



An Act to Protect Persons with Intellectual or Developmental Disabilities from Abuse

Chapter 19 of the Acts of 2020

Disclaimer

- This presentation is strictly for informational purposes only.
- DPPC is in the process of gathering input from all registry stakeholders.
- Registry related policies, procedures and regulations are still under development and the final versions may differ from those described in this presentation.

History of Legislation

- Spearheaded by the Arc of Massachusetts
- Series of working groups over several years
- Referred to as Nicky's Law and/or Dana's Law – cases where abusive caregivers continued working in human service field
- Close gap between substantiated abuse and criminal conviction

Statutory Provisions

- The law adds a new section, section 15, to DPPC's enabling statute—M.G.L. c. 19C
- Section 15 provides that the DPPC will maintain a registry of care providers against whom the DPPC has made a substantiated finding of registrable abuse

Statutory Definitions - Abuse

Act or Omission of a **caretaker** that results in serious physical or serious emotional injury

Abuse *Per Se*

Act or Omission of a **caretaker** that causes or results in – 4 categories:

- a. Deliberate removal of adaptive aids
- b. Pattern of touching not required or appropriate
- c. Intentional/wanton/reckless application of physical force that results in pain or serious emotional injury as determined by totality of circumstances
- d. Sexual Abuse

Registrable Abuse

- Act or Omission of a **care provider** that results in serious physical or emotional injury or constitutes abuse *per se* of a person with **I/DD**; provided, however, that “registrable abuse” shall not include instances in which the commission, upon weighing the conduct of the **care provider** and its outcome, determines that the incident was isolated and unlikely to reoccur and that the **care provider** is fit to provide services or supports to persons with I/DD

