STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 8816
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) "founding" a report against him of sexual abuse of his daughter, and he seeks to have this report "expunged" from the SRS "registry".

FINDINGS OF FACT

1. On January 20, 1988, the Department of Social and Rehabilitation Services received a report that a three year old girl was believed to have been sexually abused by her father. The reporter was the child's mother and ex-wife of the named perpetrator.

2. The report was assigned for investigation to a departmental social worker with fifteen years experience who had personally conducted at least 340 investigations involving child abuse, including at least 150 which involved alleged sexual abuse and 20 - 30 which involved preschool children. The social worker holds a bachelor's degree in social work from the University of Vermont and has had over 400 hours of post graduate training in child development, recognizing signs of child abuse and neglect, assessing risk and interviewing children. At least half of that training has specifically

involved sexual abuse of children. The social worker is found to be an expert in investigating and evaluating sexual abuse complaints.

3. Pursuant to the department's protocol, the social worker contacted and obtained the assistance of a police officer who would accompany the worker during her interview with the child in order to avoid subjecting the child to multiple interviews.

4. The child was interviewed on January 21, 1988, at the home of her mother by the social worker with the police officer present and the child's aunt and mother nearby in another room. Anatomically correct dolls were used to allow the child to illustrate her statements although she ultimately did not use them that way. Some time was spent playing with the child in order to put her at ease, and non-leading, open-ended questions were used whenever possible in order to avoid suggesting answers to the child. For the same reasons, negative and positive comments regarding her answers were avoided.

5. During the interview, the child was direct, specific, simple and spontaneous in giving answers. This child, who was described as being quick, verbal and intelligent, did not hesitate in her answers and needed no prompting to respond. She disclosed, in pertinent part, to the worker that her dad had been "playing doctor" with her and that he had touched her in the vaginal area using a

rubbing motion while the two were on a couch in the father's home. The child said that she told her father that it hurt and he said he would be more gentle. The responses given in this interview were written in the record of the investigation.

6. One week later on January 27, 1988, the child was again interviewed by the social worker in her mother's home with the same persons present. The child was shown anatomically correct drawings of a preschool girl and was asked to mark those areas where she and her father had "played doctor". The child marked the vaginal area first, then the finger and the hands, followed by her head, anus, face, toes, knees and feet. On the back side of the picture she marked the buttocks and heels. She asked the social worker to talk to her father and tell her he could touch her at any places on the drawing except the vagina and heels--that it did not feel good either.

7. The social worker spoke with the girl's mother to determine if the reporter or the child might have had a secondary gain from reporting the abuse. No other background checks or interviews were conducted as part of the investigation.

8. What the worker learned from the mother-reporter was that the mother's sister, who baby-sat for the child, had told the mother that the child had made statements suggesting that she may have been inappropriately touched by her father whom she stayed with every other weekend.

That report greatly surprised the mother who, despite their divorce, had an amicable relationship with her ex-husband and felt he was a loving and good parent to their daughter; and she strongly supported a continuation of their relationship. Up to that point, she felt that visitation had gone very well and that the visitation schedule was, in fact, very helpful for the mother, who had to work on the weekends when the child was with her father. It was difficult for her to believe that her ex-husband would engage in such behavior, and after first learning of these allegations to her aunt she did not interfere with visitation. However, she became increasingly concerned when her sister reported that the child continued to make disclosures. The mother herself never questioned the child regarding the incidents, but had been concerned in the past that the child had a preoccupation with penises and frequently spoke of seeing her father unclothed. In the end, the mother's concern for the child persuaded her to seek an investigation of the matter by SRS.

9. The mother is found to have had no motive in reporting the suspected abuse other than the protection of the child.

10. The child's aunt is the manager of a community care home and has experience teaching in a day care center where she has, on several occasions, questioned children regarding allegations of abuse. On Friday, January 15, 1988, her niece, the allegedly abused child, and her

daughter and son were playing together when her daughter reported that the niece liked to play doctor "down there" pointing to her vaginal area. The niece volunteered that "Daddy touches me there when we play doctor."[1] The aunt then asked her niece to show her on a doll how her Daddy played doctor. The niece spread the dolls legs and rubbed the vaginal area. Following that disclosure, the aunt was not convinced that abuse was being described but she was concerned enough to mention the disclosures to the child's mother. On Tuesday, January 19, 1988, following a weekend visit with her father the aunt, upon agreement with the mother, questioned the child again by asking her to play doctor with a doll the way she played doctor with Daddy. The child took off the doll's sleeper and cloth diaper and rubbed the vaginal area to show what her father did, and added that it had hurt her and that he said he would be more gentle. Thereafter, the aunt wrote down both conversations she had had with the child and later gave that record to the police.

