

December 1, 2006

The Honorable John Lynch
Governor of New Hampshire
State House, Room 208
Concord, NH 03301

The Honorable Theodore Gatsas
President of the Senate
State House, Room 302
Concord, NH 03301

The Honorable Doug Scamman
Speaker of the House
State House, Room 308
Concord, NH 03301

Dear Governor Lynch, Senate President Gatsas and Speaker Scamman:

Re: HB 1672-FN, Chapter 289:3, 2006: Establishing a committee to study further improvements in the central registries.

Pursuant to HB 1672-FN, Chapter 289:3, Laws of 2006, enclosed please find the final report of the study committee.

Should you have any questions or comments regarding the report please do not hesitate to contact me.

Respectfully,

Representative Susan Emerson
Chair

Enclosures

cc: Tammy Wright, Senate Clerk
Karen O. Wadsworth, Clerk of the House
Michael York, State Librarian
Members of the Committee

FINAL REPORT

December 1, 2006

HB 1672-FN, Chapter 289:3, 2006

Establishing a committee to study:

- (a) The need for further improvements in the efficiency, effectiveness and accessibility of the registries established pursuant to RSA 161-F:49 and RSA 169-C:35, and to study the provisions of 42 C.F.R. 488.335 (c)-(e);
- (b) The efficiency, effectiveness and accessibility of the criminal records check process and the statutes relative to such checks for those providing care to vulnerable populations, served through the department, including, but not limited to, individuals eligible for or receiving services pursuant to RSA 171-A, RSA 135-C:13, RSA 135-C:14, or programs licensed under RSA 151:2, I(b), (e), or (f), or who is an incapacitated adult as defined in RSA 161-F:43, VII; and
- (c) Whether the department shall make available certain information regarding a complaint about a permitted or licensed child day care agency, under RSA 170-E:17.

MEMBERS OF THE COMMITTEE:

Representative Susan Emerson (Chair)
Mary Castelli, Administrator DHHS
Senator Lou D'Allesandro (Vice Chair)
Joan Fossum, Department of Education
Representative Neal Kurk
Linda Szelog, Director, Little Apples Learning Center
Senator Robert Letourneau
Mary Mc Guire, Attorney, BEAS
Representative Paul Ingbretson
Dennis Powers, Executive Director, CSNI, Inc.
Erica Ungerelli, Parent Representative
Laurel O'Connor, Attorney NH Legal Assistance
Brian Collins, Executive Director, Community Partners
Deirdre O'Hare, NH Child Care Advisory Council
Don Rabun, Long Term Care Ombudsman
Margaret McCabe, Parent Representative
Ann Larney, Office of the Attorney General
Jill Burke, Granite State Independent Living
Richard Cohen, Executive Director, Disabilities Rights Center

The committee elected Representative Susan Emerson Chair and Senator Lou D'Allesandro Vice Chair of the committee. The committee received testimony from the following:

Jeff Kellett, Chief Administrator, NH State Police Criminal Records Unit
Jeff Cahill, Senior Assistant Attorney General
Christopher Domian, Investigator, Attorney General's Medicaid Fraud Unit
Bernard Bluhm, Administrator, DCYF
Mary Griffin, State Representative

Ken Neilsen, Attorney, DHHS Client & Legal Services
Jackie Cowell, Early Learning NH and Task Force Member
Joan Fossum, NH Department of Education and Task Force Member
Lynn Koontz, Administrator BEAS
John Martin, Administrator, Licensing & Regulatory Services
Wendy Kessler, Supervisor, Child Care Licensing
Byry Kennedy, Attorney, DCYF

TESTIMONY:

The HB 1672 committee was charged with studying a variety of issues. There issues included:

- (1) studying the need for further improvements in the efficiency, effectiveness, and accessibility of the registries established pursuant to RSA 161-F:49 and RSA 169-C:35;
- (2) include an examination of 42 C.F.R. 488.335 (c)-(e);
- (3) determine the need, desirability, and feasibility of merging or combining the registries into one registry or otherwise improving access to and between the registries so that all licensed, certified, and funded programs by the department of health and human services and the department of education or other local or state programs have greater access to founded perpetrator information in and across all systems serving children and incapacitated or vulnerable adults;
- (4) study the confidentiality issues concerning complaints and investigations and the public availability of such information relative to licensed child day care agencies;
- (5) study the efficiency, effectiveness and accessibility of the criminal records check process and the statutes relative to such checks for those providing care to vulnerable populations served through the department.

The committee heard testimony that within DCYF there are cases referred to as “Founded Services Only” or “ B Cases” in which the alleged perpetrator acknowledges that abuse or neglect has occurred and enters into a voluntary service plan to address the identified problems. Those who participate in these voluntary cases waive their right to due process and by their own admission are entered into the DCYF Central Registry. Of significant concern is that broadening access to the DCYF registry would have a chilling effect in that perpetrators would not be as willing to cooperate with the investigation or to waive their rights and participate with services on a voluntary basis if DCYF were required to share their findings/records for a purpose and use other than child protection.

The statutory language of RSA 169-C:35 states that it is unlawful for any employer other than those specified in RSA 170-E and 170-G:8-c to require as a condition of employment that an employee submit his or her name for review against the registry. Thus, any requirement to the contrary would necessitate a change to this statute.

Consideration must also be given to the federal regulations pertaining to the DCYF Registry as there are regulations for state automated child welfare information systems (SACWIS). SACWIS are funded and supported largely by federal funds. In part this is for

the purpose of gathering non-identifying information about child placement and child abuse and neglect required by the US Dept of Health & Human Services. There are federal provisions that DCYF must follow to maintain SACWIS compliance and continued federal funding for the system. One requirement is that the DCYF Central Registry must be contained within Bridges (NH's SACWIS) by July 2007. The federal requirements limit who can have access to the information. Thus, any broadening of access to the registry could jeopardize federal funding.

In light of these factors the Task Force determined that access to the DCYF registry beyond the current framework by those who have access to the new adult registry should only be to founded cases on the DCYF registry where the perpetrator was a paid caregiver, not a natural or adoptive parent. This limited access would not undermine the intent of the DCYF mission and undercut the ability to get voluntary agreements from parents on alleged parental abuse and neglect cases. Additionally the access should not violate federal requirements.

