MEMORANDUM

TO: Joint Legislative Child Protection Oversight Committee

FROM: Joel D. Cook, Executive Director, Vermont-NEA

DATE: June 30, 2016

SUBJECT: Mandatory reporting of suspected child abuse – a proposal

Introduction

Vermont-NEA suggested the 2015 removal from mandatory reporters the capacity merely to "cause a report to be made." We believe that standard was confusing, and it led to inconsistent school district policies and follow-through. That standard did not actually relieve the obligation from those who believed a report had been made. Some educators found themselves in trouble, not stemming from any improper intention but from inadequate attention to the actual statutory requirement.

The current standard, requiring all mandatory reporters to report directly and without regard to whether they know a report has already been made, "fixes" one problem but obviously has created another: multiple redundant reports by everyone who has reasonable cause to believe a child has been abused or neglected. That led to the introduction early this year of H.622.

As I testified before the House Human Services Committee, it doesn't much matter, from the standpoint of how we advise our members, how the reporting obligation is triggered. The current consequence of a mere allegation that an educator "fails" to report abuse typically involves a law enforcement investigation, possible prosecution by state's attorneys, potential loss of employment, and, for licensed educators, potential loss of the right to practice their profession. As a basic matter of preferring safety to sorrow, we simply advise our members to report.

That doesn't mean the current problem should be ignored, at all. We support fixing it, so long as in doing so we don't compromise the best interests of children or the rights of mandatory reporters.

The fix, in our view, has two parts, and they are related. They are to the trigger of the obligation and to the consequence for missing it. I get there after discussing provisions in H.622.

H.622: The Trigger

How can we be sure DCF is aware of suspected abuse and, yet, avoid redundant reports? The attempt in H.622 was language permitting a mandatory reporter not to report where (s)he

knows a report about the same child and matter has been made and has good reason to believe (s)he has nothing to add.

The House passed version, though, would not have worked well, at least in a school setting. Here's why:

Requiring written documentation from someone else that a report already has been made would require the reporter (a) to know about it, (b) to obtain something in writing about it, and (c) to know enough about the report made to be sure (s)he has nothing to add. I can see how that might work in, for example, a hospital where patient notes are entered and read multiple times daily by multiple adults. Schools and, I suspect, many other settings, however, don't have the same behaviors or procedures. In particular, there is no daily, or even monthly, much less multiple times daily, entry of information on each student's "chart" in school. As a result:

- We don't think it is good or practical (and, in some situations under federal education law – FERPA – perhaps even legal) to communicate broadly within a school setting that someone there has already reported to DCF about a specific child. The magic federal law term is "need to know," and, at least in many instances, it is not necessary for most adults to know details about each and every student.

- We don't readily see how a reporter can obtain from someone else written documentation that a report has been made. It is wholly unrealistic to put this obligation/exception in law and expect that doing so will result in any substantial reduction in the number of redundant reports. It may very well simply confuse people even more: what is sufficient "documentation," from whom, stating what, with what measure of certainty? Again, the school setting is not the same as a hospital setting.

- We don't see how, given the consequence of failing to report, to expect a mandatory reporter to feel secure in concluding (s)he doesn't have something to add to a report, at least without having access to the details of the report, not merely the fact a report has been made.

H.622: The Consequence

H.622 got hung up in the Senate because of the focus there on the elements of the crime of failing to report. Forcing the reporter, now a defendant embroiled in a possible criminal prosecution, to demonstrate, as an affirmative defense, a specific report was not mandated, would not have worked. Here's why:

The damage to the reporter is (often) done the moment an investigation by law enforcement authorities begins: the presumption of (criminal) innocence simply isn't sufficient insulation. The fact of being investigated generally leads to employment and license action and, not infrequently, to media involvement. That may very well be appropriate where some improper intent by a mandatory reporter is involved, but we have seen enough instances where mere

allegations of mere negligent failures to report have done irreparable harm to people just trying to do their job.

- Criminal prosecution requires truly clear standards – elements of the crime – susceptible of proof in a beyond a reasonable doubt setting with a potential $500 fine. This need for clear standards apparently is part of the reasoning behind the Senate version of H.622. This is not to suggest, however, that making it easier for state's attorneys to obtain convictions would be good or acceptable policy.

- The cost of defending against a criminal – or any – prosecution involving state's attorneys – is prohibitive, often making it only practical to accept the fine, but the damage to the reporter's reputation and livelihood is so great as to make the practical course sometimes impossible.

- There is another abuse reporting law (33 V.S.A. §6913, regarding disabled adults and older persons ("vulnerable adults")) that provides a useful comparison. The general construct is similar, but not the same: report if you are obligated and, if you fail, face the consequence. The differences in the consequence, though, are substantial. In the vulnerable adult context:

    - There is a criminal penalty for intentional violations, but not for merely negligent violations.
    - There is no potential prison sentence.
    - The financial penalty is substantially greater: up to $500/day for each day the report is late, up to a maximum of $5000, or ten times the penalty in the child abuse context.
    - The forum is administrative: the Commissioner of DAIL and appeal to the Human Services Board, rather than the criminal justice system.
    - The standard of proof – preponderance of the evidence rather than beyond a reasonable doubt – obviously is substantially simpler for the state to meet.

