



**FINAL REPORT OF THE
VIRGINIA COMMISSION ON YOUTH**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**

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

**COMMONWEALTH OF VIRGINIA
RICHMOND
2019**

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I. Authority for Study

Section 30-174 of the *Code of Virginia* establishes the Commission on Youth and directs it to “study and provide recommendations addressing the needs of and services to the Commonwealth’s youth and their families.” This section also directs the Commission to “encourage the development of uniform policies and services to youth across the Commonwealth and provide a forum for continuing review and study of such services.”

Section 30-175 of the *Code of Virginia* outlines the powers and duties of the Commission on Youth and directs it to “undertake studies and to gather information and data ... and to formulate and report its recommendations to the General Assembly and the Governor.”

During the summer of 2017, Senator Barbara 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 in Arlington County in which the teacher, subject to a founded case of child abuse and neglect, was able to secure employment in a school district in another state.¹ During the first year of this study, Commission on Youth staff worked with the Department of Social Services and the Department of Education to prepare draft recommendations that were presented at the November 8, 2017, Commission on Youth meeting. At the December 5, 2017, meeting, the Commission adopted a number of recommendations to be presented before the 2018 General Assembly.

The Commission also determined that a second year of the study was needed to review the standard of proof for a non-school personnel child protective services (CPS) investigation versus a CPS investigation involving a public school employee. At the June 6, 2018, Commission on Youth meeting, a study plan was approved to further research this topic and to advise the Commission of its findings and recommendations by December 1, 2018.

II. Members Appointed to Serve

The Commission on Youth is a standing legislative commission of the Virginia General Assembly. It is comprised of twelve members: three Senators, six Delegates, and three citizens appointed by the Governor.

Members of the Virginia Commission on Youth are:

Delegate Richard P. “Dickie” Bell, Staunton, Chair

Delegate Emily M. Brewer, Smithfield

¹ NBC Washington. (August 3, 2017). *Loophole Allowed School Administrator Accused of Sex Abuse to Find Job as Assistant Principal*. Retrieved from: <https://www.nbcwashington.com/investigations/Loophole-Allowed-School-Administrator-Accused-of-Sex-Abuse-to-Find-Job-as-Assistant-Principal-438400113.html>.

Delegate Jerrauld C. “Jay” Jones, Norfolk
Delegate Mark L. Keam, Vienna
Delegate Christopher K. Peace, Mechanicsville
Delegate Todd E. Pillion, Abingdon
Senator David W. “Dave” Marsden, Burke, Vice-Chair
Senator Barbara A. Favola, Arlington
Senator Charles W. “Bill” Carrico, Sr., Galax
Avohom B. Carpenter, Chester
Deirdre S. “Dede” Goldsmith, Abingdon
Christian Rehak, Radford

III. Executive Summary

(Year One)

During the summer of 2017, Senator Barbara Favola requested that the 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 in Arlington County in which the teacher, subject to a founded case of child abuse and neglect, was able to secure employment in a school district in another state.² 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 prepare draft recommendations that were presented at the November 8, 2017, Commission on Youth meeting. After receiving oral public comment at the December 5, 2017, meeting, the Commission on Youth approved the following recommendations:

Recommendation 1

Amend § 63.2-1505(B)(7) of the *Code of Virginia* to require local departments of social services to report founded cases of child abuse and neglect of former school employees if they were an employee during the course of the investigation or at the time of the alleged conduct.

Recommendation 2

Amend § 63.2-1503(P) of the *Code of Virginia* to require local departments of social services to report founded cases of child abuse and neglect for an individual holding a license to the

² NBC Washington. (August 3, 2017). *Loophole Allowed School Administrator Accused of Sex Abuse to Find Job as Assistant Principal*. Retrieved from: <https://www.nbcwashington.com/investigations/Loophole-Allowed-School-Administrator-Accused-of-Sex-Abuse-to-Find-Job-as-Assistant-Principal-438400113.html>.

Superintendent of Public Instruction at the same time as a report is made to the local school board.

Recommendation 3

Amend § 63.2-1526 of the *Code of Virginia* to add language stating that an appellant may request no more than two extensions of the state administrative hearing unless compelling reasons exist, not to exceed an additional 90 days.

Recommendation 4

Request the Virginia Commission on Youth to study the difference in standards of review to determine a founded case of abuse and neglect between school personnel and non-school personnel and to advise the Commission of its findings and recommendations by December 1, 2018.

(Year Two)

At the June 6, 2018, Commission on Youth meeting, a study plan was approved to further research the standard of proof for a non-school personnel child protective services (CPS) investigation versus a CPS investigation involving a public school employee and to advise the Commission of its findings and recommendations by December 1, 2018. The study plan instructed Commission staff to:

- 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

Commission staff held two Advisory Group meetings with impacted stakeholders on August 20 and September 11, 2018. Draft study findings and recommendations were presented at the Commission's September 18, 2018, meeting. The Commission received written public comment through November 6, 2018. After receiving oral public comment at the November 20, 2018, meeting, the Commission on Youth approved the following recommendations:

Recommendation 1

Hearing officer training: Request Department of Social Services hearing officers to undergo child protective services new worker guidance training as well as training on forensic interviewing, other best practices, and topics deemed essential to recognizing abuse and neglect. Department of Social Services hearing officers shall undergo training within the first 6 months of employment. Further, require continuing education training annually, biennially, or as deemed necessary. Department of Social Services shall determine the training requirements.

Recommendation 2

Child protective services worker training: Support Department of Social Services' efforts in regards to training on how cases are being overturned due to documentation issues. In this training, request that child protective services and Department of Social Services 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.

Recommendation 3

Update 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.

Recommendation 4

Update guidance on sexual abuse: Request the Department of Social Services provide guidance to child protective services 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 *Code of Virginia* § 63.2-1511 analysis.

Recommendation 5

Update guidance and analyze scenarios for application of gross negligence and willful misconduct to sexual abuse: Request the Department of Social Services provide guidance to child protective services workers that details the scenarios and appropriate analysis for gross negligence or willful misconduct as it applies to complaints of sexual abuse.

IV. Study Goals and Activities

(Year One)

During the summer of 2017, Senator Barbara Favola requested that the 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 in Arlington County in which the teacher, subject to a founded case of child abuse and neglect, was able to secure employment in a school district in another state.³ During the first year of this study, Commission on Youth staff worked with the Department of Social Services and the Department of Education to prepare draft recommendations that were presented at the November 8, 2017, Commission on Youth meeting. At the December 5, 2017, meeting, the Commission adopted a number of recommendations to be presented before the 2018 General Assembly.

(Year Two)

The Commission also determined that a second year of the study was needed to review the standard of proof for a non-school personnel child protective services (CPS) investigation versus a CPS investigation involving a public school employee. At the June 6, 2018, Commission on Youth meeting, a study plan was approved to further research this topic and to advise the Commission of its findings and recommendations by December 1, 2018.

