

## ADULT ABUSE REGISTRY REPORT

### **I. BACKGROUND**

The federal Omnibus Budget Reconciliation Act of 1987 (OBRA '87) — which included the Nursing Home Reform Act of 1987 — established training and certification requirements for nurse aides who work in long term care facilities that receive payment through the Medicare and/or Medicaid programs. Each state was required to establish a nurse aide registry to document the individuals who have completed the required training and certification. In addition, this registry must also include information on any substantiated findings of abuse, neglect, or misappropriation by a nurse aide employed in such a facility. In South Carolina, the nurse aide registry is maintained by the Department of Health and Human Services (DHHS) through contractual arrangements with the Department of Health and Environmental Control (DHEC) and Assessment System, Inc. (ASI), a private company that assists several states with their registries.

When an individual successfully completes the nurse aide competency evaluation program or is granted reciprocity as the result of another state's training and evaluation program, that person's name is entered on the registry. Any individual or entity may contact the registry to confirm the status of a nurse aide. Long term care facilities that receive Medicare or Medicaid payments are required to ensure that their nurse aides are appropriately certified and do not have any substantiated findings against them on the registry.

Federal law specifies that only the state survey agency — DHEC in South Carolina — may place substantiated adverse findings on the nurse aide registry. DHEC has the authority to investigate complaints in Medicare or Medicaid certified long term care facilities. When an allegation of abuse, neglect, or misappropriation is substantiated, that adverse finding is placed on the registry. Once listed on the registry in this manner, the nurse aide is prohibited by federal law from working in any Medicare or Medicaid certified long term care facility. In South Carolina, the nurse aide's rights to due process are protected through the availability of an appeal process that involves an administrative hearing before DHEC with subsequent review by the appropriate courts.

Although the information contained on the nurse aide registry is available to any interested party and is frequently utilized by a variety of health care providers, only long term care facilities are required to check it. More importantly, the employment prohibition for individuals who have adverse findings listed on the registry only applies to long term care facilities that receive Medicare and/or Medicaid payments. An adverse listing on the registry does not prohibit a nurse aide from obtaining employment in any other health care setting, although other potential employers do make use of the registry for the purpose of screening out potential problem job applicants.

Because only DHEC is allowed to enter adverse findings on the registry, the only substantiated findings reported are those made or validated by DHEC. As a result, the registry does not contain any information about nurse aide misconduct that occurs in private or non-institutional

settings because DHEC's investigative authority does not extend to these other settings.

No other federal or state legislation requires reporting of any type of care giver misconduct to a state-maintained registry or other database that would be available to prospective employers and consumers. As a result, even the benefits of the limited reporting applicable to nurse aides from long term care facilities are not available in many other situations.

In accordance with the State's 1997 Long Term Care Plan, the prospect of establishing a broader-based registry for all care givers who are found to have engaged in the abuse, neglect, or exploitation of vulnerable adults in South Carolina was studied by the Adult Protection Coordinating Council (APCC). The APCC submitted recommendations to the Long Term Care Committee (LTCC), which were approved by the LTCC and, subsequently, by the Human Services Coordinating Council. The recommendations were then presented to the Sub-cabinet group, which requested follow-up information. An interagency workgroup was established to further explore due process concerns and other issues related to the creation of a perpetrator registry, and to develop the projected costs associated with such an undertaking.

That interagency workgroup produced a report entitled "Perpetrator Registry Report" which was submitted to the Sub-cabinet group in January, 2000. After review and discussion, the Sub-cabinet group asked the interagency workgroup to reconvene and reconsider its report in light of the concerns raised. The workgroup again took up the issue in March, 2000. This revised report, including more detailed recommendations, resulted.

## ***II. PURPOSE***

The purpose of an adult abuse registry is to protect vulnerable adults from abuse, neglect, and exploitation. An adult abuse registry can reduce the opportunity for individuals previously found to have abused, exploited or willfully neglected a vulnerable adult to be entrusted with the care of vulnerable persons.