The most difficult difference for us to bridge: how to reconcile the presence, in the child context, of a penalty for mere negligence and of potential incarceration for a mandatory reporter's intentional concealment of abuse or neglect, and their absence in the vulnerable adult context. While we would prefer, in the proposal below, to conform the two reporting statutes with each other, we recognize there are considerations that may not make that viable.

Our Proposal

We propose changing the trigger and the consequence of a failure to report suspected child abuse or neglect so that:

- Mandatory reporters will know when they must report and when it is permissible for them not to report, AND

- The state will have a simpler method of enforcing the obligation to report against those who, without improper intent, fail to meet it.

The trigger, similar to the thinking underlying H.622, would become:

- A mandatory reporter (as currently) who has reasonable cause to believe a child has been abused or neglected must report, UNLESS
- (S)he knows, because (s)he has been told, a report about the same child and event has already been made AND
- (S)he reasonably believes (s)he has nothing to add to that report.

The important difference from the H.622 approach: rather than having to obtain documentation from someone else that a report has already been made, the mandatory reporter would complete a form – perhaps one on DCF's website – attesting to reasonable beliefs a child has been abused or neglected, someone else specified has reported about it, and (s)he has no additional information. That way, reporters fulfill their duty, DCF is not flooded with redundant reports, AND DCF has contact information in case it finds a need to follow up.

The consequence would become one of the following:

Option A. To conform our responses to abuse, whether of children or vulnerable adults:

Adopt in the child abuse context the consequence in the vulnerable adult law, which, for willful violations only, is an administrative penalty – not a criminal fine – up to $500/day for every day a report is late, to a maximum of $5000, imposed through a process administered by DCF and the Human Services Board rather than the criminal justice system.

OR

Option B: To simplify our response to failure to report suspected child abuse and preserve a criminal justice response for those limited instances where failure to report is accompanied by intent to conceal abuse or neglect:

- For a mere negligent failure to report violation: an administrative penalty up to $500, the same amount as in current law, but imposed through a process administered by DCF and the Human Services Board rather than the criminal justice system.

- For a failure to report violation involving intent to conceal abuse or neglect: the current criminal penalty (a sentence up to 6 months and/or a fine up to $1000).

The benefits of either approach:

- Most (but not all) redundant reports may be avoided;
- The system of reporting and of sanctioning is simplified; and
- The general burden on the criminal justice system is eased.

I understand DCF feels it does not have the resources for this approach (regarding a web-based form or administering the penalty). This approach, however, would reduce the number of redundant reports it's been receiving, taxing its current limited resources. And, DCF would not be required to examine every situation to determine if the absence of a report was permissible. To make the system work better for children, for reporters, and for the state, the minimal increase in state resources needed here seems well worthwhile.

Finally, a word about the vast array of mandatory reporters. They are Vermonters who did not ask for the role, but who have the role by virtue, generally, of their chosen employment or profession. In all things related to abuse, the primary public policy focus should be on its victims and perpetrators. We don't sanction purposeful failures to report abuse, but, regarding the vast numbers of mandatory reporters, they are just trying to help and to do their jobs. We believe the central focus of your discussion should be on helping them and DCF do theirs.

Suggested language is on the next page.

Possible bill language amending current child abuse reporting statute

The purpose of this bill is to simplify the process through which (a) the Department for Children and Families obtains reports of suspected child abuse and (b) mandated reporters who fail to report are sanctioned.

Sec. 1. 33 V.S.A. §4913 is amended to read

(c) Any mandated reporter who reasonably suspects abuse or neglect of a child shall **either (i)** report in accordance with the provisions of section 4914 of this title within 24 hours of the time information regarding the suspected abuse or neglect was first received or observed **or (ii) complete a paper or on-line form developed by the Department for Families and Children attesting to the mandatory reporter's reasonable beliefs that (A) a specified child has been abused or neglected, (B) a named other person has made a report about the same matter and (C) the mandatory reporter has no additional information to report.**

Option A

(conforming our responses to abuse of children and vulnerable adults)

Replace current (h)(1) and (2) as follows (mimicking 33 V.S.A. §6913(b)):

(h)(1) Whenever the Commissioner finds, after notice and hearing, that a mandatory reporter has willfully violated the provisions of subsection (c) of this section, the Commissioner may impose an administrative penalty not to exceed $500.00 per violation. For purposes of this subsection, every 24 hours that a report is not made beyond the period for reporting required by subsection (c) of this section shall constitute a new and separate violation, and a mandatory reporter shall be liable for an administrative penalty of not more than $500.00 for each 24-hour period, not to exceed a maximum penalty of $5,000.00 per reportable incident.

(2) This section shall not be construed to prohibit a prosecution under any other provision of law.

Option B

(simplifying our response while preserving a limited criminal justice role)

(h)(1) A person who violates subsection (a) of this section ~~shall be fined~~ **may be subject to an administrative penalty, imposed by the Commissioner, of** not more than $500.00.

(2) A person who violates subsection (a) of this section with the intent to conceal abuse or neglect of a child shall be imprisoned not more than six months or fined not more than $1,000.00, or both.

(3) This section shall not be construed to prohibit a prosecution under any other provision of law.