

19-3987-cr

*Lowell v. Vermont Dep't for Children and Families*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

AMENDED SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15<sup>th</sup> day of December, two thousand twenty.

PRESENT:

BARRINGTON D. PARKER,

DENNY CHIN,

*Circuit Judges,*

JANE A. RESTANI,

*Judge.\**

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MIRIAM LOWELL, SETH HEALEY,

*Plaintiffs-Appellants,*

v.

19-3987-cv

VERMONT DEPARTMENT OF CHILDREN AND FAMILIES, "DCF," KENNETH SCHATZ, COMMISSIONER, DCF, KAREN SHEA, DEPUTY COMMISSIONER FOR THE FAMILY SERVICES DIVISION ("FSD"), DCF, CHRISTINE JOHNSON, DEPUTY COMMISSIONER FOR FDS, DCF,

\* Judge Jane A. Restani, of the United States Court of International Trade, sitting by designation.

EMILY CARRIER, DISTRICT DIRECTOR, DCF,  
CATHERINE CLARK, DIRECTOR, COMMISSIONER'S  
REGISTRY REVIEW UNIT, DCF, KATHLEEN SMITH,  
FAMILY SERVICES SUPERVISOR, CHRISTINE GADWAH,  
FAMILY SERVICES WORKER, DCF, KATHLEEN  
GREENMUN, SUBSTANTIATION HEARING OFFICER,  
DCF,

*Defendants-Appellees,*

JOHN AND JANE DOES 1-10,

*Defendants.*

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FOR PLAINTIFFS-APPELLANTS: COLIN R. HAGAN, Shlansky Law Group,  
LLP, Chelsea, Massachusetts.

FOR DEFENDANTS-APPELLEES: BENJAMIN D. BATTLES, Solicitor General, for  
Thomas J. Donovan, Jr., Attorney General,  
Montpelier, Vermont.

Appeal from the United States District Court for the District of Vermont  
(Crawford, *Ch. J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,**

**ADJUDGED, AND DECREED** that the decision of the district court is **AFFIRMED**.

Plaintiffs-appellants Miriam Lowell and Seth Healey ("plaintiffs") appeal the decision of the district court issued November 18, 2019, denying their motion for a temporary restraining order and preliminary injunction. Plaintiffs brought the action below seeking declaratory and injunctive relief, and damages against defendant-appellant Vermont Department for Children and Families ("DCF") and certain DCF

officials. DCF had brought a proceeding against plaintiffs seeking to investigate and determine whether to substantiate a report of child abuse or neglect based on purportedly false allegations. Plaintiffs sought injunctive relief to stop DCF from conducting an administrative hearing and listing their names on Vermont's child protection registry. In its ruling, the district court concluded that the *Younger* abstention doctrine barred plaintiffs' claims for injunctive relief. *See Younger v. Harris*, 401 U.S. 37 (1971). The court also denied defendants' motion to dismiss the action, noting that *Younger* abstention did not apply to plaintiffs' claims for damages. This appeal followed. We assume the parties' familiarity with the underlying facts, procedural history of the case, and the issues on appeal.

We review *de novo* whether the requirements for abstention have been met. *See Disability Rights New York v. New York*, 916 F.3d 129, 133 (2d Cir. 2019); *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 197-98 (2d Cir. 2002). Although the findings of facts are reviewed for clear error, whether those facts support a finding that the case meets an exception to the *Younger* abstention doctrine is a mixed question of law and fact that is reviewed *de novo*. *See id.* at 198.

As a general matter, *Younger* abstention requires federal courts to abstain from exercising jurisdiction over state-level proceedings. Three types of proceedings trigger *Younger* abstention: 1) "ongoing state criminal prosecutions," 2) state "civil enforcement proceedings," and 3) proceedings involving state courts "perform[ing] their

judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 70 (2013).

Moreover, after applying the categorical *Sprint* approach, this court will consider three additional, non-dispositive factors to determine whether abstention is appropriate: 1) whether there is a "pending state proceeding," 2) whether that proceeding "implicates an important state interest," and 3) whether "the state proceeding affords an adequate opportunity for judicial review of . . . federal constitutional claims." *Falco v. Justices of Matrimonial Parts of Supreme Ct. of Suffolk Cnty.*, 805 F. 3d 425, 427 (2d Cir. 2015) (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)). Altogether, even if *Younger*'s prerequisites are satisfied, a federal court may exercise jurisdiction if the plaintiff can make a showing of "bad faith, harassment or any other unusual circumstance that would call for equitable relief." *Id.* (quoting *Younger*, 401 U.S. at 54).

The district court correctly concluded that Vermont's substantiation process is akin to a criminal prosecution, falling within *Younger*'s second category. In determining whether a civil enforcement action is akin to a criminal proceeding, we consider whether the action involved a state sanctioning a party "for some wrongful act," was "initiated [by the State] to sanction the federal plaintiff," and involved "[i]nvestigations [that] culminat[e] in the filing of a formal complaint or charges." *Sprint*, 571 U.S. at 79-80. The substantiation process at issue here possessed these features. Therefore, DCF's proceeding constituted an ongoing state proceeding akin to a criminal prosecution.

The substantiation proceedings also satisfy the additional *Middlesex* factors. Vermont has a vital interest in protecting the well-being of its children. *See Moore*, 442 U.S. at 435 ("Family relations are a traditional area of state concern."). Moreover, the state proceedings provide a sufficient forum for review of federal constitutional claims. After an accusation of wrongdoing, DCF can initiate an investigation. Vt. Stat. Ann. Tit. 33 § 4915, 4915a, 4915b. If DCF finds that the claims are substantiated, it provides notice of that fact to the accused. It also informs the accused that DCF can place the individual on the child protection registry. Vt. Stat. Ann. tit. 33 § 4916a(a). The accused is notified of the right to request administrative review of the decision, *id.*, which is conducted by a neutral arbiter who is not an employee of DCF, *id.* § 4916a(f). The burden of proof rests on DCF and the accused has the right to present documentary evidence and other evidence. *Id.* §§ 4916a(d), a(e). A person's name is not placed on the registry until after the accused is granted an administrative review, and the substantiation is upheld. *Id.* § 4916a(h). The accused can appeal that decision to the Human Services Board. *Id.* §§ 4916a(i), b. That decision, in turn may be appealed to the Vermont Supreme Court. *Id.* tit. 3 § 3091(f). Accordingly, plaintiffs have an opportunity to raise their constitutional claims at the hearing before the Human Services Board and before the Vermont Supreme Court.

