§3.1. Definitions.
The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

1. Advanced practice nurse (APN)—A registered nurse approved by the Texas Board of Nursing to practice as an advanced practice nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with advanced nurse practitioner.

2. Agent—Any person not employed by the facility but working under the auspices of the facility (e.g., a volunteer or a student).

3. Allegation—A report by a person suspecting or having knowledge that an individual has been or is in a state of abuse, neglect, or exploitation as defined in this subchapter.

4. Applicant—A person who has applied to be an employee, volunteer, or unpaid professional intern.

5. CANRS—The client abuse and neglect reporting system maintained by DADS Consumer Rights and Services.

6. Child—An individual less than 18 years of age who is not and has not been married or who has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

7. Clinical practice—The demonstration of professional competence in nursing, dental, pharmacy, or medical practice as described in the relevant chapter of the Occupations Code.

8. Confirmed—Term used to describe an allegation which is determined to be supported by the preponderance of evidence.

9. Contractor—Any organization, entity, or person who contracts with a facility to provide services to an individual. The term includes a local independent school district with which a facility has a memorandum of understanding (MOU) for educational services.

10. Conviction—The adjudication of guilt, plea of guilty or nolo contendere, or the assessment of probation for a violation of the Penal Code.

11. DADS—Department of Aging and Disability Services.

12. Deferred adjudication—Has the meaning given to “community supervision” in Texas Code of Criminal Procedure, §42.12, Section 2.

13. Department—DADS.

14. Designee—A staff member immediately available who is temporarily or permanently appointed to assume designated responsibilities.

15. Department of Family and Protective Services (DFPS) investigator—An employee of DFPS with expertise and demonstrated competence in conducting investigations.

16. Director—The director of a facility, or designee.

17. Employee—A person employed by a facility or a person employed by the department whose assigned duty station is at a facility.

18. Facility—A state supported living center or the ICF/MR component of the Rio Grande State Center.


20. Inconclusive—Term used to describe an allegation leading to no conclusion or definite result due to lack of witnesses or other relevant evidence.

21. Individual—A person with a developmental disability receiving services from a facility.

22. Medical intervention—Treatment by a licensed medical doctor, osteopath, podiatrist,
dentist, physician's assistant, or APN. The term does not include first aid, an examination, diagnostics (e.g., x-ray, blood test), or the prescribing of oral or topical medication.

(23) Mental health services provider--This term has the meaning assigned in the Texas Civil Practice and Remedies Code, Chapter 81.

(23) Peer review--A review of clinical and/or professional practice of a doctor, pharmacist, licensed vocational nurse, or registered nurse conducted by his or her professional peers.

(24) Perpetrator--A person who has committed an act of abuse, neglect, or exploitation.

(25) Preponderance of evidence--The greater weight of evidence, or evidence that is more credible and convincing to the mind.

(26) PMAB or Prevention and Management of Aggressive Behavior--The Health and Human Services Commission’s proprietary risk management program that uses the least intrusive, most effective options to reduce the risk of injury for individuals and for staff from acts or potential acts of aggression.

(27) Primary contact--In cases in which the alleged victim is an adult with intellectual disabilities who is unable to authorize the disclosure of protected health information and who does not have a guardian, the person designated as the alleged victim's primary contact who receives all other information about the alleged victim (e.g., spouse, parent).

(28) Registries--
(A) the Nurse Aide Registry maintained by DADS in accordance with 40 Texas Administrative Code (TAC) §94.10 (relating to Registry, Findings, Inquiries); and
(B) the Employee Misconduct Registry maintained by DADS in accordance with 40 TAC Chapter 93.

(29) Reporter--The individual who reports an allegation of abuse, neglect, or exploitation.

(30) Retaliation--Any action intended to inflict emotional or physical harm or inconvenience on a person that is taken because the person has reported abuse, neglect, or exploitation. This includes, but is not limited to, harassment, disciplinary measures, discrimination, reprimand, threat, and criticism.

(31) State supported living center--A state-supported and structured residential facility operated by DADS to provide to individuals a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills.

(32) Unconfirmed--Term used to describe an allegation in which a preponderance of evidence exists to prove that abuse, neglect, or exploitation did not occur.

(33) Unfounded--Term used to describe an allegation that is spurious or patently without factual basis.

(34) Volunteer--A person who is not part of a visiting group and who has active, direct contact with an individual and who does not receive compensation from DADS, other than reimbursement for actual expenses.
Subchapter B. Abuse, Neglect, and Exploitation.

§3.100 Prohibition of Abuse, Neglect, and Exploitation (ANE).
(a) Abuse, neglect, and exploitation have the meanings and classifications assigned in Chapter 711 of Title 40 (concerning Investigations in DADS Mental Retardation and DSHS Mental Health Facilities and Related Programs).
(b) ANE of any individual is prohibited. If an employee is confirmed to have abused, neglected, or exploited an individual, DADS will take disciplinary action, up to and including dismissal, in accordance with DADS’ operational procedures. DADS reports a confirmed finding of ANE to CANRS and applicable professional licensing authorities.
(c) If an aggressive action by an individual, including non-consensual sexual activity between individuals, occurs as a result of possible neglect, the facility must report the action as neglect.

§3.102. Reporting Abuse, Neglect, and Exploitation (ANE) to DFPS
(a) A person who knows or suspect an individual has been abused, neglected, or exploited must be immediately report the alleged ANE to DFPS within one hour of learning of or suspecting the incident by calling 1-800-647-7418. ANE may occur before admission, during an absence, or while in residence at the facility.
(b) The facility must report incidents identified as ANE during the course of a facility investigation or peer review.
(c) If the person with knowledge or suspicion of ANE is not an employee, agent, or contractor, an employee must assist the person in making a report, if necessary.
(d) DADS may take disciplinary action, up to and including termination, against an employee who is found to have:
   (1) failed to report as required by this section within the allotted time period without sufficient justification; or
   (2) made a false statement of fact, refused to cooperate, or destroyed evidence during an investigation.

