

Chapter 12: REGULATIONS GOVERNING REPORTABLE EVENTS, ADULT PROTECTIVE INVESTIGATIONS AND SUBSTANTIATION HEARINGS REGARDING PERSONS WITH MENTAL RETARDATION OR AUTISM

SUMMARY: This chapter sets forth the policy of the Maine Department of Health and Human Services regarding reportable events and the investigation of allegations of abuse, neglect and exploitation of adults with mental retardation and autism. It also describes the process for individuals appealing a substantiation of abuse, neglect and exploitation.

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6.01 PURPOSE AND SCOPE

A. Reportable Events

Any provider of services to persons with mental retardation or autism who is licensed, funded or regulated in whole or in part by the Department of Health and Human Services is required to report certain events to the Department by state law and this policy. Section 6.03 defines reportable events and sets out the responsibilities of the provider agency and the Department regarding reportable events.

B. Adult Protective Assessments and Investigations

The Department of Health and Human Services, Office of Cognitive and Physical Disability Services (OACPDS), through its Adult Protective Services Unit (APS), is responsible for investigating allegations of abuse, neglect or exploitation of incapacitated or dependent adults with mental retardation and/or autism and to provide protective services when indicated.

The Department provides protective services when necessary to allow the incapacitated or dependent adult the same rights as other citizens and to keep the adult safe. The objectives of the protective services are to mobilize the adult's own strengths; to utilize community resources; to improve the adult's ability to function and to live life in safety, dignity, and with as much satisfaction, enjoyment and comfort as possible; to prevent unnecessary or inappropriate institutionalization; to safeguard the rights and resources and maintain the physical and mental health of the adult; to prevent injury to the adult; and to recognize and preserve the rights of self-determination, autonomy and self-care of the adult.

C. Substantiation Determinations

The Department's obligations under the Adult Protective Services Act require the Department to protect incapacitated and dependent adults. The APS system is also designed to initiate and track corrective action in the service delivery system through investigation, report-writing, protective recommendations, and follow-up with the provider agency in order to correct present problems and to avoid future threats of possible neglect or abuse to persons with mental retardation or autism. An important component of providing protection is identifying individuals who have abused, neglected or exploited such adults. The Department does this by *substantiating* allegations of abuse, neglect or exploitation, and thus identifying an individual as having committed one or more of those acts. Because of the significance of this action by the state, which may directly impact present and/or future employment prospects in this field, appeal rights are provided to challenge the substantiation. This is a "Level I" substantiation. There is another finding that may be made by an APS investigator that is also a substantiation of abuse, neglect, or exploitation but one that does not rise to the level defined for a Level I substantiation. This is a "Level II" substantiation, and it is made where there is evidence of abuse or neglect yet not at the level of severity and/or intent required to meet the standards for Level I substantiation. This finding is not reported outside of the Department. Rather, it is tracked by the Department. This finding is tracked on a database, and if there are two or more findings of Level II substantiations over the nine month period immediately preceding the date of the minor conduct under investigation, the Department may then substantiate the person as a Level I based upon these repeated

substantiations. Finally, the Department may make a finding of a program substantiation if it finds that inadequate training, supervision or oversight was the real cause of the neglect, abuse or exploitation.

D. Appeal Rights Regarding Substantiations

The Department recognizes that as a result of adult protective investigations, the Department may substantiate allegations of abuse, neglect or exploitation against an individual and that if these findings are reported to employers or listed on state or national registries (in the case of Level I substantiations), this may result in adverse employment actions. Section 6.05 sets up a process that allows an appeal of substantiations of abuse, neglect and exploitation and limits disclosure and prohibits publication of the substantiation finding unless it has been affirmed subsequent to a due process hearing.

E. Procedures for Reportable Events and Quality Assurance

This policy is meant to provide a broad foundation for the APS system. A number of operational details are found separately in the Department's "Reportable Events Procedures: Reporting, Recording, Investigation, and Quality Assurance/Quality Improvement". These procedures provide important information on the day-to-day functioning of these systems, and as they are procedures and not rules, may be quickly amended by the Department in order to meet new challenges or changes in the system. These Procedures can be found at <http://www.maine.gov/dhhs/bds/mrservices/APS/index.htm>.

F. ICF/MRs and Nursing Facilities

The Department recognizes that facilities licensed by the Department of Health and Human Services (such as ICF/MRs and licensed nursing facilities) may be subject to investigations by the Department's Division of Licensing & Regulatory Services. The Department's Division of Licensing & Regulatory Services and Adult Protective Services Unit will share applicable information, and, where possible, conduct simultaneous investigations.

6.02 DEFINITIONS

For purposes of this Chapter, the following terms have the following meanings, unless the context indicates otherwise:

- A. Abuse** means the infliction of injury, unreasonable confinement, intimidation or cruel punishment that causes or is likely to cause physical harm or pain or mental anguish; sexual abuse or exploitation; or depriving an adult with mental retardation or autism of essential needs and doing so intentionally, knowingly or recklessly. Injuries need not be intentionally inflicted to be reportable, and need not leave visible marks or bruises.
NOTE: Treatment of an incapacitated or dependent adult by an accredited practitioner of

a recognized religious organization is not considered to be abuse, neglect or exploitation solely because such treatment is by spiritual means¹. *See* 22 M.R.S.A. §3476.

- B. Advocate** means an employee of the Office of Advocacy who provides advocacy services to a person with mental retardation or autism, and investigates reportable events related to rights violations.
- C. Adult** means any individual who has attained the age of 18 or who is a legally emancipated minor.
- D. Adult Protective Services** is a unit within the Office of Adults with Cognitive and Physical Disability Services (OACPDS) within the Department that is authorized to investigate reportable events, except those related to rights violations, regarding adults with mental retardation or autism.
- E. Agency** (*see also* “**provider**”) means an organization, entity or individual providing services to adults with mental retardation or autism, funded in whole or in part, licensed/certified or otherwise authorized by the Department.
- F. Assault** means any hitting, slapping, kicking, biting or other unprivileged contact against an adult with mental retardation or autism characterized by the recipient as unwanted. In the case of a person deemed incapacitated by the Probate Court, all unwanted contact described in the foregoing is considered an assault. However, it is not an “assault” when the unwanted contact arises from: a restraint utilizing a technique that is reasonable under the circumstances; a medical need; or when physically assisting a person for personal care or safety reasons.
- G. At risk** means a situation in which physical or mental injury, physical or mental impairment, physical pain, or mental anguish is likely to occur.
- H. Autism** refers to a developmental disorder characterized by a lack of responsiveness to other people, gross impairment in communicative skills and unusual responses to various aspects of the environment, all usually developing within the first 30 months of age.
- I. Commissioner** means the Commissioner of the Department of Health and Human Services.
- J. Community Consent Decree** means the agreement between class members and the Department pursuant to *CAB v. Glover, et al.*, Civil Docket No. 91-321P.
- K. Community Case Management** means an agency employee who provides case management services to a person with mental retardation or autism. This term is used interchangeably with “case manager”.
- L. Conservatorship** means a fiduciary relationship created by court appointment of a conservator, pursuant to the Maine Probate Code, 18-A M.R.S.A. §5-401 *et seq.* or 18-A M.R.S.A. §5-601 *et seq.*, to manage the financial affairs of a protected individual based

¹ This provision does not negate reporting requirements under the reportable events policy or the mandatory reporting law if there is a concern about possible abuse, neglect or exploitation. The decision as to whether abuse, neglect or exploitation has occurred is the Department’s decision based upon the facts and application of law.

upon a finding of inability of the protected individual to manage their property and affairs.

