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ENTRY ORDER

2024 VT 46

SUPREME COURT DOCKET NO. 23-AP-323

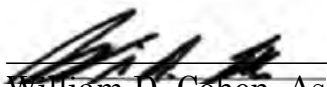
APRIL TERM, 2024

Miriam Lowell and Seth Healey	} APPEALED FROM:
	}
	} Superior Court,
v.	} Washington Unit,
	} Civil Division
Department of Children and Families et al.	}
	} CASE NO. 23-CV 00852

In the above-entitled cause, the Clerk will enter:

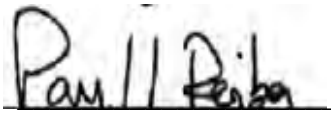
The portion of the appeal relating to plaintiff Miriam Lowell is dismissed as moot. In all other respects, the judgment of the trial court is affirmed.

FOR THE COURT:

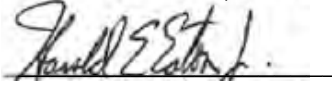


William D. Cohen, Associate Justice

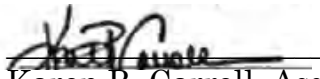
Concurring:



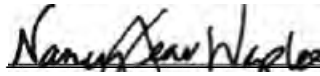
Paul L.Reiber, Chief Justice



Harold E. Eaton, Jr., Associate Justice



Karen R. Carroll, Associate Justice



Nancy J. Waples, Associate Justice

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE
AUG 02 2024

2024 VT 46

No. 23-AP-323

Miriam Lowell and Seth Healey	Supreme Court
v.	On Appeal from Superior Court Washington Unit
Department for Children and Families et al.	Civil Division

Timothy B. Tomasi, J.

David J. Shlansky of Shlansky Law Group, LLP, Chelsea, Massachusetts, for Plaintiffs-Appellants.

Charity R. Clark, Attorney General, and David R. Groff, Assistant General, Montpelier, for Defendants-Appellees Department for Children and Families,

Catherine Clark, Kathleen Greenmun, and Christine Gadwah.

PRESENT: Reiber, C.J. Eaton Carroll Cohen and Waples, JJ.

¶1. **COHEN, J.** Plaintiffs Miriam Lowell and Seth Healey, proceeding under pseudonyms, appeal from the trial court's decision dismissing their complaint against various defendants including the Department for Children and Families (DCF).[1] On appeal, plaintiffs primarily argue that the complaint adequately stated a constitutional due process claim challenging DCF's process for placing individuals on the Vermont Confidential Child Protection Registry. We dismiss as moot the portion of the appeal relating to Lowell. In all other respects, we affirm.

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[1] According to their notice of appeal plaintiffs also appealed from the trial court's order denying plaintiffs motion for reconsideration of its dismissal order. However, they abandoned that claim by failing to brief it. See McAdams v. Town of Barnard, 2007 VT 61, ¶ 8 182 Vt. 259, 936 A.2d 1310 ("Arguments not briefed are waived."). Plaintiffs additionally claim that the trial court improperly denied their motion for a preliminary injunction. Since we affirm the court's dismissal of plaintiffs' complaint, we do not address this separate claim because "any pronouncement on the subject wil1 have no effect." In re Snowstone, LLC Act 250 Jurisdictional Op, 2021 VT 72A, ¶ 27,216 Vt. 216,274 A.3d 42

Procedural and Factual Background

¶2. Our review begins with a brief overview of the procedural setting at the center of this appeal. The registry, which is maintained by DCF, consists of "a record of all investigations that have resulted in a substantiated report" of a person who has abused or neglected a child. 33 V.S.A. § 4916(a)(l). Records contained on the registry are not available to the public and except in limited circumstances remain confidential. See id. § 4916(c); id. § 4919. For instance, DCF may disclose a record on the registry to an employer concerning a prospective employee, but only if the purpose of the employment involves working with children. See id. § 4919(a)(3). The same is true of an employer seeking a record of a current employee but only upon that employee's consent. Id.

¶3. There are several steps before an individual is placed on the registry. DCF must first receive a report of abuse or neglect of a child and then choose to investigate the report s allegations. Id. §§ 4915, 4915b. If it elects to investigate, DCF must determine whether the allegations of abuse or neglect are substantiated. Id. § 49l 5b(b). Should DCF determine that the allegations are substantiated, it must provide certain notice to the individual, including information about the substantiation decision, its consequences, the nature of the registry, and the right to seek further review. Id. § 4916a(a).

¶4. Before being listed on the registry, the individual can request an administrative review of DCF's

substantiation determination.[2] Id. §§ 49 l 6a(c)(1), 4916(a)(1). Upon that request DCF must provide the individual with certain investigative information and then hold an 'administrative review conference" within thirty-five days, where it retains the burden to establish substantiation. Id. § 4916a(d); id. § 4916a(e) ("[DCF] shall have the burden of proving that it was accurately and reliably concluded that a reasonable person would believe that the child has been abused or neglected by that person."). Presiding over the conference is an administrative reviewer who must be a neutral and independent arbiter" with "no prior involvement in the original investigation of the allegation.' *ld.* § 4916a(f). During the conference, the accused individual can present documentary evidence and other information they deem relevant, but they lack subpoena power to compel the attendance of witnesses. Id. § 4916a(d), (e). The administrative reviewer has the power to overturn DCF s substantiation, and they must render a decision within seven days of the conference. Id. § 4916a(g). The individual must receive that decision within seven days of its issuance. Id. § 4916a(i). If the administrative reviewer accepts DCF's substantiation determination, the individual is immediately placed on the registry. Id. § 4916a(h).

¶5. An individual who receives an adverse decision from the administrative reviewer may appeal to the Human Services Board, which must afford the individual with a fair hearing under 3 V.S.A. § 3091

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[2] Failure to timely exercise the right to an administrative review renders DCF's substantiation determination a final and unreviewable order. 33 V.S.A. § 4916a(k).

within sixty days of the request. 33 V.S.A. §§ 4916a(i), 4916b(a)-(b). The fair hearing is held before a neutral hearing officer with no prior involvement in the matter. See Fair Hearing Rules, § 1000.3(a), Code of Vt. Rules 13 020 002 http://www.lexisnexis.com/hottopics/codeofvtrules.
A fair hearing under § 3091 affords the individual with more procedural rights and consists of a de novo review. See In re Bushey-Combs, 160 Vt. 326 328 628 A.2d 541,542 (1993) (holding that' fair hearing' under§ 3091 "is to be de novo"). The individual may subpoena witnesses examine and cross-examine witnesses under oath, be represented by counsel, and examine documents and records related to the investigation prior to the hearing. See 3 V.S.A. § 3091(b)· Fair Hearing Rules, § 1000.3, Code of Vt. Rules 13 020 002, http://www.lexisnexis.com/hottopics/codeofvtrules.
The Board has the power to reverse or modify the substantiation decision, with DCF retaining the burden of proof by a heightened preponderance-of-the-evidence standard. Fair Hearing Rules, §§ 1000.3(0) 1000.4(d), Code of Vt. Rules 13 020 002, http://www.lexisnexis.com/hottopics/codeofvtrules. If the Board upholds the substantiation decision, an individual may seek judicial review by this Court. See V.R.A.P. 13 · 3 V.S.A. § 3091(f).

