

Memorandum

To: Members of House Judiciary Committee
From: Ken Schatz, Commissioner *KAS*
Date: February 18, 2016
Re: Comments on H.523 and H.398 as they relate to hearsay exceptions for the testimony of children

Thank you for the opportunity to comment on hearsay rules involving testimony by children. Section 1 of the bill before you today, H.523, proposes to amend Rule 804a of the Vermont Rules of Evidence (VRE) to expand the situations in which the hearsay exception for the testimony of children under 12 and persons with psychiatric, intellectual or developmental disabilities applies. DCF's testimony today is limited to situations involving children. Under the current rule, VRE 804a hearsay exception applies in civil, criminal and administrative proceedings when the child is the victim of one of the following sexual offenses as defined by the criminal code and the statements offered relate to one of these offenses allegedly committed against the child:

- Sexual assault,
- Aggravated sexual assault,
- Lewd and lascivious conduct, or
- incest

H.523 proposes to add to this list, instances when the child is the victim of bodily injury or serious bodily injury as defined in criminal code. In order for VRE 804a to apply and allow hearsay testimony from children, the statements must not have been taken in preparation for a legal proceeding and the child victim must be available to testify.

DCF generally supports expanding the hearsay exception for the testimony of children in VRE 804a to apply to physical injuries. The Department does not have a position on whether VRE 804a should be amended through the legislative process or whether these amendments should come through the traditional rule amendment process. In either case, consideration should be given to also specifically allow a child's hearsay statements in physical injury Child in Need of Care of Supervision (CHINS) matters and not limit this rule to only CHINS cases involving the sexual abuse of a child (the proposed bill does not appear to include physical injury in CHINS cases as the language applicable to CHINS is still limited to sexual abuse of a child).

We would like to speak today and provide comments in support of a related proposal involving hearsay and children's testimony which is found in H.398 and that has also been referred to this committee. We will limit our testimony on H.398 today to the hearsay topic, but would also like to note that DCF supports all sections of H.398; if the committee wishes and time allows during this legislative session, we would be happy to come back and provide further testimony on this bill.¹



Proposed H.398 Hearsay Exception

To provide some context and background, DCF places the names of persons who are substantiated for child abuse/neglect on the Child Protection Registry. You may recall from our previous testimony on H.400 in this committee that the Child Protection Registry is a confidential registry of persons substantiated for abusing or neglecting a child. Unlike the Sex Offender Registry maintained by the Department for Public Safety, DCF's Child Protection Registry cannot be accessed by the general public. Its access and use is restricted by law and is only available to employers who are hiring people or enlisting volunteers to work with children or vulnerable adults and for a few other, limited child protection purposes.¹¹ Employers may only check the Child Protection Registry through a request to the Department and with the signed permission of the individual. A second level of appeal for persons who have been substantiated for allegedly abusing or neglecting a child is provided by the Human Services Board (HSB).

Vermont law (33 V.S.A. §4916b) currently states that the VRE 804a hearsay exception applies to HSB appeals of child sexual abuse substantiations. This statute modifies slightly how VRE 804a rule applies to HSB proceedings by stating that children do not have to be made "available" to testify under the rule (one of the requirements of the hearsay exception) if the hearing officer finds, based on a preponderance of the evidence, that requiring the child to testify will present a substantial risk of trauma to the child.

H.398 proposes to modify 33 V.S.A. §4916b and take the hearsay exception for the testimony of children at HSB appeal hearings one step further to provide for greater protection of child victims. H.398 proposes the following:

- VRE 804a hearsay exception does not apply to HSB proceedings
- Instead, children under 18 years old shall not be required to testify at *any* HSB appeal of alleged child abuse or neglect.
 - This is broader than the current statute, which follows Rule 804a and only applies to child sexual abuse.
 - The proposal in H.398 would apply to all alleged child abuse and neglect, which prevents child victims from having to confront their alleged abuser.
- Reliable hearsay of children is admissible in HSB appeals of child abuse/neglect substantiations.

