

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF LONG TERM CARE RESIDENTS PROTECTION

Statutory Authority: 11 Delaware Code, Section 8564(g) (11 Del.C. §8564(g))
16 DE Admin. Code 3101

FINAL

3101 Adult Abuse Registry

ORDER

Nature of the Proceedings:

Delaware Health and Social Services ("Department"), Division of Long Term Care Residents Protection, initiated proceedings to amend the regulations regarding the Adult Abuse Registry. The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code, Section 10114, with authority prescribed by 29 Delaware Code, Section 7971.

The Department published its notice of proposed regulatory change pursuant to 29 Delaware Code Section 10115 in the February 2010 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by February 28, 2010 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposed Change

The proposal updates the regulations to accommodate the statutory amendments enacted last year and found at 11 Del.C. § 8564 which provides on-line access to the Adult Abuse Registry. Additionally, the regulation expands the existing authority to remove a person from the AAR before the expiration of their period when the person no longer poses a threat to any person receiving care to include removal when equity requires.

Statutory Authority

11 Del.C., §8564, Adult Abuse Registry Check

Background

Access to the Adult Abuse Registry was cumbersome because it required the inquiring party to secure a signed consent form and transmit the form to the Division of Long Term Care Residents Protection. That transmission was usually done by FAX, which produced thousands of printed pages each year. The vast majority of inquiries were negative, but time was spent examining the registry and communicating back with the inquiring source. There was a concern that very few inquiries came from individuals, as opposed to corporate or State employers, who appeared to be uninformed about the Registry, or about how to secure the information. The solution to all problems was to put the Registry online. The proposed regulatory changes were necessary to accommodate the statutory change.

Summary of Proposed Amendment

The proposed Amendment eliminates the parts of the regulation that became obsolete because of the statutory change. The exigent circumstance component of the statute appeared to be moot, since the online registry would be available any time. Thus Sections 2.1.2, and 2.1.3 were marked for deletion.

Summary of Comments Received with Agency Response and Explanation of Changes

The Governor's Advisory Council for Exceptional Citizens, the Developmental Disabilities Council, and the State Council for Persons with Disabilities offered the comments and recommendations summarized below. DLTCRP has considered each comment and responds as follows:

First, the statute permits an employer to hire an applicant pending clearance on the Adult Abuse Registry. Because the web site for the Registry could become unavailable, the option should be retained.

Response: The point is well-taken. The language will be retained, with a modification to conform to the current on-line access. The regulation will read:

- 2.1.2 When exigent circumstances exist which require an employer to fill a position in order to maintain the required or desired level of service, and access to the on-line Adult Abuse Registry is unavailable, the employer may hire a person seeking employment on a conditional basis not to exceed 15 days pending a Registry check.
- 2.1.3 The person shall be informed in writing, and shall acknowledge in writing, that his or her employment is conditional, and contingent upon receipt of the Adult Abuse Registry check.

Second, no notice to the applicant is required, nor is the applicant required to consent to the Registry search. The records are not public. Employers may violate the applicants' rights, particularly since there is no language in the regulation which imposes confidentiality requirements.

Response: The purpose of the statutory change enacted last year was to facilitate rapid public access to the Registry which is especially important to those in the community who need home care assistance. The statutory change necessarily included the elimination of consent and a signed statement authorizing the release of the information. An individual who applies for a position which requires an Adult Abuse Registry check implicitly consents to the Registry review. The policy decision to put the Registry online embraces the potential for abuse by non-employers or others who do not seek the information for an employment-related purpose.

The statutory change enacted last year permitted only a limited exception to the privacy requirement. The records of the underlying investigation, and administrative appeal, if any, remain confidential. The new statute permits the Division to post the "names of those actively listed on the Adult Abuse Registry and whether the listing is due to a substantiated finding of abuse, neglect, mistreatment or financial exploitation." 11 Del.C., §8564(e). The comparison to Criminal Background Checks is not valid because the dissemination of that data continues to be restricted; it never becomes public.

Findings of Fact

The Department finds that the proposed changes set forth in the February 2010 *Register of Regulations* should be adopted, subject to the modification set forth above which is not substantive.

THEREFORE, IT IS ORDERED, that the proposed changes to Regulation 3101 - Adult Abuse Registry, with the modification indicated herein, is adopted and shall be final effective April 1, 2010.

Rita Landgraf, Secretary, DHSS

3101 Adult Abuse Registry

1.0 Definitions

"Abuse" shall have the same meaning as contained in 16 **Del.C.** §1131, and shall include mistreatment, neglect and financial exploitation as defined therein.

