



**Department of Health and Social Services
Policy Memorandum # 46
Responding to Reportable Incidents/Allegations**

**March 2, 2016
Revised: August 22, 2016**

I. Purpose

- a. To identify and define reportable incidents and allegations that warrant notifications and investigations.
- b. To identify standardized reporting and investigative procedures of reportable incidents and allegations.

II. Policy

- a. It shall be the policy of the Delaware Health and Social Services (DHSS) that individuals receiving residential services (community or institutional based) and/or attend a DHSS funded day program shall be free of abuse, neglect, mistreatment, significant injury and financial exploitation.
- b. It shall be the policy of the DHSS that Divisions initiate a policy/procedures that minimally include the requirements set forth in this policy memorandum.

III. Scope

This policy applies to employees and contractors of the Division of Developmental Disabilities Services (DDDS), Division of Long Term Care Residents Protection (DLTCRP), Division of Substance Abuse and Mental Health (DSAMH), and Division of Services for Aging and Adults with Physical Disabilities (DSAPD). It is intended to protect the well-being of the following individuals:

- a. Individuals who live in a community residential placement or Long-Term Care facility, unlicensed or licensed by the Division of Long Term Care Residents Protection, operated by or for any of the aforementioned DHSS Divisions;
- b. Individuals who receive treatment at the Delaware Psychiatric Center (DPC);
- c. Individuals who attend a DHSS funded day program if the reportable incident is alleged to have occurred while receiving day program services.

IV. Definitions

- A. **Bullying** shall mean any written, digital, electronic, verbal or physical acts or actions that may elicit fear or cause harm to an individual's emotional, psychological or physical well-being. Inciting, soliciting or coercing a single entity or group to demean, dehumanize, embarrass or cause emotional, psychological or physical harm to an individual is also considered bullying.
- B. **Division** shall refer to the Division of Developmental Disabilities Services, Division of Long term Care Residents Protection, Division of Substance Abuse and Mental Health and Division of Services for Aging and Adults with Physical Disabilities.

- C. **Health Care Surrogate** shall mean the individual who has the highest priority to act for the patient under Delaware law. Delaware law presumes a person has decision-making capacity until a physician determines that a patient does not have decision-making capacity. The hierarchy under Delaware Law to act as the authorized-representative for a person without decision-making capacity is as follows:
1. The court-appointed Guardian, only with the appropriate authority;
 2. The patient's most recently appointed Agent in an Advance Health Care Directive or Health Care Power of Attorney, only with the appropriate authority;
 3. If there is no Guardian or Agent or if the designated Guardian or Agent is unavailable, or if the patient revoked an Advance Health Care Directive pursuant to 16 Del.C. § 2504, the Surrogate Statute applies and will allow either the individual named by the patient prior to losing decision-making capacity or if none, the individual recognized by the Surrogate Statute, 16 Del.C. § 2507, to act.
- D. **Immediately** shall mean as soon as the situation is stabilized (e.g., actions have been taken to provide treatment, comfort and safety in individuals involved) and minimally within eight (8) hours of discovery of the incident.
- E. **Individual (Served)** shall mean the people who receive services from the DHSS Divisions and are covered within the scope of this policy (see section III).
- F. **Long Term Care Facility** shall mean any facility operated by or for DHSS which provides long term care residential services. It also includes the Delaware Psychiatric Center.
- G. **Reportable Incidents** shall mean suspicion of any of the following occurrences:
1. **Abuse** shall mean:
 - a. Physical abuse by unnecessarily inflicting pain or injury to a patient or resident. This includes but is not limited to, hitting, kicking, punching, slapping or pulling hair. When any act constituting physical abuse has been proven, the infliction of pain is assumed;
 - b. Sexual abuse which includes, but is not limited to, any sexual contact, sexual penetration, or sexual intercourse by an employee or contractor, as defined in 11 DE Code, Ch. 5, §761, with an individual. It shall be no defense that the sexual contact, sexual penetration, or sexual intercourse was consensual;
 - c. Sexual act (any) between staff and an individual and any non-consensual sexual act between individuals or between an individual and any other person such as a visitor;
 - d. Emotional abuse which includes, but is not limited to, ridiculing, demeaning, humiliating, bullying or cursing at an individual, or threatening an individual with physical harm.
 2. **Financial Exploitation** shall mean the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the individual by any person or entity for any person's or entity's profit or advantage other than for the individual's profit or advantage. "Financial exploitation" includes, but is not limited to:
 - a. The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with an individual to obtain or use the property, income, resources, or trust funds of an individual for the benefit of a person or entity other than the individual;
 - b. The breach of a fiduciary duty, including but not limited to, the misuse of a power of