¶6. With this backdrop in mind, we now turn to the instant matter. According to plaintiffs' complaint Lowell is a single parent with three children who shares a home with Healey. Lowell was employed as a personal care specialist by an in-home care provider. On September 20, 2018, Lowell was terminated from that position after DCF chose to investigate a report

of abuse or neglect with respect to her children. Healey was also the subject of that report and was also investigated by DCF. The allegations of abuse or neglect centered upon claims that plaintiffs used drugs in front of one of Lowell's children, and that plaintiffs forced that child to use drugs and consume a1cohol. Healey was also reported to have physically abused another child of Lowell's.

¶7. In October 2018, DCF notified plaintiffs of its determination that the allegations of abuse or neglect were substantiated. Plaintiffs thereafter timely requested an administrative review pursuant to § 4916a. DCF sent a response to that request in

¶8. In June 2019, DCF sent plaintiffs a letter scheduling their administrative review conference for August 29, 2019.[3] On August 14, 2019, plaintiffs responded with a letter seeking to defer the conference and "confer about how to correct the process to allow for compliance with constitutional requirements." (Internal quotation marks omitted.)

¶9. Three days before the administrative review was scheduled to take place on August 29, 2019, plaintiffs filed a complaint in the United States District Court for the District of Vermont. They alleged that the administrative review process violated their right to

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[3] Nothing from the record, the complaint or the parties' filings in this appeal explains this delay. The trial court expressed confusion as to why the administrative process had stalled even after plaintiffs' federal action was dismissed. We similarly cannot determine the cause for why the administrative review conference was initially scheduled so long after plaintiffs exercised their right to a pre-listing administrative review. Nevertheless, the issue is not currently before us.

adequate due process and sought both compensatory and injunctive relief. In November 2019, the court denied plaintiffs requested injunction.[4] See Lowell v. Vt. Dep't for Child. & Fams., No. 5:19-cv-150, 2019 WL 11767547, at *4 (D. Vt. Nov. 18, 2019), aff'd, 835 Fed. App'x 637 (2d Cir. 2020) (summary order), cert. denied, U.S. , 141 S. Ct. 2715 (2021). At that point, defendants sought to resume the administrative review process over plaintiffs' objection.

¶10. In February 2023, plaintiffs filed the complaint in this case, naming DCF and several DCF-affiliated employees and officials as defendants. The complaint made numerous allegations challenging the constitutionality of the administrative review process largely mirroring their federal complaint. Plaintiffs alleged that the administrative review procedure was unconstitutional under both the U.S. Constitution and the Vermont Constitution and asserted that defendants' implementation of that procedure violated the minimal requirements for procedural due process.[5] Plaintiffs sought declaratory and injunctive relief and relief in the nature of

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[4] Plaintiffs voluntarily dismissed their federal action without prejudice on August 8, 2023. See Plaintiffs' Stipulation Lowell v. Vt. Dept for Child. & Fams., No. 5:19-cv-150 (D. Vt. Aug. 8 2023), ECF No. 61.

[5] The trial court construed the complaint as a facial challenge to the constitutionality of the administrative review process, and plaintiffs do not take issue with that description on appeal. See In re Mountain Top Inn & Resort, 2020 VT 57, ¶ 22, 212 VT. 554, 238 A.3d 637 (discussing general differences between facial and as-applied challenges). Our decision does not rest on the nature of their constitutional claims, and we therefore need not resolve the issue.

mandamus under Vermont Rule of Civil Procedure 75. They contemporaneously moved for a preliminary injunction based on those alleged procedural infirmities. Defendants moved to dismiss the complaint in its entirety and opposed plaintiffs' motion for a preliminary injunction.

¶11. Following a hearing, the trial court dismissed plaintiffs' complaint for failure to state a claim. It assumed for purposes of the motion that defendants bad a sufficient liberty interest at stake to warrant due process protections. Defendants refused to take a position as to whether plaintiffs' failure to exhaust their administrative remedies warranted dismissal, so the trial court did not address that issue. It rejected the merits of plaintiffs' due process challenge, concluding that the pre-listing administrative review process was constitutionally sufficient under this Court's precedent and federal case law. It similarly found that plaintiffs' "conjectural claims' regarding the possibility that DCPs employees might deprive plaintiffs of their procedural rights during the administrative review process were not reviewable. After the trial court denied their motion for reconsideration, plaintiffs brought this appeal.

II. Analysis

¶12. This Court reviews decisions on a motion to dismiss de novo, ' using the same standard as the trial court." Sutton v. Vt. Reg'l Ctr., 2019 VT 71A, ¶ 20, 212 Vt. 612, 238 A.3d 608. We will uphold a dismissal for failure to state a claim under Vermont Rule of Civil Procedure 12(b)(6) only if 'it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief. ' Boland v. Est. of

Smith, 2020 VT 51, ¶5 212 Vt. 386, 237 A.3d 723 (quotation omitted). "Accordingly, we assume that the facts pleaded and reasonable inferences from those facts are true, and that any contrary facts or inferences asserted in defendant's pleadings are false.' Rodrigue v. Illuzzi. 2022 VT 9 30. 216 Vt. 308, 278 A.3d 980. A trial court's dismissal for failure to state a claim may be affirmed "on any appropriate ground." Fluerrey v. Dep't of Aging & Indep. Living, 2023 VT 11, ¶ 4,217 Vt. 527,292 A.3d 1219 (quotation omitted).

A. Mootness as to Lowell

¶13. During the pendency of this appeal, DCF filed a motion with this Court seeking to dismiss Lowell's claims as moot.[6] According to DCF plaintiffs attended an administrative review conference in May 2024 after which the administrative reviewer overturned DCF's substantiation decision against Lowell and fully concluded the matter in her favor. DCF argues that, with the substantiation having been overturned without Lowell ever appearing on the registry, this Court can no longer provide her with any effective relief. It contends that Lowell's claims are therefore moot. We agree.

[6] Although the motion proposed to dismiss the entire appeal as moot, counsel for DCF clarified at oral argument that DCF was not seeking to dismiss Healey's claims since the administrative reviewer partially upheld the substantiation determination against him. We therefore consider the motion as directed solely towards Lowell.

¶14. A case becomes moot if the reviewing court can no longer grant effective relief." In re Blue Cross, 2022 VT 53, ¶ 7, 217 Vt. 285, 288 A.3d 160 (quotation omitted). The fact that a live controversy existed at the start of a case is not dispositive, as "intervening events since its filing can render it moot.' Paige v. State, 2017 VT 54, ¶ 7, 205 Vt. 287, 171 A.3d 1011. When further events render a claim moot, we lack the jurisdiction to address it. See Wool v. Off. Of Prof'l Regul 2020 VT 44, ¶ 6, 212 Vt. 305, 236 A.3d 1250. "Thus, even if a case presented an actual controversy in the lower court, we may not consider the issues unless they remain alive throughout the appellate process." In re M.M., 2024 VT 28. ¶ 6, _Vt. _, _A.3d _ (quotation omitted).

¶15. Here, Lowell has been vindicated by a final decision of the administrative reviewer in a process that she directly challenged in the complaint. That decision resolved her claims on appeal, which are focused solely on seeking injunctive, mandamus, and declaratory relief for an allegedly m1constitutional process. Even if this Court were to determine that the administrative review violates Lowell's right to procedural due process, our reversal would provide Lowell with no practical relief.