11. Although the aunt supported her sister's divorce from the petitioner and dislikes him, in large part as a result of the alleged incident, she nevertheless felt he loved his daughter, and she knew that the child wanted to be with him. As she supported and encouraged their relationship, she is found to have had no motive for reporting the abuse other than protection of the child.

12. The police officer involved in the investigation is a sergeant detective with the state police who has personally investigated 140 - 150 child sexual abuse cases, of which 25% involved children under the age of five. He has had approximately 100 hours of training regarding interviewing victims.

13. The officer was present and took notes at both interviews with the child. He recorded essentially the same details as the social worker. On January 27, 1988, the police office interviewed the girl's father regarding her allegations. He denied touching her in any inappropriate way or ever playing doctor with her. The police officer reported the results of this interview to the social worker. Because of concerns about the perpetrators' rights should criminal proceedings become necessary, social workers do not themselves interview perpetrators who might be the subject of criminal investigations, and this social worker did not do so in this case.

14. Following her conversations with the police sergeant on January 27, 1988, the social worker determined that the child's statements were credible and met the statutory definition of abuse. The statements were found to be credible by the social worker because the child spoke spontaneously and naturally, not appearing to have been rehearsed; because her statements were concrete and specific; and because the same information was reported at

each interview. Although it is possible that the child made up the story or that it was suggested to the child by someone else, the social worker felt it was unlikely both because the child spoke so spontaneously, describing the events in child-like language, and because no motive could be found for anyone to suggest such a story to her.

15. A form report was prepared by the social worker shortly after January 27, 1988, indicating that the investigation had resulted in a determination that the alleged facts were true and constituted sexual abuse of a child and that, as such, the child's name should be added in the registry of abused children with the father listed as the perpetrator.

16. It is found that the social worker followed the investigative procedures required of her and performed her duties thoroughly, professionally and without bias. It is also found that the information relied upon by the social worker, including the child's statements and her own observations were accurately stated. Therefore, the social worker's evaluations and conclusions are found to be accurate and reliable.

17. Following the "founding" of the report, the child, at the request of her mother, was evaluated by a psychologist, Dr. C. to determine if she had been victimized, and if so, by whom and to get a recommendation for treatment. The psychologist has a bachelor's degree in psychology from the University of Vermont, a Master's in

Community Mental Health from Minnesota-Mancheto State University and a Ph.D. from Mississippi State in education and clinical psychology. Prior to his current private practice of five years, the psychologist worked with a community mental health agency where he spent half his time doing school assessments and half his time in therapy. His current specialty is assessment of children in trauma, especially child sexual abuse and treatment of offenders and victims of child abuse. In the last five years he has had 60 - 65 hours of training in this area and stays abreast of the literature. He has evaluated approximately 120 children who were allegedly sexually abused. He is found to be an expert in psychology, and particularly in assessing and treating child sexual abuse.

18. Dr. C. talked with the child twice, on February 2 and February 17, 1988, for a total of 3 1/2 hours.

19. At the first interview, which was tape recorded and transcribed, he psychologically evaluated the child and concluded that she was intellectually above average, verbal, developmentally age appropriate, strong willed, and not easily susceptible to suggestion. In order to determine whether she had been sexually abused, he had the child draw pictures of her family, describe body parts on anatomical drawings to learn her vocabulary and to demonstrate her disclosures on drawings and dolls. His interviewing method for this three-year-old involved asking open-ended questions about being touched in ways she didn't

like and looking for consistency of her answers within and over both interviews; watching for detail which went beyond a general description; and observing the manner and affect of the child when discussing the matter of sexual abuse. Prior to such interviews, he does not question adults or others involved about possible coaching of the child or her propensity to fantasize. He makes those assessments himself from talking with the child. During the interview, he tests the child's general concept of truth and falsehood.

20. In response to his questions at the first interview, the child stated that she had been touched by her father outside and inside of her vagina, and that her father had touched her on the mouth with his penis. She demonstrated on a drawing of a child the places she had been touched that she didn't like which included her vagina. On two drawings of an adult male she indicated first those places that had been used to touch her and secondly those parts she had been asked to touch. She marked the penis and mouth and feet on the first picture and the penis, chest, eye, nose and mouth on the second. She stated that the touching activities had occurred at her father's house on his living room couch after dinner while watching TV. The interviewer did not ask the child to pinpoint when or how many times that happened, although she indicated it was after Christmas. She indicated with dolls that her father had lay on top of her and had touched her

in the vaginal area.

