

## MEMORANDUM

TO: House Human Services Committee

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

DATE: March 31, 2015

SUBJECT: Vermont-NEA testimony on S.9 – "Reasonably should have known"

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On this cover page, I address two related matters. The first is the role of school employees in the mandatory reporting process, primarily as background for you. The second are our basic thoughts about Section 3's establishment of a felony regarding "failure to protect a child." Appended to this memo is the one Vermont-NEA submitted to the Committee on Child Protection last September.

### **1. Role of school employees in the mandatory reporting process**

School personnel as mandatory reporters. School personnel (at more than 16% of all reports) and law enforcement personnel (also at more than 16%) are the primary reporters of suspected child abuse and neglect.<sup>1</sup> Other groupings account for no more than about 11%. Parents and other relatives each account for about 6% of all reports. By contrast, a parent is considered the perpetrator in more than 80% of instances nationally. Educators fall within a basket category of "other professionals" accounting for 0.1% of instances.

Vermont-NEA's notice about mandatory reporting. Over decades, we have informed our members of their obligation under the mandatory reporting statutes. Attached is the 2-page document we distribute, most recently revised in June, 2013.

### **2. Protecting our children: "Reasonably should have known" a new felony?**

We acknowledge the spirit in which the Senate developed Section 3. There has got to be a less severe and punishing approach. It appears that these provisions were written by lawyers for lawyers: they completely fail to take into account the circumstances under which school employees, and adults in virtually any walk of life in which they have the care of someone else's child, actually function. In particular, the mere whiff of accusation of wrongdoing by a school employee almost guarantees a career-ending spiral of process, as well as emotional and monetary cost, whether or not that process results in a criminal conviction. The availability of affirmative defenses does little to address that. Of course, we should protect our children. We should not, however, needlessly expose educators, clergy, camp counselors, coaches, scoutmasters, health professionals, even social workers and state caseworkers, to such extreme consequence for not knowing what they "reasonably should have known."

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<sup>1</sup> This information comes from the 2012 report on "Child Maltreatment," published by the US Department of Health & Human Services.

## MEMORANDUM

TO: Vermont Legislative Committee on Child Protection  
Governor's Council on Pathways from Poverty

C: Ken Schatz, Commissioner, Department for Children and Families

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

DATE: September 10, 2014

SUBJECT: Educator comments and suggestions

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Over the past month, we elicited comments from more than a dozen Vermont-NEA members regarding their interactions with the Department for Children and Families (DCF). I seek to summarize them here. Our original purpose was to address the specific mission of the Committee on Child Protection. More recently, the Council on Pathways from Poverty began to solicit comments on its broader mission, leading to our decision to send these comments to both bodies, despite their narrower focus.

Our members' thoughts and suggestions appear to overlap with others the Committee has heard. They range from true fellow feeling for the difficult work of DCF caseworkers – in terms of their inadequate numbers and various constraints within which they perform their jobs – to the same sorts of dissatisfactions I know you have heard from a variety of voices. The connection between the work of DCF and public schools is simple to describe. One teacher, with a series of concerns about DCF, says it this way:

"What are teachers to do when the expectation is to educate all students, when not all students are available for learning and we have minimal support from DCF?"

That notion of "minimal support" should not be received as criticism of individuals, but rather of a policy-driven child protection system that does not appear to acknowledge sufficiently it can't do the job alone. As you will read below, our members are the eyes and ears that bring to light the lion's share of suspected abuse and neglect. Once the reporting obligation is completed, though, our members hardly ever learn what happens and feel they hardly ever are engaged to help.

The essential theme here, therefore, is that, whatever other steps you may wish to take in this context, the most important is to facilitate, even require, greater coordinated local efforts involving DCF and other helping agencies to address the welfare of children subject to reports of abuse or neglect. This extends to addressing

the important matter of confidentiality in ways that focus on protecting children more than on protecting information.

The comments here, therefore, fall under the following overlapping headings:

- A. Confidentiality
- B. Coordination
- C. Prioritization
- D. Reunification

Please note, as you go through these comments, how those made under one of these headings relate as well to others.

Mandatory reporting. First, a word about the role of school personnel in reporting suspected abuse or neglect.

School personnel as mandatory reporters. School personnel (at more than 16% of all reports) and law enforcement personnel (also at more than 16%) are the primary reporters of suspected child abuse and neglect.<sup>2</sup> Other groupings account for no more than about 11%. Parents and other relatives each account for about 6% of all reports. By contrast, a parent is considered the perpetrator in more than 80% of instances nationally. Educators fall within a basket category of "other professionals" accounting for 0.1% of instances.