¶16. Although Lowell tacitly concedes that her claim for injunctive relief is moot under the instant circumstances, she maintains that her two remaining claims have not been mooted by the administrative reviewer's decision. She effectively argues that, if this Court were to reverse and remand, the trial court

could still award her relief in the form of a declaration that the existing administrative review process is unconstitutional and an order that defendants fix the allegedly defective process.[7]

¶17. "The purpose of a declaratory judgment is to provide a declaration of rights, status and other legal relations of parties to an actual or justiciable controversy." Doria v. Univ. of Vt, 156 Vt. 114, 117 589 A.2d 317 318 (1991) (quotation omitted). Absent a justiciable controversy, a declaratory judgment is "merely an advisory opinion which we lack the constitutional authority to render." Id. That is precisely the case here. Even if Lowell's right to due process was violated, "the harm has already passed, and there is no longer a threat of actual injury." Id.

The administrative review process has concluded in her favor, and she no longer has a legal interest in the outcome of any declaration regarding the constitutional adequacy of that process. See id. at 117, 589 A.2d at 318-19 (holding that candidate's constitutional challenge seeking declaratory judgment was moot at conclusion of election because

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[7] Despite Lowell's arguments to the contrary, she does not have any legal interest in the outcome of Healey's claims, as that interest inures solely to Healey. See In re John L. Norris Trust, 143 Vt. 325,328,465 A.2d 1385, 1387 (1983) ("[T]he plaintiff generally must assert [their] own legal rights and interests and cannot rest [their] claim to relief on the legal rights or interests of third parties.' (quotation omitted)). Lowell s apparent claim regarding an alleged violation of the separation-of-powers doctrine was not raised below, as the complaint lacks any allegations on that subject. As to Lowell's remaining arguments that her claims are not moot, we conclude that they lack merit.

harm had since passed and no threat of actual injury). Our decision in All Cycle. Inc. v. Chittenden Solid Waste Dist. does not alter this conclusion because Lowell did not seek monetary damages for the alleged constitutional violation. 164 Vt. 428, 434-35, 670 A.2d 800, 804-05 (1995) (holding plaintiff's request for declaratory relief not moot because declaration on constitutionality of government conduct was predicate to plaintiff's claim for monetary damages under 42 U.S.C. § 1983).

¶18. The same is true of Lowell's mandamus claim. Assuming she prevailed in this appeal, Lowell would obtain no benefit from the mandamus relief she seeks in the complaint – an order that defendants remedy an allegedly unconstitutional process. See In re LeClair, 2011 VT 63, 17, 190 Vt. 535, 26 A.3d 41 (mem.) (concluding that inmate's mandamus claim under Vermont Rule of Civil Procedure 75 for credit for time served was moot upon release as inmate "would gain nothing '). With Lowell no longer subject to the substantiation process, and with no impending risk of her being listed on the registry, she stands to gain no practical benefit from the requested mandamus order.

¶19. Lowell argues that her claims raise issues that are capable of repetition yet evading review and are therefore excepted from our mootness doctrine. See Blue Cross, 2022 VT 53, ¶ 9 (recognizing mootness exception for cases that are capable of repetition yet evading review"). But to satisfy that exception, Lowell must meet two conditions: "(I) the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration and (2) there must

be a reasonable expectation that the same complaining party will be subjected to the same action again.' Id. (quotations omitted) (alteration accepted).

¶20. Lowell makes no attempt to satisfy the first prong of the exception. She argues only that "there is a reasonable expectation that" she could again be subjected to an unconstitutional substantiation procedure because of the high number of child abuse and neglect substantiations that are opened annually. Putting aside the fact that Lowell only addresses this second factor of the exception, Lowell must nevertheless "demonstrate that it is more than just theoretically possible that the situation [she] currently objects to will repeat itself." Id. ¶ 16 (quotation omitted). She must "show a demonstrated probability that [she] will become embroiled again in the same situation." Id. (quotation omitted). Lowell has failed in that respect. Her reliance on the number of annual substantiation investigations represents, at best, a theoretical probability that she might again be subjected to a substantiation process she claims is unconstitutional. This statistic does not establish a reasonable expectation that Lowell will be (1) investigated by DCF and (2) substantiated for unidentified and hypothetical allegations of abuse or neglect.

¶21. Lowell also argues that her claims are not moot because she has and will continue to suffer negative collateral consequences if her claims are not addressed See In re M.M., 2024 VT 28, ¶10 ("Under the [negative collateral consequences exception], we will consider a case that no longer involves a live controversy if the challenged action will continue to

pose negative consequences for the appellant if it is not addressed." (quotation omitted)). She purports to have already suffered adverse consequences in the form of unemployment and loss of custody over her children. However, reaching the issues on appeal would not impact Lowell's previous termination from employment and loss of custody; she neither describes nor cites to any authority that a favorable decision from this Court would ameliorate those injuries.

¶22. Lowell further contends that she will face negative consequences because, should Healey's substantiation be upheld and listed on the registry, she might be punished for allowing her children to be in Healey's presence. Lowell's claim is purely speculative and unsupported by any authority. See id. ¶ 13 (holding that negative collateral consequences mootness exception not applicable, where parents failed to identify "the requisite connection between the possibility" of registry listing and adverse adjudication that child was in need of care or supervision). But even assuming Healey fails to overturn the substantiation determination, there are countless eventualities that would need to occur for those risks to materialize. In other words, the likelihood that Lowell will be punished for allowing Healey to interact with her children is untenably remote. See In re Collette, 2008 VT 136, ¶ 17, 185 Vt. 210, 969 A.2d 101 (observing that "the mere possibility of negative collateral consequences' is insufficient to avoid mootness).

¶23. In sum, Lowell's claims on appeal are moot and they are not saved by either of the mootness

exceptions. Accordingly, we grant DCF's motion to dismiss Lowell's claims.

A. Healey's Due Process

¶24. We now turn to Healey's procedural due process claim.[8] He argues that for the administrative review

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[8] Healey also argues that the statutory scheme creating the administrative review process is an unconstitutional violation of the separation of powers. However, the complaint lacks any allegations attacking the constitutionality of § 4916 or § 4916a on separation-of-power grounds. He has therefore failed to preserve this argument for appellate review. Brault v. Welch, 2014 VT 44, ¶ 15, 196 Vt. 459, 97 A.3d 914 ('Issues not raised in pleadings are waived."); N.W. Vt. Solid Waste Mgmt. Dist. v. Cent. Vt. Solid Waste Mgmt. Dist., 159 Vt. 61, 65, 614A.2d 816,819 (1992) ("[Excessive fee] claim was not raised by the complaint, and we will not consider it here for the first time."). For the same reason, we do not address his claim that he was entitled to a jury trial under Chapter I, Article 12 of the Vermont Constitution.

Relying on Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175 (2023), Healey further contends the trial court should have addressed his constitutional claims regardless of the sufficiency of the complaint's allegations because the trial court has jurisdiction to address such claims, and the administrative agency does not. This contention confuses subject-matter jurisdiction to hear a claim with the adequacy of a complaint's factual allegations to support that claim. The former "refers to the power of a court to hear and determine a general class or category of cases." In re Est. of Thomas, 2022 VT 59, 7, 217 Vt. 368, 295 A.3d 850 (quotation omitted). In contrast a Rule 12(b)(6) motion for failure to state a claim "test[s] the law of the claim." Brigham v. State, 2005 VT 105, ¶11, 179 Vt. 525, 889 A.2Q 715 (mem.) (quotation omitted). Axon has no relevance to this appeal. 598 U.S. at 180 (explaining that sole "task today" was to determine whether district court had subject matter jurisdiction to hear

to satisfy due process DCF must provide him with all of the procedural rights that accompany a full adversarial bearing.

