

TITLE 7 HEALTH
CHAPTER 1 HEALTH GENERAL PROVISIONS
PART 12 EMPLOYEE ABUSE REGISTRY

7.1.12.1 ISSUING AGENCY: Department of Health.
[7.1.12.1 NMAC - N, 01/01/2006]

7.1.12.2 SCOPE: This rule applies to a broad range of New Mexico providers of health care and services and employees of these providers who are not licensed health care professionals or certified nurse aides. This rule requires that providers check with the registry and avoid employing an individual on the registry. This rule provides for the investigation and determination of complaints alleging abuse, neglect or exploitation of recipients of care or services by employees. This rule further requires listing employees with substantiated registry-referred abuse, neglect or exploitation on the registry, following an opportunity for a hearing. This rule supplements other pre-employment screening requirements currently applicable to health care providers, such as the requirement for criminal history screening of caregivers employed by care providers subject to the Caregiver Criminal History Screening Act, NMSA 1978 Sections 29-17-1 *et seq.* and that Act's implementing rule, 7.1.9 NMAC. It also supplements requirements for pre-employment screening of certified nurse aides applicable to nursing facilities pursuant to 42 CFR Sections 483.75(e) and 488.335; and 16.12.20 NMAC. This rule does not address the consequences of abuse, neglect, or exploitation for which a provider, as distinguished from an employee, is responsible.

[7.1.12.2 NMAC - N, 01/01/2006]

7.1.12.3 STATUTORY AUTHORITY: The Department of Health Act, NMSA 1978, Section 9-7-6(E) and the Employee Abuse Registry Act, NMSA 1978, Sections 27-7A-1 to 27-7A-8 (2005).

[7.1.12.3 NMAC - N, 01/01/2006]

7.1.12.4 DURATION: Permanent.

[7.1.12.4 NMAC - N, 01/01/2006]

7.1.12.5 EFFECTIVE DATE: January 1, 2006, unless a later date is cited at the end of a section.

[7.1.12.5 NMAC - N, 01/01/2006]

7.1.12.6 OBJECTIVE: The objective of this rule is to implement the Employee Abuse Registry Act. The rule is intended to provide guidance as to the rights and responsibilities under the Employee Abuse Registry Act of providers, employees of providers, the department of health and the adult protective services division of the department of aging and long term services, and the public including recipients of care and services from providers.

[7.1.12.6 NMAC - N, 01/01/2006]

7.1.12.7 DEFINITIONS:

- A. **"Abuse"** means,
- (1) knowingly, intentionally or negligently and without justifiable cause inflicting physical pain, injury or mental anguish, and includes sexual abuse and verbal abuse; or
 - (2) the intentional deprivation by a caretaker or other person of services necessary to maintain the mental and physical health of a person.
- B. **"Adjudicated"** means with respect to a substantiated registry-referred complaint, a final determination by the Secretary following a hearing, or by a court, that the employee committed abuse, neglect, or exploitation requiring the listing of the employee on the registry.
- C. **"APS"** means the adult protective services division of the New Mexico aging and long term services department.
- D. **"Behavioral change"** means an observable manifestation of psychological, emotional or mental harm, injury, suffering or damage, and includes, but is not limited to, crying, hysterical speech, or disruptions to sleeping, working, eating, speech, nonverbal communications, socially interacting, or other activities which were performed routinely before the harm, injury, suffering, or damage.

E. **“Complaint”** means any report, assertion, or allegation of abuse, neglect, or exploitation made by a reporter to the incident management system, and includes any reportable incident that a licensed or certified health care facility or community based services provider is required to report under applicable law.

F. **“Custodian”** means the person assigned by the secretary to maintain the registry in accordance with this rule and the Employee Abuse Registry Act.

G. **“Department”** means the New Mexico department of health.

H. **“Direct care”** means face-to-face services provided or routine and unsupervised physical or financial access to a recipient of care or services.

I. **“Employee”** means a person employed by or on contract with a provider, either directly or through a third party arrangement to provide direct care. “Employee” does not include a New Mexico licensed health care professional practicing within the scope of the professional’s license or a certified nurse aide practicing as a certified nurse aide.

J. **“Exploitation”** means an unjust or improper use of a person’s money or property for another person’s profit or advantage, pecuniary or otherwise.

K. **“Investigation”** means a systematic fact finding process that has as its goal the gathering of all information relevant to making a determination whether an incident of abuse, neglect or exploitation occurred.

L. **“Licensed health care professional”** means a person who is required to be licensed, and is licensed, by a New Mexico health care professional licensing board or authority, and the issuance of whose professional license is conditioned upon the successful completion of a post secondary academic course of study resulting in a degree or diploma, including physicians and physician assistants, audiologists, acupuncture practitioners, dentists, registered nurses, licensed practical nurses, chiropractors, pharmacists, podiatrists, certified nurse-midwife, nurse practitioners, occupational therapists, optometrists, respiratory therapists, speech language pathologists, pharmacists, physical therapists, psychologists and psychologist associates, dietitians, nutritionists and social workers.