Vermont-NEA's notice about mandatory reporting. Over decades, we have informed our members of their obligation under the mandatory reporting statutes. Attached is the 2-page document we distribute, most recently revised in June, 2013.

### **A. Confidentiality**

A basic sin of a public employee and of many professionals is the improper sharing of information about clients/students/patients. What our members noted more than anything is the "failure" of DCF to keep them informed about the status of their reports and the children who are the subjects of their reports. Most recognize it not as an actual failure but as the product of a much too narrow vision of child protection. Public school employees are subject to strict confidentiality obligations that, at a minimum, rival those of just about any profession. Yet, the federal law generally limiting the sharing of information about students only to those with a "need to know," extending by the way to state required abuse reporting, does enable school professionals and employees to work actively with others in the best interests of their students. The manner in which DCF's confidentiality rules are implemented leaves many educators, and others, unwisely in the dark, and that does nothing to protect children. Here is how one educator makes the point:

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<sup>2</sup> This information comes from the 2012 report on "Child Maltreatment," published by the US Department of Health & Human Services.

"I am for reforming 'confidentiality' laws. Currently, DCF basically wants everyone to share everything with them with no reciprocal arrangements. I do not think they need to be reformed in the sense of releasing juicy details to newspapers...I do mean that DCF should be able to talk openly with other professionals who are also under confidentiality requirements, such as school personnel, police, health care, etc. The current law, or interpretation of the law, makes communication one way and this will never lead to working relationships which would only make children safer."

The same educator "confesses" that "Honestly, the best workers find ways to communicate around the law...because they know it is the only way to work. It is not a discussion of total secrecy or no secrecy, it is a matter of professional communication respecting people's confidentiality." He concludes with what amounts to one of the best ironic observations made:

"We often used to discuss how 'secrecy' in a family is a dynamic common in abuse and neglect, and the system uses secrecy in such a dangerous and dysfunctional way."

## **B. Coordination**

Directly related to the matter of confidentiality is the extent to which DCF works with or works "independently" of other entities and professionals responsible for children. The comments we received focus on the importance of local, rather than centralized, decision-making, on obscure "jurisdictional lines," and on lack of interaction between DCF and the school regarding the same child.

1-800. An educator who also had years of DCF employment suggests that the question be asked "if the 1-800 statewide report system has worked for Vermont," acknowledging its similarity to the approach in other states. He states, however,

"It gets in the way of the system working because of (local) relationships people have and has made the system much more bureaucratic and 'by the book.'"

That is, centralizing reporting may be "efficient" and may make decision-making about "accepting" reports more consistent, but its secondary effects – loosening if not eliminating locally established professional relationships – does not help children.

Jurisdictional lines. Several educators report about confusing "jurisdictional" statements. One special educator recited the following experience in the context of seeking attention to one of her high school students:

"I took one of my concerns straight to the top...to the commissioner's office, after contacting the governor. The response I received was that my concern

didn't fall within DCF guidelines but was a criminal concern and I needed to contact my local police and follow up with them."

Plainly, a system that requires educators and others to report suspected abuse, and that centralizes the system through which reports are processed, should be able to accommodate a report that implicates law enforcement rather than DCF. It is obviously a system flaw to require centralized reporting that leads to a suggested secondary report by the same individual. Plainly, this educator met the obligation of a mandatory reporter. Equally plainly, however, the report should have been sufficient to set in motion measures to protect children of any age in the midst of an abusive situation.

"Competing services." A school counselor, who has truly lost faith in DCF's capacity to help children, makes a telling point:

"If DCF opens an assessment, do they realize, if we as a school made the report, we undoubtedly offered the same services to the family?"

That is, schools work with children in need everywhere and every day. Indeed, educators become aware of suspected abuse and neglect largely because they interact with their students and their students' families on a routine basis. It makes obvious sense, therefore, for DCF to work with the child's school in determining what services are in order, much in the same way the school engages with a variety of agencies where it is involved in the life of a special needs child.

