

1 H.436

2 Introduced by Representatives Grad of Moretown and Fay of St. Johnsbury

3 Referred to Committee on

4 Date:

5 Subject: Crimes; Vermont court rules; crimes; evidence; disclosure of
6 confidential records; notice to prosecution

7 Statement of purpose of bill as introduced: This bill proposes to add
8 statements made by children who were victims of alleged physical abuse to the
9 hearsay exception; allow flexibility in the testimony given by children who
10 were victims of alleged physical abuse; forbid children who were victims of
11 alleged physical abuse to be deposed in a criminal case; and require a hearing
12 to determine a particularized showing before a court may issue a subpoena for
13 a victim's personal records.

14 An act relating to child victims of physical abuse and court procedural rules

15 It is hereby enacted by the General Assembly of the State of Vermont:

16 Sec. 1. Rule 804a of the Vermont Rules of Evidence is amended to read:

17 Rule 804a. HEARSAY EXCEPTION; PUTATIVE VICTIM AGE 12 OR
18 UNDER; PERSON WITH A MENTAL ILLNESS OR
19 DEVELOPMENTAL DISABILITY

1 (a) Statements by a person who is a child 12 years of age or under or who
2 is a person with a mental illness as defined in 18 V.S.A. § 7101(14) or
3 developmental disability as defined in 18 V.S.A. § 8722(2) at the time the
4 statements were made are not excluded by the hearsay rule if the court
5 specifically finds at the time they are offered that:

6 (1) the statements are offered in a civil, criminal, or administrative
7 proceeding in which the child or person with a mental illness or developmental
8 disability is a putative victim of sexual assault under 13 V.S.A. § 3252,
9 aggravated sexual assault under 13 V.S.A. § 3253, aggravated sexual assault of
10 a child under 13 V.S.A. § 3253a, lewd or lascivious conduct under 13 V.S.A.
11 § 2601, lewd or lascivious conduct with a child under 13 V.S.A. § 2602, incest
12 under 13 V.S.A. § 205, abuse, neglect, or exploitation under 33 V.S.A. § 6913,
13 sexual abuse of a vulnerable adult under 13 V.S.A. § 1379, any offense in
14 which bodily injury or serious bodily injury is an element as defined in
15 13 V.S.A § 1021, or wrongful sexual activity and the statements concern the
16 alleged crime or the wrongful sexual activity; or the statements are offered in a
17 juvenile proceeding under chapter 52 of Title 33 involving a delinquent act
18 alleged to have been committed against a child 13 years of age or under or a
19 person with a mental illness or developmental disability if the delinquent act
20 would be an offense listed herein if committed by an adult and the statements
21 concern the alleged delinquent act; or the child is the subject of a petition

1 alleging that the child is in need of care or supervision under chapter 53 of
2 Title 33, and the statement relates to the sexual abuse of the child;

3 (2) the statements were not taken in preparation for a legal proceeding
4 and, if a criminal or delinquency proceeding has been initiated, the statements
5 were made prior to the defendant's initial appearance before a judicial officer
6 under Rule 5 of the Vermont Rules of Criminal Procedure;

7 (3) the child or person with a mental illness or developmental disability
8 is available to testify in court or under Rule 807; and

9 (4) the time, content, and circumstances of the statements provide
10 substantial indicia of trustworthiness.

11 (b) Upon motion of either party in a criminal or delinquency proceeding,
12 the court shall require the child or person with a mental illness or
13 developmental disability to testify for the state.

14 Sec. 2. Rule 807 of the Vermont Rules of Evidence is amended to read:

15 Rule 807. TESTIMONY WHERE VICTIM IS A MINOR, A ~~MENTALLY~~

16 ~~ILL PERSON OR A MENTALLY RETARDED PERSON~~

17 PERSON WITH MENTAL ILLNESS OR WITH

18 INTELLECTUAL DISABILITY

19 (a) Application. This rule applies only to the testimony of a child age 12 or
20 under or ~~mentally ill or mentally retarded person~~ a person with mental illness

1 or a person with an intellectual disability as defined in 14 V.S.A. § 3061(4)

2 or (5) in a proceeding:

3 (1) in a prosecution for sexual assault under 13 V.S.A. § 3252 or
4 aggravated sexual assault under 13 V.S.A. § 3253 alleged to have been
5 committed against that child or ~~mentally ill or mentally retarded person~~ person
6 with mental illness or person with an intellectual disability;

7 (2) in a prosecution for lewd and lascivious conduct with a child under
8 13 V.S.A. § 2602 or incest under 13 V.S.A. § 205 alleged to have been
9 committed against that child;

