STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. J-01/17-21
	)	
Appeal of	)	
	)	

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families substantiating a report that he placed certain teenage girls at risk of harm from sexual abuse by coaching their high school basketball team. The issue is whether the Department's decision is supported by a preponderance of evidence.

PROCEDURAL HISTORY

In 1994, when the petitioner (now 38) was fifteen years old, the Department substantiated a report that he had sexually abused a five-year-old girl in his mother's daycare. At that time, he was judged to be a juvenile offender and was placed in a then-existing juvenile sex offender treatment program ("Resolutions"). Treatment records from that program show that the petitioner participated in that program from March 1995 until he turned eighteen in March 1997, a period of two years.

In early 2013, the Department received a report that the petitioner was coaching the girls' basketball team at his local high school. Shortly thereafter, the Department substantiated this report as placing those team members at risk of harm from sexual abuse.

The petitioner timely requested a review of this decision, and also requested expungement of the 1994 report of sexual abuse. The parties subsequently agreed that the petitioner's appeal would be limited at this time to the 2013 substantiation for risk of harm, and that any decision (and potential appeal) regarding expungement of the 1994 substantiation would be deferred pending the outcome of the instant appeal. The petitioner has indicated that he is *not* appealing the 1994 *substantiation* of sexual abuse.

Following its further review of the matter (see *infra*), the Department, in a decision dated January 5, 2017, affirmed its decision substantiating the 2013 report as placing those team members at risk of harm from sexual abuse. The petitioner's appeal of this decision to the Board was filed on January 11, 2017.

Following several telephone status conferences and rulings on preliminary motions (including a denial of a Motion for Summary Judgment filed by the petitioner), a

hearing in the matter was held on December 15, 2017. The following findings of fact are based on the testimony taken and the documents submitted at that hearing.

FINDINGS OF FACT

1. As noted above, the petitioner is now thirty-eight. He is married and has two children, ages three and five. As also noted above, in 1994 the Department substantiated the petitioner, then fifteen, for sexually abusing a five-year-old girl (by digital penetration of her vagina) while she was in his mother's daycare.

2. The Department does not dispute that upon turning eighteen and being discharged from the juvenile justice system (in 1997), the petitioner was not aware that he remained on the Department's child abuse registry as a sexual offender.

3. In 2010, the petitioner (then 30) was approached by a family member with children in the local high school to be the assistant coach of their girls' basketball team. The petitioner accepted, and continued to coach at the school for at least two-and-a-half years. In February 2013, a person aware of the petitioner's prior history, notified the school and the Department of the situation. There is no dispute

that the school (unlawfully) failed to check the Department's registry either before the petitioner was hired or at any time during his tenure

4. There is also no dispute that in the nearly twenty years that had elapsed since the 1994 substantiation the petitioner had no record of any reported child (or adult) abuse and had not had any other contact with either the Department or the criminal justice system. Since his graduation from high school in 1997 he has continued to live in the local community and has been continuously employed in his father's business. He serves as a volunteer fire fighter and, from all appearances, is a respected member of the community. He has never had any drug, alcohol, or significant mental health issues.

5. There is also no dispute that in the nearly three years that he coached girls' basketball at the local high school there were no complaints or accusations whatsoever about his conduct or demeanor.

6. Following the 2013 substantiation by the Department regarding his coaching activities, the petitioner initiated and voluntarily underwent an Adult Sexual Behavior Risk Assessment by a forensic Ph.D. psychologist. The Department

does not dispute the professional expertise and credentials of this examiner.

8. Following a description and explanation of his extensive interviewing and testing of the petitioner, the examiner concluded (in a report dated February 17, 2015, with original emphasis) that the petitioner "should be considered a low to minimal risk of engaging in aberrant sexual acts with his target population (prepubescent females) . . . (and) should be considered at minimal to no risk of engaging in aberrant sexual acts with female adolescents."

9. Following the above assessment, in its review decision dated January 5, 2017, the Department upheld the 2013 report of the petitioner's coaching activities as constituting a substantial risk of harm from sexual abuse to the members of the basketball team he was coaching.

10. The Department's 2017 review decision and its evidence offered at the hearing were based primarily, if not exclusively, on the opinions of a "consulting" M. A. psychologist regarding the petitioner's risk of offense against teenage girls. There is no dispute that this psychologist (like the one who evaluated the petitioner, see *supra*) is also a recognized expert in the field of child sexual abuse.

11. The Department's consulting psychologist testified at the hearing that his opinions in the matter were based exclusively on information provided to him in a phone call he had received from the Department's investigator. The psychologist (and the investigator) testified that the investigator had informed the consultant of portions of treatment notes from the petitioner's participation in the Resolutions Program from March 1993 through April 1995, which were in the Department's records.

12. By stipulation of the parties, those treatment notes were admitted into evidence (Dept.'s Ex. 2) for the sole purpose of establishing the record basis of the Department's decision in the matter, but not for the validity of any medical conclusions contained therein. (The Department admits that the authors of those notes were not available.) The Department's consultant admitted at the hearing that he had not seen or reviewed the actual notes, but had relied exclusively on the description of some of those notes provided to him on the telephone by the Department's investigator.

13. The notes in question contain references to purported "admissions" by the petitioner when he was in juvenile offender treatment that he had performed digital

penetration on a second girl in his mother's daycare and that he had on occasion rubbed his body against two or four other children, boys and girls. The notes also refer to "fantasies" allegedly reported by the petitioner of forcible sex with a female age peer he had watched playing basketball while he was a member of the boys' team.

