



COMMONWEALTH OF VIRGINIA

Commission on Youth

# **Review of the Standard of Proof to Determine a Founded Case of Child Abuse and Neglect**

September 18, 2018

Will Egen

# Study mandate



- In August 2017, Senator Favola requested that Commission on Youth staff work with the Department of Social Services and Department of Education to update the Commission in reference to an investigative report by NBC4 Washington about a teacher sexual misconduct case.
- At the September 2017 Commission on Youth meeting, the Commission heard a presentation from the Department of Social Services and the Department of Education on the child protective services (CPS) appeals process and teacher license review process.
- Commission on Youth staff worked with the Department of Social Services and the Department of Education to craft draft recommendations to be presented at the November 2017 Commission on Youth meeting. The Commission received written and oral public comment on these recommendations.

# Study mandate



- At the December 2017 meeting, the Commission adopted a number of recommendations to be presented before the 2018 General Assembly.
  - Report cases to the Superintendent of Public Instruction when founded.
  - Report founded cases to the local school board for former school employees.
  - Shorten the administrative appeals process.
  
- The Commission also determined that further study was needed to review the standard of proof for a non-school personnel child protective services investigation vs. a conduct investigation involving a public school employee. The Commission adopted the following recommendation:
  - Request the Virginia Commission on Youth to study the difference in standards of proof to determine a founded case of child abuse and neglect between school personnel and non-school personnel and to advise the Commission of its findings and recommendations by December 1, 2018.

# Study Activities



- Identify and work with impacted stakeholders
- Convene Advisory Group with impacted stakeholders
  - August 20, 2018
  - September 11, 2018
- Conduct extensive background and literature reviews
  - Virginia law, regulation, and policy
  - Regulatory town hall, NOIRA, proposed and final documents
  - Department of Social Services Child and Family Services Manual
  - Virginia case law
  - *Paul D. Coverdell Teacher Protection Act of 2001*
  - Journal articles on standards of proof
  - U.S. Department of Health and Human Services statistics and reports
  - Other states' statutes, regulations, studies, and activities

# Advisory Group



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## **Lori Battin**

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## **Jeremy Bennett**

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## **Ben Kiser**

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## **Dana Schrad**

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## **Tom Smith**

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## **Christopher Spain**

Families Forward Virginia

## **Nancy Walsh**

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## **Staff**

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# Standard of proof in a CPS investigation



- The alleged abuser or neglector must be a caretaker. According to 22VAC 40-705-10 a “caretaker” means any individual having the responsibility of providing care and supervision of a child.
  
- Non-school personnel caretakers
  - The standard in these cases is **preponderance of the evidence**. Preponderance of the evidence means that the evidence offered in support of the allegation is of greater weight than the evidence offered in opposition.
  - This standard applies to parents, daycare workers, and volunteer coaches.
  
- School personnel caretakers (use § 63.2-1511)
  - When the investigation is completed, the standard to make a founded disposition in addition to the preponderance of the evidence is whether such acts or omissions constituted “**gross negligence**” or “**willful misconduct.**”
  - Put another way: Analysis of preponderance of evidence clearly documents facts to support requirements of § 63.2-1511:
    - Alleged abuser acting in good faith within the scope of employment as public school employee.
    - Alleged abuser’s actions were not reasonable or necessary to quell disturbance, etc.
    - Facts/Evidence supports finding determination of gross negligence or willful misconduct.



## ➤ Preponderance of the Evidence

- Defined in 22VAC40-705-10 as “just enough evidence to make it more likely than not that the asserted facts are true. It is evidence which is of greater weight or more convincing than the evidence offered in opposition.”

## ➤ Gross Negligence

- The Supreme Court of Virginia defines “gross negligence” as “that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of [another]. It must be such a degree of negligence as would shock fair minded [people] although something less than willful recklessness.”

## ➤ Willful Misconduct

- The Virginia Department of Social Services uses the definition of “willful and wanton conduct” given by the Supreme Court to define “willful misconduct” in the child and family services manual. “In order that one may be [found to have committed] willful [sic] or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result.”