¶25. Our review of Healey's constitutional claim requires us to first determine its source. Healey does not rest any aspect of his due process claim exclusively on the Vermont Constitution. See State v. Brillon, 2010 VT 25, ¶ 6, 187 Vt. 444 995 *A2d* 557 (refusing to address state constitutional argument not raised in pleadings or adequately presented on appeal). Nor does be contend that the Vermont Constitution offers more procedural protections than that of its federal counterpart. See id. (determining that defendant's failure to' set forth any rationale as to how our analysis of this constitutional claim should differ under the Vermont Constitution in comparison with the federal constitution's precluded review (quotation omitted)). As such, we construe Healey's procedural due process claim as arising solely from the U.S. Constitution. Cf. In re Smith, 169 Vt. 162, 171, 730 A.2d 605, 612 (1999) (mem.) ("The due process requirements imposed by Article 10 of the Vermont Constitution mirror those imposed by the United States Constitution. ').

¶26. Under the Fourteenth Amendment to the U.S. Constitution, a state is prohibited from depriving a person of "life, liberty or property, without due process of law." U.S. Const. amend. XIV § l. To adequately state a procedural due process claim, "a plaintiff must allege facts showing that governmental action deprived plaintiff of a property [or liberty] interest protected by the Fourteenth Amendment" to the United States Constitution. Gould v. Town of

Monkton, 2016 VT 84, 19,202 Vt. 535, 150 A.3d 1084. This Court performs a two-part inquiry when presented with a procedural due process claim: "the first asks whether there exists a liberty ... interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Wool, 2020 VT 44 ¶ 20 (quotation omitted). Like the trial court, we assume that Healey has a protected liberty interest at stake despite not alleging that he will seek employment related to children.[9] Cf. Valmonte v. Bane, 18 F.3d 992, 1001 (2d Cir. 1994) (holding that plaintiff challenging process for placement on registry for child abuse has liberty interest where she has alleged that she seeks but will be unable to obtain employment in child-care field). We therefore focus on the second inquiry.

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[9] As already noted, DCF did not argue before the trial court that plaintiffs' complaint should be dismissed for failure to exhaust administrative remedies. See Luck Bros., Inc. v. Agency of Transp., 2014 VT 59, ¶ 21, 196 Vt. 584, 99 A.3d 997 (explaining that requirement to exhaust administrative remedies by raising claim with agency before seeking judicial relief applies to "constitutional challenges to administrative proceedings"); Stone v. Errecart, 165 Vt. 1, 6, 675, A.2d 1322, 1326 (1996) (holding that failure to exhaust administrative remedies "deprives the superior court of jurisdiction"). The trial court therefore did not address that question. Nor did the parties brief the topic in this appeal. Given these circumstances, we do not address the issue of exhaustion. See Vt. Coll. of Fine Arts v. City of Montpelier, 2017 VT 12, ¶ 13, 204 Vt. 215, 165 A.3d 1065 (reaching merits of claim without addressing exhaustion issue given conflicting jurisprudence on exhaustion requirement for challenging tax-exempt status).

¶27. The core components of procedural due process are notice and an opportunity to be heard. See In re Miller, 2009 VT 112, 19, 186 Vt. 505,989 A.2d 982. However, procedural due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.' Hogaboom v. Jenkins, 2014 VT 11, 1 14, 196 Vt. 18, 93 A.3d 131 (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976)). Rather it "is a flexible concept that calls for such procedural protections as the particular situation demands." Luck Bros. Inc. v. Agency of Transp., 2014 VT 59, 110, 196 Vt. 584, 99 A.3d 997 (quoting Mathews, 424 U.S. at 334). This means that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the proceedings.' Miller, 2009 VT 112, 13 (quotation omitted).

¶28. For instance, a pre-deprivation hearing 'need not be elaborate...nor must it definitively resolve the propriety of the [deprivation]." Mordukhaev v. Daus, 457 Fed. App x 16 20-21 (2d Cir. 2012) (summary order) (quotations omitted). Even notice and an opportunity to be heard can, under certain circumstances, be dispensed with at the pre-deprivation stage without running afoul of due process "provided there is sufficient post-deprivation process." Spinelli v. City of New York, 579 F.3d 160, 170 (2d Cir. 2009) (quotation omitted).

¶29. Healey argues that, for purposes of notice, he must be given the w1redacted investigation file. Healey also contends that, for the administrative review to comport with due process, he must be provided with subpoena power the right to cross-

examine witnesses, and an expansion on the right to present exculpatory evidence. In essence, Healey proposes that the pre deprivation process of the administrative review must provide the extensive procedural protections afforded to individuals in the post-deprivation process. We disagree.

¶30. This Court has not addressed the sufficiency of the procedural safeguards in place for the administrative review under 33 V.S.A. § 4916. However, we have previously examined the constitutionally required standard of proof for the substantiation stage under a previous iteration of the statutory scheme at issue here. In In re Selivonik, 164 Vt. 383, 388, 670 A.2d 831 834-35 (1995), the petitioner argued that due process required DCF to prove substantiation by a preponderance of the evidence before being listed on the registry. This was the same standard required for expungement, which, at the time, was the only form of post-listing review. We rejected that argument, reasoning that employing the higher standard "at the investigatory stage is not necessary to meet due process concerns because of the availability of such a hearing at any time after inclusion in the registry." Id. at 388-89, 670 A.2d at 835. We distinguished the Second Circuit's decision in Valmonte v. Bane, which found New York's registry process to be constitutionally insufficient, because the child abuse registry process at issue there did not provide any process with a heightened standard of proof unless an individual suffered adverse employment consequences as a direct result of being included on the registry. Selivonik, 164 Vt. at 388-89, 670 A.2d at 835.

¶31. The statutory process addressed in Selivonik has since been substantially amended by the Legislature and now affords individuals far greater procedural rights throughout the registry-listing process. See generally 2007, No. 77, § 1. And although the administrative review process does not provide the trial-like setting that Healey seeks, it continues to be constitutionally adequate under the familiar three-part test set forth in Mathews. That test requires us to balance (1) the private interest affected by the official action (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value of additional procedures, and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail." 424 U.S. at 334-35.

¶32. Healey identifies several private interests, only two of which-reduced employment opportunities and avoiding reputational harm-are arguably at stake.[10] These claimed interests are not insignificant.