§3.104. Prohibition Against Retaliation.
(a) A facility, employee, or agent of the facility may not retaliate against a person who in good faith reports an allegation.
(b) A person who believes he or she is being subjected to retaliation as a result of reporting an allegation, or who believes an allegation has been ignored, may contact the director. The person may also contact:
   (1) The Office of the Attorney General at 512-463-2185 (Consumer Protection Division);
   (2) The Office of Inspector General at 1-800-436-6184; or
   (3) DFPS at 1-800-647-7418.
(c) DADS may take disciplinary action, up to and including termination, against an employee who is found to have engaged in retaliation.

§3.106. Responsibilities of the Director.
(a) Immediately upon notification of an allegation by the DFPS investigator, the director must take measures to ensure the safety and protection of an alleged victim, in accordance with DADS’ operational procedures.
(b) The director must arrange for immediate and on-going medical and psychological attention for an alleged victim and any other individuals involved in the incident, as necessary.
(c) The director must:
   (1) ensure that required reports are made to DFPS, DADS Regulatory Services,
and law enforcement;

(2) in accordance with the Civil Practice and Remedies Code, Chapter 81, report allegations of sexual exploitation committed by a mental health services provider to the prosecuting attorney in the county where the alleged sexual exploitation occurred and any state licensing board with responsibility for the mental health services provider’s licensing; and

(3) notify the following persons of the allegation immediately, but in no case later than 24 hours, after being notified an allegation:

(A) the alleged victim (unless contraindicated based on clinical evaluation); and

(B) the alleged victim's guardian or primary contact, or parent if the alleged victim is a child.

(d) The director must cooperate with the DFPS investigator by ensuring:

(1) the preservation and safeguarding of evidence of the alleged ANE, if any, including precautionary measures necessary to prevent physical evidence from loss, destruction, or tampering; and

(2) the availability of facility employees upon request by the investigator.

§3.108. Completion of the Investigation.

(a) The director may not change DFPS’s confirmed finding. However, the director may change a finding of unconfirmed, inconclusive, or unfounded to confirmed. If the director changes the finding to confirmed, the confirmed finding cannot be appealed to DFPS.

(b) A facility has the appeal and review rights specified in 40 TAC Chapter 711, Subchapter K. The final finding is the last finding uncontested by the facility.

(c) The director must ensure that the alleged victim, the alleged victim’s guardian, or the parent if the alleged victim is a child is notified of:

(1) the final finding;

(2) the method of appealing the final finding as described in Chapter 711, Subchapter M of Title 40, if the final finding was not made by the director; and

(3) the right to receive a copy of the investigative report upon request.

(d) The director must inform the primary contact and the perpetrator or alleged perpetrator of the final finding.

(e) A facility must establish a mechanism for evaluating a recommendation concerning problematic patterns or trends identified by the DFPS investigator or the facility.

(f) The director must ensure the victim, guardian, or primary contact, or parent if the victim is a child is promptly notified of:

(1) the disciplinary action taken against the employee or agent;

(2) the employee's right to request a grievance hearing to dispute the disciplinary action; and

(3) the opportunity to be informed if the employee files a grievance.

(g) If the state’s protection and advocacy organization informs the director that it represents the victim of confirmed Class I abuse, the director must notify the protection and advocacy organization if the dismissed employee requests a grievance hearing.

(h) If a confirmation of ANE is rendered by DFPS and the perpetrator is a licensed professional, the director must ensure notification of the appropriate licensing board of the confirmation.

(i) If the alleged perpetrator is a physician, registered nurse, licensed vocational nurse, or pharmacist, and the DFPS investigator determines that the allegation involves clinical practice rather than ANE, the facility is responsible for conducting peer review in accordance with department policies and notifying the appropriate professional licensing board.

(j) Upon request, the director must provide a copy of the investigative report to the alleged victim or guardian with the identities of other persons served and any information
determined confidential by law concealed. The director may charge a reasonable fee for providing a copy of the investigative report.

§3.110. Contractors.
   (a) The director is responsible for requiring that all of the facility's contractors comply with this subchapter.
   (b) The director will ensure that each contractor is provided a copy of DFPS’s rules in 40 TAC Chapter 711.
   (c) Each contract shall describe the procedural responsibilities of the facility and the contractor regarding at least the following:
       (1) the reporting of allegations of abuse, neglect, and exploitation (ANE);
       (2) the safety and protection of individuals involved in allegations;
       (3) the facilitation of proper investigations and peer reviews and the preservation of the integrity of investigations and peer reviews;
       (4) the notification of appropriate licensing authorities in response to reportable conduct;
       (5) DADS policies on disciplinary and protective actions; and
       (6) staff training in identifying, reporting, and preventing ANE.

[new content ends]
Chapter 7, DADS Administrative Responsibilities
Subchapter K, Abuse, Neglect, and Exploitation in TDMHMR Facilities
transferred from TDMHMR 9/1/04 — 28 TexReg 3354 — eff date 4/23/03

§7.501. Purpose.
The purpose of this subchapter is to prescribe procedures:
(1) for effective reporting of allegations of abuse, neglect, and exploitation;
(2) for ensuring the safety and protection of persons served involved in allegations;
(3) for facilitating Texas Department of Protective and Regulatory Services investigations of allegations;
(4) for facilitating peer review of allegations involving clinical practice;
(5) for notifying appropriate licensing authorities and other individuals regarding issues relating to an allegation;
(6) for contesting the Adult Protective Services (APS) review of a finding of an investigation;
(7) for ensuring proper disciplinary action is taken; and
(8) for training staff in identifying, reporting, and preventing abuse, neglect, and exploitation.

(a) This subchapter apply to all facilities of the Texas Department of Mental Health and Mental Retardation and their agents.
(b) All facilities are responsible for amending their contracts to ensure contractors' compliance as specified in §417.513 of this title (relating to Contractors).
(c) This subchapter does not apply to:
(1) psychiatric hospitals licensed by the Texas Department of Health (TDH) under Chapter 577 of the Texas Health and Safety Code; or
(2) state-funded community hospitals, which are inpatient mental health facilities licensed by the Texas Department of Health under the Texas Health and Safety Code, Chapter 242, or operated by a university health system and exempted from licensure, that provides TDMHMR-funded inpatient mental health services pursuant to a contract between TDMHMR and a local authority.