A. 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.

³ NBC Washington. (August 3, 2017). *Loophole Allowed School Administrator Accused of Sex Abuse to Find Job as Assistant Principal*. Retrieved from: <https://www.nbcwashington.com/investigations/Loophole-Allowed-School-Administrator-Accused-of-Sex-Abuse-to-Find-Job-as-Assistant-Principal-438400113.html>.

- In Virginia, the standard of proof for a complaint of abuse and neglect is preponderance of 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 all 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 Virginia Department of Social Services Child and Family Services Manual states that the CPS worker 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 CPS workers 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 the 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.

B. STUDY ACTIVITIES

The Commission's adopted study plan included the following 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

V. Study Methodology

The findings of this study are based on several distinct research activities conducted by the Commission on Youth.

A. RESEARCH AND ANALYSIS

In the summer of 2017, Senator Barbara Favola requested that the 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 in Arlington County in which the teacher, subject to a founded case of child abuse and neglect, was able to secure employment in a school district in another state.⁴ At the September 20, 2017, Commission on Youth meeting, the Commission heard a presentation from the Virginia Department of Social Services and the Department of Education on the child protective services appeals process and the teacher licensure review process, respectively. At the direction of the Commission, staff continued to work with the Department of Social Services and Department of Education to prepare recommendations on 1) how to ensure the timely notification of a founded case of child abuse and neglect to the local school division and to the Superintendent of Public Instruction, and 2) how to shorten the appeals process. Draft recommendations were then presented at the November 8, 2017, Commission on Youth meeting. At the December 5, 2017, meeting, the Commission adopted a number of recommendations to be presented before the 2018 General Assembly.

At the December 5, 2017, Commission meeting, it was also determined that a second year of the study was needed to review the standard of proof for a non-school personnel child protective services investigation (CPS) versus a CPS investigation involving a public school employee. At the June 6, 2018, Commission on Youth meeting, a study plan was approved to further research this topic and to advise the Commission of its findings and recommendations by December 1, 2018. In the second year of the study, staff convened an Advisory Group to look at the standard of proof issue. Additionally, staff worked closely with the Department of Social Services as well as the Virginia League of Social Services Executives. Finally, staff performed a detailed review of the information relating to the topic within the Virginia Department of Social Services Child and Family Services Manual, Virginia state laws and regulations and the laws of other states, and articles published in professional journals.

⁴ NBC Washington. (August 3, 2017). *Loophole Allowed School Administrator Accused of Sex Abuse to Find Job as Assistant Principal*. Retrieved from: <https://www.nbcwashington.com/investigations/Loophole-Allowed-School-Administrator-Accused-of-Sex-Abuse-to-Find-Job-as-Assistant-Principal-438400113.html>.

B. ADVISORY GROUP

Commission staff held two Advisory Group meetings with impacted stakeholders on August 20 and September 11, 2018. Represented stakeholder groups included:

- Court Improvement Program, Office of the Executive Secretary, Supreme Court of Virginia
- Greater Richmond SCAN
- Virginia Association of Chiefs of Police
- Virginia Department of Education
- Virginia Educational Association
- Virginia Poverty Law Center
- Virginia School Boards Association
- Families Forward Virginia
- Local Departments of Social Services
- Virginia Association of School Superintendents
- Virginia Department of Social Services
- Virginia High School League
- Virginia Professional Educators
- Private attorneys

At its first meeting on August 20, 2018, the Advisory Group heard an overview of the standard of proof to determine a founded case of child abuse and neglect. The Advisory Group also held a discussion on draft recommendations on this topic. It was determined that an additional meeting would be necessary to review edits to the draft recommendations. Proposed draft recommendations were then presented for discussion at the September 11, 2018, Advisory Group meeting.

Following the work of the Advisory Group, at the September 18, 2018, Commission on Youth meeting, the Commission heard a presentation from staff on the review of the standard of proof to determine a founded case of child abuse and neglect. Additionally, Commission staff presented draft recommendations based on input received from the Advisory Group at its September 11, 2018, meeting. A complete listing of Advisory Group members is provided as Appendix A.

VI. Background

A. YEAR ONE

During the summer of 2017, Senator Barbara 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 in Arlington County in which the teacher, subject to a founded case of child abuse and neglect, was able to secure employment in a school district in another state.⁵ At the September 20, 2017, Commission on Youth meeting, the Commission heard a presentation from the

⁵ NBC Washington. (August 3, 2017). *Loophole Allowed School Administrator Accused of Sex Abuse to Find Job as Assistant Principal*. Retrieved from: <https://www.nbcwashington.com/investigations/Loophole-Allowed-School-Administrator-Accused-of-Sex-Abuse-to-Find-Job-as-Assistant-Principal-438400113.html>.

Department of Social Services and the Department of Education on the child protective services (CPS) appeals process and teacher licensure review process.

The presentation from the Department of Social Services and the Department of Education highlighted a number of different areas related to the child protective services investigation process, specifically complaints against teachers and school employees.

CPS Appeals Process Timeline:

The timeline for the CPS appeals process begins with a valid CPS report and investigation.⁶ Child protective services shall determine within 45 days if the report of abuse and neglect is founded. This deadline can be extended to 60 days upon written justification by the local department. When a report and investigation yields a founded disposition, the alleged abuser/neglector has 30 days to request an appeal, known as the local conference.⁷ The local department has 45 days to act when a local conference is requested. The appellant can also request that this time to act be extended by 60 days, which begins at the end of the statutorily given 45 days. If the local department refuses the request for a local conference or does not amend the founded disposition in favor of the appellant, the alleged abuser/neglector may appeal to the Commissioner of the Department of Social Services for a state administrative hearing.

Unlike with the initial investigation and the local conference, the *Code of Virginia* does not give a definite deadline for a state administrative hearing. The regulation section for a state administrative hearing dictates that “a hearing officer shall schedule a hearing date within 45 days of the receipt of the appeal request unless there are delays due to subpoena requests, depositions or scheduling problems.”⁸ These delay allowances can cause an appeal to take much longer than 45 days. The current regulations as they are written permit the appellant to request multiple delays. Additionally, a hearing officer is free to reschedule a hearing beyond the receipt of the appeal request. However, “within 60 days of the close of receiving evidence, the hearing officer shall render a written decision.”⁹

The final level of review for an appellant is at the circuit court level. As provided by § 63.2-1526 of the *Code of Virginia*, a person aggrieved by the decision of the hearing officer may seek further review by the appropriate Circuit Court in accordance with Article 5 of the Administrative Process Act.

⁶ *Code of Virginia* § 63.2-1505.

⁷ *Code of Virginia* § 63.2-1526.

⁸ Va. Regulations 22VAC40-705-190.

⁹ *Ibid.*

Notifications:

Another piece of the CPS investigation process unique to complaints against teachers and school employees are notifications to various entities. The *Code of Virginia* instructs the notification of a founded decision of abuse and neglect to the local school board, the Superintendent of Public Instruction, and the Central Registry at different points in the investigation and appeals process.

