

REVIEW OF THE STANDARD OF PROOF TO DETERMINE A FOUNDED CASE OF CHILD ABUSE AND NEGLECT

DRAFT STUDY PLAN

Study Mandate

- 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.
- Further, the Commission heard findings and recommendations from staff on the reporting of child protective service cases to Virginia's public schools and the child protective services appeals process at the November 2017 meeting. At the December 2017 meeting, the Commission 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.

Identified Issues

- States across the country use a variety of standards of proof to substantiate a case of child abuse and neglect, ranging from reasonable basis and probable cause, to credible evidence and preponderance, and finally to the highest standard of clear and convincing evidence.
- In Virginia, the standard of proof for a complaint of abuse and neglect is preponderance of the evidence. 22VAC40-705-10 states that "'Founded' means that a review of the facts shows by a preponderance of the evidence that child abuse or neglect has occurred." This standard is used for the majority of child protective services cases in Virginia.
- However, an additional element is added for complaints of abuse and neglect against public school personnel. According to *Code of Virginia* § 63.2-1511, "if [the actions or omissions of a school personnel] 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." Section 63.2-1511 was amended in 2005 to include the substantive state of mind element of gross negligence or willful misconduct.
- When applying the standard invoked by § 63.2-1511, the VDSS Child and Family Services Manual states that the CPS investigator needs to decide if "a preponderance of evidence show the employee's acts or omissions constitute gross negligence or willful misconduct." This is an addition to the primary inquiry, made by investigators in all cases, as to whether or not, by a preponderance of the evidence, abuse or neglect has occurred.
- The use of corporal punishment also figures prominently into how these investigations involving public school employees are conducted. *Code of Virginia* § 22.1-279.1 prohibits the use of corporal punishment in schools and has done so since 1987. Further, § 22.1-279.1 provides for exceptions to prohibition of corporal punishment. Section 63.2-1511 borrows

much of the language in the corporal punishment statute, including exceptions, and applies it to the child abuse and neglect investigation process.

- In Virginia, the child protective services investigation process involving a public school employee also appears to have a direct relationship to the state law regarding civil liability for teachers. *Code of Virginia* § 8.01-220.1:2, enacted in 1997, states, “Any teacher employed by a local school board in the Commonwealth shall not be liable for any civil damages for any acts or omissions resulting from the supervision, care or discipline of students when such acts or omissions are within such teacher’s scope of employment and are taken in good faith in the course of supervision, care or discipline of students, unless such acts or omissions were the result of gross negligence or willful misconduct.”
- More recently, federal law has addressed the topic of teacher civil liability. According to the *Paul D. Coverdell Teacher Protection Act of 2001*, “[N]o teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if ... the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher.” This law was passed to protect teachers from civil liability.

Study Activities

- Identify and work with impacted stakeholders
 - Law Enforcement
 - Local Departments of Social Services
 - Office of the Attorney General
 - Virginia Association of School Superintendents
 - Virginia Department of Education
 - Virginia Department of Social Services
 - Virginia Educational Association (VEA)
 - Virginia High School League
 - Virginia League of Social Services Executives
 - Virginia Poverty Law Center
 - Virginia Professional Educators
 - Virginia School Boards Association
 - Other Stakeholders
- Convene advisory group with impacted stakeholders
- 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
- Synthesize findings of literature review and advisory group discussion
- Develop findings and recommendations
- Present findings and recommendations to the Commission on Youth
- Receive public comment
- Prepare final report