M. **“Manager”** means the department employee designated by the secretary to manage the employee abuse registry program pursuant to the New Mexico Employee Abuse Registry Act and this rule.

N. **“Mental Anguish”** means a relatively high degree of mental pain and distress that is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these and includes a mental sensation of extreme or excruciating pain.

O. **“Neglect”** means, subject to a person’s right to refuse treatment and subject to a provider’s right to exercise sound medical discretion, the failure of an employee to provide basic needs such as clothing, food, shelter, supervision, protection and care for the physical and mental health of a person or failure by a person that may cause physical or psychological harm. Neglect includes the knowing and intentional failure of an employee to reasonably protect a recipient of care or services from nonconsensual, inappropriate or harmful sexual contact, including such contact with another recipient of care or services.

P. **“Provider”** means an intermediate care facility for the mentally retarded; a rehabilitation facility; a home health agency; a homemaker agency; a home for the aged or disabled; a group home; an adult foster care home; a case management entity that provides services to elderly people or people with developmental disabilities; a corporate guardian; a private residence that provides personal care, adult residential care or natural and surrogate family services provided to persons with developmental disabilities; an adult daycare center; a boarding home; an adult residential care home; a residential service or habilitation service authorized to be reimbursed by medicaid; any licensed or medicaid-certified entity or any program funded by the aging and long-term services department that provides respite, companion or personal care services; programs funded by the children, youth and families department that provide homemaker or adult daycare services; and any other individual, agency or organization that provides respite care or delivers home- and community-based services to adults or children with developmental disabilities or physical disabilities or to the elderly, but excluding a managed care organization unless the employees of the managed care organization provide respite care, deliver home- and community-based services to adults or children with developmental disabilities or physical disabilities or to the elderly.

Q. **“Registry”** means an electronic database operated by the department that maintains current information on substantiated registry-referred employee abuse, neglect or exploitation, including the names and identifying information of all employees who, during employment with a provider, engaged in a substantiated registry-referred or an adjudicated incident of abuse, neglect or exploitation involving a recipient of care or services from a provider.

R. **“Reporter”** means a person who or an entity that reports possible abuse, neglect or exploitation to the department’s incident management system.

S. “**Secretary**” means the secretary of the department.

T. “**Sexual Abuse**” means the inappropriate touching of a recipient of care or services by an employee for sexual purpose or in a sexual manner, and includes kissing, touching the genitals, buttocks, or breasts, causing the recipient of care or services to touch the employee for sexual purpose, or promoting or observing for sexual purpose any activity or performance involving play, photography, filming or depiction of acts considered pornographic.

U. “**Substantiated**” means the verification of a complaint based upon a preponderance of reliable evidence obtained from an appropriate investigation of a complaint of abuse, neglect, or exploitation.

V. “**Substantiated registry-referred**” means a substantiated complaint that satisfies the severity standard for referral of the employee to the registry.

W. “**Unsubstantiated**” means that that the complaint’s alleged abuse, neglect or exploitation did not or could not have occurred, or there is not a preponderance of reliable evidence to substantiate the complaint, or that there is conflicting evidence that is inconclusive.

X. “**Verbal abuse**” means profane, threatening, derogatory, or demeaning language, spoken or conveyed by an employee with the intent to cause pain, distress or injury, and which does cause pain, distress or injury as objectively manifested by the recipient of care or services.

[7.1.12.7 NMAC - N, 01/01/2006]

7.1.12.8 REGISTRY ESTABLISHED; PROVIDER INQUIRY REQUIRED: Upon the effective date of this rule, the department has established and maintains an accurate and complete electronic registry that contains the name, date of birth, address, social security number, and other appropriate identifying information of all persons who, while employed by a provider, have been determined by the department, as a result of an investigation of a complaint, to have engaged in a substantiated registry-referred incident of abuse, neglect or exploitation of a person receiving care or services from a provider. Additions and updates to the registry shall be posted no later than two (2) business days following receipt. Only department staff designated by the custodian may access, maintain and update the data in the registry.

A. **Provider requirement to inquire of registry.** A provider, prior to employing or contracting with an employee, shall inquire of the registry whether the individual under consideration for employment or contracting is listed on the registry.

B. **Prohibited employment.** A provider may not employ or contract with an individual to be an employee if the individual is listed on the registry as having a substantiated registry-referred incident of abuse, neglect or exploitation of a person receiving care or services from a provider.

C. **Applicant’s identifying information required.** In making the inquiry to the registry prior to employing or contracting with an employee, the provider shall use identifying information concerning the individual under consideration for employment or contracting sufficient to reasonably and completely search the registry, including the name, address, date of birth, social security number, and other appropriate identifying information required by the registry.

