

**REPORT OF THE
DEPARTMENT OF SOCIAL SERVICES
AND DEPARTMENT OF EDUCATION STUDYING**

**The Feasibility Of Development
Of A Behavioral Profile To
Screen Prospective Workers in
Child-Caring Positions**

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



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LETTER OF TRANSMITTAL

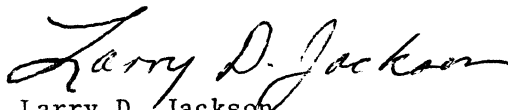
To the Members of the General Assembly of Virginia:

The Departments of Social Services and Education in conjunction with the Office of the Attorney General were directed by the 1987 General Assembly to conduct a study of the feasibility of development of a behavioral profile to screen prospective workers in child-caring positions. The Department of Social Services served as the lead agency in planning and coordinating the study and drafting the report. A study committee was convened representing expertise in the fields of child sexual abuse, personnel and screening procedures, legislation, education, child protective services, and children's advocacy. The report of the Committee's findings and recommendations follows.

We wish to acknowledge and give special thanks to each of the Committee members from the private and public sectors for their work and support in completing the study in a timely manner. We also want to recognize Delegate Alan B. Mayer, who introduced House Joint Resolution No. 258 and participated in the study. Additionally, special acknowledgement and thanks goes to Lynne Edwards and Ann Childress from the Department of Social Services for chairing the Committee and coordinating the study; Pamela M. Reed, Assistant Attorney General, for legal research; Jim Micklem, liaison from the Department of Education; and Suzanne Fountain of the Department of Social Services for assistance in drafting the report.

Although no fail-safe mechanism exists for protecting children from sexual abuse, we are optimistic that enactment of the Committee's recommendation would enhance the ability of employers to select qualified child care personnel and significantly minimize the likelihood of a potential molester being placed in a child caring role.

Respectfully submitted,



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Commissioner, Department of Social Services



S. John Davis
Superintendent of Public Instruction

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EXECUTIVE SUMMARY

House Joint Resolution No. 258, agreed to by the 1987 General Assembly, requested a study of the feasibility of the development of a behavioral profile to screen prospective workers in child-caring positions (Appendix A). The Departments of Social Services and Education in conjunction with the Office of the Attorney General were directed to study and evaluate the feasibility of the development of a behavioral profile to aid in identifying potential child molesters. The Department of Social Services in consultation with the Office of the Attorney General and the Department of Education convened a study committee. The committee members selected represent expertise in the fields of child sexual abuse, personnel and screening procedures, legislation, education, child protective services, and children's advocacy. Delegate Alan E. Mayer, patron of House Joint Resolution No. 258 and a member of the Joint Subcommittee Studying Screening of Child Care Personnel, was in attendance and provided a link to the prior study.

The following discussion will highlight the activities, findings and recommendations of the Study Committee.

Activities of the Study Committee

The Committee met three times over the course of the study. In establishing the parameters of the study, one of the Committee's first tasks was to frame a definition of a behavioral profile. It was agreed that the search should be for disqualifying behaviors that could be used to screen applicants. The Committee therefore defined behavioral profile as:

Behavioral Profile: A list of distinctive behaviors that characterize child molesters and can be used to identify known or potential molesters in order to disqualify them from employment in child care settings.

Having established this definition of a behavioral profile, the Committee, in order to assess feasibility, focused its research in four major areas:

1. literature search on sexual molesters and their common characteristics
2. survey of experts with knowledge of child sexual abuse and the development of profiles
3. survey of other states in regard to the use of profiles for screening child care personnel
4. research on the legal feasibility of developing and using a child molester profile

Findings

In exploring the feasibility of the development of a behavioral profile to screen child molesters, the Committee relied heavily on research in the field of child sexual abuse and on the opinions of experts in this field as well as in the area of employment screening. A summary of the findings which influenced the Committee in assessing the feasibility of the use of a behavioral profile in employment screening follows.

1. There are many different types or subgroups of molesters; no unique or distinct characteristics have emerged that distinguish any of these types from the general population.
2. Unlike the behaviors identified in other profiles in use such as the hijacker profile, the behaviors and characteristics that are present in child molesters have low visibility (i.e., are not observable and identifiable) and therefore require more evaluation and judgment on the part of the observer.
3. Experts agree that child molesters engage in denial and response distortion which makes information gathered through self-reporting less reliable; as a result, information obtained during an interview with a molester is not likely to be distinguishable from that of a non-molester.
4. The majority of experts in the field of sexual abuse do not believe that the characteristics and behaviors that have been associated with child molesters can be used as reliable or valid predictors.
5. The fact that information gathered during an employment interview is not gathered as a result of an allegation and that a job applicant may have a protected interest, imposes additional legal constraints on the kind of information that can be solicited.
6. Although some molester characteristics can be easily incorporated into the hiring process (e.g., frequent moves, separation from the military), others require gathering highly personal information (e.g., spousal relationships) and are, therefore, subject to many legal constraints on the kind of information that can be solicited.

Statement on Feasibility

Given all of these factors, the development of a behavioral profile of child molesters for use as an employment screening tool does not seem feasible at this time. What is feasible is a more uniform and consistent application of what is currently known about child molesters in a context that can be reasonably and legally addressed in the hiring process.

Recommendation

The recommendation below seeks to build on the research conducted by the Committee and to strengthen the screening practices of child care personnel by establishing guidelines that promote and support the hiring of quality staff.

FUNDS SHOULD BE APPROPRIATED FOR THE DEVELOPMENT AND DISSEMINATION OF VOLUNTARY GUIDELINES FOR THE SCREENING AND HIRING OF CHILD CARE PERSONNEL AND FOR TRAINING IN THE USE OF SUCH GUIDELINES.

I. INTRODUCTION

Sexual abuse of children by child care personnel in schools and child care settings has received widespread public attention in the past three years. Well-publicized reports of sexual abuse in day care centers have resulted in federal and state legislation intended to protect children from becoming victims of sexual abuse. Required criminal records checks for child care personnel have been used as one approach to preventing these incidents.

It is known that most child abuse, including sexual abuse, takes place in the home and is perpetrated by close relatives, family, friends or neighbors. Sexual abuse in a day care center or other child care setting, however, frequently involves multiple victims. Screening child care personnel at the time of initial employment offers an opportunity to limit access to children by molesters.

The General Assembly in recognizing a responsibility to help safeguard children in some settings licensed by the State has continued to search for ways to protect children. A study of the feasibility of the development of another specific tool for protecting children -- a behavioral profile of child molesters for use in screening child care personnel -- is the focus of this report.

