To: Members of the House Human Services Committee

From: Bob Sheil, Juvenile Defender

Re: H.680, An Act Relating to Records and Appeals of Child Abuse and Neglect Decision Made by The Department for Families and Children

Date: February 11, 2014

From the Committee's remarks at the end of its consideration of H. 680 on Thursday morning, Feb. 6, 2014 I gathered that Committee members believe the subject matter of this bill is fertile ground for opening a much broader discussion regarding this topic. This discussion could range all the way from what is the definition of "child abuse and neglect" through its being reported, investigated and substantiated, as well as how the Child Protection Registry works, how one's name ends up on it, and ultimately what is the process to seek expungement from that Registry. The discussion may well include reviewing "standards of proof" per Rep. Linda Martin's request, an overview of the entire process of substantiations and public policy regarding expungement from the Child Protective and Adult Protection Registries.

Chairwoman Pugh said the committee will schedule it for time this Thursday, 2/13, in the PM. They at that time will be looking for a broader presentation and be interested in having the following questions answered:

1) What are the present definitions of child abuse and neglect?
2) How does one's name end up on the Child Protection Registry and what is the appeal process?
3) What is the present process for expungement from the Child Protection Registry?
4) How does one's name end up on the Vulnerable Adult Protection registry and what is the appeal process?
5) Who is listed on the Sex Offender Registry and how does that happen

In addition, the Committee would like to hear testimony from someone in DCF such as an investigator, who actually does this type of work as well as someone who investigates allegations of abuse of vulnerable adults.

Through my work in the Juvenile Defender's Office I am able to provide some insight as to information regarding Questions # 2 and 3 and how they relate to minors and would offer the following comments:

First of all, I agree with the sentiments expressed by Rep. Martin in her comments. I have always felt that having such a low standard as "a reasonable person standard" for substantiating abuse or neglect does not comport with the serious repercussions such a finding has for the individual involved. It is one thing to say that in order for a report of abuse or neglect to be accepted that the reporter must have "reasonable grounds to suspect (or believe)" that child maltreatment may have occurred. However to substantiate that type of allegation there should be a higher standard of

proof. At the very least, especially given its ramifications, there should be a standard of preponderance of the evidence and perhaps as high as clear and convincing evidence. That determination is a policy matter for the legislature.

My office only becomes involved when a minor is appealing a substantiation for sexual abuse of another child. As I stated in my earlier memorandum to you, with the exception of a minor being the parent of a young child, the only grounds for a minor to have her/his name entered onto the Child Protection Registry is if the minor is substantiated for sexual abuse of another child. All of the substantiation appeals that I have been involved in, which is roughly one dozen, have been such appeals.

Once a substantiation has been made, the individual who has been substantiated shall be notified of the Registry entry, provided with the Commissioner's findings and advised of the right to seek an administrative review of that decision. It is at this point that my office may become involved.

My involvement in cases where I have sought review of substantiation decisions has been very mixed. I have had substantiations upheld on appeal and overturned on appeal and have also been successful twice in having clients' registry records on the Child Protection Registry expunged.

The expungement process involves different criteria which is focused on an individual's behavior and treatment in the time period since the original substantiation and focuses on risk of future harm. In both cases where my clients' records were expunged the youth had engaged or allegedly engaged in inappropriate sexual touching at a much younger age and had no history of any similar subsequent behavior and had been assessed as low risk for engaging in any type of child abuse in the future.

I expect that DCF will give you information on how they investigate, substantiate, and address appeal issues regarding this process and I will not address those issues. In an attempt not to overburden you with too much detail, I will briefly offer my comments in two areas:

1) General observations and concerns with the substantiation and appeal process; and 2) Analyses of two particular cases

I. General Observations and Concerns

First of all, regarding investigations and resulting substantiations there is the basic concern as noted above and in Rep. Martin's comments of the standard for finding child abuse or neglect to be a "reasonable person" standard. This has been discussed previously.