Plaintiffs argue that this review of their constitutional claims arrives too late, beyond the point that their names are listed on the child protection registry,

potentially affecting their employment in an irreparable way. Plaintiffs' names, however, have not been placed on the child-protection registry, as the state has not held the administrative review for reasons not entirely made clear by the record. Moreover, in *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 79 (2d Cir. 2003), this Court held that the "ability to raise constitutional claims in subsequent 'state-court judicial review of [an underlying] administrative proceeding' is sufficient to provide plaintiffs with a meaningful opportunity to seek effective relief through state proceedings and bar federal courts from taking jurisdiction over the same claims while the state proceeding is pending" (emphasis added). Thus, the state process provides sufficient opportunity to raise constitutional claims.

Plaintiffs also argue that the district court should have applied the "bad faith" exception to *Younger*, and exercised jurisdiction because they have shown "bad faith" and "harassment" by defendants. *Diamond "D,"* 282 F.3d at 198 (quoting *Younger*, 401 U.S. at 54). The district court correctly held that the actions alleged in the complaint are not sufficient to sustain a finding of bad faith. To show bad faith, a plaintiff must show that "the state proceeding was initiated with and is animated by a retaliatory, harassing, or other illegitimate motive" and "ha[s] no reasonable expectation of obtaining a favorable outcome." *Diamond "D,"* 282 F.3d at 199. A state proceeding that "is legitimate in its purposes, but unconstitutional in its execution -- even when the violations of constitutional rights are egregious -- will not warrant the application of the

bad faith exception." *Id.* (internal citation omitted). Here, the case was initially brought to the attention of a mental health counselor by the accusations of Lowell's daughter, not by the reporting of a DCF employee. Hence, the suggestion that the state proceeding was therefore initiated with a harassing or retaliatory motive, or that the state had no reasonable expectation of a favorable outcome, is not plausible, and plaintiffs have not met their burden of showing that the bad faith exception should apply.

We have reviewed plaintiffs' remaining arguments on appeal and conclude they are without merit. Accordingly, we **AFFIRM** the order of the district court denying plaintiffs' claims for a temporary restraining order and preliminary injunctive relief.

FOR THE COURT:  
Catherine O'Hagan Wolfe, Clerk


U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

MIRIAM LOWELL and SETH HEALEY, )  
Plaintiffs, )  
v. ) Case No. 5:19-cv-150  
VERMONT DEPARTMENT OF )  
CHILDREN AND FAMILIES, *et al.* )  
Defendants. )

**DECISION ON MOTION TO PROCEED UNDER PSEUDONYMS and MOTION FOR  
PROTECTIVE ORDER, MOTION FOR TEMPORARY RESTRAINING ORDER and  
MOTION FOR PRELIMINARY INJUNCTION, AND MOTION TO DISMISS  
(Docs. 4, 5, and 8)**

Plaintiffs bring this civil rights action against the Vermont Department of Children and Families (“DCF”) and multiple individual defendants employed by DCF. Defendants have filed a motion to dismiss on *Younger* abstention grounds. In addition, the parties disagree over whether the plaintiffs have made a sufficient showing for entry of a preliminary injunction.

**Factual Background**

For purposes of the motion to dismiss, the court accepts the allegations of the complaint. Plaintiff Miriam Lowell is the mother of three minor children. She is divorced from the children’s two fathers. She is currently married to plaintiff Seth Healey. The plaintiffs’ names are pseudonyms to protect their privacy.

On August 10, 2018, Ms. Lowell’s teen-age daughter falsely told her mental health counselor that her mother had crushed and snorted a pill. (Doc. 1 ¶ 38.) The counselor contacted DCF worker Christina Gadwah to report the incident. (Doc. 1 ¶ 39.) According to plaintiffs, Ms. Gadwah immediately took steps to “extrajudicially remove” the children from Ms. Lowell’s home. (Doc. 1 ¶¶ 42-49.)

Plaintiff alleges that after an intimidating meeting with Ms. Gadwah and others, the children were permitted to live with Ms. Lowell's sister and mother. (Doc. 1 ¶ 49.) The children's fathers then sought custody in the Vermont Family Court which placed temporary custody with the two fathers. *Id.* Ms. Lowell had little or no contact with her children for many months. *Id.* After a series of hearings in the divorce cases between plaintiff Miriam Lowell and her ex-husbands, the Family Court ordered the return of the children to their mother's custody almost a year after they left her home. (Doc. 1 ¶¶ 108, 109.) According to plaintiffs, the teenage daughter now states that she made up the story about the crushed pill and her mother's alleged drug abuse. (Doc. 1 ¶ 160.)

Ms. Lowell claims that Ms. Gadwah violated confidentiality requirements by informing her former husbands of the DCF investigation and a false substantiated report of child abuse.<sup>1</sup> (Doc. 1 ¶ 3.) She alleges that Ms. Gadwah appeared at a custody hearing in Ms. Lowell's divorce case advocating placement of the children with their fathers. *Id.* She also alleges that Ms. Gadwah coerced her into entering drug treatment despite 18 years of abstinence. As a consequence, Ms. Lowell lost her job as a home care provider and she and her husband have suffered damage to their reputations. (Doc. 1 ¶ 75.)

The events give rise to the motion to dismiss and the request for a preliminary injunction concerning the substantiation of plaintiffs as child abusers. Plaintiffs claim that DCF initiated substantiation proceedings on the basis of false and fabricated evidence and without consideration of exculpatory evidence. (Doc. 1 ¶ 4.) Plaintiffs seek a preliminary injunction

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<sup>1</sup> A "substantiated report" is defined at 33 V.S.A. § 4912(16) as a determination by DCF "after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected."

preventing DCF from going forward with an administrative hearing to determine whether to substantiate the abuse claim and place plaintiffs on the child-abuse registry maintained by DCF.

On October 16, 2018, DCF notified plaintiffs that DCF intended to substantiate them for placing the children at risk for physical harm. (Doc. 1 ¶¶ 79-80.) On November 7, 2018, DCF sent a second letter advising plaintiffs of their right to a “substantiation hearing.” (Doc. 1 ¶ 90.) Both plaintiffs requested review of DCF’s substantiation determinations. (Doc. 1 ¶ 95.)

Plaintiffs make several specific complaints about the substantiation process. They complain of excessive delay. Although DCF issued the initial report on or about August 10, 2018, DCF did not schedule a substantiation hearing until August 28, 2019. They also complain of an inadequate investigation prior to issuance of the substantiation letters. They complain that the substantiation hearing process is flawed because the hearing officer selected by DCF may receive ex parte communications. (Doc. 1 ¶ 172.) Plaintiffs allege that they are unfairly restricted in their ability to read the charge against them before the hearing and to offer evidence of their own. They allege that DCF relied on a fabricated charge that one of the children bears a scar on his back as a result of abuse by plaintiff Seth Healey. (Doc. 1 ¶ 153.) They seek a more complete copy of their investigation file. (Doc. 1 ¶ 165.) They seek an opportunity to call their children and other relatives to testify at the substantiation hearing that no abuse occurred. (Doc. 1 ¶ 169.) They also seek an opportunity to cross-examine the investigator and other witnesses. (Doc. 1 ¶ 177.)