A. Authority for the Study

House Joint Resolution No. 258, agreed to by the 1987 General Assembly, requested a study of the feasibility of the development of a behavioral profile to screen prospective workers in child-caring positions (Appendix A). The Departments of Social Services and Education in conjunction with the Office of the Attorney General were directed to study and evaluate the feasibility of the development of a behavioral profile to aid in identifying potential child molesters and submit recommendations to the 1988 General Assembly.

B. Background

During the 1986 General Assembly Session, House Joint Resolution No. 98 was introduced as a part of the legislative crime package proposed by the Governor and the Attorney General. The legislation was intended to help ensure effective and appropriate screening of child-care workers. The resolution was passed and established a joint subcommittee to study and develop recommendations to ensure appropriate screening of all adults who seek to work with children. The report of the Joint Subcommittee Studying Screening of Child Care Personnel contained extensive data on the types of facilities which should screen applicants, the crimes and other acts for which applicants should be screened, and uniform screening procedures. The focus of the study was directed to criminal records checks including data on Virginia's experience with these checks.

Among the issues explored by the Joint Subcommittee was screening by use of behavioral profiles. The Joint Subcommittee heard testimony from Dr. John T. Dailey, a psychologist who assisted in the

development of the hijacker profile while working for the Federal Aviation Administration, and Dr. Charles Ullman, a practicing clinical psychologist. It was felt that if a tool could be developed and used to identify potential or actual child molesters, then only those applicants matching the profile would need to undergo thorough background checks. The Joint Subcommittee felt that further study was needed of the issues raised about the development and use of such a profile. One of the recommendations of the Joint Subcommittee was that the Departments of Social Services and Education in conjunction with the Attorney General's Office study the feasibility of development of such a profile. As a result, House Joint Resolution No. 258 was passed requesting the feasibility study.

C. Methodology of the Study

The Department of Social Services in consultation with the Office of the Attorney General and the Department of Education, convened a study committee. The committee members selected represent expertise in the fields of child sexual abuse, personnel and screening procedures, legislation, education, child protective services, and children's advocacy. Delegate Alan E. Mayer, patron of House Joint Resolution No. 258 and a member of the Joint Subcommittee Studying Screening of Child Care Personnel, was in attendance and provided a link to the prior study.

The Committee met three times over the course of the study. A plan of action was developed and tasks were divided for completion by individual members. The meetings were then used to establish the parameters of the study, identify areas for research, report on the research, evaluate work done, make decisions and formulate the final recommendations.

In establishing the parameters of the study, one of the Committee's first tasks was to frame a definition of a behavioral profile. It was agreed that the search should be for disqualifying behaviors that could be used to screen applicants. The Committee therefore defined behavioral profile as:

Behavioral Profile: A list of distinctive behaviors that characterize child molesters and can be used to identify known or potential molesters in order to disqualify them from employment in child care settings.

Having established a definition of behavioral profile, the Committee then explored the impact of the development and use of such a profile and the key questions that needed to be answered in order to assess feasibility. Some of the key questions to be answered were:

1. Who should the profile describe in order to have the greatest impact on protecting children from molesters?
2. How can we insure the validity and reliability of a profile?
3. What current research is available on profiles?

4. What are current screening practices?
5. Who are the experts who can address the issue of feasibility? What do the experts say?
6. What are the constraints on development?
7. What relevant data is available from other fields?
8. What are the constraints (legal limits) on the employment relationship?
9. What would be the State's liability?

In order to answer these questions, research was focused in four major areas:

1. literature search on sexual molesters and their common characteristics
2. survey of experts with knowledge of child sexual abuse and the development of profiles
3. survey of other states in regard to the use of profiles for screening child care personnel
4. research on the legal feasibility of developing and using a child molester profile

The next section of this report will provide a detailed discussion of the Committee's findings.

II. FINDINGS

A. Literature Review

Research literature was reviewed to determine if a reliable predictive behavioral profile of child sexual abusers/molesters had been developed and tested for validity. A number of research articles were reviewed. A bibliographical listing of these articles is attached (Appendix B). Current research efforts fall into two categories.

1. Predisposing Factors and Behavior Traits

The first, and largest body of research, is designed to delineate predisposing factors and behavior traits among known child sexual abusers/molesters. These studies look at populations who are currently incarcerated or under treatment for sexually deviant behavior. Through these studies certain characteristics or traits have been found in statistically significant numbers of the studied population so that certain post-facto statements can be made. For example, Pantone, J.H.

(1979) administered the Minnesota Multi-phasic Personality Inventory (MMPI) to 63 males convicted of sexual offenses against children and found that this sample had mean scale elevations and profile configurations indicative of: self-alienation, despondency, rigidity, inhibition, feelings of insecurity, and fears of not being able to function adequately in heterosexual relationships. Another example of this type of research was the study that Somers (1978) conducted reviewing 348 men convicted of sexual assault and found that among those who showed a preference for children, 46% reported being sexually victimized themselves.

By studying groups of known child sexual abusers/molesters, we are able to begin to formulate a picture of some common factors shared by the majority of such individuals. What we can not do is extrapolate this information to the population as a whole. For example, we know that 46% of child sexual abusers in one study were sexually victimized. We do not know, however, the number of people who were sexually victimized who do not molest children. Among the larger population of sexual victims (vs. known abusers) it could well be that a very small percentage are molesters.

The results of studies which focus on the diagnostic attributes of individuals already known to exhibit a problem can not be applied for predictive purposes to the population at large without significant further research. The results of such studies may be helpful in identifying certain characteristics which can act as "indications for concern" but can not be seen, at present, as valid, reliable predictors of pedophilia.

2. Chemical and Physiological Factors

The second body of research reviewed was designed to look at the population at large and determine certain physiological or chemical responses to certain types of stimuli. Preund (1981) attempted to study adult sexual interest in children by exposing men to certain materials and measuring, by chemical and physiological responses, the level of erotic arousal subjects displayed to the material. His test methods involved monitoring galvanic skin response, cardiovascular response, respiration, pupil dilation, EEG and looking time. Subjects were presented with pictures of nude adults, adolescents and children and their level of arousal response was then measured.

An undated study by Berlin and Krout looked at different types of child sexual abusers and proposed that certain of these types were the result of predisposing biological factors, biochemical imbalances and chromosomal anomalies, but cited no conclusive evidence to support this proposal. In order to be useful, this type of approach would first have to be tested for reliability and validity. After these were

established, their application would rely on fairly sophisticated laboratory analysis.

Both types of research shared the common finding that there is no single typology of child sexual abusers. In the broad category of child sexual abusers, there exist a variety of different sub-groups each of which varies according to certain characteristics such as: age (adolescent, middle aged and senescent), sexual attitude toward children (fixated and regressed) or relationship to the victim (intrafamilial, acquaintance and stranger).