Currently, the placement of an aide's name on the nurse aide abuse registry prohibits the aide from employment in long term care facilities. Expansion of that prohibition on employment in long term care facilities to a general ban on employment in any "facility," as defined in the Omnibus Adult Protection Act (OAPA) ["Facility" means a nursing care facility, community residential care facility, a psychiatric hospital, or a facility operated or contracted for operation by the State Department of Mental Health or South Carolina Department of Disabilities and Special Needs] or hospital, and expansion of the nurse aide abuse registry by creation of a registry which includes all persons found to have abused, exploited or willfully neglected a vulnerable adult could have dramatic effects. Not only would the number of individuals listed on a registry increase, but the settings in which such individuals would be banned from working would be extensive. The creation of such an expanded registry could also make the investigation and resolution of adult protection cases more difficult, as individuals who are the subject of such investigations would be very

defensive as adverse findings by the investigative entities could impact the individual's future employability. Conversely, without a mechanism to more publically identify abusive care givers, vulnerable adults could be at increased risk of abuse, neglect and exploitation.

**Decision Point:** Determine how to best accomplish the purpose of the registry.

- Options:**
- (1) The registry could trigger an automatic ban on certain types of employment for persons who have committed abuse, neglect, or exploitation.
  - (2) The registry could be a source of information for all potential employers of hands-on care givers (including individuals privately employing a care giver).
  - (3) Short of a ban to employment, other intermediate steps or a range of consequences could be developed.

**Workgroup Recommendation:** Option number two is recommended. This option would create a registry which could be accessed by potential employers and be a resource for information about the potential employee. The consensus of the Workgroup was that the registry should not supplant existing enforcement mechanisms. Concern was expressed that if option number one (listing on the registry triggers a ban on employment) was chosen, the registry would become primarily a regulatory/enforcement tool. *[The Workgroup recognizes that despite the envisioned law enforcement involvement and criminal prosecution under OAPA, those measures are generally underutilized at present. The Workgroup encourages efforts to address this situation.]* The Workgroup's decision on this issue also took into account several fairness issues associated with a complete ban on employment, including the difficulty of creating a system that imposes the same severe sanction regardless of the nature/severity of the offense. Another concern expressed was that such a system may encourage investigative entities to make no reports of relatively minor infractions, which could hamper identification of "habitual" violators who commit less serious offenses. Option #3 (a range of intermediate sanctions) was viewed as requiring the creation of an unduly complex administrative bureaucracy.

### **III. SCOPE OF THE REGISTRY**

The proposal is to create an **adult abuse registry** that would reflect findings of abuse, willful neglect or exploitation against any individuals who are found to have abused, exploited or willfully neglected a vulnerable adult in any setting. This broad scope would eliminate many of the shortcomings of the nurse aide registry and would provide a mechanism for any potential employer (including private citizens) seeking the services of a care giver to determine whether a potential employee has a prior history of abuse, willful neglect or exploitation. As previously noted, the proposed adult abuse registry would contain substantiated findings for any type of hands-on care giver in any setting — e.g., nurse aides, nurses, personal care aides, other hospital employees, and employees of nursing homes, facilities for the mentally ill or those with special needs, assisted living facilities, community residential care facilities and those providing private home care to vulnerable adults.

The Omnibus Adult Protection Act (OAPA), S. C. Code of Laws, Title 43, Chapter 35, provides for the protection of vulnerable adults in our State. OAPA includes the following definitions that would be relevant to the establishment of an adult abuse registry:

A **care giver** is defined as “a person who provides care to a vulnerable adult, with or without compensation, on a temporary or permanent or full or part-time basis and includes, but is not limited to, a relative, household member, day care personnel, adult foster home sponsor, and personnel of a public or private institution or facility”.

A **vulnerable adult** is defined as “a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person’s own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.”