Plaintiffs allege violations of the Due Process Clause of the U.S. Constitution, the Vermont Constitution, and Vermont law and administrative regulations. (Doc. 1 ¶ 209.) They seek injunctive and declaratory relief and money damages. They also allege violations of the

Americans with Disabilities Act and Rehabilitation Act based on DCF's determination that plaintiff Miriam Lowell was a person addicted to illegal drugs. (Doc. 1 at 56-57.)

### Analysis

Defendants seek to dismiss the claims for injunctive relief under the doctrine of *Younger* abstention. Plaintiffs argue that review by an independent reviewer, then by the Vermont Human Services Board and finally by the Vermont Supreme Court is insufficient because these steps occur only after plaintiffs have been placed on the child abuse registry. In their view, the damage to plaintiffs (including the potential loss of employment) occurs at the time of listing on the registry and later review is an inadequate remedy.

The *Younger* abstention doctrine requires the trial court to answer to four questions:

1. Does the child abuse registry process fit within the three categories of cases recognized by the Supreme Court as appropriate for *Younger* abstention?
2. Does the process implicate vital state interests?
3. Does the process afford the plaintiff an opportunity to raise the federal constitutional claims which he or she seeks to raise in the federal lawsuit?
4. Do extraordinary circumstances justify a federal court's decision to enjoin a state proceeding which otherwise meets *Younger* criteria?

#### **I. Categories of Cases Subject to Abstention**

In *Younger v. Harris*, 401 U.S. 37 (1971), an individual charged in state court in California with the crime of "criminal syndicalism" sought a federal injunction on the ground that his prosecution violated his First Amendment and Due Process rights. He was joined by others who feared similar prosecution. The Supreme Court held that the federal courts should not enjoin state court criminal proceedings except in extraordinary circumstances. *Younger* is

consistent with established precedent which confined federal intervention in state court criminal proceedings to “extraordinary circumstances where the danger of irreparable loss is both great and immediate.” *Fenner v. Boykin*, 271 U.S. 240, 243 (1926).

In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975), the Court extended the *Younger* abstention principle to civil cases which are “more akin to a criminal prosecution than are most civil cases.” *Huffman* concerned efforts by law enforcement to close a pornographic movie house under a state nuisance statute. Other state remedies which have been held to be akin to criminal prosecutions for purposes of *Younger* abstention include civil forfeiture, *Trainor v. Hernandez*, 431 U.S. 434 (1977), civil contempt, *Juidice v. Vail*, 430 U.S. 327 (1977), child protection proceedings, *Moore v. Sims*, 442 U.S. 415 (1979), attorney discipline, *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), and administrative civil rights claims, *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986).

In a third category of cases subject to *Younger* abstention, the Supreme Court has recognized that federal lawsuits which seek to enjoin the enforcement of state court judgments and orders are potentially subject to *Younger* abstention. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

The expansion of the *Younger* doctrine beyond criminal prosecutions is not without limits. In *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), the Court rejected arguments that any state court proceeding implicating state interests and affording an opportunity to raise federal claims was subject to abstention. The Court renewed its statements in previous cases that *Younger* abstention was limited to state criminal prosecutions, civil cases akin to criminal prosecutions, and cases that implicate a state’s interest in enforcing the orders and judgments of its courts. See *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*,

491 U.S. 350, 367-68 (1989). If a case falls within one of these categories, it may be subject to abstention if the remaining criteria are also present.

There can be little doubt that inclusion on the child abuse registry is a proceeding akin to a criminal prosecution. The decision arises from an accusation of wrongdoing. The state initiates the proceeding and remains a party. As in a criminal statute, the statute identifies specific conduct as a basis for registration. The accused receives notice of the state's allegations and an opportunity to disprove them. While identification of an individual on the registry does not require the same proof as a criminal conviction, the proceeding is similar in its focus on potential serious misconduct by a parent or other adult. *See In re M.E.*, 189 Vt. 114, 120 (2010) ("The [Vermont] registry law clearly addresses the acts or omissions of parents and other individuals, not DCF's response to these actions.")

For these reasons, the court concludes that the statutory process for placing an individual on the child abuse registry is sufficiently similar to a criminal prosecution as to be potentially subject to *Younger* abstention.

## **II. Implication of Vital State Interests**

Child welfare is a serious social problem which implicates state interests in a very direct manner. The Supreme Court has recognized the significance of this state interest in the context of *Younger* abstention. "Family relations are a traditional area of state concern." *Moore*, 442 U.S. at 435.

## **III. Opportunity to Raise Federal Constitutional Issues Before a State Court**

The procedures to appeal a decision to place a person on the child abuse registry appear at 33 V.S.A. §§ 4916a-4916b. These include an administrative review before "a neutral and independent arbiter who has no prior involvement in the original investigation of the allegation."

33 V.S.A. § 4916a(f). At this administrative review conference, the burden is on DCF to prove “that it has accurately and reliably concluded that a reasonable person would believe that the child has been abused or neglected by [the subject of the abuse investigation].” 33 V.S.A. § 4916a(e). A decision in favor of DCF’s position results in placement of the subject on the registry. 33 V.S.A. § 4916a(h) (“If the administrative reviewer accepts [DCF’s] substantiation determination a [child abuse] Registry record shall be made immediately.”).

A second level of administrative review is available through an appeal to the Vermont Human Services Board (“HSB”). 33 V.S.A. § 4916b. In contrast to the initial review which is primarily documentary, the HSB hearing includes an opportunity to call witnesses, subject to some restrictions about testimony by children.<sup>2</sup> The HSB is authorized by statute to consider potential violations of state or federal law. 3 V.S.A. § 3091(d). The HSB exercises discretion in conducting a de novo review of DCF’s action. *In re R.H.*, 189 Vt. 15 (2010).

An individual dissatisfied with the HSB ruling may appeal directly to the Vermont Supreme Court. 3 V.S.A. § 3091(f). The appeal to the Vermont Supreme Court is on the record developed before the HSB. V.R.A.P. 13(b).

As this description indicates, the state procedures permit an individual to raise claims of constitutional violation before the HSB and, on appeal, before the Vermont Supreme Court. Plaintiffs argue that raising these issues before the HSB and the Vermont Supreme Court comes too late because their names may already appear on the registry. (Doc. 16 at 16.) In their view, later removal cannot undo the harm caused by placing their names on the registry. But review

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<sup>2</sup> Hearings before the HSB are called “fair hearings” because they are intended to afford individuals an opportunity to be heard before deprivation of liberty or property consistent with the requirements of due process. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951). The use of the word “fair” as a term of art to identify a hearing which meets due process standards does not imply that the administrative review which precedes it is unfair.

of criminal proceedings and similar cases by state courts frequently occurs after a conviction or other ruling adverse to the individual. It would effectively eliminate *Younger* abstention in many settings if the federal courts intervened before a ruling by the state court or agency in order to prevent that body from entering a conviction or otherwise completing its work. The opportunity to raise constitutional claims in state court very frequently follows a public conviction. The harm in this case of placement on the registry until review by the HSB or the Vermont Supreme Court does not justify federal court intervention before the state process is complete.