### **C. Prioritization**

Several educators commented about DCF "triage," believing it stems from both the outsized workload of caseworkers and, frankly, the limits of our collective understanding how to help in egregious circumstances. A special educator cited the example of a 15-year old in custody, foster care, and "perpetually under the influence of drugs," about whom the caseworker is said to have responded: "Her parents are addicts; being clean for 2 hours is all we can hope for." This educator concluded, not as a criticism of the individual worker, but as a comment about our state of knowledge: "Our system is a mess and our DCF case managers are not equipped or capable of making the best decisions for these children, regardless of their age." While each profession may lay claim to "knowing" how to respond to such family dynamics, we all share the frustration involved in how to approach them. One educator put it this way:

"I do support and will continue to support the very tough work at DCF. Yes, I wish the process of 'reporting' were more streamlined. (Do they really need to know the birth date or mom's phone number?) It's especially difficult when reporting on a child not from our classroom. That being said, they, like we, have a tough job and we all need to support rather than distort each other."

Money. A more prosaic take on the concern over prioritization relates, of course, to the pressure always to "save the state money." A commenter with broad-ranging experience over several decades, stated that "(DCF) workers should not feel pressure...from the top down to 'meet the budget.' I heard too often in meetings that 'my supervisor would never go for it because of money."

Another said:

"...[I]t's very important that we don't blame DCF for the terribly desperate state of affairs. DCF needs more people. Staff are overworked. I've witnessed many admirable interventions over the years. I've been impressed when I'm present at DCF interviews of students – skilled workers who are thoughtful and careful, but very, very busy...[Cutting] services from Vermont's most vulnerable people...creates extreme stress and despair."

Foster care. A final thought about the impact of both money and the sheer difficulty associated with this arena has to do with the foster care component of the system. We received only a couple of related comments. One was cited in the opening to this segment. The other is from a teacher who has made multiple reports to DCF over the years. His comment is more a series of questions:

"I have confidence that, as in a school, there are many committed people working to help kids and families out, but there are some things about the way DCF functions that I do not understand. Chief among these is why children in DCF custody seem to be moved around so often. Many of the young people I have heard of in the DCF foster system seem to get bounced from home to home, sometimes many times a year. Is there a lack of qualified foster families in Vermont? Are families unprepared to live and work with kids who have suffered developmental trauma? Do families quit?"

Types of prioritization. The comments about prioritization, rather than the reasons for it, fall under three basic categories: "seriousness," abuse v. neglect, and age.

Seriousness. Where a human services system is understaffed, it is obvious that policy and service will tend to focus on the "most serious" concerns. That is plainly the focus of most of the comments we received. One particularly frustrated special educator stated, "I don't expect any response from DCF unless there is a documented mark on a student (or a referral to DCF from the police)." A school counselor, with years of DCF employment in her own right, went further down that same path:

"At one time our baseline for having DCF respond was, does the child have a visible bruise? Now, we have children with documented, colorful, recent, large bruises across faces, on arms, and on bodies. Children have been slapped, punched, pushed down steps, and thrown on the floor and still no

one responds or advocates in any shape or form for these children...I have also watched helplessly as the same child is hit again for telling DCF but no longer will talk to me for fear I will make another report."

That is, there are apparent instances of appropriately reported child abuse that, due to the need to prioritize responses to reports generally, lead nowhere.

Neglect. Comments suggest that child neglect – no less important than child abuse for purposes of mandatory reporting – is treated with less vigor. A special educator quotes different local DCF workers, in this context:

"Poor parenting is not a crime."

About a 15-year old girl (repeating from above): "Her parents are addicts; being clear for 2 hours is all we can hope for."

Age. A less prevalent comment under this prioritization heading is the age of the victim. One educator in particular pointed out that, as the age of the reported victim rises, the capacity of "the system" to respond declines.

#### **D. Reunification**

Several educators take issue with the same "primacy of the family unit" policy I know you've encountered elsewhere. I mention them here not to challenge the general policy but to suggest that its application always be subject to the specific child's best interests. One educator stated: "The mission of reunification is flawed (laudable, but flawed). There needs to be more balance between reunification at mostly all cost and taking kids needlessly from parents." This educator points out that "this is out of DCF's hands to a large degree."

Another long-time educator working with youth mentions this policy requirement in commenting about the overall "system's" shortcomings:

"The Department seems to be seriously understaffed. Workers have been forced by laws and regulations to prioritize family reunification and kinship care, or to pressure foster parents to commit to adoption in a very short time frame and convince parents to permanently relinquish parental rights, even when those options are not in the best interests of the child."

#### **Conclusion**

On behalf of Vermont-NEA's teacher and support staff members all over the state, I hope you find these summarized comments helpful as you continue to examine how the state best should approach the difficult work of protecting its most vulnerable citizens. If you would like any elaboration about these comments, please just let me know. Thank you very much.

