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Agency of Human Services

Memorandum

To: **Senate Judiciary Committee**
From: **Karen Shea, Family Services Deputy Commissioner**
Leslie Wisdom, DCF General Counsel
Re: **H.727 Children's Hearsay Statements**
Date: **April 4, 2018**

Purpose of the Bill

The purpose of this bill is to protect children. H.727 addresses a very narrow area of law regarding the type of evidence that is admissible in child abuse and neglect substantiation appeals before the Human Services Board (HSB). The goal of the legislation is to prevent re-traumatization of child victims by allowing their reliable prior statements to be admissible in appeals provided those statements are determined to be trustworthy. The key language in the bill with regard to a child's prior statements is:

> "Evidence shall be admissible if the time, content, and circumstances of the statements provide substantial indicia of trustworthiness."

Child Protection Registry

The Department for Children and Families (DCF) receives over 20,000 phone calls every year with concerns about children. DCF has different options for addressing concerns that rise to the level of alleged child abuse/neglect, assessment or investigation. By law, assessments cannot result in a substantiation, only investigations can. DCF has refined its acceptance policies to be clear that only the most serious types of child maltreatment go the investigative route. The mandatory investigation route includes:

- sexual abuse or risk of sexual abuse (with exceptions for child perpetrators noted below),
- parent/caretaker's acts or omissions resulting in a child fatality,
- parent/caretaker
    - abandoned the child,
    - maliciously punished a child,
    - physically abused a child under 3 years of age,
    - physically abused a child who is non-verbal or non-ambulatory, or
    - exposed a child to the production of methamphetamines.

DCF does not automatically investigate cases where children are accused of sexually abusing other children. Investigations are only opened when the alleged perpetrator is 14 years old or older. All other cases of youth accused of sexual abuse are assigned an assessment intervention, including all cases of sexting between children/youth.

The Child Protection Registry contains the names of all persons the DCF has substantiated for child abuse or neglect. The Registry is not public, but can be accessed, only with the written permission of the person being checked, by authorized persons for a number of purposes regarding employment or volunteer work with vulnerable populations.

Appeals of Child Abuse/Neglect Substantiations

When an investigation results in a substantiation, there are multiple options for review of the substantiation decision. First, a person may ask a contracted, independent reviewer for reconsideration of the Family Services Division decision to substantiate. This first step is called a request for a Registry Review. A person's name is not placed on the Child Protection Registry until after there is a chance for the Registry Review. At the Registry Review, a person has an opportunity to meet with an independent reviewer to discuss their case. They may bring any documents or other information to the review meeting. The Registry Reviewer reviews the DCF file and investigative work and makes a decision following the meeting whether to uphold the substantiation, overturn the substantiation or send it back to the Family Services Division for further work.

If the Registry Reviewer upholds the substantiation, a person's name is placed on the Child Protection Registry and they are given notice that they may appeal further to the Human Services Board, which is an administrative hearing.

The hearsay at issue in H.727 is before the HSB. The HSB is composed of seven members appointed by the Governor and acts as a fair hearing board on appeals of decisions made by the departments within the Agency of Human Services. The Board has three hearing officers who hear appeals around the state and recommend a course of action by the Board which meets once a month to rule on appeals. The HSB hearing officers review cases de novo and make decisions based on the preponderance of the evidence.

What is Hearsay?

Hearsay is a statement other than that by a witness testifying at a hearing that is offered to prove the truth of the matter stated. Hearsay is usually not admissible in criminal and some civil contexts, but reliable hearsay is generally admissible in administrative hearings like the HSB. HSB hearings follow the Vermont Administrative Procedures Act, which do not strictly follow the rules of evidence. The HSB hearing rules are similar in that they do not strictly follow the rules of evidence.

Vermont law specifically adopts the Vermont Rules of Evidence with regard to the general prohibition of hearsay in HSB child abuse/neglect administrative hearings, with a slight modification. The Vermont statute in title 33 allows the admission of hearsay testimony, but only in limited cases of children under 12 years old who are the victims of sexual abuse as long as the department is successful in making a case that testimony would be traumatic to the child. This bill seeks to amend this statute.

We know that recounting any abuse that was perpetrated on a child could be traumatic. Rather than ask some children to do this, the department has removed people's names from the Registry and dropped the case. This has happened 48 times in the last three years. This means that 48 people who have been substantiated for the most serious kinds of child abuse are not on the Child Protection Registry and may have access to employment opportunities working with children.