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[10] We again stress that we only assume Healey has a liberty interest at stake by being placed on the registry. Supra, ¶ 26. Our decision today does not definitely resolve whether Healey adequately alleged a sufficient liberty interest for purposes of his procedural due process claim. Nevertheless, in assessing the competing interests under Mathews, we do not consider several of Healey s purportedly protected interests-family association and the care, custody, and control of his children-because we see no reason to conclude that a registry listing will affect those interests. Healey is not the spouse of Lowell nor is he the legal guardian of Lowell s children. Healey offers no legal basis to suggest that being listed on the registry would impact his right to reside with Lowell or her children. Importantly, we have already observed that the fundamental interests implicated in

See Herrera v. Union No. 39 School Dist., 2009 VT 35, ¶11, 186 Vt. 1,975 A.2d 619 ([O]ne of the liberties protected by [the Due Process Clause] is the individual's right to engage in any of the common occupations of life. (quotation omitted)); Stone V. Town of Irasburg, 2014 VT 43, ¶ 32, 196 Vt. 356, 98 A.3d 769 (observing that plaintiff 'has a strong private interest at stake since any damage to her reputation can affect her standing in the community and her future prospects" for holding political office) Valmonte, 18 F.3d at 1003 (recognizing that, for balancing purposes under Mathews, plaintiff has "a legitimate interest in pursuing her chosen occupation"

¶33. In contrast DCF "has a profound interest in the welfare of the child particularly his or her being sheltered from abuse." Tenenbaum v. Williams, 193 F.3d 581 593-94 (2d Cir. 1999). Indeed, some of the most fundamental liberty interests are "counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against [the children's guardians]." Southerland v. City of New York, 680

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juvenile proceedings under chapter 55 of Title 33 including family integrity, are "not at stake in the registry process" of chapter 49 of Title 33. In re M.E., 2010 VT 105, ¶13-14, 189 Vt. 114. 15. A.3d 112 ("[W]e have expressly recognized that the statutes governing the registry process ... have legislative goals, functions, and procedures completely different from those governing juvenile proceedings in family court." (quotation omitted)).

F.3d 127 152 (2d Cir. 2012) (quotation omitted). When that government interest is implicated, as it is here courts will afford ' unusual deference in the abuse investigation context' absent "obvious extremes." Wilkinson ex rel. Wilkinson v. Russell, 182 F.3d 89, 104 (2d Cir. 1999) cert. denied, 528 U.S. 1155 (2000).

¶34. As for the adequacy of the current procedure in light of those dueling interests, that Mathews factor weighs in DCF's favor. To recap, the registry-listing process begins when DCF makes an initial substantiation of a report of abuse, and the accused individual is then provided with notice of 'the nature of the substantiation decision' as well as other information related to the registry. 33 V.S.A. § 4913a(a). When an individual requests a pre-listing administrative review DCF must promptly provide that review within thirty-five days. Id. § 4916a(d). DCF must also provide the person with "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." Id. The subject individual is also entitled to redacted versions of prior investigation files that DCF relied upon in its substantiation determination. Id. The administrative review conference is presided over by "an objective arbiter" with no previous involvement in the investigation. Id. § 4916a(f). And although the individual has no right to compel a witness's appearance, id. § 4916a(d), they are entitled 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 " id. § 4916a(e).

¶35. Here, providing redacted investigation files is constitutionally adequate for purposes of notice. Based on the complaint's allegations the information Healey received before the review conference placed him on notice that he was accused of injuring a specific child that resulted in scaring. Healey tacitly conceded in the complaint that the redacted investigation file provided him with the factual basis for that allegation. Healey makes a similar concession with respect to the charge of having forced another child to consume alcohol and drugs. In fact, Healey expressly alleged that until he read through the redacted investigation file he was unaware DCF was basing its substantiation determination on that alleged incident. Thus, even when read in the light most favorable to Healey, the complaint admits that Healey was notified of the nature of DCF's allegations against him and their underlying facts. See Mordukhaev. 457 Fed. App'x at 21 (holding that pre-deprivation process satisfied notice requirements where individual had notice of charge and explanation of evidence supporting charge). Our review of the redacted investigation file supports our conclusion that Healey was provided with the necessary information to mount an adequate defense. The redactions protected sensitive information relating to allegations of abuse or neglect of a child and did not deprive Healey of adequate notice at this pre-deprivation stage.[11] See Spinelli v. City of New York,

[11] Pursuant to 33 V.S.A. § 4912(12), a redacted investigation file consists of "the intake report, the investigation activities

579 F.3d at 172 ("The particularity with which alleged conduct must be described varies with the facts and circumstances of the individual case."); Doyle v. Camelot Care Ctrs., Inc., 305 F.3d 603, 623 (7th Cir. 2002) (holding that individuals accused of child abuse received adequate pre-listing notice where redacted case file provided them with nature of charges and details of some evidence underlying those charges).

¶36. We reach a similar conclusion with regards to the other procedural rights that Healey argues are required at the administrative review stage. As with all pre-deprivation proceedings the "primary function" of a pre-listing administrative review is to provide "an initial check against mistaken decisions' of DCF's initial substantiation determination. O'Connor v. Pierson, 426 F.3d 187 198 (2d Cir. 2005). The procedural rights currently afforded to Healey adequately serve that function. At the review conference, he may present documentary evidence and other information that will aid his cause in overturning the initial substantiation determination. In other words, Healey will have the opportunity to "tell his side of the story" before being placed on the registry. Gilbert v. Homar, 520 U.S. 924, 929 (1997). To require a trial-like setting at this stage would

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summary and case determination report that are amended in accordance with confidentiality requirements set forth in [33 V.S.A. § 4913]. By statute, some of this information is no longer confidential at the post-listing fair hearing held before the Human Services Board. Id.§ 4913(g)(2); see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 n.12 (1985) ("[T]he existence of post-termination procedures is relevant to the necessary scope of pretermination procedures.').

undermine DCF s interest in efficiently and expeditiously determining whether a particular person poses a risk to the health and safety of a child especially one in that person's household. See Bohn v. Dakota Cty., 772 F.2d 1433, 1439 (8th Cir. 1985) (holding that government's interest in protecting powerless children will be impaired where additional procedural protections ' might delay or frustrate the protection of these children").

¶37. Two other factors temper the risk of an erroneous listing on the registry as a result of the administrative review process. First, information on the registry is not public; it is available only to a select set of entities and only under specific circumstances. See 33 V.S.A. § 4919 see also id. § 4916b(a) (providing that Department shall note in registry listing that subject individual has appealed substantiation determination to Human Services Board). Second, Healey will have the opportunity to seek a prompt post-deprivation fair hearing before the Human Services Board and, if dissatisfied, judicial review. See Nnebe v. Daus, 644 F.3d 147, 159 (2d Cir. 2011) (holding that risk of erroneous deprivation in pre deprivation context "decisively" in government's favor because risk "is mitigated by the availability of a prompt post-deprivation hearing"). As already discussed, Healey must receive a decision by the administrative reviewer within fourteen days of the administrative review conference and can thereafter seek a post-listing review in the form of a fair hearing before the Human Services Board under 3 V.S.A. § 3091. That de novo hearing before the Board, presided over by a neutral hearing officer, provides Healey with the right to subpoena and cross-examine

witnesses. He may also call the child to testify, who may be compelled to do so except in certain circumstances. See 33 V.S.A. § 4916b(b)(3). The Board may reverse the substantiation determination. And if Healey does not prevail before the Board, he has the right to judicial review by this Court. The adequate pre-listing procedure coupled with the more thorough post-listing procedure renders the process constitutionally sufficient.[12] See Locurto v. Safir, 264 F.3d 154, 173-75 (2d Cir. 2001) (holding that due process satisfied where "minimal' pre- deprivation hearing given to terminated employee followed by "wholly adequate post-deprivation hearing'); Doolen v. Wormuth, 5 F.4th 125 135 (2d Cir. 2021) ("Whereas here, a given procedure includes some form of pre-deprivation hearing and post-deprivation remedies with the opportunity to obtain full judicial review, the