3. Summary

In summary, there is a significant body of research which identifies characteristics of known child sexual abusers/molesters that is helpful in understanding the dynamics of the abuse and provides a basis for the design of treatment interventions for this population. This body of research is not appropriate as a predictive base for identifying child sexual abusers/molesters in the general population.

There is a limited body of research that attempts to look at physiological and biochemical factors present in child sexual abusers/molesters. For the most part this is in the early stages, has not been replicated and would have limited practical application.

B. Survey of States

1. General Findings

Through conversations with various national child welfare organizations, several states were identified as being progressive in the area of child protective services. These included California, Colorado, Connecticut, Delaware, Florida, Illinois, Kansas, Massachusetts, Maryland, North and South Carolina, Texas, Washington, and Wisconsin. Each state office was contacted by telephone and asked a series of questions in reference to their hiring and screening practices of child care personnel (See Appendix C).

Of those states surveyed, 88% legally mandate screening of child care personnel, primarily through the use of a criminal records check. No state uses a behavioral profile of child molesters as a part of their screening practices. A few have explored and abandoned the idea based on their own assessment of current state-of-the-art. Colorado is one state that has attempted more thoroughly to address the prevention of maltreatment in out-of-home child care settings.

2. Colorado-Prevention of Abuse in Out of Home Settings

In 1985, Colorado initiated a federally funded Interagency Project for Prevention of Abuses in Out-of-Home Child Care Settings. The primary focus of this project was the selection and screening of personnel. After undertaking an extensive search for a model for screening and selection that would include a mechanism for identifying the sexually and physically abusive individual, the Colorado task force decided that a behavioral profile was not feasible and moved toward a more eclectic approach to screening and hiring.

Colorado's efforts resulted in the development of a handbook for the selection and screening of child care personnel entitled "An Effort Toward the Prevention of Maltreatment of Children and Youth in Out-of-Home Care Settings in Colorado." It provides information to child care providers about child sexual abuse and the dilemmas in predicting this type of abuse. The handbook also identifies ways in which the interview process can be structured to more easily identify problem behaviors and explore them with the applicant more fully. It provides a sampling of selection and screening methods and techniques advocated by national experts in the field.

Wayne Holder, Executive Director of the national organization Action for Child Protection, emphasizes that the screening focus should be on ruling in quality employees versus just ruling out molesters. Holder asserts "...by knowing what to look for, the negatives will be ruled out...to the extent that an applicant possesses desirable traits which can be identified, there will be little need to address the undesirable."

Selection should focus on finding positive, desirable qualities which are possessed by good child care workers. Varied and thorough interviewing and screening approaches can encourage the surfacing of relevant data which help separate desirable and undesirable child care applicants based on a full range of qualifications.

C. Expert Opinions

A variety of experts in the fields of child abuse, psychology, research and law enforcement were interviewed to obtain their evaluation of several aspects of development and use of a behavioral profile to identify potential child molesters (See Appendix D). Information gained through interviews was supplemented by review of published and unpublished literature authored or referred to by the experts.

1. Situational Molester v. Preferential Child Molester

In Child Molesters: A Behavioral Analysis (K. Lanning, 1987), developed for law enforcement officers, Kenneth Lanning identifies sets of characteristics which describe two broad categories of child molesters and seven subcategories of pattern

of behavior, which are not mutually exclusive. This guide differentiates between the Situational Child Molester, who does not have a true sexual preference for children, and the Preferential Child Molester, the pedophile who is sexually attracted to and prefers children.

Lanning adds the caveat that "these categories are not intended for use by mental health professionals or clinicians...but for law enforcement officers and prosecutors in developing the evidence to identify, arrest and convict child molesters." Many of the indicators cited by Lanning could not be elicited using acceptable employment interviewing techniques (e.g., limited dating relationships if not married, limited peer relationships, sexually dysfunctional with adults, etc.).

2. Child Abuse Potential Inventory

Dr. Joel Milner, a child abuse researcher, has developed a 160 item Child Abuse Potential Inventory over an 11 year period. Extensive validation studies support its accuracy in classifying child physical abusers. A current study is exploring the addition of items to the questionnaire to identify intrafamilial child sexual abuse. Milner forewarned of several difficulties in developing a profile for child molesters. There are at least 10 different sub-types of child sexual abusers, the characteristics of which may overlap and may not be distinguishable from the general population. Few empirical studies exist. Child sexual abusers engage in significant denial and cognitive response distortion which limits the usefulness of self report instruments. Misclassifications -- false positives -- may increase when populations with a low base rate of the target behavior are tested. Test instruments are most useful when the population tested contains about 50% of subjects exhibiting the target behavior.

3. Denial and Response Distortion by Molesters

Joseph Lynch, a clinical social worker, elaborated on the problem of denial and response distortion by molesters with these statements: An untreated offender attempting to get a job which gives him access to children will lie about everything. With this in mind, the more information that can be verified is what will be most helpful to screening {including} police records, state and federal records checks, phone checks of references and previous employment, military history, marital status and living arrangements. Arrest records need to be particularly scrutinized for misdemeanor crimes which appear to have no overt sexual content, such as trespassing, disorderly conduct or simple assault... {or} a sexual encounter plea-bargained down to a misdemeanor.

4. Reliability of a Profile

Most experts concurred on several issues related to ensuring validity and reliability when moving from a typology, or list of characteristics, to a profile used as a measurement tool. To date, the behavioral profiles which have been developed regarding child sexual offenders are descriptive in nature. They have been developed and are used primarily to determine treatment needs.

These typologies have not been scientifically defined, rather they are traits, characteristics, and situations that may contribute to the occurrence of abuse, and/or may place a person at-risk for becoming an offender. These profiles or typologies cannot be incorporated into a measurement tool or an accurate standard for the screening of potential offenders because these profiles address different "types" of offenders (Situational vs. Preferential), and there appears to be limited "across-the-board" characteristics of all offender types.

Since child sexual offenders do not appear to be a homogenous population, a single measurement tool or standard would be futile. These profiles have been developed, to a large extent, through observation of incarcerated offenders. There is doubt that these observations/ profiles can be generalized to the larger non-incarcerated population of offenders.

The validity of a research/measurement tool is the degree to which a tool measures what it is intended to measure. In addition to the reason stated above, a behavioral profile as an employment screening tool is at great risk of being scientifically invalid because:

- The behaviors which might be included in a "tool" may not reflect the potential of an applicant becoming an offender. Examples include "poor coping skills", a limited or sporadic employment history, and a "user of people". These traits may be difficult to define and may also be prevalent among non-offender employment applicants. Child care is not high-salaried employment and is likely to attract individuals with a limited employment history. Thus the content of the tool is invalid.
- The criteria for measurement is based on observation and has not been empirically proven, therefore there is no basis for measurement. Criterion validity is often determined through test/observation techniques. A test or measurement tool is administered and then the applicant is placed in a situation where behavior can be directly observed. Given the nature of this study, it is not plausible to determine criterion validity through direct child-applicant interaction observation.