"Child Care Facility" means any child care facility which is required to be licensed by the Department of Services for Children, Youth and Their Families.

"Contractor" means an entity under contract to provide services for more than 20 hours per week (aggregate) and for more than six weeks in a twelve month period for a health care service provider, and whose employees have the opportunity for direct access to persons receiving care. For purposes of these regulations, contractor does not include construction contractors.

"Department" means the Department of Health and Social Services.

"Direct Access" means the opportunity to have personal contact with persons receiving care during the course of one's assigned duties.

"Division" means the Division of Long Term Care Residents Protection.

"Health Care Service Provider" means any person or entity that provides services in a custodial or residential setting where health, nutritional or personal care is provided for persons receiving care, including but not limited to, hospitals, home health care agencies, adult care facilities, temporary employment agencies and contractors that place employees or otherwise provide services in custodial or residential settings for persons receiving care, and hospice agencies. Health Care Service Provider does not include any private individual who is seeking to hire a self-employed health caregiver in a private home.

"Nursing Facility and Similar Facility" means any facility required to be licensed under 16 Del.C. Ch. 11. This includes, but is not limited to, facilities commonly called nursing homes, assisted living facilities, intermediate care facilities for persons with mental retardation, neighborhood group homes, family care homes and rest residential care facilities. Also included are the Stockley Center, the Delaware Psychiatric Center and hospitals certified by the Department of Health and Social Services pursuant to 16 Del.C. §5001 or 5136.

"Person Receiving Care" means any person who, because of his/her physical or mental condition, requires a level of care and services suitable to his/her needs to contribute to his/her health, comfort and welfare.

"Person Seeking Employment" means any person applying for employment with or in a health care service provider, nursing facility or similar facility that may afford direct access to persons receiving care at such facility, or a person applying for licensure to operate a child care facility or nursing facility and similar facility. It shall also include a self-employed health caregiver who has direct access in any private home.

"Substantiated Pending Appeal" refers to a placement on the Registry based on an investigative finding prior to the subject exercising his/her right to appeal.

"Substantiated Abuse" means that, weighing the facts and circumstances, a reasonable person has concluded by a preponderance of evidence that the identified individual has committed adult abuse for the purpose of placement on the Adult Abuse Registry.

5 DE Reg. 1073 (11/1/01)

2.0 Use of Registry

- 2.1 No health care service provider, to include nursing and similar facilities, or child care facility shall hire any person seeking employment or retain any contractors without ~~requesting and receiving~~ conducting an a check of the person through the on-line Adult Abuse Registry check for such person available at the Division's website. The provider shall maintain a copy of the results of the check to demonstrate compliance with this requirement.
- 2.1.1 ~~Any employer who is required to request an Adult Abuse Registry check shall obtain a statement signed by the person seeking employment wherein the person authorizes a full release for the employer to obtain the information provided pursuant to such a check. Said authorization shall include the following language: "I hereby release the indicated employer to obtain from the Division of Long Term Care Residents Protection any information concerning me which may be on the Adult Abuse Registry pursuant to 11 Del.C. §8564."~~
- [2.1.1 **When exigent circumstances exist which require an employer to fill a position in order to maintain the required or desired level of service, the employer may hire a person seeking employment on a conditional basis after the employer has requested an Adult Abuse Registry check.**]
- 2.1.2 ~~When exigent circumstances exist which require an employer to fill a position in order to maintain the required or desired level of service, the employer may hire a person seeking employment on a conditional basis after the employer has requested an Adult Abuse Registry check.~~
- [2.1.2 **The person shall be informed in writing, and shall acknowledge in writing, that his or her employment is conditional, and contingent upon receipt of the Adult Abuse Registry check.**]

~~2.1.3 The person shall be informed in writing, and shall acknowledge in writing, that his or her employment is conditional, and contingent upon receipt of the Adult Abuse Registry check.~~

2.2 Private individuals seeking to hire an individual to provide health care services in a private residence may request the Division to determine if the potential employee is listed on the Adult Abuse Registry conduct a check of the on-line Adult Abuse Registry available at the Division's website. A An individual who does not have access to the internet may submit short letter of request ~~along with a release form signed by the prospective employee may be mailed or faxed~~ to the Division of Long Term Care Residents Protection (DLTCRP) # 3 Mill Road, Suite 308, Wilmington, DE 19806, fax number (302) 577-6673 by mail or fax.

5 DE Reg. 1073 (11/1/01)

3.0 Investigation of Adult Abuse

3.1 The Division shall investigate any individual against whom an allegation of adult abuse has been made in accordance with the time frames delineated in 16 **Del.C.** §1134(d).