- attorney , trust, or a guardianship appointment that results in the unauthorized appropriation, sale or transfer of the property, income, resources or trust funds of the individual for the benefit of a person or entity other than the individual; and
- c. Obtaining or using an individual's property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the individual lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds. (31 Del.C. §3902(11)).
3. **Medication Diversion** shall mean knowingly or intentionally interrupting, obstructing or altering the delivery or administration of a prescription drug to an individual receiving services, provided that such prescription was :
 - a. Prescribed or ordered by a licensed health care practitioner for the individual receiving services **and**
 - b. The interruption, obstruction or alteration occurred without the prescription or order of a licensed health care practitioner.
 4. **Mistreatment** shall mean include the inappropriate use of medications, isolation, or physical or chemical restraints on or of an individual receiving services.
 5. **Neglect** shall mean:
 - a. Lack of attention to the physical needs of an individual receiving services to include but not limited to toileting, bathing, nutrition and safety;
 - b. Failure to report problems or changes in health problems or changes in health condition to an immediate supervisor or nurse;
 - c. Failure to carry out a prescribed treatment plan or plan of care that resulted in a negative impact or potential negative impact or the neglect resulted in a repeated trend;
 - d. A knowing failure to provide adequate staffing which results in a medical emergency to any individual receiving services where there has been documented history of at least 2 prior cited instances of such inadequate staffing within the past 2 years in violation of minimum maintenance of staffing levels as required by statute or regulations promulgated by the Department, all so as to evidence a willful pattern of such neglect. (16 DE Code, §1161-1169).
 6. **Unanticipated death** shall include all deaths of individuals served that are of a suspicious and/or unusual nature. They shall also include those deaths whereby the Division of Forensic Science assumed jurisdiction.
 7. **Significant Injury** shall include:
 - a. Injury from an incident of unknown source in which the initial investigation or evaluation supports the conclusion that the injury is suspicious. Circumstances which may cause an injury to be suspicious are: the extent of the injury, the location of the injury (e.g., the injury is located in an area not generally vulnerable to trauma), the number of injuries observed at one particular point in time, or the incidence of injuries over time;
 - b. Injury which results in transfer to an acute care facility for treatment or evaluation or which requires periodic neurological reassessment of the resident's clinical status by professional staff for up to 24 hours;
 - c. Areas of contusions or bruises caused by staff to a dependent resident during ambulation, transport, transfer or bathing;
 - d. Significant error or omission in medication/treatment, including drug diversion, which causes the resident discomfort, jeopardizes the individual's health and safety or requires periodic monitoring for up to 48 hours;

- e. A burn greater than first degree;
- f. Any serious unusual and/or life-threatening injury.

H. **Residential Facility** shall include any facility operated by or for DHSS including long term care licensed facilities, group homes, foster homes and other supervised community living arrangements.

V. **Standards**

- A. The Division Director, or his/her designee within the scope of this policy, is hereby designated as an official DHSS designee under the State Mandatory Patient Abuse Reporting Law and/or as it applies to Policy Memorandum #46.
- B. The Division Director or designee shall review reportable incidents and initiate investigations for reports that fall within the purview of this policy. He/she shall ensure that actions have been taken to protect the health and safety of individuals who are in immediate danger from further abuse.
- C. Nothing in this policy shall replace additional federal and state statutory requirements relative to reporting and responding to allegations of abuse, neglect, mistreatment, significant injury, financial exploitation, medication diversion or unanticipated death.
- D. The requirements set forth in this policy memorandum and the respective Division policy shall be incorporated into Divisional operational procedures and all contracts of agencies/entities that provide services to people covered by this policy.
- E. Each Division shall develop written policy/procedures that include the requirements set forth in this policy. The Division policy shall be approved by the applicable Division Director prior to implementation and a copy forwarded to the Office of the Secretary.
- F. DHSS shall develop standardized protocol for Divisions to implement relative to orienting the individuals served, guardians of person (or property if the allegation involves financial exploitation), other legally authorized persons. Divisions shall customize their orientation to include their protocol and contacts.
- G. All persons covered by the scope of this policy shall be required to attend annual training on the requirements of this policy.
- H. Each Division shall develop a process that describes the monitoring, trending and follow up quality improvement protocol in response to reportable incident investigations.
- I. Laws prohibiting intimidation of witnesses and victims (11Del.C., §3531-3534) shall be understood by all employees and contractors identified in the Scope section of this policy.
- J. Employees and contractors identified in Scope section of this policy shall protect the confidentiality of records and information related to the investigation as well as persons involved in the case. The investigative process shall be confidential and not subject to disclosure pursuant to 24 De Code, §1768 and because it is privileged under the governmental privilege for investigative files.

