

**The Vermont Parent Representation Center, Inc.**

**Broken System, Broken Promises**

Vermont Child Abuse Determination and the Child Protection Registry  
A Multi-Year Analysis & Recommendations for Reform  
October 12, 2022



James Stanton-Abbott: "Judith Brown's Lamentations Group." 1991, silver print.  
Fleming Museum of Art, University of Vermont. Gift of the artist, 1994.4.1

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The families who placed their trust and futures in a small non-profit agency that was willing to represent them when no-one else would or could.

Those people in the system who believe it is broken but daily try their best to make it work including attorneys, frontline workers, supervisors and administrators.

### In Memoriam:

**Steven Habif**, for helping to establish and guide the independent organization that made this Project possible.

## 1. Executive Summary

**The Substantiation Project was designed to test one of the most significant powers granted to state government: the power to substantiate (formally determine as guilty) a person for child abuse or neglect, and therefore place the person's name on the Vermont Department for Children and Families' (DCF) Child Protection Registry (Registry).**

Most Vermonters understand that child abuse and neglect in Vermont is real. The State has a legitimate interest in protecting children from abuse and assisting parents who often are struggling with a wide variety of challenges. Toward that end, state government has created systems which aim is to ensure that children and youth are safe from abuse, their basic needs are met, they abide by the law and their families are supported to achieve these goals. We have no doubt that there are children who are protected and parents who receive help. But the ability to intervene in the relationship between children and their parents, especially to separate them, is arguably the most awesome power the State can employ. The Department for Children and Families (DCF) opens over 3,000 child abuse/neglect investigations each year, substantiating about 30% of them. It opens over 2,000 child and family assessments each year.<sup>1</sup> It is a complex system that must act justly within the law, and generally meet commonly accepted standards of common sense for the children and parents it touches so intimately. Unfortunately, this report finds that the Vermont child protection system has serious failings, instances of misconduct, violations of the law and, to date, an unwillingness to address those issues at every stage of the system. The grievous harm done to at least hundreds of children and parents each year should outrage all Vermonters and prompt immediate change. Broken government systems can be fixed and Vermont can at long last keep the promises made to children, families and the Vermont taxpayer when it initially created those systems some twenty years ago.

The Substantiation Project is a continuation of the work that the Vermont Parent Representation Center, Inc. (VPRC) first depicted in its groundbreaking analysis of Vermont's failed child protection system ([Bending the Curve to Improve Our Child Protection System](#)).<sup>2</sup> That analysis was met with widespread acceptance, as well as some denial. In the three and one-half years since that publication, no organization has

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<sup>1</sup> [Bending the Curve to Improve Our Child Protection System](#), (VPRC Nov. 9, 2018), [www.vtprc.org](http://www.vtprc.org).

<sup>2</sup> *Ibid.*

successfully refuted the findings. In fact, many of those initial findings have been echoed in later studies commissioned by the Vermont Legislature.<sup>3</sup>

**The VPRC Substantiation Project accepted thirty (32) appeals** on a first-come, first-served basis over a thirty-month period. No appeal was pre-screened or turned down.

### **Outcomes:**

- Twenty-five (25) of the appeals have been completed to date. **All 25** have resulted in the Department's substantiations being reversed, **a 100% rate of reversal**. Seven (7) appeals are pending and in various stages of completion.
- In contrast, yearly fewer than a third of the people substantiated appeal their substantiation and of those, **only 5-10% succeed**.<sup>4</sup>

**The outcomes demonstrate that the current system is broken in virtually every respect and presents an expensive and destructive disservice to children, families, the state workers who are charged with making the system work, and the Vermont economy alike.** Especially negatively impacted are economically-challenged, single heads of households, typically women.

To our knowledge, this the first independent, long-term test of the system, its efficacy, adherence to law, and the economic and social justice issues inherent in the system.

### **Findings:**

- A. Most of the identified failures in the Substantiation and Registry system are self-inflicted by state government and can be solved at virtually no cost.

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<sup>3</sup> Study of CHINS Case Processing in Vermont, National Center for State Courts, May 2021  
<https://legislature.vermont.gov/Documents/2022/WorkGroups/Child%20Protection%20Oversight/Judiciary/W~Brian%20Grearson~Final%20Chins%20Report~6-30-2021.pdf>. Drivers of Custody Rates in Vermont's Public Child Welfare System, The University of Vermont Education and Social Services, January 2020,  
<https://ljfo.vermont.gov/assets/Publications/Budget/fc7fc1675b/VT-Custody-Rates-Study-Literature-Review-Full-Report-1-31-20.pdf>

<sup>4</sup> Annually approximately 700 – 1,000 people are substantiated. 2/3rds never appeal and the reasons for this failure are myriad. 1/3<sup>rd</sup> do appeal for a DCF Review and approximately 10% are successful. The next stage of appeal is the HSB, where less than 1% appeal of which approximately 1% are recorded as successful. However, these numbers are deceptive in that an unknown number of HSB appeals are “settled” (meaning that the appeal is overturned by mutual consent), but no record of such is published since it was a confidential settlement. Source: cumulative data derived from Annual Child Protection Reports, VT Dept. for Children & Families  
<https://dcf.vermont.gov/child-protection-data> and Human Services Board Fair Hearing Decisions  
<https://humanservices.vermont.gov/human-services-board>

- The current Substantiation and Registry system is governed by antiquated laws (Title 33 V.S.A. Chapter 49). It is inefficient/ineffective in investigations, notifications and appeal processes, and is further hampered by different standards of proof used by DCF and the Human Services Board (HSB).
  - Part of the problem is based in statute; a larger part is based in history beginning as a strictly internal-use process for state government licensing and reporting purposes, but evolving into an employment screening tool covering about 1/3<sup>rd</sup> of all jobs in Vermont.<sup>5</sup> The result is that constitutional due process requirements must now be met which the original system did not require since there was no liberty or property interest at stake (employment) in the past.
  - A lack of investigative skill and knowledge among DCF investigators and supervisors, a failure to understand applicable laws and policies, and a basic lack of understanding of the difference between DCF's dual roles (protecting children and conducting objective investigations) all contribute to today's failure of this critical system.
  - The vast majority of needed reforms cost little or nothing to implement and the few that could bring added costs will save more in efficiencies than the cost of implementing them.<sup>6</sup>
- B. The current system is found wanting when it is ably challenged. The problem is that it is rarely so challenged and therefore it experiences little need to reform itself.
- The outcome of appeals in which the person appealing is assisted by an effective advocate is dramatically better than when a person attempts to represent themselves. However, the cost of an experienced, effective advocate ranges from \$10,000 to \$50,000+, a sum far beyond the means of most Vermonters. Any system of "justice" which consistently fails in this manner does little to protect those needing protection, while raising significant social and economic justice concerns.

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<sup>5</sup> Initially, under the Dept. of Social & Rehabilitation Services, the Registry was utilized solely by state government for licensing of child care and foster care, and to provide the federal government with a metric for measuring child abuse in each state. However, the Registry was later converted by the Legislature for use in not just state licensing, but public and private employment, volunteerism and professional credentialing. This moved the Registry into a realm wherein constitutional due process protections apply, protections that Vermont has failed to adequately address.

<sup>6</sup> Bending the Curve to Improve Our Child Protection System, VPRC, Nov. 2018, [www.vtprc.org](http://www.vtprc.org)

- The public safety purpose of the Registry has lost its sense of purpose as approximately 25,000+/- names are listed in the Registry.<sup>7</sup> With the exception of the period of time within which a person so listed can seek expungement, there is little distinction between someone who has seriously and intentionally injured a child and a grandparent who may have kicked a child in the ankle in response to the child kicking them in the lower knee with no injury or bruise resulting to either. Both categories of people are substantiated and both are placed on the same Registry. Parents who have labored for decades to maintain children with severe mental health challenges at home find themselves repeatedly substantiated for physical contact arising when the child becomes a young adult and is incapable of controlling his/her aggressive behaviors. There is no longer rhyme nor reason for maintaining the Registry as it exists today.
- C. The associated waste in taxpayer dollars, lost income, and destruction in family life all cry out for reform. This is particularly so when one considers that the charges associated with a substantiation are frequently the same allegations used to request a CHINS petition in Family Court to remove children temporarily or permanently from their families.<sup>8</sup>
- Effectively, a Vermont parent can be substantiated by the Department and simultaneously be charged in Family Court for abuse/neglect, but have neither process synchronized with the other. If there is a timely substantiation appeal, it could be persuasive in the Family Court hearings; simultaneously, a Family Court Merits Hearing could find “no merits” yet the Department’s substantiation process continues unabated as if there was no finding in Family Court. Absent an effective advocate, this contradiction in actions goes unnoticed.
  - The problem arising due to having different standards of proof (DCF uses the “Reasonable Person” standard while the Human Services Board uses the higher standard of “Preponderance of the Evidence”) also presents itself when comparing DCF substantiation Reviews to findings in Family Court.<sup>9</sup> The court uses “Preponderance of the Evidence” as its standard of proof. Essentially, what we have is a situation in which the exact same issues are being ruled on in two or three different forums while different standards of proof are being utilized. From an efficiency, effectiveness or fairness perspective, this convoluted system is a waste of finite resources at every level and does little to advance child protection, child safety or family integrity.

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<sup>7</sup> Source is Department for Children and Families I.T. section, July 6, 2022.

<sup>8</sup> Child in Need of Care or Supervision (CHINS), 33 V.S.A 5102

<sup>9</sup> DCF substantiation Reviews are appealed to the Human Services Board (HSB).

## **Recommendations:**

**Specific, low- to no-cost changes to address these failings are detailed in the “Recommended Statutory Changes” section of this report.** If we desire an effective—and cost-effective —system for children, families, the state, and the Vermont economy, these changes are vital. As an example:

### **Investigations: (determining if abuse or neglect has occurred)**

- Investigations should not be transferred to the Assessment track.<sup>10</sup> Once an Investigation is commenced, it should be brought to a determination of whether there is abuse/neglect or not and then closed. Threatening families with Family Court intervention unless the family agrees to enter an open Family Services case prior to the closure of an investigation should be prohibited.
- The standard of proof for a DCF substantiation should be “Preponderance of the Evidence” in order to bring Vermont into the mainstream of national thinking and ensure due process safeguards applicable to the consequences of being placed on the Registry.
- Both Investigations and Assessments should be finalized within sixty (60) days, with a thirty (30) day extension permitted by a showing of exigent circumstances identified in the case record.
- Substantiations should have a statutory basis, not one based upon DCF Policy which has not been promulgated via the Vermont Administrative Procedures Act, or Rules that have been improperly written so as to expand or contract statutory language. DCF’s Rule 2000 is an example of how the Department has attempted to include non-caregivers and children as individuals who can be charged with Sexual Exploitation of a Minor while the statute defining Sexual Exploitation of a Minor (13 V.S.A. 3258) specifically states an age requirement and that the person must be fulfilling a professional or voluntary role as a caregiver in order to be culpable.
- Forensic interviews should be documented via audio/video technology and safeguarded by standardized practices across DCF.<sup>11</sup>

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<sup>10</sup> Assessments are interventions by DCF to evaluate family strengths and weaknesses and are distinct from investigations. 33 V.S.A. 4915

<sup>11</sup> Forensic interviews are a means of gathering information from a victim or witness for use in a legal setting, such as a court hearing or determination of abuse or neglect.