3.2 If the investigation substantiates pending appeal that the alleged abuse occurred, the Division's Investigations Unit Chief shall enter on the Adult Abuse Registry, with a finding of "Substantiated Pending Appeal," the individual's name, date/time of the incident, a description of same and the length of time the finding shall remain on the Registry.

3.3 The Division may accept preliminary investigations by a state agency or an entity contracted by a state agency. The Division will review and may revise the findings upon further investigation.

3.4 Upon placement of a person on the Adult Abuse Registry, the Division will notify the facility from which the complaint originated as well as the current employer, if different, and the victim that the person is on the Registry as "Substantiated Pending Appeal."

5 DE Reg. 1073 (11/1/01)

4.0 Administrative Hearings

4.1 An individual against whom an allegation is substantiated pending appeal shall be notified by certified mail at his/her home address, to be followed by written notice in care of his/her current employer at the discretion of the Division, that his/her name has been entered on the Adult Abuse Registry and shall be offered a right to an administrative hearing. The burden of proof in such hearing shall be on the Division. Individuals shall be informed upon completion of the investigation of the following:

4.1.1 The date and time of the incident if known.

4.1.2 The name and type of facility where the incident occurred.

4.1.3 A brief description of the incident.

4.1.4 Length of time the finding remains on the Adult Abuse Registry.

4.2 All requests for an administrative hearing must be received in writing, postmarked within 30 days of the date of the notice that a finding of abuse has been substantiated pending appeal. The Director or his/her designee shall dismiss untimely requests for hearing except when the individual submits evidence of good cause.

4.3 An individual who fails to request an administrative hearing as described above shall have his/her name and information regarding the incident changed from a finding of "Substantiated Pending Appeal" to a finding of "Substantiated Abuse" on the Adult Abuse Registry. At that time the Division shall notify the individual, the facility from which the complaint originated as well as the current employer, if different, and the victim that the individual is on the Registry with a finding of "Substantiated Abuse."

4.4 An individual who has entered a plea or who has been convicted by a court of law of a criminal offense based on the same conduct that resulted in placement on the Adult Abuse Registry shall have the right to an administrative hearing solely to challenge the proposed length of time of registration on the Adult Abuse Registry.

- 4.5 The hearing officer shall have the power to compel the attendance of witnesses and the production of evidence. Under no circumstance shall the hearing officer order the release of the investigative report and documents attached thereto, provided however, the hearing officer may order the release of statements of witnesses.
- 4.6 The hearing officer should receive requests for witnesses and/or the production of evidence no less than ten business days prior to the hearing date.
- 4.7 The individual shall be afforded an opportunity to appear with or without an attorney, submit documentary evidence, present witnesses, and question any witness the Division presents. Limited continuances shall be granted for good cause.
- 4.8 If, at the conclusion of the hearing, the hearing officer concludes by a preponderance of evidence, that the identified individual has committed adult abuse, for the purpose of placement on the Adult Abuse Registry, a notice of "Substantiated Abuse" shall be placed on the Adult Abuse Registry. If, at the conclusion of the hearing, the hearing officer concludes that the individual has not committed adult abuse, the finding of "Substantiated Pending Appeal" shall be removed from the Adult Abuse Registry.
- 4.9 The hearing officer shall render a written decision within thirty working days of the hearing and will notify the individual, the Division, the facility and the victim of the decision. The notice will specify the reasons for the decision and, if the finding is substantiated, the length of time the finding of substantiated abuse shall remain on the Adult Abuse Registry.
- 4.10 Any person placed on the Adult Abuse Registry shall have the right to appeal the decision within thirty days of the finding. The decision of the hearing officer may be appealed on the record to Superior Court. Appeals of hearing officer decisions are governed by the Administrative Procedures Act, Title 29, Chapter 101.

5 DE Reg. 1073 (11/1/01)

7 DE Reg. 82 (7/1/03)

5.0 Length of Time on the Adult Abuse Registry

- 5.1 The length of time on the Adult Abuse Registry shall be based on the seriousness of the incident and whether there exists a pattern of adult abuse. Evidence of mitigating circumstances may be considered.
- 5.2 The names of registrants with findings of abuse, neglect or misappropriation entered on the Registry of Nurse Aides created pursuant to 42 CFR §483 shall be entered on the Adult Abuse Registry with a finding of substantiated abuse. There shall be a right of appeal for findings entered on the Adult Abuse Registry under this section solely to challenge the proposed length of time of registration on the Adult Abuse Registry.
- 5.3 Upon final disposition of the allegation, the Division shall notify, in writing, the victim, the facility where the incident occurred as well as the current employer of the individual, if different, of the final disposition.