With respect to the notification to the school board of a founded case, § 63.2-1505(B)(7) of the *Code of Virginia* states, “if a report of child abuse and neglect is founded, and the subject of the report is a full-time, part-time, permanent, or temporary employee of a school division located within the Commonwealth, notify the relevant school board of the founded complaint.” As the law is presently written, notification to the relevant school board would not occur if the employee subject of the founded complaint was no longer employed at the school. This *Code* section is also reflected in regulations at 22VAC40-705-140(B)(3).

The next type of notification is to the Superintendent of Public Instruction. Unlike the notification to the school board, this type of notification only happens when a licensed teacher is involved in the complaint. In addition, the notification to the Superintendent of Public Instruction occurs at the end of the administrative appeals process. According to the *Code of Virginia* § 63.2-1503(P), “the local department shall notify the Superintendent of Public Instruction when an individual holding a license issued by the Board of Education is the subject of a founded complaint of child abuse or neglect and shall transmit identifying information regarding such individual if the local department knows the person holds a license issued by the Board of Education and after all rights to any appeal provided by § 63.2-1526 have been exhausted.” In summary, notification to the Superintendent of Public Instruction commences several steps after notice to the local school board. This *Code* section is also reflected in regulations at 22VAC40-705-140(B)(4).

The final type of notification is made to the Virginia Child Abuse and Neglect Central Registry, which contains the names of individuals identified in founded child abuse and neglect investigations. The Central Registry is searched by local departments, schools, and volunteer organizations that interact with children during the hiring process or when a volunteer is being onboarded.¹⁰ However, in the case of a teacher or school employee accused of child abuse and neglect, the information contained in a founded case is not submitted to the Central Registry until all administrative appeals have been exhausted.¹¹ Notification to the Central Registry occurs at the end of the administrative appeals process to protect the due process rights of the accused abuser or neglector.

¹⁰ The Virginia Department of Social Services. *Central Registry Release of Information Form*. Retrieved from: https://www.dss.virginia.gov/files/division/licensing/background_index_childrens_facilities/founded_cps_complaints/032-02-0151-12-eng.pdf.

¹¹ Va. Regulations 22VAC40-211-10.

Founded Criteria:

In order to make a finding for any complaint of child abuse and neglect, whether the accused is a school employee or a non-school employee, the CPS worker must demonstrate by a preponderance of the evidence that the abuse and/or neglect occurred.¹² Preponderance of evidence is defined in regulations 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.”¹³

In addition to documenting by a preponderance of the evidence that the abuse and neglect occurred, for complaints against school employees, the *Code of Virginia* states that if “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.”¹⁴ Section 63.2-1511 was amended to use this additional standard in 2005.

There are a couple of implications that result from the use of gross negligence or willful misconduct in school employee cases. Complaints of abuse and neglect involving school employees have a higher overturn rate on appeal when compared to other cases. Although complaints being overturned on appeal may be viewed as a source of protection for teachers against unfounded accusations, the higher number of appeals could also be the result of an unclear statute or complicated and confusing guidance to CPS workers. Similarly, the Department of Social Services has a definition for preponderance of evidence in regulations, but does not have one for gross negligence or willful misconduct, terms more commonly associated with tort law. This presents a hurdle for instructing CPS workers on the review process for these cases.

A number of issues related to founded criteria that were articulated during year one of this study became sources of discussion in year two.

B. YEAR TWO

The second year of this study focused specifically on the review of standard of proof to determine a founded case of child abuse and neglect. At the December 2017 Commission on Youth meeting, the Commission approved 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

¹² Va. Regulations 22VAC40-705-10.

¹³ Ibid.

¹⁴ *Code of Virginia* § 63.2-1511.

neglect between school personnel and non-school personnel and to advise the Commission of its findings and recommendations by December 1, 2018.

School employees are statutorily allowed to avail themselves of extra protection or a higher standard when accused of child abuse and neglect if they were acting in the scope of employment when the alleged abuse and neglect occurred. The Commission looked at Virginia laws, regulations, and case law; guidance to CPS workers and definitions; other states' standards of proof; and sexual abuse accusations related to this higher standard.

VIRGINIA LAWS, REGULATIONS, AND CASE LAW

Civil Immunity Law

Section 63.2-1511 of the *Code of Virginia* describes the additional standard of proof for out-of-family investigations involving public school employees. The additional standard of gross negligence or willful misconduct was added in 2005. Subsection (C) of § 63.2-1511 details the additional standard, as follows:

§ 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.¹⁵

While this language was added in 2005 to § 63.2-1511 as part of the CPS investigation process, it is not new language in the *Code of Virginia*. In 1997, the following subsection (A) was added to § 8.01-220.1:2, civil immunity for teachers under certain circumstances, and remains in the *Code of Virginia*:

§ 8.01-220.1:2 (A) – 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.¹⁶

This section of the *Code of Virginia* codifies a Virginia Supreme Court decision, *Lentz v. Morris*, 236 Va. 78 (1988), by granting immunity from civil damages to public school teachers when acting

¹⁵ *Code of Virginia* § 63.2-1511.

¹⁶ *Code of Virginia* § 8.01-220.1:2.

in good faith and within their scope of employment while supervising, caring for, or maintaining discipline of students, unless the acts or omissions were the result of gross negligence or willful misconduct. In *Lentz v. Morris*, the court ruled that a teacher is protected by the doctrine of sovereign immunity from a claim of simple negligence. While this case was decided in 1988, it was not added to the *Code of Virginia* until 1997. The Supreme Court of Virginia, in 2012, further clarified that subsection (A) of § 8.01-220.1:2 only applies to teachers and not to principals or other school employees, because of the plain language of the statute.¹⁷ While subsection (A) of the civil immunity statute (§ 8.01-220.1:2) applies solely to teachers, subsection (C) of the complaints of abuse and neglect against school personnel statute (§ 63.2-1511) applies to any person employed by a local school board.

Federal law also gives teachers an affirmative defense against claims of simple negligence. The U.S. Congress passed the *Paul D. Coverdell Teacher Protection Act of 2001* and it was signed by President George W. Bush in 2002. This pertinent part of the law states:

(a) **LIABILITY PROTECTION FOR TEACHERS.**—Except as provided in subsection (b), no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if [...]

(4) 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;¹⁸

Protection of teachers from claims of simple negligence is a thread that runs through both federal law and state law and is also applied in Virginia in the context of CPS abuse and neglect investigations. Teacher advocacy organizations highlight the special role that teachers play in our society and the need for protection against false and wild accusations.¹⁹

Corporal Punishment Law

In 2001, § 63.2-1511 was enacted to add the corporal punishment exceptions already existing in the education title of the code (22.1) in § 22.1-279.1, corporal punishment prohibited, to the welfare (social services) title (63.2).²⁰ The corporal punishment exceptions were first added to the *Code* in 1989 and updated in 1995. The two sections are compared below.