Testimony illustrated that the some of the purposes of the DCYF registry and the current BEAS database were unique to their respective populations and that the standards and criteria utilized by each agency in determining placement on the registry/database differed. On the other hand there were some similarities in purpose and function. As indicated the above recommended limited access to the DCYF registry accommodates the differences and promotes the similarities in that it will help prevent perpetrators in paid care giving situations from moving from the child care to the adult/disability care systems and making sure that prospective employers have all relevant information.

The Task Force also determined that persons who have access to the DCYF registry would also benefit from access to the adult registry. Accordingly a recommendation has been made to permit or mandate that. Whether it should be permissive vs. mandatory the Commission leaves to the Legislature and Governor to decide through the necessary legislation.

The Task Force heard testimony regarding the complaint investigation process involving individuals who are mentally ill or developmentally delayed where it is alleged that there has been a violation of their rights as clients of services. Client Rights investigators employed or hired by community mental health centers and/or Area Agencies conduct all investigations and every investigation is reviewed by the department through the Office of Client and Legal Services. As required, any allegation of abuse, neglect or exploitation is reported to BEAS pursuant to RSA 161-F:46. The investigations conducted by Client Rights investigators focus upon what can be done programmatically to assure that a rights violation, if found, does not reoccur. The focus in a client rights investigation is on the client not the perpetrator and investigations are designed to improve the service delivery system.

That the language in HB 1672 referencing 42 CFR 488 (c)-(e) is incorrect. The correct citation is 42 CFR 488.335 (c)-(e).

That when a complaint is made against a child care/family center, the department cannot release information until the investigation, including law enforcement investigation is complete and, then only if it is founded. However, when there are charges of sexual misconduct, department staff meet with child care/family center owners/administrators and

develop an agreement to assure protection of the children during an investigation and makes spot checks to insure that appropriate safeguards have been implemented and are being followed.

Testimony on behalf of the Early Learning NH whose membership includes both family and center-based child care provider agencies indicated that while they support FBI criminal record checks, they are concerned about the costs. Under current law, FBI checks must be done every three years. Family child care providers must include all family members, which can be costly. In addition, if a child care staff member works at an organization that has several sites, the staff member must have an FBI criminal check for each work site, again a significant cost. There was also concern expressed that when an allegation is made against a child care provider which results in an investigation, that public disclosure of information prior to a determination may have negative consequences for the children, parents and provider.

The committee heard testimony regarding childcare licensing. This testimony is contained in the HB 1672 meeting minutes dated 10/19/06 and attached hereto as Attachment "A".

The Department of Education advised that local school districts conduct criminal record checks pursuant to RSA 189:13(a) to determine if a prospective employee has a criminal background that should disqualify them from employment. Further, an employee's certification could be denied, revoked or suspended for "incompetence, a felony conviction, misconduct or falsification of information." An investigation is conducted by the Department of Education to determine if certification should be revoked. Local school officials also follow the reporting requirements pursuant to RSA 169-C:34.

BEAS presently maintains a database that contains data on all cases of founded abuse, neglect and exploitation against vulnerable, incapacitated adults. HB 1672 as currently written does not mandate inclusion of family members who are determined to have abused, neglected or exploited another family member. By excluding family members from the registry, that individual could pursue employment with a vulnerable population. Consideration should be given to inclusion of family members on the registry.

There are state statutes that require both a NH and an FBI criminal records check including RSA 189:13 (a) that includes those employed in education. The NH Board of Nursing also specifically requires a criminal records check. An employee requesting a NH criminal record check must pay \$15.00 per request and \$24.00 per request for an FBI criminal record check. In addition to the \$24.00 fee, in order to determine if information exists in other states concerning criminal convictions, an applicant must agree to have a fingerprint card sent to the FBI.

Federal regulations require that no data received from the FBI be kept by the NH State Police Criminal Records Unit related to out-of-state convictions. The only information retained are convictions in NH that had not yet been recorded in the NH database. If there is a criminal conviction in NH that does not appear in the FBI records, that information is provided to the FBI.

By statute the NH State Police Criminal Records Unit can only release conviction records for non law enforcement use. Thus, a criminal records check would not reveal any

indication that an individual has been arrested. In addition, there does exist a lag time between a court issuing a disposition and that conviction being recorded by the Criminal Records Unit due to the receipt of thousands of records and record requests received daily. Although the current backlog in NH is currently 10 months, an initiative is underway to reduce this backlog by the first of the year.

Concerns were raised regarding the potential liability for the State arising from a requirement that an employer must obtain a waiver from the department prior to hiring any individual who is on the adult abuse and neglect registry.

SUMMARY CONCLUSIONS:

Based upon the testimony, as summarized above, the committee believes that the efficiency, effectiveness and accessibility of the registries could be improved and submits the following recommendations for consideration.

RECOMMENDATIONS:

- 1) That it is not desirable or feasible to combine the registries established pursuant to RSA 161-F:49 and RSA 169-C:35, to create one single registry.
- 2) That improvement to the access to and between registries is desirable and supported by the task force as described in recommendations 3 and 4, with the condition that the legislature provides adequate funding.
- 3) That subject to adequate funding for implementation, a person who is required to request a DCYF registry check should be permitted to request a HB 1672 registry check. They shall be entitled only to the date that the abuse, neglect or exploitation occurred and the date the finding was entered into the registry. The Task Force did not decide on whether this should be a mandatory requirement or merely permissive, and left that issue to the Legislature to decide.
- 4) That subject to adequate funding for implementation, a person who is required to perform a registry check under HB 1672 shall also be required to check the DCYF registry, but only may have access to information on individuals who are paid caregivers, including foster parents, on the DCYF registry pursuant to RSA 169-C:35.
- 5) That HB 1672, RSA 161-F:49 VII, be amended to remove the requirement that an employer obtain a waiver from the department prior to hiring an individual on the registry and to provide as follows. "All employers of programs which are licensed, certified, or funded by the department to provide services to individuals shall be required before hiring a prospective employee who may have client contact to submit his or her name, for review against the registry of founded reports of abuse, neglect, and exploitation to determine whether the person is on the registry. The employer, upon receiving notice that a prospective employee is on the registry and in order to determine whether he or she should be hired, may request permission from the