D. **Documentation of inquiry to registry.** The provider shall maintain documentation in the employee’s personnel or employment records that evidences the fact that the provider made an inquiry to the registry concerning that employee prior to employment. Such documentation must include evidence, based on the response to such inquiry received from the custodian by the provider, that the employee was not listed on the registry as having a substantiated registry-referred incident of abuse, neglect or exploitation.

E. **Documentation for other staff.** With respect to all employed or contracted individuals providing direct care who are licensed health care professionals or certified nurse aides, the provider shall maintain documentation reflecting the individual’s current licensure as a health care professional or current certification as a nurse aide.

F. **Consequences of noncompliance.** The department or other governmental agency having regulatory enforcement authority over a provider may sanction a provider in accordance with applicable law if the provider fails to make an appropriate and timely inquiry of the registry, or fails to maintain evidence of such inquiry, in connection with the hiring or contracting of an employee; or for employing or contracting any person to work as an employee who is listed on the registry. Such sanctions may include a directed plan of correction, civil monetary penalty not to exceed five thousand dollars (\$5000) per instance, or termination or non-renewal of any contract with the department or other governmental agency.

[7.1.12.8 NMAC - N, 01/01/2006]

7.1.12.9 INCIDENT MANAGEMENT SYSTEM INTAKE: The department has established an incident management system for receipt, tracking and processing of complaints. Complaints may be reported to the department's incident management system using the department website's on-line form completion utility, by telephone using a toll free number, facsimile, U.S. mail, email, or in-person. The method of reporting preferred by the department is on-line form completion via the department's website, <http://dhi.health.state.nm.us/elibrary/ironline/ir.php>. The toll free telephone line is staffed by the department during normal business hours and a message system is available for reporting complaints during non-business hours.

A. **Incident Report Form.** Complaints of suspected abuse, neglect or exploitation will be reported by providers on the department's incident report form if possible. This form and instructions for completing and filing the form are available at the department's website, <http://dhi.health.state.nm.us/elibrary/ironline/ir.php> or may be obtained from the department by calling the toll free number 800-752-8649 or 800-445-6242, or by faxing a request to 800-584-6057, or by mailing a request to the Incident Management Bureau, Division of Health Improvement, department of Health, P.O. Box 26110, Santa Fe, New Mexico, 87502-6110.

B. **Reportable Intake information.** Reports of suspected abuse, neglect or exploitation made to the department by persons who do not have access to, or are unable to use, the department's current incident report form shall provide as specific a description of the incident or situation as possible, and shall contain the following information where applicable:

- (1) the location, date and time or shift of the incident;
- (2) the name, age and gender, address and telephone number of the person the reporter suspects to have been abused, neglected, or exploited, and the name, address and telephone number of the guardian or health care decision maker for such person, if applicable;
- (3) the names, addresses, phone numbers and other identifying information of the providers who provide services to the person the reporter suspects to have been abused, neglected, or exploited;
- (4) the names, addresses, phone numbers and other identifying information of the following people who the reporter believes may have been involved with, or have knowledge of, the incident; provider's staff and employees; family members or guardians of the person the reporter suspects to have been abused, neglected, or exploited; other health care professionals or facilities; and any other persons who may have such knowledge;
- (5) the condition and status of the person the reporter suspects to have been abused, neglected, or exploited;
- (6) the reporter's name, address, telephone number and other contact information, together with the name and address of the provider with whom the reporter is employed, if applicable.

C. **Method of Filing Complaint.** The completed incident report form must be filed with the department. It may be hand delivered, faxed toll free to 800-584-6057, mailed, emailed, or, preferably, filed by use of the department's procedure for on-line form completion.

[7.1.12.9 NMAC - N, 01/01/2006]

7.1.12.10 COMPLAINT PROCESSING:

A. **Assignment of Complaint.** The manager or designee shall review the complaints, reports or allegations of abuse, neglect or exploitation, prioritize these complaints and assign appropriate department staff to investigate when warranted, and refer the complaint, report, or allegation to APS, and other appropriate oversight agencies for investigation.

(1) Assignment shall be made to appropriate staff of the department of all complaints of abuse, neglect or exploitation involving a provider for whom the department has oversight authority or for whom the department has agreed to investigate.

(2) Referral shall be made to APS of complaints of abuse, neglect or exploitation in all instances where the complaint involves a provider of medicaid waiver services administered by the aging and long-term services department and the provider is not otherwise licensed by or under contract with the department.

(3) The manager shall prioritize the complaints and ensure that the complaints that allege the most serious incidents of abuse, neglect or exploitation, or that present a high risk of future harm, are promptly investigated.

B. **Immediate threat to health or safety.** In instances where the investigation determines that there exists an immediate threat to the health or safety of a person in the care of a provider, the department or APS, in accordance with applicable statutory authority, will make the necessary arrangements or referrals to ensure the protection of persons at risk of harm or injury. The department will take appropriate action to eliminate or reduce the immediate threat to health or safety with respect to providers it licenses or with whom it contracts.

