the two credible children reflected a misunderstanding and mischaracterization of the petitioner's actions. There was also sentiment expressed that the new principal did not know the petitioner and acted hastily in not checking out the claims himself before contacting SRS. These views were considered by the investigator but rejected as representing biased attempts to help the petitioner.

7. Despite allegations by the children that the events described took place in the presence of other children and adults, no attempt was made by the investigator to seek out corroborating eyewitnesses. References made by the three interviewed children to behavior perpetrated on other children was only inconsistently checked out. An allegation made by B.O. on p. 34 of the transcript that K.G., another child, had been treated in a similar manner (touched on the boobs) was denied by that child.

8. The investigator, upon considering all of this information, made an initial finding that the allegations made by R.B. were not substantiated and forms were filled out to that effect. Next, she notified the petitioner by five identical letters dated November 18, 1992, November 19, 1992 and November 23, 1992 that "insufficient information exists to

substantiate the allegations." No names or initials of any children were contained in the letters and SRS never explained what children were covered by those letters. Each letter was signed by the investigator and, with the exception of the one dated November 18, 1992, by the investigator's supervisor.

9. On November 23, 1992, the investigator called the petitioner to inform him that the letters previously sent were premature and in error and that the matter had not been thoroughly investigated. It appears that no further information was gathered after that date but that the information already gathered was compared and further discussed by the investigator with her supervisors. A final decision was made to substantiate all three reports. Although the investigator did not feel that any of the incidents standing alone, with the exception of the touching of the breasts under the shirt, necessarily indicated sexual abuse, she felt that the cumulative number of events combined with the girls' uncomfortable reactions to these events was sufficient to conclude that sexual abuse had occurred.

10. Thereafter, three identical letters, two dated November 24, 1992 and one dated December 7, 1992 were mailed to the petitioner informing him that the investigation of the report of child abuse made against him "had been substantiated in accordance with the provisions of Chapter 49 of Title 33 of the Vermont Statutes." No names or initials of children appeared on those letters and they were each signed by the

investigator. A further letter dated December 7, 1992, was also mailed to the petitioner informing him that "insufficient information exists to substantiate the allegations." That letter contained no child's name and was signed by the investigator and her supervisor.

11. Within weeks of these mailings, SRS, at the request of the petitioner's attorney, specifically advised him as to which children and which events substantiated findings had been made. The petitioner appealed and the matter was reviewed by the Commissioner. In a letter dated December 2, 1993, the petitioner was notified that the substantiation was based on the following findings:

With regard to B.O., in September, 1992 you rubbed your hands on her body in a sexually inappropriate manner and you touched her breasts in a sexually inappropriate manner during the prior school year. B. was 9 years old at the time and there is accurate and reliable information that would lead a reasonable person to believe that she was sexually abused by you as defined in 33 V.S.A. Sec. 4912(8).

With regard to E.P., you touched her breasts in a sexually inappropriate manner in the Spring of 1990 while she was a student in your third grade class. E. was 9 years old at the time and there is accurate and reliable information that would lead a reasonable person to believe that she was sexually abused by you as defined in 33 V.S.A. Sec. 4912(8).

With regard to R.B., you touched her on the buttocks in September of 1992 and during the prior school year you rubbed your hands on her body in a sexually inappropriate manner. R. was 10 years old at the time and there is accurate and reliable information that would lead a reasonable person to believe that she was sexually abused by you as defined in 33 V.S.A. Sec. 4912(8).

12. In the meantime, after three days of hearing, the

School Board concluded that the petitioner had not participated in inappropriate behavior and he was offered his job back for the 1993-1994 school year. However, the petitioner declined to return stating that his credibility and teaching effectiveness had been compromised by this episode. The Superintendent of Schools who had initiated the misconduct investigation, thereafter supported the petitioner with affidavits indicating that the petitioner "has never given me any reason whatsoever to doubt his credibility."

13. In addition to the investigator, testimony was taken at the hearing from the petitioner and two of his former colleagues, a teacher and his former principal. The testimony of all those individuals is found to be entirely credible. Based upon that testimony and the transcripts admitted into evidence the following further findings of fact are made:

- a. The testimony of E.P., as recorded in the transcript, cannot be found to contain a reliable degree of credibility and accuracy. That child, unlike the others, did not report the alleged incident (although she was aware of the abuse reporting process from prior experiences) until almost two years after it allegedly occurred and until after she was aware that other children had made allegations regarding "sexual molestation." Her allegations were of a different and far more serious type and were not supported by any details which lent credibility to the incident. The

child's reputation for exaggeration and inordinate need for attention from teachers and her mother were well documented by the teacher and principal, further casting doubt upon the veracity of her statements. The child's statements in the interview regarding her clothing (at first stating that she did not know what she was wearing and later, after it was suggested to her that she was wearing a T-shirt, actually describing it as a "plain T-shirt") further indicate both that she is prone to suggestion and to fabrication. Finally, her allegation that the petitioner reached under her blouse to touch her breasts in front of a crowd of teachers and children at a recess soccer game, does not have the ring of truth or sense.

b. The testimony of R.B. is found to be entirely credible based on the internal consistency, affect and detail in her interview as well as statements by all the witnesses, including the petitioner, that this is a credible child. This child was doubtless describing touching by the petitioner that made her uncomfortable but it is impossible to conclude from the context that the petitioner was attempting to sexually molest or exploit her. His touching of her on the buttock which she believes was his action, but which she did not actually see, was not described in such a way that it could reasonably be concluded that it was sustained or

gratuitous. It is not at all clear what the child meant by the touch since she first described it as a pinch and then something that occurred with the open hand. The duration of the touch is also questionable since she was never tested as to what she meant by "a minute." Again, the fact that it occurred when there were many other children and at least one other adult nearby in the context of a hike, equally supports the petitioner's contention that any such touching was probably a tap on the rear to someone in front of him to get going on the trail. Without some firm details or corroborating eyewitnesses, it is certainly not reasonable to conclude that this action was deliberate sexual molestation.