5. Behavioral Profile As a Predictor of Abusive Behavior

In over 20 years of research, there is no evidence to support a behavioral profile as an accurate predictor of abusive behavior

In recent years clinical observations have reported patterns which contradict current profiles. For example, a "regressed" offender was thought to act in response to an emotional shock and the behavior was an isolated event. Service delivery systems have now reported repeat offenses by the "regressed" offender. Additionally, the existence of some indicators may be difficult to determine -- there is emerging evidence that the incident of abuse is correlated with the offender's bonding with his mother as an infant. Finally, the observational data on profiles has been gathered by studying male offenders, the overwhelming majority of reported offenders. This data may not be applicable to the screening of female job applicants, who are the overwhelming majority of child care employees.

Dr. John Dailey has performed extensive work with the development of profiles, most notably the Federal Aviation Administration's hijacker profile. Eight top government officials and Dailey required six months and \$50,000 to develop the hijacker profile which used visually observable cues and behavior to achieve a highly accurate classification rate. Dailey explains that the purpose of a profile is to narrow the scope of suspicion in order to extensively examine only a small portion of the total group. He suggested that development of a sexual molester profile would require an initial commitment of \$40,000 to \$50,000 and six to twelve months to develop and test. The concept, he said, "is conceivable...but a long shot...no guarantees."

Dr. Milner's assessment of the development of a sexual molester profile for screening purposes was, "difficult...if attempted must commit to a long-term, multi-year project." He cautioned that much research would be necessary, specifically to include cross validation.

In his presentation to the Joint Subcommittee Studying Screening of Child Care Personnel in November, 1986, Dr. Charles Ullman observed that "the circumstances under which screening for employment can be conducted and the nature of the child molestation phenomenon itself suggest that the focus (of screening) should be on observable evidence...rather than the disclosure of thought patterns and feeling states." He proposed that procedures suitable for use by a local employer would include:

- a. A requirement that each employment application include a full employment history and two references who know the applicant well;
- b. The development of two additional references by the potential employer based on the applicant's employment history;
- c. Checking of the above four references with due regard to gaps in the employment record;

- d. A spousal reference check whenever the applicant has been married; and
- e. An investigation or evaluative interview focusing on gaps in the employment history.

These procedures would make use of behavioral characteristics such as those described in Child Molesters: A Behavioral Analysis (e.g., premature separation from the military, frequent and unexpected moves, and prior arrests for various offenses).

6. Summary

In summary, experts have agreed on some characteristics, behavioral and otherwise, which may be indicators of child sexual molesters. However, other than those which are based on knowledge of prior offenses, these characteristics are not unique to sexual molesters. The development of these into a profile to screen sexual molesters is limited by the difficulty in creating a tool which has proven validity and reliability. In addition to the feasibility of development, the section on legal issues which follows addresses the feasibility of use of such a profile.

D. Legal Feasibility of Developing and Using A "Sexual Abuser Profile"

By law, regulations must not be arbitrary or capricious and must be reasonably related to the goals of the regulating entity. The development and use of a sexual abuser profile to screen potential child care licensees or employees pose several complex legal problems.

1. Recent "Profile" Cases

Profiles have frequently been used in the criminal law enforcement setting. Airline hijacker profiles and drug courier profiles have attained a degree of legal acceptability as a basis for highway stops or airport stops. In drug courier or hijacker investigations, a government employee, charged with the responsibility of enforcing the law, typically observes an individual who overtly exhibits the characteristics of the applicable profile. In these instances, courts have, with consistency, upheld a simple stop and questioning of such an individual.

The courts typically look to the facts and balance the competing interests. Reviewing the officers observations, the absence or presence of consent to the search, the reasonableness of the search and the public policy at stake, courts weigh these against the individual's right to privacy and right to be free from unreasonable searches. The courts have gone to great lengths to ensure that intrusions, without a warrant, do not occur indiscriminately or arbitrarily.

2. Administrative Searches/Investigations and the Fourth Amendment

a. Consent To Be Searched/Investigated

Application to the state for a child care license or to a licensed facility for employment is voluntary and as such, consent allowing the state or the employer to conduct reasonable investigations into the qualifications of the applicant is implied. If however the state elects to require investigations of greater depth, the question of actual versus implied consent takes on added significance.

If a new employee/new licensee applicant claims to have been coerced into consenting to an unusual level of investigation, litigation may arise. The courts typically balance the reasonableness of the government investigation against the public policy at issue. If it appears that the only alternative to "voluntary" consent is denial of a job or license, it is unclear whether the procedure will meet constitutional muster (unless the court sees the balance as weighing very heavily towards the public interest).

b. Reasonableness of the Profile

(1) Degree of Personal Inquiry/Invasion

Not all of the characteristics potentially to be reviewed to see if an applicant matches a sexual abuser profile are characteristics that are readily observable. Use of a profile delves into an applicant's past and present activities and may entail obtaining information from an applicant's family members and past or present sex partners. Denial of a license or denial/termination of employment raises serious legal questions concerning:

- (a) the coercive nature of an applicant's consent if a license or job is at risk; and
- (b) the reasonableness of this sort of highly personal inquiry.

(2) Statistical Validity

Before a profile can be applied, it is necessary to test its reliability by statistical validation. During this process, it is also necessary to review the procedure for potential adverse impact on protected individuals/classes {See §3(b) below}.

(3) Appeals of Adverse Decisions

Legal problems may arise in the interpretation of sexual abuser profile findings. In the hijacker and drug courier cases, the profile characteristics are objective and overtly observable. A sexual abuser profile will more than likely include both objective factors and subjective evaluations. In the criminal stop setting, the detainee may be exonerated "on the spot". This cannot occur in an abuser profile

investigation. As a result, if such a profile is developed for use, it will be necessary to provide a mechanism whereby the applicants can have a meaningful appeal of adverse decisions.

3. Potential Challenges

a. Injury to Reputation

Individuals who are found to meet a sexual abuser profile and subsequently are denied a license or an employment opportunity will surely challenge the finding by alleging they have been stigmatized and/or denied a protected interest. Due to the fact that the profile may target both actual abusers and individuals with behavioral characteristics that may only potentially lead to abuse, suits can be expected.

While reputation is not per se a constitutionally protected interest, if (1) reputation is injured by a governmental agency (2) the governmental agency publishes the stigmatizing information and (3) the result is injury to a protected interest (e.g., an existing classified state employment interest) then the State could have some potential liability.