C. **Conducting the Investigation.** The department investigation of complaints will follow the procedures in this rule. The investigations conducted by APS will comply with applicable APS rules or with the provisions herein.

(1) The investigators shall gather all relevant evidence, weigh the evidence including making credibility determinations. Individuals from whom information is gathered may include the reporter, witnesses identified by the reporter, listed on the incident report form or discovered during the investigation, the alleged victim, appropriate representatives of the provider, medical personnel with relevant information, family members and guardians of the alleged victim, any employee suspected of abuse, neglect or exploitation, other recipients of care and services, and other persons possibly having relevant information.

(2) Physical injuries that are the subject of the complaint will be observed in person and documented. Complete documentation must be obtained of all objectively verifiable manifestations of mental anguish, verbal abuse, sexual abuse or neglect on the part of the recipient of care or services.

(3) The investigator will generally follow department guidelines addressing face-to-face individualized interviews, telephonic interviews, witness statements and documentation of contacts.

(4) The investigator will follow established guidelines for clinical consultations.

(5) In instances where the investigation results in discovery of other, unrelated instances of possible abuse, neglect or exploitation, the investigator will file an incident report form with the incident management system. However, additional allegations involving the same complaint as the one under investigation are considered the same case and will not be separately reported, although the investigator may supplement the Incident Report.

(6) At any time during the investigation, the manager shall make referrals to other licensing authorities based upon information of possible violations of applicable health facility, community provider or health care professional standards.

(7) The investigator will submit an investigation report to the manager with recommendations as to whether the complaint is:

- (a) unsubstantiated;
- (b) substantiated; or
- (c) substantiated registry-referred.

(8) Where appropriate, the investigation report may make findings and recommendations with respect to provider responsibility for abuse, neglect or exploitation.

(9) The manager shall review the investigation report and recommendations and shall make a determination whether the complaint of abuse, neglect or exploitation is substantiated.

(10) If the manager determines, as a result of the manager's review of the investigation report and recommendations, that the complaint is substantiated, the manager shall apply the appropriate severity standard to the substantiated complaint to further determine if the complaint is substantiated registry-referred.

D. **Investigation File and Report.** The department shall establish an investigation file, which shall contain all applicable information relating to the complaint including the incident report form, correspondence, investigation, referrals, determinations, secretary's decision, and notices of appeal. Following the investigation and determination by the manager, the complaint and investigation file will be maintained by the custodian. The investigator, or the investigator from the lead agency in a joint investigation, shall prepare and submit a written investigation report. The investigation report shall be part of the investigation file. The investigation report shall contain a review of the evidence obtained during the investigation, including but not limited to:

- (1) interviews conducted and written statements;
- (2) interviews and statements reviewed that were originally conducted or obtained by other entities such as the provider, other health care facilities and medical providers, or law enforcement;
- (3) documents, diagrams, photographs and other tangible evidence obtained or reviewed;
- (4) a description of any actions taken by the provider in a response to the complaint or situation under investigation; and,

(5) analysis of the evidence and recommendations.

E. **Timeline and processing of a complaint.** The investigation of each complaint shall be completed by the department within sixty (60) calendar days of receipt of the complaint.

(1) The investigation report shall be submitted to the manager no later than sixty (60) calendar days following the receipt of the complaint.

(2) The manager shall review the investigatory findings and recommendations and make a determination within five (5) business days of receipt of the findings as to whether the complaint of abuse, neglect or exploitation is substantiated registry-referred.

(3) The manager may issue a specific extension of any complaint processing deadline if reasonable grounds exist for such extension and the reasons are set out in the written extension. The written extension is included in the investigation file. Grounds for an extension may include, but are not limited to, the temporary non-availability of witnesses or documentary evidence, or the need for information not yet available from other entities that may be involved with an investigation into the facts that form the basis of the complaint, including the office of the medical investigator and agencies charged with law enforcement, auditing, financial oversight, fraud investigation, or advocacy.

F. **Validity of enforcement actions.** Failure by the department or APS to comply with the procedures or time requirements set out in this section does not abrogate or invalidate any action taken against an employee pursuant to this rule, or any action taken against a provider for noncompliance with this rule or any other applicable law or regulation. However any such failure may be admitted into evidence at a hearing.
[7.1.12.10 NMAC - N, 01/01/2006]

7.1.12.11 SEVERITY STANDARD: A determination of the severity of all substantiated complaints of abuse, neglect or exploitation is made for the purpose of deciding if the employee is to be referred for placement on the registry. The determination of the severity of the substantiated complaint of abuse, neglect or exploitation is based upon application of the severity standards in this section. A substantiated complaint that satisfies the severity standard in this section is a substantiated registry-referred complaint. A substantiated complaint that does not satisfy the severity standard in this section will not be referred to the registry. Severity is determined by assessing the impact of the substantiated abuse, neglect, or exploitation on the recipient of care or services, and by assessing the employee for aggravating factors.