§7.503. Definitions.
The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:
(1) Adult Protective Services (APS) investigator—An employee of the Texas Department of Protective and Regulatory Services (TDPRS) with expertise and demonstrated competence in conducting investigations.
(2) Advanced practice nurse (APN)—A registered nurse approved by the Board of Nurse Examiners for the State of Texas to practice as an advanced practice nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with advanced nurse practitioner.
(3) Agent—Any individual not employed by the facility but working under the auspices of the facility, (e.g., a volunteer, a student).
(4) Allegation—A report by an individual suspecting or having knowledge that a person served has been or is in a state of abuse, neglect, or exploitation as defined in this subchapter.
(5) Child—A person served under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.
(6) Clinical practice—Relates to the demonstration of professional competence in nursing.
dental, pharmacy, or medical practice as described, respectively, in the Nursing Practice Act, Vocational Nurse Act, Dental Practice Act, Pharmacy Practice Act, or Medical Practice Act.

(7) Confirmed—Term used to describe an allegation which is determined to be supported by the preponderance of evidence.

(8) Contractor—Any organization, entity, or individual who contracts with a facility to provide mental health and mental retardation services. The term includes a local independent school district with which a facility has a memorandum of understanding (MOU) for educational services.

(9) Designee—A staff member immediately available who is temporarily or permanently appointed to assume designated responsibilities of the head of the facility.

(10) Facility—A state hospital, state school, state center, or other entity providing mental retardation or mental health services that is operated by the Texas Department of Mental Health and Mental Retardation.

(11) Guardian—An individual appointed and qualified as a guardian of the person under the Probate Code, Chapter 13.

(12) Head of the facility—The superintendent or executive director of a facility, or designee. (If the superintendent or executive director is the alleged perpetrator, then the designee assumes all responsibilities of the head of the facility described in this subchapter.)

(13) Incitement—To spur to action or instigate into activity; implies responsibility for initiating another's actions.

(14) Inconclusive—Term used to describe an allegation leading to no conclusion or definite result due to lack of witnesses or other relevant evidence.

(15) Medical intervention—Treatment by a licensed medical doctor, osteopath, podiatrist, dentist, physician's assistant, or advanced practice nurse (APN). For the purposes of this subchapter, the term does not include first aid, an examination, diagnostics (e.g., x-ray, blood test), or the prescribing of oral or topical medication.

(16) Non-serious physical injury—Any injury requiring minor first aid and determined not to be serious by a registered nurse, advanced practice nurse (APN), or physician.

(17) Office of Consumer Services and Rights Protection—Ombudsman—The office located at the Texas Department of Mental Health and Mental Retardation's Central Office.

(18) Peer review—A review of clinical and/or medical practice(s) by peer physicians; a review of clinical and/or dental practice(s) by peer dentists; a review of clinical and/or pharmacy practice(s) by peer pharmacists; or a review of clinical and/or nursing practice(s) by peer nurses.

(19) Perpetrator—A person who has committed an act of abuse, neglect, or exploitation.

(20) Perpetrator unknown—Term used to describe instances in which abuse, neglect, or exploitation is evident but positive identification of the responsible person(s) cannot be made, and in which self-injury has been eliminated as the cause.

(21) Person served—Any person registered or assigned in the Client Assignment and Registration (CARE) system who is receiving services from a facility or contractor.

(22) Preponderance of evidence—The greater weight of evidence, or evidence which is more credible and convincing to the mind.

(23) PMAB or Prevention and Management of Aggressive Behavior—TDMHMR's proprietary risk management program that uses the least intrusive, most effective options to reduce the risk of injury for persons served and for staff from acts or potential acts of aggression.

(24) Primary contact—In cases in which the alleged victim is an adult with mental retardation who is unable to authorize the disclosure of protected health information and who does not have a guardian, the individual designated as the alleged victim's correspondent who receives all other information about the alleged victim (e.g., spouse, parent).

(25) Reporter—The individual who reports an allegation of abuse, neglect, or exploitation.

(26) Retaliatory action—Any action intended to inflict emotional or physical harm or inconvenience on a person that is taken because the person has reported abuse, neglect, or
exploitation. This includes, but is not limited to, harassment, disciplinary measures, discrimination, reprimand, threat, and criticism.

(27) Review authority--An individual or panel of individuals who, at the discretion and request of the head of the facility, reviews selected cases of abuse, neglect, or exploitation, including those that are confirmed, unconfirmed, unfounded, or inconclusive. The review authority may include a member of the facility's public responsibility committee.

(28) Serious physical injury--Any injury requiring medical intervention or hospitalization or any injury determined to be serious by a physician or advanced practice nurse (APN).

(29) TDMHMR--The Texas Department of Mental Health and Mental Retardation.

(30) TDPRS--The Texas Department of Protective and Regulatory Services.

(31) Unconfirmed--Term used to describe an allegation in which a preponderance of evidence exists to prove that abuse, neglect, or exploitation did not occur.

(32) Unfounded--Term used to describe an allegation that is spurious or patently without factual basis.

§7.504. Prohibition and Definitions of Abuse, Neglect, and Exploitation.

(a) Abuse, neglect, and exploitation of any person served is prohibited.

(b) Consistent with Chapter 711 of Title 40 (concerning Investigations in TDMHMR Facilities and Related Programs), the terms "abuse," "neglect," and "exploitation" are defined as follows when the alleged perpetrator is an employee, agent, contractor, or is unknown.