- M. Crisis Response System** means the Department's system of response to reports that an adult with mental retardation or autism is in imminent need of assistance, services, medical treatment, or other aid in order to keep that adult safe.
- N. Danger** means a situation or condition of abuse, neglect or exploitation as defined by 22 M.R.S.A. §3472 or a situation involving the inability of a person with mental retardation or autism with no responsible substitute decision-maker to give informed consent.
- O. Dangerous Situations** is any act or situation that endangers an adult with mental retardation or autism, including dangers that have been ignored or uncorrected. Actual harm or injury need not occur. Some examples include malfunctions of equipment such as Hoyer lifts or wheelchairs that continue to be used even though they are dangerous, people darting into a busy street, or grabbing the steering wheel in a moving car.
- P. Department** means the Department of Health and Human Services, and, in most cases, is referring to the Department's Office of Cognitive and Physical Disability Services.
- Q. Dependent Adult** means any person with mental retardation or autism who is wholly or partially dependent upon one or more other people for care or support, either emotional or physical, and who would be in danger if that care or support were withdrawn. Dependent adult includes, but is not limited to, any of the following:
- (1) A resident of a nursing home licensed or required to be licensed under Title 22 M.R.S.A. §1817; or
 - (2) A resident of a facility providing assisted living services licensed or required to be licensed pursuant to Title 22 M.R.S.A. §7801.
- R. Direct Support Professional** are those individuals who are employed or otherwise compensated for assisting in the support of a person with mental retardation or autism.
- S. Emergency** means a situation in which:
- (1) the adult with mental retardation or autism is in immediate risk of serious harm;
 - (2) the adult with mental retardation or autism is unable to consent to services which will diminish or eliminate the risk; and
 - (3) there is no guardian to consent to emergency services.
- T. Emergency Services** means any use of law enforcement, fire, rescue, or crisis service impacting an adult with mental retardation or autism.
- U. Exploitation** means the illegal or improper use of an adult with mental retardation or autism or that adult's resources for another's profit or advantage. It includes taking advantage of or using an individual's limitations to illegally, improperly, or unfairly deprive him/her of money, property, or reimbursement, wages, or compensation due. Some examples of exploitation are: using a person to do work and paying them little or

nothing; manipulating an aggressive individual into hurting someone; or offering to give a person who does not understand the value of money TWO one dollar bills in exchange for ONE twenty dollar bill.

- V. Finding** means a determination made at the completion of an investigation based on facts gathered during the investigation.
- W. Guardianship** means a legal relationship in which a guardian is given authority to make decisions regarding an incapacitated person with mental retardation or autism (ward) as the result of an appointment by will or by a court pursuant to the Maine Probate Code, 18-A M.R.S.A., Article V. A guardianship ordered by a court may be limited or general; it may be temporary or permanent.
- X. Incapacitated Adult** means any adult with mental retardation or autism who is impaired by this condition to the extent that the adult lacks sufficient understanding or capacity to make or communicate responsible decisions or to the extent the adult cannot effectively manage or apply his/her estate.
- Y. Individual Support Coordinator (ISC)** means a regional employee of the Department who provides case management services to a person with mental retardation or autism. This term is used interchangeably with “case manager”.
- Z. Informed consent** means that the consent is given by a person with mental retardation or autism who has sufficient knowledge and comprehension of the subject matter involved and a basic understanding of the significant benefits, risks, alternatives and consequences of the proposed decision, so as to enable the person giving consent to make and communicate a responsible decision, without any element of force, fraud, deceit, duress or other form of constraint or coercion.
- AA. Intentionally** has the meaning set forth in 17-A M.R.S.A. §35 as follows: A person acts intentionally with respect to a result of his conduct when it is his/her conscious object to cause such a result.
- BB. Investigation** is the process of gathering and evaluating facts, as well as making findings and documenting conclusions regarding the capacity, dependency, and danger or substantial risk of danger, including the ability to give informed consent, regarding a person with mental retardation or autism.
- CC. Knowingly** has the meaning set forth in 17-A M.R.S.A. §35 as follows: A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.
- DD. Licensing Violations** means violations of State or Federal health, safety or rights rules and laws that adversely impact an adult with mental retardation or autism.
- EE. Lost or Missing Person** is an adult with mental retardation or autism who is lost or missing when s/he cannot be located after a reasonable time and after reasonable inquiry and no helpful information exists as to the individual’s whereabouts.
- FF. Mechanical Devices and supports** (*see also* “Restraint”) are devices:

- (1) when used in normative situations to achieve proper body position and balance are not considered restraints, but mechanical supports must be prescriptively designed and applied under the supervision of a qualified professional with concern for principles of good body alignment, circulation and allowance for change of position; or
- (2) whose effect is to reduce or inhibit a person's movement in any way but whose purpose is to maintain or ensure the safety of the person and when so used is not considered behavioral treatment. Such a device may be used only in conformity with applicable state and federal rules and regulations and only:
 - (a) When recommended by a qualified professional after approval of the person's service plan;
 - (b) For an adult 18 years of age or older, when use of the device is approved by a review team composed of an advocate from the Office of Advocacy, a representative of the Office of Cognitive and Physical Disability Services and a representative of the Consumer Advisory Board.

All mechanical devices and supports used on an adult with mental retardation or autism must be applied under the supervision of a qualified professional and be an approved part of a treatment plan.

- GG. Medication error** includes wrong person, wrong dose, wrong medication, wrong time (over one hour variance), wrong route, wrong method of administration or omission.
- HH. Medication Missing** is missing medications of an adult with mental retardation or autism under such circumstances that suggest the possibility of theft and must be reported. This includes a pattern of missing medications, or a significant amount of missing medications, especially Schedule II drugs.
- II. Medication Refusal** is any circumstance in which staff of a provider agency or a shared living provider has knowledge of a client (including a self-medicating client) who does not take his or her medications.
- JJ. Mental retardation** means a condition of significantly sub-average intellectual functioning manifested during the developmental period, existing concurrently with demonstrated deficits in adaptive behavior. The developmental period extends from birth to eighteen (18) years of age. Mental retardation must have its onset prior to age 18, and impaired adaptive behavior may be reflected in maturational rate, learning ability or social adjustment.
- KK. Mistreatment** is any action adversely impacting an adult with mental retardation or autism that is not in keeping with established norms or standards of care. These norms include licensing, statutory or regulatory standards, and also include reasonable professional standards for the delivery of care and support. For example, treatment that is not part of an approved treatment plan may constitute mistreatment.
- LL. Neglect** means a threat to the health or welfare of an adult with mental retardation or autism by physical or mental injury or impairment, deprivation of essential needs or lack of protection from these. Neglect includes:

- (1) the failure by a provider agency to perform a duty that is a work expectation that directly impacts health and safety. For example, if an individual in a provider agency's care requires assistance to change wet clothing, failing to assist him/her in a timely fashion is neglect;
- (2) the failure to provide adequate shelter, clothes, food and water, emotional support when needed, personal care, medical attention or necessary medication, or glasses, dentures, hearing aids, walkers, etc.;
- (3) situations where a caregiver is under the influence of drugs or alcohol at the time he/she is providing care and unable to meet the needs of the person served;
- (4) when the caregiver is emotionally distraught to the extent that he/she is unable to meet the needs of the person served; or
- (5) failure to address dangerous situations that could hurt an adult with mental retardation or autism, such as failing to cordon off areas where there is falling ice or broken stairs.