- DCF should record/memorialize key statements provided by witnesses during Investigations if those statements are to be relied upon in a substantiation.

#### **Affidavits, Case Determination Reports:**

- Affidavits requesting Family Court Intervention must state reasonable efforts made to avoid court intervention and why they have not succeeded. Additionally, affidavits must specify what it is that DCF would like Family Court to do that DCF does not already have the power/authority to do on its own.
- Affidavits and Case Determination Reports for substantiations should be based solely upon reliable and credible information supported by evidence.

#### **Substantiation Notifications:**

- At the commencement and conclusion of an Investigation, DCF should Inform the subject of the investigation that they must keep contact information up to date, including postal and email addresses, and telephone numbers.
- At the conclusion of an investigation, the notification of results should be via certified mail, text and email.
- The time period for requesting a DCF Review should be increased from the current 14 days to 30 days with the time period running from the postmark/email delivery date of the notification to the postmark/email send date of the request for appeal.
- DCF should establish a system that verifies the actual posting of a substantiation notification letter, email and/or text.

#### **DCF CRRU Reviews:**

- DCF should consider removing the substantiation process from the individual District Offices and relocating the actual determination process to gain state-wide uniformity in decision making.
- Hold Review within 90 days of the request, but no sooner than 45 days.
- Provide Review materials, in hardcopy and electronically, at least 30 days prior to the Review date.
- Provide unredacted material for the Review.
- Change the current “reasonable person standard” to “preponderance of the evidence” standard of proof.

- DCF must prohibit *ex parte* communication of any type. In instances where *ex parte* communication is found to have taken place, the substantiation should be dismissed with prejudice.

### **Child Protection Registry:**

Vermont's population is approximately 650,000 and the Child Protection Registry contains approximately 25,000 names. Mathematically, 1 in every 26 Vermonters is currently listed on the Child Protection Registry equating to approximately 4% of the state's total population. Excluding children from the equation, 1 in every 20 adult Vermonters is currently listed. Effectively, 1 in every 20 Vermonters is prohibited from working in approximately 30% of the jobs in Vermont simply by virtue of being on the Registry.

- Make no entry in the Registry until either the Commissioner's Registry Review Unit (CRRU) Review or HSB Appeal is finalized, whichever comes later.
- DCF should annually report the number of individuals listed on the Registry, the number removed and the number added.
- Expungement should be automatic after 3 years in all instances when a substantiation is not accompanied by a corresponding criminal conviction for the same offense, unless DCF can present credible evidence as to why expungement should not be automatic.
- Expungement, and the denial of Expungement, from the Registry should be based solely upon the statutory criteria for such. A denial based upon "not sufficient passage of time" should be used only when the person seeking Expungement has not complied with the statutory or regulatory timeframe for requesting Expungement. Additionally, denial of expungement for acts occurring prior to the substantiation, and known by the Department at the time of substantiation, should not be a basis for denial of expungement.

## 2. How the Substantiation and Registry Systems Work

**The Vermont Department for Children and Families substantiates (finds guilty) approximately 700 – 1,000 people for child abuse or neglect each year.<sup>12</sup>**

- The actual substantiation for most investigations is determined in each DCF District Office by DCF staff, typically a DCF investigator and their supervisor who make a subjective decision based upon what they think a “reasonable person” (the current legal standard) would decide. There is no central oversight for most substantiations and no court is involved.
- Once the substantiation is made, the “appeal” process is heavily weighted in DCF’s favor. Few people have the substantiation overturned unless they are able to engage an effective advocate at their own expense— a cost of tens of thousands of dollars.
- Of the 700 – 1,000 people substantiated, two-thirds never appeal and the reasons for this failure are myriad. One-third do appeal for a DCF Review and approximately 10% are successful. The next stage of appeal is the HSB where far fewer appeal because it is a quasi-judicial process that utilizes the Vermont Rules of Evidence and prosecution of the case is done by the Office of the Attorney General. Of this small number only a very small percentage are successful, again due to a myriad of issues, however the exact number is difficult to discern since substantiation appeals can be resolved by settlement rather than an HSB decision.<sup>13</sup> In both the DCF and HSB instances the numbers are extremely difficult to discern due to the complexity of how cases are handled, resolved, and accounted for.<sup>14</sup>

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<sup>12</sup> [Child Protection in Vermont](#), years 2010 – 2020, Vt. Dept. for Children and Families

<sup>13</sup> The HSB overturn rate is a deceptive number because cases which are “settled” because DCF has the option of dropping the case prior to an actual HSB decision being rendered. This happened when DCF could not bear the burden of proof and therefore agreed to overturn the substantiation itself and remove the person from the Registry. Unfortunately, this results in the case not being recorded as being sustained or recorded, in fact the case is not recorded at all. Only one of the overturned cases in the Project are not formally reported by the HSB as having been overturned in the public record. The effect is that DCF can make the same mistake repeatedly, but the public will not have the benefit of that knowledge so there is little pressure for DCF to correct the mistakes that it is repeating.

<sup>14</sup> Sources: Cumulative data derived from [Annual Child Protection Reports](#), VT Dept. for Children & Families <https://dcf.vermont.gov/child-protection-data> and Human Services Board Fair Hearing Decisions <https://humanservices.vermont.gov/human-services-board>, each of which has multiple caveats to their veracity.

### 3. How the Project Tested the System

- Thirty-two (32) substantiation appeals involving physical abuse, emotional maltreatment, neglect, sexual abuse and risk of harm were accepted. These were accepted on a first- come, first- served basis, with no pre-screening and no appeal was rejected from inclusion in the Project.
- Each appeal was assigned a lead advocate. Although 32 cases out of a field of approximately 2,000 substantiations occurring over the trial period may seem like a non-representative sampling, the extraordinary amount of time required for a single appeal (40 – 150 hrs. over a 12 – 24-month period) precluded a larger cohort of appeals. However, to the best of our knowledge, the 32 appeals are the largest number of appeals engaged in by any organization to date over a comparable period. It is this concentration of appeals by VPRC which provided insights not previously available when evaluating the overall system. Each case was fully re-investigated, witnesses re-examined, and DCF reports analyzed for factual and legal sufficiency. The result is the first comprehensive picture of a system badly in need of repair from the legal, social and economic justice perspectives.
- The lead advocate was in each instance an individual with a legal background and in most cases a joint legal/social work background. Project coordination was managed by an individual with a joint law/social work background having senior managerial experience in state government and human services, including administrative and child protection hearings.

## 4. Three Case Studies which show how the system is broken.

**Case Study No.1: A violent father, a defenseless child, a gun and a bureaucracy without moorings: common sense became lost in a decision based upon a failure to provide necessary services in a timely manner, poor investigative practice, and bureaucratic expediency.**

### The allegation:

Father of the 15-year-old daughter puts his hands around her neck during a heated argument, lifts her off the ground while squeezing her throat and walks her out of the parent's bedroom, putting her down in the adjacent hallway where she passes out. In doing so, the Department alleged that the father physically abused the daughter by obstructing her airway and strangling her.

### The DCF investigation:

Within days, DCF interviewed the daughter, at which point she stated that during the altercation she could not breathe and passed out. Also interviewed was mother and the visiting teenager who each stated that they did not actually see the event. The teenager later stated that she "heard" noises from the hallway but did not actually see anything. Father was interviewed weeks later and stated that he did not squeeze the daughter's throat or otherwise block her airway as evidenced by her continual screaming at him and the absence of injury. Based upon this information, and a "search on the internet" that stated "strangulation can occur in less than 10 seconds", DCF substantiated the father for physical abuse (strangulation). Father is a building contractor and his substantiation and placement on the Child Protection Registry would negatively impact his employment and his ability to volunteer for school activities involving his 14-year-old son.

### The VPRC investigation:

A thorough investigation by VPRC determined that the daughter, unbeknownst to parents, held a drinking party the night before. Next evening, she walked into the parent's bedroom and informed them that she was "going out with friends." Mother said "no" in light of the drinking party and late hour. Daughter began to scream at her mother and threatened to "pound her into the ground." The threat was not idle, as the daughter had physically beaten her mother at least once before, had a long history of physical violence and was recently expelled from school for repeatedly physically attacking another student. As the screaming escalated, father stepped between daughter and mother so as to protect mother, and told daughter to calm down. Daughter then placed herself inches away from her father and "poked" at his face while continuing to threaten the mother. After multiple requests for the daughter to calm

down, father placed his hands loosely on either side of daughter's neck, just under the jawbone, and lifted the daughter about 2 inches off of the floor, so as to walk her 2-3 steps through the bedroom door and into an adjacent hallway without risking what was likely to be a brawl in a confined bedroom. The daughter continued to scream at father throughout this brief period (3-5 seconds). Upon putting daughter back down on the floor, she ceased screaming and calmed down. She then went into her bedroom and called the police. Police arrived in minutes, interviewing the daughter, father, mother and a visiting older teenager. Daughter demonstrated no injuries when interviewed, and the police issued no citations. Daughter was subsequently taken to the local medical center and evaluated, but inexplicably she was not evaluated for physical injuries, only for a "mental health screening." Daughter and mother relocated to the home of relatives as part of a safety plan while a DCF investigation ensued. In reviewing the DCF reports, it was found that the DCF investigator's determination of abuse resulted from combining conflicting statements made at different times so as to appear to be a consistent statement made by both the daughter and the teenage visitor, when their statements were actually inconsistent. This was translated by the investigator into an assumption of strangulation, but with no evidence of actual strangulation presented. The DCF report omitted critical information:

- The daughter's long history of violent behavior toward people and property.
- No acknowledgment that the parents had repeatedly sought, unsuccessfully, to have DCF place the child in a secure treatment facility.
- The DCF report noted that the child was "expelled" from school, but did not acknowledge that the expulsion resulted from the daughter viciously attacking a schoolmate, and when physically separated later she hunted the schoolmate down and re-attacked the schoolmate.
- At the time of Father's Review contesting the substantiation, the Department made no mention of the Department's offer to "push that stuff aside" (the substantiation) if father would agree to allow DCF to place the daughter at his home.
- No mention was made of the fact that a week later, the daughter, accompanied by her mother (during a divorce from father) and two older teenagers, drove to father's home and physically attacked him in his front yard. The daughter "pistol whipped" father with a 9mm handgun while mother and the two accomplices beat him to the ground with fists and feet. Daughter discharged the pistol in her brother's face as he took the pistol away from her. She then fled the scene. None of this information was presented in the Department paperwork at the Review hearing.
- Nor was the fact that upon apprehension, the daughter was incarcerated at the women's correctional facility "because DCF had no place to put her." While at the facility there was an altercation wherein 3 correctional officers were

required to subdue the daughter. The daughter was charged with two felonies carrying a combined 20-year sentence. She was later placed in a staff-secure youth facility while awaiting transfer to a secure youth detention facility in New Hampshire.