prospective employee for the authority to obtain further information from the department about a founded case of abuse, neglect, or exploitation in accordance with department rules. Any individual hiring a caregiver directly, or through an authorized representative or fiscal intermediary, to provide personal care services, as defined in RSA 161-E or RSA 161-I, may, with the consent of the prospective employee, submit the prospective employee's name for review against the registry and, if the prospective employee is on the registry, and with the further permission of the prospective employee, obtain information about any founded case. It shall be unlawful for any employer other than those specified under this paragraph to require as a condition of employment that the employee submit his or her name for review against the registry of founded reports of abuse, neglect, or exploitation and any violation of this provision shall be punishable as a violation. Nothing herein shall preclude an employer from obtaining information from other sources."

- 6) The legislature should consider whether or not to amend the language of HB 1672 to include maintaining a record of information on each case of alleged abuse, neglect or exploitation toward an individual by a family member. We recommend that the bureau of elderly and adult services adopt rules to retain founded reports for a period of 7 years and retain unfounded reports for a period of 6 months as required by RSA 161-F:49.
- 7) Subject to adequate funding for implementation, the legislature should consider amending RSA 170-E, by adding new sections, RSA 170-E:7-a Criminal Charges Pending; Action to be Taken By Licensed Providers, as set forth in Attachment "B".
- 8) That the Legislature determine whether the costs for child care providers related to a national record check should be funded in part, by the Legislature.
- 9) That the legislature consider amending RSA 170-E:7 to address the financial burden due to costs incurred by employers and employees due to requirements for multiple record checks when employed by the same provider at different sites within the same three year period of time before a new national criminal record check is required.

Recommendations of the HB 1672 Task Force, if adopted, will require a review of, and possible legislative changes to, RSA 169-C, RSA 170-E and RSA 161-F to ensure statutory consistency.

Respectfully submitted on behalf of the committee,

Representative Susan Emerson (Chair)

ATTACHMENT “A”

Draft Meeting Minutes of HB 1672 Task Force

October 19, 2006

Present: Representative Susan Emerson, Senator Robert Letourneau, Linda Szelog, Little Apples Learning Center, Deirdre O'Hare, NH Child Care Advisory Council, Ann Larney, Attorney General's Office, Alyssa Pockell, Joan Fossum, Department of Education, Richard Cohen, Disabilities Rights Center, Don Rabun, Office of the Long-Term Care Ombudsman, Mary Castelli, Department of Health and Human Services, Brian Collins, Community Mental Health Centers, and Dennis Powers, Community Support Network, Inc.

Representative Susan Emerson called the meeting to order at 1 pm.

Providing Testimony: Lynn Koontz, Bureau of Elderly and Adult Services (BEAS) Adult Protective Services Administrator, Attorney John B. Martin, Administrator of Licensing and Regulatory Services, and Wendy Kessler, Supervisor of the Bureau of Child Care Licensing.

Lynn Koontz introduced herself and advised that she wished to open her testimony with an overview of the adult protective services statute (RSA 161-F:42-57). She noted that this statute was developed in 1978 and passed into law in 1979. Lynn Koontz reminded the task force members that this is a civil, not a criminal, statute with a focus on providing remedies, not punishment.

She read the Purpose section of the statute:

161-F: 42 Purpose

The purpose of this subdivision is to provide protection for incapacitated adults who are abused, neglected, or exploited. Implicit in this subdivision is the philosophy that whenever possible an adult's right to self-determination should be preserved, and that each adult should live in safe conditions and should live his own life without interruption from state government. Only when these principles become impossible to follow should legal proceedings be initiated in order to care for and protect such adults.

Lynn Koontz testified that this statute addresses incapacitated adults from 18-59 and older adults in all settings. She noted that the statute has a mandatory reporting requirement, one of the first adult protective services statutes in the country to require mandatory reporting, by virtually everyone. She also noted that there is a liability section that states that any person or agency, other than an alleged perpetrator, participating in good faith in the making of a report of an alleged incident of adult abuse, neglect or exploitation, has immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. She also testified to the Confidentiality requirements under the statute noting that records related to adult protective services investigations shall only be released to law enforcement, under court order or to those providing services to the incapacitated adult, but only to the extent necessary to protect the incapacitated adult. She noted that unlike the child protection act, the statute provides no legal authority to remove people from bad situations and the statute cannot compel someone to accept adult protective services. She noted that all service delivery is voluntary. However, she explained that through skillful use of social work techniques her staff can often engage a client who has expressed no interest in services by persuading them to allow additional visits by the adult protective services workers (APSWs) who monitor the situation and attempt to persuade the client to accept needed services. She noted that in the array of services that BEAS can offer, the counseling services offered by the APSWs is the most effective.

Lynn Koontz next testified about the due process afforded to those initially determined to have committed abuse, neglect and financial exploitation. She advised that if determined to have committed abuse, neglect or financial exploitation, the alleged perpetrator is provided a letter indicating the determination of the case and the reasons for the finding(s). The letter also affords the alleged perpetrator an appeal if they disagree with the determination. They may first appeal to the supervisor of the APSW who will hold a hearing to consider any new information not available at the time of the determination. If the supervisor upholds the original determination, the alleged perpetrator may make another appeal in which a hearing is held and Administrator Koontz makes a ruling. If still unsatisfied, the alleged perpetrator can make an appeal to the Administrative Appeals Unit and finally to the Supreme Court, if still unsatisfied. She noted that BEAS does not overturn many and there are only about forty-five appeals each year.

Lynn Koontz testified that BEAS is obligated to report to law enforcement if a crime has been committed.

Under the statute investigations must be initiated within seventy-two hours by the APSWs and the investigation must be completed within forty-five days. Services can be offered and provided prior to the close of an investigation.

She noted that there are forty APSWs in the ten district offices and at the state office.

