

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 17,588
)
Appeal of)

INTRODUCTION

The petitioner seeks an expungement of a finding by the Department of Social and Rehabilitation Services (SRS) that she abused three children by exposing them to a risk of harm. The issue is whether the petitioner's acts or omissions fall within the meaning of the term "accidental."

FINDINGS OF FACT

1. In July 2001, the petitioner was the director of child care services for a corporation that operates a ski area. She had been the director for eleven years. Four separate children's programs existed within the center, including an employee day care and a pre-school center. Each of those divisions has its own supervisors who are responsible for the day to day operations of their programs.

2. During the ski season, the petitioner does strictly administrative and supervisory work. In the off-season, which includes the summer, staff positions are reorganized and the petitioner also works as a direct caregiver in the employee

day care center. When she assumes that position, she works under the supervisor of the employee day care program and does not attempt to run her program. The petitioner was working as a primary caregiver in the summer of 2001 in the employee day care division.

3. The supervisors of both programs that operate during the summer, as well as the petitioner's other employees, think very highly of her. She is regarded as a person who is genuinely concerned with the welfare of children in her care and a person who exhibits and expects respect for children in the center's care. There was no evidence presented that the petitioner has ever been cited by SRS for failing to care for children entrusted to her.

4. In July of 2001, the supervisor of the employee day care, Maureen, organized a field trip to a science museum. Maureen had been a child care professional for some six to seven years and is currently an elementary school counselor. Children from the pre-school were invited to sign up for the museum trip as well. The response was great. More children signed up for this field trip than any previously taken by the center. In all, thirty-two children aged from eight years down to seventeen months along with nine caretakers were scheduled for the trip. Several of the children were the

children of the caregivers. The petitioner helped Maureen to assign the children to vans and to obtain permission and medical slips for them. In all, two large corporate vans and three private cars were employed to transport the children. Maureen assigned the petitioner the duty of driving one of the large corporate vans to the museum. All of the employees who testified at the hearing clearly understood that Maureen was in charge of the field trip.

5. The center did not have any written procedures with regard to taking field trips in the summer of 2001. The center had informal procedures that had been used for years. The informal procedure for unloading the vans was that one adult in the van would unload the children while the other one would supervise the unloaded children. Head counts were done of the children as necessary depending on the situation. Children were assigned to specific adults, no more than four to a single adult when they arrived at the destination. The children were assigned so that no one single adult had too many toddlers to supervise. The center had never had a problem with supervision of the children on the many field trips taken over the years. However, some of the drivers indicated after this incident that they were unaware of these

procedures and had made up their own procedures for insuring that the children were safely unloaded.

6. The day of the trip was July 18, 2001, a sunny summer day. The petitioner had a list of the thirteen children who were to ride in her van. She did not load the children into the van. Maureen and her husband and Nancy, another caretaker who was to ride along in the van, loaded the children. In the end, only eleven children were loaded into the van due to a broken seat belt and some last minute changes. The van list was not changed before the trip to reflect the two children who did not ride with the petitioner. The van has five rows of seats. The children were dispersed among the four back rows with the two adults in front.

7. On the way to the museum, Nancy agreed that she would unload the children and the petitioner would watch them after unloading. Nancy was also counting money during the drive as Maureen had designated her to handle purchasing the tickets for the group.

8. The caravan of cars and vans arrived at the museum about 11:10 in the morning. The petitioner pulled her van in to the curb of the parking area with the back opening on to the parking lot roadway. As agreed, Nancy began to pull the children out of the passenger side door of the van that opened

onto the middle seats. She took five children out of rows two and three and sent them around the back of the van to where the petitioner stood. Before she could unload the rest, one or more adults approached her with money for the trip. At that time she stopped unloading the children and started to deal with the money.

9. The petitioner realized at some point that Nancy had interrupted her unloading to take money from the adults. In order to facilitate the unloading, the petitioner opened the back doors of the van and took the three children out of the last (fifth) row. She was able to do this and still watch the five children then at the back of the van. She could not see how many children were still in the other rows of the van. She did make eye contact with Nancy during this event. However, the two did not communicate about this change in the unloading plan.