- Following the Review but prior to the issuance of a decision, DCF representatives, while faced with again needing a placement for the daughter since no opening had arisen in New Hampshire, **approached father once again asking him if he would agree to have the daughter placed with him.** Again, the father said that he would like to have his daughter back home, but only after she received the treatment that she needed that could only be provided in a locked facility. Again, he asked how DCF could simultaneously substantiate him AND ask that he allow his daughter to be placed with him? These discussions, witnessed by a third party, took place while Father's Review was pending. This constituted a violation of DCF's own policies, appeared coercive in nature, and was witnessed by 3<sup>rd</sup> parties.
- At this point, VPRC filed an appeal, on behalf of the father, with the Human Services Board based upon DCF's failure to render a timely decision in the substantiation appeal, interfering with father's ability to conduct his building trades business (he could not bid on contracts if he was listed on the Registry) and applying what appeared to be coercion relative to the Department's continued requests to have the daughter placed at his home in exchange for "pushing the substantiation aside."
- Within 12 hrs. of the motion being filed with the HSB, the Department produced a letter (dated two days earlier) overturning the substantiation.

#### Why the substantiation was overturned:

The Department had no evidence that the substantiation complied with applicable state law or that DCF followed its own policies:

- There was no "accurate and reliable information" that the daughter was injured, much less seriously injured.
- There was no mention of any statute or rule supporting the substantiation. Rather, there appeared to be an "assumption" that the mere placing of hands on a child constituted abuse, a recurring theme in DCF substantiations. In this instance, there was no evidence of an obstructed airway, simply an assumption of obstruction that was not supported by evidence.
- The "Policy" relied upon was an internal Policy that applied only to DCF employees, not to 3<sup>rd</sup> parties or the public. It appears that DCF investigators and supervisors (and some Administrative Review Officers) have not been educated as to the fact that DCF policies are not adopted according to the Administrative

Procedures Act and therefore, those policies only apply to DCF employees, not to the general public or other 3<sup>rd</sup> parties.<sup>15</sup>

- There was no allegation, much less evidence, that father intended harm as he successfully de-fused a potentially dangerous situation.
- The evidence of prior and current, violent acts on the part of the daughter were mitigating factors, but were seemingly withheld by the Department to present a stronger argument for substantiation, a practice VPRC observed in other substantiations.
- When asked, in Review, how the Department proposed that father should have handled the altercation considering the experience depicted with the 3 correctional officers, the Department had no response as to an alternative approach.
- The Department failed to explain the Department's offer to "push the substantiation off to the side" if the father would agree to allow the Department to place his daughter at his home both **AFTER** the Department had substantiated him and again **AFTER** the daughter physically attacked him with a pistol.

## **Case Study No.2: Young children found wandering on dark busy streets.**

### The allegation:

Two very young children were found by local law enforcement and neighbors wandering a dangerous street at night during winter and without coats or boots and with a neglectful mother nowhere to be found. The neighbors reported a history of seeing the children left unattended. Mother was substantiated for placing her children at Risk of Harm.

### The DCF investigation:

The investigator reported that neighbors and law enforcement found the children walking at night next to a busy street several blocks from their home. Once found, the mother did not appear at the scene for some 15 minutes. Upon questioning, the neighbors told the investigator that the children were routinely seen playing next to the street without any apparent adult supervision. The basis for the substantiation was that the children could be injured by speeding cars on the dark street or that the children could be abducted.

### The VPRC investigation:

A visit to the location of the home and surrounding area, coupled with discussions with relevant witnesses, showed that:

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<sup>15</sup> Azar v. Alina Health Services, 139 S. Ct. 1804, 1818 (2019) and Parker v. Gorczyk, 173 Vt. 477 (2001), DCF FSD Policy 21



- The street was a quiet dead-end street flanked by residential homes.
- The sidewalk was broad and well-lit and sited on the other side of an expansive grassy area separating the sidewalk from the street.
- The law enforcement officer was stationed adjacent to the street monitoring individuals who might try to walk across the nearby border and through the quiet neighborhood. The officer had been watching the children stroll down the sidewalk and had no concerns for their safety as he could hear their mother calling for them.
- The officer's log identified that the children were in their pajamas, but with coats and boots, and that he had no concerns regarding the children's welfare.
- The mother arrived within 2-3 minutes, had enlisted a neighbor to help her look for the children, and appeared genuinely alarmed that her children had gone outside while she was in the bathroom as a result of having been sick.
- Upon questioning, the neighbors clarified that their comments about the children being routinely unattended were not in regard to these children, but were about another family who lived nearby. They were curious as to how the DCF investigator could have mis-interpreted their statement.

Why the substantiation was overturned:

Risk of harm is one of the categories of abuse / neglect most frequently cited in DCF substantiations, and it is frequently broadly interpreted by DCF investigators and supervisors. However, the statute regulating Risk of Harm is quite specific:

- The risk must pose a **significant danger**;
- The danger must be one of **serious harm** by other than accidental means;
- The harm must be **likely to cause serious physical injury**;
- Finally, the HSB has ruled that the risk of harm "must be predicated upon evidence showing a significant risk that **a child will be seriously harmed, not on speculation.**"<sup>16</sup> However, DCF does not follow this guideline in its substantiations.

None of the required elements were present.

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<sup>16</sup> HSB Fair Hearing Nos. Y-01/08 and 19,126.

### **Case Study No.3: A statute, a policy and a practice – but no proof.**

#### The allegation:

A nurse with considerable experience in the medical field applied for nursing positions at multiple medical establishments over several years. In each instance she was denied the position. In exasperation, she contacted the last place she applied to and asked “what did I do wrong in my application; I have more experience than you were seeking and still you did not hire me?”. The answer: “you are listed on the Vermont Child Protection Registry and as a result we cannot hire you.” This was the first time that she was told that she had been substantiated years earlier, a substantiation for which she had never been notified or told of her appeal rights. She then applied to the DCF CRRU for a Review. The CRRU’s response was that her request was “too late” and that she needed to appeal to the Human Services Board, at which point she contacted the VPRC Substantiation Project.

#### The VPRC investigation:

- The Project reviewed the law and applicable regulations and Policies. What was discovered is that a person who “misses” the 14 days within which the law requires the person to appeal a substantiation to the Department, that person’s only recourse is to appeal directly to the Human Services Board. However, if a person does not avail themselves of the CRRU Review, that person is precluded from appealing to the HSB, thus presenting a “Catch- 22.”<sup>17</sup>
- An analysis of three years’ worth of HSB decisions showed that this Catch-22 was routinely applied to the detriment of those appealing. Essentially, DCF would inform the person that they had to appeal to the Human Services Board if they wanted their appeal to be heard. Once the person applied to the HSB, DCF would object to the appeal based on the person’s not having had a CRRU Review.
- VPRC’s research regarding “timeliness” issues revealed that in every case the individual appealing had acknowledged receipt of the initial substantiation letter, but failed to respond within the allowed 14 days. In every case, the HSB ruled in favor of the DCF motion to dismiss the appeal.
- In this instance, however, the nurse contended that she had never been notified of the substantiation. As a result, VPRC submitted a motion to the HSB requesting that it remand the case to DCF for a hearing because DCF could not prove that it actually

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<sup>17</sup> Heller, Joseph, Catch-22. A problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule. In this instance, a person who misses the CRRU Review can only appeal to the Human Services Board, but one is not entitled to a HSB Review if one does not have a CRRU review first!

sent the nurse a notification letter. Based upon the HSB's published decisions, it appears that this was the first case raising this assertion.

#### Why the substantiation was overturned

A VPRC investigation showed that DCF has no system verifying that a letter is actually mailed:

- The Department has developed a "Policy" which calls for a standardized office "practice" by which substantiation letters are to be mailed in compliance with the relevant statute (USPS first class mail).
- Letters are mailed first class postage directly from the individual DCF District Office that is issuing the substantiation.
- DCF District Offices do not maintain a log verifying that a letter has actually been posted, by whom and when posted. Effectively, DCF has a statute generating a Policy which describes a "practice" for mailing, but no "proof" that the letter is actually posted, when and by whom.
- Further, the person being investigated is never told that they must maintain a current address with the Department, or that the notification about the outcome of the investigation will be by first-class mail.
- VPRC filed a motion on behalf of the nurse, and it was acknowledged by the Attorney General's Office that there is no verification system. Effectively, the Department cannot prove that a letter was actually sent. As a result, the substantiation was remanded to the Department for reinvestigation.
- The reinvestigation resulted in the Department overturning the substantiation; however, the rationale for the decision was not made known. Arguably, such a decision is the result of a determination that the evidence supporting the substantiation was lacking, or the personnel involved with the original substantiation decision are not available to testify, or the records could not be located.

**Note:** Within 3 months of this decision, 3 additional individuals approached VPRC with the same situation. It was only by accident that each discovered they were on the Registry. This raises a legitimate question about how many of the 25,000 +/- other people who are on the Registry were notified of such and denied their appeal rights as a result? Potentially, this could be a large class of individuals.

