

S.9: Senate Judiciary and Health & Welfare Joint Hearing Tuesday 2/17/15

Comparison of Judiciary strike-all amendment, sections 10 (definitions) and 12 (referral to law enforcement),
and Health & Welfare alternative language (submitted by DCF)

Section & issue	Judiciary	Health & Welfare	Explanation
<p>I. Sec. 9 (33 V.S.A. § 4912 definition of "harm")</p> <p>pp. 13–14 of strike-all</p>	<p>(6) "Harm" can occur by:</p> <p>(A) Physical injury or emotional maltreatment.</p> <p>(B) Failure to supply the child with adequate food, clothing, shelter, or health care. As used in this subchapter, "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state <u>State</u> law. Notwithstanding that a child might be found to be without proper parental care under chapters 51 and 53 of this title, a parent or other person responsible for a child's care legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered neglectful for that reason alone.</p> <p>(C) Abandonment of the child.</p> <p><u>(D) The possession, use, or sale of alcohol in a manner that harms or creates a substantial risk of harm to the physical health, psychological growth and development, or welfare of the child.</u></p> <p><u>(E) The unlawful possession, use, manufacture, cultivation, or sale of a regulated drug, as defined in</u></p>	<p>N/A</p>	<p>Language in Judiciary strike-all is taken from 33 V.S.A. § 4912(1), the definition of "abused or neglected" child. This language is an attempt to add alcohol and drug abuse to the definition of harm, in a manner that draws a nexus between the substance abuse and harm to the child.</p> <p>DCF attempts to achieve the same goal by modifying the definition of "risk of harm" (see III below).</p>

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	<u>18 V.S.A. § 4201, in a manner that harms or creates a substantial risk of harm to the physical health, psychological growth and development, or welfare of the child.</u>		
<p>II. Sec. 9 (33 V.S.A. § 4912 definition of "physical injury")</p> <p>p. 19 of Judiciary strike-all</p>	<p>(11) "Physical injury" means death or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means <u>bodily injury or serious bodily injury as defined in 13 V.S.A. § 1021 by other than accidental means.</u> "Serious physical injury" means serious bodily injury as defined in 13 V.S.A. § 1021 by other than accidental means.</p> <p>Note: the suggested definition of "physical injury" as including both bodily injury and serious bodily injury is unusual, based on the very broad definition of physical injury as including death, and perhaps should be limited to only bodily injury. It would be helpful if DCF and Judiciary could weigh in on whether "physical injury" should be defined as only including "bodily injury."</p>	<p>Keeps definition of physical injury as is:</p> <p>(11) "Physical injury" means death or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means."</p>	<p>The current definition of "physical injury," which DCF suggests retaining, suffers from 3 problems:</p> <ol style="list-style-type: none"> 1. It is very broad. For example, it includes the most serious possible result: "death." It also would seem to include relatively minor conduct, such as the "temporary ... impairment of any bodily ... function." Does this include a pulled muscle that temporarily impairs the ability of a child to run? 2. DCF is required to refer certain cases to law enforcement and work with law enforcement as part of a MDT / SIU. However, because of the T.33 definition of physical injury, which is different from the penal law definition of bodily injury, there is confusion and differences as to how injuries are classified and cases reported. 3. The term "serious physical injury" is used in other sections of T.33. For example, it is a key term in the criteria established in 33 V.S.A. § 4915(d) for when DCF must conduct an investigation. However, despite its importance, it is never defined. If mere "physical injury" includes death, what constitutes "serious physical injury"? <p>The Judiciary version seeks to address these problems by defining physical injury as the same as bodily injury, and serious physical injury as the same as serious bodily injury. Accidental injuries are excluded. The penal law definition of "bodily injury" is also broad. As a result, it may be useful to</p>