21. At the second interview on February 17, which was also tape recorded, the child told the psychologist that her father tried to put his penis in her vagina but could not because it was too small; that she didn't want to do it but he said to; and that the event occurred while they were watching TV at night in her father's home and that they had all their clothes off. The child was anxious and did not want to talk at length about the event and tried to change the subject to her other friends especially Jessie. She told the interviewer that her father was learning to play the right way and didn't touch her anymore in her private parts.

22. During the course of the interviews, the child also indicated that a neighbor's daughter aged 10 or 11 (whom the child thought of as a family member) had touched her with a penis, discussed penises with her and had shown her pictures of naked people. She indicated that she told the neighbor's daughter about her sexual experience with her dad. During a demonstration of how they played using anatomically correct dolls, the child did not show the two girls in any contact with each other aside from one riding on the other's shoulders fully clothed and she had no details regarding these experiences. It was Dr. C.'s opinion that these revelations were a distraction and that no inappropriate sexual activity had occurred between the

two girls who he felt were sharing their sexual experiences with each other.

23. It is Dr. C.'s "very strong" opinion following both interviews that the child had truthfully described her father's actions toward her based on the following:

a) the clarity and forthrightness of her presentation,
b) the large amount of detail for a child of that age,
c) the repetition of the same details throughout both sessions,
d) the consistent demonstration on the dolls,
e) the uneasy affect accompanying both her telling of her reluctance to get involved and discomfort in repeating the story.

24. It was Dr. C.'s opinion that any child, including this one, could have been coached by someone before and between the sessions to relate the story, could have had the story suggested to her by reinforcement or could have fabricated the story. However, he did not feel that was the case here as it did not appear that she had been asked leading questions by anyone, including her aunt,[2] and that the telling of the story was uniquely in her own words with details which would be difficult for a young child to remember so consistently and vividly and to relate with such feeling. These attributes are not typical of coached or fabricated stories.

25. It was also Dr. C.'s opinion that the perpetrator was the father as that fact was central to the child's disclosure. The child's revelations about Jessie were

interpreted as an attempt by the child to share and demonstrate what she had learned with her father to the other child. Her statement that her father "didn't do it anymore" was interpreted not as a retraction but as an attempt by the child to save her relationship with her father.

26. It is found that Dr. C.'s evaluation was carried out thoroughly and completely and in accordance with standard psychological practice and that it was not biased in any way. Because of this and because the data he relied on including statements of the child and his observations are accurate, his evaluation and conclusions are found to be accurate and reliable.

27. The department received a copy of the report written by Dr. C. in March of 1988 which information it relied on to further substantiate the "founding" made in January of 1988.

28. Because she believed her daughter had been sexually abused and was in need of psychological therapy, the child's mother took her to see a clinical psychologist in private practice, Dr. S., beginning March 24, 1988. Dr. S. saw the child for 19 weekly sessions of one hour each.

29. Dr. S. holds a B.A. in philosophy and engineering from the University of California, an M.A. in child development from Tufts University and a Ph.D. in clinical psychology from Harvard University. She spent three years as a teaching fellow at Harvard and is an assistant

professor of clinical psychiatry at Dartmouth Medical School, specializing in pediatrics. She is a consultant to the National Institute of Mental Health on evaluating 2-6 year olds for sexual abuse and currently has four grants to investigate children's memory and suggestibility. She has published a book on child sex offenders and victims and currently spends about half her time seeing clients. She has conducted training and workshops on child sexual abuse in 46 states and has, over the past 10 years, evaluated between 50 and 200 cases of child sexual abuse and has treated several hundred in therapy. She is found to be an expert in the sexual abuse of young children.

30. At the outset of therapy, Dr. S. interviewed the child to determine if, and to what extent, she had been abused. A verbatim transcript of her interview with the child on March 28, 1988, is appended hereto as "SRS #2" and is incorporated into these factual findings by reference to show the questions asked and the statements made by the child.

31. Dr. S. interviews children through a combination of playing with them and asking them open ended questions. At the outset, she tests children with regard to their ability to tell the truth from a lie. She found this child's ability in this regard to be good. She also found, as did Dr. C., that the child did not readily accept facts given to her that did not fit her view of reality--that is, the child was not easily suggestible. The child is also

encouraged to freely recall events, and her lead is followed. Anatomically correct dolls and pictures are provided to the child so that she can demonstrate what she is saying verbally. It is Dr. S.'s opinion that dolls and pictures prop the memory and do not lead to false accusations.