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12 Healey also argues the administrative reviewer might violate his due process rights by engaging in ex parte communications and considering extra-record evidence without allowing him an opportunity to address those communications and evidence. This claim is entirely speculative. Cf. Doolen v. Wormuth, 5 F.4th 125, 135 (2d Cir. 2021) (concluding that due process argument "offers nothing more than speculation" that final decisionmaker would engage in conduct violative of due process); Swanigan v. City of Chicago, 881 F.3d 577,584 (7th Cir. 2018) (rejecting due process claim as "entirely speculative" where police officer' might' refer to cleared-closed case files in future encounter with plaintiff pursuant to allegedly unconstitutional department policy). In any event the availability of an adequate post-listing review process renders his claim without merit. See Lilakos v. New York City. 808 Fed. App'x 4, 9 n.3 (2d Cir. 2020) (summary order) (explaining that deprivation of right during "the more structured environment of established state procedures" will nevertheless satisfy due process based on "a closer examination of the adequacy of the post deprivation process" (quotation omitted)).

combination of the two provide due process.' (quotation omitted)).

¶38. Our conclusion mirrors that of Dupuy v. Samuels, where the United States Court of Appeals for the Seventh Circuit addressed a due process claim that arose from a similar pre-deprivation process for listing individuals on a child abuse registry. 397 F.3d 493 (7th Cir. 2005). Dupuy involved an appeal from a preliminary injunction requiring Illinois to provide certain procedural protections during the process for being placed on the registry. Between the statutes and the injunction, the process consisted of the following. First, the agency had to determine that there was credible evidence to support a report of child abuse and if so, the report would be "indicated" and at risk of being placed on the registry, thus impairing an individual's ability to work with children. Id. at 497. The individual had the right to an administrative review conference before being listed. Id. at 501. That conference would be presided over by a neutral arbiter with no prior involvement. Although the individual could not call or cross-examine witnesses, they could be represented by counsel, present their own account and submit evidence, and the presiding arbiter could overturn the initial determination. Id.

¶39. The plaintiffs in Dupuy argued that this administrative conference violated their right to procedural due process because it did not afford them with "a full evidentiary hearing at the pre-deprivation stage." Id. at 508. In upholding the adequacy of the administrative review process under Mathews, the court noted the importance "that the

accused individual is provided with adequate notice of the opportunity for such a hearing and with sufficient information about the nature of the allegation to afford an adequate opportunity to tell his side of the story." Id. Of significance, "the decision-maker . . . is a person who has had no part in the investigative process." Id. And "while not having the opportunity to call other witnesses and to engage in cross- examination, [the accused] does have the opportunity to tell his side of the story and to present evidence that he deems relevant before a new decision-maker." Id. Thus, the pre-listing process satisfied due process because:

> At the Administrator's conference stage, the accused has adequate notice of the allegation and an opportunity to place his version of the situation before an individual who has played no adversarial role in the matter. Furthermore, any adverse determination is subject to de novo review under a heightened standard of proof within a very short period of time. Given the countervailing concerns of [the agency] to identify individuals who pose a continuing threat to children we believe that th[is] structure ... is adequate to ensure the accused individual due process.

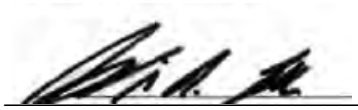
Id. at 509.

¶40. The same is true here. As already noted, Healey was provided with adequate notice of the nature of the allegations forming the basis of the substantiation

determination before an administrative review conference. The conference itself will be held before a neutral and objective arbiter who has had no prior involvement in the matter and can overturn the substantiation determination. Healey can provide documentary evidence and other information to offer his version of the events including any exculpatory evidence that would undermine the initial substantiation determination. While he cannot subpoena or cross-examine witnesses, he has sufficient tools to tell his version of events and provide information to undercut the factual basis for DCF's allegations of abuse or neglect. Should Healey not prevail there, can obtain a post- listing de novo hearing before the Human Services Board via another neutral arbiter. At this bearing, DCF must satisfy a higher standard of proof, Healey has the right to subpoena, examine and cross-examine witnesses, and the Board must issue a prompt decision. Given the above, we see no reason to disturb the trial court's determination that the procedural protections afforded at the pre-listing administrative review stage comports with due process.

The portion of the appeal relating to plaintiff Miriam Lowell is dismissed as moot. In all other respects, the judgment of the trial court is affirmed.

FOR THE COURT:



Associate Justice

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Miriam Lowell and Set Healey v. Vermont Department of Children and Families et al

Opinion and Order on Plaintiffs' Motion for Reconsideration

In this case, Plaintiffs Miriam Lowell and Seth Healey lodged a broad constitutional challenge to the process by which one may become listed on Vermont's Child Protection Registry after the substantiation of abuse or neglect, claiming that it violates their federal and state due process rights. The State filed a motion to dismiss. After the parties briefed the motion extensively and the Court entertained oral argument, the Court granted it. Plaintiffs now seek reconsideration of that decision. They argue that the Court misunderstood or misapplied *In re Selivonik,* 164 Vt. 383 (1995); a recent Supreme Court decision, *In re J.N.,* 2023 VT 34, has some impact on this case; and if the Court does not rescind the decision, then it at least should elaborate on certain matters to create a "more complete record for appeal."

"The standard for granting [a motion to reconsider] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might

reasonably be expected to alter the conclusion reached by the court." *Latouche v. North Country Union High School Dist.,* 131 F. Supp. 2d 568, 569 (D. Vt. 2001) (*quoting Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995)). "[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Id.*

The Court declines to reconsider its decision insofar as *Selivonik* goes. The Court analyzed that case in detail in the decision. Plaintiffs' disagreement with the Court's analysis is not a basis for reconsideration.

Nothing in *In re J.N.,* 2023 VT 34, suggests any basis for reconsideration either. That case was an appeal of a family division determination that a child was CHINS-B (lack of proper parental care). The Supreme Court ruled that the family division erred by treating one incident of parental discipline, which might have been potentially relevant to an uncharged CHINS-A (abuse) analysis, as sufficient for the charged CHINS-B (neglect) analysis, since abuse and neglect legal inquiries are substantially different. *Id.* at ¶¶ 11-12. In response to the State's argument that the Court should reweigh the evidence under CHINS-A on appeal, the Court declined: "[T]he family division's findings in this case do not fit the theory charged by the State. To the extent that the State is asking us to affirm the CHINS determination based on a theory of abuse, we agree with mother that this would create a problem of notice." *Id.* at ¶ 16.

The Court discerns nothing in *In re J.N.* that is material to this case. The *J.N.* Court did not address

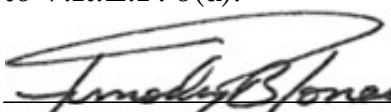
the Child Protection Registry in any way, much less the constitutionality of the listing process.

The Court also declines to elaborate on anything due to Plaintiffs' apparent perception of some need for a "more complete record for appeal." The dismissal decision speaks for itself and fully and fairly addresses the issues presented by the parties. There are no remaining claims not subject to dismissal.