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			<p>narrow what cases DCF must accept in other statutes.</p>
<p>III. Sec. 9 (33 V.S.A. § 4912(14) definition of “risk of harm”)</p>	<p>N/A</p>	<p>(14) “Risk of harm” means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment, or sexual abuse, including:</p> <p>(A) <u>a single, egregious act that resulted in significant risk that a child could have been seriously physically injured, including production or preproduction of methamphetamines in a dwelling where a child resides;</u></p> <p>(B) <u>leaving a child without supervision appropriate for the child’s age and circumstances;</u></p> <p>(C) <u>not providing developmentally appropriate supervision or care for a child due to use of illegal substances, or misuse of prescription drugs or alcohol;</u></p> <p>(D) <u>failing to supervise appropriately a child in a situation in which drugs, alcohol, or drug paraphernalia are accessible to the child;</u></p> <p>(E) <u>knowingly allowing a child to be at substantial risk of sexual abuse;</u></p> <p>(F) <u>failure by a registered sex offender or person substantiated for</u></p>	<p>The highlighted language is taken from, or substantially similar to, DCF policy 51 (screening reports of child maltreatment) and 56 (substantiating child abuse and neglect). The summer study committee heard extensive testimony concerning these policies and their application. Codifying policies into statute will “lock” that language into law.</p> <p>Overall, Health & Welfare’s suggested language seems to define “risk of harm” narrowly, by requiring a “significant” danger that a child will suffer “serious” harm, which is further defined as including: (A) a “significant” risk of “serious” physical injury, and (E) knowingly allowing a child to be at “substantial” risk of sexual abuse. DCF’s input should be sought as to why “risk of harm” should be defined so narrowly; this is a policy choice for the committees.</p> <p>the suggested language is vague, and contains important undefined terms. This may result in confusion or inconsistent application. For example under (A), risk of harm may include:</p> <ol style="list-style-type: none"> 1. one “egregious” act that results in, 2. “significant risk” that a child could be, 3. “seriously physically injured.” <p>However, “egregious” is not defined, and, as noted above, the key term of “serious physical injury” is not defined. As discussed below, “sexual abuse” is also not defined in a clear manner.</p> <p>(C) and (D) attempt to establish a nexus between</p>

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		<u>sexually abusing a child to refrain from residing with or spending unsupervised time with a child.</u>	alcohol abuse and drug abuse and risk of harm to a child. As noted above, the Judiciary strike-all version attempts to establish the same nexus by amending the definition of “harm.”
<p>IV. Sec. 9 (33 V.S.A. § 4912(15) definition of “sexual abuse”)</p> <p>pp. 19–20 of Judiciary strike-all</p>	<p>(15) “Sexual abuse” consists of any act or acts by any person involving sexual molestation or exploitation of a child, including incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement, or sadomasochistic abuse involving a child means:</p> <p><u>(A) lewdness and prostitution in violation of 13 V.S.A. chapter 59;</u> <u>(B) human trafficking in violation of 13 V.S.A. chapter 60;</u> <u>(C) obscenity in violation of 13 V.S.A. chapter 63;</u> <u>(D) sexual exploitation of children in violation of 13 V.S.A. chapter 64; or</u> <u>(E) sexual assault in violation of 13 V.S.A. chapter 72.</u></p>	<p>Keeps definition largely as is:</p> <p>(15) “Sexual abuse” consists of any act or acts by any person involving sexual molestation or exploitation of a child, including incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement, or sadomasochistic abuse involving a child. <u>Sexual abuse also includes the viewing, possession, or transmission of child pornography, excluding exchanges of images between mutually consenting minors.</u></p>	<p>The current definition of sexual abuse in T.33:</p> <ol style="list-style-type: none"> 1. Is vague and different from penal law, potentially leading to confusion and disagreements between DCF and law enforcement. 2. Uses terms no longer used in the penal law, such as “rape” and “sodomy.” 3. Is perhaps overly broad, including “abetting” or hiring anyone under 18 to “participate” in a show, film, or photograph that depicts “in whole or in part ... sexual conduct” or “sexual excitement.” Notably this definition is not limited to actual sexual conduct. Instead, it seems to include the mere depiction in any play, film, or photograph of sexual conduct or “excitement.” 4. In addition to being potentially broad, the language could also be read as narrower than the penal law because it does not list all sexual crimes. DCF’s input should be sought on this issue, but why would DCF not want its mandate to include all sexual crimes? <p>The Judiciary strike-all attempts to address these issues by amending the definition of “sexual abuse” to include every sexual crime in Title 13, including child pornography (13 V.S.A. § 2827). DCF would not have to “prove” all the elements of these crimes; the goal is that DCF would have jurisdiction over all conduct underlying these offenses.</p> <p>The Health & Welfare language keeps the current language in T.33, but adds a new sentence that</p>