Lynn Koontz shared statistics on adult protective services activities with the members of the task force.

She noted that BEAS Adult Protective Services investigates physical abuse, sexual abuse, emotional abuse, financial exploitation, neglect and self-neglect. She noted that self-neglect reports are the most frequently investigated reports by adult protective services.

One of the task force members reacted to a comment in which the phrase, "legitimate reports of abuse or neglect" was made. Lynn Koontz explained that there is an ability to rule out reports that are received that do not meet the statutory requirements, such as reports related to victims who are not incapacitated. She further noted that adult protective services tends to err on the side of caution and investigate to determine the circumstances and explore if the alleged victim is someone who could benefit from voluntary services.

Richard Cohen posed the question is current data like that that comprised the statistics that were shared kept in a database?

Lynn Koontz confirmed that this data is kept in a database.

He then asked, "What more must you do to develop the database into the Central Registry by July 2007 as required in the statute?"

Lynn Koontz noted that prior to this legislation passing, the intent had been to have a central registry for all perpetrators of abuse and neglect, not just paid caregivers, but also family members. She noted that the original intent possibly exceeds the scope of the legislative requirements.

There was discussion that a family member who abuses, neglects or exploits a family member could later pursue employment with a vulnerable population and including this information on the BEAS Central Registry might be beneficial.

Brian Collins offered a compliment to the APSWs who investigate with the clients' rights investigators. He did note that sometimes their determinations vary from each other. It was noted that this might be due to different definitions and different standards.

A question arose about conducting joint investigations and Lynn Koontz testified that BEAS does not usually do that. She noted that Developmental Services and Behavioral Health focus on systemic issues and that adult protective services focuses upon an individual's actions or inaction.

Brian Collins posed the question, "Does the law, as currently written, pose any problems?"

Lynn Koontz testified that it might be confusing to meld different registries together and that a staff person with access to the various registries could share information as required.

Richard Cohen noted that when two investigations are conducted on the same incident and the investigators arrive at different findings, the person determined to have a founded case might argue that this should be reversed on appeal because the other investigating entity made an unfounded determination.

A discussion ensued as to what will transpire if two different investigators determine different findings. It was noted that DHHS could determine who will make entries in the adult protective services central registry in HB 1672.

Another discussion ensued about systemic, rather than individually focused investigations and the relative merits of each system. Systemic investigations explore the facts to determine if there is an apparent need for changes to policies, practices and/or procedures to assure that the likelihood of a client or resident suffering a negative consequence is minimized. Individually focused investigations attempt to determine responsibility for an act, or an omission, that resulted in abuse, neglect or financial exploitation.

There was a question of whether the substantiation rate was higher by the clients' rights investigators or the adult protective service workers and the fact that alleged perpetrators have no due process rights in clients' rights investigations was also discussed as a factor that could influence the substantiation rate.

Brian Collins stated that staff members who are founded to have committed abuse, neglect or exploitation are afforded due process in the personnel actions taken against them by the agencies in which they are employed.

Lynn Koontz noted that a determination of unfounded doesn't necessarily mean that the incident did not occur. She noted that cross-pollination of registries could be beneficial.

There was a discussion related to whether a person being entered onto the Adult Protective Services Central Registry should always be precluded from employment. Suggestions were made in which a person on the central registry could still be allowed to work in some capacities in agencies serving vulnerable populations based upon a waiver process or that the central registry could have tiers of complaint types that, if founded, would preclude all perpetrators in the most grievous categories from employment, but still allow others with founded determinations for lesser offenses opportunities to work in agencies serving vulnerable populations.

Next, Attorney John B. Martin, Administrator of Licensing and Regulatory Services, and Wendy Kessler, Supervisor of the Bureau of Child Care Licensing, offered testimony.

Handouts were provided to the task force members including Statistics on Complaints 2000-2006, a redacted Complaint Findings and Disposition (CFD) report, statutes (RSA 170-E:7, 10, 17 and 19) and rules (He-C 4002.08 and 09).

It was noted in Ms Kessler's testimony that there are both licensed and unlicensed child care centers operating in New Hampshire. The Bureau of Child Care Licensing responds to complaints received from children, parents and from child care staff members by investigating so long as the reported incident occurred within the last six months and the reporter must have witnessed the concern directly. In addition, the report must constitute a critical rule violation, which are the rules, that if not followed, suggest a potential of harm.

Ms. Kessler testified about the complaint process, indicating that the licensing coordinator contacts the complainant after a complaint is received. The licensing coordinator then visits the child care center and interviews the child, the staff and reviewed the record. The parents are not notified of the investigation unless permission is sought from the parent to interview their child or the parent was the complainant. Depending upon the allegations the licensing coordinator might also have collateral contacts with the Division for Children, Youth and Families, law enforcement and parents of children at the child care center. If the matter is determined to be unfounded, the child care provider is notified and the complainant is also notified, if the complainant expressed a wish to be notified. If the investigation is founded a Complaint Findings and Disposition (CFD) report is issued. In founded cases, the provider must develop and submit a corrective plan of action within three weeks to the Bureau of Child Care Licensing. A statement of findings is public information and is posted on the bureau website. It was noted that unfounded does not necessarily mean that an incident did not occur despite a thorough investigation, it is sometimes not possible to make a determination based on the evidence. The Bureau of Child Care Licensing utilizes a preponderance standard of evidence in its investigation process.

Senator Letorneau asked, "To what extent does the Bureau of Child Care Licensing limit discipline in child care centers?"

Wendy Kessler advised that there is a large section of the rules addressing discipline that are broken-out as either critical or non-critical.

If a complaint is very serious and/or a repetitive concern, a child care license can be limited, suspended or revoked.

Task force member, Deirdre O'Hare, noted that the child care providers have concerns about the Bureau of Child Care Licensing releasing information before an investigation is completed, a matter that has been discussed in previous task force meetings. In support of her contention, she asked the task force members to take note of the large number of unfounded investigations.

Task force members complimented the representatives of the Bureau of Child Care Licensing for a transparent and efficient process.

A question was raised, "If self reports are posted on the web, could this result in the number of self reports?"