H.727 Limits the Admission of Children's Hearsay to Only Reliable Hearsay

The hearsay that is contemplated in this bill is the reliable hearsay of children who have been abused or neglected. The House Judiciary Committee took hours of testimony from a variety of individuals and explored what is meant by "reliable" hearsay. Language in the bill was refined and ultimately passed out of the House to be clear that reliability is determined by the time, content and circumstances of the child's statements and whether the child's disclosure is ultimately found to be trustworthy, as judged by the hearing officer. An example of statements that may not meet this test are statements by a child to one parent, when the parents are in the midst of a divorce and custody battle. On the other hand, statements by a child to a daycare provider or teacher may be deemed more reliable in light of the time, content and circumstances of the disclosure of the abuse.

The hearsay testimony of abused or neglected children is just one piece of evidence and is not dispositive of the case. Hearsay evidence is weighed by the hearing officer and may not be given as much weight as other live testimony. Admission of reliable hearsay evidence in this administrative hearing is important to protect children who have been abused or neglected and are either unavailable or too traumatized to testify at the hearing. Importantly, this bill does not prohibit any child from testifying if they want to.

Constitutional Considerations/Admission of Reliable Hearsay in Other Administrative Proceedings in Vermont

The due process afforded in administrative hearings requires a three-part balancing test pursuant to *Matthews v. Eldridge*, 425 U.S. 319 (1976), of (1) the importance of the interest at stake, (2) risk of erroneous deprivation of the interest and the probative value of additional procedural safeguards, and (3) the government's interest. A Vermont case, *In re Smith*, 169 Vt. 162, 171-72 (1999), affirmed the use of preponderance of the evidence in an administrative hearing of a nursing license revocation hearing and also goes on to explain the Vermont Administrative Procedures Act's relaxed evidentiary rules and use of hearsay in administrative proceedings. In that case, the Vermont Supreme Court held:

> While we disagree that a license suspension hearing approximates a criminal action for the purpose of establishing a burden of proof, we recognize that the appellee has a substantial interest in maintaining her license, and thus her livelihood. Here, the interest is somewhat tempered by the fact that the Board has not permanently removed her ability to practice her chosen profession.... The State likewise has a substantial interest in regulating the nursing profession. As expressed by the statute itself, the purpose underlying governmental regulation of the nursing profession is safeguarding the "life and health of the people of this state." … Since Vermont's APA governs nursing disciplinary actions, several procedural protections are afforded nurse licensees such as: notice of the charges; opportunity to present evidence and argument; compulsion of witnesses' testimony by subpoena; cross-examination of witnesses; modified evidentiary rules; and findings of fact based on the evidence and matters officially noticed. We conclude that these statutory procedures, together with the preponderance of evidence burden of proof placed on the State, afforded the constitutional process due to appellee. Where substantial interests exist on both sides, due process demands no more than an equal apportionment of the risk of error, which the preponderance standard accomplishes.

In addition, *In re Hackett* 2017 WL 253561, an unpublished Vermont Supreme Court case notes *In re Smith* and its conclusion that the professional nursing board is not required to strictly follow the rules of evidence governing hearsay.

The Department finds many parallels in the government's interest in the regulation of the practice of nursing and its child protection duties. In both instances, the government's interest is the protection of the life and health of Vermonters or Vermont's children. The interest of the individual accused of child abuse or neglect is very similar to that of the nursing license

revocation, which is the inability to work in certain professions for a period of time. The procedural protections in the HSB process mirror those in the nursing license revocation process. In addition, included in this bill are the limitations on the admissibility of children's hearsay evidence. Evidence shall only be admissible if the time, content, and circumstances of the statements provide substantial indicia of trustworthiness

Information About Other States

The use of reliable hearsay is a widely accepted practice in administrative child abuse/neglect hearings. Vermont is currently an outlier in New England. All of the New England states utilize the admission of children's hearsay in substantiation administrative proceedings. Some New England states go even farther than this bill and prohibit completely the testimony of children in these proceedings. Please see Appendix A for detail about the use of hearsay in the other New England States. In addition, please see the publication from the Child Welfare Information Gateway https://www.childwelfare.gov/pubPDFs/registry.pdf that provides some detail about the legal framework in other states, including some details about other states' administrative due process proceedings.

The Child Welfare Information Gateway also published this report, https://www.childwelfare.gov/pubPDFs/confide.pdf , which explains that 32 states plus the District of Columbia utilize a child protection registry for employment purposes. In these states, like Vermont, employers may check the registry before hiring an individual to work with children or vulnerable adults.

Opportunities for Expungement (Removal of a Person's Name) from the Registry

Persons placed on the Registry are currently required to wait three or seven years, depending on the severity of the substantiated abuse before they may request that their names are removed from the Registry. The department is in the process of filing a proposed rule with the Interagency Committee on Administrative Rules that would add other options for expungement from the Registry, including a one-year option.