32. Dr. S. evaluates each child's statements by using a variety of criteria designed to assess whether the child is relating actual events which happened to her or whether she has fabricated these statements, either at her own instigation or with coaching or suggestions from third parties. The following criteria were used with regard to this child's statement.

a) Explicit and unique detail makes it more likely that a child is telling the truth. In this case, the child described her father putting his finger, mouth and penis outside of and/or inside of her vagina, both orally and with the use of dolls and pictures. She demonstrated her father lying on top of her with the dolls in genital to genital contact. She described other details such as where they both were (on the living room couch), what they were doing (awake and watching TV) and what her father and herself were wearing (either underwear or nothing). It was Dr. S.'s opinion that this was a large amount of detail for a 3 year old. The fact that the child did not say when or how often the events occurred was not considered significant as three year olds have little sense of time.

b) Age appropriate language makes it more likely that a child is telling the truth and not parroting an adult. The child here was described as having excellent language skills and using terms, although she often interchanged terms, which were normal for a three year old.

c) Demonstrated affect consistent with the impact of the event makes it more likely that a child is relating actual events. The child in this case exhibited puzzlement over what had happened to her and

fury that her father had denied the events she related. It was Dr. S.'s opinion that the child's affect was consistent with the events she is describing.

d) Progressively detailed disclosures are the norm and make it more likely that the child is describing a real event. In this case, the child provided very little, "the tip of the iceberg", at first and gradually revealed more and more behaviors.

e) A precocious understanding of sex and anxiety when discussing the subject. While the child here had no signs of serious trauma, she did become anxious when talking about sex and had a fascination with penises which in Dr. S.'s opinion suggests she has been sexually over stimulated for a child her age.

f) Spontaneous comments, (i.e., not in response to questions) make it more likely that the child is telling the truth. In this matter, the child spontaneously volunteered statements regarding where she and her father were at the time of alleged abuse, what her father was wearing, that he sometimes touched her with his penis, that the touching hurt and that she has asked her father not to do it. It was Dr. S.'s opinion that the child was very spontaneous in adding information, which spontaneity is not consistent with fabrication or coaching.

g) Statements which are consistent over time, especially for such a young child are less likely to be fabrications. Dr. S.'s opinion was that during the course of her nineteen hours with the child, her statements were remarkably consistent. After the child became aware that her disclosures would affect her ability to be with her father, the child made statements like "can I see Dad if I didn't say it?" which were interpreted as experiments to see what would happen if she recanted. However, she never changed her story although from time to time she used different terms to describe it. It was Dr. S.'s opinion that the passage of four months between the events and her interviews was not enough to diminish her memory of such an important event.

h) If a child has a motive for secondary gain, such as a desire to get the alleged perpetrator into trouble, it is more likely that he statements are fabrications. In this case, the child had nothing to gain and everything to lose by making these disclosures which resulted, at least for a time, from her being separated from her father whom she loves very much and enjoyed being with in spite of the

> reported abuse. Dr. S.'s opinion was that her continuing love for her father is typical of young children who have been sexually or even physically abused by parents.

33. Based on the above interviews, Dr. S. concluded that the child's statements described actual events which had happened to her and that the statements were graphic and detailed enough to need very little interpretation. It was her opinion that the child had been sexually molested and that the perpetrator was the child's father. She based her conclusion as to the perpetrator on the fact that her father was consistently mentioned in the statements and that the child's expression of anger and betrayal sprang from the fact that it had been her father who abused her.

34. Although Dr. S. styles herself as an "advocate" for the protection of children, she only advocates for those children she believes, after evaluation, to have been abused. While she believes it is unlikely that a three year old can fabricate an entire event, her assessments of the child's statements are not based on "profiles" but on the criteria set out above.

35. Subsequent to the petitioner's acquittal on criminal charges arising from the same matter, Dr. S. wrote an article published in a Burlington paper critical of the Court's procedures in taking evidence from young children regarding alleged sexual abuse. That article, among other things, suggested that children were intimidated by the

process and needed a special kind of questioning and microphones to amplify their views.

36. It is found that neither of the events in the above two paragraphs nor any other evidence shows in any way that Dr. S. was biased in her opinion regarding the child's statements or that she employed improper or faulty methodology in arriving at her conclusions. Her evaluation is found to be fair, complete, professional and based on an extraordinary fund of knowledge in this subject area and on an impressive amount of time spent with this child. The data used by Dr. S., including the statements made by the child and her observations of the child's behavior, are accurate and, as such, her evaluations and conclusions are found to be accurate and reliable.

37. A report written on April 21, 1988, containing the results of her evaluation was received by and relied on by the department to further substantiate its "finding" in this matter.

38. A transcript of the child's testimony at the criminal trial is appended hereto as Petitioner's #1 and incorporated herein by reference.

39. In the transcript the child's testimony was basically consistent with, although less detailed, than, that given to the experts. Although, at one point the child denied that her father touched her with his penis, it cannot be found that this isolated inconsistency, in light of all the other evidence to the contrary, makes it more

likely than not that the child fabricated her story. No expert was asked to evaluate that testimony.