10. After the petitioner unloaded the back seat, she closed the back doors of the van. By that time, several other children were converging with her original group of five children behind the van and she focussed her attention on their safety since they were near the roadway. The petitioner did not go around to the side of the van to unload the rest of

the children thinking that Nancy would resume that task when she finished with the money.

11. After some minutes, the petitioner heard Nancy call from the front of the van asking if the group was ready to go into the museum. The petitioner replied from the back of the van amid a crowd of children that they were all just waiting for her. The petitioner had not seen Nancy unload the rest of the children from the side of the van but assumed that she had resumed that task when she had finished with the money. Nancy assumed that the petitioner's remark meant that she had removed the rest of the children from the van already.

12. Although Nancy walked by the side tinted windows of the van she did not look inside to see if the children were actually gone nor did she confirm with the petitioner that she had taken the children out. Nancy recalls that she did shut the side passenger door for the first row but does not recall closing the side door opening into the middle three rows. Her memory is that it was closed when she walked by. The petitioner did not close the side door because she was at the back of the van the whole time. The van doors were left unlocked and the two windows in the front row were left slightly open.

13. It had taken about fifteen or twenty minutes to unload all of the children from the five vehicles. The witnesses described the number of children standing behind the vans as large and the scene as chaotic. The children behind the van required close supervision because they were close to the roadway. When Nancy joined them, all of the children and caretakers walked together to the museum. By that time, the outside temperature was about 73 or 74 degrees.

14. The children and adults entered the museum about 11:30 a.m. When they were all inside, Maureen, the supervisor, gathered the children together, allowed them to use the bathroom and then assigned them to groups with specific adults supervisors. She did not have a master list of the children and did the sorting by sight. She surveyed the children and thought they were all there but she was "too busy" that day to do an actual head count before the sorting. She added that she usually does continuous head counts to make sure children are all accounted for during trips. The smaller groups were assigned by mixing ages to avoid too many small children with one caregiver. The groups were not divided in relation to the groupings that had occurred in the vans. The bathroom trips and sorting took about fifteen to twenty

minutes. There was no evidence offered that the petitioner was aware that Maureen had not accounted for the children.

15. Following the sorting process, the groups of children and supervising adults scattered throughout the museum. The petitioner went upstairs with her group. Nancy, who was in a different group, went upstairs as well with her partner, another caretaker named Sharon.

16. After about ten or fifteen minutes, Sharon turned to Nancy and said she had a "sense" that all of the children they left the center with were not in the museum.¹ She said she was going to look around and asked Nancy to watch the children while she did so. As she was going down the stairs, she heard a page over the public address system asking for the owner of a van with the center's license plate number to come to the front desk because children had been found in the van. Sharon ran to the parking lot.

17. The petitioner also heard the page and instructed Nancy, who was with her group nearby, to run to the parking lot while she watched all of the children. Nancy did so and arrived a minute after Sharon.

¹ One of the witnesses who testified recalled that Sharon had said this when the group entered the museum and that the remark was ignored by the petitioner. This testimony was vague and inconsistent with the testimony

18. By that time, three children, aged seventeen, twenty-one and twenty-two months had been removed from their carseats in the van. The children had been discovered by a bus driver who had just brought another group of children to the museum a few minutes after the petitioner's group arrived. He was parked in the back near the van and was sitting in a picnic area eating his lunch when he noticed some movement in one of the vans. He went over to check and discovered the movement was the waving arm of a child. He looked in the van and saw three children in carseats, one in the third row of the van and two in the fourth row. He called to the counselor in charge of his own field trip, who was also eating lunch nearby, to look in the van. The counselor told him to take the children out of the van while she ran to the office to report the situation. She asked the desk clerk at the museum to page the owner of the vehicle and to call the police. The bus driver did remove the children from the van. He guessed that the temperature inside the van was close to 100 degrees. The outside temperature at that time was about 75 degrees.