**Decision Point:** Based on the OAPA “care giver” definition, a family member who provided care and for whom there is a substantiated finding of abuse, willful neglect or exploitation, would be reported to the registry. Using the care giver definition in the OAPA (above), the registry would also include licensed health care professionals.

**Options:**

- (1) Use the OAPA definitions as the basis for the adult abuse registry.
- (2) Create exceptions for reporting to the registry that would exempt designated individuals from being listed even when substantiated findings are made (e.g., no reporting of family member care givers; exemption of licensed health care professionals).

**Workgroup Recommendation:** The recommendation is to adopt the definitions in the OAPA in order to maintain consistency with the statute for the protection of vulnerable adults and to create a more comprehensive resource for potential employers. The registry should be constructed within the framework of the OAPA in an effort to provide a consistent complement to the safeguards contained in the Act.

#### **IV. PROCESS**

**Intake:** The OAPA provides for the protection of vulnerable adults in all settings and sets forth the investigative entities and the system for adult protection in South Carolina. The Adult Protective Services Division of the Department of Social Services [DSS-APS] is charged with investigating reports in the community, while the State Long Term Care Ombudsman [Ombudsman] is responsible for investigating reports in facilities. (To comply with its OAPA mandate, the Ombudsman has Memoranda of Agreement with the Department of Mental Health and the

Department of Disabilities and Special Needs that allow those agencies to conduct internal investigations of their respective facilities and to submit reports to the Ombudsman.) Law enforcement agencies, local prosecutors, and the Office of the Attorney General are also frequently involved in OAPA cases. Other entities have investigative responsibilities in accordance with federal mandates — e.g., OBRA authorizes DHEC to investigate complaints in Medicare/Medicaid certified long term care facilities in order to determine whether the facilities are in compliance with the Medicare/Medicaid requirements for participation; the Older Americans Act authorizes the Ombudsman to investigate complaints in facilities and to act as an advocate for residents.

*Investigations and Findings:* For cases arising under the OAPA, the local DSS-APS staff in the county DSS offices and representatives of the regional Ombudsman offices investigate reports and make findings. Substantiation of a report is based on a preponderance of the evidence — e.g., the conclusion that the allegation is more likely than not to have occurred. DHEC’s Survey and Certification staff may also be involved in this process, depending upon the setting of the alleged violation.

**Workgroup Recommendation:** Given the number of potential investigative entities from which “findings” could be available for inclusion on the registry, the Workgroup stresses the need for consistency among the investigative entities in their criteria and processes for making determinations. Additional training for investigative staff would address this concern. In addition, although there are a large number of agencies and individuals conducting investigations, all investigations are under the general jurisdiction of the two Investigative Entities listed in the OAPA: the Long Term Care Ombudsman Program and the Adult Protective Services Program within the Department of Social Services. Therefore, issues of consistency could also be addressed by an internal review process established within those agencies.

*Reporting to the Registry:* The investigative entities will be responsible for reporting findings to the registry. The investigative entities will also be responsible for the outcomes of their respective investigations and will be required to participate as necessary in the case preparation and presentation of testimony during any appeals process.

**Decision Point:** The point at which a subject individual's name and a brief description of the offense is placed on the registry needs to be determined.

- Options:**
- (1) The subject individual could be reported to the registry after the *allegation* is received and the registry could contain information regarding the allegation which would be accessible to entities/individuals who query the registry.
  - (2) The subject individual's name could be placed on the registry after a *substantiated* finding by the investigative entity or after a substantiated finding has been made and the individual's due process protections have been exhausted.
  - (3) The subject individual's name could be placed on the registry following a *conviction* in criminal court. [Note: Historically, there have been few criminal

prosecutions of adult protection cases.]