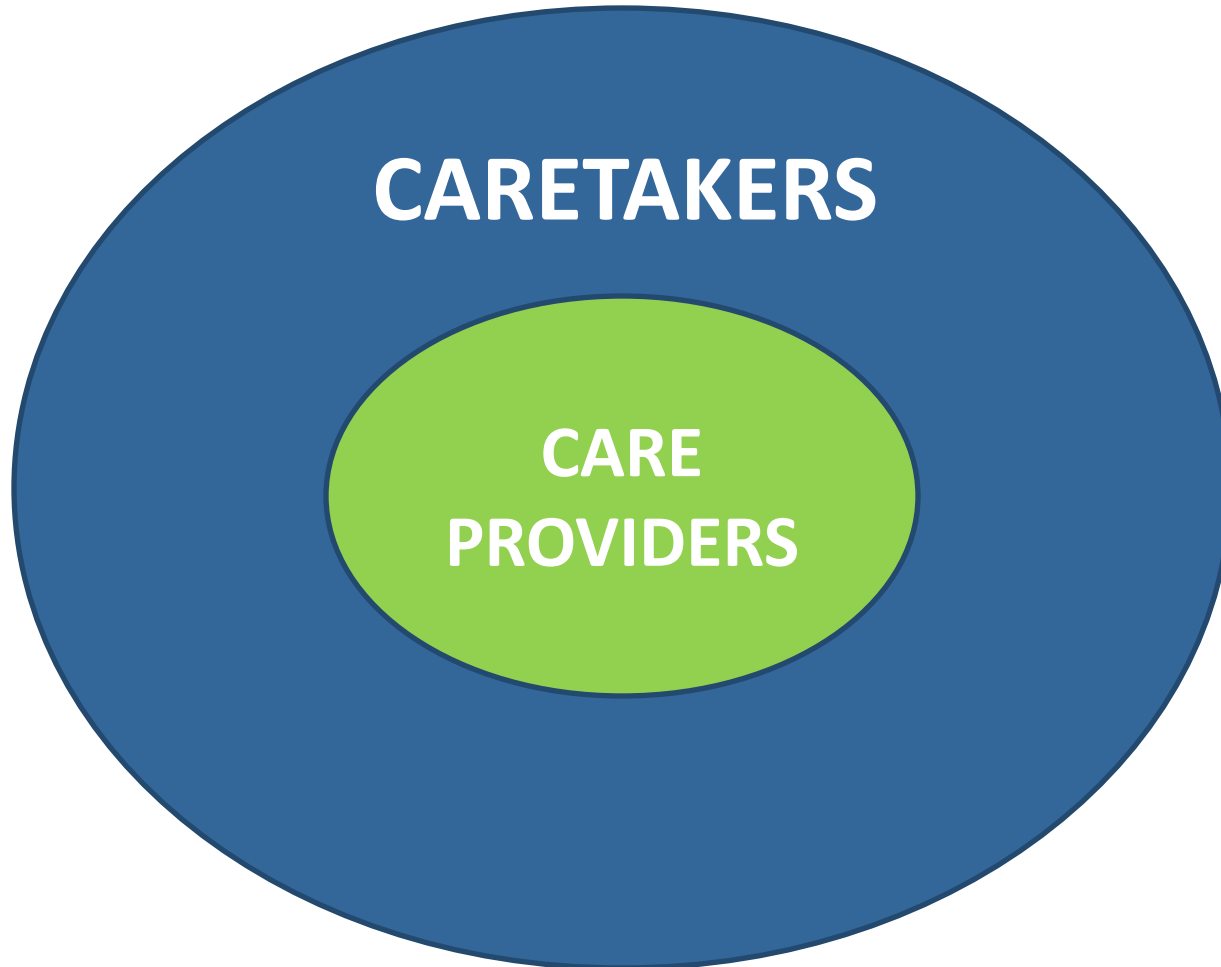
Abuse and Registrable Abuse



Statutory Definitions – The Who

- **Caretaker:** any agency or individual responsible for the health and welfare of a person with a disability by providing for or directly providing assistance in meeting a daily living need. *Excludes minors (under 18) and adults adjudicated incompetent by court.*
- **Care Provider:** a caretaker who is employed by, or contracts with, the department or an employer to provide services or supports to a person with an intellectual or developmental disability between the age of 18 and 59.

Caretakers and Care Providers



The Who . . .

- **Employer:** an entity that provides services or treatment to persons with intellectual or developmental disabilities between the ages of 18 and 59 pursuant to:
 - Contract or agreement with DDS; or
 - Funding administered by DDS; or
 - License issued by DDS pursuant to Chapter 19B
 - **Section 15:** Residential and day programs for individuals with intellectual disabilities
 - **Section 15A:** Residential and day programs for individuals with developmental disabilities

Who is an Employer?

➤ The relevant inquiry:

Is the program funded or licensed by DDS, or contracting with DDS?

Am I a Care Provider?

- **Care Provider:** a caretaker who is employed by, or contracts with, the department or an employer to provide services or supports to a person with an intellectual or developmental disability between the ages of 18 and 59.
- The relevant inquiries are two fold:
 - Do I work for **DDS** or an **EMPLOYER**?
 - Am I providing services or supports to a person with an intellectual or developmental disability?

Registrable Abuse

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Two-Part Investigations

➤ Did Abuse Occur?

- Did a *caretaker* commit abuse or abuse per se?

➤ Is the Abuse Registrable?

- If the victim is a person with I/DD, investigator determines:
 - Is the caretaker employed by DDS or an Employer?
 - Is the caretaker also a care provider?
 - Gather personnel/training file.
 - Ensure registry compliance.

How Does the Abuser Registry Process Work?

- Applicable to any allegation substantiated after **July 31, 2021**
 - Note: Operative date is when finding is made, not when allegation is reported
 - **REGISTRY IS NOT RETROACTIVE**
- Individual substantiated for registrable abuse will be notified of findings and entitled to petition for review

Petitions for Review

- Prior to the issuance of a report containing a finding that abuse has occurred, the DPPC shall provide **written notice** to the person or persons alleged to have committed such abuse and afford them the opportunity to **respond in writing** prior to the issuance of said report; provided, that, as determined by the DPPC, such notice of abuse will not place the alleged victim at risk of further abuse

Petitions for Review

- All substantiated caretakers (ALABs) can petition on the following grounds:
 - a. Investigation not conducted in accordance with 118 CMR 5.02 which likely resulted in substantial prejudice;
 - b. Preponderance of the evidence does not support conclusions of the Report; or
 - c. Preponderance of the evidence supports conclusions not reached by the Report

What if I am a Substantiated Care Provider?