#### **IV. Exceptional Circumstances**

The final requirement for abstention is the absence of exceptional circumstances which justify federal intervention. The federal courts may enjoin prosecutions and other actions undertaken in bad faith to chill the exercise of constitutional rights. *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975) (“...[B]ad faith in this context generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction.” While plaintiffs allege that the individual DCF workers involved in their case acted without an adequate investigation and jumped to the wrong conclusions, there is no claim of systemic “bad faith” in the sense that the child registry process was used improperly to prevent plaintiffs from exercising their constitutional rights.

#### **Conclusion**

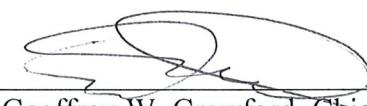
The conditions for *Younger* abstention are present. The court will not issue injunctive relief. Instead, issues concerning the constitutionality of the registry procedures in general or as they have been applied in this case may be examined before through the processes of state administrative and judicial review.

Plaintiffs have also made a claim for money damages. This claim is not subject to *Younger* abstention. Discovery is stayed until the plaintiffs have completed the process of review before the DCF administrative reviewer and the HSB review. A stay of discovery will permit the state process to go forward without interference. The filing of an appeal to the Vermont Supreme Court will not stay discovery since that review is on the record and discovery in this case will not interfere with the process of appellate review. The parties shall submit a joint proposed discovery schedule upon completion of the administrative review process.

The court's decision renders plaintiffs' request for a preliminary injunction moot. The court will not be holding a hearing on the request or issuing a preliminary injunction order. The parties are excused from further compliance with their temporary agreement to postpone the DCF administrative review. This decision expressly authorizes the resumption of the statutory process for review of the decision to place plaintiffs on the child abuse registry.

Based on the findings above, the Motion to Proceed Under Pseudonyms and Motion for a Protective Order (Doc. 4) is GRANTED. The Motion for a Temporary Restraining Order and Motion for Preliminary Injunction (Doc. 5) is DENIED. The Motion to Dismiss (Doc. 8) is DENIED.

Dated at Rutland, in the District of Vermont, this 18<sup>th</sup> day of November, 2019.



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Geoffrey W. Crawford, Chief Judge  
United States District Court

West's Vermont Statutes Annotated

Title Thirty-Three. Human Services

Part 3. Programs and Services for Children and Youth

Chapter 49. Child Welfare Services (Refs & Annos)

Subchapter 2. Reporting Abuse of Children

33 V.S.A. § 4912

## § 4912. Definitions

### Currentness

As used in this subchapter:

(1) "Abused or neglected child" means a child whose physical health, psychological growth and development, or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person and a child who has died as a result of abuse or neglect.

(2) "Assessment" means a response to a report of child abuse or neglect that focuses on the identification of the strengths and support needs of the child and the family and any services they may require to improve or restore their well-being and to reduce the risk of future harm. The child and family assessment does not result in a formal determination as to whether the reported abuse or neglect has occurred.

(3) "Child" means an individual under the age of majority.

(4) "Child Protection Registry" means a record of all investigations that have resulted in a substantiated report on or after January 1, 1992.

(5) "Emotional maltreatment" means a pattern of malicious behavior which results in impaired psychological growth and development.

(6) "Harm" can occur by:

(A) Physical injury or emotional maltreatment.

(B) Failure to supply the child with adequate food, clothing, shelter, or health care. As used in this subchapter, "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under State law. Notwithstanding that a child might be found to be without proper parental care under chapters 51 and 53 of this title, a parent or other person responsible for a child's care legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered neglectful for that reason alone.

(C) Abandonment of the child.

(7) "Investigation" means a response to a report of child abuse or neglect that begins with the systematic gathering of information to determine whether the abuse or neglect has occurred and, if so, the appropriate response. An investigation shall result in a formal determination as to whether the reported abuse or neglect has occurred.

(8) "Member of the clergy" means a priest, rabbi, clergy member, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, or person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, nun, brother, ordained or licensed minister, leader of any church or religious body, or accredited Christian Science practitioner.

(9) "Multidisciplinary team" means a group of professionals, paraprofessionals, and other appropriate individuals impaneled by the Commissioner under this chapter for the purpose of assisting in the identification and review of cases of child abuse and neglect, coordinating treatment services for abused and neglected children and their families, and promoting child abuse prevention.

(10) "Person responsible for a child's welfare" includes the child's parent, guardian, foster parent, any other adult residing in the child's home who serves in a parental role, an employee of a public or private residential home, institution, or agency, or other person responsible for the child's welfare while in a residential, educational, or child care setting, including any staff person.

(11) "Physical injury" means death or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

(12) "Redacted investigation file" means the intake report, the investigation activities summary, and case determination report that are amended in accordance with confidentiality requirements set forth in [section 4913](#) of this title.

(13) "Registry record" means an entry in the Child Protection Registry that consists of the name of an individual substantiated for child abuse or neglect, the date of the finding, the nature of the finding, and at least one other personal identifier, other than a name, listed in order to avoid the possibility of misidentification.

(14) "Risk of harm" means a significant danger that a child will suffer serious harm by other than accidental means, which harm would be likely to cause physical injury, or sexual abuse, including as the result of:

(A) a single, egregious act that has caused the child to be at significant risk of serious physical injury;

(B) the production or preproduction of methamphetamines when a child is actually present;

(C) failing to provide supervision or care appropriate for the child's age or development and, as a result, the child is at significant risk of serious physical injury;

(D) failing to provide supervision or care appropriate for the child's age or development due to use of illegal substances, or misuse of prescription drugs or alcohol;

(E) failing to supervise appropriately a child in a situation in which drugs, alcohol, or drug paraphernalia are accessible to the child; and

(F) a registered sex offender or person substantiated for sexually abusing a child residing with or spending unsupervised time with a child.

(15) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child, including:

(A) incest;

(B) prostitution;

(C) rape;

(D) sodomy;

(E) lewd and lascivious conduct involving a child;

(F) aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement, or sadomasochistic abuse involving a child;

(G) viewing, possessing, or transmitting child pornography, with the exclusion of the exchange of images between mutually consenting minors, including the minor whose image is exchanged;

(H) human trafficking;

(I) sexual assault;

(J) voyeurism;

(K) luring a child; or

(L) obscenity.

(16) "Substantiated report" means that the Commissioner or the Commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected.