40. It was stipulated that the petitioner denies that any of the events described in his daughter's statements actually occurred. The petitioner did not himself testify from which decision the hearing officer infers nothing regarding the accuracy or reliability of the information.

41. Based on the statements made by the child to the social workers and the psychologists, and on those experts unanimous agreement as to criteria to be used in evaluating that child and as to the conclusions to be drawn, it is found that is more likely than not that the statements made by the child to the experts are descriptions of real events that happened to her.

RULINGS ON MOTION

1. The petitioner's motion to expunge the record because he has been acquitted of a criminal charge of sexual assault based on the same incidents is denied.

2. The petitioner's motion to expunge the record because the child is allegedly out of state and he allegedly plans to see her only on supervised visits is denied.

3. The petitioner's motion to exclude both psychologists' testimony because their interviews with the child occurred after the department originally placed the "finding" in the registry is denied.

4. The petitioner's motion to exclude opinions of

the expert witnesses regarding the veracity of the child's testimony is denied.

5. The petitioner's objection to testimony by the social worker, police officer and psychologists as to what the child said is sustained insofar as it is offered for the truth of the statements, but it is denied insofar as that testimony is offered to show that the child made the statements and that the statements are consistent.

6. The petitioner's objection to testimony by the child's mother and aunt as to statements made by the child is sustained insofar as it is offered for the truth of the statements, but denied insofar as it is offered to show their motivation for making the consistent statements by the child they may remain.

The reasons for these rulings are discussed below.

ORDER

The decision of the Department to place in the registry a "finding" that the petitioner had sexually abused his daughter is affirmed.

REASONS

The petitioner has argued throughout the course of this appeal that standards used in criminal prosecutions for child abuse be adopted by this Board because the "guilt or innocence" of the petitioner is similarly at stake. The petitioner concludes that his acquittal on a criminal charge should be binding on this administrative agency with regard to any "finding" made by it. A close look at the

welfare statutes on abuse of children (adopted at Title 33, Chapter 14), shows, however, that the purpose of the legislation is not to determine who is "guilty or innocent" of child abuse but to:

> . . . protect children whose health and welfare may be adversely affected through abuse or neglect; to strengthen the family and to make the home safe for children whenever possible by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse and neglect, investigation of such reports and provision of services, when needed, to such child and family. 33 V.S.A. ə 681.

If the investigation required by statute "produces evidence that the child has been abused or neglected, the commissioner shall cause assistance to be provided to the child and his family in accordance with a written plan of treatment. 33 V.S.A. ə 685. The statute also requires that the Commissioner:

> Maintain a registry which shall contain written records of all investigations initiated under ə 685 unless the commissioner or his designee determines after investigation that the reported facts are unfounded, in which case, the unsubstantiated report shall be destroyed unless the person complained about requests within 30 days that the report not be destroyed . . . 33 V.S.A. ə 686(a).

The following section (33 V.S.A. ə 686(c)) requires that the records be kept confidential and that:

> Written records maintained in the registry shall only be disclosed to the commissioner or person designated by him to receive such records, persons assigned by the commissioner to investigate reports, the person reported on, or a state's attorney. In no event shall

> records be made available for employment purposes, for credit purposes, or to a law enforcement agency other than the state's attorney. Any person who violates this subsection shall be fined not more than $500.00. A person may, at any time, apply to the human services board for relief if he has reasonable cause to believe that contents of the registry are being misused. All registry records relating to an individual child shall be destroyed when the child reaches the age of majority. All registry records relating to a family or siblings within a family shall be destroyed when the youngest sibling reaches the age of majority. All registry records shall be maintained according to the name of the child who has been abused or neglected. 33 V.S.A. ə 686(d).

The statutory language cited above clearly focuses on protecting the child, not punishing the alleged perpetrator. Virtually no legal consequence is suffered by the petitioner as a result of this "finding", and the department is prevented by law from disclosing it to others.[3] This is not a hearing where the state must prove beyond a reasonable doubt that the petitioner had performed the acts and had the mental status constituting the elements of a crime. This is a hearing to determine whether that the commissioner had information that more likely than not was accurate and reliable showing that the child had been sexually abused--for the purpose of protecting that child. As the petitioner's life, liberty and property are not at stake in this matter, there is no constitutional reason to place the same stringent burden of proof on the department as would be placed on a prosecutor in a criminal trial. Neither is there reason to adopt the same evidentiary rulings used by criminal courts in

assessing the "guilt" and "innocence" of persons accused of the crime of sexual abuse. An administrative "finding" is simply a different concept used for a different purpose, and all requests for establishing burdens of proof and restricting evidence must be viewed in terms of that concept, not in terms of the criminal justice system.