A. **Abuse.** A substantiated complaint of abuse meets the severity standard if:

- (1) the abuse results in, or is a contributing factor to, death;
- (2) the abuse results in the infliction of a significant, identifiable physical injury that reasonably requires or results in medical or behavioral intervention or treatment;
- (3) the abuse results in any injury for which criminal charges are brought against the employee resulting in a plea or conviction;
- (4) the abuse results in the infliction of excruciating pain or pain that endures over a significant time period;
- (5) the abuse causes significant mental anguish as evidenced by the victim's descriptions, or significant behavioral changes;
- (6) the abuse is sexual abuse; or
- (7) the abuse is verbal abuse that causes significant mental anguish, including psychological or emotional damage, and which is evidenced by significant behavioral changes or physical symptoms.

B. **Neglect.** A substantiated complaint of neglect meets the severity standard if:

- (1) the neglect results in, or is a contributing factor to, death;
- (2) the neglect results in the infliction of a significant, identifiable physical injury that reasonably requires or results in medical or behavioral intervention or treatment;
- (3) the neglect results in any injury for which criminal charges are brought against the employee resulting in a plea or conviction;
- (4) the neglect results in the infliction of excruciating pain or pain that endures over a significant time period; or,
- (5) the neglect causes significant mental anguish as evidenced by the victim's descriptions, or significant behavioral changes.

C. **Exploitation.** A substantiated complaint of exploitation meets the severity standard where unjust or improper use of the money or property belonging to the recipient of care or services results in:

- (1) a single instance of an objectively quantifiable loss, the value of which exceeds the lesser of either:
 - (a) twenty five dollars (\$25); or,
 - (b) twenty five percent (25%) of the monthly income available to the recipient of care or services for purchasing personal items or discretionary spending; or
- (2) a subjectively substantial loss to the recipient of care or services due to a special attachment to the property, as demonstrated by anger, fear, frustration, depression or behavioral changes caused by the loss.

D. **Aggravating factors.** A substantiated complaint of abuse, neglect or exploitation meets the severity standard requiring referral of the employee for placement on the registry where:

(1) the employee used alcohol or a controlled substance at or near the time of the substantiated abuse, neglect or exploitation; or

(2) the employee used, brandished or threatened to use, a weapon in connection with the substantiated abuse, neglect or exploitation.

[7.1.12.11 NMAC - N, 01/01/2006]

7.1.12.12 PROVIDER COOPERATION:

A. **Access to provider by investigators.** The provider shall provide immediate physical access to the provider's entire facility or its service delivery sites to investigators from the department or APS. The investigators may require such access during any or all shifts.

B. **Access to provider records.** The provider shall provide to investigators from the department or APS immediate access to all information obtained as a result of the provider's own internal investigation of the matters that form the basis of the complaint, including but not limited to written statements, interviews, affidavits, physical items, medical information, electronic and computer data, and photographic information.

C. **Interviews.** Investigators from the department or APS shall have a reasonable opportunity to conduct confidential interviews with any person who may have relevant information relating to the complaint, including employees and other staff including licensed health care professionals and certified nurse aides, other licensed health care professionals and other provider staff, recipients of care or services from the provider and their family members, guardians, health care decision makers and friends.

D. **Physical access to recipients of care and services.** The provider must allow reasonable access to individuals receiving care or services from the provider to investigators from the department or APS when such investigators announce that they are investigating a complaint. Such access may be telephonic or face-to-face.

E. **Access to the provider's records, patient trust accounts and patient property.** The provider must provide immediate access to investigators from the department or APS to the provider's billing records, patient trust accounts, representative payee records, patient care and medical records, and patient property. In addition the provider must assure access to employee and personnel records, including documentation showing provider inquiry to the registry.

F. **Copying.** The access required to be provided to investigators includes copying paper documents and printing and copying electronic and computer records or data. Copied documents shall be retained in accordance with applicable state retention policies.

G. **Consequences of provider's denial of cooperation.** The department shall administer sanctions for a provider's failure to comply with the Employee Abuse Registry Act, including failure to provide access as required herein to conduct investigations of complaints, and such sanctions include a directed plan of correction, a civil monetary penalty not to exceed five thousand dollars (\$5,000), or such sanctions as are available under applicable contract or licensing provisions.

[7.1.12.12 NMAC - N, 01/01/2006]

7.1.12.13 NOTIFICATION FOLLOWING INVESTIGATION:

A. **Notification to provider and employee.** If the department or APS determines, following an investigation, that an instance of either substantiated or substantiated registry-referred employee abuse, neglect, or exploitation has occurred, then the department, if it substantiated the complaint, or APS, if it substantiated the complaint, shall promptly notify the employee and the provider.

B. **Required information for substantiated registry-referred complaints.** The notice to the provider and employee for substantiated registry-referred complaints shall be by certified mail and shall include the following information.