- MM. Person** means an adult with mental retardation or autism who is, or could be, the subject of an adult protective referral or reportable event.
- NN. “Physical plant disasters”** include any unplanned situation that adversely impacts an adult with mental retardation or autism and forces the closure of a home or program site for one or more days. This includes any fire, or other situation that requires the active involvement of fire personnel or personnel such as HAZMAT Team, Code Enforcement, or other health or safety officials. This category does not apply to individuals who reside in the home of a family member.
- OO. Provider Staff** means individuals engaged by provider agencies who work with persons with mental retardation or autism. It includes interns and volunteers.
- PP. Protective services** mean services that will reduce or eliminate the danger or risk of danger to an incapacitated or dependent adult with mental retardation or autism. Protective services include but are not limited to social, medical and psychiatric services necessary to preserve the person's rights and resources and to maintain the person's physical and mental well-being. Protective services may include seeking guardianship or a protective order under 18-A M.R.S.A., Article 5.
- QQ. Provider or Provider Agency** (see also “Agency”) means an entity, organization or individual providing services to adults with mental retardation or autism, funded in whole or in part, licensed/certified or otherwise authorized by the Department.
- RR. Public guardian**, for purposes of these rules, means the Department of Health and Human Services, OACPDS when appointed as such by a court pursuant to the Probate Code.
- SS. Recklessly** has the meaning set forth in 17-A M.R.S.A. §35 as follows: A person acts recklessly with respect to a result of his/her conduct when he consciously disregards a risk that his/her conduct will cause such a result.

- TT. Reportable Events** are events, described in Section 6.03 of this rule, that happen or may happen to adults with mental retardation or autism and that have or may have an adverse impact upon the safety, welfare, rights or dignity of adults with mental retardation or autism.
- UU. Reporter** means an individual or agency that makes a referral or complaint to the regional Office of Cognitive and Physical Disability Services about a situation of alleged abuse, neglect, or exploitation of an incapacitated or dependent person with mental retardation or autism, or substantial risk thereof.
- VV. Restraint** means personal/physical/chemical or other restraints used on an adult with mental retardation or autism that are not part of an approved plan. Restraints are defined as any intervention that deprives an adult with mental retardation or autism of the use of all or any part of the individual's body, except for safety positioning. Improper or unauthorized use of restraint on an adult with mental retardation or autism is considered abuse. Seat belts, when riding in a motor vehicle, are not considered restraints since they are required by state law for everyone riding or driving in a motor vehicle.
- WW. Rights Violations** means a violation of the rights afforded to adults with mental retardation or autism by 34-B M.R.S.A. §5605, and any related rules.
- XX. Self-injurious Behaviors** are actions by a person with mental retardation or autism that have caused or that have the potential for causing self-injury that are not addressed and tracked as part of a formal plan. Self-injurious behaviors need not result in obvious injuries or marks. For example, pica (ingestion of inedibles) is self-injurious behavior.
- YY. Serious harm** means:
- (1) serious physical injury or impairment;
 - (2) serious mental injury or impairment that now or in the future is likely to be evidenced by serious mental, behavioral or personality disorder, including, but not limited to, severe anxiety, depression or withdrawal, untoward aggressive behavior or similar serious dysfunctional behavior;
 - (3) sexual abuse or exploitation; or
 - (4) serious waste or dissipation of resources.
- ZZ. Sexual abuse or exploitation** means contact or interaction of a sexual nature involving an incapacitated or dependent adult without the adult's informed consent. Sexual exploitation may include exposing an incapacitated or dependent adult with mental retardation or autism to pornographic material, if the person does not have the capacity to consent, or, if capable of consent, did not consent. Sexual activity between a dependent person and a paid provider of service, whether consensual or not, constitutes sexual abuse or exploitation.
- AAA. Substantiated or Substantiation** means a determination by a state APS investigator, based on a preponderance of the evidence, that: 1) an individual has engaged in conduct of abuse, neglect or exploitation that supports a finding of Substantiation Level I under

Section 6.05(I)(3) or Substantiation Level II under Section 6.05(I)(4); or that a program has been operated or managed in a manner that causes a situation of abuse, neglect or exploitation that supports a finding of Program Substantiation under Section 6.05(I)(5).

BBB. Verbal Abuse means any verbalization that inflicts or may cause emotional harm, invokes fear and/or humiliates, intimidates, degrades or demeans an adult with mental retardation or autism, or otherwise coerces an adult with mental retardation or autism to do something through the threat of force.

6.03 REPORTABLE EVENTS AND PROTECTIVE RESPONSIBILITIES

A. Purpose

This rule establishes uniform procedures for documenting, reporting, investigating and reviewing events that have or may have an adverse impact upon the safety, welfare, rights or dignity of adults with mental retardation or autism. Required forms are found on the Department's website.

B. Who Must Report

Persons required to report under this rule include: all individuals, staff of agencies, subcontractors and volunteers who provide residential, day, employment or other services to adults with mental retardation or autism and who are licensed, funded, or regulated in whole or in part by the Department. Nothing in this rule relieves mandated reporters of their responsibility to report suspected abuse, neglect or exploitation to the Department, the district attorney, the medical examiner and/or law enforcement as required by law.

Individuals working with persons with mental retardation or autism are mandated reporters. As such, they have an obligation under state law to report suspected or known abuse, neglect or exploitation.² While many mandated reporters will make the report to DHHS directly, agencies may establish written protocols for transmitting these reports as reportable events. This protocol may include review by supervisors in order to alert supervisors of problems. This review cannot delay or be a "filter" to alter or minimize the reportable event, and the reportable event must be promptly forwarded to the Department as specified in sub-section C below.

Anyone else with knowledge of a reportable event is encouraged to report.

² While not a complete list, mandated reporters include doctors, RNs and LPNs, CNAs, social workers, physical, speech and occupational therapists, mental health professionals, unlicensed assistive personnel, and any person who has assumed full, intermittent or occasional responsibility for the care or custody of the adult (regardless of whether the person receives compensation). See 22 M.R.S.A. §3477. In addition, when a person is required to report as staff of a medical, public or private institution, agency or facility, "the staff person immediately shall make a report to the Department". 22 M.R.S.A. §3477(1)(B).

C. Where, When and How to Report

(1) Where to Report.

- (a) All events reportable pursuant to this rule must be reported to the Department. After hours reporting is done in the same way as regular reporting, and may be handled by Crisis staff. At a minimum, the reportable event should be faxed to the regional office. *See* Section 6.04(C)(2)(p. 18 of these rules) ;
- (b) Licensing violations must also be reported to the applicable licensing authority; and
- (c) The provider agency must also notify the OACPDS Crisis Program and local law enforcement when making a lost or missing persons report or when reporting a possible crime. However, *see* sub-section 6.04(F) for more information regarding reports to law enforcement.

(2) When to Report. Reports must be made within the following time frames:

- (a) The following reports must be made **immediately**:
 - Abuse, neglect, or exploitation of a person
 - Death
 - Serious illness or injury
 - Lost or missing person
 - Assaults
 - Suicide attempts or threats of suicide
 - Dangerous situations that pose an imminent risk of harm
 - Physical plant disasters
- (b) Other events that must be reported **within one (1) business day** include the following:
 - Mistreatment
 - Emergency services
 - Dangerous situations not included in (2)(a) above
 - Rights violations
 - Medication error or refusal
 - Failure to obtain consent of public or private guardian or other legally-authorized representative prior to implementation of new, changed or additional medical order, including changes in medication or DNR orders, when the person with mental retardation or autism cannot give informed consent³

³ It is not a reportable event when it is necessary for immediate action when implementing new, changed or additional medical orders and consent from the public or private guardian is not immediately available. In those instances, the best interest of the consumer becomes paramount, and so “failure” to obtain consent under these circumstances do not constitute a reportable event. The provider/caregiver is still responsible for securing consent from the public or private guardian as soon as possible. Failure to secure that consent in a reasonable time would constitute a reportable event.

- Missing medication suggesting the possibility of theft. This includes a pattern of missing medication, or a significant amount of missing medications, especially Schedule II drugs
- Physical plant dangers
- Restraint
- Use of mechanical devices and supports, not applied under the supervision of a qualified professional or part of an approved treatment plan
- Self-injurious behaviors
- Other events not listed above, but which create a dangerous or harmful situation

- (3) **Separate Reports.** If the reportable event involves a person with mental retardation or autism assaulting another person with mental retardation or autism, then two separate reportable incidents have occurred and separate reports must be filed for each person.