In my experience DCF investigations of child abuse and neglect also often fall far short of what is required by DCF policy, rule and statute. Investigators sometimes do not inspect the physical location where the abuse is alleged to have occurred. Witnesses who could provide important information are sometimes never interviewed. The time frames set forth in policy are not adhered to. In some cases DCF does not undertake an investigation at all and relies solely on the investigative

efforts of a local Special Investigations Unit of law enforcement. Children who have been accused are interviewed by law enforcement officers without a parent or other responsible adult present and are falsely told that whatever they report to the police will not go outside the room and they will not get into any trouble.

Regarding the appeals of substantiations, my experience has been that the professionalism of the contracted reviewers varies greatly, that there is little if any training to assist them in conducting the reviews and coming to their determinations and that, at least in times in the past, they have not felt that they have complete independence from DCF which was the intent of this body when legislation in this area was enacted in 2007. It was considered essential in the 2007 legislation to ensure due process that the reviewers were to be contracted independent individuals and not answerable to DCF.

As to the administrative review conferences themselves that are mandated by 33 V.S.A. § 4916a (e), it is clear from that statute that DCF has the burden of "proving that it has accurately and reliably concluded that a reasonable person would believe that he child has been abused or neglected by that person." Yet, in most cases that I have been involved in, DCF has no one attend those review conferences. Neither the DCF investigator or any social worker or supervisor involved in the investigation attends. This obviously makes it impossible to ask them questions regarding the investigation and what took place. It is, therefore, impossible to point out omissions on the part of the investigator or garner any additional important information that is not contained in the DCF written report.

At the very first appeal conference that I attended the reviewer began the conference by telling me that this was my chance to "give my side of the story." I replied that since DCF had the burden of proof I thought they should go first and we would then have an opportunity to rebut it but the DCF investigator did not attend. The youth's social worker, who had no familiarity with the investigation, participated by phone, basically stating that she had no knowledge regarding the investigation. The reviewer also remarked that "if two kids are saying it you have to believe them." Additionally he totally disregarded all of the shortcomings in the investigation and after my proffer of additional information refused to re-open the case.

On a separate occasion some months later when I arrived at another review conference for a different client at a different location the same reviewer was there to conduct the review. I was accompanied by my client and upon entering the room where the review was to be held the reviewer was sharing lunch with the DCF employee who supervised him and ran the review unit.

On behalf of a third client, I appealed the upholding of another substantiation by the same reviewer to the Human Services Board. As part of the "discovery" materials involved in the Human Services Board appeal I was sent not only all of the investigative reports and accompanying documents but email correspondence relative to the case. There was a stream of emails between the same reviewer and the head of the Registry Review Unit regarding the reviewer's decision from the administrative appeal conference. In one email to the head of the Unit the reviewer noted that

he was including his decision for the Unit head's review and mentioned if the Unit head felt there should be any changes to let him know. In the final line of the reviewer's email he stated that he wanted to get the decision back in on time so that he "wouldn't give Bob Sheil anything more to complain about."

My final interaction with this reviewer was on a fourth appeal where I was asking that he re-open an investigation due to newly discovered evidence regarding the alleged child victim's being coached to report abuse by my client and other important information. I was supported in this effort by the child's Guardian ad Litem, his foster mother, and a church worker who worked closely with the family. All three attended the review conference and testified. The reviewer upheld the substantiation and refused to re-open the case. The child's social worker told the foster mother afterwards that the reviewer said he wasn't interested in additional information and only in facts that had been reported incorrectly in the first place.

Another reviewer at yet another review conference told me that they were a therapist and didn't believe that children (victims) lie. Yet they failed to believe a third boy who was present and reported that the alleged event hand not occurred.

Finally the gravest reasons for my concern about how the administrative review process is handled and the decisions made at that level are made are the result of conversations I had with a former contract case reviewer who was highly thought of and asked to handle appeals in three different DCF Districts. She explained to me that contract reviewers were told that they had a template that they needed to have their decisions fit in. (I understand that there is a basic "decision letter" format that it makes sense to employ for purposes of uniformity, but the former reviewer told me that was not what she was referring to). She said there had been situations where she had initially overturned a substantiation and it had been sent back to her two or three times for her to review again to see if she would reach a different decision. She said that she did not believe that the contract reviewers felt that they could act in an independent manner. She left that position.