Staff from the Bureau of Child Care Licensing testified that the Statement of Findings (SOF) would reflect that the provider reported the matter.

Senator Letourneau noted that there were fewer complaints against unlicensed child care centers than licensed child care centers and asked for an explanation of this data.

It was noted that child care centers that are not licensed are not subject to the rules for licensed child care facilities and there are fewer matters that can be investigated in unlicensed childcare centers.

It was also noted that the number of founded investigations has gone up and the number of unfounded has diminished over the years that the statistics cover. A question was raised about whether there was an explanation for this trend.

John Martin advised that they have no clear reason for this trend.

It was noted that child care could be provided legally or illegally in unlicensed child care centers. An unlicensed child care center cannot provide care to more than three children in addition to the children of the unlicensed provider.

When an unlicensed provider is identified they are sent a certified cease and desist letter and offered assistance in becoming a licensed provider. A follow-up visit then occurs to determine either compliance with the cease and desist order or to offer technical assistance and assist them with becoming licensed. If the unlicensed provider does not wish to become licensed and continues to operate providing care to more than three children, other than their own, the Bureau of Child Care Licensing sometimes proceeds to court for injunctive relief. It was noted that these illegal, unlicensed child care providers could be fined.

A licensing action can occur before a hearing, but if the providers appeal, they can continue to operate until the hearing. RSA 541-A:30 does allow for the revocation of a license, but must have a hearing within ten days.

Complaints related to child abuse and neglect are referred to the Division for Children, Youth and Families (DCYF). However, determinations made by the Bureau of Child Care Licensing are not entered onto the DCYF Central Registry.

A question was posed, "If a child care staff member is accused of abuse or neglect, do you have the authority to compel administrative leave?"

John Martin testified that the Bureau of Child Care Licensing cannot compel an administrative leave. However, it was noted that if a family member is accused of abuse or neglect, an agreement is negotiated with the child care provider that limits the accused any access to children. The Bureau of Child Care Licensing make visits to assure that the provider is complying with the agreement and, if not, the bureau can take further action.

John Martin further testified that the Department of Health and Human Services and Bureau of Child Care Licensing is limited by statute as to what can be shared prior to the completion of an investigation. Records can only be released by court order and only to law enforcement if they are co-investigating with the Bureau of Child Care Licensing. He testified that the Bureau of Child Care Licensing retains unfounded investigations for one year. He

further noted that there is no expungement statute, but that by policy investigations completed by the Bureau of Child Care Licensing are expunged in one year.

Task force member, Ann Larney, advised that it might be important to retain unfounded records for a year because it may be necessary to defend legal actions initiated against state government.

It was noted that some other states allow more information to be shared during the investigation. It was further suggested that this task force explore these processes utilized in other states.

A question was posed, “When there is a joint Bureau of Child Care Licensing - law enforcement investigation, does the Bureau of Child Care Licensing issue its findings upon completion or await the completion of the law enforcement investigation?”

John Martin testified that the Bureau of Child Care Licensing usually waits to release its findings until the law enforcement investigation is completed.

Deidre O’Hare advised that she has seen a lot of crossover from caregivers in long-term care to child care and vice versa.

Wendy Kessler advised that she feels that access to information about other founded cases in areas other than child care would be beneficial.

It was noted that the task force has two charges; One, to determine if potential employers can have access to all registries; and, two, to determine if the Bureau of Child Care Licensing should release information that an investigation at a child care center has been initiated.

NEXT MEETING: November 2, 2006, at 1 pm in Room 205 in the Legislative Office Building.

ATTACHMENT “ B”

CHAPTER 289

HB 1672-FN – FINAL VERSION

07Mar2006... 1140h

04/20/06 1795s

05/03/06 1975s

24May2006... 2381eba

2006 SESSION

06-2748

01/04

HOUSE BILL ***1672-FN***

AN ACT relative to a registry for founded cases of abuse, neglect, or exploitation of incapacitated adults, relative to certain background checks, and establishing a task force relative to central registries.

SPONSORS: Rep. Naro, Graf 7; Rep. Carson, Rock 3; Rep. Whalley, Belk 5; Rep. Bleyler, Graf 9; Rep. Hagan, Hills 17; Sen. Martel, Dist 18; Sen. Estabrook, Dist 21; Sen. Green, Dist 6; Sen. Hassan, Dist 23

COMMITTEE: Health, Human Services and Elderly Affairs

AMENDED ANALYSIS

This bill:

I. Requires employers of programs licensed, certified, or funded by the department of health and human services to check the backgrounds of certain prospective employees against the registry for founded cases of abuse, neglect, or exploitation of incapacitated adults.

II. Clarifies the criminal records check procedures for child day care providers.

III Establishes a task force to study certain registries.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

07Mar2006... 1140h

04/20/06 1795s

05/03/06 1975s

24May2006... 2381eba

06-2748

01/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Six

AN ACT relative to a registry for founded cases of abuse, neglect, or exploitation of incapacitated adults, relative to certain background checks, and establishing a task force relative to central registries.

Be it Enacted by the Senate and House of Representatives in General Court convened:

289:1 Elderly and Adult Services; Immunity From Liability. Amend RSA 161-F:47 to read as follows:

161-F:47 Immunity From Liability. Any person or agency, other than an alleged perpetrator, participating in good faith in the making of a report of an alleged incident of adult abuse, neglect or exploitation, providing information relative to such incident or following a reporting protocol developed jointly with the department, ***or who in good faith investigates the report, administers the registry, or who participates in a judicial or administrative proceeding resulting from that report***, shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any person or agency providing information in good faith, including materials requested by the department pursuant to RSA 161-F:56, shall have the same immunity with respect to participation in any investigation by the commissioner or his authorized representative or in any judicial proceeding resulting from such report.

289:2 Registry for Founded Cases of Abuse, Neglect, or Exploitation of Incapacitated Adults. RSA 161-F:49 is repealed and reenacted to read as follows:

161-F:49 Registry.