For that reason, the petitioner's motion to expunge the finding due to the petitioner's acquittal on a criminal charge of sexual abuse involving the same child must be denied. The statute calls for expungement of the record only:

> If no court proceeding is brought pursuant to ə 683(d) within six months of the date of the notice to the person complained about, or if the court after hearing, determines that the report was not made in good faith, the unsubstantiated report shall be destroyed. 33 V.S.A. ə 686(b)

Or if the record is determined to be "unfounded" by the Human Services Board after application therefore and a fair hearing. 33 V.S.A. ə 686(e). The petitioner has not met the requirement of subparagraph (b). Therefore, this order may only be expunged by the Board if the statutory criteria are not met.[4]

The statutory process set up for expungement is as follows:

> A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him on the grounds that is unfounded 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. 33 V.S.A. ə 686(e).

The statute directs that:

> . . . a report shall be considered to be unfounded if it is not based upon accurate and reliable information that would lead a reasonable person to believe that a child is abused or neglected. 33 V.S.A. ə 686(a).

The board has previously interpreted this section as placing two burdens upon the department which must be met by the usual civil standard of a "preponderance of the evidence". See Fair Hearing No. 8110. The first burden is to establish that its decision to place in its registry a report of child abuse is based upon information that is both accurate and reliable. Second, the department must show that the information relied upon constitutes a reasonable basis for concluding that a child has been abused or neglected.

In this matter, the petitioner challenges the accuracy and reliability as well as the relevancy and admissibility of the department's information. However, if the information is found to be accurate and reliable, relevant and admissible no argument has been made, and, indeed, could reasonably be made, that the facts do not constitute sexual abuse of a child as defined in the statute.[5] Therefore, this matter is limited to the consideration of the department's first burden, which is to present admissible evidence which shows that it is more likely than

not (preponderance of the evidence) that the information it relied upon was accurate and reliable, as well as legally relevant.

The information relied upon by the department in support of its "finding" consisted almost exclusively of the expert opinions of a social worker and two psychologists as to whether the child had been abused based upon statements made to the experts by the child, behaviors observed by the experts, and assessments and evaluation based upon their training and experience. The department also used the statements of the petitioner as relayed by the police officer who interviewed him in making its finding.

THE CHILD'S STATEMENTS

The department introduced the statements made by the child through the testimony of the child's mother, aunt, the department's social worker, the police officer and the two psychologists. The child was not present and was not asked to testify. The petitioner objected that the statements offered were hearsay and thus inadmissible under the civil rules of evidence. The Fair Hearing Rule adopted by the Human Services Board with regard to the issue of evidence states as follows:

> 14. Rules of Evidence. The rules of evidence applied in civil cases by the courts of the State of Vermont shall be followed, except that the presiding officer may allow evidence not admissible thereunder where, in his judgement, application of the exclusionary rule would result in unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their

affairs.

The Vermont Rules of Evidence provide that:

> Rule 802. Hearsay Rule
>
> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by statute.

Those same rules define "hearsay" as . . . a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c). The department argues that the testimony of all its witnesses regarding the child's statements should be admitted under this "relaxed" hearsay rule because it is an unnecessary hardship to require the young child victim to come to a hearing and be subjected to the further trauma of confrontation by her abuser, the retelling of painful events and the opening of old wounds when her (or his) disclosures have already been repeatedly made and recorded. Secondly, the department argues that the child's statements were, in most cases, recorded manually or electronically verbatim by persons who are required to either investigate or question the child and accurately record and evaluate the statements in the course of the performance of their duties. Therefore, it is reasonably prudent to rely upon the statements recorded as being those actually made by the child.

The board has said in the past that the statutory

purpose of protecting children from harm is defeated if the child-victim is unnecessarily required to appear at the hearing. The board sees no reason in this matter to retreat from its position. However, it is not necessary here to determine whether the hearsay rule should be suspended because in this case the child's statements are clearly not being offered for the truth of those statements but solely to show that those statements were made by the child to the experts and other relatives. It is clearly the evaluations and opinions of the experts which the department relied upon in making its "founding"--not the bald statements of the child that she was sexually abused. What is really being offered is an assertion by a witness based on his or her personal knowledge that the child made certain statements, a fact which, in itself, has consequence and is, thus, admissible.