(1) Abuse is:

(A) physical abuse, which is:

(i) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, which caused or may have caused physical injury or death to a person served;

(ii) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to a person served; or

(iii) the use of chemical or bodily restraints on a person served not in compliance with federal and state laws and regulations, including:

(I) Chapter 405, Subchapter F of this title (concerning Voluntary and Involuntary Behavioral Interventions in Mental Health Programs); and

(II) Chapter 405, Subchapter H of this title (concerning Behavior Management--Facilities Serving Persons with Mental Retardation);

(B) sexual abuse, which is any sexual activity involving an employee, agent, or contractor and a person served, including but not limited to:

(i) kissing a person served with sexual intent;

(ii) hugging a person served with sexual intent;

(iii) stroking a person served with sexual intent;

(iv) fondling a person served with sexual intent;

(v) engaging in with a person served:

(I) sexual conduct as defined in the Texas Penal Code, §43.01; or

(II) any activity that is obscene as defined in the Texas Penal Code, §43.21;

(vi) requesting, soliciting, or compelling a person served to engage in:

(I) sexual conduct as defined in the Texas Penal Code, §43.01; or

(II) any activity that is obscene as defined in the Texas Penal Code, §43.21;

(vii) in the presence of a person served:

(I) engaging in or displaying any activity that is obscene, as defined in the Texas Penal Code §43.21; or

(II) requesting, soliciting, or compelling another person to engage in any activity that is obscene, as defined in the Texas Penal Code §43.21;

(viii) committing sexual exploitation, as defined in the Texas Civil Practice and
Remedies Code, §81.001, against a person served. A copy of the Texas Civil Practice and Remedies Code, §81.001, is referenced as Exhibit A in §417.516 of this title (relating to Exhibits);

(ix) committing sexual assault as defined in the Texas Penal Code §22.011, against a person served;

(x) committing aggravated sexual assault as defined in the Texas Penal Code, §22.021, against a person served; and

(xi) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, videotaping, or depicting of a person served if the employee, agent, or contractor knew or should have known that the resulting photograph, film, videotape, or depiction of the person served is obscene as defined in the Texas Penal Code, §43.21, or is pornographic; and

(C) verbal/emotional abuse, which is any act or use of verbal or other communication, including gestures, to curse, vilify, or degrade a person served or threaten a person served with physical or emotional harm, that results in observable distress or harm to the person served or be of such a serious nature that a reasonable person would consider it harmful or causing distress.

(2) Neglect is a negligent act or omission by any individual responsible for providing services to a person served, which caused or may have caused physical or emotional injury or death to a person served or which placed a person served at risk of physical or emotional injury or death. Neglect includes, but is not limited to, the failure to:

(A) establish or carry out an appropriate individual program plan or treatment plan for a person served if such failure results in a specific incident or allegation involving a person served;

(B) provide adequate nutrition, clothing, or health care to a specific person served; or

(C) provide a safe environment for a specific person served, including the failure to maintain adequate numbers of appropriately trained staff if such failure results in a specific incident or allegation involving a person served.

(3) Exploitation is the illegal or improper act or process of using a person served or the resources of a person served for monetary or personal benefit, profit, or gain.

(e) Abuse, neglect, or exploitation does not include:

(1) the proper use of restraints and seclusion, including PMAB, and the approved application of behavior modification techniques as described in:

(A) Chapter 405, Subchapter F of this title, relating to Voluntary and Involuntary Behavioral Interventions in Mental Health Programs;

(B) Chapter 404, Subchapter E of this title, relating to Rights of Persons Receiving Mental Health Services; and

(C) Chapter 405, Subchapter H of this title, relating to Behavior Management—Facilities Serving Persons With Mental Retardation;

(2) other actions taken in accordance with TDMHMR rules;

(3) such actions as an employee/agent/contractor may reasonably believe to be immediately necessary to avoid imminent harm to self, persons served, or other individuals if such actions are limited only to those actions reasonably believed to be necessary under the existing circumstances. Such actions do not include acts of unnecessary force or the inappropriate use of restraints or seclusion, including PMAB; or

(4) general complaints (e.g., regarding rights violations; theft of property; the daily administrative operations of a facility). (Within 24 hours of receipt of such a complaint, the APS investigator refers the complaint to the head of the facility using the Adult Protective Services Referral Form, who ensures the complaint is investigated administratively by the head of the facility, the facility rights officer, or other appropriate parties.)
§7.505. Reporting Responsibilities of All TDMHMR Employees, Agents, and Contractors: Reports to Texas Department of Protective and Regulatory Services (TDPRS).

—(a) Reporting suspected abuse, neglect, or exploitation.

(1) Each employee/agent/contractor who suspects or has knowledge that a person served is being abused, neglected, or exploited shall make a verbal report to TDPRS immediately, if possible, but in no case more than one hour after suspicion or after learning of the incident, by calling 1-800-647-7418.

(2) Each employee/agent/contractor who suspects or has knowledge that a person served has been abused, neglected, or exploited, including prior to admission, during an absence, or while in residence at the facility, shall make a verbal report to TDPRS immediately, if possible, but in no case more than one hour after suspicion or after learning of the incident, by calling 1-800-647-7418.

(3) If the person making the allegation is not an employee/agent/contractor (e.g., a person served, a guest), staff shall assist the person in making the report, if necessary.

(b) Any pregnancy of a person served, provided there is medical verification that there is reasonable expectation that conception could have occurred while the person was a resident of the facility or contractor, or any diagnosis of a sexually transmitted disease in a person served which could have occurred while the person was a resident of the facility or contractor, shall be reported in accordance with this subchapter as possible abuse or neglect.

(c) If an aggressive action by a person served, including non-consensual sexual activity between persons served, occurs as a result of possible neglect, then the action is reported as neglect in accordance with this subchapter.

(d) Failure to make reports as required by this section within the allotted time period without sufficient justification is considered a violation of this section and makes the employee/agent subject to disciplinary action and possible criminal prosecution. An employee/agent found to have made a false statement of fact during an investigation is also subject to disciplinary action.

(e) In addition to reporting to TDPRS, employees shall take appropriate steps to secure evidence related to an allegation, if any, consistent with "Guidelines for Securing Evidence," referenced as Exhibit B in §417.516 of this title (relating to Exhibits

§7.507. Prohibition Against Retaliatory Action.

—(a) Retaliatory action. Any employee/agent or any individual affiliated with an employee/agent is prohibited from engaging in retaliatory action against a person served, a family member of a person served, the guardian of a person served, the primary contact of a person served, or an employee/agent who in good faith reports an allegation.