## 5. Major Findings

- A. The Department's ability to investigate allegations was inconsistent at best and woefully inadequate in most cases. DCF investigators appeared not to understand the difference between hearsay and verified facts, or even how to verify facts. Assumptions were rampant in decision-making with little to no evidence to support the assumptions.
- B. Investigators and Supervisors appeared to have an inadequate understanding of the law and its interpretation. Frequently, substantiations failed to identify the statutory basis for the substantiation.
- C. Substantiations are decentralized across 12 DCF District Offices, thereby ensuring little consistency in decision making from one DCF district to another.
- D. By statute, the decision to substantiate is conveyed by First Class Mail; however, individuals under investigation are not told that they must keep the Department informed about address changes, the result being that substantiation letters may, or may not, actually reach the intended receiver. Thus, there are individuals listed on the Registry who do not know that they are so listed.<sup>18</sup>
- E. There was no verification system ensuring that the substantiation letter was actually posted or posted in a timely manner. In HSB hearings, DCF was unable to prove that the person being substantiated was ever given notice of the substantiation and their right to appeal.
- F. Failure to respond within 14 days of the postmark on the substantiation letter results in loss of appeal rights, including the ability to appeal to the HSB.<sup>19</sup>
- G. Substantiations are to be based on state law; however, the Department has created a multitude of internal Policies regarding substantiation. These Policies are not adopted through the Vermont Administrative Procedures Act and therefore apply only to DCF employees, not to the general public. However, substantiations frequently only cite a DCF Policy as the basis of a substantiation. It appears that DCF investigators, supervisors and Review Officers who hear appeals were unaware that these Policies are not binding upon individuals being substantiated. The individual being substantiated are equally unaware.

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<sup>18</sup> 33 V.S.A. 4916a(b)

<sup>19</sup> 33 V.S.A. 4916a(c)(1)

- H. Investigators did not formally memorialize critical testimony, leaving both the Department and those being substantiated unable to verify what was actually said during critical interviews.
- I. DCF/law enforcement forensic interviews are recorded. These recordings are critical in that they, often, are the only first-hand testimony derived from young or very young children. These recordings are critical for both prosecution and defense purposes as they frequently provide the only direct, firsthand testimony in cases of alleged serious abuse, especially sexual abuse wherein there is no medical evidence of abuse. It was the Project's experience that recordings ranged from very good quality to unusable quality. There appeared to be little formal quality assurance in the making, cataloging, and preserving of these essential recordings. In one instance, even after assurances of preservation, a critical recording was found to be unusable, while in another instance, the name and date on a recording did not match the actual recording which turned out to be a child involved in an unrelated case.
- J. Investigators routinely paraphrased expert opinion (typically medical opinion) and frequently did so incorrectly.
- K. Investigators routinely provided experts (typically medical personnel) with only partial information, effectively obtaining what appeared to be a pre-ordained expert opinion. The experts appeared largely unaware of this, as in the example of a parent providing multiple possible reasons for the child's bruise, with the first being a "sledding accident at school," and after repeated questioning about other possibilities, offering that the child "may have fallen on a disassembled bed frame while rearranging her room." The DCF investigator's only explanation to the physician was that the mother said "she fell on her bed." The physician had little recourse except to say that the bruise in question could not have occurred by falling on a bed, thus it must be non-accidental. Nothing was relayed relative to a sledding accident, an accident later found documented in the school nurse's records. The child was removed and underwent 3 foster placements in a matter of weeks before the court ordered her returned to mother when VPRC and mother's attorney checked the nurse's records.
- L. By statute the Department is to hold its substantiation review within 35 days of request by the person being substantiated.<sup>20</sup> The Department took between 200 and 700+ days, leaving the Appellant in limbo for up to two years after the

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<sup>20</sup> 33 V.S.A. 4916a(d)

alleged event before actually being told any of the specifics of what they are accused of doing. In the interim, memories faded, and witnesses were no longer locatable.

- M. There is no penalty associated with the Department's failure to meet statutory requirements, even those preceded with the word "shall," in light of the Supreme Court determining that, absent a penalty, the term "shall" is merely advisory. However, for every "shall" related to a person appealing, such as when to file an appeal, there is a penalty for failure to meet the statutory requirement.<sup>21</sup> Effectively, DCF is not accountable when it fails to comply with the law, whereas the citizen is held strictly accountable for compliance.
  
- N. By statute, a person being substantiated must be provided with the Department's charging documents no later than 10 days prior to the Departmental Review.<sup>22</sup> However, 10 days was found to be entirely insufficient for developing a defense, locating, and preparing witnesses, and other essential preparations by even the most skilled advocate. It is in receipt of the charging documents that the substantiated person first learns any details regarding the actions for which they have been substantiated.
  
- O. By statute, the charging documents are provided only in redacted format, redactions regularly covering 50% of the documents.<sup>23</sup> The redaction process is time-consuming and significantly hampers an understanding of who said what, in what context, and how the information relates to the allegations. However, upon further appeal to the Human Services Board, the documents are provided in un-redacted form, raising into question why they are not provided in unredacted form to begin with at the Department review? The answer is that the statute is a hold-over from the past, a time when an accused person did not have a right to know who their accuser was or what the accuser said. The absurdity of redaction today is best exemplified by the fact that virtually all names (except those of DCF workers) are redacted, including one's own children's names.

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<sup>21</sup> These timelines are procedural rather than substantive. In re Francis Beer, 2010 VT 31

<sup>22</sup> 33 V.S.A. 4916a(d)

<sup>23</sup> 33 V.S.A. 4916a(d) The requirement for redacted documents is a hold-over from the earlier period when the Registry was purely an internal record accessible only to the child protection agency in its issuance of child or foster care licenses. As such, personal information contained in those documents was considered confidential. The statute was not updated when the Registry began to be accessible for employment purposes. This expanded access raised issues related to the right to constitutional due process protections, including the right to know what one is accused of and to confront accusers.

- P. There is no DCF requirement to update substantiation material once the substantiation is formally determined, even if DCF is aware of new material. Effectively, DCF goes into a Review with the mistaken belief that because the information it is presenting was considered accurate and reliable at the time of the initial substantiation, DCF appears to believe that it has no responsibility to provide information that is counter to DCF's stated position, nor any duty to provide such information to the party appealing. Essentially, DCF operates as though information gathered after the initial investigation does not require acknowledgment even if such information shows that the initial determination of guilt was incorrect. Such an operating principle undermines the concept of due process and a requirement to provide "accurate and reliable" information as required by statute.<sup>24</sup>
- Q. Individuals are not provided with legal counsel for either the Department Review or the HSB, yet the Department is represented by the Attorney General's Office at the HSB. This presents an inherently uneven appeal process, especially since the HSB appeal follows the Vermont Rules of Evidence, something virtually no Vermonters, and few people with legal training, understand. The HSB Hearing Officers do attempt to accommodate people who represent themselves; however, the level of assistance is severely limited in that the Hearing Officer cannot be both the "judge" and defense counsel in a hearing.
- R. DCF routinely substituted the gathering of "information" in place of "evidence" as the basis for substantiation. Charging reports frequently contained an abundance of information and assumptions, but little in the way of evidence.
- S. Substantiations for Risk of Harm were the largest category appealed and were in every instance overturned due to the Department having interpreted risk of harm so broadly that it far exceeds statutory guidelines, HSB determinations, or common-sense assessment. In some instances, the DCF charging documents did not reference a single legal element required for substantiation.
- T. In multiple cases, exculpatory information/evidence was known to the Department investigator but not made available to the person being substantiated. This included victims who made credible recantations.
- U. By statute, the Department utilizes the "Reasonable Person" standard of proof in Reviews.<sup>25</sup> This standard has no discernable measurement as two, or more,

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<sup>24</sup> 33 V.S.A. 4916a(e)

<sup>25</sup> Ibid

reasonable people can arrive at two, or more, different conclusions after looking at the same information. However, the Human Services Board utilizes the “Preponderance of the Evidence” standard wherein a verdict is decided when 51% of the evidence weighs in one direction or the other. Vermont is currently one of only four states to retain “Reasonable Person.”<sup>26</sup> As a result, a substantiation that has little or no possibility of withstanding a HSB appeal will nonetheless be upheld at the DCF Review. The individual is then placed on the Registry and compelled to incur the cost of an appeal to the Human Services Board if they wish to be removed from the Registry.

- V. The concept of “*Stare Decisis*” (determining points in litigation according to precedent) is seemingly not followed in DCF Reviews or HSB appeals. The result is that some procedural determinations do not transfer to other cases presenting the same facts. In a DCF Review opposite decisions can arise in the case of two identical Reviews if different Review Officers are assigned to the cases. An example was found when one Administrative Reviewer questioned why DCF “Policy” could not be used as the basis for a substantiation and a brief addressing the issue of non-applicability of “Policy” to 3<sup>rd</sup> parties was provided. In another case, a different Administrative Reviewer cited DCF “Policy” as the basis for affirming a substantiation. The information presented to one Administrative Reviewer describing legal precedent does not appear to be disseminated to other Reviewers.<sup>27</sup> As a result, one DCF substantiation supported by “Policy” is overturned, while another substantiation supported by the same “Policy” is upheld. At the HSB, one Hearing Officer can establish that *ex parte* communication requires an immediate remand to DCF, while another Hearing Officer can question the mere relevance of *ex parte* communication even though the Vermont Supreme Court has commented upon the issue.<sup>28</sup> As a result, an issue that is established in one hearing has to be argued again in each subsequent hearing as though it is being raised for the first time. It is only because of the Project, having been engaged in 32 appeals over a relatively short period of time, that this pattern of inconsistency and inefficiency became evident. This was particularly evident in the case of multiple instances of *ex parte* communication in DCF Reviews, where in one case DCF informed the Attorney General’s Office and the HSB that it no longer engaged in this prohibited behavior, yet continued to engage in the behavior in subsequent

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<sup>26</sup> See Attachment No. 1

<sup>27</sup> *Parker v. Gorczyk*, 173 Vt. 477 (2001) ‘Interpretative rules’, (created outside of the VAPA process) among other things, are not promulgated through the Vermont Administrative Procedures Act (3 V.S.A. 801) and are not binding upon third parties.

<sup>28</sup> The Vermont Supreme Court in *Sheldon v Ruggiero*, 2018 VT 125, No. 2017-387, footnote 3, clearly identified *ex parte* communication in such hearings as being inconsistent with statutory and regulatory protections.



cases. This was possible because in each instance (after the initial discovery) DCF agreed to withdraw the substantiations rather than formally acknowledge continued improper behavior. Since “settlements” are not recorded as HSB decisions, Appeal Officers had no way of knowing that DCF had previously agreed to discontinue the improper communication.