The same is also true of the other events described by R.B.: the hand on the shoulder to mid-back, the rub on the side or on the outer thigh. The description of the rubbing is inexact. There was insufficient clarification as to what action and duration were really being described here. Again, according to her testimony, there were several witnesses to all these events and yet no one was asked to clarify or corroborate her statement. Finally, the stomach rubbing clearly was confined to only the stomach region and clearly was in the context of attempting to soothe the child while waiting for her parent to arrive. The fact that the contact may have made the child uncomfortable, does not make it sexually

abusive.

c. The testimony of B.O. is also found to be entirely credible based upon her affect, detail and internal consistency, as well as testimony from all the witnesses, including the petitioner, affirming her reputation for credibility. However, her testimony suffers from the same defect as R.B.'s in that it is not at all clear that she is accurately describing the events. Her complaints that he rubbed her thigh, put his arm around her while she was standing at his desk (she is a tall girl) thereby rubbing the top of her buttock, and that he had rubbed her back all suffer from the same lack of indication as to the type, intensity and duration of the touch. As these events could all occur in an innocent context as well, it cannot be concluded that they accurately describe a sexual context absent some more specific information. Her own feeling that it was uncomfortable, while somewhat probative on the issue of the intent of the touch, is not dispositive of the issue since her reaction could be as much as result of her own sensitivity as the petitioner's intention or motives.

B.O.'s report of being touched on the "boob" by the petitioner is more problematic in that a deliberate touching of this part of her body without any explanation could reasonably be described as sexual exploitation. However, there is no indication here that such a touching

was deliberate. This is the only credible report by any student of touching on a sexually sensitive area. It came in the context of a gymnastics practice at which the petitioner was assisting the students. His credible testimony indicated that he frequently helped her to roll and get up because she was struggling with the sport. While he does not recall touching her breast, he indicated that any such touching would have been accidental. Given the fact that this touching occurred before another crowd of persons during a physical event makes it very unlikely that the touching was an attempt to sexually molest the child.

d. The petitioner has been a teacher for almost sixteen years including five years as an acting principal. The school where the touching occurred is a very small one consisting of one teaching principal and three teachers.

The petitioner has taught multi-aged classrooms and has never had a complaint lodged against him before this time. He admits that he is affectionate and physical with the children and was unaware that any children were uncomfortable with his style of relating to them. His physical style does include pats on the back or knee and arms around the waist. If any child or parent had complained about his behavior, he says he would have stopped it but he has never had a complaint before. He tries, according to his colleagues, to create a warm and

supportive environment in his classroom and is very popular with most children. His students most frequently initiate physical contact with him, including climbing into his lap, hugging him, and sidling up next to him. Neither his fellow teacher nor his former principal have ever observed any behavior on his part toward children which they would classify as inappropriate.

ORDER

The decision by SRS that the reports of sexual abuse of E.P., B.O. and R.B. by the petitioner are substantiated is reversed, and the record containing this matter is expunged from the Department's registry.

REASONS

The petitioner has made application for an order expunging the record of the alleged incidents 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 Hearing Nos. 8,110, 8,446, 10,136, and 11,232.

"Sexual abuse" is specifically defined by 33 V.S.A. § 4912 as follows:

- (8) "Sexual abuse" consists of any act of 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 this case there is no evidence which accurately and reliably shows that the petitioner molested, exploited or

otherwise sexually abused the children in question. Although the transcripts admitted into evidence contained a few credible (but incomplete) descriptions of behavior that could be considered exploitive in some context (touching on the breasts over the clothing and grabbing the buttocks), there is not enough evidence here (even circumstantial evidence) to conclude that it is more likely than not that the petitioner intended the touching or intended it in a sexually exploitive manner. Some touches speak for themselves (such as manipulation of the genitals); however, most touches must be interpreted in a context which makes sense. It is difficult to conclude that these touches, which mainly involved the back, the legs and the waist, and which were performed openly before a multitude of witnesses were thought of or intended to be sexually exploitive by their perpetrator. While it is possibly so, it does not seem very likely.

The real issue lurking in this investigation is whether the petitioner's relationship with his students is more intimate or intrusive than is seemly for a third grade teacher. Had this teacher been a close male relative, such as a parent, it is unlikely that this behavior would have ever been viewed as sexual molestation.

However, when the perpetrator is a non-relative, as is this teacher, more confusion seems to exist as to the classification of the behavior. The SRS investigator herself demonstrated a good deal of ambivalence as to the treatment of

this evidence and her first instinct was to not substantiate it. In the end, the substantiation seemed to rest more on the number of instances and the children's reactions to them rather than any analysis of the behavior under the statutory definitions. The statute, is not designed to register persons who may be acting in a professionally inappropriate way with children but to rather register persons who are sexually abusing children. Even if the SRS team felt the petitioner might turn to sexual abuse and that these intimacies were merely a precursor to more harmful behavior, it would not be appropriate to find that sexual abuse occurred--a serious charge, even in a civil context--based on the children's discomfort and number of touches alone.

A decision as to the professional propriety of the petitioner's behavior is the domain of the petitioner's superintendent, principal and school board, and not of SRS, where sole concern must be whether abusive behavior occurred as that term is defined in the statute.

It cannot be concluded in this case that any of the allegations of E.P. are credible. Neither can it be concluded that the credible allegations of B.O. and R.B. are accurately describing events which could reasonably be characterized as a deliberate attempt to seek sexual gratification through touching a child. As such, the findings should be reversed and the registry should be expunged.

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