(1) Any person who believes he or she is being subjected to retaliatory action upon reporting an allegation, or who believes an allegation has been ignored, should immediately contact the head of the facility. The person may also contact:

(A) the Office of Consumer Services and Rights Protection—Ombudsman at the dedicated toll-free number for facilities at 1-800-252-8154; or

(B) the Office of the Attorney General at 512/463-2185 (Consumer Protection Division) which, under the Whistleblower Act, Texas Civil Statutes, Article 6252-16a, may prosecute a supervisor who suspends or terminates a public employee for reporting a violation of law to law enforcement authorities.

(2) Retaliatory action against a person served which might be considered abuse, neglect, or exploitation is reported to TDPRS in accordance with this subchapter.

(b) Disciplinary action. Any employee/agent found to have engaged in retaliatory action is subject to disciplinary action.
§7.508. Responsibilities of the Head of the Facility.

(a) All allegations are investigated in accordance with Chapter 711 of Title 40 (concerning Investigations in TDMHMR Facilities and Related Programs).

(b) Immediately upon notification of an allegation by the APS investigator, the head of the facility takes measures to ensure the safety of the alleged victim(s), including the following actions:

(1) As necessary, the head of the facility ensures immediate and on-going medical attention is provided to the alleged victim and any other person served involved in the incident (e.g., examination for and treatment of injuries, screening and treatment for sexually transmitted diseases). The examination and treatment of abuse/neglect-related injuries is documented on the client injury assessment, with a copy submitted to the APS investigator. All issues relating to clinical practice are referred to the medical/clinical director for consultation.

(2) The head of the facility ensures the protection of the alleged victim. Action taken to ensure the protection of the alleged victim must be appropriate within the context of the allegation and may include:

(A) reassigning the employee/agent to a non-direct care area in accordance with the Human Resources Operating Instruction 407-12;

(B) allowing the employee/agent to remain in his or her current position pending investigation;

(C) granting the employee emergency leave in accordance with the Human Resources Operating Instruction 407-12; or

(D) suspending the agent pending investigation.

(3) As necessary, the head of the facility ensures psychological attention is provided to the alleged victim and any other person served who may have witnessed or been affected by the incident. The psychological attention shall be provided in a timely manner while preserving the integrity of the investigation.

(4) If the alleged perpetrator is known but is not an employee/agent (e.g., family member, friend, guest), the head of the facility imposes a restriction on the alleged perpetrator's access to the alleged victim pending investigation. The restriction should be documented in the record of the alleged victim.

(5) Immediately, but in no case later than 24 hours after notification of an allegation, the head of the facility notifies the following individuals of the allegation:

(A) the alleged victim (if appropriate); and

(B) the alleged victim's guardian or primary contact (as defined), or parent if the alleged victim is a child.

(e) The head of the facility designates a contact staff person to coordinate with the APS investigator to ensure private interview space, private telephones, and employees/agents are available to the APS investigator. The head of the facility shall require employees/agents to cooperate with APS investigators so that the investigators are afforded immediate access to all records and evidence and provided keys as are necessary to conduct an investigation in a timely manner. The head of the facility shall assist in whatever way possible to make employees/agents who are relevant to the investigation available in an expeditious manner. Employees/agents who fail to cooperate with an investigation are subject to disciplinary action.

(d) Reports regarding alleged "sexual exploitation" committed by a "mental health services provider" (as defined in the Texas Civil Practice and Remedies Code, §81.001) are made by the head of the facility to the prosecuting attorney in the county in which the alleged sexual exploitation occurred and any state licensing board that has responsibility for the mental health services provider's licensing in accordance with the Texas Civil Practice and Remedies Code, §81.006. A copy of the Texas Civil Practice and Remedies Code, §81.001 and §81.006, is referenced as Exhibit A in §517.516 of this title (relating to Exhibits).
At facilities that operate an intermediate care facility for the mentally retarded (ICF/MR), the head of the facility must report those allegations that are considered reportable incidents to the Texas Department of Human Services (TDHS), ICF/MR/RC Department in accordance with the memorandum of understanding, referenced as Exhibit C in §417.516 of this title (relating to Exhibits), between TDMHMR, TDHS, and Texas Department of Protective and Regulatory Services.

§7.509. Peer Review.

(a) If the allegation involves the actions of a physician, dentist, pharmacist, registered nurse, or licensed vocational nurse, then a determination of whether the allegation involves the clinical practice, as defined in §417.503 of this title (relating to Definitions), of the physician, dentist, pharmacist, registered nurse, or licensed vocational nurse is made by the head of the facility, the APS investigator, and the facility medical/dental/nursing/pharmacy director, as appropriate to the discipline involved.

(1) If the allegation does not involve clinical practice the APS investigator pursues an investigation.

(2) If the allegation does involve clinical practice the APS investigator refers the allegation to the head of the facility, who immediately refers the allegation to the facility medical/dental/nursing/pharmacy director, as appropriate to the discipline involved, for review for possible peer review as follows:

(A) for allegations involving physicians, pharmacists, and dentists, Investigative Medical Peer Review Operating Instruction 417-19; and

(B) for allegations involving registered nurses and licensed vocational nurses, Investigative Nursing Peer Review Operating Instruction 408-1.

(3) If the allegation involves clinical practice and non-clinical issues, then the allegation is referred to peer review in accordance with paragraph (2) of this subsection and is investigated by the APS investigator.

(4) If a determination of whether the allegation involves clinical practice cannot be made, then:

(A) the allegation is referred to peer review in accordance with paragraph (2) of this subsection and is investigated by the APS investigator; or

(B) the regional APS program administrator and the head of the facility jointly agree to use a previously mutually agreed-upon physician/dental/nursing/pharmacy consultant, as appropriate to the discipline involved, to make the final determination within 24 hours. The facility is responsible for the costs of the consultant's services.

(b) If the allegation involves the facility medical/dental/nursing/pharmacy director, the head of the facility refers the allegation to the TDMHMR medical/dental/nursing/pharmacy director, as appropriate to the discipline involved, for review for possible peer review in accordance with subsection (a)(2)(A) or (B) of this section. If the allegation involves the TDMHMR pharmacy director, then the head of the facility refers the allegation to the TDMHMR medical director for review for possible peer review in accordance with subsection (a)(2)(A) of this section.