(17) "Serious physical injury" means, by other than accidental means:

(A) physical injury that creates any of the following:

(i) a substantial risk of death;

(ii) a substantial loss or impairment of the function of any bodily member or organ;

(iii) a substantial impairment of health; or

(iv) substantial disfigurement; or

(B) strangulation by intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

#### Credits

1981, Adj. Sess., No. 207, § 1; 1985, Adj. Sess., No. 211, §§ 1, 2; 1989, Adj. Sess., No. 295, §§ 1, 2; [1991, Adj. Sess., No. 141](#), § 1; [1995, Adj. Sess., No. 145](#), § 5; [2001, Adj. Sess., No. 135](#), § 15; [2003, No. 43](#), § 2; [2003, No. 66](#), § 136a; [2007, No. 77](#), § 1, eff. June 7, 2007; [2007, Adj. Sess., No. 168](#), § 2, eff. July 1, 2008; [2007, Adj. Sess., No. 172](#), § 18, eff. July 1, 2008; [2013, Adj. Sess., No. 131](#), § 76, eff. May 20, 2014; [2015, No. 60](#), § 3, eff. July 1, 2015.

#### Notes of Decisions (22)

33 V.S.A. § 4912, VT ST T. 33 § 4912

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).

West's Vermont Statutes Annotated

Title Thirty-Three. Human Services

Part 3. Programs and Services for Children and Youth

Chapter 49. Child Welfare Services (Refs & Annos)

Subchapter 2. Reporting Abuse of Children

33 V.S.A. § 4915

§ 4915. Assessment and investigation

Currentness

(a) Upon receipt of a report of abuse or neglect, the Department shall promptly determine whether it constitutes an allegation of child abuse or neglect as defined in [section 4912](#) of this title. The Department shall respond to reports of alleged neglect or abuse that occurred in Vermont and to out-of-state conduct when the child is a resident of or is present in Vermont.

(b) If the report is accepted as a valid allegation of abuse or neglect, the Department shall determine whether to conduct an assessment as provided for in [section 4915a](#) of this title or to conduct an investigation as provided for in [section 4915b](#) of this title. The Department shall begin either an assessment or an investigation within 72 hours after the receipt of a report made pursuant to [section 4914](#) of this title, provided that it has sufficient information to proceed. The Commissioner may waive the 72-hour requirement only when necessary to locate the child who is the subject of the allegation or to ensure the safety of the child or social worker.

(c) The decision to conduct an assessment shall include consideration of the following factors:

(1) the nature of the conduct and the extent of the child's injury, if any;

(2) the accused person's prior history of child abuse or neglect, or lack thereof; and

(3) the accused person's willingness or lack thereof to accept responsibility for the conduct and cooperate in remediation.

(d) The Department shall conduct an investigation when an accepted report involves allegations indicating substantial child endangerment. For purposes of this section, "substantial child endangerment" includes conduct by an adult involving or resulting in sexual abuse, and conduct by a person responsible for a child's welfare involving or resulting in abandonment, child fatality, malicious punishment, or abuse or neglect that causes serious physical injury. The Department may conduct an investigation of any report.

(e) The Department shall begin an immediate investigation if, at any time during an assessment, it appears that an investigation is appropriate.

(f) The Department may collaborate with child protection, law enforcement, and other departments and agencies in Vermont and other jurisdictions to evaluate risk to a child and to determine the service needs of the child and family. The Department may enter into reciprocal agreements with other jurisdictions to further the purposes of this subchapter.

(g) The Department shall report to and receive assistance from appropriate law enforcement in the following circumstances:

(1) investigations of child sexual abuse by an alleged perpetrator 10 years of age or older;

(2) investigations of serious physical abuse or neglect requiring emergency medical care, resulting in death, or likely to result in criminal charges;

(3) situations potentially dangerous to the child or Department worker; and

(4) an incident in which a child suffers:

(A) serious bodily injury as defined in [13 V.S.A. § 1021](#), by other than accidental means; and

(B) potential violations of:

(i) [13 V.S.A. § 2602](#) (lewd or lascivious conduct with child);

(ii) 13 V.S.A. chapter 60 (human trafficking);

(iii) 13 V.S.A. chapter 64 (sexual exploitation of children); and

(iv) 13 V.S.A. chapter 72 (sexual assault).

## Credits

1981, Adj. Sess., No. 207, § 1; [1995, Adj. Sess., No. 178](#), § 300; [1999, Adj. Sess., No. 78](#), § 1; [2007, No. 77](#), § 1, eff. June 7, 2007; [2007, Adj. Sess., No. 168](#), § 5, eff. July 1, 2008; [2015, No. 60](#), § 17, eff. July 1, 2015.

## Notes of Decisions (13)

33 V.S.A. § 4915, VT ST T. 33 § 4915

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).

West's Vermont Statutes Annotated  
Title Thirty-Three. Human Services  
Part 3. Programs and Services for Children and Youth  
Chapter 49. Child Welfare Services (Refs & Annos)  
Subchapter 2. Reporting Abuse of Children

## 33 V.S.A. § 4915b

## § 4915b. Procedures for investigation

## Currentness

(a) An investigation, to the extent that it is reasonable under the facts and circumstances presented by the particular allegation of child abuse, shall include all of the following:

- (1) A visit to the child's place of residence or place of custody and to the location of the alleged abuse or neglect.
- (2) An interview with or observation of the child reportedly having been abused or neglected. If the investigator elects to interview the child, that interview may take place without the approval of the child's parents, guardian, or custodian, provided that it takes place in the presence of a disinterested adult who may be, but shall not be limited to being, a teacher, a member of the clergy, a child care provider regulated by the Department, or a nurse.
- (3) Determination of the nature, extent, and cause of any abuse or neglect.
- (4) Determination of the identity of the person alleged to be responsible for such abuse or neglect.
- (5)(A) The identity, by name, of any other children living in the same home environment as the subject child. The investigator shall consider the physical and emotional condition of those children and may interview them, unless the child is the person who is alleged to be responsible for such abuse or neglect, in accordance with the provisions of subdivision (2) of this subsection.  
(B) The identity, by name, of any other children who may be at risk if the abuse was alleged to have been committed by someone who is not a member of the subject child's household. The investigator shall consider the physical and emotional condition of those children and may interview them, unless the child is the person who is alleged to be responsible for such abuse or neglect, in accordance with the provisions of subdivision (2) of this subsection.
- (6) A determination of the immediate and long-term risk to each child if that child remains in the existing home or other environment.
- (7) Consideration of the environment and the relationship of any children therein to the person alleged to be responsible for the suspected abuse or neglect.

(8) All other data deemed pertinent.

(b) For cases investigated and substantiated by the Department, the Commissioner shall, to the extent that it is reasonable, provide assistance to the child and the child's family. For cases investigated but not substantiated by the Department, the Commissioner may, to the extent that it is reasonable, provide assistance to the child and the child's family. Nothing contained in this section or [section 4915a](#) of this title shall be deemed to create a private right of action.