- W. A legal fiction appears to exist in HSB recording decisions.<sup>29</sup> It was the Project’s experience that what is considered a “settlement” is, in reality, not a settlement. Rather, it is the result of the state acknowledging that it cannot bear the burden of proof in a hearing and withdrawing the substantiation and removing the person from the Registry. The fictional “settlement” is premised upon the person appealing agreeing to withdraw their appeal. However, this is not really a settlement in that once DCF agrees to overturn its own substantiation, there is nothing left to appeal and the HSB won’t hear the case. However, what this “legal fiction” results in is that the reason that DCF withdraws is never recorded; thus, DCF can engage in the same mistakes time and again, yet there is no record of those mistakes and, consequently, the mistakes never need to be corrected. An analogy can be made to an assembly line wherein defects in the product are repeatedly found, the defective product pulled off the line but no record of them is ever noted. Thus, the mistakes continue unabated. The same is true with DCF substantiations “settled” at the HSB.
- X. Relative to investigations, it appeared that the Department’s mission of protecting children routinely took precedence over the duty to ensure an unbiased assessment of whether abuse actually took place. As a result, investigatory outcomes did not meet statutory substantiation requirements, but resulted in substantiations nonetheless.
- Y. DCF’s ability to retain recordings of critical forensic interviews was found to be seriously deficient, if not entirely absent. Critical recordings either could not be found or were unusable when they were found, even after formal assurances were made by the Attorney General’s Office that the recordings would be preserved. DCF appears to have no systematic method of storing and/or duplicating and preserving forensic interview recordings.
- Z. The public safety purpose inherent in the maintenance of a Child Protection Registry appears to be in question in that there is little distinction between parents who may have engaged in minor infractions and a parent who seriously

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<sup>29</sup> Legal fiction: an assertion accepted as true, though probably fictitious, to achieve a particular goal in a legal matter.

physically abused/neglected a child, other than the duration required before Expungement can be sought.

AA. An individual who represents themselves in their informal administrative hearing had less than a 10% chance of successfully overcoming the substantiation. An individual who represents themselves in a Human Services Board appeal has less than a 1% chance of prevailing. The individuals represented by the Substantiation Pilot Program had a 100% chance of prevailing.<sup>30</sup>

BB. The average cost of hiring a skilled advocate (in Vermont these are typically a lawyer) to represent one in a substantiation appeal ranges from \$10,000 to \$50,000 based on the average rate of \$350 per hour demanded by competent advocates on the open market. The challenge arises in that few Vermonters can afford to pay this amount, resulting in even fewer attorneys who are skilled in this line of work.

CC. The fact that each year only about 33% of individuals substantiated by DCF avail themselves of an administrative Review of their substantiation is perplexing and deserves evaluation. The fact that the 14 day time period for requesting a Review is completely inadequate in an era when it can take a week, or more for a notification letter to be delivered and the responding request for appeal to arrive at DCF; that there is no verification that the notification letter was actually mailed; that the actual Review is delayed by half a year; that one only learns of the details of the substantiation 10 days before the Review itself; that information is so heavily redacted that it is difficult to determine what is alleged to have been done and to whom it was done; that Reviews reference forensic interviews which the person seeking a Review is not allowed to see, and may in fact not exist; that DCF relies upon Policies which most citizens have no knowledge of or the awareness that the Policies do not apply to them; that the average person has no idea how to actually prepare for a Review; that few people can afford an attorney resulting in there being even fewer attorneys who are experienced in Reviews and HSB appeals, all scream for evaluation.

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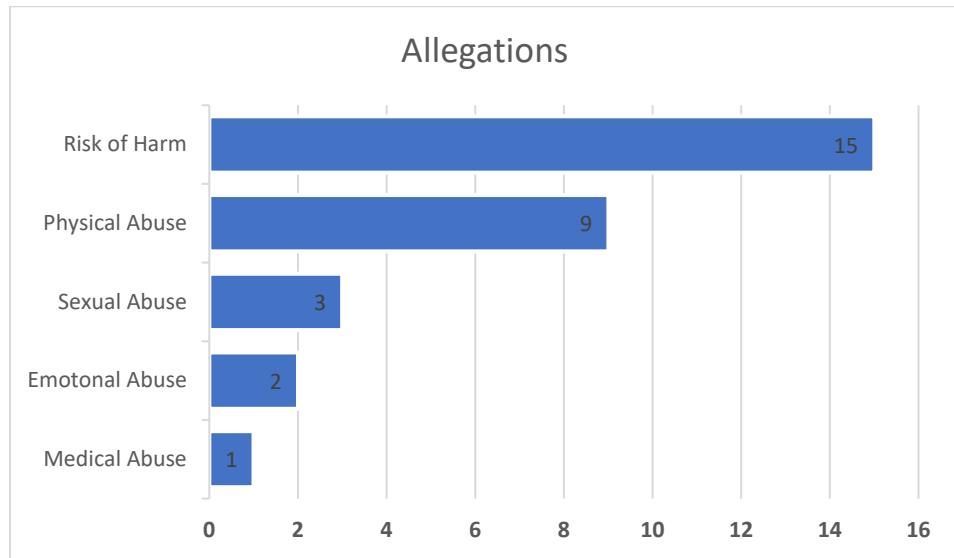
<sup>30</sup> Annually approximately 700 – 1,000 people are substantiated. 2/3rds never appeal and the reasons for this failure are myriad. 1/3<sup>rd</sup> do appeal for a DCF Review and approximately 10% are successful. The next stage of appeal is the HSB, where less than 1% appeal of which approximately 1% are recorded as successful. However, these numbers are deceptive in that an unknown number of HSB appeals are “settled” (meaning that the appeal is overturned by mutual consent), but no record of such is published since it was a confidential settlement. Source: cumulative data derived from Annual Child Protection Reports, VT Dept. for Children & Families <https://dcf.vermont.gov/child-protection-data> and Human Services Board Fair Hearing Decisions <https://humanservices.vermont.gov/human-services-board>

## 6. The Data

### Cases:

Total # cases: 32  
 Gender of the accused: 21 Female 11 Male  
 Children removed: 20 Yes 7 No 5 Had no children

### Allegations:



### Duration:

By law, DCF is to hold a Review within 35 days of request.<sup>31</sup> **That timeline was complied with in only one (1) case.** There is no penalty for DCF failure to comply with the statute. From commencement of a DCF investigation to conclusion of a Review is approximately 123 days, or 6 months, as identified in statute (60 days for investigation, 14 days to respond to the substantiation letter, 35 days within which to hold the Review, and 14 days within which the Administrative Reviewer issues a decision). As can be seen in the chart, below, DCF took almost three times the amount of time specified in statute.

Statutory Commencement:	Within 35 days of request
Actual DCF Commencement:	7 - 18 months before holding the Review

<sup>31</sup> 33 V.S.A. 4916a(d)

Duration Start to Finish:	7 - 46 months from substantiation to final decision
Average Duration Start to Finish:	16.5 months

**Outcomes:**

Total Cases Resolved:

- 0 Substantiations upheld
- 25 Substantiations overturned or dismissed

DCF Commissioner’s Registry Review Unit Review:

- 11 Substantiations upheld
- 12 Substantiations overturned or withdrawn
- 3 Substantiations returned for reinvestigation
- 2 Remain pending

Human Services Board Appeals:

- 0 Substantiations upheld
- 7 Substantiations overturned or withdrawn
- 2 Remanded to DCF for rehearing

**Advocate Hours & Cost per case:**

- Range from start to finish: 40 hrs. – 150 hrs.
- Market rate for advocate: \$350 per hr.
- Average per CRRU Review: \$10,000
- Range per HSB Appeal: \$20,000 to \$50,000

**Standard of Proof: The level of certainty and the degree of evidence necessary to establish proof in a criminal or civil proceeding.**

- DCF CRRU Review: “Reasonable Person standard” relies upon a subjective decision based upon information rather than a measurement of evidence, once the majority standard nationally, but today utilized by only 4 states.<sup>32</sup> The problem with this standard is that two, or more people, all reasonable in their nature, can look at the same situation and arrive at three different outcomes. It is a subjective standard having little to nothing to do with the weight of evidence.

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<sup>32</sup> See: Attachment No. 1

- HSB Appeal: “Preponderance of the Evidence standard”, meaning 51% or more of the evidence. Today utilized by the vast majority of states, with the remainder using an even higher standard.

## 7. Case Descriptions

### **Legend:**

**N** = No, children not removed upon initial substantiation

**O** = Overturned

**R** = Remand for reinvestigation or review

**S** = Substantiate (DCF determination of guilt)

**Y** = Yes, children removed upon initial substantiation

### **Glossary:**

**Case Duration** = The amount of time between the initial notification that a person has been substantiated to the conclusion of the appeal.

**Child Protection Registry** = DCF list of individuals substantiated. The list is available to employers, schools and other groups utilizing employees and volunteers, and to professional licensing entities covering approximately 1/3<sup>rd</sup> of all VT jobs. There are approximately 25,000 +/- people currently listed on the Registry.

**Child Removed** = Child(ren) removed initially upon complaint, or during the course of the investigation or substantiation appeal.

**CRRU** = DCF Commissioner's Registry Review Unit charged with conducting DCF Reviews utilizing contract Administrative Reviewers who are not DCF employees but are managed and supervised by DCF employees.

**DCF** = Department for Children and Families

**Exculpatory evidence** = Evidence indicating that the alleged abuse did not occur or that mitigates the alleged act.

**Ex parte communication** = When a party to a case, or someone involved with a party, talks or writes to or otherwise communicates directly with the judge about the issues in the case without the other parties' knowledge. Prohibited in Vermont law (Sheldon v Ruggiero 2018 VT 125).

**HSB** = Human Services Board (quasi-judicial appeal body) utilizing state employee Hearing Officers and a Volunteer Board.