19. In a few moments, Sharon, the first adult from the day care who had left the building to check on the children,

of all other witnesses, including the witness who made the remark. As such, that statement is rejected as not credible.

was in the parking lot and saw that the children had been taken out of the van. The children were sweaty and two were crying but they were unharmed. Nancy came out shortly thereafter and attempted to minister to the children who had been placed in the shade and given water. By this time, the museum director had arrived in the parking lot and asked to speak to the program's director. Sharon went into the museum to get the petitioner. At that point Maureen had gathered all the children from the center into one place so they could deal with the emergency.

20. The petitioner went out to the parking lot to talk with the manager and the police who arrived a few minutes later. The petitioner was described by everyone who saw her as "devastated" by this incident. The police determined that the children were safe and left the scene. No one was criminally charged in this event. The children appear to have been alone in the van for about 35 minutes.

21. All of the children were shortly taken back to the child care center. The petitioner herself immediately reported the event to SRS and to all of the parents of the children. She wrote to SRS the next day saying that the event had been a "great mistake" from which "we have all learned"

and advised SRS that new policies on field trips were being put in place to avoid this ever happening again.

22. The written policy which the petitioner later provided to SRS stated that in the future older and younger children would be taken on separate trips; master lists would be drawn up of all children on the trip with a sublist of children in each vehicle; one person would unload and load each child; one person would also check the vehicle and do a head count; headcounts would continue every fifteen minutes; and, each adult would be assigned to a specific child.

23. All the witnesses described this event as a terrible mistake and one which was never intended by the petitioner or anyone else from the center. The petitioner and the supervisors acknowledged that the children were placed in a very dangerous situation by this mistake. They have never had any problem like this on a prior field trip but have all become more aware of the dangers since this event.

24. No abuse investigations were conducted with regard to either Nancy or Maureen in this matter. Both of those persons were called as witnesses at the hearing.

25. SRS determined that the petitioner was responsible for leaving the children in the van because she took the children on a field trip without adequate mechanisms in place

to insure their supervision. It was found that the petitioner committed a single egregious act that placed children at a significant risk of harm and thus warranted placement of her name in the abuse registry in order to protect children in the future.

26. SRS presented evidence that its regulations had been changed some five months before this event (February 2001) to require written procedures for field trips. The regulations also contain prohibitions against leaving children in cars and require that children be assigned to primary caregivers.² SRS had been having some discussions with the child care facility about the use of primary caregivers prior to this matter. However, no evidence was presented that the petitioner was informed during these discussions or otherwise of this new regulation regarding written field trip policies or that SRS had personally indicated to her at any time during its discussions that her field trip policies were inadequate or needed to be in writing for the safety of the children.

² The concept of primary caregiver is that a particular staff person is assigned to each child for the purpose of monitoring and facilitating their emotional, physical and social growth and for purposes of communicating with the child's parent. SRS Children's Daycare Licensing Regulations, 1996, "Definitions."

27. The petitioner is no longer employed as the director of the day care center and has not been able to work in the day care field since this finding was made.

28. Based on all of the evidence above it is concluded that the petitioner's actions and omissions which contributed to the risk of harm in this matter were neither intentional nor reckless, but rather fall within the meaning of the term "accidental".

ORDER

The request of the petitioner to expunge the abuse finding against her is granted.

REASONS

The Vermont legislature has adopted laws to "protect children whose health and welfare may be adversely affected through abuse and neglect" by any "person responsible for a child's welfare" while "in a residential, education or day care setting, including any staff person." 33 V.S.A. §§ 4911 and 4912(5). To this end, the legislature requires SRS to investigate reports of child abuse or neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or

neglect. 33 V.S.A. § 4913 and 4916. A report is substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

Any person placed in the registry "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." 33 V.S.A. § 4916(h). Under this statutory provision, "the burden shall be on the commissioner to establish that the record shall not be expunged." Id.

SRS attempts to meet its burden in this case by maintaining that the above facts constitute abuse in that a reasonable person would conclude that children were threatened with physical harm by the acts or omissions of a person responsible for their care. The statutory sections relied on provide as follows:

(2) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare . . .

(4) "Threatened harm" means a substantial risk of physical or mental injury to such child by other than

accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or mental health or protracted loss or impairment of the function of any bodily organ.

33 V.S.A. § 4912 (Emphasis supplied)

The petitioner agrees that the three children in this case were subjected to a substantial risk of harm that could have resulted in death or serious injury when they were left unsupervised in the van for thirty-five minutes. She fully acknowledges that this situation could have been fatal for these three children. However, the petitioner says that the children do not need further protection because the threatened harm occurred through "accidental means" and that such harm from the same source is highly unlikely to occur again.

SRS does not dispute that the petitioner had no intention of leaving the three children in the van. However, it does not agree that the threatened harm occurred through "accidental means". In its memorandum, SRS exhaustively discusses definitions of "accidental" used in the criminal, tort and insurance fields. However, none of those definitions seems adequate to describing an "accident" in the realm of the child protection area. Justice Benjamin Cardozo of the United States Supreme Court, as SRS pointed out, has said that "an accident is what the public calls an accident." Quoted in

Wickman v. Northwestern National Insurance Company, 908 F.2d 1077 (1990) This statement seems closest to the truth of the matter and means that each case must be assessed by reasonable people on its own facts. The adoption of a general definition of "accidental" would likely be neither possible nor desirable, as the Vermont legislature undoubtedly realized when it failed to define this term in the child protection statute--a statute which is otherwise replete with definitions. See 33 V.S.A. § 4912.

Turning then to the facts of this case, SRS first argues that the children were left in the van "by other than accidental means" because the petitioner intentionally took the children on a field trip without any mechanisms in place to insure their supervision. To be sure, the petitioner intentionally drove these children in the day care van to the field trip. However, there is no evidence that the petitioner had formed the intention that her transportation and supervision of these three children would not include mechanisms to insure their safety.

SRS argues alternatively that the children were left in the van by "other than accidental means" because the petitioner recklessly took them on a field trip without any mechanisms in place to insure their supervision. SRS argues

that there is a level of behavior between an intentional act and a pure unavoidable accident that can place children at risk of harm and from which children need to be protected. Relying on the holding in *G.S.*, 157 N.J. 161, 723 A.2d 612³ (1999), SRS asserts that the Vermont legislature, like the New Jersey legislature, meant by the term "by other than accidental means" to protect children not only from intentional acts and their harmful consequences but also from reckless acts and their harmful consequences.

There can be no doubt from the context and language in the statute cited above that the Vermont legislature was trying to protect children from persons who would expose them to harm. There is nothing in the statute which would restrict protecting children from harm caused by intentional actions only. "Intentional" is not the opposite of "accidental" but is, as SRS argues, a quality along a continuum. The legislature has eliminated only the "accidental" from its targeted behavior. It must be concluded, therefore, that,

³ In this case a child protection statute in New Jersey with a similar exemption for injuries caused "other than by accidental means" was held to include conduct that was not intentional but was so reckless as to cause injury. In that case a respite caregiver confused about the dosage of medication to give a sick child gave the child a huge overdose of the medication instead of calling the mother for clarification of the amount to be given. The Court concluded that the caregiver who regularly dispensed medication was well aware that harm could occur if the wrong

"reckless" behavior, which is neither intentional nor accidental, is behavior also targeted by the statute.

The New Jersey Supreme Court, relying on a statutory definition in its abuse statute, described a person who engages in reckless behavior as one who fails to "exercise a minimum degree of care when he or she is aware of a danger inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." Id. at 169. Thus, a person who sees a child run into a busy street but does not intervene, a person who gives a dose of medication to a child without first determining the correct amount, or a person who allows a small child to use a hot iron is engaged in reckless behavior.

