

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. Y-09/21-541
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Appeal of)
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INTRODUCTION

Petitioner appeals a denial of his request for expungement from the Child Protection Registry by decision of the Department for Children and Families ("Department"). The following is based on telephone status conferences on October 4, 2021, and January 3, 2022, and the filings of the parties. The primary issue is whether the Department abused its discretion in making its decision.

FINDINGS OF FACT

1. Petitioner is 21 years old and has been substantiated three (3) times for separate incidents of sexual abuse. The first substantiation occurred in 2010, when petitioner was substantiated for sexual abuse of two (2) other children living with him, ages six (6) and seven (7). The second substantiation occurred in 2011, when the Department determined that petitioner had sexually abused his 7-year-old stepbrother and 4-year-old stepsister. The third

substantiation occurred in 2016, when the Department determined that petitioner (then 16 years old) had sexually abused a 12-year-old boy who was attending the same residential treatment program as petitioner.

2. Petitioner filed for expungement in 2021. A Commissioner's Review of petitioner's request for expungement was held by telephone on April 21, 2021. The Department issued a decision dated August 19, 2021, denying expungement. The Department's decision included consideration of all the statutory factors required pursuant to 33 V.S.A. § 4916c (each factor is followed by the Department's response):

1. The nature of the substantiation that resulted in the person's name being placed on the Registry. You were substantiated three times over a six-year period for sexually abusing four victims. You sexually abused two of your siblings on multiple occasions over time. You used force, threat, and/or coercion to sexually abuse each of your victims. You did not offer specific details regarding your actions but admitted to sexually abusing all the children as alleged.
2. The number of substantiations. There are three substantiations.
3. The amount of time that has elapsed since the substantiation. You were substantiated in 2010, 2011 and 2016. It has been five years since the last substantiation.
4. The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur. You take full responsibility for your actions which resulted in your substantiations. You suffered a

very traumatic childhood which resulted in you acting out sexually on others back then.

5. Any activities that would reflect upon the person's changed behavior or circumstances, such as therapy, employment or education. You said you were adjudicated delinquent following both the 2011 and 2016 incidents. You spent much of your adolescence in therapy, and in and out of several residential treatment programs through NFI, Howard Center (Park Street), Washington County Mental Health (Skyline), Beckett Family Services, Jarrett House, Brattleboro Retreat (several times), and Hawk Lane, among others. During this time, you have worked hard on addressing your past trauma, and learning about what is right and wrong. You can now recognize where your mind goes and pay attention to your actions. You have come a long way and made a lot of changes to your personality and behaviors. You know your past behaviors were wrong and you will never reoffend. As an adult, you are calm and collected.

You aged out of Park Street and Hawk Lane programs on good terms. Since April 2021, you have been living with a shared-living provider (SLP) through the Howard Center. There are two young girls who live in your SLP, and you have had no issues with them. You are also able to go out by yourself, and are around children alone, such as going to the mall. You now have had unsupervised access to a cell phone and the internet for a month as well. You have been responsible for managing your medications without supervision for the past six months. You worked at Target for over two years before you left due to paycheck disputes. You want to have your name removed from the Registry because it is affecting your ability to apply for certain jobs you are interested in.

6. References that attest to the person's good moral character. During the review meeting your opportunity to provide additional documents in support of your petition was discussed. It was also discussed that the support persons who were present on the call submit written

documentation on your behalf. We reviewed the Document Submission Form, and you agreed to submit all letters and documentation for consideration by May 1, 2021. A copy of that agreement was mailed to you following the review meeting, as well as emailed to your program manager [name of petitioner's program manager].