Once an individual has a license or has more than an "at will" job, that individual "arguably" has a protected interest. The use by the State of the profile to screen existing licensees, or current state employees involved in child care is bound to trigger litigation if licenses are revoked, or employment terminated. The same potential for litigation exists, but is not as predictable, in the case of new applicants for licenses or employment. In those instances there is less of a "right" at stake, however, even then the state cannot be arbitrary.

b. Potential for Adverse Impact On Protected Classes

Under federal and state law, hiring and licensing practices must not discriminate on the basis of race, color, religion, sex, age, national origin or handicap. If the development of a profile results in specific individuals or a protected class being disproportionately screened out, the profile will be subject to challenge as having an adverse impact on the individuals or class. (In this area the Committee has identified a particular concern because the vast majority of child care workers are female and statistics demonstrate that "known" sexual abusers are predominantly male.) This area will require careful study and statistical documentation. {See §2(b)(2) above}.

4. Discovery of Suspected Criminal Activity

A related problem that may arise in investigating applicants' sexual background is the question of how the investigating agency will deal with potentially incriminating information that is uncovered. The investigation procedure may be challengeable under the Fifth Amendment to the U. S. Constitution. (Citizens are to be free from nonconsensual self-incrimination).

A State agency in a "sexual abuser profile" investigation should be prepared to comply with §63.1-248.3 and/or §22.1-296.1, Code of Virginia.

5. Summary of Legal Issues

To develop a legally defensible "sexual abuser profile" for use by the Commonwealth in making child care licensing and/or employment decisions, the following should exist:

- a. Consent to be investigated should be voluntary.
- b. The profile should be composed of objective observations as opposed to challengeable subjective considerations.
- c. The profile developed should be tested to the appropriate population for its statistical validity.
- d. The testing should demonstrate that the profile does not have an adverse impact on "protected individuals".
- e. The profile developed should not rely heavily upon an intrusion into the privacy of nonapplicants.

If such a profile can be developed, the following problems will need to be addressed prior to use of the profile:

- a. Applicants should be given notice of the procedure, thereby enhancing the State's position that consent to be investigated is voluntary.
- b. Safeguards should be developed to keep results confidential thereby minimizing the risk of "stigmatizing" rejected applicants.
- c. Procedures should be developed to apply the profile consistently in spite of the frequent turnover of employees in licensed child care facilities.
- d. Guidelines should be developed to determine who to investigate. (e.g., the owner of the facility, the program director, family members or other individuals living in a licensed home care setting)
- e. An appeals process should be developed permitting rejected applicants to challenge the propriety of the decision. (Unless these appeals fall within an exception to the Virginia Administrative Process Act, they will potentially consist of an informal conference, a formal hearing and judicial review.)

III. CONCLUSIONS

A. Critical Issues Related to the Development and Use of a Behavioral Profile

In exploring the feasibility of the development of a behavioral profile to screen child molesters, the Committee relied heavily on research in the field of child sexual abuse and on the opinions of experts in this field as well as in the area of employment screening. What emerged in the literature are extensive lists of behaviors and personality characteristics that are reflective of some, though not all of the known child molesters on whom the information was gathered. The behaviors and characteristics which appear on these lists range from the concrete to the abstract, the obvious to the obscure and include such factors as frequent and unexpected moves, prior arrests, skills in manipulating children, youth oriented interests and hobbies, dysfunctional sexual relationships with adults, immaturity and a sense of alienation from others.

Factors which influenced the Committee in assessing the feasibility of the use of such a list in employment screening are as follows:

1. There are many different types or subgroups of molesters; no unique or distinct characteristics have emerged that distinguish any of these types from the general population.
2. Unlike the behaviors identified in other profiles in use such as the hijacker profile, the behaviors and characteristics that are present in child molesters have low visibility (i.e., are not observable and identifiable) and therefore require more evaluation and judgment on the part of the observer.
3. Experts agree that child molesters engage in denial and response distortion which makes information gathered through self-reporting less reliable; as a result, information obtained during an interview with a molester is not likely to be distinguishable from that of a non-molester.
4. The majority of experts in the field of sexual abuse do not believe that the characteristics and behaviors that have been associated with child molesters can be used as reliable or valid predictors.
5. The facts that information gathered during an employment interview is not gathered as a result of an allegation and that a job applicant may have a protected interest, impose additional legal constraints on the kind of information that can be solicited.
6. Although some molester characteristics can be easily incorporated into the hiring process (e.g., frequent moves, separation from the military), others require gathering

highly personal information (e.g., spousal relationships) and are, therefore, subject to many legal constraints on the kind of information that can be solicited.

B. Statement on Feasibility

Based on the information gathered, the Committee concluded that a list of distinctive behaviors that characterize child molesters and can be used to identify known or potential molesters in order to disqualify them from employment is not available at this time. The development of such a profile would require extensive and long term research in order to meet the legal demands of the use of the profile in the employment setting, namely ensuring validity and reliability. Such research would be costly and time consuming and according to most experts in the field, still might not result in a usable tool.

Even if a valid and reliable profile were developed, it would be extremely difficult and costly to apply it uniformly in child care settings because of the high degree of expertise it would require of the interviewer/employer. The impact in terms of safeguarding children in child care settings would be minimal given that most molesters are male, and most applicants for child care employment are female.

Given all of these factors, the development of a behavioral profile of child molesters for use as an employment screening tool does not seem feasible at this time. What is feasible is a more uniform and consistent application of what is currently known about child molesters in a context that can be reasonably and legally addressed in the hiring process.

IV. **RECOMMENDATION**

The recommendation outlined below seeks to build on the research conducted by the Committee and to strengthen the screening practices of child care personnel by establishing guidelines that promote and support the hiring of quality staff.

FUNDS SHOULD BE APPROPRIATED FOR THE DEVELOPMENT AND DISSEMINATION OF VOLUNTARY GUIDELINES FOR THE SCREENING AND HIRING OF CHILD CARE PERSONNEL AND FOR TRAINING IN THE USE OF SUCH GUIDELINES.

The Committee recommends that the responsibility for implementing this recommendation be given to the Department of Social Services in conjunction with the Department for Children.

Based on what is known about child molesters that can be reasonably and legally applied in the hiring process, the Committee recommends that the proposed voluntary guidelines include the following:

- A. A model application form that includes a complete employment history, supervisory references, reasons for termination of past employment, reason for proposing to leave current employment,

volunteer experience with children, military history and certification by the applicant that he or she has not been convicted of any crimes specified in 63.1-198.1, Code of Virginia.

- B. Sample interview questions.
- C. Suggested interview techniques that include a) situations to which the applicant responds and b) cues to the employer when responses indicate that further probing may be necessary.
- D. Training curriculum for child care personnel having the responsibility for hiring. This curriculum should provide instruction on the effective use of the proposed voluntary guidelines and forms. Special attention should be given to instruction on obtaining and documenting reference checks and on review of the employment history.
- E. Training information for interviewers on child abuse/neglect and tactics used by child molesters.