¹⁷ *Burns v. Gagnon*, 283 Va. 657 (2012).

¹⁸ 20 U.S.C. § 6736.

¹⁹ Virginia Commission on Youth Advisory Group Meeting, August 20, 2018.

²⁰ Previously titled 63.1.

§ 63.2-1511 is stated as follows:

§ 63.2-1511 (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.

(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.

Similarly, § 22.1-279.1 is stated as follows:

§ 22.1-279.1 (A) – 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. 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 which 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 which are upon the person of the student or within his control.

(B) In determining whether a person was acting within the exceptions provided in this section, due deference shall be given to reasonable judgments at the time of the event which were made by a teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth.

(C) For the purposes of this section, "corporal punishment" means the infliction of, or causing the infliction of, physical pain on a student as a means of discipline.

This definition 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 subdivision (i) of subsection A of this section or the use of reasonable and necessary force as permitted by subdivisions (ii), (iii), (iv), and (v) of subsection A of this section, or by participation in practice or competition in an interscholastic sport, or participation in physical education or an extracurricular activity.

The corporal punishment prohibition and exceptions were added to the welfare (social services) title of the *Code* (63.2) in order to clarify within the child abuse and neglect statute that teachers, principals or other persons employed by a school board or employed in a school operated by the Commonwealth are prohibited from subjecting a student to corporal punishment. Section 63.2-1511 (A) (B) further explains that the definitions of "corporal punishment" or "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. Also, in discussing the exceptions to corporal punishment, § 63.2-1511 adds that a CPS worker in an investigation shall look at whether the acts of the school employee were reasonable. Prior to this addition in 2001, one Virginia court affirmed a CPS worker's decision and agreed that bruises on a student demonstrate "that the touching was not incidental, minor, or reasonable."²¹ The court did not look at whether the acts that led to the bruising were reasonable. After § 63.2-1511 was enacted, a CPS worker was required to look at whether the acts themselves were reasonable. In the scenario described above, the worker would not be able to rely on the mere occurrence of bruising from the result of an intentional act to make a case for abuse and neglect.

Finally, it should be noted that in 2000, § 18.2-57, Assault and battery; penalty, was updated to add the corporal punishment exceptions as acts not constituting "simple assault" or "assault and battery." Part of this section is currently written as follows:

§ 18.2-57 (G) – "Simple assault" or "assault and battery" shall not be construed to include the use of, by any school security officer or full-time or part-time employee of any public or private elementary or secondary school while acting in the course and scope of his official capacity, any of the following: (i) incidental, minor or reasonable physical contact or other actions designed to maintain order and control; (ii) reasonable and necessary force to quell a

²¹ Mulvey v. Jones 41 Va. App. 600 (Va. Ct. App. 2003).

disturbance or remove a student from the scene of a disturbance that threatens physical injury to persons or damage to property; (iii) reasonable and necessary force to prevent a student from inflicting physical harm on himself; (iv) reasonable and necessary force for self-defense or the defense of others; or (v) reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or associated paraphernalia that are upon the person of the student or within his control.

In determining whether a person was acting within the exceptions provided in this subsection, due deference shall be given to reasonable judgments that were made by a school security officer or full-time or part-time employee of any public or private elementary or secondary school at the time of the event.

This section on assault and battery protects a school employee from criminal liability in situations where they are acting in their official capacity by giving them an affirmative defense.

THE INVESTIGATION PROCESS

CPS Worker Guidance

Child protective services (CPS) workers are given detailed guidance on accessing the applicability of § 63.2-1511, which is the *Code of Virginia* section that deals with complaints of abuse and neglect against school personnel. This guidance is found in the “Out of Family Investigations” section of the Child and Family Services Manual for Child Protective Services.²² The guidance goes through a series of questions that a CPS worker should follow during a school employee investigation. The following questions must be documented by a CPS worker in their final report:

1) Is the alleged abuser a public school employee?

This is the threshold question for examining whether or not to proceed further with § 63.2-1511 analysis. If the alleged abuser/neglector is not a public school employee, the complaint may still be investigated, but the alleged abuser/neglector may not avail him or herself of the additional standard. For purposes of this *Code* section, a volunteer sports coach would not be considered a public school employee.

2) Was the action of the employee in the course of his educational employment?

According to the child protective services (CPS) manual, some questions that a CPS worker may use to help answer this question are as follows: Was the alleged abuser/neglector acting within the scope of his employment regarding supervision, care or discipline of students?;

²² Virginia Department of Social Services. (July 2017). *Child and Family Services Manual, Child Protective Services, Out-of-Family Investigations*. Retrieved from: http://www.dss.virginia.gov/files/division/dfs/cps/intro_page/manuals/07-2017/section_5_out_of_family_investigations.pdf. (pg. 46).

What are the job duties, role and responsibilities of the alleged abuser/neglector? (as indicated by the alleged abuser, administrator, or collaterals); Where did the incident occur and under what circumstances?; and, Was the alleged abuser/neglector acting on an assignment as part of his employment? If the action of the employee was in the course of his or her educational employment, then the CPS worker may continue to evaluate the complaint under § 63.2-1511. If the alleged abuser/neglector was not acting in the course of his or her employment but still considered a caretaker, the complaint would still be investigated, but the alleged abuser/neglector may not avail him or herself of § 63.2-1511.

- 3) Did employee use incidental, minor or reasonable physical contact to maintain order and control; Use reasonable and necessary force to quell a disturbance that threatens injury or property damage; Use reasonable and necessary force to prevent student from self-harm; Use reasonable and necessary force to defend self or others; or, Use reasonable and necessary force to obtain weapon, dangerous object, or controlled substances or paraphernalia upon the person of the student?**

A CPS worker shall consider the use of reasonable and necessary force at the validity stage before a complaint is even investigated. If during the validity stage it is determined that the school employee used reasonable and necessary force for the enumerated reasons, then the complaint is screened out and not investigated assuming that the school employee was acting in the course of employment.²³ Sometimes, the facts regarding the use of reasonable and necessary force are not available at intake. In that situation, an investigation would be initiated, and the CPS worker would look at the use of reasonable and necessary force during the investigation. The investigation must result in an unfounded disposition if, after gathering evidence, the CPS worker determines that the alleged abuser used reasonable and necessary force. Alternatively, if the situation that gave rise to the complaint did not involve the use of force (i.e., a neglect complaint) or the CPS worker determines that the type of force used was not reasonable or necessary, then the complaint would not be screened out and would be fully investigated. Finally, it is important to note that the use of reasonable and necessary force is only considered by CPS workers in investigations that involve a public school employee.