EXPERT OPINIONS

The petitioner objects to the admission of testimony by the experts (the social worker and the two psychologists) interpreting the child's statements and giving opinions on the child's veracity. Again, analogizing to the criminal justice system, the petitioner asserts that the Board as the trier of fact is required to assess the credibility of the child, and, cannot rely on the testimony of experts as to the child's credibility. The petitioner puts forth a Vermont Supreme Court opinion, State v. Catsam, 148 VT 366 (1987) in support of its

position in which the Supreme Court reversed a criminal conviction of sexual assault on a child because of expert testimony that children who fit the description of the child at issue generally do not lie. The Court indicated in dicta that any direct comment on the credibility of a complaining witness, even if based on an evaluation of that particular child and not a statistical evaluation of abused children as a whole, might be inappropriate because it usurps the role of the trier of fact.

It may be, that if this were a criminal jury trial on the issue of the petitioner's guilt or innocence with regard to the elements of a crime, some of the expert evidence offered at this hearing would be inadmissible. However, it is crucial again to point out that this is an administrative hearing to determine if the Commissioner of Social and Rehabilitation Services properly placed the child and father's name on the registry in order to protect her based on "information" which was accurate and reliable. Part of that information, and undoubtedly the critical part, were the assessments and opinions of the social worker and the psychologists that the child was relating incidents that actually occurred. As such, those opinion on credibility have an important legal significance of their own that has no analogy in the criminal justice system. It would not be an exaggeration to say that the Commissioner could hardly act without relying on some interpretation and assessment of the child's statements

when there is no direct evidence other than a very young child's disclosures. Of course, the Commissioner has to show that those opinions are more likely than not to be accurate and reliable in order to substantiate his findings. It is still the province of the Board to determine the facts but the critical fact in an expungement hearing is whether the information relied upon by the Commissioner, including the experts reports and opinions, were accurate and reliable. Therefore, it is not only proper but necessary to include the expert's opinions on the child's story as part of the evidence.

REPORTS MADE AFTER THE "FINDING"

The "finding" in this case was originally made a few days after the social worker interviewed the child and the police officer interviewed the father. It was originally based only on the expert opinion of the social worker. Subsequent to the placement of the "finding" in the registry, the reports of the two psychologists were made available to the department which then further relied on the psychologists opinion to substantiate the "finding". The petitioner claims that the two psychologists reports should be excluded as irrelevant because they were made after the department had already determined to "find" the case. The petitioner cites nothing in the statute which requires that the department's investigation cease and be finalized the day the finding is made. Indeed, the only time reference in the statute is one which requires the

department to commence an investigation within seventy-two hours after receipt of a report of abuse or neglect. 33 V.S.A. ə 685(a). The remedial and protective purposes of the statute stand in direct contrast to the limitation which the petitioner urges the board to adopt. Under the petitioner's theory, even if the department's social worker saw the petitioner sexually abusing his daughter the day after the finding was made, she could not use it to substantiate the department's previous action. Such a policy makes no sense. Of course, due process entitles the petitioner to know prior to the hearing what facts the department will rely on in support of its findings and to the extent that a "surprise" comes his way he may have a reason to have that ground excluded or ask for a continuance. However, that was not the case here as the petitioner appeared to be very familiar with all the ground and the evidence offered by the department to substantiate its finding.

RELIABLE AND ACCURATE INFORMATION

With the disposal of these important threshold issues, the remaining question is whether the information used by the department to make its finding and put into evidence was more likely than not accurate and reliable. The most critical pieces of evidence relied on by the department were the evaluations and the opinions of the social worker and the two psychologists who interviewed the child.

The many records and transcripts made by professionals

in this matter including the department's own agent, the social worker, make it very likely that the experts were accurate that the child had made statements indicating that she had been touched in the vaginal area by her father with his fingers, mouth and possibly his penis. The records also show that the child did make statements about the details of where (her father's living room couch) this happened, and how she felt about (it hurt and she didn't like it). There is actually no dispute that she made those statements. In fact, it is fair to say that the petitioner himself does not really dispute that these words were said by his daughter but does take issue with the meaning attached to the statements and their depiction of actual events, i.e., their truthfulness.

What this case boils down to then is whether the child's statements were truthful and whether they can be interpreted as implying conduct which can be labeled as inappropriate sexual activity between a father and daughter. The department believes they are true and that they describe sexual abuse because its own expert social worker and two expert psychologists have provided them with evaluations and opinions saying so. As it was necessary and proper for the department to use those sources, it ultimately becomes necessary to determine if the expert reports and opinions that were part of the investigation were accurate and reliable.