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			creates a “carve out” for minors exchanging images. It is notable that this “carve out” is not limited to children exchanging images of themselves, but would also include “mutually consenting” minors exchanging graphic images of other minors. Would this include the situation where two boys (or even a larger group) exchange explicit images of another girl or boy without his or her consent?
<p>V. Sec. 11 (33 V.S.A. § 4915b, when DCF notifies law enforcement)</p> <p>pp. 21–22 of Judiciary strike-all</p>	<p>(e) The Department:</p> <p><u>(1) shall report to and request assistance from law enforcement in the following circumstances:</u></p> <p>(1) investigations of child sexual abuse by an alleged perpetrator age 10 or older;</p> <p>(2) investigations of serious physical abuse or neglect likely to result in criminal charges or requiring emergency medical care</p> <p><u>(A) an incident in which a child suffers, by other than accidental means, serious bodily injury as defined in 13 V.S.A. § 1021; and</u></p> <p><u>(B) potential violations of:</u></p> <p><u>(i) 13 V.S.A. § 2602;</u></p> <p><u>(ii) 13 V.S.A. chapter 60;</u></p> <p><u>(iii) 13 V.S.A. chapter 64; and</u></p> <p><u>(iv) 13 V.S.A. chapter 72; and</u></p> <p><u>(C) situations potentially dangerous to the child or Department worker;</u></p> <p><u>and</u></p> <p><u>(2) may report to and request assistance from law enforcement in the following circumstances:</u></p> <p><u>(A) an incident in which a child</u></p>	<p>(e) The Department:</p> <p><u>(1) shall report to and request assistance from law enforcement in the following circumstances:</u></p> <p><u>(A) investigations of child sexual abuse by an alleged perpetrator age 10 years of age or older;</u></p> <p><u>(B) investigations of serious physical abuse or neglect likely to result in criminal charges or requiring emergency medical care;</u></p> <p><u>(2) shall report to and request assistance from Special Investigative Units in the following circumstances pursuant to 24 V.S.A. § 1940...</u></p> <p>[note: rest of language in (2)(A) is similar to Judiciary’s version and tracks the list of crimes that SIUs “shall” or “may” investigate]</p>	<p>Judiciary’s language is identical to that in Sec. 6, concerning the jurisdiction of SIUs, and is intended to ensure that DCF “shall” report or “may” report the same categories of cases to law enforcement that SIUs are required to investigate, or may investigate.</p> <p>Health & Welfare’s language also tracks the jurisdiction of SIUs, but includes additional text in (1)(A) and (B) that seems to create a two-step reporting process:</p> <ol style="list-style-type: none"> 1. report the category of cases in (1)(A) and (B) to law enforcement; and 2. separately report the other specified cases set forth in (2) to SIUs. <p>DCF’s reasons for requesting such a two-step process include a lack of responsiveness by SIUs. However, if the definitions of “serious physical injury” and “sexual abuse” are amended, as Judiciary has suggested, this two-part reporting requirement may be duplicative.</p> <p>It is also notable that this language keeps the 10 years of age limitation, which, as applied by DCF, limits acceptance of some sexual abuse reports.</p> <p>Judiciary’s version states that DCF “shall” notify law enforcement if a situation is dangerous to a</p>

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	<u>suffers:</u> <u>(i) bodily injury, by other than accidental means, as defined in 13 V.S.A. § 1021; or</u> <u>(ii) death; and</u> <u>(B) potential violations of:</u> <u>(i) 13 V.S.A. § 2601;</u> <u>(ii) 13 V.S.A. § 2605;</u> <u>(iii) 13 V.S.A. § 1304; and</u> <u>(iv) 13 V.S.A. § 1304a.</u> (3) situations potentially dangerous to the child or Department worker.		social worker. Health & Welfare's version states that DCF "may" notify law enforcement in such situations.