5 DE Reg. 1073 (11/1/01)

6.0 Removal of a Person from the Adult Abuse Registry

- 6.1 The Department shall be authorized to remove a person from the Adult Abuse Registry before the expiration of his/her registration period when the Department deems that the person no longer poses a threat to any person receiving care in accordance with 11 **Del.C.** §8564(g) or where equity requires.
- 6.2 A person whose name has been placed on the Adult Abuse Registry shall have the right to petition the Division, in writing, for the removal of his/her name from the Registry. Said petitioner must demonstrate:
 - 6.2.1 A minimum of twelve months has passed since his/her placement on the Registry.
 - 6.2.2 Affirmative steps have been taken to correct behavior that led to placement on the Registry, i.e. anger management counseling, drug/alcohol treatment, sensitivity training, etc.
 - 6.2.3 Demonstrated improved behavior through work references.

- 6.3 The Division will evaluate the information provided by the petitioner and respond in writing within 60 days of receipt of all information provided by the petitioner. The Division is authorized to grant or deny the removal based on the review of the information presented. If the Division denies the request, the petitioner may request a hearing to appeal the denial, or reapply for the removal after 6 months or when the petitioner can produce evidence of performance of the affirmative steps listed above.

5 DE Reg. 1073 (11/1/01)

7.0 Disclosure of Adult Abuse Registry Records

Except as otherwise provided in these regulations, the dissemination of information contained in the Adult Abuse Registry shall be limited as follows:

- 7.1 Hearing Officer Opinions shall be released upon request to the following:
- 7.1.1 The subject of the hearing.
 - 7.1.2 A victim identified by name in the record or his/her legal representative.
 - 7.1.3 Law enforcement officials pursuant to an official investigation.
 - 7.1.4 The Long Term Care Ombudsman pursuant to a complaint from a victim identified in the record.
 - 7.1.5 The Medicaid Fraud Control Unit of the Department of Justice.
 - 7.1.6 The Division of Professional Regulation if a finding of substantiated abuse pertains to a licensed professional.
- 7.2 Investigative files shall be released upon request to:
- 7.2.1 Law enforcement officials pursuant to an official investigation.
 - 7.2.2 The Medicaid Fraud Control Unit of the Department of Justice.
 - 7.2.3 Rights protection agencies otherwise entitled under applicable federal or state law.

5 DE Reg. 1073 (11/1/01)

Addendum Reporting To Nurse Aide Registry

In accordance with 42 CFR §483, the Division of Long Term Care Residents Protection will report findings of abuse to the Nurse Aide Registry under the following procedure:

1. When the Division has substantiated pending appeal a finding of abuse, neglect, mistreatment or financial exploitation against a certified nurse assistant, a determination will be made whether the substantiated findings meet the criteria required in the federal regulations or the criteria in state statute and regulations.
2. If the findings support the criteria for abuse, mistreatment or misappropriation of property in the federal regulations, the certified nurse assistant will be notified that his/her name is both reported to the Nurse Aide Registry and placed on the Adult Abuse Registry, and that he/she has a right to a hearing. The CNA will also be notified that, with regard to the Nurse Aide Registry, a substantiated finding will result in a lifetime prohibition against employment in a federally certified facility.
3. If the findings support the criteria for neglect in the federal regulations, the certified nurse assistant will be notified that his/her name is both reported to the Nurse Aide Registry and placed on the Adult Abuse Registry, and that he/she has a right to a hearing. The CNA will also be notified that, with regard to the Nurse Aide Registry, a substantiated finding of neglect will result in a lifetime prohibition against employment in a federally certified facility. However, the CNA will be further informed of his/ her right to petition the Division to have the report removed from the Nurse Aide Registry in accordance with §1819(g)(1)(D) of the Social Security Act.
4. The notice to the certified nurse assistant will include an explanation that the hearing described in the Adult Abuse Registry regulations will also consider the placement of the CNA on the Nurse Aide Registry. The CNA will be informed that if the evidence presented at a hearing does not warrant a finding of abuse, neglect, mistreatment or misappropriation of property under the federal regulations, the evidence will be considered to determine whether it meets the criteria for abuse, neglect, mistreatment or financial exploitation under the state Adult Abuse statute.

5 DE Reg. 1073 (11/1/01)

13 DE Reg. 1308 (04/01/10)