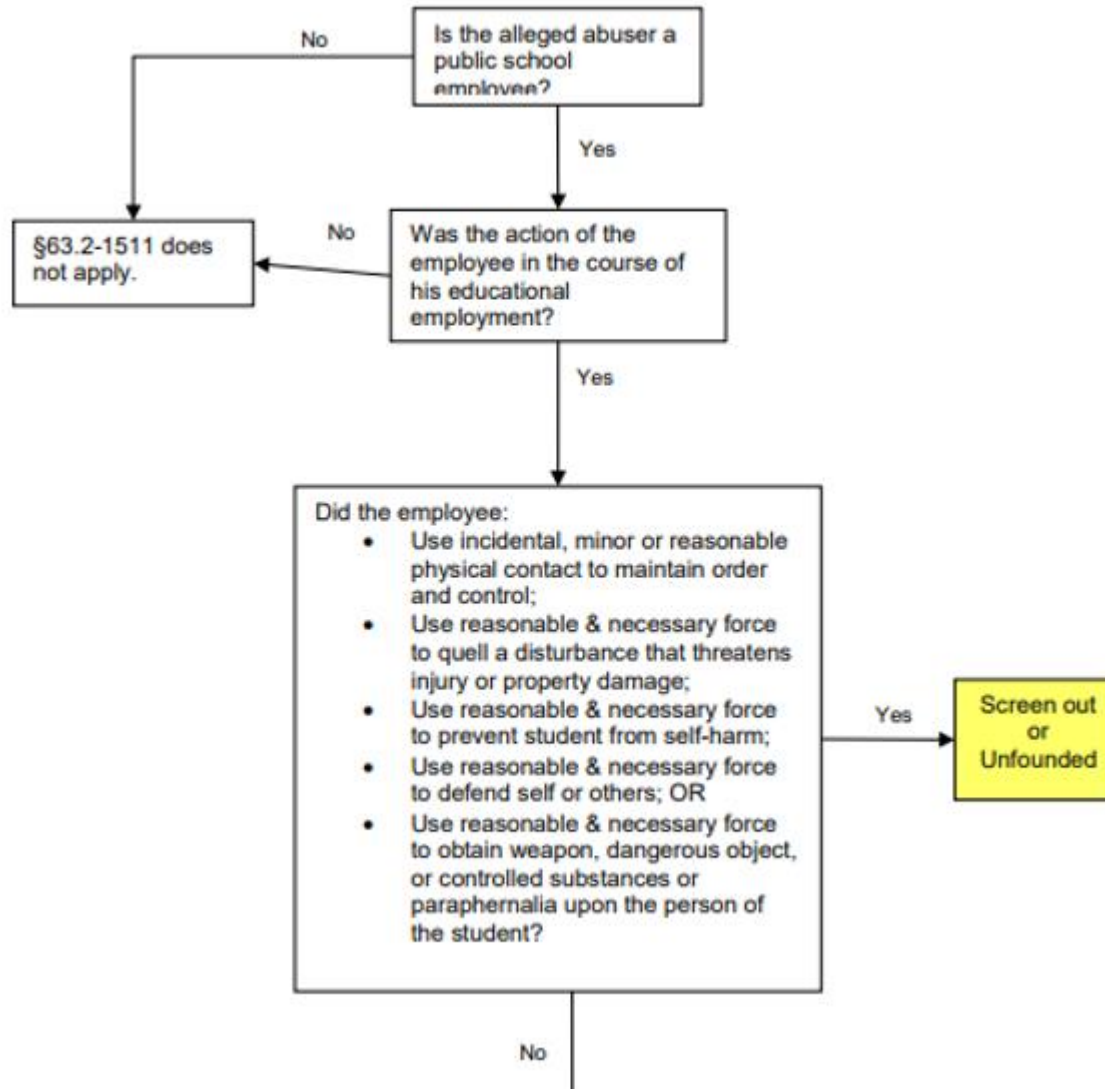
# Standards in other states



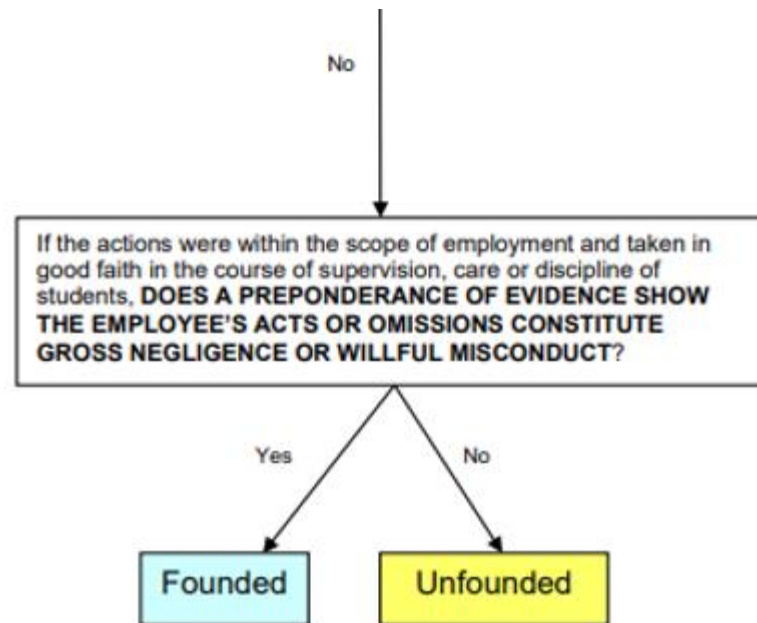
- States use a spectrum of standards to determine a founded case. (from low to high)
  - Reasonable basis, probable cause, and credible evidence – These are all examples of a low standard of proof.
  - Preponderance – 25 states have this standard. This standard is the most common.
  - Clear and convincing evidence – This is the highest standard and only one state uses it. Virginia used “clear and convincing evidence” until 1998.
  