**Workgroup Recommendation:** In keeping with the concept of the registry as a useful informational resource, the Workgroup recommends some version of option number two. A mere allegation of misconduct was viewed as premature for listing the name of a subject individual on the registry. However, once a finding has been substantiated, sentiment swings strongly in favor of making that information available as soon as possible. If the substantiated finding is entered on the registry prior to completion of the due process measures, the registry should include the status of that process for inquirers (e.g., appeal filed and currently pending; administrative appeal concluded, now pending judicial review). Consideration could also be given to allowing the subject individual to provide a brief explanation/refutation that could be included with the listing. (See discussion at “Due Process Protections,” below.)

*Location of the Registry:* It has been recommended that the registry be centralized and that DHEC operate the registry in conjunction with the operation of the current nurse aide registry. Should the registry be maintained by another entity, federal regulations would prohibit the registry from including the Survey and Certification findings against a certified nurse aide. The result would be the maintenance of two registries, one for certified nurse aides and one for all other care giver perpetrators, unless a waiver of federal regulations can be obtained.

## V. **DUE PROCESS PROTECTIONS**

Some level of due process protection must be afforded to individuals whose names are subject to being placed on the perpetrator registry. The extent of protection that is necessary will be directly related to the consequences of being listed on the registry. For example, if the registry is used to administer an automatic ban upon employment, more extensive due process protections will be necessary than would be required if the registry is simply a source of information for potential employers.

- Options:**
- (1) Develop a process modeled after the National Practitioners Data Bank whereby a brief report is prepared and submitted to the subject of the report, who is then given an opportunity to add his/her comments and explanation. The full report — including the offender’s comments — is then submitted to the national data bank and there are no further avenues of appeal.
  - (2) Establish an internal agency team to review the investigative entities’ records and findings. (This sort of review is utilized by Delaware prior to placement of a perpetrator’s name on the registry. See attachments.)
  - (3) Offer full appeal rights that would include the opportunity for an administrative hearing, followed by further review under the South Carolina Administrative Procedures Act.

### **Workgroup Recommendations:**

The workgroup devoted significant time and attention to this issue after reconvening. The workgroup studied the process involved in listing an individual's name on South Carolina' Child Abuse Registry, as well as the Adult Abuse Registry in Delaware. The consensus of the workgroup was that the following procedure should be utilized in determining whether to, and how to, place an individual's name on the registry:

(1) After the Investigative entity, makes a substantiated finding\* that there is a preponderance of evidence that the subject individual abused, exploited or knowingly and willfully neglected a vulnerable adult, the subject individual would be advised in a written Notice of such finding. The Notice would further advise the individual that, pursuant to the Adult Abuse Registry law, the individual's name will be listed on the Adult Abuse Registry with a finding of "Proposed Concern." The Notice would further advise the individual for what period of time (from 5 years to permanent) the IE had decided the individual's name should remain on the Adult Abuse Registry.

*\*It will be up to each IE to determine how it will arrive at a substantiated finding of abuse, exploitation or knowing and willful neglect. Investigations of OAPA cases are carried out by staff with varying degrees of knowledge and experience. To ensure some consistency among various investigative staff, IEs may determine it prudent to consider all investigation findings preliminary until reviewed by senior staff or an internal review committee.*

(2) The individual will be further advised in the Notice of the requirement that certain licensed health care entities and licensed facilities which serve vulnerable adults are required to query the Registry prior to employment, and others may query the registry with the written consent of the individual listed. The individual will also be advised that they have the right to file an appeal of this action within 30 days from the date of the Notice. Such appeals will be subject to the APA, and will follow the contested case procedure of the APA.

(3) Appeal hearings will be conducted by a hearing officer, with a right of appeal to Circuit Court. In the event there is no appeal or the appeal results in a decision upholding the finding of abuse, willful neglect or exploitation, the listing in the registry will be changed from "Proposed Concern" to "Substantiated Finding." In the event an appeal by an individual results in a decision finding that there is insufficient evidence to substantiate the finding of abuse, willful neglect or exploitation, the listing shall be removed.