(1) The nature of the abuse, neglect, or exploitation.

(2) The date and time of the occurrence.

(3) The right to request a hearing, and the time and manner for requesting a hearing.

(4) The fact that the substantiated registry-referred findings will be reported to the registry, once the employee has had an opportunity for a hearing.

(5) The failure by the employee to request a hearing in writing within thirty (30) calendar days from the date of the notice shall result in the reporting of the substantiated findings to the registry and the provider.

C. **Required information for substantiated complaints.** The notice to the provider and employee for substantiated complaints may be by mail or by email and shall include the following information.

(1) The nature of the abuse, neglect, or exploitation.

(2) The date and time of the occurrence.
(3) The fact that the substantiated complaint was not sufficiently severe to warrant reporting the employee to the registry.

(4) The fact that the employee may not request a hearing.

D. **Unsubstantiated complaints.** Notice of a determination that an investigated complaint is unsubstantiated shall be mailed or emailed to the provider following such determination.

E. **APS notification to the department.** APS shall notify the manager of substantiated complaints of abuse, neglect and exploitation, and substantiated registry-referred complaints of abuse, neglect and exploitation. [7.1.12.13 NMAC - N, 01/01/2006]

7.1.12.14 HEARINGS: Hearings are provided to employees by either the department or APS. This section provides rules applicable to hearings held by the department.

A. **Request for hearing.** An employee may request an evidentiary hearing if the employee is notified that as a result of substantiated registry-referred findings of abuse, neglect, or exploitation the employee will be reported to the registry. The request for hearing shall be made to the department if the department conducted the investigation and issued the notice. The employee's request for hearing shall be made to APS if APS conducted the investigation and issued the notice. A provider may not request a hearing pursuant to the Employee Abuse Registry Act. The following applies to hearings properly requested of the department.

(1) The request for a hearing shall be in writing and mailed or delivered to the New Mexico Department of Health, Manager of the Employee Abuse Registry Program, P. O. Box 26110, Santa Fe, New Mexico 87502-6110; or to an alternative address if set forth in the notice.

(2) The request for hearing shall include a copy of the notice.

(3) The request for hearing must be mailed or hand-delivered no later than thirty (30) calendar days after the date of the notice.

B. **Scheduling order.** The department, or the hearing officer, shall issue a scheduling order that sets the hearing at a location reasonably convenient for the employee and at a date and time reasonably convenient to the parties. The scheduling order shall establish deadlines for completion of discovery and provide for the filing of a confidentiality order. The hearing shall be scheduled within thirty (30) calendar days following the department's receipt of the request for hearing. Either party may request a continuance of the hearing for good cause. If a hearing is continued it shall be rescheduled at the earliest date and time available to the parties.

C. **Hearing officer.** The hearing will be conducted before an impartial and independent hearing officer of the department. The hearing officer is not required to be an attorney. Upon appointment, the hearing officer shall establish an official file of the case. The hearing officer shall resolve all prehearing matters, including amendment of the scheduling order, schedule and conduct prehearing conferences, rule on prehearing motions, and resolve discovery disputes. The hearing officer will preside over the hearing and allow each party an opportunity to present its case, and shall resolve all motions, evidentiary issues and other matters as may be necessary. Within thirty (30) calendar days of the conclusion of the hearing the hearing officer will issue a report and recommended decision to the secretary.

D. **Parties.** The parties to the hearing are the department, through the manager or designee, and the employee. Each party may be represented by an attorney.

E. **Confidentiality.** The hearing officer shall require the filing of an appropriate signed confidentiality order in which each party agrees to maintain and protect the confidentiality of all individually identifiable health information that is, or may be, used or disclosed at any time during the course of the entire proceeding in accordance with applicable state and federal law and regulations. Refusal or failure to sign an appropriate confidentiality order constitute grounds for denying discovery to the non-signing party, limiting the number and testimony of the non-signing party's witnesses, limiting the admission of evidence that discloses individually identifiable health information, and the imposition of other appropriate measures to limit the scope of disclosure of individually identifiable health information to the non-signing party.

F. **Discovery.**

(1) Exhibit and witness lists will be exchanged between the parties and provided to the hearing officer prior to the hearing by the parties in accordance with the scheduling order, any prehearing order, or by agreement of the parties. The witness list shall include a summary of the subject matter of the anticipated testimony of each witness listed.

(2) No depositions are allowed except by order of the hearing officer upon a showing that the deposition is necessary to preserve the testimony of persons who are sick or elderly, or persons who will not be able

to attend the hearing. Pursuant to provisions in the scheduling order or upon agreement of the parties, and with the consent of the witness if the witness is not employed by the department or another governmental entity, a party may interview witnesses identified by the other party at a reasonable time and in a reasonable manner.

(3) **Production of documents.** Upon request by the employee, the department shall provide a copy of the investigation to the employee. The parties may request the production of other relevant documents in accordance with the scheduling order or other discovery order.