In order to insure widespread utilization of the voluntary guidelines * developed, the Committee recommends that a portion of the funds appropriated be used to publicize the availability of the guidelines, to disseminate the guidelines to all child care employers and to conduct training in the use of guidelines for those who request it.

*The materials identified in subsections B, C, D, and E should include self-instructional materials.

1987 SESSION
ENGROSSED

HP9012598

HOUSE JOINT RESOLUTION NO. 258

House Amendments in [] - February 8, 1987

Requesting a study of the feasibility of [the] development of a behavioral profile to screen prospective workers in child-caring positions.

Patrons—Mayer, Woodrum, Melvin, Grayson, Plum, Slayton and Saunders

Referred to the Committee on Rules

WHEREAS, the issue of child molestation [which occurs while a child is in the care of an individual or business licensed to provide such care has become volatile and the cause has become volatile and the cause] for much concern by all affected; and

WHEREAS, study has revealed little on early identification and screening of potential child molesters, and a "single homogeneous typology has not emerged and child molesters do not appear to be a well-defined disease group"; and

WHEREAS, screening would have to be based now on a behavioral profile rather than a psychological profile of potential molesters; and

WHEREAS, according to various experts in this field, screening could possibly be done by means of the evaluation of employment history and reference data which would direct attention to underlying weaknesses on the part of the prospective employee; and

WHEREAS, this method as well as others need to be thoroughly examined and evaluated for effectiveness and usefulness in identifying potential child molesters; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Departments of Social Services and Education in conjunction with the Office of the Attorney General study and evaluate the feasibility [and of the] development of a behavioral profile to aid in identifying potential child molesters; and, be it

RESOLVED FURTHER, That the study be completed in time to submit recommendations to the 1988 Session of the General Assembly.

Official Use By Clerks

Agreed to By
The House of Delegates
without amendment
with amendment
substitute
substitute w/amdt

Agreed to By The Senate
without amendment
with amendment
substitute
substitute w/amdt

Date: _____

Date: _____

Clerk of the House of Delegates

Clerk of the Senate

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QUESTIONNAIRE FOR SURVEY OF STATES

State: _____

Person responding: _____

Address: _____

Phone Number: _____

1. How are child care personnel screened in your state? (i.e., what's required by law, by state policy and done in practice?)

Required by law: Does the law mandate screening?

Required by state policy:

Dictated by protocol or practice:

2. What are the screening and selection procedures, step by step?
3. What, if any, screening tools or instruments are used? List all Ask for copies
4. How are they used? by whom? What, if any, special training is required by those who administer the instrument?
5. What was the cost of developing and implementing the instrument?
6. What data is available in reference to the reliability and validity of your instrument? Ask for copies
- 7a What other states use screening tools or instruments? Please list
or
- 7b Are you aware of states that use a screening tool or instrument? Please list
8. What do you consider to be the pros and cons of developing a behavioral profile of sexual abusers?

Pros

Cons

9. What do you consider to be the pros and cons of using such a profile to screen child care providers?

Pros

Cons

10. Other comments?

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**A STUDY OF THE LEGAL FEASIBILITY OF DEVELOPING
AND USING A "SEXUAL ABUSER PROFILE"**

Introduction

The Commonwealth involves itself in a number of areas impacting on the health and safety of children. Three of these areas (licensing of day care, foster care and formal adoptions) are state created and regulated privileges rather than constitutional or federal entitlements.¹ The Commonwealth licenses certain child care facilities, and in some instances employs child caretakers. Applicants who apply for employment or licenses voluntarily submit to the regulatory procedures promulgated by the licensing agency. By law, regulations must not be arbitrary or capricious and must be reasonably related to the goals of the regulating entity.² The development and use of a sexual abuser profile to screen potential child care licensees or employees poses several complex legal problems.

¹ See Code of Virginia, §§ 63.1-56 and 63.1-220 et seq. (adoption); §§ 63.1-196 et seq. (foster care) and specifically § 63.1-196(a) and § 63.1-196.1 (licensing of child placement and child care facilities).

² Statutes in Virginia are enacted through public procedure by the General Assembly. State agency regulations must be approved pursuant to the Virginia Administrative Process Act (§ 9-6.14:1 et seq.). This Act provides for publication and public comment prior to approval by the appropriate state entity (e.g., the General Assembly and/or the Governor).

I.

Recent "Profile" Cases

Profiles have frequently been used in the criminal law enforcement setting.³ Airline hijacker profiles and drug courier profiles have attained a degree of legal acceptability as a basis for highway stops or airport stops.⁴ The control of drug traffic and hijacking are high priority public policy issues. These offenses impact large numbers of citizens and public interest in deterring these acts is substantial.

In spite of this, courts have not overlooked the fact that the Federal Constitution protects individuals in their persons and in their homes. What this means is that governmental entities cannot invade an individual's "person" or "home"

³ May v. Commonwealth, 3 Va. App. 348, 349 S.E.2d 428 (Va. App. 1986); United States v. DeAngelo, 584 F.2d 46 (4th Cir. 1978). A number of recent unreported Virginia cases have dealt with the issue of drug courier profiles (e.g., Antoniou v. Commonwealth; Castaneda v. Commonwealth; Iglesias v. Commonwealth; Jefferson v. Commonwealth; Little v. Commonwealth; Silvia v. Commonwealth; and Varasco v. Commonwealth).

⁴ These profiles are typically made up of physically observable details (e.g., a car traveling at night, heavily loaded, few occupants, little luggage, and a license plate from a rental car agency in a known drug traffic area or an airline passenger traveling alone, first or last to deplane, nervous, no luggage, ticket in another name).

unreasonably.⁵ In drug courier or hijacker investigations, a government employee, charged with the responsibility of enforcing the law, typically observes an individual who overtly exhibits the characteristics of the applicable profile. In these instances, courts have, with consistency, upheld a simple stop and questioning of such an individual.⁶ Most courts view this as a sufficiently limited intrusion of the "person" so as not to trigger a constitutional dilemma. Some courts have allowed greater intrusions than a mere stop.⁷ In these instances, however, the legal analysis frequently turns on the question of "consent" and whether due process requires "probable cause" to

⁵ U.S. CONST. AMEND. IV. provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁶ U.S. v. Skipwith, 482 F.2d 1272 (5th Cir. 1973) held that, due to the safety considerations, the general standards for searches were lower for passengers boarding an aircraft. But see U.S. v. Albarado, 495 F.2d 799, 807, n.14 (2nd Cir. 1974) which rejected the argument that airline passengers consent to metal detector searches. Yet in the same decision, the Court upheld the reasonableness of the search. Cited in Opinion of the Attorney General of Maryland, (October 22, 1986).

