

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 13,154

)

Appeal of )

)

INTRODUCTION

The petitioner appeals to the Human Services Board for an order expunging from the "registry" maintained by the Department of Social and Rehabilitation Services (SRS)

a report of child sexual abuse allegedly perpetrated by him. The issue is whether the report was "substantiated" within the meaning of the pertinent statutes.

FINDINGS OF FACT

The Department's evidence in this matter consisted of the testimony of four witnesses: the petitioner's therapist, the SRS investigator, the petitioner himself, and R, the alleged victim. The hearing officer will consider that testimony in the order in which it was presented at the hearing.

The petitioner's therapist testified that the petitioner has been her client since July, 1991, when he came to her to address "issues" surrounding his sexual arousal by and attraction to his stepdaughter, R (the alleged victim), who was then eleven or twelve years old. The petitioner is married to R's mother. At the time, R and her younger sister were splitting their time pursuant to a joint custody arrangement between the home of their father and his female companion and that of their mother and the petitioner.

The petitioner's therapy centered around his establishing "behavioral guidelines" when he was around R. He and the therapist arrived at a "contract" of unacceptable risks and behaviors that would govern the petitioner in his contact with R. Among the activities and types of contact the petitioner was to avoid with R were R sitting on his lap, not being alone with R when she went to bed, not going swimming alone with R, not wrestling with or tickling R, and not being in R's bedroom after she was asleep. The elements of the contract were suggested by the petitioner after he admitted to his therapist that he had experienced physical arousal around R and had had sexual fantasies about her.

In October, 1992, the petitioner admitted to his therapist that he had become physically aroused while

wrestling with R, but had continued with this activity for another ten minutes after becoming aroused. The therapist agonized over and sought the advice of colleagues whether she should report this incident to SRS. She concluded that while R was not in danger and the incident probably did not amount to one legally requiring her to report, because of the "sexual atmosphere" surrounding the petitioner's relationship with R, it would be "beneficial" to the petitioner's family, including R, if the petitioner's problem was confronted and investigated.

The therapist initially reported the incident to the petitioner's wife (R's mother), and told her that if she did not report it to SRS she, the therapist, would. Apparently with some reluctance, R's mother then contacted SRS. SRS proceeded to investigate the incident, but at that time concluded that it could not be "substantiated" as one of sexual abuse or exploitation.

Despite his initial anger with the therapist for reporting the incident the petitioner continued seeing the therapist on a regular basis. In March, 1994, the therapist learned that R had related an incident (discussed below) of alleged inappropriate sexual contact with her by the petitioner that had occurred while she, the petitioner, and other family members were vacationing in Mexico. After discussing this incident with the petitioner the therapist concluded that it did not involve any sexual arousal on the part of the petitioner and that it did not constitute sexual abuse or exploitation of R. The therapist testified that concerning this latest incident she believes the petitioner's denials (see *infra*) that he neither intended nor engaged in any inappropriate sexual activity with R. There is no indication, however, that the therapist has ever discussed the latest incident with R, herself.

The SRS investigator testified that he learned of the latest incident after it was reported to SRS by R's high school guidance counselor. On April 8, 1994, the investigator, along with the guidance counselor and a police officer assigned to the county child abuse investigation "unit", interviewed R in the guidance counselor's office. R was hesitant to discuss the incident but wrote the following statement:

Cozumel Island

La Ceiba

Room 516

I was sick, (intestinal [illegible]) [petitioner] massaged my belly as I fell asleep. He has never done that before. I fell asleep, then woke up (I couldn't say exactly how long). When I woke up [petitioner] had moved his hands (on top of my shirt) onto my chest. Not in a lingering motion but touching me. He left after about ten minutes. I told nobody, only distancing myself from him the rest of the trip. When I got back I talked to [friend].

No repeat instances since or before.

R told the investigators that the incident had made her feel very uncomfortable around the petitioner and that she had avoided the petitioner since that time.

The investigator then interviewed R's father and sister, the petitioner, and the petitioner's therapist. The petitioner admitted to the investigator that he had rubbed R's stomach in the hotel room, but stated that he was not aware he had touched R's breasts. When confronted with R's statement the petitioner denied that anything sexual had occurred, but he did not deny that he may have inadvertently touched R's

breasts while he was rubbing her stomach.

The petitioner's therapist told the investigator that based on her discussions with the petitioner she didn't think anything sexual had occurred, and that she didn't think the petitioner posed any danger to R. She did say, however, that she was concerned about the incident in that the petitioner had apparently "changed the contract" regarding his contacts with R.

