

VERMONT SUPERIOR COURT  
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CIVIL DIVISION  
Case No. 23-CV-852

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

### Opinion and Order on Motion to Dismiss

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

### Statutory Background and Plaintiffs' Claims

At a general level, the current substantiation, listing, and appeal process includes a pre-listing process before DCF, which may result in a substantiation determination. The pre-listing process includes an informal opportunity for the person suspected of

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<sup>1</sup> Plaintiffs currently are proceeding under pseudonyms.

<sup>2</sup> Named defendants other than DCF have been sued in their official capacities only. There is, thus, one real defendant, the State.

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

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

To place those claims in full context, a deeper dive into the statutory process is required. When DCF receives a report of abuse or neglect, it determines whether to conduct an assessment (which will not lead to a Registry listing) or an investigation (which may). 33 V.S.A. § 4915(b); *see* 33 V.S.A. § 4915b (procedures for investigation). Following an investigation, DCF considers all “supporting or conflicting” information and then determines whether abuse or neglect occurred. DCF Family Services Policy 56 at 1. If it substantiates the abuse or neglect, it notifies the person of the substantiation, its implications, DCF’s intent to place the person on the Registry, and the ability to seek administrative review. 33 V.S.A. § 4916a(a). If the person seeks administrative review, an administrative review conference is held at which, to sustain the substantiation, DCF

must prove “that it has accurately and reliably concluded that a reasonable person would believe that the child has been abused or neglected by that person.” 33 V.S.A. § 4916a(e). The person may “present documentary evidence or other information that supports his or her position and provides information to the reviewer in making the most accurate decision regarding the allegation.” *Id.* However, witnesses cannot be subpoenaed and there is no cross-examination.

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

If appealed, “[t]he Board shall hold a hearing within 60 days after the receipt of the request for a hearing and shall issue a decision within 30 days after the hearing.” 33 V.S.A. § 4916b(b)(1). If the person may be facing employment consequences, the hearing is expedited. 33 V.S.A. § 4916b(b)(2). The hearing is conducted under 3 V.S.A. § 3091 (Human Services Board fair hearings) and is *de novo*. 33 V.S.A. § 4916b(a); *In re Bushey-Combs*, 160 Vt. 326, 328 (1993). At the hearing, DCF has the burden of proving the substantiation by a preponderance of the evidence. *See In re Selivonik*, 164 Vt. 383, 389 (1995). Appeals from Board decisions go straight to the Supreme Court, as do petitions

to enforce Board orders. 3 V.S.A. § 3091(f), (g). No part of the statutory process comes to the Superior Court. *See infra* n.3 at 4.

### Analysis

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

Plaintiffs are asking this Court to intervene in the administrative actions so that when

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<sup>3</sup> It is not altogether clear why, however. Plaintiffs initially filed an action in federal district court seeking both an injunction and damages. The federal court refused any injunctive relief on *Younger* abstention grounds, declined to stay that order, and the appeals court affirmed, all so that the *state administrative process* could proceed. *See Lowell v. Vermont Department of Children and Families*, 835 Fed. Appx. 637 (2d Cir. 2020); *Lowell v. Vermont Department of Children and Families*, No. 5:19-cv-150, 2020 WL 8613649 (D. Vt. June 4, 2020), 2019 WL 11767547 (D. Vt. Nov. 18, 2019). Instead, Plaintiffs then filed this action, and the administrative processes have never resumed. DCF appears to have assented to not proceeding so long as litigation is pending and thus has never arrived at final pre-listing substantiation decisions. In this case, DCF also has expressly indicated that it does not take the position that Plaintiffs have failed to exhaust their administrative remedies, although at argument it conceded that Plaintiffs could raise all the issues they raise here in the administrative proceedings. As a result, the parties have not analyzed whether the statutory appeal path, which leads to the Supreme Court rather than this Court, suggests that Plaintiffs' issues would have been more appropriately raised in the administrative process rather than in this separate, parallel action. *See generally Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and succeeding cases fashioning the so-called *Thunder Basin* test to determine when a constitutional issue arising in an administrative process may be presented to the trial court even though a statute directs review of the administrative proceeding exclusively to an appeals court. *See also Travelers Indem. Co. v. Wallis*, 2003 VT 103, ¶¶ 18–19, 176 Vt. 167, 174–75 (2003) (concluding that the trial court may hear facial challenges to statutes in certain circumstances on primary jurisdiction grounds). Though the Court has some uncertainty as to the proper venue for Plaintiffs' claims, it declines to delay the matter further and will address the substance of Plaintiffs' facial challenge. The Court accepts for these purposes that the parties have sufficient liberty interests at stake to warrant due process protections.

the independent pre-listing reviews occur, they can be assured that they will be entitled to the full panoply of due process protections before any deprivation occurs.