⁷ U.S. v. Lopez-Pages, 767 F.2d 776 (11th Cir. 1985) and U.S. v. Fern, 484 F.2d 666 (7th Cir. 1973).

justify a further intrusion or search without a warrant. The question most frequently asked of the courts is "If a police or security officer stops a car or individual, does matching the profile constitute sufficient probable cause to justify a further search without a warrant?"

The courts typically look to the facts and balance the competing interests to answer this question. Reviewing the officer's observations, the absence or presence of consent to the search, the reasonableness of the search and the public policy at stake, courts weigh these against the individual's right to privacy and right to be free from unreasonable searches. In the criminal setting, the initial stop is typically not a voluntary one; however, consent to some further search may follow, and potentially the individual may be exonerated "on the spot" thereby minimizing the intrusion. (These cases rarely, but occasionally, result in further litigation). Because there is a constitutionally protected liberty and property interest involved (potential imprisonment and loss of livelihood if incriminating evidence is discovered), the courts have gone to great lengths to ensure that even these limited intrusions without a warrant, do not occur indiscriminately or arbitrarily.

II.

Administrative Searches/Investigations and the Fourth Amendment

A. Consent to be Searched/Investigated

Applications to the state for a child care license or to a licensed facility for employment are administrative matters rather than criminal ones. Applications are voluntary and as such, consent is implied, arguably allowing the state or the employer to conduct reasonable investigations into the qualifications of the applicant. See e.g., Virginia Department of Social Services (615-50-1) "Standards and Regulations for Agency Approved Providers", § 2.1. This "consent", implied from the knowledge of the regulatory policies and procedures, eliminates some of the risk that applicants will challenge an investigation by calling it an unreasonable search without a warrant or an invasion of privacy.⁸ This assumes, however, that it can be demonstrated that the applicant had notice of the investigation

⁸ In Rush v. Obledo, 756 F.2d 713 (9th Cir. 1985), the court concluded that warrantless searches of family day care homes, including questioning of the children, was permissible because (1) the interest in protecting children is vital; (2) it (the interest) is furthered by the searches; and (3) regulation of the industry was sufficiently pervasive due to the licensing requirements, compliance monitoring, on-site inspections and sanctions for noncompliance.

to be conducted⁹ and that a reasonable relationship exists between the public policy considerations and the scope of the investigation.¹⁰

Personal liberty and the right to privacy are protected against unreasonable governmental intrusion by the Fourth Amendment to the United States Constitution. The voluntary nature of consent to a search may be diminished or obliterated entirely if the consent is granted solely because the

⁹ In Re: Fairbanks, 287 N.W.2d 579 (Iowa, 1980) required "pre-employment notice" prior to administering a polygraph test in an employment termination dispute.

¹⁰ Even after obtaining a license, courts have recognized the governmental need to regulate by inspection:

"The pervasively-regulated business exception" to the warrant requirement of the fourth amendment was first introduced in Colonnade Catering Corp v. United States, 397 U.S. 72 (1970). In Colonnade, the Court reviewed a statute providing for warrantless inspections of the merchandise and records of liquor licensees. Entry was authorized by federal agents under the statute during "business hours," day or night. Holding that such inspections were reasonable, the Court noted that the liquor industry has historically been subject to close government supervision and inspection and, where that industry was concerned, Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the "evils at hand." Quoting from Serlis, Irene, "Rush v. Obledo: Warrantless Home Day Care Searches Held Not to Violate the Fourth Amendment", 9 Criminal Justice Journal 165, 168-69 (1986).

employee/licensee or applicant faces loss or denial of a job/license as a result of refusing consent. Serpas v. Schmidt, 621 F.Supp 734, 743 (N.D. Ill. 1985). While this area of the law is neither clear nor nationally consistent, it must be recognized that claims of coercion may be raised.¹¹ If Virginia openly advises employees, licensees or applicants that they will be asked to consent to various record checks and/or psychological/behavioral testing, this will bolster the Commonwealth's position that the procedure is reasonable as well as justified by the public interest at stake. Nonetheless, the voluntariness of this consent may still be subject to challenge.

B. Reasonableness Of The Profile

1. Degree of Personal Inquiry/Invasion

A legal analysis of the permissibility of developing and using a sexual abuser profile turns on a balancing of interests. It is necessary to weigh the reasonableness and scope of the type of investigation to be conducted through application of the profile against the applicant's fourth amendment rights.

Not all of the characteristics potentially to be reviewed to

¹¹ See Lefkowitz v. Turley, 414 U.S. 70, 82-83, (1973) where the Court stated that "a waiver (of the 5th Amendment right to be free from self-incrimination) secured (by a state) under threat of substantial economic penalty cannot be termed voluntary."

see if an applicant matches a sexual abuser profile are characteristics that are readily observable. Some of the characteristics identified by available research and this committee appear to be discoverable only by delving explicitly into the personal history and sexual habits of applicants. Assuming applicants answer sexually explicit questions frankly, the profile may also entail obtaining corroboration from an applicant's past or present sex partners and/or family members. Serious legal questions arise as to the reasonableness of this sort of highly personal inquiry (particularly if it entails exposure of the intimate details of a nonapplicant's sexual activity). In the event of a challenge, a court will balance the competing right to privacy against the Commonwealth's need to protect its children. While the balance may favor the state's interest, the court will surely factor into the balancing the statistical validity and reliability of the profile itself.

2. Statistical Validity

Before a profile can be applied, it will be necessary to test its reliability by statistical validation.¹² This may be a

¹² Inwald, Robin E, "Administrative, Legal, and Ethical Practices in the Psychological Testing of Law Enforcement Officers", 13 Journal of Criminal Justice 367, 367-72 (1985), discusses the importance of professional test-usage standards. Inwald indicates that psychological tests used for "employee selection purpose...must be validated and normed on the

difficult hurdle due to the nature of the licensing process and the employment practices of child care providers. Assuming, however, that the profile can be validated and that applicants are on notice that they will be subjected to such scrutiny, the next legal problem arises in the area of interpreting the findings.

3. Appeals of Adverse Actions

In the hijacker and drug courier profile cases, the profile characteristics are objective and overtly observable. On the other hand, a sexual abuser profile more than likely will include both objective factors and subjective evaluations. In the criminal stop setting, the detainee may be exonerated "on the spot" even though he/she meets the profile. In this type of administrative investigation, however, the individual may be found to meet the profile subjectively and yet have little or no opportunity to negate or challenge the conclusion. For this reason, if a profile is developed for use, it will be necessary to provide a mechanism whereby the applicants have a meaningful appeal of adverse decisions.

III.

Potential Challenges

appropriate populations." Id. at 369.