D. Protective Action by Agency

Immediately upon identification or notification of an incident reportable under this rule, provider agencies shall take all reasonable measures to ensure the health and safety of all individuals served. Depending on the circumstances, this may include: obtaining immediate and ongoing medical attention; removal of an employee from direct contact when the employee is the subject of an allegation of abuse, neglect or exploitation until such time as it is determined that such removal is no longer necessary; contacting law enforcement; and other measures as necessary to protect the health and safety of individuals served by the provider agency.

E. Agency Responsibilities

(1) Large Provider Agencies

(a) Policies and Procedures

Large provider agencies (which for the purposes of these rules is defined as an agency with 25 or more full time equivalent employees working with persons with mental retardation or autism) must maintain written policies and procedures requiring staff to report events under this rule. The provider agency's written policies and procedures must be consistent with federal and state law, as well as this rule and the accompanying procedures. Provider agency policies must make clear that failure to report events may lead to administrative or disciplinary action. Provider agencies must ensure that their employees and those who support the provider agency are trained in reporting policies and procedures. Provider agencies must cooperate fully with any APS investigation.

(b) Approved Investigators

- (i) Large provider agencies under contract or agreement with the Department must have at least one approved investigator employed by their agency. The employee may have other

functions or responsibilities within the provider agency. DHHS will approve an agency investigator when such person meets the criteria established by the Department. These criteria are set forth in the Department's *Reportable Events Procedures: Reporting, Recording, Investigation, and Quality Assurance/Quality Improvement* found on the Department's website at <http://www.maine.gov/dhhs/bds/mrsvservices/APS/index.htm>

Approval of the agency investigator by DHHS may be withdrawn when the Department determines it to be in the best interests of the Department and its legal responsibilities to its clients to withdraw approval. In such cases the agency will work cooperatively with the Department to secure approval of another employee within a reasonable time.

- (ii) Provider agencies with approved investigators must have written protocols for:
- (A) Conducting and/or participating in investigations, as directed by the APS Unit;
 - (B) Internal administrative review of events that do not require a formal investigation but that must be internally reviewed and acted upon in order to protect the health, safety, and rights of persons served by the agency;
 - (C) Reporting of rights violations to the Office of Advocacy; and
 - (D) Cooperation in the investigation of rights violations with the Office of Advocacy.
- (iii) The provider agency's policy must be submitted for approval to the APS Manager as part of any new service agreement or contract with the Department. The APS Manager will review the policy and provide comment regarding compliance with state law and this policy. The APS Manager may ask to review any agency policy at any time. Agencies will periodically review their policy in order to ensure they remain in compliance with the requirements of this rule.
- (2) **Small Provider Agencies.** Small provider agencies must comply with the reporting provisions of this rule but are not required under contract or agreement with the Department to have an approved investigator or adopt a written policy as set forth in sub-section E(1)(A) above. All provider agencies, whether small or large, must cooperate fully with any APS investigation.
- (3) **Office of Advocacy Investigations.** All provider agencies, regardless of size, are also required to cooperate with any investigations of rights violations conducted by the Office of Advocacy.

F. Department Responsibilities—Receipts and Assignments of Reports

- (1) Within the Department, each Regional Office shall identify a person or persons whose responsibilities include reviewing and immediately logging reportable events. Once logged, the reported event will then be referred to the appropriate person or entity pursuant to a protocol established within the Department.
- (2) All reportable events, with the exception of medication errors, restraints and rights violations will be forwarded for review to the APS Unit. The Office of Advocacy will be provided access to all reportable events.
- (3) Medication errors and restraints will be forwarded to and reviewed by the person's Individual Support Coordinator/Community Case Manager. If the ISC/CCM has concerns about whether a particular restraint or medication error rises to the level of abuse or neglect, the concern must be brought to the attention of the ISC/CCM supervisor who in turn may refer to the APS Unit.
- (4) All restraints and rights violations (including all incidents of abuse, neglect and exploitation) will also be sent to the Office of Advocacy.
- (5) In any event where there is indication of serious harm, the Department will notify local law enforcement or the District Attorney's Office as required by 22 M.R.S.A. §3485.

6.04 APS INVESTIGATIONS**A. Responsibility for Investigation – Adult Protective Cases**

- (1) Investigation of all allegations of abuse, neglect or exploitation is the responsibility of the APS Unit and the state APS investigator pursuant to the Adult Protective Services Act, 22 MRSA §§3471 and 3473;
- (2) The APS investigator may delegate specific investigative tasks to approved staff of a provider agency after determining that the designated staff is capable of performing the tasks, has sufficient skill and experience to handle the tasks in the instant case, and can perform the tasks objectively without any conflicts of interest. The provider agency should inform the APS investigator of any material conflict which they believe will impair the ability of the approved agency investigator to perform a particular investigation. The decision whether to perform the investigation or to request the assistance of a provider to investigate certain aspects of an allegation will be made on a case-by-case basis by the APS investigator with the agreement of the provider. Once this determination is made the provider must assure compliance with APS policy and provide written documentation of its activities; and

- (3) The decision of who will investigate the event is the responsibility of the APS Unit. Final approval of the findings and recommendations and the investigation report remains the sole responsibility of the APS Unit.

B. Investigation of Rights Violations and Provider Administrative Reviews

- (1) **Investigation of Rights Violations.** For all allegations of rights violations, the Office of Advocacy may conduct an investigation either directly or in cooperation with the APS investigator or an approved agency investigator.
- (2) **Administrative Reviews by Providers.** For reportable events that are not designated as adult protective or rights violations the provider agency shall conduct an administrative review. The review must attempt to identify the cause of an event and recommend preventative or corrective action as necessary. The review must be in writing, kept on file by the provider, and be made available for review when requested by the Department.

C. Intake of Referrals, Reports and Complaints

- (1) **Method.** Referrals, reports or complaints may be conveyed by telephone, letter, e-mail or in person. When the Department establishes an electronic system of reporting, agencies shall comply with that system of reporting. While normally the Department will require some identification of the referent, some referents will insist on anonymity. In such cases the Department will inform the person that their name can only be protected to the extent allowed by law.
- (2) **Where to Report**
 - (a) The Department's Regional Offices will serve as a point of intake for referrals, reports and complaints from all methods of reporting;
 - (b) After hours, the crisis number will be answered by individuals trained to refer cases as appropriate to the Adult Protective Services Unit investigators; or
 - (c) Allegations of abuse, neglect or exploitation which become known after regular business hours should be reported to the OACPDS Crisis Unit. The Crisis Unit will consult with their supervisor or the APS Manager or designee as necessary, respond to assure the safety of the person in question, preserve evidence and take any other action that appears warranted in their professional judgment to protect the person. Allegations reported to the Crisis Unit will be brought to the attention of the APS Unit on the next business day.
- (3) **Content of Intake.** As much of the following specific information as possible shall be elicited from the reporter by the person conducting the intake:
 - (a) name, address and age of the referred adult;
 - (b) name and address of caretaker, guardian or correspondent if any;

- (c) nature and extent of the referred adult's incapacity or dependency;
- (d) the nature and extent of the alleged abuse, neglect or exploitation or the facts demonstrating the substantial risk thereof;
- (e) nature and gravity of condition or injury resulting from reported abuse, neglect or exploitation;
- (f) names and addresses of referred adult's relatives and close friends when pertinent or when it appears that they serve as supportive individuals;
- (g) name, address and telephone number of the reporter, unless the reporter wishes to remain anonymous; and
- (h) any other pertinent information, such as names, addresses or phone numbers of collateral contacts.

D. Priority of Cases

The Adult Protection Unit will categorize cases as having a High, Moderate, or Low Priority based on the seriousness of the allegation. The seriousness of the allegation will take into account the subject person's capacity, dependency, danger and whether there is substantial risk of harm, and the ability/inability of the person to give informed consent to medical treatment or services if this appears necessary.