On May 14, 2021, this office received over 400 pages via fax from [petitioner's program manager]. The documentation was reviewed and found to be missing the even-numbered pages of each of the reports and case notes contained within. Subsequently, the CRRU reached out to [petitioner's program manager] on several occasions to inform her of the incomplete submission. In that correspondence, the CRRU also asked [petitioner's program manager] to clarify which specific documents she wished to be considered in support of [petitioner's] petition to be postmarked no later than July 12, 2021. As of the date of this letter, the CRRU has received over 800 pages of treatment notes and evaluations from [petitioner's program manager]. The documents received have not been individually listed below for the sake of brevity; they can be found in their entirety in the CRRU file.¹

3. Petitioner's therapist, program manager, and Family Services Division worker also attended the review meeting and provided information to the reviewer. This information was summarized in the decision as follows:

- [Petitioner's therapist] stated you were referred to her for an evaluation/consultation around age 11; she has had contact [with] you through the years, and eventually as your therapist again in 2018-2019; you participated

¹ In this section, the Commissioner's Review decision goes on to describe six (6) documents submitted by petitioner in support of his request: two (2) letters from different staff at a mental health agency serving petitioner; petitioner's resume; a 2017 psychosexual assessment of petitioner; a 2017 psychological evaluation of petitioner; and what was described as the Howard Center's "Annual Update dated 5/24/2019" and "Personal Development Plan dated 6/10/2019."

in a variety of treatment programs most of your adolescence; she could not offer a formal assessment of your current risk; your last psychosexual was conducted in 2017; she did not access DCF records during your treatment with her, but had access to Howard Center records; she was not familiar with the specifics of the 2016 substantiation, but believes your last "hands-on offense" was when you were 11-12 years old; your current therapy with her focuses on navigating your past trauma, understanding how your sexual offending was related to your own victimization and deregulation, and preparing you for independence after living in residential treatment facilities for the past 10 years; you are working on how to navigate the world on your own; you are doing well in your SLP; while engaged in services and under supervision, you have not offended since 2016; you have made progress socializing and forming relationships; you utilize supports and are trying to get a job; since aging out of Park Street on a positive note, you have been responsible for your own medications and more recently, have unsupervised access to your cell phone and internet.

- [Petitioner's program manager] stated she knows you for about a month since you began living in the SLP; you receive supports through Howard Center to help you with skill-building and to prepare you for independent living, such as getting a cell phone, navigating transportation, and running errands in the community with a staff member several times a week; you are currently applying for jobs and will begin to participate in Project Hire at Howard Center; you can stay in the SLP for several years if needed, and the usual stay is 2-3 years, but transition can occur sooner; you have been in residential facilities for most of your life, so the main goal is to prepare you for the real world once you leave the SLP.
- [Petitioner's Family Services worker] stated he was involved with you on-and-off as a DCF worker when you were in State's custody from 2011-2017, due to assorted

delinquencies; he has kept in touch with your progress over the years; he is glad to hear you are in an SLP and is encouraged by your progress.

4. The Commissioner also considered the intake reports and investigatory summaries from petitioner's three (3) substantiations.

5. After consideration of all of the above information, the Review decision went on to conclude the following:

You claim your circumstances have significantly changed since you were a juvenile offender, as you accept full responsibility for your actions, and have participated in extensive treatment programs and therapy for years to address your mental health and sexually reactive behaviors. You remain actively engaged with several service providers, with supports in place to assist you with your current goal to live independently. You contend there have been no reports of concern made to the Department regarding inappropriate sexual conduct since the 2016 substantiation.

While your current situation appears to be encouraging, the Department's mandate to protect children places an obligation on it to consider all factors that may impact a person's potential to place children at risk of harm.

In your case, it is considered significant that until just very recently, you were under close supervision continuously in multiple residential treatment programs for nearly a decade to address a myriad of ongoing sexually offending behaviors.

Your current program manager provided this office with your extensive therapeutic records including multiple

evaluations, assessments, and case notes related to your years of treatment from 2012-2019:

Notwithstanding your claim that you have not sexually reoffended in five years, it is noted that your offense in 2016 occurred while you were in residential treatment, and despite prior sanctioning and many years of ongoing, intensive therapeutic intervention for sexual offending behaviors. Your last psychosexual assessment and a comprehensive psychological evaluation were conducted in 2017, per request of the Howard Center. It is acknowledged these are not current assessments; however, their information is the most recent available and provided, and as such, must be considered in lieu of any other current formal evaluations. While the psychosexual assessment was conducted in order to support treatment planning, and the psychological evaluation to clarify your psychological diagnoses, both independent evaluations offered similar findings: The former concluded you were at a high level of risk to sexually reoffend, particularly in unsupervised and community situations, thus requiring ongoing, intensive supports. The latter also concluded you would "require vigilant oversight in order to protect himself and the community".