Conclusion

For persons who have been substantiated, we believe that the Registry is an important tool for the protection of children. It is a lot to ask of a child to testify and retell their story again at an administrative hearing so that we as a State may prevent future harm to other children. We believe that the admission of their reliable hearsay statements strikes the right balance and provides protection to children who have already suffered.

Appendix A – Information from New England States

DCF reached out to the other New England states to understand whether reliable hearsay statements from children are admitted in substantiation appeals. All five of the other New England states utilize reliable children's hearsay statements in proceedings of child abuse and neglect substantiation appeals. Each state approaches this topic in its own unique way and so a summary is provided below.

Maine

Maine's procedures for administrative hearings of appeals of child abuse and neglect substantiations provide:

> Oral or written evidence of statements of any child are admissible without the testimony of the child, except that statements written by a child, made for purposes of the appeal, are not admissible. The hearing officer may rely on a child's statement to the extent of its probative value. The hearing officer shall not draw any negative inference from a party's inability to cross-examine the child about the child's statements.

Maine Department of Health and Human Services, Office of Child and Family Services, Procedure 10-148, Chapter 201, section XI(G)(2), page 15, available at https://www1.maine.gov/dhhs/ocfs/documents/Substantiation%20Rules-2016Update.pdf.

Maine's administrative procedures also provide that only adult witnesses may testify at these hearings (see section XVI(B)(3)(b)). In addition, the Maine administrative procedures also provide:

> c) The hearing officer may admit and consider oral or written evidence of statements made by any child that are offered by an adult witness. The hearing officer may rely on such evidence to the extent of its probative value. The only exception is statements by a child that were made solely for the purpose of the administrative hearing, such statements are not admissible.
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> g) The Maine rules of evidence are not strictly followed in administrative hearings. Generally, evidence shall be admitted if it is relevant and is the kind of evidence upon which reasonable persons are accustomed to relay in the conduct of serious affairs. Evidence which is irrelevant or unduly repetitious may be excluded.

Maine Department of Health and Human Services, Office of Child and Family Services, Procedure 10-148, Chapter 201, section XVI(B)(3), page 23, available at https://www1.maine.gov/dhhs/ocfs/documents/Substantiation%20Rules-2016Update.pdf

Connecticut

The Connecticut policy on the conduct of child abuse/neglect substantiation hearings is very specific on the topic of testimony from children who have been allegedly abused or neglected. This policy prohibits the testimony of these children in administrative substantiation hearings:

> The abused or neglected minor child who is the subject of the substantiation shall not testify in a substantiation hearing.
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> A minor child who is not the subject of the substantiation may be called as a witness at the discretion of the hearing officer, after the party calling the child presents an offer of proof as to why the child's testimony is necessary and material to the case and not duplicative of other evidence.

Connecticut Department of Children and Families, Conduct of Substantiation Hearing Policy 22-12-7, available at http://www.portal.ct.gov/DCF/Policy-Homepage/Chapter-22/Chapter-22

In these hearings, Connecticut policy provides that "any oral or documentary evidence may be received" and that the hearing officer shall exclude evidence that is irrelevant, immaterial or unduly repetitious. *Id.*

Massachusetts

The Massachusetts Department of Children and Families administrative hearings do not follow the rules of evidence and the use of hearsay has been affirmed. Please see 110 C.M.R. §10-21, available at http://www.mass.gov/eohhs/docs/dcf/regs/110cmr10.pdf

> The Hearing Officer need not strictly follow the rules of evidence. The Massachusetts Rules of Evidence do not apply but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient and attorney-client privileges. Only evidence which is relevant and material may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

Rhode Island

In Rhode Island, reliable hearsay evidence may be introduced in an administrative hearing process. According to counsel in Rhode Island, the submission of reliable hearsay evidence is not dispositive of the factual issue and often times, additional testimony is also presented. In administrative appeal hearings on findings of child abuse or neglect, Rhode Island Department of Youth, Children and Families Policy 100.0055 (http://sos.ri.gov/documents/archives/regdocs/released/pdf/DCYF/DCYF_1053_.pdf) provides:

> The rules of evidence as applied in the civil cases in the Courts of this State shall be followed, except as provided in R.I.G.L. §42-35-10. In addition, the Hearing Officer may in his or her discretion permit as evidence any statement by a child under the age of thirteen (13) years old about a prescribed act of abuse, neglect, or misconduct by a parent or guardian, if that statement was made spontaneously within a reasonable time after the act is alleged to have occurred, and if the statement was made to someone the child would normally turn to for sympathy, protection or advice.

New Hampshire

New Hampshire's Child Protection Act provides that in any hearing under this act, a court is not bound by the technical rules of evidence and may admit evidence which it considers relevant and material. New Hampshire R.S.A. §169-C:12, available at http://www.gencourt.state.nh.us/rsa/html/xii/169-c/169-c-mrg.htm .