DCF supports the H.398 proposed hearsay exception for the testimony of children in HSB appeals. This proposal provides for greater protection of children and helps prevent the trauma of having to testify and confront their alleged abuser. Although current law provides for a "trauma exception" as discussed above, not all parents/guardians have been willing to engage in the appeal process and to assist the Department in making the "trauma" case. As a result, with the child unavailable to testify, the Department usually concedes the case resulting in previously substantiated persons having their names removed from the Child Protection Registry without the opportunity to have the merits of the substantiation tested in the crucible of an administrative HSB hearing.

DCF believes it is appropriate to provide for a broader hearsay exception for the testimony of children in the HSB appeal proceedings than is provided in VRE 804a because these administrative proceedings are confidential and the outcome determines whether a person's name will be placed on a confidential registry for the protection of children. This is a much narrower scope of hearings than is contemplated by VRE 804a, which applies to all civil, criminal and administrative proceedings, many of which are public.





DCF supports the addition of the H.398 hearsay exception language to H.523 if the Committee wishes to add this language. DCF also supports H.398 if the Committee has the willingness and time to move forward with testimony on that bill.

The proposed hearsay exception language for HSB child abuse/neglect proceedings from H.398 can be found below:

Sec. 4. 33 V.S.A. § 4916b is amended to read:

§ 4916b. HUMAN SERVICES BOARD HEARING

(a) Within 30 days of the date on which the administrative reviewer mailed notice of placement of a report on the Registry, the person who is the subject of the substantiation may apply in writing to the Human Services Board for relief. The Board shall hold a fair hearing pursuant to 3 V.S.A. § 3091. When the Department receives notice of the appeal, it shall make note in the Registry record that the substantiation has been appealed to the Board.

(b) (1) The Board shall hold a hearing within 60 days of the receipt of the request for a hearing and shall issue a decision within 30 days of the hearing.

(2) Priority shall be given to appeals in which there are immediate employment consequences for the person appealing the decision.

(3) Rule 804a of the Vermont Rules of Evidence (V.R.E.) shall apply to hearings held under this subsection only as follows:

~~(A) V.R.E. 804a(a)(1) and (4) shall apply.~~

~~(B) V.R.E. 804a(a)(2) shall apply, except that any deposition or testimony given under oath at another proceeding shall be admissible evidence in a hearing held under this subsection.~~

~~(C) V.R.E. 804a(a)(3) shall apply to hearings under this subsection unless the hearing officer determines, based on a preponderance of the evidence, that requiring the child to testify will present a substantial risk of trauma to the child.~~

~~(D) V.R.E. 804a(b) shall not apply.~~

At a hearing held under this subsection, evidence is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs, and, notwithstanding any administrative rule to the contrary, the Vermont Rules of Evidence (V.R.E.) shall not apply except for the rules respecting privilege.

(A) An individual under 18 years of age who is alleged to have been abused or neglected shall not be required to testify or give evidence at any hearing held under this subsection.



(B) V.R.E. 804a shall not apply to hearings held under this subsection.

ⁱ H.398 proposes the following amendments to the statutes governing HSB appeal of child abuse/neglect substantiation proceedings:

- provides for Secretary of Agency Human Services reversal of HSB decisions in limited circumstances (the Secretary of AHS currently has reversal authority for decisions regarding Medicaid, TANF (Reach Up) and Office of Child Support)
- makes clear that DCF decisions on whether reports of child abuse are investigated or assessed (our two different child safety intervention track options) are not reviewable by the HSB. Please note that only DCF assessments cannot result in substantiations, investigations can. As a result, the underlying initial track decision has been challenged as a way to question whether the Department made a proper substantiation decision. This proposed language makes clear that the Department's track decision is not a reviewable decision.
- proposes that children who have been allegedly abused or neglected are not required to testify against their abuser and that their reliable hearsay testimony is admissible. There are many times when the Department drops a substantiation case because we do not want to force a child to testify.
- proposes a provision similar to what was included in H.399 regarding the first level of a substantiation review by the Commissioner's registry review unit. HSB hearings are the second step in the appeal process of substantiation decisions. HSB hearings may be stayed at the request of the appellant when there is a related pending criminal or family division case. This proposal, similar to what the House approved in H.399, allows for the Department's substantiation decision to become final if the appellant fails to contact the HSB within 30 days of the resolution of the related court case for reactivation of the HSB appeal.

ⁱⁱ 33 V.S.A. §4919 provides for the list of limited persons/agencies who may access the confidential Child Protection Registry.