Finally, a few years ago when I had a conversation with the former Commissioner of DCF and his chief counsel regarding my concerns with the investigative and appeal policies regarding substantiations, he told me that roughly 25% of the appeals were being granted and the substantiations overturned so he believed the system was working. My response was that if 1 in 4 appeals is being granted that would give me pause as to the validity of the original investigations and substantiation decisions.

II. Analyses of Two Particular Cases

Case Scenario I

My client was a high school boy who was accused of nonconsensual sexual contact with a high school girl in a public park. He was interviewed by a Special Investigations Unit detective in the detective's car by himself outside his parent's home and tape recorded. His mother was asked to wait inside and not accompany him to "avoid him being embarrassed." He admitted to sexual contact but said that the young woman had initiated the contact and that it was consensual. He was substantiated on the basis of the SIU report.

There was a court case but it was dismissed and I was asked by the boy's attorney to appeal the substantiation.

No one from DCF showed up to present evidence (I told the reviewer that DCF had the burden of proof and needed to present their evidence). The reviewer said she had the DCF file and that was the evidence. I presented oral evidence from my client, his mother and an educator at my client's school.

The educator testified that the day after the alleged incident the complaining witness had stated in a crowd of other students that she had been the aggressor during the incident and that everything had been consensual. The educator reported this to the school principal when she was called into the office. The educator said that she would also provide that information to anyone investigating the incident as she felt my client was being wrongly accused.

No investigator ever spoke to the educator. The complaining witness also told the educator several weeks later that everyone at school knew she had made the allegation up.

The appeal meeting ended without the presentation of any additional evidence from DCF. I also pointed out to the reviewer that the DCF investigator had not conducted any investigation at all and was simply relying on information that was gathered by a Northwestern Special Investigations Unit officer.

Thirteen days after the appeal meeting I received a letter from the Registry Review Unit informing me that the reviewer was directing the DCF Office Director to re-open the investigation based on the fact that "in the course of the review questions have been raised regarding the "investigation process" and the "credibility/accuracy" of the complaining witnesses statements to (the special investigation unit)." It also instructed that the new "investigation needed to be completed and a written determination sent to" the reviewer within 30 days.

My client's mother called me about two and one-half weeks later and told me that she had not hear " a sound, a peep, nothing" from DCF about her son being re-interviewed and she knew that he investigation needed to be complete in 9 days. I told her I would call the District Director which I did that afternoon. The next day I received a voice mail from the District Director who told me he knew what I was calling about. He further related that his supervisor had called in the original investigator, who no longer works for DCF, but had been gracious enough to come in and speak with her. He further said that "the former investigator had reviewed everything and ,

the supervisor, then sent up a recommendation to the boss of the reviewers (head of the Registry Review Unit) so I'm not sure if there is going to have to be a full investigation or a re-opening of the investigation given what the record review revealed so if it goes any differently I will let you know. But that's it; it's in (Registry Review Unit's head's) hands right now so there

I telephoned the former head of the Registry Review Unit and he told me there was a debate in his office going on about where would they go with this case. There were discussions with the District Office with which there was some dispute regarding what to do next. He stated that they were struggling with what to do in a case where the reviewer decision is to reopen the case.

He further stated that his office, in a instance such as this, had decided to treat a case reviewer's decision to re-open an investigation as the conclusion of the review. This created problems which had not been previously contemplated about new time frames being set up to conduct a re-opened investigation, etc. He said they were switching how they were doing things. He said there was an ongoing discussion with the District DCF office and there was a need to clarify with the supervisor there, about what to do with this case. He further stated that he thought the District had two options: to "flip' the original substantiation or pursue an investigation.

He also told me that he could not tell me much but that there was a question being posed to him and he could not be specific with me what that was. He stated this was new territory and people were uncertain as to how to proceed.

