



**Department for Children and Families
Commissioner's Office**
280 State Drive – HC 1 North
Waterbury, VT 05671-1080
www.def.vt.gov

[phone] 802-241-0929
[fax] 802-241-0950

Agency of Human Services

Memorandum

To: Members of the Child Protection Oversight Committee
From: Ken Schatz, DCF Commissioner *KAS*
Date: October 24, 2016
Re: Child Protection and Confidentiality Concerns

Thank you for the opportunity to testify about patient privilege and confidentiality concerns and how those concerns relate to child protection. Last year, H.622 as introduced, provided language that allowed for a patient privilege exception for Department for Children and Families (DCF) child abuse and neglect investigations. DCF supported that language last year. The House ultimately passed a bill that called for a review by the Child Protection Oversight Committee of issues related to patient privilege, confidentiality of patient records and information and the rules governing professional conduct and how those professional obligations impact child protection activities. While H.622 did not pass out of conference committee, DCF appreciates that this Committee is reviewing these issues. The following information about patient privilege and other confidentiality laws is provided by DCF's General Counsel, Leslie Wisdom, and Assistant Attorney General and Agency of Human Services HIPAA Privacy Officer, Martha Csala.

Vermont patient privilege law and its intersection with state and federal laws

DCF appreciates that there have been inconsistent interpretations by healthcare professionals about whether information sharing with DCF is permitted under state and federal law. DCF also appreciates that there are potential professional licensing concerns related to inappropriate sharing of information. The proposed legislation last year in H.622 provides protection under the state patient privilege law to allow for information sharing when appropriate under other confidentiality laws.

Federal confidentiality laws provide that healthcare providers may share information with DCF in making mandated reports of child abuse and neglect.¹ Vermont's child abuse reporting law provides that mandated reporters may not assert privilege as a basis to withhold a report. Please see 33 V.S.A. §4913(i), which provides:

Except as provided in subsection [j] of this section, a person may not refuse to make a report required by this section on the grounds that making the report would violate a privilege or disclose a confidential communication.

¹ The Health Insurance Portability and Accountability Act (HIPAA) as well as the federal substance abuse treatment confidentiality law allow for the sharing of information to DCF in making mandated reports of alleged child abuse/neglect. See 45 C.F.R. §164.512(b)(1)(ii) (HIPAA) and 42 C.F.R. §2.12(c)(6) (Part 2 substance abuse confidentiality exception for reporting suspected child abuse/neglect).



The Vermont patient privilege doctrine is codified in statute at 12 V.S.A. §1612.² Neither the Vermont mandated reporter statute nor the Vermont patient privilege law explicitly extends the privilege exception for child protection activities beyond making the initial mandated report. The problem that H.622 sought to address last year was in providing coverage under state patient privilege law to healthcare providers working with DCF either following the initial mandated report or if the provider was not the mandated reporter, but had information relevant to the investigation.

It is DCF's position that the permissive HIPAA exception allows healthcare professionals to cooperate with and provide information to DCF and law enforcement at various stages of a child abuse investigation, not just the initial mandated report. While it is DCF's opinion that HIPAA is not a bar for healthcare providers to cooperate with DCF in child abuse/neglect investigations, Vermont's patient privilege statute may be. The language in the as introduced version of H.622 would address this concern and allow cooperation with DCF under the state law.

It is our understanding that some mandated reporters opposed this language last year due to concerns that limiting the patient privilege could erode the therapeutic treatment relationship and provide a disincentive for certain clients to seek professional treatment. Please note that the language introduced in H.622 last year was permissive, not mandatory, and would allow, but does not require disclosure to DCF of confidential information.

There may be other federal privacy laws at issue in a specific child abuse investigation such as 42 C.F.R. Part 2 substance abuse treatment information that would not allow for certain information sharing beyond the initial mandated report even with this proposed state law change. The proposal in H.622 is not meant to trump federal law, but rather is meant to provide protection under the state patient privilege law for healthcare professionals who are sharing information with DCF as permitted by federal or other laws.

Suggested additions to the language in last year's H.622

DCF supported the language in section 2 of the as-introduced version of H.622, which is copied below. If the Committee wishes to pursue similar legislation this year, DCF suggests the following additions:

- Add a reference to "assessments" in addition to investigations in paragraph (a) to be clear that reporters may cooperate with DCF's ongoing assessments as well as investigations. This would cover all possible child safety interventions initiated by the Department.
- The State of Maine has a statute that extends Maine's privilege exception beyond the initial report of child abuse/neglect and allows physicians, clinicians and others to not only make the initial report but to also cooperate with the child protection agency, investigators, prosecutors and guardians ad litem in child protection cases, including CHINS proceedings. DCF proposes that Vermont's statute is drafted in a

² Vermont's patient privilege law provides:

"Confidential information privileged. Unless the patient waives the privilege or unless the privilege is waived by an express provision of law, a person authorized to practice medicine, chiropractic, or dentistry, a registered professional or licensed practical nurse, or a mental health professional as defined in 18 V.S.A. §7101(13) shall not be allowed to disclose any information acquired in attending a patient in a professional capacity, including joint or group counseling sessions, and which was necessary to enable the provider to act in that capacity." 12 V.S.A. §1612(a).



similar way to allow for participation in child protection cases generally, not just DCF investigations and assessments.

- Finally, it might be further helpful to reporters with patient privilege to include a provision in §4914a similar to the immunity from civil and criminal liability for acting in good faith found in the mandated reporter statute at 33 V.S.A. §4913(f).

Language in the as-introduced version of H.622 (2016)

Sec. 2. 33 V.S.A. § 4914a is added to read:

§ 4914a. PRIVILEGED OR CONFIDENTIAL COMMUNICATIONS

(a) The patient privilege set forth in 12 V.S.A. § 1612 and Rule 503 of the Vermont Rules of Evidence shall not bar a person authorized to practice medicine, a registered professional or licensed practical nurse, a mental health professional as defined in 18 V.S.A. § 7101(13), or an alcohol or drug abuse counselor as defined in 18 V.S.A. § 3231(1) from cooperating with the Department in an ongoing investigation of child abuse or neglect. Information disclosed to the Department pursuant to this section shall be kept confidential and may not be disclosed by the Department except as provided in section 4921 of this title.

(b) It shall not be considered unprofessional conduct for a person authorized to practice medicine, a registered professional or licensed practical nurse, a mental health professional as defined in 18 V.S.A. § 7101(13), or an alcohol or drug abuse counselor as defined in 18 V.S.A. § 3231(1) to cooperate with the Department in an investigation of child abuse or neglect.