The treatment records submitted on your behalf also indicate your providers continued to express ongoing concerns through 2019 regarding you engaging in inappropriate sexual behaviors; physical aggression; property destruction; routinely stealing electronics to access pornography; other deceptive conduct; and intimidating others. According to your most recent Howard Center/Hawk Lane Program Annual Update (dated 5/24/2019) and Personal Development Plan (dated 6/10/2019) submitted for consideration, you were under "24/7 supervision" at the time, and your behaviors as aforementioned necessitated a "line of sight supervision in the community at all times." It is worth noting that such oversight may have provided the structure to

prevent any further sexual offenses, as may any ongoing supports.

In the end, it is reasonable to conclude that the past couple of months in which you have been living in the shared living facility (SLP) represents a relatively short period of time to demonstrate a significant and sustained change in your circumstances and behavior without the rigorous monitoring and framework of residential treatment. It is also only quite recently that you have been afforded unsupervised access to a cell phone and the internet, due to your long-documented history of struggling with inappropriately accessing pornography. Although your therapist and several of your program managers currently offer highly positive reports regarding your favorable progress in therapy and towards independent living, none provided a formal assessment of your current risk to children.

Thus, your young age at the time of the offenses, and your recent strides in independent living, does not outweigh the aforementioned concerns particularly in light of the egregious nature and number of substantiated incidents involving multiple victims over time, and the length of time you have engaged in inappropriate sexual behaviors. Even the most expert of psychologists cannot predict with certainty the likelihood of a sexual offender to reoffend. Sex offender treatment involves learning to recognize triggers for offending behaviors, manage your sexual impulses, and avoid placing yourself in high-risk situations in order to minimize your risk to reoffend. The Child Protection Registry also serves as a final barrier in this manner. It should also be noted that the purpose of the Child Protection Registry is to protect children, and that goal is balanced with the potential consequences to a petitioner's employment opportunities.

Your petition has been discussed and a decision reached together with the Commissioner's office. It has been decided that you have not met your burden of proving

that a reasonable person would believe you no longer present a risk to the safety or wellbeing of children. Your name will remain in the Vermont Child Protection Registry.

6. On appeal, petitioner was assisted by his current program manager with the Howard Center. In response to the Department's argument that the record before the Registry Review Unit and application of the legal standard for Board review warrants affirming the Department's decision, petitioner's program manager submitted a letter on his behalf containing the following (in pertinent part):

I am a Program Manager with the Family Centered Services Team for the Howard Center's Developmental Services. I am writing today on behalf of [petitioner], to ask for his appeal of the State's recent decision to be granted. [Petitioner] and I both believe that he should be granted the expungement he applied for because of the time elapsed since any substantiated claims, his current level of supports, and his overall progress towards independent living.

The last substantiated claim on [petitioner's] record was in 2016; since then, [petitioner] has lived in multiple residential programs and has received consistent treatment and support to learn healthy coping mechanisms. Currently, he is living with a Shared Living Provider, a model that the Howard Center utilizes to secure housing for clients with families within the community at-large. [Petitioner] has been living with his Provider since March of 2021. The family that [petitioner] lives with includes two young children, and there have been a total of zero incidents or negative interactions between [petitioner] and the children or the family. [Petitioner] does not present a risk to this family or the community as whole.