G. Hearing procedures. The hearing shall be closed to the public. The hearing officer shall conduct the hearing in an efficient and orderly manner that respects the rights of the parties to present their cases. The hearing officer shall maintain proper decorum and shall assure that all participants in the hearing are courteous to one another. The hearing officer is authorized to resolve motions and other disputes before and during the hearing.

(1) **Recording.** The hearing officer will cause a record to be made of the hearing and retained in the official file. Generally such record is made by use of commonly available audio recording technology. A log of the recording shall be maintained.

(2) **Order of presentation at hearing.** The department shall present its case, the employee shall present the employee's case, and the department may present its rebuttal case.

(3) **Public.** The hearing is a closed, nonpublic hearing.

(4) **Evidence.** The New Mexico Rules of Evidence do not apply, although they may be referred to for guidance as to type of evidence that may be admitted. Generally, evidence shall be admitted if is of a type relied upon by reasonable persons in the conduct of important affairs. Proffered evidence may be excluded if it is not relevant, or is repetitious or cumulative.

(5) **Telephonic testimony.** Upon timely notice to the opposing party and the hearing officer and with the approval of the hearing officer, the parties may present witnesses by telephone, or live video.

(6) **Recommended decision.** The hearing officer shall issue a recommended decision to the secretary within (30) days of the closing of the hearing and transfer the official record to the custodian.

(7) The custodian shall maintain the official record of the hearing, which shall include the recommendation of the hearing officer and the secretary's adjudicated decision.

H. Secretary's decision. Within ten (10) business days of receipt of the department's or the APS' hearing officer recommendation, the secretary of the department shall issue a final decision, and promptly provide the parties with a copy. If the decision of the secretary finds that the employee was responsible for abuse, neglect or exploitation of sufficient severity for referral to the registry, it shall be the adjudicated decision of abuse, neglect or exploitation.

I. Judicial review. An employee may appeal the secretary's adjudicated decision of abuse, neglect or exploitation to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978. The custodian will enter the employee's name into the registry within two (2) working days following receipt of the adjudicated decision. The custodian shall promptly remove the employee from the registry upon the department's receipt of an order issued by the district court granting a stay pending the outcome of the appeal, or upon the department's receipt of a district court order reversing the adjudicated decision.

J. Court of Appeals. If the employee seeks review in the court of appeals by writ of certiorari, the employee shall remain on the registry, unless a stay is granted or the court of appeals reverses the district court. If a stay is granted or the court of appeals reverses, notification shall be made to the custodian who shall promptly remove the employee from the registry.

[7.1.12.14 NMAC - N, 01/01/2006]

7.1.12.15 NOTIFICATION BY APS: APS shall promptly provide all required employee information to the custodian of the final disposition of complaints of substantiated registry-referred abuse, neglect or exploitation after the occurrence of each of the following:

A. No hearing requested. The employee has not requested an administrative hearing within thirty (30) calendar days after the date of the notice to the employee following an investigation resulting in the determination of substantiated registry-referred abuse, neglect, or exploitation.

B. Adjudication of abuse, neglect or exploitation. The employee has not filed for review in the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978 after thirty (30) calendar days following the date of the final APS administrative adjudication decision of employee abuse, neglect or exploitation of sufficient severity for registry referral.

C. **Judicial decision.** Upon the receipt by APS of a district court order or decision sustaining the APS administrative adjudication decision of abuse, neglect or exploitation of sufficient severity for registry referral, if an employee seeks judicial review in the district court.

D. **Court of Appeals.** If the employee seeks review in the court of appeals by writ of certiorari, the employee shall remain on the registry, unless a stay is granted or the court of appeals reverses the district court. If a stay is granted or the court of appeals reverses, then notification shall be made to the custodian who shall promptly remove the employee from the registry.

[7.1.12.15 NMAC - N, 01/01/2006]

7.1.12.16 ENTRY ON THE REGISTRY: The custodian shall provide the employee and the provider for whom the employee worked with notice of the employee's listing on the registry. The following employees will be listed on the registry by the custodian:

A. **No hearing requested.** Any employee determined to have committed substantiated registry-referred abuse, neglect or exploitation who does not request an administrative hearing within thirty (30) calendar days after the date of the notice to the employee.

B. **Adjudicated decision.** Any employee who, after thirty (30) calendar days following the date of an adjudicated decision of abuse, neglect or exploitation, has not filed for review in the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

C. **Judicial decision.** Any employee for whom a district court has entered an order or decision sustaining an administrative adjudication of abuse, neglect or exploitation.

D. **Court of Appeals.** Any employee who seeks review in the court of appeals by writ of certiorari shall remain listed on the registry, unless a stay is granted pending the outcome of the case, or the court of appeals reverses the district court. If a stay is granted or the court of appeals reverses the district court, then the custodian shall promptly remove the employee from the registry.