- In addition, a care provider (RALAB) can offer evidence that the abuse is not registrable because it was:
 - Isolated; and
 - Unlikely to reoccur; and
 - The care provider is fit to provide services and supports to persons with I/DD.

- How does the DPPC determine if the care provider should not be found to have committed registrable abuse?

Some Factors Considered

- The nature and extent of the serious physical injury, serious emotional injury, or abuse *per se* sustained by the person with I/DD.
- Relevant details about the care provider, including:
 - Training relevant to the incident at issue;
 - Employment history with persons with I/DD;
 - Prior instances of similar conduct;
 - Statement from the Employer about care provider's fitness;
 - Whether care provider's conduct could be remedied through education, training, corrective action—and the care provider's willingness to engage in such.

Statutory Process for RALAB

- If RALAB does not file a petition for review:
 - Name goes on the registry

That was so easy!

What was all this fuss about?

What Next?

- If RALAB files petition for review to DPPC:
 - DPPC issues a Decision
 - If Decision reverses conclusion of report to unsubstantiated....end of the road.

- If abuse is affirmed in Decision:
 - RALAB has right to appeal to the **Division of Administrative Law Appeals (DALA)** within 10 business days

What Next?

- If RALAB does not appeal to DALA:
 - Name goes on Registry
- If RALAB does appeal to DALA:
 - DALA hearing process begins. RALAB does not go on the Registry during the pendency of DALA hearing process

What is DALA?

- Independent agency within the Executive Office of Administration and Finance that conducts due process adjudicatory hearings for other administrative agencies, such as:
 - Contributory Retirement Appeals Board
 - Board of Registration in Medicine
 - Department of Public Health
 - Fair Labor Standards

- Where is DALA?
 - Malden, Massachusetts—on Summer Street
 - Satellite locations in Springfield and Worcester

What Happens at DALA?

- Typically multiple step process:
 - Prehearing: the parties frame the issues, discuss procedural matters, enter stipulations, etc.
 - Limited discovery
 - Prehearing motions and motion hearings
 - Formal hearing

The process may change for future administrative hearings due to social distancing.

What Happens at DALA?

- DALA issues a decision which affirms or reverses finding of registrable abuse
 - If DALA affirms, then RALAB's name goes on registry...(unless RALAB appeals to Superior Court and is granted preliminary injunction)

- ** Registry proceedings are confidential and not public records

What Happens After DALA?

DPPC and/or RALAB can challenge DALA in Superior Court pursuant to M.G.L. c. 30A, section 14

What Happens at Superior Court?

- Appeals in Superior Court are based upon record of DALA proceeding
- Parties file Motion for Judgment on the Pleadings followed by Motion Hearings
- Court enters decision on Motions
 - Typically, no new testimony or evidence offered in Superior Court

What Happens After Superior Court?

Seriously, we're not done yet?

- If they choose, RALAB or DPPC can file further appeals of Superior Court decision to:
 - Appeals Court
 - Supreme Judicial Court

- Also, any court can remand cases back to DALA for further fact finding or reconsideration, and then DALA would issue a remand decision, and the process would repeat

Who is Notified, and Of What?

- DPPC is required to notify:
 - Last known employer
 - Victim and his/her guardian
 - DDS

- Of any of the following:
 - Substantiated finding of registrable abuse
 - Appeal of such findings
 - Decision on any such appeal
 - Judicial appeals and court decisions
 - Request of RALAB to remove name from registry
 - Any decisions or appeals on removal requests

Here are the Basics. . .