While SRS encourages the adoption of a standard similar to that used by New Jersey, it has stated that it would not include persons in this definition who created a risk of harm through momentary inattention. The petitioner does not disagree with this definition of reckless behavior but also argues that other kinds of culpable behavior should not be considered reckless. She points out that the Vermont Supreme Court has defined "gross negligence", which is another way of

dose was given but went ahead and administered the medication without verifying the proper dose.

saying reckless behavior (See generally the discussion of these terms in *G.S.*, *id.*), in a similar way as the New Jersey court but has pointed out several more exceptions. *Rivard V. Roy* 124 Vt. 32 (1963). While the Vermont court similarly defines "gross negligence" or reckless behavior as the failure to exercise even a slight degree of care and an indifference to the duty owed to another, it adds that "an error of judgement, momentary inattention and loss of presence of mind" do not fall into the former category. *Id* at 35. Given this description of reckless behavior by our own Supreme Court, it makes sense to refer to it when determining whether abuse or neglect was "by other than accidental means". The test then, must be whether the act (a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgement, momentary inattention or loss of presence of mind.

In order to apply this test to the present case, it is necessary to look closely at what the petitioner's actions were during the days leading up to and on the day when the risk of harm was created. The evidence shows that the petitioner prepared a list of children who were riding in her van (although two children on the list did not ultimately ride in that van) and formulated a plan to unload and supervise the

children from her van after they were unloaded. The petitioner was not in charge of unloading the children from the van, but assisted in that activity to the extent she was able before her duties to supervise the unloaded children from her van, as well as several other children, took her attention away. She had no reason to believe that the person in charge of unloading the van had not completed her duties. She escorted what she believed were all of the children she had brought in the van plus several others to the museum. When she was inside she relied on the person who was in charge of the trip, an experienced child care supervisor, to account for and sort the children. She had no reason to believe that that person had not accounted for the group of children before she divided them into smaller groups. The petitioner remained with the children to whom she was assigned until she was called outside by the manager and police. At that time she left the children she was supervising in the specific care of other adults. When she returned home she called each parent of a child on the field trip to inform them of what had occurred and called SRS herself to report the incident.

While it was true that the petitioner had no written procedures for field trips, the informal procedures used had always worked in the past and the petitioner had no reason to

believe that they would not work on this trip. There is no evidence that the petitioner was aware of new regulations promulgated by the Department requiring written field trip procedures or their importance to the children's safety.

These facts do not meet the test set forth above. The petitioner was clearly making an attempt to care for the children in her van and the other children who were on the field trip that day. She was far from indifferent to her duty to the children. While she may not have perfectly performed her duties, the mistakes she made were not based on a lack of due care for her charges. While in hindsight she could surely have had a more effective plan for safeguarding the children, she at least had some plan meant to address the safety of the children. Similarly while she could have exercised more caution by making sure that her employees were actually doing their jobs, there was no evidence that she needed to doubt that they would take reasonable steps to protect the children. The petitioner's mistakes sprang not from a lack of care but rather from a lack of presence of mind caused by her need to supervise children at the rear of the car. Her distraction at that moment was probably compounded by bad judgement in not talking over the unloading with her partner before they went in the museum. However, it cannot be said that the petitioner

at any point realized there was a potential danger to these children and chose not to take any action to prevent it. The petitioner's behavior was either simple inattention, poor judgment or a loss of presence of mind, not a reckless act. Since the petitioner neither intended that the children should be unsupervised nor acted recklessly with regard to their supervision, it must be concluded that her actions fall into the category of "accidental."

SRS has internal criteria it uses in deciding when to substantiate a risk of harm. The pertinent parts prescribe as follows:

1. If the investigation was of a single, egregious act or omission of the parent or caretaker, the report should be substantiated if a reasonable person would believe that all four of the following criteria are met:
 - The parent or caretaker did the act alleged;
 - The act was egregious;
 - There was a significant risk that the child could have been physically injured as a result; and
 - The physical injury would be serious

2. If the investigation was of risk of harm caused by other circumstances, the investigation should result in substantiation when a reasonable person would believe that all four of the following criteria are met:
 - The child was without supervision appropriate for his or her age or circumstances;
 - There is a significant risk that the child could have been physical injured as a result;

- The physical injury would be serious; and
- The caretaker has not taken effective steps to reduce or eliminate that risk.