I. There shall be established a state registry of abuse, neglect, and exploitation reports at the department for the purpose of maintaining a record of information on each case of alleged abuse, neglect, or exploitation toward an individual by a paid or volunteer caregiver or a caregiver hired or obtained by an agency, individual, family, or guardian. Unfounded cases shall not be maintained on the registry. The department shall maintain statistical, non-identifying information on founded cases as the department determines is necessary to track and address trends. This section shall apply in each case of abuse, neglect, or exploitation by a paid caregiver toward an individual that is founded by an investigator. For the purposes of this section:

(a) “ Individual” means an individual found eligible for or receiving services pursuant to RSA 171-A, RSA 135-C:13, RSA 135-C:14, RSA 161-E, RSA 161-I, or programs licensed under RSA 151:2, I(b), (e), or (f), or who is an incapacitated adult, as defined under RSA 161-F:43, VII.

(b) The investigators shall be designated or employed by the department, in accordance with a protocol developed by the department to ensure objectivity, thoroughness, timeliness, and uniformity in methodology and format in the conduct of investigations and investigation reports. The investigators may include investigators employed by area agencies or community mental health centers, if designated by the department.

II. Within 5 business days of completion of an investigation report by an investigator of alleged abuse, neglect, or exploitation by a caregiver of an individual, the investigator shall provide the investigation report to the commissioner, or designee. Except as provided in paragraph IV, for a founded report, the commissioner, or designee, shall, within 5 business days, notify the perpetrator:

(a) Of the founded case against him or her and that such information shall be entered on the registry and the consequences of such a finding.

(b) Of the right to contest the finding by appealing within 10 business days.

(c) Of the right to receive a full and fair administrative hearing, including the right to be represented by counsel at his or her own expense.

(d) Of the right to appeal an adverse administrative hearing decision to the probate court in accordance with paragraph V.

(e) That he or she may petition the probate court to expunge his or her name from the registry pursuant to RSA 161-F:49, IX.

III. Except as provided in paragraph IV, for a founded report, the commissioner, or designee, shall notify the employer:

(a) Relative to a prospective employee who is not on the registry of that fact within 5 days of receipt of a request from the employer.

(b) Relative to a prospective employee who is on the registry of that fact within 5 business days of receipt of the request from the employer, and the employer shall include in the notice the date the person was placed on the registry.

IV. A founded case of abuse, neglect, or exploitation, and other information the commissioner deems appropriate, shall be entered on the registry upon:

(a) Expiration of the 10-day period for appeal when the perpetrator does not request an appeal.

(b) An administrative hearing officer sustaining the finding, unless an appeal is filed in accordance with paragraph V and an order of stay is issued by the probate court.

V. If the finding is sustained after an administrative hearing, a person shall have the right to appeal as follows:

(a) A person may file a petition in the Merrimack county probate court to review the final order by the commissioner, or designee, within 30 days of the date of the final order. Jurisdiction to hear such appeals is vested in the Merrimack county probate court.

(b) At the earliest practical time, the court shall review the record as developed before the commissioner, or designee, together with any written legal argument presented to the court. Based on that review, the court may affirm or reverse the decision of the commissioner, or designee, or order that oral argument be held. As justice may require, the court may remand the case to the commissioner, or designee, for further findings or rulings. The petition for appeal shall set forth all the grounds upon which the final order is sought to be overturned. Issues not raised by the appellant before the commissioner, or designee, shall not be raised before the probate court. The burden of proof shall be upon the appellant to show that the decision of the commissioner, or designee, was clearly unreasonable or unlawful, and all findings of the commissioner, or designee, upon all questions of fact properly before him or her shall be deemed to be prima facie lawful and reasonable. The order or decision appealed from shall not be vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence, that the order is unjust or unreasonable.

(c) No new or additional evidence shall be introduced in the probate court. The case shall be determined upon the record and evidence transferred, except that in any case, if it shall be necessary in order that no party shall be deprived of any constitutional right, or if the court determines that justice requires the reception of evidence of facts which have occurred since the hearing, or which by reason of accident, mistake, or misfortune could not have been offered before the commissioner, or

designee, it shall remand the case to the commissioner, or designee, to receive and consider such additional evidence.

VI. If it is determined by the investigator or after a hearing requested pursuant to subparagraph II(c) that a founded case was caused by factors beyond the control of the perpetrator, then the finding shall not be entered onto the registry as founded.

VII. All employers of programs which are licensed, certified, or funded by the department to provide services to individuals shall be required before hiring a prospective employee who may have client contact to submit his or her name, for review against the registry of founded reports of abuse, neglect, and exploitation to determine whether the person is on the registry. The employer shall not hire the prospective employee if the person is listed on the registry with a founded case of abuse, neglect, or exploitation, unless the employer requests and obtains a waiver from the department to hire such person. The employer, upon receiving of notice that a prospective employee is on the registry and in order to determine whether he or she should request a waiver from the department to be hired, may request permission from the prospective employee for the authority to obtain further information about a founded case of abuse, neglect, or exploitation. Any individual hiring a caregiver directly, or through an authorized representative or fiscal intermediary, to provide personal care services, as defined in RSA 161-E or RSA 161-I, may, with the consent of the prospective employee, submit the prospective employee's name for review against the registry and, if the prospective employee is on the registry, and with the further permission of the prospective employee, obtain information about any founded case. The individual shall not be required in such situations to obtain a waiver prior to hiring a person on the registry. It shall be unlawful for any employer other than those specified under this paragraph to require as a condition of employment that the employee submit his or her name for review against the registry of founded reports of abuse, neglect, or exploitation and any violation of this provision shall be punishable as a violation.

VIII. Founded reports of abuse, neglect, or exploitation shall be retained for a period of 7 years subject to an individual's right to petition for the earlier removal of his or her name from the registry as provided in this section.

IX. Any individual whose name is listed in the founded reports maintained on the central registry may petition the probate court to have his or her name expunged from the registry as follows:

(a) A petition to expunge shall be filed in the probate court where the petitioner resides or where the abuse, neglect, or exploitation occurred.

(b) A petition to expunge shall be filed on forms provided by the probate courts. The petition shall include certified copies of the petitioner's criminal record and may include any other information the petitioner deems relevant.