- Prior to hiring a prospective employee, an employer must check the Registry to ensure individual is not listed
- Employer cannot hire or retain anyone whose name appears on the Registry
- Employers need written consent of employee/prospective employee to search the Registry
- If employee refuses to provide consent, employer cannot hire or retain employee

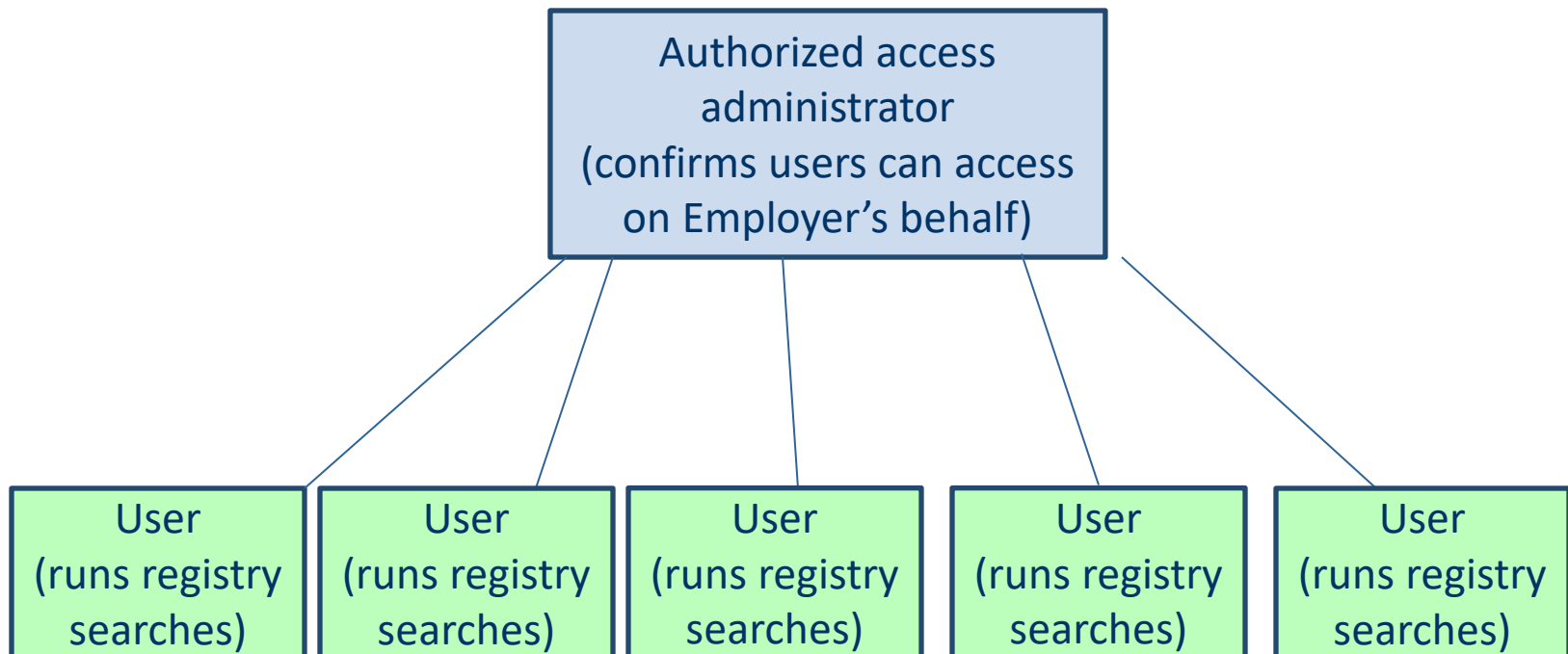
How Does an Employer Access the Registry?

- Secure online portal through the DPPC's website
- Administrative/HR staff for DDS and Employers will be given unique login IDs
- DPPC can track access and searches
- DPPC can audit user/Employer activity

What Else Should an Employer Know?

- Anticipate accessible by July 1, 2021—providing Employers a month to register for accounts.
- Employers:
 - One authorized access administrator
 - DPPC will begin contacting identified personnel (based on Virtual Gateway list of administrators) to sign up
 - Up to 5 authorized users
 - User application process through portal

Administrator and Users



What Info will DPPC Need?