Case #:	Case Duration:	Child Removed:	CRRU Ruling:	HSB Ruling:	Charge:
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**001.**            29 mos.            N            S            O            Risk of Harm

*Parent alleged to have allowed a convicted sex abuser access to children. Withdrawn at HSB due to an absence of evidence, irregularities in investigation, and ex parte communication on the part of the Department.*

**002.**            15 mos.            Y            O            Risk of Harm

*Step-parent alleged to present a risk to teenagers because of an accident occurring with an infant years earlier. Overturned due to absence of significant risk of serious harm to teenagers.*

**003.**            15 mos.            Y            O            Risk of Harm

*Parent alleged to have permitted a person substantiated for dropping an infant to live in the same home as teenagers. Overturned due to an absence of significant risk of serious harm to teenagers.*

**004.**            13 mos.            Y            R            Physical Abuse

*Parent alleged to have grabbed a teenage child having a developmental disability by the hair and dragging them up a flight of stairs while also blocking the child's airway. Sent back for reinvestigation due to failure of investigator to have followed investigative protocol, interview witnesses, and withholding exculpatory evidence.*

**005.**            13 mos.            Y            R            Physical Abuse

*Parent alleged to have thrown teenage child with developmental disability onto a cement basement floor and make child sleep on deflated air mattress. Sent back for reinvestigation due to failure of investigator to have followed investigative protocol, interview witnesses and withhold exculpatory evidence.*

**006.**            20 mos.            Y            O            Physical Abuse

*Allegations amended for different facts after reinvestigation. Overturned due to lack of evidence supporting the legal definition of physical abuse.*

Case #:	Case Duration:	Child Removed:	CRRU Ruling:	HSB Ruling:	Charge:
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**007.**            24 mos.            Y            S            O            Physical Abuse

*Parent alleged to have attacked child with developmental disability. Substantiated by Department Reviewer, but Overturned at the Human Services Board for lack of evidence.*

**008.**            8 mos.            Y            O                       Physical Abuse

*Reinvestigation resulted in Department dismissing the substantiation, but refusing to state the rationale for the decision even though the rationale likely related to another parent having been substantiated for the same acts. DCF's refusal to state the reason for the dismissal was that there is no statutory requirement for them to do so, even if the reason is exculpatory to another party charged with the same act. In any other forum such refusal would have been prohibited; however, the CRRU Review process is absent effective oversight or appeal regarding such arbitrary and self-serving decisions.*

**009.**            20 mos.            Y            S            R            Emotional Maltreatment

*Parent alleged to have emotionally mistreated teenage child by calling teenager names and isolating the child. Substantiated by Department Review, but remanded by the Human Services Board due to ex parte communication found between Department HSB Reviewer and Department staff. Parent lost job, professional license, housing, and children were removed while awaiting Department re-review. Teenager acknowledged the story was made-up in order to leave home and continue seeing adult boyfriend.*

**010.**            12 mos.            Y            S            O            Physical Abuse

*Parent alleged to have inflicted physical harm on the teenager. Substantiated in Department Review but Overturned by the Human Services Board due to a lack of evidence, conflicting medical opinion that was persuasive, and a persuasive recantation by the teenager to a therapist. Parent lost nursing job, nursing certification, housing and children, then charged criminally before the substantiation was overturned and criminal charges dropped, but only after becoming destitute and living in emergency housing with 3 children under 3 years of age. Teenager acknowledged the story was fabricated because the parent would not buy the child a new electronic device.*



Case #:	Case Duration:	Child Removed:	CRRU Ruling:	HSB Ruling:	Charge:
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**011.**            8 mos.            Y            O                       Emotional Maltreatment

*Reinvestigation resulted in renewed substantiation; however, substantiation overturned in Department Review due an absence of any of the elements necessary to constitute Emotional Maltreatment. The reinvestigation took 7 months within which to hold a 5-minute conversation with a witness followed by a consultation with a physician. The physician was provided only a cursory description of the alleged injury. A second physician, trained in emergency medicine and offered by the defense, presented a detailed opinion as to why the alleged injury did not meet statutory requirements for abuse.*

**012.**            46 mos.            Y            Pending                       Physical Abuse

*Parent alleged to have committed multiple, continually changing abusive acts, and allowing teenager to be abused to an extent that extensive scarring resulted. A Department Review was scheduled based on the contention that the Department investigator fabricated the allegations and that there is no physical evidence to support the allegation of severe scarring. Case is pending in federal court and the Department Review has been stayed pending judicial decisions as to the constitutionality of the investigation and Review processes.*

**013.**            43 mos.            N/A            S            O                       Sexual Abuse

*Minor alleged to have engaged in improper actions with a child a year younger. Substantiated by Department Review and later denied Expungement. Upon appeal to the Human Services Board, it was determined that during the Expungement appeal the Department improperly accessed juvenile court records and utilized them for the substantiation. Rather than confirm or deny improprieties, the Department refused for 12 months to respond to the Petitioner's and HSB's requests for discovery. As a result, the HSB Overturned the substantiation, which made the issue of Expungement moot.*

**014.**            21 mos.            N            S            O                       Risk of Harm

*Parent alleged to have failed to prevent the young child from leaving the home unattended. Substantiation was Overturned in the Department Review when it was demonstrated that the parent had gone above and beyond the Department's own*

recommendations about how best to ensure that the child could not leave the home undetected.

Case #:	Case Duration:	Child Removed:	CRRU Ruling:	HSB Ruling:	Charge:
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**015.**            14 mos.            N            O            Risk of Harm

*Parent alleged to have failed to intervene when the child was spanked by other parent after the child set a 5th indoor fire in the home. Substantiation Overturned in Department Review due to corporal punishment, alone, not being a basis for substantiation (absent malice or serious injury), and evidence that parent did in fact intervene appropriately contrary to the investigators statement.*

**016.**            13 mos.            N            O            Risk of Harm

*Parent alleged to have left children unattended; children found on busy street at night by law enforcement and neighbors who said the children were regularly unattended. Substantiation Overturned in Department Review when it was determined that the children were absent for 5 minutes or less, were safely on the sidewalk of a dead-end street, that the law enforcement officer had no concerns about the children’s safety, and that the neighbors were referencing another family, not this family.*

**017.**            15 mos.            Y            O            Risk of Harm

*Parent alleged to have left the crying child in a closed, hot automobile with drug paraphernalia present and the child requiring medical attention. Substantiation Overturned when it was determined that the investigator based the substantiation on assumptions, that the auto was closed because the air conditioner was on, a parent was in the automobile and the child had been crying due to teething, that the child required no medical attention and there was no drug paraphernalia present.*

**018.**            15 mos.            Y            O            Risk of Harm

*Parent alleged to have been unresponsive in the automobile with a young child present. Substantiation Overturned when it was determined that the parent was not unresponsive; rather, she was 8 and a half months pregnant and had been up the night before with her young child. She was resting in the car while husband went into a store to buy beverages.*

Case #:	Case Duration:	Child Removed:	CRRU Ruling:	HSB Ruling:	Charge:
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**019.**            17 mos.            Y            O                       Medical Abuse

*Parent alleged to have left hospital against medical advice after bringing autistic child for a mental health intervention, thereby denying the child medical care. Department Review Overturned the substantiation in that there was no evidence that she departed against medical advice, her advocacy for her child was determined to be appropriate by witnesses, and the reporter was found to have lied when making the report.*

**020.**            18 mos.            Y            S            O            Risk of Harm

*Parent alleged to have failed to supervise a teenager who was taking medication when medication spilled and possibly ingested by a younger sibling who was taken to hospital. Department Review supported the substantiation; upon appeal to the Human Services Board, it was contended that the Department engaged in ex parte communication during the Review and improperly accessed a juvenile court record. DCF agreed to overturn the substantiation and remove the parent from the Child Protection Registry.*

**021.**            11 mos.            N            R                       Risk of Harm

*Parent alleged to have exposed children to an individual who had been charged with sex abuse and had court- ordered prohibitions against being in the presence of children. Upon Department Review it was presented that none of the 3 elements of Risk of Harm were present. At CRRU Review, allegation of possible ex parte communication arose and Reviewer raised the prospect of substantiations being permitted for violation of DCF policy rather than law. Issues were challenged and Reviewer remanded the case for reinvestigation while also withdrawing from future involvement in the Review without addressing the issue of ex parte communication. This follows a pattern of DCF engaging in ex parte communication after repeated notice of such being prohibited.*

Case #:	Case Duration:	Child Removed:	CRRU Ruling:	HSB Ruling:	Charge:
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**022.**            10 mos.            Y            S            O            Physical Abuse

*Grandparent alleged to have injured grandchild by kicking grandchild in the foot as a reflex after the grandchild kicked grandmother in the lower knee while sitting opposite her on a kitchen stool. As a result of the kick to the lower area of the knee, grandparent’s leg reflexively kicked outward (as is commonly demonstrated in a medical exam of reflexes) striking the child’s foot which was directly across from grandparent’s foot. Substantiation supported in Department Review. In the Human Services Board appeal, the Department withdrew the substantiation due to an absence of evidence of injury or intent.*

**023.**            3 mos.            N/A            S            R            Risk of Harm

*Nurse denied employment due to being listed on the Child Protection Registry, but had no knowledge of a substantiation or appeal rights. Appeal to the Human Services Board resulted in the Department acknowledging that it has no system of verifying that a substantiation letter is actually posted. This case remains pending at DCF.*

**024.**            2 wks.            N/A            O            Risk of Harm

*Nurse petitioned the Department for the Review that she should have been offered several years earlier. Upon internal review, the Department Overturned its earlier substantiation. No rationale given.*

**025.**            54 mos.            Y            O            Risk of Harm

*Parent told verbally that they were substantiated in 2017, but never received substantiation letter or appeal rights. Merits were not found in the associated CHINS case. DCF acknowledged that it cannot verify that she was ever notified. Substantiation withdrawn.*

Case #:	Case Duration:	Child Removed:	CRRU Ruling:	HSB Ruling:	Charge:
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**026.** Pending Y Pending Risk of Harm

*Parent substantiated years ago but never notified of such. The allegations were dismissed by Family Court. DCF Review granted but DCF has failed to hold Review. She is ineligible as placement for her grandchild because she is on the Registry. CRRU failed to hold timely Review and case appealed directly to the HSB.*

**027.** Pending Y S Pending Risk of Harm

*Parent alleged to have placed children at risk of harm due to alleged domestic violence. DCF substantiated without interviewing the alleged victim. Had they done so, DCF would have discovered that none of the alleged incidents took place and children were never at risk of harm, much less serious physical injury as required by statute.*

**028.** 8 mos. N O Physical Abuse

*Parent substantiated for allegedly strangling teenage daughter when daughter threatened to beat another parent. Teenager had a long history of violence to persons and property, permanent expulsion from school, and history of runaway from residential facilities. Following the incident, the teenager badly beat father in his front yard, pistol whipped him and discharged the pistol when struggling with older brother. Teenager held for 3 weeks in an adult correctional facility due to lack of juvenile placement. DCF overturned the substantiation when it was alleged that the CRRU decision was being withheld to coerce the parent into allowing DCF to place the teenager back home.*

**029.** Y S O Sex Abuse

*Juvenile with developmental disability. No witnesses to the alleged event and the recording of the forensic interview of the very young alleged victim is defective beyond repair despite assertions by the Attorney General's Office that the recording would be preserved. The statutory offense does not apply to the juvenile. Nonetheless, DCF created a Rule and internal Policy that effectively re-writes the statute to include him. The Rule contains language not in statute and therefore does not apply. This is a recurring practice on DCF's part. After months of filing motions and counter motions, DCF withdrew the substantiation and removed the youth from the Registry.*