K. The policy shall minimally include the following:

1. **The process for responding to reportable incidents:**

- a. The person who has reasonable cause to believe that an individual has been abused, neglected, mistreated, financially exploited, had their medication diverted, received a significant injury or died an unanticipated death shall immediately take actions to ensure the individual receives all necessary medical treatment and evaluation **and then**;
- b. Take actions to protect all individuals from further physical or emotional harm **and then**;
- c. Ensure that individuals reported to be victims of sexual assault are examined by a Sexual Assault Nurse Examiner (SANE) at the hospital **and then (or concurrently if possible)**; contact the local law enforcement to report crimes against individuals **and then**;
- d. Report immediately to the Division's Designated recipient of reportable incidents **and then**;
- e. Make a verbal report to the DLTCRP by telephoning the 24 hour toll free number at 1-877-453-0012 if the individual lives in a facility that is licensed by the DLTCRP.

2. **Other notifications that are required:**

- a. Persons not included within the Scope of this policy may also notify the Division of their suspicion of a reportable incident. Such a report shall trigger the same reporting, notification and response procedure as delineated within this policy;
- b. The Division Director or designee shall notify the Office of the Secretary, Office of the Attorney General/Medicaid Fraud Control Unit and DLTCRP if an individual dies as a result of suspected abuse, neglect, mistreatment, significant injury;
- c. The Division's designated recipient(s) of reportable incidents shall issue notification to all required entities regarding the reportable incident, within 24 hours of receiving notification. Notifications are situational specific and may include any combination of the following non-exhaustive list of entities:
 - i. Office of the Secretary
 - ii. Division Director or designee
 - iii. Division of Long Term Care Residents Protection (verbal followed by web based reporting for licensed facilities/homes)
 - iv. Division of Medicaid and Medical Assistance (if the individual receives services funded by Medicaid)
 - v. Local law enforcement (for all reasonable suspicion of crime)
 - vi. Delaware State Police Drug Diversion Unit (for medication diversion allegations)
 - vii. DHSS Medical Director (for unanticipated deaths)
 - viii. Adult Protective Services (for non-residential)
 - ix. Child Protective Services (individual under 18)
 - x. Elder Abuse Hotline
 - xi. Community Legal Aid Society, Inc (if required by 16 DE Code, §5162)
 - xii. Division of Forensic Science (for unanticipated deaths)
- d. The designee of any hospital or residential center that admits individuals pursuant to 16 Del. CH. 50, 51 or 55 shall notify the Community Legal Aid Society, Inc. (CLASI) within 72 hours of an individual's death by any means pursuant to 16 Del. CH. 51, §5162;
- e. Individual to Individual incidents involving at least one person who lives in a Long Term Care Facility or licensed residential facility involving abuse and/or assault and results in actual harm/injury to at least one of the individuals, that is not the result of staff

- negligence shall be reported to the DLTCRP via their web based Incident Report;
- f. The Division shall notify the individual (reported victim) unless there is an identified guardian of person (or property if the allegation involves financial exploitation), health care surrogate pursuant to Title 16, §2507 or other legally authorized person of the reportable incident. Exceptions to this standard shall include if the alleged offender is the guardian or primary contact person, or release of information has the potential to harm or if the individual served (Victim) expressly communicates that he/she does not want the non-guardian family contact person to be contacted about the allegation. Notifications shall occur with the following frequency:
 - i. Initial notification on the day the reportable incident is reported by the Division's designated recipient of reportable incidents (verbal and written);
 - ii. Follow-up notification if the investigation exceeds 5 working days (for Long Term Care Facilities and the Delaware Psychiatric Center) or 10 calendar days (verbal or written);
 - iii. Notification at the conclusion of the investigation (verbal and written).
 - g. Incidents that involve conduct that a reasonable person would suspect also constitute a criminal offense under local, State or Federal law shall be reported to the appropriate law enforcement agency. Such reports to law enforcement shall be made within two (2) hours for serious bodily injury.
 - h. The Division shall notify the supporter under a supported decision making agreement if the individual who is the victim of the incident requests such notice be given or if the victim is unable to contact the supporter and the supporter has been engaged in discussions with the provider or Agency prior to the incident.