- (1) **High.** High priority cases are those in which the allegation, if substantiated, would indicate that the person is in imminent risk of serious harm or immediate need of medical attention. If the person is receiving agency services, steps must be taken immediately by the agency to assure the person's safety. The APS staff will formulate a plan of action immediately with regard to the most expedient way to protect the person and assess the validity of the allegations. If the situation becomes known after regular business hours, a crisis worker will respond to assure the safety of the person. Investigation of high priority referrals shall commence on the **day of receipt** of the referral, report or complaint.
- (2) **Moderate.** Moderate priority cases are those that do not present an imminent risk of serious harm or immediate need for medical attention, but nevertheless, if not addressed, are likely to get worse without intervention and could, if continued, expose the client to serious physical injury or harm. Investigation of these cases shall be initiated within **three (3) working days** of receipt of a referral, report or complaint.
- (3) **Low.** Low priority cases are all other APS reports of alleged abuse, neglect or exploitation. Investigation shall commence within **five (5) working days** of the date of the receipt of the referral, report or complaint.

E. Initial Assessment and Action by the Department

- (1) **Assessment**
 - (a) When a report of abuse, neglect or exploitation is received by the

Department during regular business hours, a determination will be made with regard to the urgency of the situation. If there is an immediate risk of serious harm, the APS Unit must be contacted immediately;

- (b) The APS investigator will assess the level of risk based on the allegations in the referral, as well as on the subject person's capacity and dependency;
- (c) If there is danger to a person, the APS investigator will, in consultation with reporters, agency staff or others, proceed immediately to take action, within the limits defined by law, or have action taken, to ensure the safety of the person and preserve evidence; and
- (d) The agency must cooperate with the APS investigator to the fullest extent possible.

(2) **Actions Based on Initial Assessment.** Actions that may result from the initial assessment include, but are not limited to:

- (a) law enforcement's removal of an alleged perpetrator;
- (b) initiation by the APS Unit of emergency guardianship proceedings and/or of a petition to terminate a current guardian's authority;
- (c) removal of a person with mental retardation or autism from a residence or other location and/or arrangement for respite or crisis services with the consent of the person or the person's guardian or legally authorized representative; or
- (d) an ISC or case manager arranging for professional services.

F. Coordination with Law Enforcement and Other Agencies During Investigation

In conducting an investigation, the APS investigator may coordinate with law enforcement, approved agency investigators, medical and health personnel when indicated, or other individuals or agencies, as appropriate. When law enforcement is involved, the APS investigator must promptly determine with law enforcement who will lead the investigation.

(1) Law Enforcement

- (a) The Department is under a legal obligation to report possible criminal acts. Section 3485 of Title 22 states as follows:

Upon finding evidence indicating that a person has abused or neglected an incapacitated or dependent adult, resulting in serious harm, or has exploited an incapacitated or dependent adult, the Department shall notify the district attorney or law enforcement agency.

This legal requirement of the Department is not meant to prohibit a provider from making reports to a law enforcement agency or the District Attorney when circumstances warrant an immediate report of a crime. Provider agencies also have the legal right to report a crime to law enforcement and should promptly do so in appropriate circumstances. As provider agencies may be “covered entities” under HIPAA, providers are advised to review HIPAA requirements regarding the transmission of protected health information to law enforcement officials. In addition, providers should be aware that while the Department has a statutory right to report to law enforcement without the consent of persons who are their own guardians, providers do not have the same statutory right and thus may require the consent of the person or their guardian (if one) before reporting a crime to law enforcement. Providers should develop their own internal protocol for reporting possible crimes to law enforcement in consultation with legal counsel.

- (b) In more serious cases where law enforcement is involved, the Department must determine whether law enforcement is the most appropriate first responder. In all cases where law enforcement is involved, the Department, in cooperation with law enforcement, must determine whether the APS investigation is secondary to the law enforcement investigation, whether there can be a joint investigation, or whether to conduct a parallel investigation. *See* Section 6.04(E).
 - (c) Law enforcement must be notified immediately when it is determined that an incapacitated or dependent adult with mental retardation or autism is lost or missing, in accordance with the Department’s Lost or Missing Person policy.
 - (d) The Office of Chief Medical Examiner must be notified immediately of any referrals involving a suspicious death.
- (2) **Professional and Occupational Licensing Boards.** The APS Unit shall notify legal counsel for the Department of situations that may justify reports to professional and occupational licensing boards regarding an individual alleged to have engaged in any unlawful activity or professional misconduct or in conduct in violation of laws or rules relating to a licensing board. Mandated reporters who fail to report are included in this category. No release of information shall be made to licensing boards without the specific prior approval of said legal counsel.
- (3) **Notifying Other Agencies of High Priority Cases and Investigation.** Direct Support Professionals are sometimes employed by two agencies. If the Department receives a reportable event and the APS investigator has knowledge that the direct support professional is also employed by another agency, and has a reasonable belief that other persons could be at risk, the APS Manager will contact either legal counsel for the Department or an Assistant Attorney General for review of the matter. If after consultation it is determined that there is a reasonable belief that other persons could be at risk, the APS Manager will contact the second agency and indicate that there is an investigation of the employee, provide a summary of the matter being investigated, and provide the status of the investigation. The agency receiving the report cannot discipline or

terminate the employee based solely on this report (*see* Sections 6.05(F) and (G) regarding agency response to substantiations), but can and should initiate independent action to assure their clients are safe.

- (4) **Reporting of Suspected Rights Violations.** Rights violations may be found during the course of an investigation. The assigned investigator must promptly report the suspected rights violation in a separate writing to the Office of Advocacy. The Office of Advocacy will establish a protocol for review and possible investigation of these referrals. All final findings and recommendations of rights violations investigations are the sole responsibility of the Office of Advocacy.

G. Reports, Findings and Recommendations

(1) Findings and Recommendations

- (a) Findings shall include determinations about a person's capacity, dependency, danger or substantial risk of danger, and need for services.
- (b) Findings by the investigator shall be documented, and recommendations shall be supported by such findings. When any component of an investigation is delegated to a provider, its written documentation shall be conveyed to the APS investigator within the timeframe outlined in the Department's Reportable Event Procedures (available on the Department's website).
- (c) In any case where training and supervision of staff is at issue, which will be most cases, the assigned investigator is expected to review and confirm agency records documenting training and supervision.
- (d) Approved agency investigators may make proposed findings and recommendations. Agency investigators shall not make final determinations regarding Level I or Level II substantiations as that is the responsibility of the Department. All final findings and recommendations of APS investigations are the sole responsibility of the APS Unit.
- (e) Based on all the information obtained by or provided to the APS investigator, the APS investigator shall prepare a final written report with findings and recommendations.

(2) Written Reports

- (a) A written report shall be prepared in all assigned investigations.
- (b) The written report shall reasonably describe the manner in which the investigation was conducted and set forth the findings, conclusions and recommendations.
- (c) All reports must be documented in a uniform way in a format prescribed by the Department. The written report should include, at a minimum, a statement of the facts or allegations contained in the initial reportable

event; who was interviewed and the results of the interviews; what records were reviewed; and an evaluation of the facts. Summarization of the facts is acceptable as long as notes regarding the investigation are retained.