(c) All allegations involving physicians, pharmacists, nurses (RN or LVN), and dentists, regardless of type or clinical/non-clinical practice, are reported by the head of the facility to the TDMHMR medical/dental/nursing/pharmacy director, as appropriate to the discipline, within five working days of the allegation. The report may be brief, but will include:

(1) the date of the alleged incident;

(2) name of the alleged victim and alleged perpetrator;

(3) a brief description of the incident; and

(4) a brief description of the investigation planned.

(d) The TDMHMR medical/dental/nursing/pharmacy director, as appropriate to the discipline involved, ensures that reports of allegations of abuse and neglect are made, if required by law,
the licensing authority for the discipline under review, i.e., the Texas Board of Medical Examiners for physicians, the State Board of Dental Examiners for dentists, the Texas State Board of Pharmacy, the Board of Nurse Examiners for the State of Texas for registered nurses, or the Board of Vocational Nurse Examiners for licensed vocational nurses.

(e) Upon receipt of an allegation involving physician misconduct or malpractice, the TDMHMR medical director reports the allegation to the Texas Board of Medical Examiners in accordance with §533.006 of the Texas Health and Safety Code and the memorandum of understanding, referenced as Exhibit D in §417.516 of this title (relating to Exhibits), between TDMHMR, TDPRS, and the Texas Board of Medical Examiners.

(f) When an allegation is determined to involve the clinical practice of a physician, nurse (RN or LVN), pharmacist, or dentist, then the head of the facility ensures that the alleged victim, guardian, or primary contact, or parent (if the alleged victim is a child) are informed that the allegation has been referred for peer review.


(a) The APS investigator sends a copy of the investigative report to the head of the facility in accordance with Chapter 711, Subchapter G of Title 40 (concerning Release of Report and Findings). The investigative report includes:

(1) a statement of the allegation(s);
(2) a summary of the investigation;
(3) an analysis of the evidence, including:
   (A) factual information related to what occurred;
   (B) how the evidence was weighed; and
   (C) what testimony was considered credible;
(4) a finding that the allegation is confirmed, unconfirmed, inconclusive, or unfounded;
(5) recommendations resulting from the investigation;
(6) the name of the perpetrator or alleged perpetrator or the designation of "perpetrator unknown";
(7) a recommended classification for each allegation as described in §417.512(a) of this title (relating to Classifications and Disciplinary Actions);
(8) the exam and treatment of abuse/neglect-related injuries documented on the client injury assessment;
(9) photographs relevant to the investigation, including photographs showing the existence of injuries or the non-existence of injuries, when appropriate;
(10) all witness statements and supporting documents; and
(11) a signed and dated Client Abuse and Neglect Report (AN-1-A) form, referenced as Exhibit E in §417.516 of this title (relating to Exhibits), reflecting the information contained in paragraphs (4), (6), and (7) of this section.

(b) Upon receiving the investigative report from the APS investigator, the head of the facility may submit the report and concerns articulated by the APS investigator to a review authority for review.

(1) The review authority may interview witnesses in the course of its review.
(2) If the review authority is reviewing a case determined by the APS investigator to be unfounded, it may consult with the APS investigator if appropriate. If the review authority determines that there is good cause to reopen the investigation (e.g., new evidence or information that was not previously available during the investigation), the head of the facility may contact the local APS supervisor to request that the case be re-opened.
(3) The review authority submits a report of its review to the head of the facility.
(c) The head of the facility:

(1) reviews the APS investigator's report;
(2) reviews the review authority's report, if applicable; and
(d) The rights of employees who appear before the review authority or the head of the facility are outlined in "Procedures in Facility Abuse, Neglect, and Exploitation Investigations and Thurston Rebuttal Proceedings," referenced as Exhibit F in §417.516 of this title (relating to Exhibits).

(e) The head of the facility may not change a confirmed finding. However, if the head of the facility disagrees with the APS investigator's finding of unconfirmed, inconclusive, or unfounded, the head of the facility may elect to change the finding to confirmed. If the head of the facility elects to change the finding to confirmed, then the confirmed finding cannot be appealed to TDPRS.

(f) If the head of the facility believes that the methodology used in conducting the investigation was flawed (e.g., failure to collect or consider evidence, such as witnesses' statements, progress notes, test results), the head of the facility may request a review in accordance with Chapter 711, Subchapter K of Title 40 (concerning Requesting a Review of Finding if You Are the Administrator or Contractor CEO).

(g) If the head of the facility disagrees with:

(1) the APS investigator's finding in accordance with §711.1007 of Title 40 (relating to Requesting a Review of Finding if You Are the Administrator or Contractor CEO);

(2) the APS review as described in §711.1007 of Title 40 (relating to Requesting a Review of Finding if You Are the Administrator or Contractor CEO), the head of the facility may contest the review by apprising the TDMHMR director of state mental health facilities or state mental retardation facilities, as appropriate. If the TDMHMR director also disagrees with the APS review, the TDMHMR director may request a decision by the TDMHMR commissioner and the TDPRS executive director. The decision of the TDMHMR commissioner and the TDPRS executive director may not be contested.

(h) The final finding is the last uncontested finding, which may be:

(1) the APS investigator's finding in accordance with subsection (a)(4) of this section;

(2) the head of the facility's confirmed finding in accordance with subsection (e) of this section;

(3) the APS finding in accordance with subsection (g)(1) of this section; or

(4) the TDMHMR commissioner and the TDPRS executive director's decision in accordance with subsection (g)(2) of this section.

(i) Within 30 calendar days of receipt of the investigative report or the final finding, the head of the facility is responsible for completing the Client Abuse and Neglect Report (AN-1-A) form, referenced as Exhibit E in §417.516 of this title (relating to Exhibits), and ensuring the information is entered into the Client Abuse and Neglect Reporting System (CANRS).