### **Variations to the Appeal Process**

(A) An exception to the appeal process under the APA will occur for those cases in which DSS APS staff have filed a petition in Family Court and, in the course of such proceedings, sought a finding that the subject individual abused, willfully neglected or exploited a vulnerable adult. Should the Family Court enter such a judicial finding, any appeal by the individual must take place from the Family Court Order. Similarly, if the Family Court makes a finding that the subject individual did not abuse,

willfully neglect or exploit a vulnerable adult, including a finding that a vulnerable adult was neglected, but that such neglect was not willful, no entry of the subject individual shall be made into the registry, and any prior entry shall be removed.

(B) Another exception to the above procedure will be that individuals who are convicted of a criminal violation arising from the same conduct which led to the IE's substantiated finding of abuse, exploitation or willful and knowing neglect will be listed on the adult abuse registry as proposed by the IE. If the conviction occurs during the review or appeals process, upon confirmation of the conviction, the review or appeals process shall terminate. (If the individual successfully appeals their criminal conviction, and such conviction is overturned, the individual may then, at that future date, re-institute the appeal of their listing on the Adult Abuse Registry, and such appeal shall not be dismissed on timeliness grounds unless the individual had already failed to timely file an appeal of the listing as of the date of their initial conviction.

(C) Another exception to the above procedure will be for Certified Nurse Aides (CNAs) who are listed on the CNA Abuse and Neglect Registry in accordance with federal regulations and procedure. The statute will provide that registration in the CNA Abuse and Neglect Registry will automatically result in a reciprocal listing of the same individual on the Adult Abuse Registry, presumably permanently.

(4) Only individuals and entities with an authorization signed by the individual listed on the Registry shall be allowed access to the information concerning the individual in the Adult Abuse Registry. However, certain employers, such as "facilities" as defined in OAPA, will be (a) required to query the Registry, (b) required to obtain a signed release from prospective employees authorizing the release of information about such person from the Registry and (c) must make any offer of employment contingent on receipt of an "acceptable" report from the Registry (although what is acceptable will be left to the discretion of the employer.) Time limits may be desirable, e.g., query must be received by the Registry prior to or within 30 days of employment. As noted, prospective employers or others who are not required to query the Registry, but nevertheless wish to find out whether a prospective employee or particular person is listed on the Registry, may, but must also present an authorization signed by the individual who is the subject of the query.

## **VI. FISCAL IMPACT**

The **costs** for developing and maintaining an adult abuse registry are estimates only and further described in the Appendix attached.



**VII. FUTURE DIRECTIONS**

*Enabling state legislation will be needed to establish an adult abuse registry.* In the event an Adult Abuse Registry is enacted into law, a plan to increase public awareness regarding the availability of the Registry would be desirable.

October 12, 2000

**ADULT ABUSE REGISTRY  
COST ELEMENTS**

1. Information to be developed and provided to DHEC by APS and the Ombudsman:
  - Case number
  - Date of incident
  - Reporter
  - Investigator
  - Narrative summary with findings (subject to FOIA) and length of time for the name to remain on the registry
  - Date due process letter sent and dates re-sent
2. When the above information is received, DHEC will enter the information in the registry.
  - Professional staff needed for data entry
3. Cost elements for responding to queries and maintaining the registry:
  - Toll free phone line
  - Fax back system
  - Voice response
  - Professional staff needed to respond
  - Technical staff needed
  - Computer hardware and software needed
  - Office equipment: fax and copy machines, etc.
  - Operational expenses: supplies to include postage, rent, file cabinets, desks, etc.
4. Appeals cost:
  - DHEC legal department to manage the appeals process
  - Court reporter
  - Hearing officer
5. Information to be provided upon query:
  - Confirmation of substantiated finding of abuse, neglect, and/or exploitation
  - Name listed as proposed concern
  - Specific information about the allegation
  - Status of the appeals process
6. Cost elements for the investigative entities:
  - Internal review of substantiated findings
  - Staff time for case preparation and appeals (5 days per case)
  - Dedicated agency attorney and paralegal
  - Training for staff

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