(3) **Final Report**

- (a) Final disposition and documentation shall consist of a written report prepared by the investigator, any written action or disposition statements made by the provider, and any referrals or notifications made to other people or agencies. An approved agency investigator may draft a final report if they were authorized to do so, leaving out any final recommendation regarding substantiation determinations;
- (b) The APS Manager, or a state employee designated by the Manager, shall review the record to determine if the investigation was adequate and if the written report fairly reflects the investigation. If so, the Manager or designee must make the final determination regarding the outcome of the case and recommendations; and
- (c) The final written report will be completed within 30 days unless an extension is granted by the APS manager. The final report will be forwarded to the provider agency, the person or their guardian (except when the guardian is the subject of an investigation), the person's ISC, the Department's Regional Office, the Office of Advocacy and the Consumer Advisory Board, or its successor. Caution should be exercised when sending out reports as most recipients fall under the optional disclosure provisions of the APS confidentiality law. This law provides that the Department may disclose relevant information, with protection for the identity of reporters and other persons when appropriate. Thus, when the situation warrants it, the Department may a) refuse to send the report, as in the case of a private guardian who is the target of the investigation; b) redact the name of a reporter when appropriate to protect their request for anonymity; or c) redact the names of the other persons when, in the judgment of the APS manager, there is good cause to do so.

- (4) **Notifying Other Agencies of Level I Substantiations.** After consultation with legal counsel to the Department or with an Assistant Attorney General, a Level I substantiation will be reported to another agency known to be employing the subject of the Level I substantiation at the time of the reportable event. The report will indicate that there was an investigation of the employee and provide a summary of the substantiation. The agency receiving the report cannot discipline or terminate the employee based solely on the fact that the state has substantiated the person (*see* Sections 6.05(F) and (G) regarding agency response to substantiations), but can and should initiate independent action to determine whether their clients are safe and take whatever employment or disciplinary action the agency deems necessary to assure safety.

H. Case Completion and Closure

Investigations will be complete when:

- (1) danger or substantial risk of danger to the person is not substantiated;
- (2) danger or substantial risk of danger to the person has been reduced or eliminated such that the danger or risk of danger is materially alleviated;
- (3) the person alleged to have been abused cannot be located or is deceased and all reasonably available investigatory information has been obtained; or
- (4) the person, having the capacity to consent, and after having been informed of his/her ability to receive services, refuses services.

Once the investigation is complete, the case will remain open until all recommendations have been accepted and implementation of those recommendations have been initiated by the agency or until modifications of the recommendations acceptable to the agency and to the APS investigator are initiated by the agency. The case may then be closed.

I. Standards for Substantiation Findings

There are five different findings that may be made by the state APS investigator: Failure to find neglect or abuse; Not substantiated; Substantiated, Level I; Substantiation, Level II; and Program Substantiation. These are explained in more detail below.

- (1) **Failure to find neglect or abuse** means that the state APS investigator cannot find, by a preponderance of the evidence, that acts or omissions that constitute abuse, neglect or exploitation actually occurred.
- (2) **Not substantiated** means that while abuse or neglect may be found by a preponderance of the evidence, that the individual named is not responsible or is not the cause of the abuse or neglect.
- (3) **Substantiation Level I** means that the state APS investigator has found that abuse, neglect or exploitation has occurred and that a specific individual is responsible for said neglect or abuse. The standard for determining whether an individual (a direct support professional, provider staff, or others working with persons with mental retardation or autism) may be substantiated for abuse, neglect or exploitation is legally articulated in a Federal Court case entitled *Susan Bouyea v. Nicholas*, Civil Action No. 1:04-cv-28 (D. Me, decided May 31, 2005) (a copy of which is posted on the APS website). Pursuant to this order, the APS Unit may substantiate an individual for abuse, neglect or exploitation if the state APS investigator determines, by a preponderance of the evidence, the following conduct, acts or omissions have occurred:
 - (a) Sexual abuse or sexual exploitation, meaning contact or interaction of a sexual nature involving an incapacitated or dependent adult without that adult's informed consent;

- (b) Exploitation, meaning the illegal or improper use of an incapacitated or dependent adult or that adult's resources for another's profit or advantage;
- (c) Intentionally, knowingly, or recklessly causing physical harm or pain or mental anguish through the infliction of injury, unreasonable confinement, intimidation or cruel punishment;
- (d) Intentionally, knowingly, or recklessly causing a threat to the protected person's health or welfare by physical or mental injury or impairment, deprivation of essential needs, or failing to protect from these; or
- (e) Intentionally, knowingly, recklessly, or negligently engaging in abuse or neglect that results in serious harm.

For purposes of subsections (a) through (e) above, the terms "intentionally," "knowingly," and "recklessly" have the meanings set forth in 17-A M.R.S.A. §35 (as set forth in the "Definitions" section of this rule). The conduct of an individual shall not be substantiated if he or she can establish by a preponderance of the evidence that the conduct at issue was the product of an objectively reasonable good faith belief that he or she was acting in the best interests of a client with mental retardation or autism under all the facts and circumstances.

Substantiations found under the criteria set forth above are "Level I" substantiations, and, as such, give rise to due process protections. This is because employers can learn about these substantiations and so impact an individual's employment prospects. Because of this, an individual has the right to appeal a Level I substantiation in order to challenge it and get a hearing before an impartial hearing officer. This right of appeal is explained in Section 6.05 below.

- (4) **Substantiation, Level II** is a new category of substantiation created by the *Bouyea* federal court order. In *Bouyea* it is called "minor conduct", and the name has been changed in these rules to a "Level II" substantiation. Its purpose is to capture those acts or omissions that meet the legal definition of abuse or neglect (and thus the use of the word "substantiation") yet do not rise to the level of sexual abuse, exploitation, or intentional, knowing or reckless conduct (as defined in the criteria set forth above). Several examples of facts that might result in this finding are set forth immediately below:
 - (a) *Example 1:* A direct support professional without any history of outbursts has an altercation with a person at the home and ends up yelling at the person in a way that constitutes verbal abuse. The person is very apologetic and indicates they were having a bad day. The finding is of verbal abuse as there was intimidation of the person (and so meets the definition of "abuse"). If under all the circumstances, it is determined that the person did not cause the intimidation intentionally, knowingly, or recklessly and the conduct did not result in serious harm, then the finding is "substantiation, Level II", and the direct support professional's name is entered into the Department's database to see if further Level II findings occur in the coming months;

- (b) *Example 2:* An individual is hired as awake staff for overnight duty at a group home. Because the residents often need assistance or supervision at night it is important (though not life-threatening) that the staff be awake. The direct support professional is found sound asleep in a chair, is very apologetic, and promises it will not happen again. If under all the circumstances, it is determined that the person did not fall asleep intentionally, knowingly, or recklessly and the conduct did not result in serious harm, then the finding is substantiation, Level II, and the direct support professional's name is entered into the Department's database for tracking; or
- (c) *Example 3:* A direct support professional brings two residents of a group home out to the curb to await their ride. She remembers she did not lock the back door and does not have her cell phone to call the staff member still in the home. She says to her two people "wait right here, don't move!" and runs around to the back and locks the door. She runs back around to find the ride has arrived. The person driving the vehicle is concerned and ultimately a reportable event is called in and the matter is investigated. If it is determined that the conduct did not place the people in circumstances that posed a threat to health or welfare, the finding is failure to substantiate. If the circumstances did cause a threat to health or welfare, then neglect occurred, but if it is determined that, under all the circumstances, the person did not cause the neglect intentionally, knowingly or recklessly and the conduct did not result in serious harm, then the finding is Substantiation Level II. If, however, the direct support professional establishes by a preponderance of the evidence that she had an objectively reasonable belief that she was working in the best interests of all her clients under the circumstances, the finding is failure to substantiate.

The Department will monitor its database on an ongoing basis to determine whether an individual has two or more Level II findings in the nine month period immediately preceding the date of the reportable event under investigation. In such a case the APS Unit must determine, based upon consideration of the findings in total, whether the person should be substantiated as a Level I substantiation for purposes of reporting outside of the Department. This finding means the person now has the right to notice of the finding and the opportunity to appeal. Appeals are described in Section 6.05 below.