He told me that I should inform my client's mother that the Department was working out these issues and he would tell me more later. I heard nothing more from the DCF office or the Registry Review Unit. When I checked the Registry some three months later my client's name had been removed.

Case Scenario II

My client was a 15 year old boy attending an alternative school program in the summer. There was an allegation that he had fondled a 17 year-old girl in a classroom at the program. The report was NOT accepted when it was first received. It was reviewed a second time and once again NOT accepted as a report. Two days later it was reviewed for a third time and again NOT accepted. Five days later central intake received additional information regarding the boy's background and accepted the report. The report was faxed to NUSI (the Northwestern Unit for Special Investigations) two days later and NUSI did NOT accept the report for investigation.

The alleged victim was not interviewed by DCF until 17 days later even though the protocol was to interview within 72 hours. This was due in part to the young girl's actions as she did not show up for two previously scheduled interviews. She had originally reported that my client tried to stick his hand down her shirt. At the DCF interview for the first time she alleged that he had touched her under her clothes and under her underwear.

DCF"S interviewing was not completed until 190 days AFTER the initial report was receive. DCF's policy at the time called for investigations to be concluded in 60 days which was also 130 days after the required completion for the investigation. The final determination to substantiate was made 199 days after the initial report, 139 days after it was required by policy to be made.

The basis for the substantiation was that the girl "stated during her interview that (my client) repeatedly touched her vagina, buttocks, and breasts under her clothing despite her pushing him away repeatedly and telling him to stop." Nowhere in any interview notes does it state that the girl stated that he "repeatedly touched her vagina." In fact, it is never stated that he touched her vagina at all. There were also many conflicting statements regarding whether she ever told him to stop. In actuality there were two staff member present on the only 3 occasions the entire summer that these two youth were in the same "classroom" and there were no reports of any such behavior by program staff.

The DCF investigator had never investigated the location of the alleged abuse. I went to the scene and discovered that the "classroom" was a small kitchen with appliances all along one wall and a long counter on the opposite wall, It was a very small room and the counter was only about 12 feet long. The activity that my client and the girl were engaged in while in that "classroom" was once a week for three weeks making lunches for summer outings that the students would take. While the sandwiches were being made, the two youth and the two staff members stood side by side at the counter. The school program had a "no touch" policy. There was no report made by staff of any sexually inappropriate conduct by my client who stood approximately one foot away from a staff member. There was no staff report that the young woman was every pushing my client away repeatedly and telling him to stop."

DCF Policy #56 , Substantiating Child Abuse and Neglect, states as follows:

Sexual abuse by one child on another child is substantiated when:

1. The victim is being exploited, or prostitution is involved;
2. Force, coercion or threat is used to sexually victimize the child, or the victim did not have the ability or opportunity to consent; or
3. A significant difference in age, size or developmental level is used to sexually victimize the child.

There was absolutely no evidence in this case that the alleged victim was ever being exploited. She was two years older than my client. . She was larger than my client. She was not developmentally delayed or handicapped.

There was absolutely no evidence anywhere in this case that force of any sort, coercion of any sort or threats of any kind were used to victimize the complainant. There is absolutely no reason to believe that the alleged victim did not have the ability or the opportunity to consent.

There was once again absolutely no way the third criterion was met. The alleged victim was two years older than my client . She was larger than my client by her own admission. There was absolutely no evidence that the alleged victim suffered from any sort of developmental delay. None of these were present and, therefore, none were used to victimize the complainant.

Even if those allegations which remained consistent during the pendency of this case were to be believed, the criteria for substantiating my client for sexual abuse were not met. While he may have engaged in inappropriate behavior, if the consistent allegations are to be believed, his conduct does not rise to the level, under Policy #56 which would allow for a substantiation to be upheld.

The contracted administrative reviewer overturned the substantiation in this case.

I apologize for the length of this memorandum but this has been an issue that my office has been dealing with for a very long time and one which has not elicited much review in quite a while.