- 4) If the actions were within the scope of employment and taken in good faith in the course of supervision, care or discipline of students, does a preponderance of evidence show the employee's acts or omissions constitute gross negligence or willful misconduct?**

This final step of a CPS investigation involving a school employee comes at the end of the investigation after all facts and evidence have been collected and documented. The CPS worker must be able to demonstrate that by a preponderance of the evidence 1) the abuse and neglect occurred; 2) the alleged abuser was acting in good faith within the scope of employment as a public school employee; 3) the alleged abuser's actions were not reasonable or necessary (to

²³ Va. Regulations 22VAC40-730-115.

quell a disturbance, etc.); and, 4) that by a preponderance of the evidence the acts or omissions of the alleged abuser constitute gross negligence or willful misconduct.

A flow chart detailing these steps can be found as Appendix B at the end of this report.

Definitions

The “Out-of-Family Investigations” section of the Child and Family Services Manual for Child Protective Services also reproduces and explains the relevant definitions that CPS workers need to understand to complete their investigations.

Founded²⁴ – A review of the facts shows by a preponderance of the evidence that child abuse or neglect has occurred. A determination that a case is founded shall be based primarily on first source evidence; in no instance shall a determination that a case is founded be based solely on indirect evidence or an anonymous complaint.

Preponderance of evidence²⁵ – 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 Negligence²⁶ – 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 Misconduct²⁷ – The Virginia Department of Social Services uses the definition of “willful and wanton conduct” to define “willful misconduct.” 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.

The CPS guidance manual explains that the term “willful misconduct” is most often used in workers’ compensation cases.

²⁴ Va. Regulations 22VAC40-705-10.

²⁵ Ibid.

²⁶ Virginia Department of Social Services. (July 2017). *Child and Family Services Manual, Child Protective Services, Out-of-Family Investigations*. Retrieved from: http://www.dss.virginia.gov/files/division/dfs/cps/intro_page/manuals/07-2017/section_5_out_of_family_investigations.pdf. (pg. 40).

²⁷ Ibid.

The definitions for gross negligence or willful misconduct are particularly important for a CPS investigation involving a public school employee because they are the *mens rea*, or state of mind, elements that CPS workers must be able to document at the end of their investigations by a preponderance of evidence, using facts and evidence. The definitions for gross negligence or willful misconduct come from Virginia case law and are not in regulations.

The CPS guidance manual and definitions are also used extensively by government attorneys during the appeals process. Throughout year two of this study, CPS workers and county attorneys expressed how important it is for the guidance to be clear and reflect proper investigation procedures. Representatives from the local departments explained that many CPS workers are young and do not necessarily understand all of the legal terminology in play under current training and guidance.²⁸

STANDARDS OF PROOF IN VIRGINIA AND OTHER STATES

History of the Standard of Proof in Virginia

The current standard of proof for a child protective services (CPS) finding of abuse and neglect, used since 1998, is preponderance of evidence. This is the most common standard in the United States and is used in a majority of states. Virginia used clear and convincing evidence until 1998, when new regulations using preponderance of evidence were implemented.²⁹ Prior to March 1995, the Department of Social Services used the categories of founded, unfounded, and reason to suspect to categorize the findings resulting from a CPS investigation. Reason to suspect was defined as follows: “[A] review of the facts shows no clear and convincing evidence that abuse or neglect has occurred. However, the situation gives the worker reason to believe that abuse or neglect has occurred.”³⁰ In 1995, it was determined by a Virginia court that the *Code of Virginia* does not permit the category of “reason to suspect.”³¹ The court in *Jackson v. Marshall* stated, “[the *Code*] clearly authorizes DSS to enter only one of two final disposition alternatives, “Founded” or “Unfounded,” in a child protective services case.” Because of this court decision, reason to suspect was eliminated as a findings category and the standard of proof was lowered to preponderance of evidence.

Standards of Proof in Use

The highest standard of proof used by any state in the U.S. is preponderance of evidence. The U.S. Department of Health & Human Services, Administration for Children and Families (ACF), collected self-reported data from every state, which was published in a report entitled *Child*

²⁸ Virginia Commission on Youth Advisory Group Meeting, August 20, 2018.

²⁹ Virginia Register of Regulations Vol. 13. Iss. 25. (Sept. 1, 1997). Retrieved from: <http://register.dls.virginia.gov/vol13/iss25/v13i25.pdf>. (PDF pg. 108).

³⁰ Virginia Register of Regulations Vol. 6. Iss. 3. (Nov. 6, 1989). Retrieved from: <http://register.dls.virginia.gov/vol06/iss03/v06i03.pdf>. (PDF pg. 91).

³¹ *Jackson v. Marshall* 19 Va. App. 628 (Va. Ct. App. 1995).

Maltreatment 2016.³² States were asked to provide the level of evidence or standard of proof that they use when determining whether maltreatment occurred in a given allegation. The ACF defined level of evidence as, “the proof required to make a specific finding or disposition regarding an allegation of child abuse and neglect.”³³ According to this report, 37 states use preponderance of evidence, 8 states use a lower standard of credible evidence, 1 state uses probable cause, and 6 states use reasonable evidence, the lowest standard.³⁴ A chart describing the levels of evidence used by all states and the District of Columbia is included as Appendix C.

SEXUAL ABUSE ALLEGATIONS AGAINST SCHOOL EMPLOYEES

The Virginia Administrative Code defines all of the various types of abuse and neglect, which include physical abuse, physical neglect (medical neglect as a subset), mental abuse or neglect, and sexual abuse.³⁵ Year two of this study highlighted the difficulty, as acknowledged by CPS workers, in applying both the state of mind elements of gross negligence and willful misconduct and the “scope of employment” question to an investigation of a complaint of child abuse and neglect against a public school employee. This section outlines some of the concerns raised by the Advisory Group related to the current guidance on this topic by the Department of Social Services.

In reference to sexual abuse, *Code of Virginia* § 63.2-100 specifies that an “abused or neglect child means any child less than 18 years of age ... 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.” Sexual abuse is also defined in the administrative code as “when the child's caretaker commits or allows to be committed any act of sexual exploitation, including sex trafficking as defined in 22VAC40-705-10, or any sexual act upon a child in violation of the law.”³⁶ The child and family services manual clarifies that the administrative code definition includes any sexual act upon a child that violates the *Code of Virginia*. The manual also outlines the various types of sexual abuse, which include sexual exploitation, sexual molestation, intercourse and sodomy, sex trafficking, and other types of sexual abuse.³⁷

In a non-school employee investigation of sexual abuse, the CPS worker must determine if the sexual abuse allegation is founded using the preponderance of evidence standard. Alternatively, in a school employee investigation of sexual abuse, the CPS worker must determine if the sexual

³² U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (Feb 1. 2018). *Child Maltreatment 2016*. Retrieved from: <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf>.

³³ Ibid., 112. (PDF pg. 126).

³⁴ Ibid., 114. (PDF pg. 128).

³⁵ Va. Regulations 22VAC40-705-30.

³⁶ Ibid.