- (5) **Program Substantiation.** This finding is warranted primarily in neglect cases where the problems which led to the neglect are more properly attributable to the program rather than a direct support professional or other employee. Lack of supervision, inadequate staffing, inadequate or improper training, and conflicting instructions and demands can all lead to situations where the direct support professional is placed in a neglectful situation that could have been prevented through better training, supervision and/or oversight. This finding can also be made in situations where the direct support professional is substantiated.

A Program substantiation by itself may not constitute evidence establishing a violation of DHHS Licensing regulations. This does not preclude DHHS Licensing from utilizing the report in conducting its investigation of possible licensing violations.

Program substantiations must include recommendations requiring the provider agency to correct the problems or deficiencies noted in the investigation. The provider agency must respond to these recommendations as required in subsection (J)(3) through (6) set forth in the section immediately below.

J. Provider Response to Recommendations

- (1) For all APS Investigations, the APS Unit shall make recommendations to protect individuals, as well as for preventative and corrective action. The Office of Advocacy may also issue reports with recommendations to correct rights violations;
- (2) Agencies remain free to make any and all employment decisions concerning their staff. Discipline and other employment decisions prior to the employee's exercise of their right to appeal a Level I substantiation by the Department (*see* Section 6.05) must be completely independent of the finding of substantiation by the Department. A substantiation of abuse, neglect, exploitation shall not be the cause, on its own, of an adverse employment action.
- (3) The affected provider agency must review and respond to all recommendations contained within the final report within thirty (30) days of receipt of the final report. This response is to be promptly forwarded to the APS Unit. For rights violations, the response must be forwarded to the regional advocate of the Office of Advocacy. The Department will review all agency responses as part of its quality improvement review;
- (4) Recommendations from the APS Unit and/or Office of Advocacy regarding individuals or allegations that are unrelated to particular agencies must be reviewed and responded to by the MR Regional Team Leader (with input from the Individual Support Coordinator and the MR supervisor) within thirty (30) days of receipt of the report;
- (5) If necessary, further review will consist of discussion with the provider agency to elicit an agency-generated evaluation of the event and response including any changes in agency procedures that might improve overall support or care provided to clients. Whenever possible and appropriate, interagency discussion of systemic barriers to optimal support and care will be encouraged, and suggestions for modifications to remove those barriers will be made; and
- (6) As a result of its review of reports and recommendations, the Department may identify an individual or team to assess a particular event or series of events. The make-up of the review team will be determined by the Regional Management Team.
- (7) All documents created and maintained by or under the direction of the APS Unit or the Office of Advocacy in compliance with this rule are records of the Department. and confidential to the extent required by 22 M.R.S.A. §3474, 34-B M.R.S.A. §1207, or other applicable law.

(8) Quality Improvement Reviews

- (a) The Department and provider agencies will collect and maintain documentation of reportable event information as required by this rule and used in accordance with the Department's Quality Improvement and Quality Assurance Policy; and
- (b) If specific problem areas are identified through the quality improvement review, the Department may meet with the provider agency to discuss the problem area and the action steps necessary to address the problem.

K. Grievances and Appeals by Persons Served by the Department

Recipients of services aggrieved by a determination of the Department that is the direct result of an Adult Protective Services investigation have the right to appeal that decision to the extent provided by the Department's Grievance and Appeals policy. *See* 14-197 CMR, Chapter 8, describing Grievances and Appeal Procedures for Persons with Mental Retardation.

6.05 SUBSTANTIATIONS & DUE PROCESS HEARINGS**A. General Provisions**

- (1) The Department recognizes that substantiation of a person for abuse, neglect or exploitation should not, solely due to the substantiation, result in adverse employment action on the part of Providers against individuals who were involved in some way with such events. The Department also recognizes that a substantiation should not be reported out to employers (other than the Provider employing the individual at the time of the reportable event) or others through a state or national registry of persons substantiated or otherwise unless the Direct Support Professional has been given an opportunity to appeal the substantiation; and
- (2) This rule affords an individual the right to a hearing whenever adverse employment action or a burden on the future employment of an individual in his or her profession is likely to occur as a result of an APS substantiation regarding the actions or inactions of an individual. This right also extends to individuals who may not at the time of the finding be so employed, but can demonstrate a realistic and sincere interest in such a career.

B. Application of Rule

- (1) After May 31, 2005, any individual substantiated or included in a state or national registry for reporting out to others determinations on allegations of abuse, neglect or exploitation, shall be given the right to a hearing as provided in this Chapter; and
- (2) Unless the individual has been substantiated and received the hearing rights as provided herein, the Department shall not place an individual on any state or national registry or disclose any finding by the Department of abuse, neglect or exploitation with respect to an individual, outside of the Department or the

Provider who employs the individual, with the exception of permitted or mandated disclosures under the APS Act (*see* 22 M.R.S.A. §§3474, 3478, and 3485).

C. Appeal Rights

(1) Notice

(a) The Department shall provide notice to an individual (who meets the definition found at Section 6.05(A)(2) above) substantiated by the state APS investigator/Unit of the right to appeal a substantiation finding. The notice shall include:

- (i) a summary of the substantiation findings; and
- (ii) information regarding the hearing process, including the right to request an expedited hearing.

(b) The person with mental retardation or autism, his/her guardian, the Office of Advocacy and the Disability Rights Center shall also receive notice of the hearing and may request the status of an intervenor at the hearing.

(2) **Time to Appeal.** The individual will have thirty (30) calendar days after written notice is received to appeal the substantiation. In calculating this 30 day period the day it is received by the person is not counted. The Department may presume that the notice is received within three days of mailing (not counting the day of mailing), a presumption which may be rebutted by the individual upon credible evidence of actual receipt. An appeal postmarked on day 30 is considered a timely appeal.

(3) **Method of Appeal.** The individual may exercise the right to appeal the substantiation by letter, fax or e-mail in accordance with instructions given in the notice by the Department.

(4) Discovery

(a) If an individual exercises the right to appeal, the Department shall promptly provide such person with the report of the substantiation, and give sufficient notice of the facts and circumstances upon which the substantiation is based and upon which the hearing will be limited to allow the person to prepare a defense;

(b) The Department retains the right to review the report and remove information that is otherwise confidential under state law so long as the report meets the standard set forth in (a); and

(c) The Department shall not present any evidence in an appeal hearing without first disclosing the above-referenced information to the person prior to the hearing.

- (5) **Time for Hearing.** When an individual exercises the right of appeal, the hearing on the appeal shall be scheduled as soon as possible, but no later than sixty (60) days after the appeal request is made, unless the individual requests an extension. An individual who can demonstrate an immediate and ongoing harm to their employment status must be given priority in securing a hearing and be given a hearing as soon as practical after a hearing is requested.
- (6) **Procedure.** The appeal hearing must comply with the due process requirements as set forth in Maine's Administrative Procedure Act, 5 M.R.S.A. §§9051 – 9064.
- (7) **Issues on Appeal.** The hearing is limited to review of the substantiation of the individual, but if the substantiation is not upheld, the Hearing Officer may make a subsidiary finding of whether the alleged conduct constitutes a Level II substantiation (referred to in the *Bouyea* order as a “minor conduct of abuse or neglect”).
- (a) A finding that the alleged conduct did not constitute a Level II substantiation is final and the facts underlying the conduct may not be used in determining “repeated” Level II findings; and
- (b) A finding that the alleged conduct did constitute a Level II substantiation is not final agency action and is not appealable under M.R.Civ.P. Rule 80C, unless the finding is made in an appeal of a substantiation of “repeated” Level II findings resulting in a Level I determination.
- (8) **Decision/Final Agency Action**
- (a) The Department may withdraw a substantiation prior to hearing if it finds, upon review, that the facts alleged, even if true, do not meet the legal standards for Level I substantiation. A decision to withdraw the substantiation does not alter or affect any protective measures recommended in the investigative report (other than those recommending disciplinary action);
- (b) The decision on appeal may affirm, modify or reverse the substantiation. The appeal or the subsequent decision does not alter or affect any protective measures recommended in the investigative report (other than those recommending disciplinary action) and no protective measures will be stayed pending an appeal;
- (c) The decision of the hearing officer in a fair hearing shall be issued within forty-five (45) days of the completion of the hearing process. The Commissioner reserves final decision making authority unless the Commissioner indicates otherwise in writing. The parties shall have twenty (20) days to submit any exceptions or objections to any Recommended Decision by the hearing officer, and then the Commissioner will have thirty (30) days to issue a final decision; and
- (d) A final decision from this process, including subsidiary findings as to Level II findings as provided in subsection C(7) above, shall be final agency action for purposes of 5 M.R.S.A. §8002(4), and may be

appealed to the Superior Court in accordance with 5 M.R.S.A. §11001, *et seq.* and Rule 80C of the Maine Civil Rules of Procedure.