(c) The Commissioner, designee, or any person required to report under [section 4913](#) of this title or any other person performing an investigation may take or cause to be taken photographs of trauma visible on a child who is the subject of a report. The Commissioner or designee may seek consultation with a physician. If it is indicated appropriate by the physician, the Commissioner or designee may cause the child who is subject of a report to undergo a radiological examination without the consent of the child's parent or guardian.

(d) Services may be provided to the child's immediate family whether or not the child remains in the home.

(e) Repealed by [2015, No. 60](#), § 16, eff. July 1, 2015.

(f) The Department shall not substantiate cases in which neglect is caused solely by the lack of financial resources of the parent or guardian.

**Credits**

[2007, Adj. Sess., No. 168](#), § 7, eff. July 1, 2008; [2015, No. 60](#), § 16, eff. July 1, 2015.

**Notes of Decisions (1)**

33 V.S.A. § 4915b, VT ST T. 33 § 4915b

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).

West's Vermont Statutes Annotated  
Title Thirty-Three. Human Services  
Part 3. Programs and Services for Children and Youth  
Chapter 49. Child Welfare Services (Refs & Annos)  
Subchapter 2. Reporting Abuse of Children

33 V.S.A. § 4916

§ 4916. Child Protection Registry

Currentness

(a)(1) The Commissioner shall maintain a Child Protection Registry which shall contain a record of all investigations that have resulted in a substantiated report on or after January 1, 1992. Except as provided in subdivision (2) of this subsection, prior to placement of a substantiated report on the Registry, the Commissioner shall comply with the procedures set forth in [section 4916a](#) of this title.

(2) In cases involving sexual abuse or serious physical abuse of a child, the Commissioner in his or her sole judgment may list a substantiated report on the Registry pending any administrative review after:

(A) reviewing the investigation file; and

(B) making written findings in consideration of:

(i) the nature and seriousness of the alleged behavior; and

(ii) the person's continuing access to children.

(3) A person alleged to have abused or neglected a child and whose name has been placed on the Registry in accordance with subdivision (2) of this subsection shall be notified of the Registry entry, provided with the Commissioner's findings, and advised of the right to seek an administrative review in accordance with [section 4916a](#) of this title.

(4) If the name of a person has been placed on the Registry in accordance with subdivision (2) of this subsection, it shall be removed from the Registry if the substantiation is rejected after an administrative review.

(b) A Registry record means an entry in the Child Protection Registry that consists of the name of an individual substantiated for child abuse or neglect, the date of the finding, the nature of the finding, and at least one other personal identifier, other than a name, listed in order to avoid the possibility of misidentification.

(c) The Commissioner shall adopt rules to permit use of the Registry records as authorized by this subchapter while preserving confidentiality of the Registry and other Department records related to abuse and neglect.

(d) For all substantiated reports of child abuse or neglect made on or after the date the final rules are adopted, the Commissioner shall create a Registry record that reflects a designated child protection level related to the risk of future harm to children. This system of child protection levels shall be based upon an evaluation of the risk the person responsible for the abuse or neglect poses to the safety of children. The risk evaluation shall include consideration of the following factors:

(1) the nature of the conduct and the extent of the child's injury, if any;

(2) the person's prior history of child abuse or neglect as either a victim or perpetrator;

(3) the person's response to the investigation and willingness to engage in recommended services; and

(4) the person's age and developmental maturity.

(e) The Commissioner shall develop rules for the implementation of a system of Child Protection Registry levels for substantiated cases. The rules shall address:

(1) the length of time a person's name appears on the Registry;

(2) when and how names are expunged from the Registry;

(3) whether the person is a juvenile or an adult;

(4) whether the person was charged with or convicted of a criminal offense arising out of the incident of abuse or neglect; and

(5) whether a Family Division of the Superior Court has made any findings against the person.

(f) Deleted by 2007, Adj. Sess. No. 168, § 8, eff. July 1, 2008.

#### Credits

1981, Adj. Sess., No. 207, § 1; 1989, Adj. Sess., No. 295, § 5; [1991, Adj. Sess., No. 159](#), § 3; [2007, No. 77](#), § 1, eff. June 7, 2007, and Sept. 1, 2007; [2007, Adj. Sess., No. 168](#), § 8, eff. July 1, 2008; [2007, Adj. Sess., No. 172](#), § 20, eff. July 1, 2008; [2009, Adj. Sess., No. 154](#), § 238(c)(10), eff. July 1, 2010.

#### Notes of Decisions (32)

33 V.S.A. § 4916, VT ST T. 33 § 4916

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).

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**West's Vermont Statutes Annotated**  
**Title Thirty-Three. Human Services**  
**Part 3. Programs and Services for Children and Youth**  
**Chapter 49. Child Welfare Services (Refs & Annos)**  
**Subchapter 2. Reporting Abuse of Children**

33 V.S.A. § 4916a

### § 4916a. Challenging placement on the Registry

#### Currentness

(a) If an investigation conducted in accordance with [section 4915b](#) of this title results in a determination that a report of child abuse or neglect should be substantiated, the Department shall notify the person alleged to have abused or neglected a child of the following:

(1) the nature of the substantiation decision, and that the Department intends to enter the record of the substantiation into the Registry;

(2) who has access to Registry information and under what circumstances;

(3) the implications of having one's name placed on the Registry as it applies to employment, licensure, and registration;

(4) the right to request a review of the substantiation determination by an administrative reviewer, the time in which the request for review shall be made, and the consequences of not seeking a review; and

(5) the right to receive a copy of the Commissioner's written findings made in accordance with subdivision 4916(a)(2) of this title if applicable.

(b) Under this section, notice by the Department to a person alleged to have abused or neglected a child shall be by first class mail sent to the person's last known address.

(c)(1) A person alleged to have abused or neglected a child may seek an administrative review of the Department's intention to place the person's name on the Registry by notifying the Department within 14 days of the date the Department mailed notice of the right to review in accordance with subsections (a) and (b) of this section. The Commissioner may grant an extension past the 14-day period for good cause, not to exceed 28 days after the Department has mailed notice of the right to review.

(2) The administrative review may be stayed upon request of the person alleged to have committed abuse or neglect if there is a related case pending in the Criminal or Family Division of the Superior Court which arose out of the same incident of abuse

or neglect for which the person was substantiated. During the period the review is stayed, the person's name shall be placed on the Registry. Upon resolution of the Superior Court criminal or family case, the person may exercise his or her right to review under this section by notifying the Department in writing within 30 days after the related court case, including any appeals, has been fully adjudicated. If the person fails to notify the Department within 30 days, the Department's decision shall become final and no further review under this subsection is required.