³⁷ Virginia Department of Social Services. (July 2017). *Child and Family Services Manual, Child Protective Services, Definitions of Abuse and Neglect*. Retrieved from: http://www.dss.virginia.gov/files/division/dfs/cps/intro_page/manuals/07-2017/section_2_definitions_of_abuse_and_neglect.pdf. (pg. 25).

abuse allegation is founded using the preponderance of evidence standard and go through the steps outlined in § 63.2-1511, which includes determining if the school employee was acting in the scope of employment and whether the school employee's acts or omissions constituted gross negligence or willful misconduct.

The Virginia League of Social Services Executives (VLSSE) argues that, in some cases, attempting to document sexual abuse as being within the scope of employment is problematic and there is no clear guidance on this topic in the CPS guidance manual. The VLSSE states that “a common view of scope of employment and sexual abuse is that sexual abuse of children does not satisfy the test that an act was done on behalf of an employer or was foreseeable in light of an employee's duties. Sexual abuse should not be one of those activities arising out of employment; therefore, it would not be within a school employee's scope of employment. Accordingly, sexual acts should be rejected under the scope of employment test because the actions are independent and unrelated to work duties.”³⁸ Currently, guidance does not specifically address sexual abuse and the scope of employment question. As a result, some local departments are unclear about whether they should proceed with § 63.2-1511 analysis for some types of sexual abuse.

Additionally, the VLSSE notes that guidance does not define gross negligence or willful misconduct in terms of sexual abuse. In some complaints it is unclear how gross negligence and/or willful misconduct is applied to sexual abuse. A consideration provided by the VLSSE is “that willful misconduct or gross negligence would apply if there is evidence that the act actually occurred. Or, in the case of non-penetrative sexual abuse, you could argue that gross negligence or willful misconduct may apply, depending on the circumstances.”³⁹ This preceding analysis is not provided in the CPS guidance manual or discussed in § 63.2-1511, so it leaves the interpretation on how to proceed in these types of sexual abuse complaints up to local departments. However, § 63.2-1511 analysis and CPS guidance is useful in some school employee investigations of sexual abuse. For example, a situation in which a school employee has physical contact with a sensitive body part of a student could be explained as reasonable physical contact to maintain order and control, which would in turn would be screened out or result in an unfounded disposition.

Overall, these sexual abuse complaints tend to be the most difficult situations to interpret and document. CPS guidance notes that “to make a founded disposition of sexual abuse in some cases, the local department may be required to establish sexual gratification or arousal.”⁴⁰ This is one area where teacher advocates discussed the need for stronger guidance.⁴¹ Additionally, teacher advocates expressed the usefulness of the gross negligence or willful misconduct analysis in

³⁸ VLSSE Public Comment to Virginia Commission on Youth.

³⁹ Ibid.

⁴⁰ Virginia Department of Social Services. (July 2017). *Child and Family Services Manual, Child Protective Services, Definitions of Abuse and Neglect*. Retrieved from: http://www.dss.virginia.gov/files/division/dfs/cps/intro_page/manuals/07-2017/section_2_definitions_of_abuse_and_neglect.pdf. (pg. 26).

⁴¹ Virginia Commission on Youth Advisory Group Meeting, August 20, 2018.

certain sexual abuse cases. For example, in the previously described scenario where a school employee has physical contact with a sensitive body part, if the CPS worker decides that the actions of the school employee were not reasonable, then analysis of gross negligence or willful misconduct becomes important in making a finding of abuse and neglect. Requiring documentation and analysis of whether or not the school employee acted grossly negligent respects the decision-making role of the school employee at the time of the action and provides an extra layer of protection for school employees, as the statute § 63.2-1511 envisioned.

Both teacher advocates and CPS worker representatives at the Advisory Group meeting in year two expressed the need for improved guidance in regards to sexual abuse complaints involving school employees.

VII. Findings and Recommendations

(Year One)

After presenting the findings and recommendations at the Commission on Youth's November 8, 2017, meeting and receipt of public comment, the Commission approved the following recommendations:

Finding 1:

Section 63.2-1505(B)(7) of the Code of Virginia details one of the duties of a local department in a CPS case: "If a report of child abuse and neglect is founded, and the subject of the report is a full-time, part-time, permanent, or temporary employee of a school division located within the Commonwealth, notify the relevant school board of the founded complaint." As the law is presently written, notification to the relevant school board would not occur if the employee subject of the founded complaint was no longer employed at the school. This code section is also reflected in 22VAC40-705-140(B)(3).

Recommendation 1

Amend § 63.2-1505(B)(7) of the *Code of Virginia* to require local departments of social services to report founded cases of child abuse and neglect of former school employees if they were an employee during the course of the investigation or at the time of the alleged conduct.

Finding 2:

Section 63.2-1503(P) of the Code of Virginia states "[t]he local department shall notify the Superintendent of Public Instruction when an individual holding a license issued by the Board of Education is the subject of a founded complaint of child abuse or neglect and shall transmit identifying information regarding such individual if the local department knows the person holds a license issued by the Board of Education and after all rights to any appeal provided by § 63.2-

1526 have been exhausted.” Notification to the Superintendent of Public Instruction commences several steps after notice to the local school board. The DOE is not permitted to comment on ongoing investigations of a license holder and earlier notice would not change the current policy. This code section is also reflected in 22VAC40-705-140(B)(4).

Recommendation 2

Amend § 63.2-1503(P) of the *Code of Virginia* to require local departments of social services to report founded cases of child abuse and neglect for an individual holding a license to the Superintendent of Public Instruction at the same time as a report is made to the local school board.

Finding 3:

The appeals process in certain situations where a complaint has resulted in a founded disposition of a child abuse or neglect is outlined in § 63.2-1526 and 22VAC40-705-190. The Code of Virginia does not specify timing deadlines for a Department of Social Services hearing officer to schedule an appeal. A timing deadline is described in regulations in 22VAC40-705-190, but it is not definite. This regulation section states “[a] hearing officer shall schedule a hearing date within 45 days of the receipt of the appeal request unless there are delays due to subpoena requests, depositions or scheduling problems.” These delay allowances can cause an appeal to take much longer than 45 days. Regulations also state that “[w]ithin 60 days of the close of receiving evidence, the hearing officer shall render a written decision.”

Recommendation 3

Amend § 63.2-1526 of the *Code of Virginia* to add language stating that an appellant may request no more than two extensions of the state administrative hearing unless compelling reasons exist, not to exceed an additional 90 days.

Finding 4:

The standard of review for a complaint of abuse and neglect is preponderance of 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 in most CPS cases. However, a higher standard is used in complaints of abuse and neglect against school personnel. According to § 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 to use this higher standard in 2005.

Complaints of abuse and neglect involving school personnel have a higher overturn rate on appeal when compared to other cases because of the higher standard of review. Additionally, the Department of Social Services has a definition for preponderance of evidence, but does not have one for gross negligence or willful misconduct, which is more commonly found associated with tort law.

Recommendation 4

Request the Virginia Commission on Youth to study the difference in standards of review to determine a founded case of abuse and neglect between school personnel and non-school personnel and to advise the Commission of its findings and recommendations by December 1, 2018.