Although the general standard for reconsideration is strict, the Court also has considerable discretion to reexamine its rulings. A court should not hesitate to revisit a decision that has been issued in error. In this instance, however, Plaintiffs' motion has not convinced the Court that its earlier ruling was incorrect.

WHEREFORE, Plaintiffs' motion to consider is denied.

Electronically signed on Monday, September 11, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge

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Miriam Lowell and Set Healey v. Vermont Department of Children and Families et al

Opinion and Order on Motion to Dismiss

In this case, Plaintiffs Miriam Lowell and Seth Healey lodge a broad constitutional challenge to the process by which one may become listed on Vermont's Child Protection Registry after the substantiation of abuse or neglect, claiming that it violates their federal and state due process rights.[1] They also seek a preliminary injunction enjoining Defendant the Department for Children and Families (DCF) from proceeding to make final substantiation determinations as to them without employing the full panoply of due process protections that otherwise would only be available later at a *de novo* hearing before the Human Services Board.[2]

Statutory Background and Plaintiffs' Claims

At a general level, the current substantiation, listing, and appeal process includes a pre-listing process before DCF, which may result in a

[1] Plaintiffs currently are proceeding under pseudonyms.
[2] Named defendants other than DCF have been sued in their official capacities only. There is, thus, one real defendant, the State.

substantiation determination. The pre-listing process includes an informal opportunity for the person suspected of abuse or neglect to challenge any such accusations before an independent, neutral reviewer. If the reviewer accepts the substantiation, the person is listed on the Registry and may request a *de novo* post-listing process before the Human Services Board. The "fair hearing" before the Board provides robust due process protections.

Plaintiffs' chief constitutional complaint is that this two-step process, where the listing occurs before the full evidentiary hearing before the Board, at which their rights would be fully protected, necessarily violates their due process rights. They criticize the pre-listing process and their opportunities to challenge the initial substantiation decision as wholly deficient because they are not as protective as the post-listing process. This is a facial challenge to the two-step pre- and post-listing statutory regime. Apart from this facial complaint, Plaintiffs assert numerous fears or anticipations about how the rest of their administrative processes actually may go and speculate that if things proceed as expected, that also will violate their due process rights.

To place those claims in full context, a deeper dive into the statutory process is required. When DCF receives a report of abuse or neglect, it determines whether to conduct an assessment (which will not lead to a Registry listing) or an investigation (which may). 33 V.S.A § 4915(b); *see* 33 V.S.A. § 4915b (procedures for investigation). Following an investigation, DCF considers all "supporting or

conflicting" information and then determines whether abuse or neglect occurred. DCF Family Services Policy 56 at 1. If it substantiates the abuse or neglect, it notifies the person of the substantiation, its implications, DCF's intent to place the person on the Registry, and the ability to seek administrative review. 33 V.S.A. § 4916a(a). If the person seeks administrative review, an administrative review conference is held at which, to sustain the substantiation, DCF must prove "that it has accurately and reliably concluded that a reasonable person would believe that the child has been abused or neglected by that person." 33 V.S.A. § 4916a(e). The person may "" 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." *Id.* However, witnesses cannot be subpoenaed and there is no cross-examination.

The reviewer is "a neutral and independent arbiter who has no prior involvement in the original investigation of the allegation." 33 V.S.A. § 4916a(f). The reviewer is empowered to accept or reject the substantiation or "place the substantiation determination on hold and direct the Department to further investigate the case based upon recommendations of the reviewer." 33 V.S.A § 4916a(g)(3). If the reviewer accepts the substantiation, the person goes on the Registry. 33 V.S.A. § 4916a(h). The person then may appeal to the Human Services Board. 33 V.S.A § 4916a(1). If no such review is sought, the DCF decision is final. 33 V.S.A. § 4916b(d).

If appealed, "[t]he 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." 33 V.S.A. § 4916b(b)(1). If the person may be facing employment consequences, the hearing is expedited. 33 V.S.A. § 4916b(b)(2). The hearing is conducted under 3 V.S.A. § 3091 (Human Services Board fair hearings) and is *de novo.* 33 V.S.A. § 4916b(a); *In re Bushey-Combs,* 160 Vt. 326, 328 (1993). At the hearing, DCF has the burden of proving the substantiation by a preponderance of the evidence. *See In re Selivonik,* 164 Vt. 383, 389 (1995). Appeals from Board decisions go straight to the Supreme Court, as do petitions to enforce Board orders. 3 V.S.A. § 3091(f), (g). No part of the statutory process comes to the Superior Court. *See infra* n.3 at 4.

Analysis

In Plaintiffs' cases, DCF received reports of abuse or neglect, conducted investigations, made initial substantiation determinations, and so notified Plaintiffs, who sought pre-listing administrative review. The administrative cases have been stalled at that point in the process ever since due to the parties' state and federal litigation.[3]

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[3] It is not altogether clear why, however. Plaintiffs initially filed an action in federal district court seeking both an injunction and damages. The federal court refused any injunctive relief on *Younger* abstention grounds, declined to stay that order, and the appeals court affirmed, all so that the *state administrative process* could proceed. *See Lowell v. Vermont Department of Children and Families*, 835 Fed. Appx. 637 (2d Cir. 2020); *Lowell v. Vermont Department of Children and Families*, No. 5:19-cv-

Plaintiffs are asking this Court to intervene in the administrative actions so that when the independent pre-listing reviews occur, they can be assured that they will be entitled to the full panoply of due process protections before any deprivation occurs.

Plaintiffs' facial claim that statutory regime essentially cannot comply with due process so long as

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150, 2020 WL 8613649 (D. Vt. June 4, 2020), 2019 WL 11767547 (D. Vt. Nov. 18, 2019). Instead, Plaintiffs then filed this action, and the administrative processes have never resumed. DCF appears to have assented to not proceeding so long as litigation is pending and thus has never arrived at final pre-listing substantiation decisions. In this case, DCF also has expressly indicated that it does not take the position that Plaintiffs have failed to exhaust their administrative remedies, although at argument it conceded that Plaintiffs could raise all the issues they raise here in the administrative proceedings. As a result, the parties have not analyzed whether the statutory appeal path, which leads to the Supreme Court rather than this Court, suggests that Plaintiffs' issues would have been more appropriately raised in the administrative process rather than in this separate, parallel action. *See generally Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and succeeding cases fashioning the so-called *Thunder Basin* test to determine when a constitutional issue arising in an administrative process may be presented to the trial court even though a statute directs review of the administrative proceeding exclusively to an appeals court. *See also Travelers Indem. Co. v. Wallis*, 2003 VT 103, ¶¶ 18–19, 176 Vt. 167, 174–75 (2003) (concluding that the trial court may hear facial challenges to statutes in certain circumstances on primary jurisdiction grounds). Though the Court has some uncertainty as to the proper venue for Plaintiffs' claims, it declines to delay the matter further and will address the substance of Plaintiffs' facial challenge. The Court accepts for these purposes that the parties have sufficient liberty interests at stake to warrant due process protections.

it delivers the full evidentiary hearing post-listing – and all the lesser, pre-listing protections are necessarily deficient on that basis – has no merit for two reasons: first, the Vermont Supreme Court has already ruled that the two-step process complies with due process; and, second, the pre-listing process sufficiently protects Plaintiffs' rights when considered in relation to the more complete protections that follow post-listing.