(j) The APS investigator notifies the reporter in accordance with §711.609 of Title 40 (relating to Requesting an Appeal if You Are the Reporter, Alleged Victim, Legal Guardian, or With Advocacy, Incorporated), if the final finding was not made by the head of the facility as provided by subsection (e) of this section; and

(k) The head of the facility ensures that the (alleged) victim or guardian or parent if the (alleged) victim is a child is promptly notified of:

(1) the final finding and if any previous findings were contested;

(2) the method of appealing the final finding as described in Chapter 711, Subchapter M of Title 40 (concerning Requesting an Appeal if You Are the Reporter, Alleged Victim, Legal Guardian, or With Advocacy, Incorporated), if the final finding was not made by the head of the facility as provided by subsection (e) of this section; and

(3) the right to receive a copy of the investigative report in accordance with §417.511(b) of this title (relating to Confidentiality of Investigative Process and Report) upon request.

(l) The head of the facility ensures that the primary contact is promptly notified of the final finding.

(m) The head of the facility informs the perpetrator or alleged perpetrator of the final finding.
If the (alleged) perpetrator and (alleged) victim will again be in close proximity following an investigation, the head of the facility is responsible for ensuring appropriate reconciliation efforts are considered, offered, and provided in accordance with "Therapeutic Reconciliation," referenced as Exhibit G in §417.516 of this title (relating to Exhibits).

The head of the facility shall establish a mechanism for evaluating any recommendations concerning problematic patterns or trends identified during the investigation by the APS investigator and the review authority, if applicable.

(a) The reports, records, and working papers used by or developed in the investigative process, and the resulting investigative report, are confidential and may be disclosed only as allowed by law or Chapter 711 of Title 40 (concerning Investigations in TDMHMR Facilities and Related Programs).
(b) Upon request, the head of the facility will provide a copy of the investigative report to the (alleged) victim or guardian with the identities of other persons served and any information determined confidential by law concealed. The head of the facility may charge a reasonable fee for providing a copy of the investigative report.
(c) Advocacy, Inc. is entitled to access the records of the (alleged) victim in accordance with 42 USC §10805(a)(4) (Protection and Advocacy for Mentally Ill Individuals) or 42 USC §15043(a)(2)(I) (Protection and Advocacy of Individual Rights).

§7.512. Classifications and Disciplinary Actions.
(a) The APS investigator recommends a classification for each allegation as follows:
(1) Class I Abuse, if the allegation involves:
(A) physical abuse which caused or may have caused serious physical injury; or
(B) sexual abuse.
(2) Class II Abuse, if the allegation involves:
(A) physical abuse which caused or may have caused non-serious physical injury; or
(B) exploitation.
(3) Class III Abuse, if the allegation involves verbal/emotional abuse.
(4) Neglect, if the allegation involves neglect.
(b) Under no circumstances may the head of the facility change a recommended classification to a lower classification (e.g., Class I to Class II). However, the head of the facility may change a recommended classification to a higher classification (e.g., Class II to Class I) in accordance with the evidence and subsection (a) of this section.
(c) The head of the facility is responsible for taking prompt and proper disciplinary action when an allegation involving an employee/agent is confirmed.
(1) Disciplinary action against an employee is based on criteria including, but not limited to:
(A) the seriousness of the abuse, neglect, and/or exploitation;
(B) the circumstances surrounding the incident;
(C) the employee's work record; and
(D) repeat violations and the length of time between violations.
(2) When an allegation has been confirmed the head of the facility takes the following disciplinary action.
(A) Class I Abuse. The employee/agent is dismissed.
(B) Class II Abuse.
(i) The employee is placed on suspension for up to 10 days, demoted, or dismissed. If the employee is exempt under the provisions of the Fair Labor Standards Act (FLSA), the suspension shall be in compliance with relevant provisions of the FLSA and current TDMHMR personnel policies.
(ii) The agent is dismissed.
(C) Class III Abuse or Neglect.
(i) The employee receives a written reprimand which becomes a part of the employee's personnel file, or the employee is placed on suspension for up to 10 days, demoted, or dismissed. If the employee is exempt under the provisions of the FLSA the suspension shall be in compliance with relevant provisions of the FLSA and current TDMHMR personnel policies.

(ii) The agent is dismissed.

(d) When disciplinary action is taken against an employee based on confirmed abuse or neglect, the head of a facility notifies the employee in writing of the disciplinary action taken and any right to a grievance hearing the employee may have under TDMHMR's internal policies and procedures relating to employee grievances. If the employee files a grievance in response to disciplinary action resulting from confirmed abuse or neglect, the head of the facility, upon the employee's written request, provides the employee with a copy of or access to the investigative report. Before receiving or inspecting the report, the employee is required to complete a document acknowledging that the report's content must be kept confidential. Additional documentary evidence, if any, may be accessed by the employee in accordance with procedures outlined in the Human Resources Operating Instruction 407-12, §18 (relating to Employee Grievances).

(e) When disciplinary action is taken against an agent as a result of confirmed abuse or neglect, the head of a facility notifies the agent in writing of the disciplinary action taken.

(f) The head of the facility ensures the victim, guardian, or primary contact, or parent if the victim is a child is promptly notified of:

(1) the disciplinary action taken against the employee/agent;

(2) the employee's right to request a grievance hearing to dispute the disciplinary action; and

(3) an offer to inform the victim, guardian, primary contact, or parent if the employee files a grievance if such information is requested.

(g) If Advocacy, Inc. informs the head of the facility that it represents the victim of confirmed Class I abuse, the head of the facility will notify Advocacy, Inc. if the dismissed employee requests a grievance hearing.

(h) If requested by the head of the facility, the APS investigator who conducted the investigation shall provide consultation and testimony at the grievance hearing.

(i) The head of the facility provides the APS director with a copy of hearings officers' decisions of employee grievances that involve TDPRS investigations.