(Year Two)

After presenting the findings and recommendations at the Commission on Youth's September 18, 2018, meeting and receipt of public comment, the Commission approved the following recommendations:

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.

Recommendation 1

Hearing officer training: Request Department of Social Services hearing officers to undergo child protective services new worker guidance training as well as training on forensic interviewing, other best practices, and topics deemed essential to recognizing abuse and neglect. Department of Social Services hearing officers shall undergo training within the first 6 months of employment. Further, require continuing education training annually, biennially, or as deemed necessary. Department of Social Services shall determine the training requirements.

Recommendation 2

Child protective services worker training: Support Department of Social Services' efforts in regards to training on how cases are being overturned due to documentation issues. In this training, request that child protective services and Department of Social Services 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.

Recommendation 3

Update 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.

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."

Recommendation 4

Update guidance on sexual abuse: Request the Department of Social Services provide guidance to child protective services 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 *Code of Virginia* § 63.2-1511 analysis.

Recommendation 5

Update guidance and analyze scenarios for application of gross negligence and willful misconduct to sexual abuse: Request the Department of Social Services provide guidance to child protective services workers that details the scenarios and appropriate analysis for gross negligence or willful misconduct as it applies to complaints of sexual abuse.

VIII. Acknowledgments

The Virginia Commission on Youth extends special appreciation to the members of the Advisory Group and to the following for their assistance on this study:

The Virginia Department of Social Services

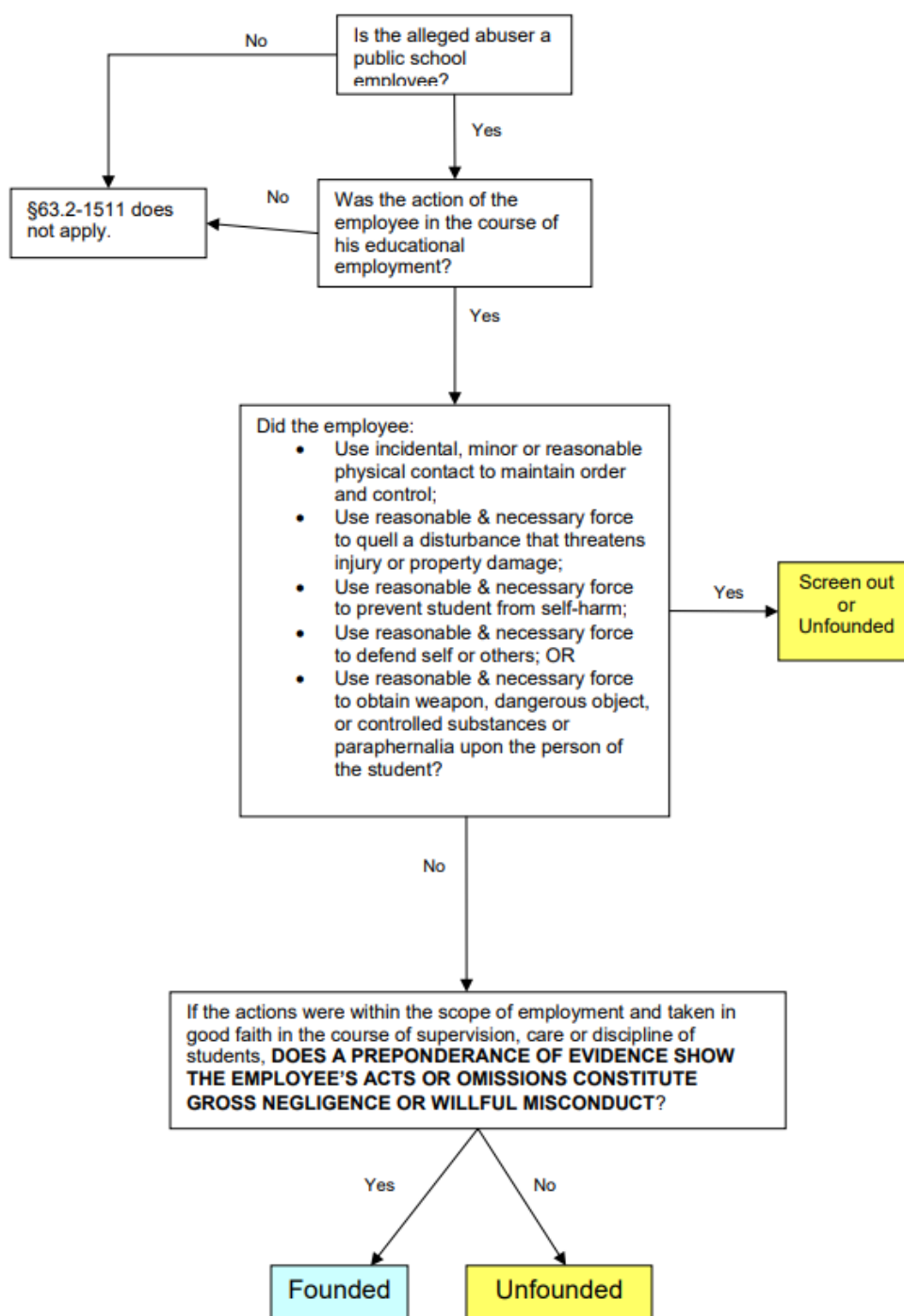
Carl Ayers, Director, Division of Family Services

Amy Munn, Child Protective Services Out of Family (OOF) Program Consultant

Review of the Standard of Proof to Determine a Founded Case of Child Abuse and Neglect Advisory Group

<p>Carl Ayers Director, Division of Family Services Virginia Department of Social Services</p> <p>Tracey Bailey State Director Virginia Professional Educators</p> <p>Lori Battin Senior Research Analyst Court Improvement Program, Office of the Executive Secretary, Supreme Court of Virginia</p> <p>Jeremy Bennett Government Relations Specialist Virginia School Boards Association</p> <p>Jeanine Harper Executive Director Greater Richmond SCAN</p> <p>Shannon Hartung Program Manager, Child Protective Services Virginia Department of Social Services</p> <p>Billy Haun Executive Director Virginia High School League</p> <p>Kimberly Irvine Director York-Poquoson Department of Social Services</p> <p>Ben Kiser Executive Director Virginia Association of School Superintendents</p>	<p>Valerie L'Herrou Staff Attorney, Center for Family Advocacy Virginia Poverty Law Center</p> <p>Rebecca Morgan Director Middlesex Department of Social Services</p> <p>Ben Rand Partner Blackburn, Conte, Schilling, & Click, P.C.</p> <p>Dena Rosenkrantz Attorney, Legal Service Director Virginia Educational Association</p> <p>Dana Schrad Executive Director Virginia Association of Chiefs of Police</p> <p>Tom Smith Education Legislative Liaison Virginia Association of School Superintendents</p> <p>Christopher Spain Prevention and Public Policy Director Families Forward Virginia</p> <p>Nancy Walsh Coordinator of Professional Practices Virginia Department of Education</p> <p>Commission on Youth Staff: Amy Atkinson Will Egen</p> <p>Division of Legislative Services Staff: David May</p>
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Assessing the Applicability of § 63.2-1511 for CPS Investigation⁴²



⁴² Virginia Department of Social Services. (July 2017). *Child and Family Services Manual, Child Protective Services, Out-of-Family Investigations*. Retrieved from: http://www.dss.virginia.gov/files/division/dfs/cps/intro_page/manuals/07-2017/section_5_out_of_family_investigations.pdf. (pg. 46).