[7.1.12.16 NMAC - N, 01/01/2006]

7.1.12.17 REMOVAL FROM THE REGISTRY: After a period of three years from the effective date of placement on the registry, an individual on the registry may petition for removal from the registry. The petition shall be sent to the custodian. The petition contents shall be reviewed for completeness within five (5) days, and if not complete, notice shall be sent to the petitioner informing the petitioner that the petition is incomplete. The petition review time does not commence to run until the submission of a complete petition.

A. **Petition contents.** Any individual whose name is on the registry may petition the custodian in writing for removal of the individual's name from the registry. In addition to the name, address, telephone number, and social security number of the petitioner, the petition shall provide:

(1) the petitioner's employment history since placement on the registry, to include for each employer, the name, address and telephone number of the employer, a brief description of the petitioner's responsibilities, the dates of the employment, reasons for ending the employment, and the names and telephone numbers of any employer contacts;

(2) evidence of any rehabilitation, restitution or education since the incident of abuse, neglect or exploitation, including copies of any certificates or other evidence of successful completion of rehabilitation or other educational programs, and including evidence of relevant volunteer activities;

(3) other relevant information including changed circumstances.

B. **Review of petition.** The department shall establish a process of review of the petition. Such process may include review of the petition by department or APS employees selected for such reviews, and shall include a requirement that a recommendation be made to the secretary on the merits of the petition within twenty (20) calendar days from receipt of the completed petition. The burden at all times rests upon the petitioner to present truthful information sufficient to show that good cause exists for removing the petitioner's name from the registry.

C. **Review considerations.** The review process established by the department shall consider all relevant factors to determine if the petitioner has presented truthful information sufficient to demonstrate that good cause exists for removing the petitioner's name from the registry, including but not limited to:

(1) the nature and extent of the substantiated abuse, neglect or exploitation which resulted in the placement of the petitioner's name on the registry including records obtained from the employee abuse registry program and the custodian of the registry;

(2) the evidence showing the rehabilitation activities of the petitioner, which may be based in part on relevant volunteer activities, education and restitution;

(3) the petitioner's age at the time of the substantiated abuse, neglect or exploitation, and the length of time since the substantiated abuse, neglect or exploitation;

(4) the likelihood that the petitioner will commit future acts of abuse, neglect or exploitation; and,

(5) the existence and extent of false or misleading statements or information provided by the petitioner in connection with the petition.

D. **Decision on Petition.** The secretary shall issue a final written determination on the petition based upon the review of the petition within thirty (30) days of receipt of the completed petition, and shall provide the decision to the petitioner in person or by certified mail. The secretary's final written determination shall be delivered or mailed to the petitioner within three (3) business days of such determination. If the petition is granted, the petitioner's name shall be promptly removed from the registry.

E. **Hearings.** If the secretary denies the petition, the petitioner may request an administrative hearing with ten (10) calendar days of receipt of the decision. Upon receipt of a request for a hearing, an independent hearing officer of the department shall conduct the hearing. If a petition is denied by the secretary and a hearing is requested and provided, the individual may not thereafter re-petition for removal from the registry. If the petition is denied following a hearing, then the petitioner may seek judicial review pursuant to the provisions of Section 39-3-1.1 NMSA 1978. If a petition is denied by the secretary, and an administrative hearing is not timely requested, then the individual on the registry may petition only one additional time for removal from the registry after a minimum of thirty six (36) months from the date of the prior petition denial.

F. **Hearing procedures for denied petition.** [Reserved]
[7.1.12.17 NMAC - N, 01/01/2006]

7.1.12.18 CONFIDENTIALITY: The department complies with all state and federal confidentiality requirements regarding information obtained in connection with the operation of the Employee Abuse Registry program, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

A. **Confidentiality of information.** Information obtained by the incident management system involving incidents or situations of suspected abuse, neglect or exploitation is confidential, and is not subject to public inspection until completion of all investigations and hearings, and then only to the extent specifically permitted by law and only such information that does not identify individuals who are receiving care or services from providers.

B. **Unsubstantiated complaints.** Complaints of suspected abuse, neglect or exploitation obtained by the incident management system that are not substantiated following investigation are not public information, and are not subject to public inspection.

C. **Substantiated complaints.** Complaints of suspected abuse, neglect or exploitation obtained by the incident management system that are substantiated following investigation are subject to public inspection only to the extent permitted by law and the disclosure may not include any identifying information about an individual who is receiving health care services from a provider.

D. **Permitted disclosures.** Nothing herein shall restrict an appropriate disclosure of information to the centers for medicare and medicaid services; nor shall any provision herein restrict disclosures to law enforcement officials, including district attorneys and courts, in accordance with the Adult Protective Services Act and the Resident Abuse and Neglect Act or other law.

[7.1.12.18 NMAC - N, 01/01/2006]

History of 7.1.12 NMAC: [Reserved]