MEMORANDUM

To: House Committee on Human Services

From: Whit Smith

Re: H.622

Date: February 4, 2016

Section 1: Proposed Change to the Mandated Reporter Statute

Kenneth Schatz, the Commissioner for the Department for Children and Families ("DCF") has noted that Act 60 imposed a requirement that mandated reporters make reports of suspected child abuse or neglect even though an initial report already had been made. This portion of Act 60 has had a distinctly negative impact on mandated reporters and Designated Agencies in particular. If a clinician made a mandated report of suspected abuse or neglect and then so informed his or her supervisor, then Act 60 required the supervisor to make another report even though he or she had no new information to offer. Act 60 thus triggered a needless over-reporting of suspected abuse or neglect and only placed additional pressures on DCF intake personnel.

For these reasons, the corrective provision set out in Section 1 of H.622 warrants enactment.

Section 2: Proposed Limitation on Patient Privacy Rights

Section 2 would permit certain types of professionals to circumvent the privacy rights of patients under State law in order to cooperate in a DCF investigation of suspected abuse and neglect. The professionals in question would have complete discretion whether or not to disclose otherwise confidential information regarding their patient.[1]

There are multiple problems with this proposed legislation. They include the following:

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[1] 12 V.S.A. § 1612(a) sets out the patient-physician and patient-counselor privilege. The term "privilege" refers to the existence of a relationship that ensures the confidentiality of the information exchanged. For example, discussions between an attorney and his or her client generally are considered "privileged" and not subject to disclosure.

A. Legal Issues

Section 2's expansion of permissible disclosures of confidential information would run afoul of privacy restrictions contained in federal law. The provisions governing the disclosure of substance abuse treatment are set out in 42 C.F.R. Part 2. They only allow disclosures by counselors for the initial mandated report of child abuse or neglect. The Legal Action Center has stated as follows:

> 42 C.F.R. Part 2's exception [to the rule of confidentiality] allowing programs to comply with mandatory child abuse reporting requirements under state law applies only to initial reports of child abuse or neglect, and to a written confirmation of that initial report. The exception does not apply to requests or even subpoenas for additional information or records . . .

Legal Action Center, *Confidentiality and Communications* at 102 (2012). In short, federal law bars substance abuse treatment programs and counselors from complying with Section 2 of H.622.

The same is generally true of the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). That provision allows the disclosure of protected health information for reporting suspected abuse or neglect of a child without the patient's authorization. 45 C.F.R. § 164.512(b)(1)(ii). While HIPAA permits disclosures of confidential information for certain law enforcement purposes, cooperation in a DCF investigation after an initial report has been made does not appear to be permitted without the patient's consent.

A third federal provision, the Family Educational Rights and Privacy Act ("FERPA") is similarly implicated by Section 2. It provides for the confidentiality of educational records. Like HIPAA's Privacy Rule, the reporting of suspected abuse or neglect of a child by school-based clinicians is authorized by FERPA without parental consent, but not the disclosure of personally identifiable information as part of a DCF investigation.

These three federal statutes preempt or trump state laws that are in conflict with them unless, in the case of HIPAA's Privacy Rule, the state provision is more protective of privacy rights. That means that if a challenge to Section 2 of H.622 were mounted, it is likely that the more robust privacy rights found in HIPAA, FERPA, and 42 C.F.R. Part 2 would prevail over this proposed legislation.

B. Policy Considerations

Section 2 allows any of the listed types of professionals who may have information about the suspected abuse or neglect of a child have the option of evading the requirements of State privacy law and providing otherwise protected information to DCF investigators. This possible bypassing of the patient-counselor privilege does not extend exclusively to the professional who

made the initial mandated report. As Section 2 is now written, it applies to any of the identified categories of professionals.

This approach may enhance DCF's investigatory efforts. But from a treatment-oriented perspective, Section 2 could well erode patients' confidence that information given to licensed professionals with an expectation of privacy will be honored. A client enters into the therapeutic relationship based on the understanding that generally his or her most personal information will be safeguarded. If the authority to make the decision about the disclosure of privileged information lies exclusively with the treating clinician, then the client has no meaningful assurance of confidentiality. Moreover, Section 2 sets no limitation on the nature and scope of the protected information that could be disclosed to DCF investigators; all information acquired by the counselor over the course of treatment could be shared with investigators. Such an erosion of patient rights would likely serve as a disincentive for some clients seeking professional treatment. As the United States Supreme Court has concluded,

> if the purpose of the [psychotherapy] privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications . . . is little better than no privilege at all.'

Jaffee v. Redmond, 518 U.S. 1, 18, 116 S. Ct. 1923, 1932, 135 L. Ed. 2d 337 (1996).

The substantive provisions in Section 2 raise important policy issues. The balancing of child protection concerns and privacy considerations is a subject that deserves deliberative reflection. It warrants a process in which multiple positions are examined and a variety of possible solutions explored. A weakened patient-counselor privilege represents a distinct alteration in Vermont law – one that should not be adopted summarily as part of the fine tuning of Act 60.

C. Drafting Issues

The legislation extends not only to the statutory privilege, 12 V.S.A. § 1612(a), but also to the patient-counselor privilege created by Vermont Rule of Evidence 503. H.622's inclusion of that Rule is hard to justify; it only applies to court proceedings, not to DCF investigations. In addition, the Vermont Legislature's authority to obviate a rule issued by the Vermont Supreme Court necessarily implicates important separation of powers issues as well as the procedures set out at 12 V.S.A. §§ 1-4.

All the above considerations suggest that the Legislature should not enact Section 2 of H.622 at this time. The potential erosion of the patient-client privilege constitutes a complex topic that should be not be addressed through curative legislation such as H.622.