Levels of Evidence Used in All States and D.C.⁴³

State	Hybrid	State Administered	State Supervised, County Administered	Credible	Preponderance	Probable Cause	Reasonable	Agency File and Child File
Alabama	-	■	-	-	■	-	-	■
Alaska	-	■	-	-	■	-	-	■
Arizona	-	■	-	-	-	■	-	■
Arkansas	-	■	-	-	■	-	-	■
California	-	-	■	-	■	-	-	■
Colorado	-	-	■	-	■	-	-	■
Connecticut	-	■	-	-	■	-	-	■
Delaware	-	■	-	-	■	-	-	■
District of Columbia	-	■	-	■	-	-	-	■
Florida	-	■	-	-	■	-	-	■
Georgia	-	■	-	-	■	-	-	■
Hawaii	-	■	-	-	-	-	■	■
Idaho	-	■	-	-	■	-	-	■
Illinois	-	■	-	■	-	-	-	■
Indiana	-	■	-	-	■	-	-	■
Iowa	-	■	-	-	■	-	-	■
Kansas	-	■	-	-	■	-	-	■
Kentucky	-	■	-	-	■	-	-	■
Louisiana	-	■	-	-	-	-	■	■
Maine	-	■	-	-	■	-	-	■
Maryland	-	■	-	-	■	-	-	■
Massachusetts	-	■	-	-	-	-	■	■
Michigan	-	■	-	-	■	-	-	■
Minnesota	-	-	■	-	■	-	-	■
Mississippi	-	■	-	■	-	-	-	■
Missouri	-	■	-	-	■	-	-	■
Montana	-	■	-	-	■	-	-	■
Nebraska	-	■	-	-	■	-	-	■
Nevada	■	-	-	■	-	-	-	■
New Hampshire	-	■	-	-	■	-	-	■
New Jersey	-	■	-	-	■	-	-	■
New Mexico	-	■	-	■	-	-	-	■
New York	-	-	■	■	-	-	-	■
North Carolina	-	-	■	-	■	-	-	■
North Dakota	-	-	■	-	■	-	-	■
Ohio	-	-	■	■	-	-	-	■
Oklahoma	-	■	-	■	-	-	-	■
Oregon	-	■	-	-	-	-	■	■
Pennsylvania	-	-	■	-	■	-	-	■
Puerto Rico	-	■	-	-	■	-	-	-
Rhode Island	-	■	-	-	■	-	-	■
South Carolina	-	■	-	-	■	-	-	■
South Dakota	-	■	-	-	■	-	-	■
Tennessee	-	■	-	-	■	-	-	■
Texas	-	■	-	-	■	-	-	■
Utah	-	■	-	-	-	-	■	■
Vermont	-	■	-	-	-	-	■	■
Virginia	-	-	■	-	■	-	-	■
Washington	-	■	-	-	■	-	-	■
West Virginia	-	■	-	-	■	-	-	■
Wisconsin	■	-	-	-	■	-	-	■
Wyoming	-	-	■	-	■	-	-	■
Reporting States	2	40	10	8	37	1	6	51

⁴³ U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (Feb 1. 2018). *Child Maltreatment 2016*. Retrieved from: <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf>. (pg. 114. PDF pg. 128).



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.

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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

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Advisory Group



Carl Ayers

Virginia Department of Social Services

Tracey Bailey

Virginia Professional Educators

Lori Battin

Court Improvement Program, Office of the
Executive Secretary, Supreme Court of Virginia

Jeremy Bennett

Virginia School Boards Association

Jeanine Harper

Greater Richmond SCAN

Shannon Hartung

Virginia Department of Social Services

Billy Haun

Virginia High School League

Kimberly Irvine

York-Poquoson Department of Social Services

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Virginia Association of School Superintendents

Valerie L'Herrou

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Rebecca Morgan

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Patty Pitts

Virginia Department of Education

Ben Rand

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Dena Rosenkrantz

Virginia Educational Association

Dana Schrad

Virginia Association of Chiefs of Police

Tom Smith

Virginia Association of School Superintendents

Christopher Spain

Families Forward Virginia

Nancy Walsh

Virginia Department of Education

Staff

Amy Atkinson, VCOY

Will Egen, VCOY

David May, Legislative Services

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Standard of proof in a CPS investigation



- The alleged abuser or neglecter 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.

Source: http://www.dss.virginia.gov/files/dssdivision/dss/cpsintro_page/manuals/07-2017/section_5_out_of_family_investigations.pdf

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Definitions



- **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."

Source: http://www.dss.virginia.gov/files/dsdivision/dfs/dfsintro_page/manuals/07-2017/section_8_out_of_family_investigations.pdf

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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.

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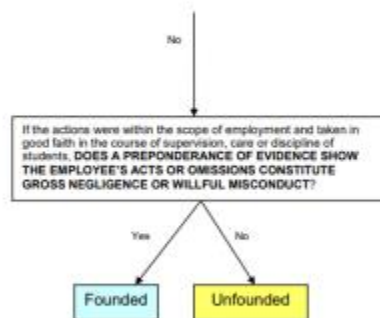
Assessing applicability of § 63.2-1511



Source: http://www.dss.virginia.gov/files/dsdivision/dstcp/intro_page/manuals07-2017/section_8_out_of_family_investigations.pdf

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Assessing applicability of § 63.2-1511



Source: http://www.dss.virginia.gov/files/dsdivision/dstcp/intro_page/manuals07-2017/section_8_out_of_family_investigations.pdf

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Applicable law and regulations



➤ § 63.2-1511 (A)

Language
copied from
Corporal
punishment
§ 22.1-279.1

- 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
similar to
Corporal
punishment
§ 22.1-279.1

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Applicable law and regulations



➤ § 63.2-1511 (B) & (C)

Language
copied from
Corporal
punishment
§ 22.1-279.1

- 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
similar to
Civil immunity
§ 8.01-220.1:2

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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.

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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.

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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.

Child abuse and neglect, founded reports regarding former school employees. SB 184 (Favola), HB 150 (Bulova)
Child abuse and neglect, notice of founded reports to Superintendent of Public Instruction. SB 183 (Favola), HB 389 (Keam)

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Findings & Recommendations

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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

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Findings & Recommendations



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.

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Findings & Recommendations



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.

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Findings & Recommendations



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.

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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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COMMONWEALTH OF VIRGINIA
Commission on Youth

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.