Case #:	Case Duration:	Child Removed:	CRRU Ruling:	HSB Ruling:	Charge:
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**030.** N/A S Pending Sex Abuse

*A 19- and 16-year-old, an absence of witnesses and different renditions of consensual and non-consensual actions. Case is awaiting production of investigative interview recordings and police report that resulted in no criminal charges being filed.*

**031.** N/A S O Sex Abuse

*Juvenile seeking expungement of substantiation for sexual abuse of another juvenile. CRRU Review denied expungement based upon the Appellant’s failure to disclose a history of substance abuse (although he was never asked about this history during his CRRU Review), unlawful mischief while in a treatment program and his failure to acknowledge culpability. Department failed to produce required information after repeated requests and HSB overturned both the substantiation and the denial of expungement as a result of DCF’s failure to comply.*

**032.** N S O Risk of Harm

*Expungement case for Parent of three young children who left children in a parked automobile outside of a grocery store while buying snacks for the children. Substantiated for Risk of Harm and determined to be eligible to seek expungement in 12 months. Mother waited 24 months to apply for expungement, had no further involvement with law enforcement or DCF. Completed educational requirements for teaching but precluded from employment due to her placement on the Registry. Expungement appeal denied due to “not enough time passing” and “two unaccepted reports which occurred prior to the original substantiation.” HSB overturned the denial due to abuse of discretion by the Department.*

**Note:** The “case count” is complicated in that some cases involved alleged perpetrators who were couples, but each person was charged with both the same, as well as different, actions in some cases. Where cases were remanded, in the ensuing re-investigations the initial charges were sometimes withdrawn and/or charges were amended/substituted which required re-hearing, but with the earlier charges dismissed because they could not be sustained, and new charges litigated as though the first substantiation did not occur.

Human Services Board outcomes are listed as “Overturned / Dismissed/ Affirmed” when in fact most cases in which the Appellant prevailed were resolved when the Attorney General’s Office withdrew the substantiation for lack of evidence to support the Department’s initial decision. All of the cases in the Project that went to the HSB ended with either a decision to Overturn, or a withdrawal by DCF, and are herein noted as having the same effect as if they had been Overturned.

Although in some cases the Department’s withdrawal/dismissal is the result of the Department not wanting to force a child to testify against a parent (after making an initial disclosure), this was not the case in any of the appeals in this Project. In other instances, the Department based the substantiation upon information allegedly gathered in recorded forensic interviews or direct testimony from witnesses; information and testimony that a defendant is not permitted to view as part of the Department’s Administrative Review, but nonetheless offered as evidence by the Department. However, upon appeal to the Human Services Board it repeatedly came to light that this “evidence” did not exist, or could not be utilized due to the poor quality of the recording or absence of any memorialization. Effectively, parents were substantiated by DCF based on evidence that they were not allowed to view, only to find upon further appeal that the evidence did not actually exist.

Additionally, since most “overturns” of substantiations that occur at the Human Services Board result from DCF withdrawing the substantiation, the rationale for each withdrawal is not memorialized for future reference because the cases are recorded as “settlements” and settlements are not actually HSB decisions, so there is no published record of them. As a result, an issue requires re-litigation time and again even though it has already been litigated but no one is aware of why it was litigated or why DCF withdrew the substantiation.

It was only through the sheer volume of appeals processed by the Project, coupled with the amount of time and skill dedicated to each of the appeals that the full picture of the inherent deficiencies and unfairness of the current system have come to light.

## 8. Recommended Statutory Changes

### **33 V.S.A. 4915a Procedures for Assessments**

**(c)** Families have the option of declining the services offered as a result of the assessment. If the family declines the services, the case shall be closed unless the Department determines that sufficient cause exists to begin an investigation or to request the State's Attorney to file a petition pursuant to Chapters 51 and 53 of this title. In no instance shall a case be investigated solely because the family declines services. In no instance shall a request to the State's Attorney for court intervention be based upon a risk assessment, absent a finding by the Department of abuse or neglect, regardless of whether the request is made under Chapters 33, 49, 51 or 53.

*Rationale: DCF uses the SDM risk assessment tools in place of investigative findings. Essentially, the SDM tools are used to coerce families, otherwise not to have been found to abuse or neglect children, into on-going Open Family Services Cases. The coercion comes in the form of explaining to the family that they have the right to decline services, however because of their perceived "risk" for future harm (through the use of tools acknowledged not to be determinative of future abuse) the family will be referred to the State's Attorney and brought into Family Court via a CHINS petition.*

*On any given day, DCF has hundreds, if not a thousand, of these "open family services cases" consisting of families not abusing or neglecting children, but who are required to be monitored by the Department nonetheless and avail themselves of services which the family has said it did not need. This coercive charade ties up countless DCF employees, costs the taxpayers untold millions of dollars and needlessly consumes scarce service provider resources. Additionally, the issue then becomes one of "not if there is abuse or neglect" but rather "is the family doing what we coerced them to do?" The result can be that a CHINS petition is sought not because of abuse or neglect, but because the family did not comply with the service plan that they did not want and did not need.<sup>33</sup>*

### **33 V.S.A. 4915b Procedures for investigation**

**(a)(9)** Forensic interviews shall be recorded (visual and audio) and such recordings shall be preserved and made available to the Petitioner in any subsequent substantiation Administrative Review and HSB appeal. The Hearsay Exception shall not apply in the event that the recordings are not made available or found to be unusable.

*Rationale: in substantiations involving very young alleged victims, the forensic interview is the primary tool that captures the alleged victim's statements. In many cases, the forensic interview is the only tool by which the Department can substantiate, and it is the*

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<sup>33</sup> Bending the Curve to Improve Our Child Protection System, VPRC, November 18, 2018. Study of CHINS Case Processing in Vermont, National Center for State Courts, May 2021.



*basis for DCF and law enforcement to utilize the exception to the hearsay rule; a rule that allows an adult to attest to the statement(s) made by the child absent the child having to endure the trauma frequently associated with the re-telling of difficult events. However, absent recordings of the forensic interviews, the exception to the hearsay rule may not apply. It was the experience of the Project that forensic interview recordings were, invariably, unusable due to a mistake in recording, damage, mis-labeling or some other avoidable eventuality. As of this writing, not a single forensic interview recording of an alleged victim has been available for viewing/listening, yet in each case DCF employees or law enforcement personnel provided testimony of what they purport to have been said during those interviews. It appears that the Department does not routinely check to see if the recording device is working properly, maintain a repository of those essential recordings, or consistently utilize a standard recording device that can be viewed/heard on standard equipment and safeguard from damage.*

### **33 V.S.A. 4915b Procedures for investigation**

**(a)(10)** Witness statements upon which a substantiation of abuse or neglect is based shall be memorialized and verified by the witness. Failure to provide verification shall result in the statement becoming non-admissible.

*Rationale: Too often key statements appear in the Investigative or Case Determination reports as the basis for a substantiation, however there is rarely verifications that the statements were actually made. The result is that at hearing, the “witness” will either state that they did not make the statement, or that the statement was taken out of context. This was found to be a common occurrence and the reason that substantiations were either overturned or withdrawn.*

**(a)(11)** At the inception and conclusion of the investigation the Department shall inform the individual being investigated that notification of the investigation findings shall be conveyed via certified mail, or other certain conveyance, email and telephone text, and that it is the persons responsibility to maintain up to date addresses by which they are to be notified.

*Rationale: There is no record of the Department informing subjects of an investigation how they will be informed of the results. This is a significant omission in that it is only via actual notification that the subject of an investigation finds out if they have been substantiated and what their appeal rights may be. Given the extended period between initial investigation and completion, individuals move and/or change telephone numbers and email addresses, making it unlikely that they will receive timely notification.*

### **33 V.S.A. 4916a Challenging placement on the Registry**

**(b)** Delete “first class mail” and replace it with “certified mail, email and telephone text”, sent to the person’s last known address. The Department shall maintain an internal tracking system verifying that the notification letter and email were posted, by whom, on what date and time, and the name and address sent.

*Rationale: Both mailing addresses and email addresses change frequently and by using both mailing and email addresses there is a greater chance that notification will be made. Currently, when an investigation commences, the person being investigated is not told that they must keep the Department informed of mailing address changes.*

### **33 V.S.A. 4916a Challenging placement on the Registry**

**(c)(1)** Increase the time period for requesting a Review from the current 14 days to “30” days.

*Rationale: The current 14 days is simply too short in light of the time required for posting and delivery. It frequently takes 5 days for some mail to move around the state, and the current 14 days begins with the day the letter is posted (which means received at the USPS, but not actually sent out for delivery), which sometimes results in a recipient having less than a week to read the letter, understand what the letter means and then take the actions necessary to secure an appeal. Add to this the number of letters that are mis-addressed, must be forwarded due to a change in address, experience mail delays, or were never actually posted, and one quickly sees the insufficiency of the current 14-day requirement.*

### **33 V.S.A. 4916a Challenging placement on the Registry**

**(d)** Delete the “35 day” requirement for holding a Review and lengthen the time to 90 days with a penalty stating that if the review is not held within that time period, the substantiation is dismissed with prejudice.

*Rationale: This would help ensure that a substantiation is resolved prior to or shortly after a Merits Hearing. Currently it is taking 150 – 420 days during which the Family Court is relying upon the Department’s allegations in order to determine whether children should have been removed, allegations that are the foundation for substantiation, but which are later (in Administrative Review) determined to be untrue.*

Delete the “at least 10” days prior to the hearing by which the accused is to receive the investigative file and lengthen the time period to “at least 30” days.

*Rationale: Given the severe implications inherent in being placed on the Registry, 10 days is wholly insufficient time within which to prepare a defense, secure witnesses or gather documents.*

Delete the term “redacted” and replace it with “unredacted” investigative files.

*Rationale: There is no legitimate purpose in taking the time needed to redact files when the accused will receive the unredacted file simply by appealing to the HSB. Redacted files frequently contain more “blacked-out” space than legible material. Continuing this antiquated and useless process is one of the reasons for the current delay in hearings.*

Insert “Accompanying the investigative file shall be any exculpatory material known, or which should have been known, by the Department, and any notice stemming from any court which references that there has been a judicial finding that no abuse or neglect was found relative to the incident from which the substantiation arose.”