A. Injury to Reputation

Individuals who are found to meet a sexual abuser profile and subsequently are denied a license or an employment opportunity will surely challenge the finding by alleging they have been stigmatized and/or denied a protected interest. Due to the fact that the profile may target both actual abusers and individuals with behavioral characteristics that may only potentially lead to abuse, suits can be expected.

While reputation is not per se a constitutionally protected interest, if (1) reputation is injured by a governmental agency, (2) which publishes the stigmatizing information, and (3) the result is injury to a protected interest (e.g., an existing classified state employment interest), then the state could have some potential liability.

In the case of Paul v. Davis, 424 U.S. 693 (1976), reh den, 425 US 985 (1976), the United States Supreme Court found that an "at will" private sector employee could not succeed in a fourteenth amendment (due process) suit or an action under 42 U.S.C. § 1983 (action by a governmental official injuring a constitutionally or federally protected interest), unless he demonstrated a deprivation "by the state" of some right "positively vouchsafed by the state." While Davis held that there is no independent constitutional protection of an

individual's reputation, it also described what is known as the "stigma plus" test. Under this test, to obtain relief a complaining party must show, not only stigma (injury to reputation) but also publication of the stigmatizing information and that the stigma and its publication have resulted in an actual injury or deprivation of a "protected interest".

Once an individual has a license or has more than an "at will" job, that individual "arguably" has a constitutionally protected interest in property which can only be taken away after due process has been accorded. See Davis at 701, and Wieman v. Updegraff, 344 U.S. 183, 192 (1952). If the sexual abuser profile is applied to new applicants, prior to licensing or renewal, or prior to hiring, there is less likelihood that a court would find the plaintiff to have a protected interest or the "plus" required under the Davis rationale.

The Davis court went on to hold that in a situation where the complaining party has demonstrated "stigma-plus" (e.g., loss of existing employment), the state may be liable if it acts in the role of "employer." The use by the Commonwealth of a profile to screen existing licensees or current state employees involved in child care is bound to trigger litigation if licenses are revoked or employment terminated. Defense of these suits would surely focus on the "stigma plus" test, looking to whether the

plaintiff has a protected interest; whether the stigmatizing information has been "published" (made public); and whether the state has in some way been the moving factor behind the action taken.¹³

B. Potential for Adverse Impact On Protected Classes

Under federal and state law, agencies and other employers are prohibited from using employment practices which discriminate on the grounds of race, color, religion, sex, age, natural origin or handicap. See e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq.; The Immigration Reform and Control Act of 1986, P.L. 99-603; Executive Order No. 1 (1986); 29 U.S.C. 706, Sections 503 and 504 of the Rehabilitation Act of 1973; Virginians with Disabilities Act (§ 51.01-40 et seq., Code of Virginia) and the Age Discrimination Act of 1967, Executive Order No. 1 (1986).

If the development of a profile results in specific

¹³ It is possible that the very act of failing to hire or fire an employee of a licensed child care facility or terminating or denying a license or application could be construed or argued to constitute "publication" thereby generating a suit alleging "stigma plus". While this claim might be made, it is unlikely to succeed considering the fact that the Virginia Department of Social Services has a fairly extensive regulatory scheme, and it would be difficult to prove that failing to hire, firing, denial of a license or application per se constitutes a publication that the individual "meets" the profile.

individuals or a protected class of individuals being disproportionately screened out, the profile will be subject to challenge by the adversely impacted individuals or class of individuals. In the process of statistically validating the profile for the appropriate population, it will be necessary to review alternate profiles to identify those with the least potential for any adverse impact.

IV. Discovery of Suspected Criminal Activity

A related problem that may arise in investigating applicants' sexual background is the question of how the investigating agency will deal with potentially incriminating information obtained during the investigation (e.g., suspected past or continuing criminal activity of the applicant and/or the applicant's spouse, sex partner, family members or employees). A similar issue has been addressed in a variety of cases involving polygraph examinations of police officers. In these cases, the tests brought to light information concerning suspected criminal activity of the officer being investigated. While the suspected activity was reported, and in some instances prosecuted, the courts, upholding the use of such tests, note that the information obtained about the officers was not admissible in the subsequent criminal prosecutions.¹⁴ On that premise, the courts frequently have found that these "employer required" polygraph

investigations do not infringe the officers right to be free from self-incrimination.¹⁵

While Virginia law does not have a blanket requirement that known or suspected criminal activity be reported, specific provisions of the law do require some individuals to report certain activities. § 63.1-248.3, Code of Virginia requires "any person employed in a public or private school...(or) providing full or part-time child care for pay on a regularly planned basis...who has reason to believe a child is an abused or neglected child...(to) report the matter...to the local department (of social services)".¹⁶ If a profile is developed for use, it will be necessary to provide education to the investigators/interviewers to assure compliance with this

¹⁴ Fireman's & Policemen's Civ. Serv. v. Burnham, 715 S.W.2d 809 (Tex. App. 1986), citing Garrity v. New Jersey, 385 U.S. 493 (1967) and Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982).

¹⁵ U.S. CONST. AMEND. V;
See Lefkowitz v. Turley, 414 U.S. 70, 82 (1973). In Lefkowitz the Court concluded that the state could not interrogate "contractors", require them to furnish potentially incriminating information and simultaneously require them to waive their Fifth Amendment immunity or risk losing their contracts.

¹⁶ See also § 22.1-296.1, Code of Virginia which requires all applicants for public school employment to certify that they have never been convicted of an offense involving "sexual molestation, physical or sexual abuse or rape of a child."

reporting requirement.

SUMMARY

To develop a legally defensible "sexual abuser profile" for use by the Commonwealth in making child care licensing and/or employment decisions, the following conditions would have to be met:

1. Consent to be investigated should be voluntary.
2. The profile should be composed of objective observations as opposed to challengeable subjective considerations.
3. The profile developed should be tested to the appropriate population for its statistical validity.
4. The testing should demonstrate that the profile does not have an adverse impact on "protected" individuals.
5. The profile developed should not rely heavily upon an intrusion into the privacy of nonapplicants.

If such a profile could be developed, the following problems also would need to be addressed prior to use of the profile:

1. Applicants should be given notice of the procedure, thereby enhancing the Commonwealth's

position that consent to be investigated is voluntary.

2. Safeguards should be developed to keep results confidential thereby, minimizing the risk of "stigmatizing" rejected applicants.
3. Procedures should be developed to apply the profile consistently in spite of the frequent turnover of employees in licensed child care facilities.
4. Guidelines should be developed to determine who to investigate. (e.g., the owner of the facility, the program director, family members or other individuals living in a licensed home care setting)
5. An appeals process should be developed permitting rejected applicants to challenge the propriety of the decision. Unless these appeals fall within an exception to the Virginia Administrative Process Act, see 9-16.14:4.1, Code of Virginia, they will potentially consist of an informal conference, a formal hearing and judicial review.

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