10 (3) in a prosecution for abuse, neglect or exploitation under 33 V.S.A.
11 § 6913 or lewd and lascivious conduct under 13 V.S.A. § 2601 alleged to have
12 been committed against that ~~mentally ill or mentally retarded person~~ person
13 with mental illness or intellectual disability;

14 (4) under chapter 55 of Title 33 involving a delinquent act alleged to
15 have been committed against that child or ~~mentally ill or mentally retarded~~
16 ~~person~~ person with mental illness or person with an intellectual disability, if
17 that delinquent act would be an offense listed in this subsection if committed
18 by an adult;

19 (5) in a civil action in which one of the parties or witnesses has been an
20 alleged victim of causes of action alleging sexual assault, lewd and lascivious

1 good cause shown and a showing that other means are not available to obtain
2 the information sought. In cases involving co-defendants, questioning shall be
3 conducted in the alphabetical order of the defendants' last names unless
4 otherwise agreed by the defendants. Repetitive questioning shall be avoided.

5 (3) Depositions of Law Enforcement Officers. Absent agreement of the
6 parties or approval of the court for good cause shown, no deposition shall be
7 taken of a law enforcement officer:

8 (A) who has been designated by the state as a person who performed
9 only a ministerial function with respect to the case or whom the prosecutor
10 does not intend to call at trial; and

11 (B) whose involvement with the case is fully set out in a police report
12 or other statement prepared by the law enforcement officer and furnished to the
13 defense; and

14 (C) who has been made available for a recorded in-person or
15 telephonic interview.

16 (4) Misdemeanors. No depositions shall be taken in misdemeanor cases
17 except by agreement of the parties or after approval of the court for good cause
18 shown. In determining whether to allow a deposition in misdemeanor cases,
19 the court may consider, among other things, the consequences to the defendant,
20 the importance of the witness's testimony, the complexity of the issues
21 involved, the complexity of the witness's expected testimony (e.g., experts),

1 and any other opportunities available to the defendant to discover the
2 information sought by the deposition.

3 (5) Depositions of Minors in Sexual and Physical Assault Cases.

4 (A) No deposition of a victim under the age of 16 shall be taken in a
5 prosecution under 13 V.S.A. §§ 2601 (lewd and lascivious conduct), 2602
6 (lewd and lascivious conduct with a child), 3252 (sexual assault), 3253
7 (aggravated sexual assault), ~~or~~ 3253a (aggravated sexual assault of a child), or
8 an offense involving bodily injury or serious bodily injury as defined in
9 13 V.S.A. § 1021 except by agreement of the parties or after approval of the
10 court pursuant to subparagraph (B) of this paragraph (5).

11 (B) The court shall not approve a deposition under this subdivision
12 unless the court finds that the testimony of the child is necessary to assist the
13 trial, that the evidence sought is not reasonably available by any other means,
14 and that the probative value of the testimony outweighs the potential detriment
15 to the child of being deposed. In determining whether to approve a deposition
16 under this subdivision, the court shall consider the availability of recorded
17 statements of the victim and the complexity of the issues involved.

18 (C)(i) If a deposition is taken pursuant to this paragraph (5), the court
19 shall issue a protective order to protect the deponent from emotional harm,
20 unnecessary annoyance, embarrassment, oppression, invasion of privacy, or
21 undue burden of expense or waste of time. The protective order may include,

1 among other remedies, the following: (I) that the deposition may be taken only
2 on specified terms and conditions, including a designation of the time, place,
3 and manner of taking the deposition; (II) that the deposition may be taken only
4 by written questions; (III) that certain matters not be inquired into, or that the
5 scope of the deposition be limited to certain matters; (IV) that the deposition be
6 conducted with only such persons present as the court may designate; or (V)
7 that after the deposition has been taken, the tape or transcription be sealed until
8 further order of the court. The restrictions of 13 V.S.A. § 3255(a) shall apply
9 to depositions taken pursuant to this paragraph (5).

10 * * *

11 Sec. 4. 13 V.S.A. § 6607 is amended to read:

12 § 6607. DISCLOSURE OF CONFIDENTIAL RECORDS; NOTICE TO
13 PROSECUTION; HEARING

14 When a defendant seeks access to a victim's school records, or to any other
15 records of a victim which are by law confidential, the defendant shall provide
16 written notice to the prosecutor ~~that the records have been requested prior to~~
17 ~~the service of any subpoena requesting the records~~ and the court. The court
18 shall hold a hearing to determine whether a particularized showing has been
19 met before ruling on the request.

20 Sec. 5. EFFECTIVE DATE

21 This act shall take effect on July 1, 2013.