The conduct of investigations carried out by the

department under this chapter is governed by statute:

> (b) The investigation, to the extent that it is reasonable, shall include:
>
> (1) A visit to the child's place of residence or place of custody and to the location of the alleged abuse or neglect;
>
> (2) An interview with, or observance of the child reportedly having been abused or neglected. If the investigator elects to interview the child, that interview may take place without the approval of the child's parents, guardian, or custodian, provided that it takes place in the presence of a disinterested adult who may be, but shall not be limited to being, a teacher, a member of the clergy, or a nurse.
> (3) The nature, extent, and cause of the abuse or neglect;
>
> (4) The identity of the person responsible for such abuse or neglect;
>
> (5) The names and conditions of any other children living in the same home environment;
>
> (6) A determination of the immediate and long-term risk to each child if that child remains in the existing home environment;
>
> (7) The environment and the relationship of any children therein to the person responsible for the suspected abuse or neglect; and
>
> (8) All other data deemed pertinent.
> 33 V.S.A. ə 685.

The social worker assigned to investigate this case followed the procedures set up by statute and the department's protocol which calls for the police to interrogate the alleged perpetrator to avoid constitutional problems if a criminal action should be initiated. She was well-trained, very professional, and extremely experienced in carrying out investigations of allegedly sexually abused

children. In interviewing the child she employed a methodology which is remarkably similar to that used by both psychologists, basically to allow the child to disclose information without suggesting it to her and to encourage her to graphically demonstrate her disclosure through the use of anatomically correct dolls and drawings. The social worker was aware of the possibility that the child might have fantasized, fabricated or had the statements she made suggested to her by a third party (such as an aunt or mother) and used criteria to rule out those possibilities including consistency over both interviews, richness of detail, accompanying appropriate affect and language appropriate to her developmental age. She also spoke with the child's mother to screen for possible family conflicts which might create a motive for coaching the child and found none and considered the father's flat out denial of any touching as part of her investigation. The petitioner put forth no evidence that the social worker's methods of assessing the child's statements and veracity were deficient or that the facts she relied upon were inaccurate. Therefore, it must be concluded that the assessments and opinions of the social worker are accurate and reliable.

Dr. C., who has a good deal of experience and training in this area, interviewed the child on two occasions and employed a methodology similar to that of the social worker. He reached similar conclusions as to the lack of

fabrication and coaching based not only on the criteria set out above but also on his own psychological evaluation which included findings that the child was bright and not particularly suggestible. Although Dr. C.'s interviews produced statements regarding possible sexual activities with another child, Dr. C.'s interpretation of these statements as being the innocent sharing of sexual knowledge were not shown to be erroneous or suspect. Given his education, training, and experience, his thoroughness and his interviewing and evaluating techniques based on well articulated criteria, it is more likely than not that Dr. C.'s assessment and opinion was accurate and reliable.

Finally, Dr. S.'s credentials, which can only be described as outstanding and her nineteen hours of interviews with the child, make it extremely likely that the information (assessment and opinion) she provided to the department are accurate and reliable. He methodology is consistent with that used by the others and the criteria she used to assess the child's statements were specific and detailed. Although the petitioner attempted to show that Dr. S. is biased because she is an "advocate" for abused children and has written articles critical of criminal court proceedings in sexual assault cases, there is no reason to believe that she was predisposed in this case to believe the child or slanted her assessment to achieve a desired result. On the contrary the evidence showed that her belief in a child's veracity or lack of it is based on

a careful and meticulous analysis of this particular child's statements. The fact that her assessments and opinions are almost identical to the other experts enhances their reliability. It must be found, therefore, that Dr. S.'s assessment that the child's statements are truthful and indicate sexual abuse are accurate and reliable.

As the Department has met its burden of showing that it based its "finding" that the petitioner's daughter was sexually abused by him on accurate and reliable information, that "finding" should not be expunged from the registry.

FOOTNOTES

[1]These statements are included not for the truth of them but to show what motivated the aunt to alert the mother and to show that the child made these statements consistently.

[2]At a prior deposition, Dr. C. said the aunt may have asked leading questions. However, he changed his opinion after actually reviewing the record of the aunt's conversations with the child.

[3]The Commissioner has adopted regulations preventing day care centers and foster homes who hire persons whose names are on the registry from obtaining licenses which it grants which regulations have been upheld by the Board. Fair Hearing No. 8110. However, no other known statutory consequences result. The petitioner has represented that this "finding" may have some bearing on his rights to visit his child. However, there is no reason to believe that a Superior Court is bound by this "finding" and, in fact, is most likely required to make its own finding. In fact, it is doubtful whether the department can make such a fact officially known to the court given the confidentiality requirements.

[4]The petitioner also moved for dismissal claiming that the child was no longer in the state and that his alleged agreement to supervised visits with the child removed any need to protect her. However, the statute cited above

makes no provision for dismissal under these grounds and even if it did, the petitioner put forth no evidence supporting his allegations.

[5]"Sexual abuse consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy and 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 sexual conduct, sexual excitement or sadomasochistic abuse involving a child." 33 V.S.A. э 682(8).

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