(d) The Department shall hold an administrative review conference within 35 days of receipt of the request for review. At least 10 days prior to the administrative review conference, the Department shall provide to the person requesting review a copy of the redacted investigation file, notice of time and place of the conference, and conference procedures, including information that may be submitted and mechanisms for providing information. There shall be no subpoena power to compel witnesses to attend a Registry review conference. The Department shall also provide to the person those redacted investigation files that relate to prior investigations that the Department has relied upon to make its substantiation determination in the case in which a review has been requested.

(e) At the administrative review conference, the person who requested the review shall be provided with the opportunity to present documentary evidence or other information that supports his or her position and provides information to the reviewer in making the most accurate decision regarding the allegation. The Department shall have the burden of proving that it has accurately and reliably concluded that a reasonable person would believe that the child has been abused or neglected by that person. Upon the person's request, the conference may be held by teleconference.

(f) The Department shall establish an administrative case review unit within the Department and contract for the services of administrative reviewers. An administrative reviewer shall be a neutral and independent arbiter who has no prior involvement in the original investigation of the allegation.

(g) Within seven days of the conference, the administrative reviewer shall:

(1) reject the Department's substantiation determination;

(2) accept the Department's substantiation; or

(3) place the substantiation determination on hold and direct the Department to further investigate the case based upon recommendations of the reviewer.

(h) If the administrative reviewer accepts the Department's substantiation determination, a Registry record shall be made immediately. If the reviewer rejects the Department's substantiation determination, no Registry record shall be made.

(i) Within seven days of the decision to reject or accept or to place the substantiation on hold in accordance with subsection (g) of this section, the administrative reviewer shall provide notice to the person of his or her decision. If the administrative reviewer accepts the Department's substantiation, the notice shall advise the person of the right to appeal the administrative reviewer's decision to the human services board in accordance with [section 4916b](#) of this title.

(j) Persons whose names were placed on the Registry on or after January 1, 1992 but prior to September 1, 2007 shall be entitled to an opportunity to seek an administrative review to challenge the substantiation.

(k) If no administrative review is requested, the Department's decision in the case shall be final, and the person shall have no further right of review under this section. The Commissioner may grant a waiver and permit such a review upon good cause shown. Good cause may include an acquittal or dismissal of a criminal charge arising from the incident of abuse or neglect.

(l) In exceptional circumstances, the Commissioner, in his or her sole and nondelegable discretion, may reconsider any decision made by a reviewer. A Commissioner's decision that creates a Registry record may be appealed to the Human Services Board in accordance with [section 4916b](#) of this title.

#### Credits

[2007, No. 77](#), § 1, eff. Sept. 1, 2007; [2007, Adj. Sess., No. 168](#), § 9, eff. Sept. 1, 2008; [2009, Adj. Sess., No. 154](#), § 221, eff. July 1, 2010; [2015, Adj. Sess., No. 92](#), § 1, eff. May 10, 2016.

#### Notes of Decisions (7)

33 V.S.A. § 4916a, VT ST T. 33 § 4916a

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).

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West's Vermont Statutes Annotated  
Title Thirty-Three. Human Services  
Part 3. Programs and Services for Children and Youth  
Chapter 49. Child Welfare Services (Refs & Annos)  
Subchapter 2. Reporting Abuse of Children

33 V.S.A. § 4916b

## § 4916b. Human Services Board hearing

Effective: July 1, 2018

Currentness

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

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

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

(3)(A) Article VIII of the Vermont Rules of Evidence (Hearsay) shall not apply to any hearing held pursuant to this subchapter with respect to statements made by a child 12 years of age or under who is alleged to have been abused or neglected and the child shall not be required to testify or give evidence at any hearing held under this subchapter. Evidence shall be admissible if the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

(B) Article VIII of the Vermont Rules of Evidence (Hearsay) shall not apply to any hearing held pursuant to this subchapter with respect to statements made by a child who is at least 13 years of age and under 16 years of age who is alleged to have been abused or neglected and the child shall not be required to testify or give evidence at any hearing held under this subchapter in either of the following circumstances:

(i) The hearing officer determines, based on a preponderance of the evidence, that requiring the child to testify will present a substantial risk of trauma to the child. Evidence of trauma need not be offered by an expert and may be offered by any adult with an ongoing significant relationship with the child. Evidence shall be admissible if the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

(ii) The hearing officer determines that the child is physically unavailable to testify or the Department has made diligent efforts to locate the child and was unsuccessful. Evidence shall be admissible if the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

(4) Convictions and adjudications that arose out of the same incident of abuse or neglect for which the person was substantiated, whether by verdict, by judgment, or by a plea of any type, including a plea resulting in a deferred sentence, shall be competent evidence in a hearing held under this subchapter.

(c) A hearing may be stayed upon request of the petitioner if there is a related case pending in the Criminal or Family Division of the Superior Court that arose out of the same incident of abuse or neglect for which the person was substantiated.

(d) If no review by the Board is requested, the Department's decision in the case shall be final, and the person shall have no further right for review under this section. The Board may grant a waiver and permit such a review upon good cause shown.

#### Credits

2007, No. 77, § 1, eff. Sept. 1, 2007; 2007, Adj. Sess., No. 168, § 10, eff. July 1, 2008; 2009, No. 1, § 29, eff. July 1, 2009; 2009, Adj. Sess., No. 154, § 222, eff. July 1, 2010; 2017, Adj. Sess., No. 147, § 1, eff. July 1, 2018.

#### Notes of Decisions (4)

33 V.S.A. § 4916b, VT ST T. 33 § 4916b

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).

---

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Proposed Legislation

**West's Vermont Statutes Annotated**

**Title Thirty-Three. Human Services**

**Part 3. Programs and Services for Children and Youth**

**Chapter 49. Child Welfare Services (Refs & Annos)**

**Subchapter 2. Reporting Abuse of Children**

33 V.S.A. § 4916c

**§ 4916c. Petition for expungement from the Registry**

**Currentness**

(a)(1) Except as provided in this subdivision, a person whose name has been placed on the Registry prior to July 1, 2009 and has been listed on the Registry for at least three years may file a written request with the Commissioner, seeking a review for the purpose of expunging an individual Registry record. A person whose name has been placed on the Registry on or after July 1, 2009 and has been listed on the Registry for at least seven years may file a written request with the Commissioner seeking a review for the purpose of expunging an individual Registry record. The Commissioner shall grant a review upon request.

(2) A person who is required to register as a sex offender on the State's Sex Offender Registry shall not be eligible to petition for expungement of his or her Registry record until the person is no longer subject to Sex Offender Registry requirements.

(b)(1) The person shall have the burden of proving that a reasonable person would believe that he or she no longer presents a risk to the safety or well-being of children.

(2) The Commissioner shall consider the following factors in making his or her determination:

(A) the nature of the substantiation that resulted in the person's name being placed on the Registry;

(B) the number of substantiations;

(C) the amount of time that has elapsed since the substantiation;

(D) the circumstances of the substantiation that would indicate whether a similar incident would be likely to occur;

(E) any activities that would reflect upon the person's changed behavior or circumstances, such as therapy, employment, or education;

(F) references that attest to the person's good moral character; and

(G) any other information that the Commissioner deems relevant.