*Rationale: Historically, DCF has withheld exculpatory information (such as recantations or contrary medical opinions and judicial findings), seemingly making no effort to update its investigative file once it proposes a substantiation even though this information is made known to the Department. Its rationale has been that such is “not required by law.”*

### **33 V.S.A. 4916a Challenging placement on the Registry**

**(e)** Delete “a reasonable person” and replace it with “a preponderance of the evidence.”

*Rationale: This brings the DCF standard in line with the vast majority of other states (36+), maintains a single standard for DCF and the HSB, is measurable (51% or more), and is in keeping with the public use of the Registry in regard to employment and professional licensure.*

### **33 V.S.A. 4916a Challenging placement on the Registry**

**(h)** Amend “a Registry record shall be made immediately” by adding the phrase “if the accused does not appeal to the Human Services Board, but no Registry record shall be made while a Human Services Board appeal is pending.”

*Rationale: Today, the implications of being entered into the Registry involve property rights that once lost may never be recovered. The Administrative Review conducted by the Department teeters on what is generally considered “due process” at best. It is only at the Human Services Board appeal level that an accused is actually afforded the level of due process that is constitutionally guaranteed. Given the results (100% failure on DCF’s part when substantiations are challenged) it is clear that placing someone on the*

*Registry if they fail to prevail at the Administrative Review stage is akin to the State saying that a person is guilty until they have been tried since it is only at the HSB appeal where the State truly has the burden of proof. In addition to the loss of employment, licensure and a host of other damages suffered by the accused, the State will be courting a host of legal actions by placing individuals on the Registry only to have the substantiations overturned at the Human Services Board, but only after the damage is inflicted upon the accused.*

### **33 V.S.A. 4916a Challenging placement on the Registry**

**(f) Insert:** The Administrative Reviewer shall consider only the material provided to the petitioner by the Department in the same form as was provided to the petitioner in addition to any material/testimony provided by the petitioner. Prior to the rendering of a finding, the Administrative Reviewer shall not engage in communication with any other party regarding the merits of the allegation, or review any material not provided to the petitioner. Instances of *ex parte* communication, or the review of material not provided to the petitioner, shall result in a remand of the substantiation for both a re-investigation and a re-Review. Such re-investigation and re-Review shall be conducted by parties other than those involved in the original investigation/Review. The Department shall issue a Policy outlining *ex parte* communication as defined in Sheldon v. Ruggiero 2019 VT 125. The Policy shall require the discontinuance of employment of any Review Officer or department employee found to engage in *ex parte* communication.

*Rationale: Ex parte communication has been explicitly determined by the Vermont Supreme Court to have no place in administrative hearings. Decision making which includes the use of material / information unknown to the accused is a violation of basic due process. One cannot reasonably expect to defend oneself if one is not aware of the allegations or of evidence used to support those allegations. Additionally, once a decision has been made utilizing prohibited material/information, one cannot reasonably expect the decision-maker who gained access to the prohibited material/information to “forget” what they heard or read. Unfortunately, after informing the HSB and the Attorney General’s Office that it no longer engages in *ex parte* communication on the part of CRRU Review Officers, the practice continues via internal memo. What does this mean?? Absent a penalty, there is no way to ensure that DCF no longer engages in this practice.*

### 33 V.S.A. 4916c Petition for expungement from the Registry

**(b)(1)** For individuals listed on the Registry for a term of 3 years and who have not been criminally convicted of the act for which they were substantiated, expungement shall be automatic unless the Department determines that there is good cause for maintaining the person on the Registry. The (delete “person”) (add) Department shall have the burden of proving (delete “reasonable person would believe”) (add) by a preponderance of the evidence that he or she (delete “no longer”) continues to present a risk to the safety or well-being of children.

**(b)(2)(4)** The Commissioner shall not deny a petition for expungement based on:

(a) insufficient passage of time when the Petitioner has complied with the time established for expungement appeals in the original substantiation and level assignment;

(b) a Petitioner’s failure to proactively divulge information in an Expungement Review;

(c) a Petitioner failing to proactively present information that was present in the Department’s historical records at the time of the substantiation or expungement Review but never asked about in the Review;

(d) an act committed by the Petitioner prior to the substantiation and known to the Department at the time of the substantiation or which should have been known;

(e) An incomplete reading, or mis-reading, of information presented by the Petitioner or contained in the Department’s records.

*Rationale: At the time of substantiation, by rule, DCF determines when a person may apply for expungement. That decision takes into account not only the current events leading to substantiation but all previous events of which the Department is, or should have been, aware.*

- *To allow a commissioner to deny expungement because insufficient time has passed, when the Petitioner has met the requirements for the passage of time set in rule, makes a mockery of the system of establishing timeframes in rule, and allows the commissioner to establish indeterminant timeframes based on personal whim or proclivity.*
- *Denying expungement because a Petitioner failed to address an issue not included in the statute, or raised by the Department in Review, places the Petitioner in the position of having to be a mind reader in so far as guessing what the Reviewer/Commissioner might want to base the decision on, but about which they did not ask.*
- *Denying expungement based upon failing to accurately read, or mis-reading, information provided by the Petitioner, or otherwise available in the Departments records, places the commissioner’s decision outside of the realm of discretion.*

- *At the time of substantiation, the timeframe assigned for requesting expungement incorporates all of the information and acts known to DCF at that time. To use those same acts in denying expungement places the appellant in the position of never qualifying for expungement because they cannot change the fact that past acts took place. Allowing these acts to be considered during an Expungement Appeal negates the statutory intent of requiring DCF to develop rules regarding the timeliness of expungement appeals and the statutory requirements for what is to be considered at the appeal hearing.*
- *Currently, placement on the Registry is akin to an “indeterminant sentence” in that although a person can apply for expungement, the commissioner is granted such wide latitude in denying expungement that a person can be on the Registry for years beyond the date they qualify for expungement. Individuals slated for expungement consideration for 3 years or less pose little to no threat to public safety. Automatic expungement, unless there is evidence to the contrary, brings the Registry back into proper use as a public safety tool. Having 25,000 names on the Registry today makes a mockery of any public safety or child welfare purpose.*

### **33 V.S.A. 5106 Powers and duties of Commissioner**

- (1)** To undertake assessments and make reports and recommendations to the court as authorized by the juvenile judicial proceeding’s chapters. Such assessments to commence only after the acceptance of a CHINS petition by the Family Court and the request of such assessment by the court. Such assessments to identify the reasonable efforts made by the Department and in the event of a failure of those efforts, a rationale as to why the efforts failed.

*Rationale: The Department currently utilizes the term “assessments” in 33 V.S.A. 5106, to be analogous to the term “assessments” found in 33 V.S.A. 4915a. By doing so, the Department avoids having to provide the court with a description of the “reasonable efforts” made to help the family avoid entering Family Court, and if those efforts failed whether the failure was due to the family, the Department or both. This addition to 33 V.S.A. 5106 makes it clear that “reasonable efforts” must be identified. This keeps Vermont in compliance with state and federal law and ensures that Vermont can successfully defend its draw-down of federal funds.*

## 10. In the Final Analysis: A Warning

Continued failures of the system, and lack of action to correct the failures, place the state at significant risk of financial liability and potential federal oversight. Several legal actions alleging wrongdoing and damages have already been filed in federal court and more are under consideration. Given the systemic nature of failures identified in this report and in the November, 2018 report (Bending the Curve to Improve Our Child Protection System) and related studies, the state appears to be highly vulnerable to class- action lawsuits and the liability accompanying them.

Rationale:

- although awards are limited in most suits against the state, there is no financial cap on the size of awards stemming from suits in federal court;
- class-action suits can carry both financial awards to a large body of litigants, as well as enforcement actions and federal oversight of systems that rely upon federal funds.

In addition, now that it has been formally determined that DCF does not have, and likely has never had, a system verifying that substantiation notification letters were actually mailed to those substantiated, there is a real possibility that countless individuals are currently listed on the Registry absent their knowledge. This raises questions of a class-action suit with significant implications for state government and the, now questionable, integrity of the Registry.

State government has been formally put on notice about the failures of the current system at least since November, 2018, and little or nothing has been done to address the systemic failings documented from that time to the present. Prior knowledge, and the failure to act upon that knowledge, are factors that can impact the awards granted by juries in federal court.

Administrative “fixes” can remedy some of the failures inherent in the system, however, absent statutory reforms there is nothing to prevent the system from reverting over time to the same dysfunctional state that exists today.

# Attachment No. 1

## STANDARD OF PROOF FOR SUBSTANTIATION OF CHILD ABUSE/NEGLECT (2021)

(Vermont is one of only four states to retain the Reasonable Person standard of proof.)

Jurisdiction	Range: Lowest (information) to Highest (evidence)			
	Reasonable Person/ Probable Cause	Preponderance/ Credible Evidence	Clear & Convincing	Beyond Reasonable Doubt
Alabama		x		
Alaska		x		
Arizona		x*		
Arkansas		x		
California		x		
Colorado		x		
Connecticut		x		
Delaware		x		
District of Columbia		x		
Florida		x		
Georgia		x		
Hawaii	x			
Idaho		x		
Illinois		x		
Indiana		x		
Iowa		x		
Kansas			x	
Kentucky		x		
Louisiana	x			
Maine		x		
Maryland		x		
Massachusetts			x	
Michigan		x		
Minnesota		x		
Mississippi		x		
Missouri		x		
Montana		x		
Nebraska		x		
Nevada		x		
New Hampshire		x		
New Jersey		x		
New Mexico		x		
New York		x		
North Carolina		x		
North Dakota		x		



Ohio			x	
Oklahoma		x		
Oregon	x			
Pennsylvania			x	
Puerto Rico		x		
Rhode Island		x		
S. Carolina		x		
D. Dakota		x		
Tennessee		x		
Texas		x		
Utah		x		
Vermont	x			
Virginia		x		
Washington		x		
West Virginia		x		
Wisconsin				x
Wyoming			x	
	<b>4</b>	<b>42</b>	<b>5</b>	<b>1</b>

(Data gathered through state-by-state search of applicable standards as of 2021)

\*“Proof of Intention” (requires evidence, but can be circumstantial)

### Standards of Proof:

- ▼ **Reasonable Person:** A legal fiction focusing on how a typical person would behave under certain circumstances. The focus is on the available information upon which to determine what is, and is not, reasonable in a given situation.
  - ▼ **Probable Cause:** Where facts and circumstances within the officer’s knowledge, and of which they have reasonably trustworthy information, are sufficient to warrant a belief by a person of reasonable caution that an event has occurred.
  - ▼ **Preponderance of the Evidence:** Burden of proof standard that is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true. It is evidentiary based.
  - ▼ **Credible Evidence:** Evidence that is likely to be believed.
- Clear and Convincing:** Evidence that is clear, cogent, unequivocal, satisfactory, and convincing.
- Beyond a Reasonable Doubt:** Evidence is so convincing that no reasonable person would question it.