- Gross negligence or willful misconduct is not considered an evidentiary standard but rather a state of mind element or *mens rea*.
  
- Virginia is unique in having a separate track for school employee investigations. Other states do not have a two-track system. However, not all states conduct school employee investigations through social services.



# Assessing applicability of § 63.2-1511



# Assessing applicability of § 63.2-1511



# Applicable law and regulations



## ➤ § 63.2-1511 (A)

- A. If a teacher, principal or other person employed by a local school board or employed in a school operated by the Commonwealth is suspected of abusing or neglecting a child in the course of his educational employment, the complaint shall be investigated in accordance with §§ 63.2-1503, 63.2-1505 and 63.2-1516.1. Pursuant to § 22.1-279.1, no teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth shall subject a student to corporal punishment. However, this prohibition of corporal punishment shall not be deemed to prevent (i) the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control; (ii) the use of reasonable and necessary force to quell a disturbance or remove a student from the scene of a disturbance that threatens physical injury to persons or damage to property; (iii) the use of reasonable and necessary force to prevent a student from inflicting physical harm on himself; (iv) the use of reasonable and necessary force for self-defense or the defense of others; or (v) the use of reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or paraphernalia that are upon the person of the student or within his control. In determining whether the actions of a teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth are within the exceptions provided in this section, the local department shall examine whether the actions at the time of the event that were made by such person were reasonable.

Language copied from Corporal punishment § 22.1-279.1

Language similar to Corporal punishment § 22.1-279.1

# Applicable law and regulations



## ➤ § 63.2-1511 (B) & (C)

- B. For purposes of this section, "corporal punishment," "abuse," or "neglect" shall not include physical pain, injury or discomfort caused by the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control as permitted in clause (i) of subsection A or the use of reasonable and necessary force as permitted by clauses (ii), (iii), (iv), and (v) of subsection A, or by participation in practice or competition in an interscholastic sport, or participation in physical education or an extracurricular activity.
- C. If, after an investigation of a complaint under this section, the local department determines that the actions or omissions of a teacher, principal, or other person employed by a local school board or employed in a school operated by the Commonwealth were within such employee's scope of employment and were taken in good faith in the course of supervision, care, or discipline of students, then the standard in determining if a report of abuse or neglect is founded is whether such acts or omissions constituted gross negligence or willful misconduct.

Language  
copied from  
Corporal  
punishment  
§ 22.1-279.1

Language  
similar to  
Civil immunity  
§ 8.01-220.1:2

# Applicable law and regulations



- § 63.2-1511. Complaints of abuse and neglect against school personnel; interagency agreement.
  - Adds a substantive state of mind requirement applicable to only school personnel.
  - Most recently updated in 2005, requires an investigator to assess if acts or omissions constituted gross negligence or willful misconduct by a preponderance of the evidence.
  
- § 22.1-279.1. Corporal punishment prohibited.
  - Defines corporal punishment.
  - Provides exceptions to the definition and instructions for applying the exceptions.
  
- § 8.01-220.1:2. Civil immunity for teachers under certain circumstances.
  - Codifies a Virginia Supreme Court decision that gives civil immunity for teachers provided that the acts or omissions of the teacher were not committed with gross negligence or willful misconduct.
  
- 22VAC40-705-10. Definitions. “Founded.”
  - Defines as by a preponderance of the evidence.