3. Requirements regarding investigators and investigations:

- a. Each Division shall develop a protocol that identifies the minimal training requirements for investigators and the Division's protocol for tracking compliance thereof.
- b. The Division or contractor investigator shall always ensure that they have approval to proceed with an investigation from law enforcement or Division of Forensic Science, when they are involved.
- c. Investigative reports shall minimally include:
 - i. Direct interview with the individual;
 - ii. Interview with the reporter of the allegation;
 - iii. Interview with all potential witnesses and individuals whom may have pertinent information;
 - iv. Written statements from employees/contractors interviewed (attempts should also be made to obtain written statements from other people interviewed);
 - v. Documents and physical evidence that relate to the investigation.
- d. Investigations shall be completed within 10 days. The following exceptions apply: 1) investigations shall be completed within five (5) working days of the incident pursuant to 42 CFR §§483.13 (c)(2) and (4), 2) the Division Director or designee approves an extension of this time frame due to extenuating facts related to the investigation and notifies the DLTCRP, if applicable.
- e. Division employee and contractors are mandated to fully cooperate with investigations initiated, as required by this policy, and all other subsequent investigations by other review entities such as but not limited to those conducted by DLTCRP, law enforcement, Office of the Attorney General/Medicaid Fraud Unit, Division of Forensic Science, all regulatory and licensing agencies and Adult Protective Services.

4. Requirements for responding to other complaints:

- a. Divisions are required to develop policy/procedures for the investigation of complaints involving individuals receiving DHSS services from DDDS, DSAMH, and DSAAPD, who are not covered by the scope of this policy.

5. Initial and closing notification to the individual, his/her guardian of person (or property if the allegation involves financial exploitation) identified health care surrogate pursuant to Title 16, §2507 or other legally authorized person shall only include:

- a. Notice that the allegation of (specify type) has been received, reassurance that the person is safe and protected and that an investigation has been initiated;
 - b. Notice of the content of the interim notification shall only include that the investigation process continues. The Divisions shall have a protocol for responding to requests for more information (ie., determine if more information can be shared and respond back to contact person);
 - c. Notice of the completion of the investigation shall only include the following information: a) the investigation was completed, b) brief explanation of the Division's follow up protocol, and c) if the investigation was referred to the DLTCRP. Information related to the investigation and any employee personnel action shall never be disclosed;
 - d. Investigative reports completed pursuant to the scope of this policy are confidential and fall under peer review protections. The DHSS Divisions within the scope of this policy are entities charged with helping to safeguard the health and safety of their clients/residents/patients. They shall be recognized as a "public health authority" and as a "health oversight agency" and they shall be recognized in the performance of their function as a peer review organization or auditor or evaluator with respect to such aspects of health delivery systems or providers.
- L. Requests for disclosure of the investigation shall be forwarded to the applicable Division Director or Division Director's Designee who will consult with the Deputy Attorney General.
- M. An internal report (not the investigation) may be forwarded to the Human Resources Office to determine appropriate level of discipline when a substantiated investigation involves a State employee.
- N. Divisions shall forward all investigative reports to DLTCRP for incidents involving individuals living in licensed facilities or licensed community residential placements.
- O. Divisions may refer substantiated investigative reports to the DLTCRP for Adult Abuse Registry (AAR) placement consideration, for individuals in non-licensed facilities or non-licensed community residential placement.

VI. Implementation

- A. This policy shall be effective within thirty (30) days of issuance.
- B. Any part of this policy which is in violation of State or Federal laws shall be null and void; all other parts shall remain operative.

VII. References

- A. 16 DE Code, §1131-1140
- B. 16 DE Code, §5162
- C. 16 DE Code, §2507
- D. 16 DE Code, §1161-1169
- E. 24 De Code, §1768
- F. 11 De Code, §3531-3534
- G. 11 DE Code, §761
- H. 16 DE Code, §9401A
- I. DLTCRP Report of Findings

VIII. Exhibits

- A. <http://delcode.delaware.gov/title11/c005/index.shtml>
- B. <http://delcode.delaware.gov/title16/c011/sc03/index.shtml>
- C. <http://delcode.delaware.gov/title31/c039/index.shtml>
- D. Initial Notification Letter Template
- E. Close out letter for non-licensed residential/day template
- F. Close out letter for licensed homes/facilities template
- G. PM #46 Tri-fold

 8/22/16

Rita M. Landgraf, Secretary Date