Based on its investigation SRS concluded that the incident was "substantiated" as one of child sexual abuse.<sup>(1)</sup> At the hearing the petitioner testified that the incident occurred while he and his wife (R's mother) were vacationing in Mexico with R and her sister and other members of his wife's extended family. He stated that R, R's sister, and a younger cousin were sharing a room at the hotel separate from the rooms where the adults were sleeping. Each girl had her own bed. The petitioner and R's aunt were in the room talking with the girls before they went to bed. R was sick with stomach cramps and was complaining of her discomfort. The petitioner stated he sat on R's bed and began rubbing her stomach over her nightshirt and the bedcovers. He stated that the other adult left the room after a few minutes and that he continued rubbing R's stomach for a few minutes and then left the room. He stated that during this time R said nothing to him and did not ask him to stop.

The petitioner stated that he does not think R is lying about the allegations, but he insists that any touching of R's breasts during this incident was unnoticed and inadvertent on his part, and that there was nothing sexual on his part about the incident.

R, who is now 15 years old, also testified at the hearing. She admitted that although she was "confused" about her relationship with the petitioner after the 1992 investigation, she had become "really conscious" of any physical contact with the petitioner.

As to the incident in question R stated that she was complaining of stomach cramps and that the petitioner sat on her bed and began rubbing her stomach. She stated that after a few minutes the petitioner's hand "moved upward" and "brushed" over her breasts several times. She stated that she is now not sure whether the petitioner was intentionally trying to "fondle" her, but that she specifically recalls that his hands "brushed" fully over her breasts rather than the side of his hand inadvertently coming in contact with the side of her breasts. She stated that she was extremely upset by the incident and that she tried to avoid any contact with the petitioner during the rest of the trip.

When they returned from the trip, R avoided going to the petitioner's house, although that was then her primary residence, and stayed with her father. She first confided the incident with the friend identified in the above written statement, who told their guidance counselor, thus triggering the investigation. For several months after the investigation whenever R visited her mother the petitioner would move out of the house. R has lately resumed some limited contact with the petitioner, but she testified that she is still "very nervous" around him.

R stated that she is still "very confused" about the incident, and is particularly upset with the rift it has caused between her parents. Apparently, R's mother has supported the petitioner, and this has severely strained the relationship of R's parents with each other. R feels that her father has "exaggerated" the significance of the incident and has been "spiteful" to the petitioner. Although R now states that the incident may have been an "accidental situation", she still does not think that the petitioner even rubbing her stomach was "appropriate" in the first place.

R struck the hearing officer as an extremely intelligent, candid, and articulate young woman. Although she remains horribly conflicted about the significance of the incident and her relationship with the petitioner, she was direct, consistent, and unequivocal in describing the details of the incident itself. Her testimony in this regard was highly credible.

The petitioner, on the other hand, struck the hearing officer as ingratiating and disingenuous. While he is probably to be commended for at least recognizing his attraction to R and attempting to control it, the evidence regarding the incident in question is clear to the hearing officer that he took advantage of R in the hotel room in Mexico to gratify his own sexual desires. Given the detail and consistency of R's testimony and the hypersensitivity that surrounded the petitioner's relationship with R, the petitioner's claims that he was not aware of touching R's breasts and that, if he did, no sexual connotations were attached to it are beyond any reasonable credibility.

The hearing officer has considered, but ultimately discounted, the opinion of the petitioner's therapist that nothing sexual transpired during this incident. The therapist's opinion, though apparently sincere, is based solely on her discussions with the petitioner, and appears to be colored by her understandable desires to be supportive to the petitioner and to preserve her therapeutic relationship with him (which is probably in everyone's best interest); but it flies in the face of R's description of the incident and inexplicably begs the troubling question of what the petitioner was doing placing himself in such an intimate position with R (i.e., sitting on R's bed and rubbing her stomach--in clear violation of his "contract" with his therapist) in the first place.

#### ORDER

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

#### 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. 12,761, 12,499, 11,660, 11,322, and 10,136.

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

"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 this case, the petitioner, who has a history of admitted sexual arousal and fantasy regarding R, is found to have, with the intent of sexual gratification, "brushed" his hand over R's breasts several times while in the process of rubbing R's stomach. It must, therefore, be concluded that the petitioner molested and exploited R within the meaning of the above statute. Inasmuch as the report in question is "substantiated", the petitioner's request for an order of expungement of this record from the SRS registry is denied.

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1. SRS maintains that no criminal charges were filed against the petitioner because the incident occurred on foreign soil.