# Advisory Group Discussion



## ➤ Meeting Dates:

- August 20, 2018
- September 11, 2018

## ➤ Topics Discussed:

- Overview of the Standard of Proof to Determine a Founded Case of Child Abuse and Neglect
  - The investigation process for school employees vs. other caretakers.
  - Reporting requirements for suspected abuse and neglect are not impacted by this standard.
  - Public school teachers play an important role in our community. There is a large negative impact as a result of a false allegation.
- Advisory Group discussion on Draft Findings and Recommendations
  - The additional state of mind element standard used in investigations of public school employees, found in subsection (c) of § 63.2-1511.
  - The role of the regional coordinator in out-of-family investigations (22VAC40-730-60).
  - The problems posed by applying the “scope of employment” analysis to sexual abuse complaints.
  - Training and guidance for CPS workers as well as for Department of Social Services hearing officers.

# Protecting children



- School districts commonly remove teachers from the classroom during an investigation.
- Legislation passed during the 2018 General Assembly Session, supported by the Commission on Youth, changed the law to alert the local school board if a former school employee is the subject of a founded complaint. Also, the Commission supported legislation, also signed into law, to alert the Superintendent of Public Instruction when a complaint is founded.
- The Licensing Division at the Department of Education investigates based on conduct.



# Findings & Recommendations





## Training and Guidance

Findings: Local department workers and hearing officers consider evidence differently. For example a hearing officer and a local department worker will look at and give different weight to a recanted statement made by a child.

Proper documentation of gross negligence or willful misconduct, and following procedure, has been cited as an issue by local departments in overturned cases.

Local departments, county and city attorneys, and hearing officers refer to the DSS guidance manual, which is unclear in some places.

### Recommendations:

Option 1. Hearing officers - Require DSS hearing officers to undergo CPS new worker guidance training as well as training on forensic interviewing, other best practices, and topics deemed essential to recognizing abuse and neglect. DSS hearing officers shall undergo training within the first 6 months of employment. Further, require continuing education training annually, biennially, or as deemed necessary. DSS shall determine the training requirements.

and/or



## Training and Guidance (cont.)

Option 2. CPS workers - Support DSS's efforts in regards to training on how cases are being overturned due to documentation issues. In this training, request that CPS and DSS appeals division identify procedural and documentation errors that prevent a hearing officer from using their discretion to uphold a founded case in which abuse and neglect occurred.

and/or

Option 3. Child and Family Services Manual - Request the Department of Social Services update and clarify the sections on conducting investigations involving public school employees in their chapter on out-of-family investigations in the Child and Family Services Manual.



## Sexual Abuse

Findings: CPS workers will often interpret sexual abuse cases under the higher standard of gross negligence or willful misconduct in complaints where the teacher or other school employee was not acting in his scope of employment.

There is an uncertainty as to what gross negligence or willful misconduct is with regards to sexual abuse.

The *Code of Virginia* in § 63.2-100 defines abused or neglected child in the context of sexual abuse as a child “whose parents or other person responsible for his care commits or allows to be committed any act of sexual exploitation or any sexual act upon a child in violation of the law.”

### Recommendations:

Option 1. Amend subsection (c) of § 63.2-1511 to exempt certain sexual abuse complaints from the use of the higher standard of gross negligence or willful misconduct.



## Sexual Abuse (cont.)

Option 1. - Potential code language:

§ 63.2-1511 (C). If, after an investigation of a complaint under this section, the local department determines that the actions or omissions of a teacher, principal, or other person employed by a local school board or employed in a school operated by the Commonwealth were within such employee's scope of employment and were taken in good faith in the course of supervision, care, or discipline of students, then the standard in determining if a report of abuse or neglect is founded is whether such acts or omissions constituted gross negligence or willful misconduct. **For purposes of this section, if the act that gave rise to the investigation was any act of sexual exploitation or any sexual act upon a child in violation of the law, then it shall never be considered in good faith or in the scope of employment.**

and/or

Option 2. Request the Department of Social Services provide guidance to CPS workers that states that if the act that gave rise to the investigation of abuse and neglect was for any act of sexual exploitation or any sexual act upon a child in violation of the law, then it shall not be deemed to be an act or omission taken in the scope of employment. The local department worker would therefore not apply § 63.2-1511 analysis.

# Findings & Recommendations



## **Sexual Abuse** (cont.)

and/or

Option 3. Request the Department of Social Services provide guidance to CPS workers that detail the scenarios and appropriate analysis for gross negligence or willful misconduct as it applies to complaints of sexual abuse.



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# Public Comment:

Written public comment must be received  
by 5:00 p.m. Tuesday, Nov. 6, 2018.

Submission instructions available online  
(<http://vcoy.virginia.gov>) after the meeting  
and in the back of the room.