- (e) All persons who received notice of the substantiation shall be promptly contacted by the Department if the substantiation is reversed by the Commissioner or by Court order. The contact may be oral or in writing. Persons contacted shall be informed of the reversal of the substantiation and, in accordance with sub-section (E) below, be directed to remove any record of the substantiation from their files.

D. Standards

- (1) At any hearing described in subsection C above, the Department shall have the burden of proving the elements of the substantiation by a preponderance of the evidence. If the individual wishes to raise the defense that their conduct was the product of an objectively reasonable good faith belief that he or she was acting in the best interests of a person with mental retardation or autism under all the facts and circumstances, the individual shall have that burden;
- (2) Whenever an appeal does involve the review of substantiation for “repeated” Level II substantiations, the Department shall have the burden of proof on all instances of abuse, neglect or exploitation; and
- (3) A finding of a level II substantiation may be considered in a future appeal of a new substantiation but shall not create any presumption related to the conduct at issue in the subsequent appeal.

E. Remedies

- (1) An individual who is successful in reversing a substantiation, shall be treated by the Department for all purposes as if no substantiation or protective recommendation had occurred, except as noted in E(2) below;
- (2) In cases where an individual prevails because his or her conduct did not meet the conduct definitions set forth in 6.04(I)(3) but there is a finding that the conduct meets the definition of a Level II substantiation as set forth in 6.04(I)(4), the findings of the Department may be considered for purposes of subsection C(7) hereof, providing for conduct that constitutes “repeated” Level II substantiations;
- (3) If an individual is successful in reversing a Level I substantiation, the record of substantiation of such a person shall be immediately removed by the Department from any state or national registry and the substantiation that was reversed shall not be disclosed outside the Department to any person or entity without a court order. *See also* 6.05(C)(8)(e) regarding notice to any recipient of the APS report. A record of the reversed substantiation may be maintained by the Department for internal purposes only, provided that the individual is not in any manner prejudiced by the retention of such records;
- (4) The individual will be notified in writing of the remedy in E(3) above if the Direct Support Professional is successful on the appeal; and

- (5) The remedies provided for in this subsection shall also apply to the individual who exercises a right to appeal when the Department chooses not to challenge the appeal.

F. Protections Pending Final Decision

After a substantiation and pending an opportunity of an individual to appeal and, if an appeal is timely requested (*see* section 6.05(C)(5) on p. 29), pending decision regarding the appeal, the individual shall not be included on any state or national registry and no report will be made to any provider, state agency or national organization or any other person or entity, that there has been a substantiation, except to the provider who employs the individual or to any person by court order or as permitted or mandated under the Act (*see* 22 M.R.S.A. §§3474, 3478, and 3485).

G. Provider Agency Action

Agencies are free to make disciplinary and other adverse employment decisions regarding individuals employed by them pending an appeal of substantiation or after an appeal is sustained so long as the decision is independent of the fact of substantiation.

H. Confidentiality and Disclosure

- (1) **Confidentiality of adult protective records.** All Department records which contain personally identifying information and are created or obtained in connection with the Department's adult protective activities and activities related to an adult while under the jurisdiction of the Department are confidential and subject to release only under the conditions of subsections 1 and 2. Within the Department, the records shall be available only to and used by authorized Departmental personnel and legal counsel for the Department in carrying out their functions.
- (2) **Optional disclosure of records.** The Department may disclose relevant information in the records to the following persons, with protection for the identity of reporters and other persons when appropriate:
 - (a) An agency responsible for investigating a report of adult abuse, neglect or exploitation when the investigation is authorized by statute or by an agreement with the Department;
 - (b) An advocacy agency conducting an investigation under chapter 961, United States Public Law 88-164, Title I, Part C or United States Public Law 99-319, except as provided in subsection 3, paragraph D;
 - (c) A physician treating an incapacitated or dependent adult who the physician reasonably suspects may be abused, neglected or exploited;
 - (d) An incapacitated or dependent adult named in a record who is reported to be abused, neglected or exploited or the caretaker of the incapacitated or dependent adult;

- (e) A person having the legal responsibility or authorization to care for, evaluate, treat or supervise an incapacitated or dependent adult;
 - (f) Any person engaged in bona fide research, provided that no personally identifying information is made available, unless it is essential to the research and the commissioner or the commissioner's designee gives prior approval. If the researcher desires to contact a subject of a record, the subject's consent must be obtained by the Department prior to the contact;
 - (g) Persons and organizations pursuant to Title 5, section 9057, subsection 6, and pursuant to chapter 857;
 - (h) A relative by blood, marriage or adoption of an incapacitated or dependent adult named in an adult protective record; and
 - (I) A member of a panel appointed by the Department or the Office of the Attorney General to review the death or serious injury of an incapacitated or dependent adult or a child.
- (3) **Mandatory disclosure of records.** The Department shall disclose relevant information in the records to the following persons:
- (a) The guardian *ad litem* of an incapacitated or dependent adult who is named in an adult protective record and is reported to be abused, neglected or exploited;
 - (b) A court on its finding that access to those records may be necessary for the determination of any issue before the court. Access must be limited to in camera inspection unless the court determines that disclosure of the information is necessary for the resolution of an issue pending before it;
 - (c) A grand jury on its determination that access to those records is necessary in the conduct of its official business; and
 - (d) An advocacy agency conducting an investigation under chapter 961, United States Public Law 88-164, Title I, Part C or United States Public Law 99-319, regarding a developmentally disabled person or mentally ill person who is or who, within the last 90 days, was residing in a facility rendering care or treatment, when a complaint has been received by the agency or there is probable cause to believe that that individual has been subject to abuse or neglect, and that person does not have a legal guardian or the person is under public guardianship. The determination of which information and records are relevant to the investigation is made by agreement between the Department and the agency.
- (4) **Further Disclosure of Records Obtained by APS.** Records created by other entities that are included in Department records can only be disclosed in accordance with the terms of the original disclosure to the Department through an appropriate release or as allowed by law or regulation;

- (5) **Disclosure Regarding Public Wards or Protected Individuals.** When the Department is appointed as an individual's public guardian or conservator, it has the authority and discretion to consent to disclosure of relevant information in its records. It may do so within the scope of its legal appointment, as may otherwise be required by law and in the same manner as the individual, had that individual been able to exercise that authority. In fulfilling its responsibilities, the Department will make reasonable efforts to maintain the individual's privacy to the maximum extent possible; and
- (6) **Disclosure to the Office of Advocacy and the Consumer Advisory Board.** APS records may be disclosed to the Office of Advocacy and to the Consumer Advisory Board (or its successor) as provided by law.
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STATUTORY AUTHORITY: 18-A M.R.S.A. §§ 5-312, 5-601, 5-606, 5-607
22 M.R.S.A. §§ 3470-3492, 7921-24
34-B M.R.S.A. §§ 1205, 3803, 3832, 5003, 5203, 5480, 5601-06

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