- Pre-Employment Screen: Employer/DDS gathers prospective care provider's legal name, date of birth, and last four of SSN.
- Employer/DDS enters information in search function. One of three results:
 - Match: Prospective employee cannot be hired;
 - No Match: No preclusion from hire by Registry; or
 - Upload Additional Documents: DPPC needs to research further, so Employer/DDS will be asked to upload prospective care provider's identifying documentation, such as driver's license, passport, etc.

Let's Work Together

- DPPC and DDS will work together to credential Employer (authorized access administrator).
- DPPC and Employer will work together to credential end users.
 - Ongoing relationship to ensure integrity of information
 - Audit function to determine inactive accounts
 - Dialogue between DPPC staff and end users when questions arise

Pre-Employment Screening

- The Employer is required to screen any prospective care provider. This includes anyone who may function as a care provider at any point.
 - Give careful consideration to staff who float between programs which may or may not be licensed by, funded by, or contract with DDS.
 - Same consideration for external relief staff.

Can I Check Current Employees on the Registry?

➤ Yes, but...

- Written consent is required each time the registry is searched.
- Employers may want to consider standardized policies regarding recurrent screening.

Separation from Employment

- A current care provider cannot be separated from employment as a result of section 15 of Chapter 19C until AFTER the care provider's name is entered on the Registry. **HOWEVER. . .**
 - Does not preclude Employer from taking independent employment action pursuant to applicable statute, regulations, policies and procedures.
 - Employer needs to take appropriate steps to ensure the safety of persons served.
 - Note: final DALA decision may take awhile

Remember, Remember, Remember!!!

- Employment restriction is only applicable to **care providers** who are substantiated for registrable abuse.

Pre-Screening v. Care Provider Status

- Staff member at DDS licensed residential program grows frustrated with a 62 year old resident and strikes him repeatedly, resulting in significant injury.
 - Staff was screened as a potential care provider.
 - However, staff is not a caretaker in this instance because the victim is not within jurisdiction of DPPC (over age of 59). Therefore, staff cannot be found to have committed abuse or registrable abuse under the DPPC's regulations, and staff will not be eligible for registry placement.

Pre-Screening v. Care Provider Status

- Staff member works 3 days a week at DMH licensed program and 2 days a week at DDS licensed program for adults with I/DD. While at DMH program, staff member engages in sexual relationship with 22 year old DMH client.
 - Staff was vetted through the registry before hire because she would sometimes be working in the role of a care provider.
 - Allegation meets DPPC's jurisdiction. Staff is a caretaker.
 - Victim is not a person with I/DD. Therefore, while staff member is caretaker, she is not a care provider.
 - DPPC can find abuse, but DPPC cannot find registrable abuse and staff would not be eligible for registry placement.

Penalties for Not Following the Rules

- If an employer fails to comply with statute by not checking the registry or hiring a person listed on the registry, it may result in:
 - Fine of not more than \$5,000
 - Recommendation for revocation or downgrade of a license
 - Recommendation for forfeiture of state contract
 - Or a combination of any of the above

Employer Sanction Process?

- DPPC anticipates conducting employer compliance investigations, when warranted, to determine non-compliance and make recommendations for sanctions.
- Also, registry portal has audit functions to monitor for potential non-compliance.

Can a Name be Removed from Registry?

- Yes. In two ways:
 - Successful appeal in court
 - After five years, a registered abuser can petition to DPPC to be removed
 - DPPC reviews to determine if registered abuser established, by preponderance of evidence, that it is no longer in the interests of persons with I/DD and the public that the registered abuser be excluded from working as care provider

Removal Process

- Registered abuser has burden of proof to justify removal
- DPPC issues decisions on petition for removal
 - If denied, registered abuser can appeal to DALA
 - Then the DALA, judicial, and notification processes previously described all come back into play
- Registered abusers can repeat removal requests every five years

What is the Standard for Removal?

- While the first removal petition is at least six years down the line, the process will be detailed in DPPC regulations.
- Essentially, same factors considered for registerable abuse will be weighed in determining removal from the Registry.



QUESTIONS?

COMMENTS?

SUGGESTIONS?