14. The Department's expert thought it highly significant that the petitioner had recently reported to his evaluator that there had only been one child involved and one occasion of digital penetration, and that the petitioner's evaluator had relied exclusively on the petitioner's self-reporting of the incident to him. The Department's expert testified that the petitioner's recent "minimization" of the number of his offenses at age fifteen, coupled with an "expansion" of his sexual "fantasies" at that time to have included a female age peer who played basketball, demonstrates that by coaching a girls' basketball team, even twenty years later in his thirties, the petitioner placed those players at risk of sexual abuse.

15. The Department's consultant acknowledged, but essentially discounted, the facts that the petitioner had never (in the twenty years following the report of his alleged fantasy) *sought* to coach girls basketball, but had

done so only when asked by a family member to fill a vacancy at the school, and that he had coached the girls' teams without any complaint, incident, or questionable behavior for at least two-and-a-half years before his offense as a teenager came to light.

16. Other than the "coincidence" of having allegedly reported while he was in treatment that he had "fantasized" about a teenage female basketball player at a time when he was a high school age peer (and watching her pursuant to him being a member of the boys' team at the same school) and ending up coaching a girls' basketball team twenty years later, there is no compelling evidence to support the Department's conclusion that the petitioner was "grooming" members of his team for sexual abuse.

17. At the hearing, the opinions of the Department's consultant were further undermined by the credible and essentially-uncontroverted testimony of the psychologist who had evaluated the petitioner in 2015. By the time of the hearing, the petitioner's witness had familiarized himself with the notes of the petitioner's 1995-1997 treatment. The psychologist's comments and opinions regarding those notes, and the Department's reliance on them, were as follows:

a. The petitioner has never denied abusing the five-year-old girl. At the time, he self-disclosed his abuse of her to his parents, who promptly notified the Department and closed their day care.

b. The "Resolutions" group programs in effect for juvenile offenders in the 1990s are now known to have provided incentive for counselees to embellish and exaggerate their histories and fantasies in order to be seen as "cooperating" with (and thus shortening the mandatory time of) their treatment.

c. The counselors in the Resolutions program were mandatory reporters of child abuse. If those counselors had actually credited the petitioner's "admission" of having multiple victims, that information would have had to have been reported to the Department. There is no evidence in this case either that Resolutions ever made or that the Department ever received any such reports.

d. Upon turning eighteen, the petitioner was discharged from the juvenile justice system without conditions or recommendations that his behavior be monitored.

e. Then, as now, Vermont statutes and procedures allowed the Department or the state, when deemed appropriate (including public safety considerations), to petition the

Family Court to continue juvenile offender supervision and/or treatment beyond the offender's eighteenth birthday. There is no claim or record that any such action was ever taken or contemplated in the petitioner's case.

f. The Department's consultant never met with the petitioner, and is not in a professional position to render an informed opinion on the petitioner's credibility, then or now.

g. The petitioner's only "crime" was with a five-year-old girl, when he was fifteen. An allegedly-disclosed "fantasy" involving females *his own age* shortly thereafter does not support any conclusion that he still harbors fantasies for teenage girls twenty years later, much less that he would be (or ever was) at risk to act on them.

h. The petitioner's examining psychologist deemed the petitioner to have been forthcoming and credible.

18. The petitioner testified briefly in his own behalf at the hearing. He stated that he began coaching girls' basketball only after being asked by a family member to volunteer. He denied that he ever had posed a risk to any of his players. He struck the hearing officer as candid, sincere, and credible.

19. In addition to the above, it is assumed (and there is certainly no allegation or indication otherwise) that the Department conducted a thorough investigation in 1994 that would have included consideration of whether there had been more than one victim. Other than the Resolutions treatment notes (which, by stipulation, were not admitted to establish any medical opinion by their authors as to the reliability and truthfulness of the petitioner's statements at that time, see *supra*), there is no evidence that the petitioner ever sexually abused any child other than one five-year-old girl, on one occasion, when he was fifteen.

20. In light of the foregoing, it cannot be found that a preponderance of evidence supports the Department's decision that, twenty years later, the petitioner posed a risk of harm from sexual abuse to the high school players on the girls' basketball team he was coaching.

ORDER

The Department's decision is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations, unless the reported facts

are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916. The statute provides an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. At an administrative review, a report is considered substantiated if 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 (16). If the substantiation is upheld at the administrative review level, the individual can request a fair hearing pursuant to 33 V.S.A. § 4916b(a) and 3 V.S.A. §3091(a). The hearing is *de novo*, and the Department has the burden of proving by a preponderance of the evidence the facts underlying the substantiation.

The pertinent sections of 33 V.S.A. § 4912 define abuse and risk of harm as follows:

> (1) "Abused or neglected child" means a child whose physical health, psychological growth and development, or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.
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> (14) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical

> injury, neglect, emotional maltreatment, or sexual abuse.
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> (15) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child, including 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 it must be concluded that the above findings do not establish by a preponderance of evidence that the petitioner, twenty years removed from a single (albeit serious) incident of sexual abuse against a prepubescent girl when he was fifteen years old, posed a threat of sexual abuse to the high school girls on the basketball team he was coaching. Therefore, the Department's decision to substantiate the report that the petitioner placed those girls at risk of harm from sexual abuse must be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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