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SRS used criteria number one above to find that the petitioner had abused the three children. The facts do not support the use of that criteria because the petitioner did not commit an egregious act which led to the risk of harm. As was pointed out above, the petitioner did have some mechanisms to insure the safety of the children that day which failed when they were not properly carried out. The petitioner failed to notice that the children were not out of the van because she was absorbed in watching other children. While the situation in which the children were placed was surely egregious the petitioner committed no act which contributed to this situation which could fairly be described as egregious itself.⁴ Therefore, the criteria in number one should not have been used in this case.

SRS' second set of criteria above more accurately describes this case. Three children were without supervision appropriate for their age or circumstance for a half an hour

⁴ As the parties point out, egregious is defined as "conspicuously bad".

or so. They were exposed to a significant risk of serious injury. But a finding can only be made under this criteria if the caretaker has not taken effective steps to reduce or eliminate the risk. In this case, the petitioner drew up a written plan to be followed on all field trips the next day. SRS has not indicated that it considers this plan to be ineffective in any way. Therefore, the abuse should not have been substantiated under its own policies.

The final and most important consideration in this matter is whether it is necessary to place this incident in the registry in order to protect these and other children from similar harm in the future at the hands of the petitioner. The answer to this is no. The legislature created the registry, as pointed out above, to protect the health and welfare of children. There is nothing in the facts of this case which indicate that the petitioner is likely to make an error like this in the future. She was a caretaker with eleven years' experience as a program director. She was (and still is) respected by those with whom she worked as a person who provided good care to children. She has absolutely no record of ever abusing children in the past. While the danger to which these children was exposed was serious, the petitioner was not the reckless cause of it. It is safe to

say after the trauma the petitioner has suffered and the lessons she learned that day that she will take extraordinary steps to prevent such an incident from ever occurring again. There is no reason to place her name in the registry.

It is important to point out that the three small children were not left in the van solely because of the petitioner's actions. Nancy, the caretaker who was supposed to unload the van, stopped her task because she believed the petitioner had taken all the children out of the van although she neither observed nor was told that this occurred. Although she walked by the windows of the van to the parking lot she did not look inside to insure that they were out. Maureen, the organizer and supervisor of the trip, knew she was supposed to account for every child once inside the museum but had no master list and did not head count. Had either of these persons actually performed their duties, it is likely that these three children would not have been placed in such danger. However, neither of these persons was placed in the registry.

It appears that SRS took this action against the petitioner because it felt that this chain of failures was her fault as the overall director of the center. While SRS may have evidence that these failures occurred because of a lack

of adequate procedures and staff training⁵, such systemic failures are more appropriately addressed through sanctions or revocation of the facility's license than through this process. SRS can protect all of these children against the risk of harm from a poorly run day care center by enforcing its regulatory provisions. As SRS has failed to show that it had accurate information which would lead a reasonable person to believe that the petitioner herself had abused these three children, the petitioner's request to expunge the record should be granted.

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⁵ Had SRS shown that the petitioner knew or should have known that a lack of written procedures for field trips was creating a risk for her children, this matter might have turned out differently. It was true that SRS presented evidence that the regulations had been recently revised to require written policies. However, there was no evidence presented that the petitioner was provided with these regulations or that she was informed that children were at a risk of harm without written policies. In addition, there is no evidence that this event occurred because of a lack of written policies. The three persons involved in creating this situation were aware of the procedures they were to have followed. The first two, the petitioner and Nancy, did not follow the unloading procedures through a communication mistake. Maureen acknowledged that she was aware she should have accounted for the children but failed to do so. The fact that some drivers were not aware of the procedures would have been relevant if those drivers had not employed sufficient other methods and had put their children at a risk of danger as well. However, that did not happen in this case. It would be more fair to say that this problem was related to what turned out to be ineffective procedures and staff failures to follow through with them than to the fact that they were not written. There is no evidence that the petitioner believed that the procedures she and her two staff members were using were ineffective since the procedures had worked up to that time.