In *In re Selivonik,* 164 Vt. 383 (1995), the Vermont Supreme Court considered a constitutional challenge to the statutory standard by which DCF makes substantiation determinations. At the time, there were no pre-listing due process protections in existence beyond the statutory standard applicable to DCF substantiation decisions. Rather, DCF would conduct an investigation, unilaterally arrive at a substantiation determination, list the person on the Registry, and the person listed thereafter could seek expungement at a "fair hearing" before the Human Services Board. *See* 33 V.S.A. §§ 4915-4916 (1995). There was no opportunity to challenge the substantiation administratively before listing.

DCF's predecessor substantiated and listed Ms. Selivonik, who was not so informed. Her employer, a day care facility, later learned of the substantiation, confirmed it with DCF's predecessor, and terminated her employment. Ms. Selivonik then challenged the substantiation on numerous grounds, including that the standard by which DCF was required to make its determination violated her due process rights. The standard at the time was "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." 33 V.S.A. § 4912(10) (1995).

The Vermont Supreme Court rejected Ms. Selivonik's challenge. It ruled that because a *de novo* fair hearing under the preponderance standard was available post-listing before the Human Services Board, the lower statutory standard applicable to the pre-listing determination was sufficient. *See In re Selivonik,* 164 Vt. 383, 389 (1995). In concluding that the pre-listing standard complied with the Due Process Clause in light of the availability of the post-listing process and standard, the Court necessarily found the two-step nature of the process constitutional; the pre-listing standard applied only to DCF's unilateral decision, for which the person had no administrative opportunity to contest.

The relevant statutes were substantially amended in 2007 and thereafter to strengthen vastly the available due process protections by creating the entire pre-listing challenge process described above. The standard for the pre-listing DCF substantiation decision remains essentially the same as it was at the time of *Selivonik:* "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." 33 V.S.A. § 4912(16).

The Court fails to see how the current two-step process, with a robust but informal pre-listing opportunity to challenge a substantiation before an independent reviewer, could violate due process rights as a matter of law while the previous regime that lacked all those protections did not. While the

Selivonik Court was not addressing the individual pre-listing protections that Plaintiffs challenge here (they did not yet exist), it was addressing the standard guiding DCF's unilateral substantiation decision in relation to the post-listing process then available and, hence, necessarily embraced the two-step process.[4] Plaintiffs' challenge in this case is that the subsequently adopted pre-listing protections, which could only have improved (and probably by good measure) the reliability of DCF's substantiation decisions, are not good enough before they believe a full evidentiary hearing remains required *pre-listing*. The argument conflicts squarely with *Selivonik*.[5]

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[4] Though somewhat opaque in the State's submissions, *Selivonik* mandates that the HSB employ a preponderance of the evidence standard at the post-deprivation hearing. *See In re Selivonik,* 164 Vt. At 388-89. That standard has been endorsed by the High Court, and it is binding on this Court and the HSB. To the extent the statutory language could be viewed to allow the potential for a substantiation on a lower standard at the pre-listing stage, that statutory text is the same as it was at the time *Selevonic* was decided, and *Selevonik* is clear that a lesser standard for a pre-listing substantiation is constitutionally permissible given the higher standard at the post-listing hearing. *See id.* at 389 ("A higher standard at the investigatory stage is not necessary to meet due process concerns because of the availability of such a hearing at any time after inclusion in the registry.").

[5] While the 2007 amendments allow DCF to share listing information with employers more broadly than at the time of *Selivonik,* doing so requires the employee's consent. 33 V.S.A. § 4919(a)(3). Moreover, the substantiated person is informed of the substantiation in real time, can challenge it pre-listing and post-listing, and the review is expedited if employment consequences are apparent. 33 V.S.A. § 4916b(b)(2). Considering that Ms. Selivonik's employment was terminated due to her substantiation before she was even aware of it, this statutory

To the extent Plaintiffs' policy position may have merit, they may take them to the Legislature, or they may ask the Vermont Supreme Court to reconsider. But *Selvonik* is binding on this Court.

Otherwise, Plaintiffs argue that the current process is deficient for many of the same reasons that New York's regime was found to be deficient in *Valmonte v. Bane,* 18 F.3d 992 (2d Cir. 1994). The state instead argues that the current pre-listing process complies with due process rights, pointing to the Seventh Circuit's review of Illinois' regime in *Dupuy v. Samuels,* 397 F.3d 493 (7th Cir. 2005).

The Court declines to spend any time here distinguishing *Valmonte* from this case. The Vermont Supreme Court already has done it. *See In re Selivonik,* 164 Vt. 383, 388-89 (1995) (distinguishing *Valmonte).* Subsequent statutory amendments have only deepened the differences.

The pre-listing process evaluated in *Dupuy* (after modifications as ordered by the district court), on the other hand, is remarkably similar to the current Vermont process. The Court of Appeals analyzed it in detail and found it constitutional. *See Dupuy,* 397 F.d at 504-509. Specifically considering the possibility that hard could accrue to a person wrongly substantiated that cannot be fully remedied by a correction on appeal (Plaintiffs' general objection here), the Court spoke plainly: "we believe that the

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change does not undermine the reasoning in the *Selivonik* decision.

procedure safeguards, provides the accused with an adequate opportunity to avoid an unjust determination" for due process purposes. *Id.* at 508-509; *see also Bohn v. Dakota County,* 772 F.2d 1433, 1439 (8th Cir. 1985) ("[T]he interjection of fuller procedural protections at an earlier state in the process would be unduly time-consuming and cumbersome and might well reduce important protections which the state legislature designed for otherwise vulnerable children."). The court adopts the relevant reasoning in *Dupuy* for purposes of this case.

Vermont's two-step process is facially valid under *Selvonik* and the reasoning of *Dupuy*.

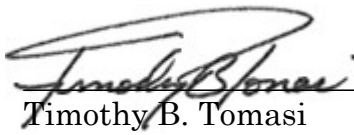
This ruling leaves only Plaintiffs' largely anecdotal and speculative suspicions that how their administrative processes may proceed from this point might, nevertheless, still violate their due process rights in some fashion. The Court cannot discern how such conjectural claims are cognizable. Any time full due process depends in part on a post-deprivation proceeding, there will exist some possibility that an agency actor during the pre-deprivation process may err in some way that violates a person's due process rights notwithstanding an otherwise facially valid two-step process. This Court cannot prospectively micromanage everything that DCF is about to do in an otherwise constitutionally valid administrative proceeding. The Court presumes that DCF agents have and will act in good faith and within constitutional bounds while undertaking their statutory duties. If Plaintiffs are concerned about how their proceedings went prior to the independent reviews that have not yet occurred, they may present

those concerns to their independent reviewers, who are fully empowered to deal with them. If they remain dissatisfied following final substantiation determinations, they may seek redress from the Human Services Board and, if necessary, the Vermont Supreme Court.

Conclusion

For the foregoing reasons, the State's motion to dismiss is granted.

Electronically signed on June 23, 2023, pursuant to V.R.E.F. 7(d).



Timothy B. Tomasi
Superior Court Judge

West's Vermont Statutes Annotated
Title Thirty-Three. Human Services
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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 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 childcare 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 acts 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. See., 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).

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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 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).

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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.

(5)(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).

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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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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 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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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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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).

West's Vermont Statutes Annotated
Title Thirty-Three Huamn 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).

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).