(3) The Commissioner may deny a petition for expungement based solely on subdivision (2)(A) or (2)(B) of this subsection.

(c) At the review, the person who requested the review shall be provided with the opportunity to present any evidence or other information, including witnesses, that supports his or her request for expungement. Upon the person's request, the review may be held by teleconference.

(d) A person may seek a review under this section no more than once every 36 months.

(e) Within 30 days of the date on which the Commissioner mailed notice of the decision pursuant to this section, a person may appeal the decision to the Human Services Board. The person shall be prohibited from challenging his or her substantiation at such hearing, and the sole issue before the Board shall be whether the Commissioner abused his or her discretion in denial of the petition for expungement. The hearing shall be on the record below, and determinations of credibility of witnesses made by the Commissioner shall be given deference by the Board.

(f) The Department shall take steps to provide reasonable notice to persons on the Registry of their right to seek an expungement under this section. Actual notice is not required. Reasonable steps may include activities such as the production of an informative fact sheet about the expungement process, posting of such information on the Department website, and other approaches typically taken by the Department to inform the public about the Department's activities and policies. The Department shall send notice of the expungement process to any person listed on the Registry for whom a Registry check has been requested.

#### Credits

2007, No. 77, § 1, eff. June 7, 2007; 2007, Adj. Sess., No. 168, § 11, eff. July 1, 2008; 2015, Adj. Sess., No. 92, § 2, eff. May 10, 2016.

#### Notes of Decisions (2)

33 V.S.A. § 4916c, VT ST T. 33 § 4916c

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).

 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

West's Vermont Statutes Annotated  
Title Thirty-Three. Human Services  
Part 3. Programs and Services for Children and Youth  
Chapter 49. Child Welfare Services (Refs & Annos)  
Subchapter 2. Reporting Abuse of Children

33 V.S.A. § 4916d

## § 4916d. Automatic expungement of Registry records

### Currentness

Registry entries concerning a person who was substantiated for behavior occurring before the person reached 10 years of age shall be expunged when the person reaches the age of 18, provided that the person has had no additional substantiated Registry entries. A person substantiated for behavior occurring before the person reached 18 years of age and whose name has been listed on the Registry for at least three years may file a written request with the Commissioner seeking a review for the purpose of expunging an individual Registry record in accordance with [section 4916c](#) of this title.

### Credits

[2007, No. 77](#), § 1, eff. June 7, 2007; [2007, Adj. Sess., No. 168](#), § 12, eff. July 1, 2008.

33 V.S.A. § 4916d, VT ST T. 33 § 4916d

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).

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West's Vermont Statutes Annotated  
Title Thirty-Three. Human Services  
Part 3. Programs and Services for Children and Youth  
Chapter 49. Child Welfare Services (Refs & Annos)  
Subchapter 2. Reporting Abuse of Children

## 33 V.S.A. § 4919

## § 4919. Disclosure of Registry records

## Currentness

(a) The Commissioner may disclose a Registry record only as follows:

(1) To the State's Attorney or the Attorney General.

(2) To the owner or operator of a facility regulated by the Department for the purpose of informing the owner or operator that employment of a specific individual may result in loss of license, registration, certification, or authorization as set forth in [section 152](#) of this title.

(3) To an employer if such information is used to determine whether to hire or retain a specific individual providing care, custody, treatment, transportation, or supervision of children or vulnerable adults. The employer may submit a request concerning a current employee, volunteer, grantee, or contractor or an individual to whom the employer has given a conditional offer of a contract, volunteer position, or employment. The request shall be accompanied by a release signed by the current or prospective employee, volunteer, grantee, or contractor. If that individual has a record of a substantiated report, the Commissioner shall provide the Registry record to the employer. The employer shall not disclose the information contained in the Registry report.

(4) To the Commissioners of Disabilities, Aging, and Independent Living and of Mental Health or their designees for purposes related to the licensing or registration of facilities regulated by those Departments.

(5) To the Commissioners of Health, of Disabilities, Aging, and Independent Living and of Mental Health or their designees for purposes related to oversight and monitoring of persons who are served by or compensated with funds provided by those Departments, including persons to whom a conditional offer of employment has been made.

(6) Upon request or when relevant to other states' adult protective services offices.

(7) Upon request or when relevant to other states' child protection agencies.

(8) To the person substantiated for child abuse and neglect who is the subject of the record.

(9) To the Commissioner of Corrections in accordance with the provisions of [28 V.S.A. § 204a\(b\)\(3\)](#).

(10) To the Board of Medical Practice for the purpose of evaluating an applicant, licensee, or holder of certification pursuant to [26 V.S.A. § 1353](#).

(b) An employer providing transportation services to children or vulnerable adults may disclose Registry records obtained pursuant to subdivision (a)(3) of this section to the Agency of Human Services or its designee for the sole purpose of auditing the records to ensure compliance with this subchapter. An employer shall provide such records at the request of the Agency or its designee. Only Registry records regarding individuals who provide direct transportation services or otherwise have direct contact with children or vulnerable adults may be disclosed.

(c) Volunteers shall be considered employees for purposes of this section.

(d) Disclosure of Registry records or information or other records used or obtained in the course of providing services to prevent child abuse or neglect or to treat abused or neglected children and their families by one member of a multidisciplinary team to another member of that team shall not subject either member of the multidisciplinary team, individually, or the team as a whole, to any civil or criminal liability notwithstanding any other provision of law.

(e) “Employer,” as used in this section, means a person or organization who employs or contracts with one or more individuals to care for or provide transportation services to children or vulnerable adults, on either a paid or volunteer basis.

(f) In no event shall Registry records be made available for employment purposes other than as set forth in this subsection, or for credit purposes. Any person who violates this subsection shall be fined not more than \$500.00.

(g) Nothing in this subsection shall limit the Department's right to use and disclose information from its records as provided in [section 4921](#) of this chapter.

#### Credits

1981, Adj. Sess., No. 207, § 1; 1983, Adj. Sess., No. 169, § 2; [1991, Adj. Sess., No. 159, § 4](#); [1993, No. 100, § 7](#); [2001, Adj. Sess., No. 135, § 16](#); [2003, No. 66, § 136b](#); [2005, Adj. Sess., No. 174, § 121](#); [2007, No. 77, § 1](#), eff. June 7, 2007; [2007, Adj. Sess., No. 168, § 15](#), eff. July 1, 2008; [2009, No. 1, § 37](#), eff. July 1, 2009; [2011, No. 61, § 7](#), eff. June 2, 2011.

#### 33 V.S.A. § 4919, VT ST T. 33 § 4919

The statutes are current through Acts 1 through 9, M-1 of the Regular Session of the 2021-2022 Vermont General Assembly (2021).