Plaintiffs' facial claim that the statutory regime essentially cannot comply with due process so long as it delivers the full evidentiary hearing post-listing—and all lesser, pre-listing protections are necessarily deficient on that basis—has no merit for two reasons: first, the Vermont Supreme Court has already ruled that the two-step process complies with due process; and, second, the pre-listing process sufficiently protects Plaintiffs' rights when considered in relation to the more complete protections that follow post-listing.

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

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

standard at the time was “that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected.” 33 V.S.A. § 4912(10) (1995).

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

The relevant statutes were substantially amended in 2007 and thereafter to strengthen vastly the available due process protections by creating the entire pre-listing challenge process described above. The standard for the pre-listing DCF substantiation decision remains essentially the same as it was at the time of *Selivonik*: “that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected.” 33 V.S.A. § 4912(16).

The Court fails to see how the current two-step process, with a robust but informal pre-listing opportunity to challenge a substantiation before an independent reviewer, could violate due process rights as a matter of law while the previous regime that lacked all those protections did not. While the *Selivonik* Court was not addressing the individual pre-listing protections that Plaintiffs challenge here (they did not yet exist), it

was addressing the standard guiding DCF's unilateral substantiation decision in relation to the post-listing process then available and, hence, necessarily embraced the two-step process.<sup>4</sup> Plaintiffs' challenge in this case is that the subsequently adopted pre-listing protections, which could only have improved (and probably by good measure) the reliability of DCF's substantiation decisions, are not good enough because they believe a full evidentiary hearing remains required *pre-listing*. The argument conflicts squarely with *Selivonik*.<sup>5</sup> To the extent Plaintiffs' policy position may have merit, they may take them to the Legislature, or they may ask the Vermont Supreme Court to reconsider. But *Selivonik* is binding on this Court.

Otherwise, Plaintiffs argue that the current process is deficient for many of the same reasons that New York's regime was found to be deficient in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994). The State instead argues that the current pre-listing process

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

<sup>5</sup> While the 2007 amendments allow DCF to share listing information with employers more broadly than at the time of *Selivonik*, doing so requires the employee's consent. 33 V.S.A. § 4919(a)(3). Moreover, the substantiated person is informed of the substantiation in real time, can challenge it pre-listing and post-listing, and the review is expedited if employment consequences are apparent. 33 V.S.A. § 4916b(b)(2). Considering that Ms. Selivonik's employment was terminated due to her substantiation before she was even aware of it, this statutory change does not undermine the reasoning in the *Selivonik* decision.

complies with due process rights, pointing to the Seventh Circuit’s review of Illinois’ regime in *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005).

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

The pre-listing process evaluated in *Dupuy* (after modifications as ordered by the district court), on the other hand, is remarkably similar to the current Vermont process. The Court of Appeals analyzed it in detail and found it constitutional. *See Dupuy*, 397 F.3d at 504–09. Specifically considering the possibility that harm could accrue to a person wrongly substantiated that cannot be fully remedied by a correction on appeal (Plaintiffs’ general objection here), the Court spoke plainly: “we believe that the procedure contemplated by the district court’s order, especially when combined with the other procedural safeguards, provides the accused with an adequate opportunity to avoid an unjust determination” for due process purposes. *Id.* at 508–09; *see also Bohn v. Dakota County*, 772 F.2d 1433, 1439 (8th Cir. 1985) (“[T]he interjection of fuller procedural protections at an earlier state in the process would be unduly time-consuming and cumbersome, and might well reduce important protections which the state legislature designed for otherwise vulnerable children.”). The Court adopts the relevant reasoning in *Dupuy* for purposes of this case.

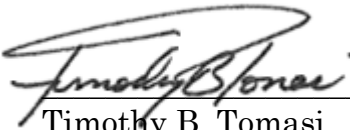
Vermont’s two-step process is facially valid under *Selvonik* and the reasoning of *Dupuy*.

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

#### Conclusion

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

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

  
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Timothy B. Tomasi  
Superior Court Judge