

**VIA EMAIL**

March 27, 2015

House Committee on Human Services  
Representative Ann Pugh, Chair  
Vermont State House  
115 State Street  
Montpelier, VT 05633

**Re: S. 9 – “An act relating to improving Vermont’s system for protecting children from abuse and neglect”**

Dear Representative Pugh:

On behalf of the AOE, I am writing to offer specific comments about the (proposed) new crime of "Failure to Protect a Child" created by S. 9, at Section 3 of S. 9, as passed by the Senate. Section 3 of the bill is problematic from AOE's perspective. This section could result in the felony prosecution of a school employee (faculty or staff), with a potential penalty of 10 years in jail, and/or a \$20,000.00 fine.

A potential scenario is the case of an educator or staff person in a school who may face an allegation of failing to act on information or knowledge related to the suspected abuse or neglect of a child. We believe it is relevant for legislators to note that AOE is not seeing any patterns of underreporting, late reporting, or failing to report to DCF, in suspected cases of abuse and/or neglect of a child, under the current law. To the contrary, we do see evidence that in many cases, educators err on the side of caution, and typically report just about any activity that could possibly be construed as suspected abuse or neglect of a child.

Through an MOU between AOE and DCF, AOE is notified, almost immediately, whenever someone makes a report of suspected abuse or neglect of a child by a school employee to DCF. Sometimes these reports are based on allegations of educator misconduct in student - teacher interactions. Other times, school-based reports to DCF relate to concerns around suspected abuse outside the school setting that educators and other school staff persons observe. The mandated reporter statute (33 V.S.A. Sec. 4913), along with the requirements around reporting unprofessional conduct allegations (by educators) to the AOE (16 V.S.A. Sec. 1699), provides the AOE with important perspective about reporting practices, types of reports made, and follow up action, in the context of school-based reports to DCF. What we see is that these reports fall along a broad spectrum ranging from the marginal possibility of abuse or neglect, to the very serious possibility of abuse or neglect. Once again, our window into the level of reporting happening in the field shows us that school employees are erring on the side of caution, and reporting just about any concern related to the possibility of abuse or neglect of

**Rep. Ann Pugh, Chair**  
**House Committee on Human Services**

a child. In addition, AOE reminds the education field, at least annually of the obligation of school based staff to report to DCF in cases of suspected abuse and/or neglect, with a very clear and direct memorandum from the Secretary of Education. The message, in a nutshell, is "err on the side of reporting," and that is exactly what is happening.

What about actual cases where educators or other staff members in schools may have failed to report under the current reporting requirement? What we do see, on rare occasions, are reports to the AOE of (alleged) educator misconduct for failing to report to DCF, as required under the mandated reporter law. In virtually all of these cases, to the extent the alleged non-reporting might have occurred, there are reasonable if not legitimate reasons and/or defenses that make it difficult, if not impossible, to substantiate an allegation of non-reporting, in the unprofessional conduct context (AOE investigates allegations of unprofessional conduct against licensed educators).

The following scenario is hypothetical and not based on the facts of any past or current licensing case:

- Consider the case of two (2) educators that become privy to the exact same information about the possible abuse of a child, occurring in the home. The information conveyed to the two educators is circumstantial in nature, but both Educators agree that a report should be made to DCF. Educator A, on a Monday morning says to Educator B, I will report to DCF. Educator A has 24 hours to do so under state law. Educator B agrees that Educator A will take up this task. As the school day unfolds, and Educator A is attempting to find the time to gather the information, collect his/her thoughts about what needs to be conveyed to DCF, Educator A is overwhelmed by other required duties.
- By the middle of the next day (Tuesday), Educator A has his/her notes together and is ready to make the report to DCF. At this point, 27-28 hours have passed from both Educators gaining knowledge about suspected abuse or neglect. Educator B has not reported, in deference to Educator A assuring Educator B that he/she (Educator A) will make the report to DCF. At this point, Educator A is slightly outside the 24 hour reporting window.
- Late in the morning the following day, about 26-27 hours after the two educators first gaining knowledge of suspected abuse, the student (absent from school) is physically abused in the home and suffers a broken arm as a result.
- The AOE eventually receives a related report of unprofessional conduct alleging that both educators failed to report to DCF as mandated reporters, within 24 hours. In the course of its unprofessional conduct investigation, the AOE verifies the above fact pattern, but also learns that, had the report by Educator A been received by DCF, at or



**Rep. Ann Pugh, Chair**  
**House Committee on Human Services**

before the 24th hour, DCF would not, in all likelihood, have been able to act on the information, regardless, in a matter of one or two hours, so as to have prevented the act of abuse that resulted in the student suffering a broken arm.

- Based on these facts and circumstances, the AOE ultimately declines to file formal charges against either Educator's professional license. Nonetheless, under S. 9 at Section 3, there may be no affirmative defense available to either Educator (in any related criminal prosecution). And, it may not be unreasonable for a state prosecutor to identify the late report of Educator A, and the non-report of Educator B, as a proximate cause of the abuse and related injuries suffered by the student.

These types of scenarios can happen. It seems inherently unfair to educators and school staff to put them in the position of a facing a possible felony prosecution in circumstances such as this. Under the current mandated reporter law, this would probably be a difficult case, at best, for the state to prosecute. The AOE cannot comment with any authority on that, but past experience has shown that the State typically has not prosecuted in scenarios like this. Under the proposed law, State's Attorneys may, arguably, feel compelled to prosecute. This could result in the incongruous outcome of an educator facing a possible felony prosecution while the AOE, through its investigative process, declines to file formal charges against an educator's professional license; and, the school district or supervisory union employer may not impose any adverse personnel action.

In addition to our specific concerns about Section 3, the AOE also joins the more comprehensive concerns already voiced to the Committee by DCF.

Thank you for your consideration of the AOE's comments. Please contact me with any questions or concerns.

Best wishes,



Gregory J. Glennon  
General Counsel