(c) When a petition to expunge is filed, the probate court shall require the department to report to the court concerning any additional founded abuse, neglect, or exploitation reports relative to the petitioner and shall require that the petitioner submit the petitioner's name, birth date, and address to the state police to obtain information about criminal convictions. The court may require the department to provide any additional information that the court believes may aid it in making a determination on the petition.

(d) Upon the receipt of the department's report, the court may act on the petition without further hearing or may schedule the matter for hearing at the request of either party. If the court determines that the petitioner does not pose a present threat to the safety of adults and has exhibited best efforts to eliminate the likelihood of reoccurrence of the type of behavior that resulted

in his or her entry onto the registry, the court shall grant the petition and order the department to remove the individual's name from the registry. Otherwise, the petition shall be dismissed.

X. The department shall, in the notice it sends out pursuant to RSA 161-F:49, II(a), notify the perpetrator of his or her right to petition to have his or her name expunged from the registry. No petition to expunge shall be brought within one year from the date that the petitioner's name was initially entered on the registry. If the petition to expunge is denied, no further petition shall be brought more frequently than every 3 years thereafter.

XI. The commissioner shall adopt rules, pursuant to RSA 541-A, relative to:

(a) Setting forth the process and criteria for requesting and granting a waiver pursuant to RSA 161-F:49, VII.

(b) Safeguarding the confidentiality of and access to the registry except for the functions necessary to comply with this section. Such safeguards shall include limitations on which persons in an employment situation may request and access the names of persons on the registry.

289:3 Task Force Established.

I. There is established a task force to study:

(a) The need for further improvements in the efficiency, effectiveness, and accessibility of the registries established pursuant to RSA 161-F:49 and RSA 169-C:35. The task force shall also study the provisions of 42 C.F.R. 488(c)-(e);

(b) The efficiency, effectiveness, and accessibility of the criminal records check process and the statutes relative to such checks for those providing care to vulnerable populations, served through the department, including, but not limited to, individuals eligible for or receiving services pursuant to RSA 171-A, RSA 135-C:13, RSA 135-C:14, or programs licensed under RSA 151:2, I(b), (e), or (f), or who is an incapacitated adult as defined in RSA 161-F:43, VII; and

(c) Whether the department shall make available certain information regarding a complaint about a permitted or licensed child day care agency, under RSA 170-E:17.

II. The task force may form such subcommittees as deemed appropriate.

289:4 Membership and Compensation.

I. The members of the task force shall be as follows:

(a) Two members of the house of representatives, appointed by the speaker of the house of representatives.

(b) Two members of the senate, appointed by the president of the senate.

(c) The commissioner of the department of health and human services and a member appointed by the commissioner of the department of health and human services, or 2 designees.

(d) The long-term care ombudsman, department of health and human services.

(e) The commissioner of the department of education, or designee.

(f) The attorney general, or designee.

(g) A representative of the Disabilities Rights Center, appointed by the center.

- (h) A representative of New Hampshire Legal Assistance, appointed by such office.
- (i) A representative of the Community Support Network, Inc. of New Hampshire, appointed by the network.
- (j) A representative of the New Hampshire Community Behavioral Health Association, appointed by the association.
- (k) A representative of Granite State Independent Living Foundation, appointed by such foundation.
- (l) A representative of the Child Care Advisory Council, appointed by such council.
- (m) A representative of a licensed child day care agency, appointed by the commissioner of the department of health and human services.
- (n) Two parents of children attending a licensed child day care agency, appointed by the commissioner of the department of health and human services.

II. The task force shall solicit information from any other person or entity the task force deems relevant to its study.

III. Legislative members of the task force shall receive mileage at the legislative rate when attending to the duties of the task force.

289:5 Duties. The task force shall study the need for further improvements in the efficiency, effectiveness, and accessibility of the registries established pursuant to RSA 161-F:49 and RSA 169-C:35 and shall include in its study an examination of 42 C.F.R. 488(c)-(e). The task force shall determine the need, desirability, and feasibility of merging or combining the registries into one registry or otherwise improving access to and between the registries so that all licensed, certified, and funded programs by the department of health and human services and the department of education or other local or state programs have greater access to founded perpetrator information in and across all systems serving children and incapacitated or vulnerable adults. The task force shall also study the confidentiality issues concerning complaints and investigations and the public availability of such information relative to licensed child day care agencies.

289:6 Chairperson; Quorum. The members of the task force shall elect a chairperson from among the members. The first meeting of the task force shall be called by the first-named house member. The first meeting of the task force shall be held within 45 days of the effective date of this section. Nine members of the task force shall constitute a quorum.

289:7 Report. The task force shall report its findings and any recommendations for proposed legislation to the speaker of the house of representatives, the president of the senate, the house clerk, the senate clerk, the governor, and the state library on or before December 1, 2006.

289:8 State Registry and Criminal Records Check; Revocation of Registration and Withholding of State Funds. RSA 170-E:7, I and II are repealed and reenacted to read as follows:

I. Child day care providers who are required to be licensed or registered according to the provisions of this chapter shall, no later than an individual's first day of employment, which individual is responsible for the care of, or having regular contact with children, and upon adding new household members or other individuals who will have regular contact with children, submit to the department, the names, birth names, birth dates, and addresses of such individuals and other information required by the department as prescribed by rules adopted by the commissioner under RSA 541-A. The persons described in this paragraph shall submit to the department a notarized criminal history records release form, as provided by the New Hampshire division of state police, which authorizes

the release of the person's criminal records, if any. The person shall submit with the release form a complete set of fingerprints taken by a qualified law enforcement agency or an authorized employee of the department. In the event that the first set of fingerprints is invalid due to insufficient pattern, a second set of fingerprints shall be necessary to complete the criminal history records check. If, after 2 attempts, a set of fingerprints is invalid due to insufficient pattern, the department may, in lieu of the criminal history records check, accept police clearances from every city, town, or county where the person has lived during the past 5 years.

II.(a) The department shall, for every name submitted on an application, in the registration process, and for each individual for whom information is required to be submitted pursuant to paragraph I, review the names, birth names, birth dates, and current and previous addresses of such persons against the state registry of founded abuse and neglect reports.