The head of the facility is responsible for requiring that all of the facility's contractors comply with this subchapter with the exception of §417.512 of this title (relating to Classifications and Disciplinary Actions) and §417.514 of this title (relating to TDMHMR Administrative Responsibilities). The head of the facility shall ensure that each contractor is provided a copy of TDPRS's rules governing investigations in TDMHMR facilities and related programs, 40 TAC Chapter 711. Each contract shall describe the procedural responsibilities of the facility and the contractor regarding at least the following:

(1) the reporting of allegations of abuse, neglect, and exploitation;

(2) the safety and protection of persons served involved in allegations;

(3) the facilitation of proper investigations/peer reviews and the preservation of the integrity of investigations/peer reviews;

(4) the notification of appropriate licensing authorities and other individuals regarding issues relating to allegations;

(5) taking proper disciplinary action or other appropriate action; and
(6) staff training in identifying, reporting, and preventing abuse, neglect, and exploitation.
§7.514. TDMHMR Administrative Responsibilities.
TDMHMR will implement systems to ensure that:
— (1) former employees with confirmed Class I Abuse and former employees who were dismissed because of confirmed abuse or neglect and whose dismissal is upheld at a grievance hearing or who fail to request a grievance hearing are not eligible for reemployment at any facility; and
— (2) former employees with confirmed abuse, neglect, or exploitation regardless of classification are not eligible for reemployment at any TDMHMR-operated ICF/MR facility.

§7.515. Staff Training in Identifying, Reporting, and Preventing Abuse, Neglect, and Exploitation.
(a) This subchapter shall be thoroughly and periodically explained to all employees/agents of each facility as follows:
(1) All new employees/agents who will provide direct services to persons served and all new employees/agents who will routinely perform job duties in proximity to persons served shall receive training on the contents of this subchapter prior to performing their duties and annually thereafter. The training will include:
(A) an explanation and examples of the acts and signs of possible abuse, neglect, and exploitation;
(B) the effects of abuse, neglect, and exploitation;
(C) an explanation that abuse, neglect, and exploitation of persons served is prohibited;
(D) the disciplinary consequences for:
(i) committing abuse, neglect, and exploitation; and
(ii) failure to cooperate with an investigation;
(E) the procedures for reporting allegations of abuse, neglect, and exploitation;
(F) a definition of retaliatory action, an explanation that retaliatory action is prohibited, and an explanation of the consequences of retaliatory action;
(G) practices and attitudes that support the prevention of abuse, neglect, and exploitation; and
(H) PMAB.
(2) All new employees/agents who will not provide direct services to persons served and who will not routinely perform any job duty in proximity to persons served shall receive training on the contents of this subchapter within two months of employment or placement and every two years thereafter. The training will include:
(A) an explanation and examples of the acts and signs of possible abuse, neglect, and exploitation;
(B) the effects of abuse, neglect, and exploitation;
(C) an explanation that abuse, neglect, and exploitation of persons served is prohibited;
(D) the disciplinary consequences for:
(i) committing abuse, neglect, and exploitation; and
(ii) failure to cooperate with an investigation;
(E) the procedures for reporting allegations of abuse, neglect, and exploitation; and
(F) a definition of retaliatory action, an explanation that retaliatory action is
(3) Physicians shall receive additional training on how to identify signs and symptoms of abuse, neglect, and exploitation.

(4) All new employees who will provide direct services to persons served shall receive training on the procedures for securing evidence in accordance with "Guidelines for Securing Evidence," referenced as Exhibit B in §417.516 of this title (relating to Exhibits) prior to performing their duties and annually thereafter.

(5) Within 90 days after the effective date of this subchapter, the head of the facility shall inform all current employees/agents/contractors of changes to policies and procedures as a result of this subchapter.

(b) All supervisory personnel have a continuing responsibility to keep employees/agents informed of current rules and policies governing abuse, neglect, and exploitation and to ensure that employees/agents receive training in accordance with this section.

(c) Instructional materials, audiovisual, and/or other training aids concerning this subchapter are developed and available through the TDMHMR System Human Resource Development, Central Office.

(d) Records of all training content and activities related to course titles shall be kept by each facility. Records shall also be kept on each employee/agent receiving training in compliance with this section, which include:

(1) the employee/agent's name and signature;
(2) the course title;
(3) the result of any assessment;
(4) the date of the training; and
(5) the name of the person facilitating, monitoring, or conducting the training.

§7.516. Exhibits.
The following exhibits referenced in this subchapter are available from the Texas Department of Mental Health and Mental Retardation, Office of Policy Development, P.O. Box 12668, Austin, TX 78711-2668.

(1) Exhibit A--Texas Civil Practice and Remedies Code, §81.001 and §81.006;
(2) Exhibit B--"Guidelines for Securing Evidence";
(3) Exhibit C--Memorandum of Understanding between TDMHMR, TDHS, and TDPRS concerning Reportable Incidents in State Schools, State Centers, State Operated Community-based MHMR Services, and Community MHMR Centers with Intermediate Care Facilities for the Mentally Retarded (ICF/MR);
(4) Exhibit D--Memorandum of Understanding between TDPRS, Texas Board of Medical Examiners, and TDMHMR concerning Mandatory Reporting of Physician Misconduct or Malpractice;
(5) Exhibit E--Client Abuse and Neglect Report (AN-1-A) form;
(6) Exhibit F--"Procedures in Facility Abuse, Neglect, and Exploitation Investigations and Thurston Rebuttal Proceedings"; and
(7) Exhibit G--"Therapeutic Reconciliation."

§7.517. References.
Reference is made to the following statutes, rules, and TDMHMR operating instructions:

(1) Texas Health and Safety Code, Chapters 242, 481, and 577;

(a) This subchapter will be distributed to:
   (1) members of the Texas Mental Health and Mental Retardation Board;
   (2) members of the Board of the Texas Department of Protective and Regulatory Services;
   (3) Central Office executive, management, and program staff;
   (4) the head of each facility;
   (5) advocacy organizations;
   (6) the Texas Board of Medical Examiners;
   (7) the State Board of Dental Examiners;
   (8) the Board of Nurse Examiners for the State of Texas;
   (9) the Board of Vocational Nurse Examiners; and
   (10) the Texas State Board of Pharmacy.

(b) The head of each facility is responsible for duplicating and disseminating copies of this subchapter to:
   (1) appropriate staff;
   (2) contractors and agents; and
   (3) any person served, employee, or other individual desiring a copy.

(c) The head of each facility is responsible for prominently displaying copies of this subchapter at nursing stations and on bulletin boards within each facility.

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