## Vermont-NEA

### Information about reporting suspected abuse of a child or "vulnerable adult"

June, 2013

*The obligation to report suspected abuse to state authorities is serious and absolute. We are providing this information to help our members understand what the law requires them to do, and what the consequences of failure to do so may be. In short, if you are a mandatory reporter and have any doubt about whether to make a report, you should err on the side of making a report.*

#### 1. Why are there "mandatory reporters?"

Generally, mandatory reporter laws are designed to help protect children and vulnerable adults from abuse, or continuing abuse, by family members. Indeed, no "family member" is ever listed as a mandatory reporter. Rather, adults who typically have contact with children and vulnerable adults in other settings are. These laws also address abuse by non-family members.

#### 2. Who within public schools are mandatory reporters?

All school employees and certain other adults who work in schools for other employers.

*Note: The reporting obligation extends beyond the workplace. A mandatory reporter aware of suspected abuse is obligated to report it whether the suspicion arises at work or elsewhere.*

#### 3. May anyone else make a report?

Anyone else may make a report.

#### 4. What triggers a mandatory report?

Children. A mandatory reporter must report or cause a report to be made to the Department for Children and Families (DCF) if [s]he "has reasonable cause to believe that any child has been abused or neglected."

Vulnerable adults. A mandatory reporter must report or cause a report to be made to the Department of Disabilities, Aging, and Independent Living (DAIL) if [s]he knows of or has received information of abuse, neglect or exploitation of a vulnerable adult or has reason to suspect that a vulnerable adult has been abused, neglected or exploited.

#### 5. What is the meaning of "child?"

A "child" is "an individual under the age of majority." The age of majority is 18.

#### 6. What is the meaning of "vulnerable adult?"

In schools, a "vulnerable adult" is a person at least age 18 who is "impaired due to brain damage...or disability" that impairs the ability to care for oneself or protect oneself from abuse, neglect, or exploitation.

#### 7. When must a mandatory reporter report or cause a report to be made to DCF or DAIL?

Children. Within 24 hours of first having reasonable cause to believe a child has been abused or neglected.



Vulnerable adults: Within 48 hours of first having reason to suspect a vulnerable adult has been abused, neglected, or exploited.

**8. How is a report of suspected abuse to be made?**

Call **1-800-649-5285** regarding children or vulnerable adults.

DAIL (for vulnerable adults) lists an additional work-hours number: **1-800-564-1612**.

**9. What should a mandatory reporter do if [s]he isn't sure that abuse (or neglect or exploitation) has occurred and wants to find out – to make sure [s]he has a good enough reason to report?**

Call to report anyway. The obligation a mandatory reporter has is to report or cause a report to be made. Conducting an investigation, however limited, to make any deeper determination is not part of the obligation. *In fact, attempting to conduct an investigation, however limited, may very well hurt the capacity of DCF, DAIL, or law enforcement authorities to do their job*, and it may cause the reporter to fail to report or cause a report to be made in timely fashion.

**10. What if a school policy requires that a mandatory reporter report to an administrator?**

A school's policy must be followed, but doing so may not be sufficient. A policy stating a mandatory reporter fulfills the legal obligation to report or cause a report to be made by reporting to a school administrator is not correct unless the administrator actually makes a timely report to DCF or DAIL. If the administrator (despite also being a mandatory reporter) does not follow through, the mandatory reporter remains obligated to report or cause a report to be made to DCF or DAIL.

**11. What if a school policy requires that a mandatory reporter not report directly to DCF or DAIL?**

That policy violates state law, unless in every instance a report to an administrator is followed by the administrator's timely report to DCF or DAIL.

**12. Won't my employer attempt to discipline me for failing to follow school policy?**

The law protects from retaliation individuals who make reports in good faith, and it actually enables them to sue their employer for retaliation.

**13. What if the general experience of reporting to DCF or DAIL is slow or inadequate response?**

That experience is irrelevant to the mandatory reporter's obligation to report or cause a report to be made.

**14. What happens if a mandatory reporter fails to report or cause a report to be made to DCF or DAIL?**

Children. It is a criminal offense punishable by a fine of up to \$500. A mandatory reporter who fails to report and intends to conceal abuse or neglect may face imprisonment up to 6 months and a fine up to \$1000.

Vulnerable adults. A willful violation is a civil offense punishable by a fine of up to \$500 for every 24-hour period a report is not made beyond 48 hours, up to a maximum of \$5000.

**15. Are there other potential consequences of a mandatory reporter's failure to report or cause a report to be made?**

Licensed professionals who violate the mandatory reporting laws may also face licensing discipline.