(b) The department shall submit the criminal history records release form to the New Hampshire division of state police, which shall conduct a criminal history records check through its records and through the Federal Bureau of Investigation. Upon completion of the background investigation, the division of state police shall release copies of the criminal conviction records to the department. The department shall maintain the confidentiality of all criminal history records information received pursuant to this paragraph.

(c) The costs of criminal history record checks shall be borne by the child day care provider; provided, that the child day care provider may require an applicant to pay the actual costs of the criminal history check of the employee.

289:9 Effective Date.

I. Sections 3-7 and 9 shall take effect upon its passage.

II. The remainder of this act shall take effect July 1, 2007.

Approved: June 15, 2006

Effective: I. Sections 3-7 and 9 shall take effect June 15, 2006

II. Remainder shall take effect July 1, 2007

DRAFT FOR DISCUSSION PURPOSES ONLY

Amend RSA 170-E by adding the following new sections:

RSA 170-E:7-a Criminal Charges Pending; Action to be Taken By Licensed Providers

I. If any person required to undergo a criminal records check in accordance with this chapter has been charged by law enforcement officials with a crime against a child, or of a crime which shows that the person might be reasonably expected to pose a threat to a child, such as a violent crime or a sexually-related crime against an adult, the licensee shall take the following action:

(a) The licensee shall immediately notify the department of the pending charges.

(b) If the licensee is the subject of the charges, the provider shall surrender the license and cease operating as a licensed provider while the charges are pending.[Subject to further discussion]

(c) If the individual who has been charged with crime is a board member, household member, or a non-child care provider who has regular contact with children in the child day care agency, the licensee shall take immediate corrective action to remove the individual from the premises, and, in conjunction with the department, shall develop a corrective action plan, approved by the department, which shall ensure that the individual will not be on the premises of the child day care agency while children are present and will have no contact with children enrolled in the child day care agency while care is being provided, such as when the children are on field trips away from the program.

(d) If the individual who has been charged with the crime is an employee of the licensee, the licensee shall either immediately suspend the employee while the charges are pending or, with the department's approval, shall develop a corrective action plan, approved by the department, which shall ensure that the employee is never allowed to work unsupervised with children while the charges are pending.

II. If a licensee does not take the action required above, or if the licensee fails to comply with the corrective action plan approved by the department, the department shall immediately suspend the license.

III. If the department immediately suspends the license in accordance with the provisions above, the licensee shall have the right to a due process hearing in accordance with RSA 541-A within 10 days of the date that the license is suspended. Notwithstanding RSA 541-A:30, III, The Department shall have sustained its burden of proof under RSA 541-A:30, III by proving that such charges were brought and the licensee failed to comply with the corrective action plan approved by the Department. The licensee shall not operate the child day care agency while the hearing process is pending unless during that period the charges are dropped or the person charged with the crime is acquitted.

IV. Any corrective action taken by the licensee in accordance with the above provisions shall remain in effect until such time as:

(a) all charges related to the conduct are dropped; or

(b) the person charged with the crime is acquitted of all offenses related to the conduct;

V. If the person charged with the crime is ultimately convicted of the crime for which the person was charged or a different or lesser crime against a child, or of a crime which shows that the person might be reasonably expected to pose a threat to a child, such as a violent crime or a sexually-related crime against an adult the provisions of RSA 170-E:7 shall apply.

Add the following new provision to RSA 170-E:12:

XIV. Meets the criteria for immediate suspension set forth in RSA 170-E:7-a.

RSA 170-E:29-a Criminal Charges Pending; Action to be Taken By Licensed Providers

Criminal Charges Pending; Action to be Taken By Licensed Providers

I. If any person required to undergo a criminal records check in accordance with this chapter has been charged by law enforcement officials with a crime against a child, or of a crime which shows that the person might be reasonably expected to pose a threat to a child, such as a violent crime or a sexually-related crime against an adult, the licensee shall take the following action:

(a) The licensee shall immediately notify the department of the pending charges.

(b) If the licensee is the subject of the charges, the provider shall surrender the license and cease operating as a licensed provider while the charges are pending [subject to discussion].

(c) If the individual who has been charged with crime is a board member, household member, or a non-child care provider who has regular contact with children in the program, the licensee shall take immediate corrective action to remove the individual from the premises, and, in conjunction with the department, shall develop a corrective action plan, approved by the department, which shall ensure that the individual will not be on the premises of the residential child care agency while children are present and will have no contact with children enrolled in the residential child care agency while care is being provided, such as when the children are on field trips away from the program.

(d) If the individual who has been charged with the crime is an employee of the licensee, the licensee shall either immediately suspend the employee while the charges are pending or, with the department's approval, shall develop a corrective action plan, approved by the department, which shall ensure that the employee is never allowed to work unsupervised with children while the charges are pending.

II. If a licensee does not take the action required above, or if the licensee fails to comply with the corrective action plan approved by the department, the department shall immediately suspend the license.

III. If the department immediately suspends the license in accordance with the provisions above, the licensee shall have the right to a due process hearing in accordance with RSA 541-A within 10 days of the date that the license is suspended. Notwithstanding RSA 541-A:30, III, The Department shall have sustained its burden of proof under RSA 541-A:30, III by proving that such charges were brought and the licensee failed to comply with the corrective action plan approved by the Department. The licensee shall not operate the child day care agency while the hearing process is pending unless during that period the charges are dropped or the person charged with the crime is acquitted.

IV. Any corrective action taken by the licensee in accordance with the above provisions shall remain in effect until such time as:

(a) all charges related to the conduct are dropped; or

(b) the person charged with the crime is acquitted of all offenses related to the conduct;

V. If the person charged with the crime is ultimately convicted of the crime for which the person was charged or a different or lesser crime against a child, or of a crime which shows that the person might be reasonably expected to pose a threat to a child, such as a violent crime or a sexually-related crime against an adult the provisions of RSA 170-E:29 shall apply.

Add the following new provision to RSA 170-E:35:

XV. Meets the criteria for immediate suspension set forth in RSA 170-E:29-a.