In the several years since the last substantiated incident, [petitioner] has also been placed in consistent wrap-around supports that help him access necessary resources, develop healthy coping mechanisms and appropriate behavior patterns, and navigate the community in a healthy and positive way. As evidenced by the letters of support offered by both support staff and a previous Program Manager, [petitioner] has made great strides in rehabilitating his previous behavior. Additionally, [petitioner's previous program manager] submitted over 400 pages of records that serve as evidence to suggest that [petitioner] has been working hard in treatment and in getting his life on track. The last major piece to fall in place for [petitioner] is employment, which is drastically hindered by his blemished record. It is my opinion that a denial of expungement will only continue to hold [petitioner] back from moving on with his life in a healthy and productive manner.

7. On appeal, the Department acknowledges that petitioner has made progress over the last several years. However, the Department argues that petitioner has not established that the denial of expungement was an abuse of discretion, and that the decision otherwise had a reasonable basis, especially given the undisputed fact that petitioner has three (3) substantiations for sexual abuse but has not undergone a recent psychosexual evaluation, and the most recent evaluations of him (from 2017) determined he was a high risk to reoffend. The Department additionally argues that the nature of petitioner's substantiations, the records

reflecting that petitioner has exhibited certain behavioral issues (described above) as recently as 2019, and petitioner's relatively short period in a less supervised living situation also support the denial of expungement.

8. Petitioner does not dispute the lack of a recent psychosexual evaluation, or the findings of the previous evaluation(s), although he does dispute that the records supplied to the Department reflect concerns from his providers that he has been "physically aggressive." This was one of several concerns described (and occurring through 2019) in the Commissioner's Review letter which the Reviewer determined were reflected in the records provided from petitioner's therapeutic and residential providers.

ORDER

The Department's denial of petitioner's expungement request is affirmed.

REASONS

A person on the Registry may periodically request expungement of their substantiation(s) and removal from the Registry. See 33 V.S.A. § 4916c. During an expungement review, the individual requesting expungement "shall have the burden of proving that a reasonable person would believe that

he or she no longer presents a risk to the safety or well-being of children.” *Id.* Expungement requests are governed by the following criteria:

- (1) The nature of the substantiation that resulted in the person’s name being placed on the registry.
- (2) The number of substantiations, if more than one.
- (3) The amount of time that has elapsed since the substantiation.
- (4) The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur.
- (5) Any activities that would reflect upon the person’s changed behavior or circumstances, such as therapy, employment or education.
- (6) References that attest to the person’s good moral character.

33 V.S.A. § 4916c(b).

If the Department denies the request for expungement a person may appeal to the Human Services Board. The Board’s standard of review is set out in 33 V.S.A. § 4916c(e):

The person shall be prohibited from challenging his or her substantiation at hearing, and the sole issue before the board shall be whether the commissioner abused his or her discretion in denial of the petition for expungement. The hearing shall be on the record below, and determinations of credibility of witnesses made by

the commissioner shall be given deference by the board.
33 V.S.A. § 4916c(e).

Based on this standard, the sole issue before the Board is whether the Department abused its discretion in denying petitioner's request for expungement. Abuse of discretion arises if the entity conducting the review totally withholds its discretion or exercises its discretion on clearly untenable or unreasonable grounds. *Brown v. State, 2018 VT 1, ¶38*. If the Department has a reasonable basis for its decision, the Board must defer to that decision even if another result might have been supportable or a different conclusion reached. See *In re L.R.R., 143 VT 560, 562 (1983)*.

At the outset, there is no dispute that petitioner has made progress behaviorally and therapeutically over the last several years, after experiencing very difficult childhood circumstances. He has broad support from and involvement of his treatment providers. However, despite these strengths, several factors support the Department's decision to deny expungement - principally, but not exclusively, the lack of a recent psychosexual evaluation, the existence of prior evaluations concluding that petitioner is a risk to reoffend,

and the relatively short period of time that petitioner has lived outside of a highly structured and supervised environment. These factors form a reasonable basis for the Department's denial.

For these reasons, it cannot be concluded that the Department's denial of expungement is an abuse of discretion. The Department's decision thus meets the standard applicable in expungement appeals and must be affirmed by the Board. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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