

Guidance to Providers on DBHDS's Legal Authority to require names of certain employees

The Department is asking that the names of employees found to have *abused or neglected* an individual be included in the CHRIS data base. The Department is also asking for the names of employees involved in any reported death or serious injury. The specific personnel action taken is not a required field at this time, so a provider may choose not to complete that information when reporting in CHRIS. In response to concerns raised by some providers about supplying employee names to the Department, we sought advice on this issue from our legal counsel. The DBHDS's legal basis for collecting information about deaths and serious injury and abuse and neglect is as follows. First, under 12 VAC 35-115-250(A)(8), (9), and (11), providers and their employees are mandated to cooperate with the human rights advocate, provide unrestricted access to individuals and individual services records whenever the advocate deems access necessary, and comply with requests for information from the advocate regarding compliance with the human rights regulations. These regulations place no limitations on the human rights system's access to provider information.

Second, Virginia Code § 37.2-400(D) gives the State Board of Behavioral Health and Developmental Services broad authority to adopt regulations requiring providers to provide information related to abuse and neglect and deaths and serious injuries. The only limitation contained in the statute pertains to information that is deemed privileged pursuant to Virginia Code § 8.01-581.17. The statute requires the Board to “adopt regulations requiring public and private facilities and programs licensed or funded by the Department to provide non privileged information and statistical data to the Department related to (i) the results of investigations of abuse or neglect, (ii) deaths and serious injuries, (iii) instances of seclusion and restraint, including the duration, type, and rationale for use per individual receiving services, and (iv) findings by state or local human rights committees or the Office of Human Rights in the Department of human rights violations, abuse, or neglect. The Board's regulations shall address the procedures for collecting, compiling, encrypting, and releasing the data. This information and statistical data shall be made available to the public in a format from which all information identifying a provider or an individual receiving services has been removed. The Board's regulations shall specifically exclude all proceedings, minutes, records, and reports of any committee or nonprofit entity providing a centralized credentialing service that are identified as privileged pursuant to § 8.01-581.17.”

To effect this, the Board adopted the regulations found at 12 VAC 35-115-230. These provide, in pertinent part, that providers shall collect, maintain, and report certain information concerning abuse, neglect, and exploitation. “The director of a service licensed or funded by the department shall report each allegation of abuse or neglect to the assigned human rights advocate within 24 hours from receipt of the allegation.

3. The investigating authority shall provide a written report of the results of the investigation of abuse or neglect to the director and human rights advocate within 10 days working days from the date the investigation began unless an exemption has been granted by the department. This report shall include:

- a. Whether abuse, neglect or exploitation occurred;
- b. The type of abuse; and
- c. Whether the act resulted in physical or psychological injury."

12 VAC 35-115-230(A). The regulations also provide, in pertinent part, that "The director of a service licensed or funded by the department shall report deaths and serious injuries in writing to the department within 24 hours of discovery and by telephone to the authorized representative within 24 hours.

3. All reports of death and serious injuries shall include:

- a. Date and place of the death or serious injury;b. Nature of the injuries and treatment required; and
- c. Circumstances of the death or serious injury."

12 VAC 35-115-230(B). The regulations make clear that reports provided under these sections "shall be submitted to the [DBHDS] on forms or in an automated format or both developed by the [DBHDS]." 12 VAC 35-115-230(E). Once this information is compiled, DBHDS must make it available to certain entities upon request, including the public, but the regulations require DBHDS to remove all provider-identifying and patient-identifying information before doing so. 12 VAC 35-115-230(F), (G).

In addition to these regulations, which are part of the human rights regulations, there are also regulations governing licensure that require providers to supply certain information to the DBHDS. *See* 12 VAC 35-105-160. This includes supplying information related to abuse and neglect, death and serious injury, as well as "other reports and information that the DBHDS requires to establish compliance with [the licensing regulations and applicable statutes]." *Id.* Therefore, under the licensing regulations, providers are required to give the DBHDS any information it asks for. If a provider refuses to respond to a DBHDS request for information, negative action can be taken against its license. Records that are confidential under federal or state law must be maintained as confidential by the DBHDS and may not be further disclosed except as required or permitted by law.

The goal of the reporting requirements in both the human rights and licensing regulations is to enable the DBHDS to monitor compliance with relevant laws and ensure patient safety. DBHDS is acting as a health oversight agency, which is an agency (or employee of a public agency) that is authorized by law to oversee the health care system, whether public or private, in which health information is necessary to determine compliance or eligibility, or to enforce rights laws for which health information is relevant.

Reading all of this in its entirety, it is clear that DBHDS has the right to request the names of involved employees and the actions taken in order to enable it to perform its health oversight functions. It is within the Department's discretion to determine exactly what information constitutes the "circumstances" of a death or serious injury, and such detailed information may be necessary for the DBHDS to determine an appropriate response to such incidents and ascertain compliance with applicable laws. Once the DBHDS receives this information, however, it is not permitted to re-disclose any identifying information to others unless further authorized by law. For instance, if a FOIA request were made for information that is in the DBHDS's possession because it was supplied through CHRIS, personnel information and PHI would be redacted, just as the DBHDS currently does.

To the extent that a provider asserts that personnel information cannot be disclosed based on policy, a policy cannot circumvent the law. It is DBHDS's position that we are entitled by law to this information or other information that we may choose to request, since we are the licensing entity and the entity charged with monitoring human rights compliance. By way of comparison, the policy governing disclosure of personnel information of state employees, DHRM Policy 6.05, provides that personnel information is confidential. It also states, however, that certain third party entities may have access to employee records without the consent of the subject employee to enable these entities to perform specific functions.

Some providers have raised concerns about employees being "blacklisted" with a lack of due process, but that is not an accurate characterization. CHRIS is nothing like, for instance, the DSS central registry, which lists individuals who have been found by DSS to have abused or neglected a child. Providers have to check this registry before they hire someone, so being in this registry does have consequences for the individual. CHRIS, however, is not such a registry; DBHDS will not be releasing any information about provider employees to outside entities. It is collecting this information to perform its own internal monitoring functions.

From a practical standpoint, the Office of Human Rights and the Office of Licensing investigate allegations of abuse and neglect and reports of death or serious injury in conjunction with one another. If a negative action is taken, it is through Virginia Code §§ 37.2-418 or -419. Under these statutes, the DBHDS only has authority to take action against the provider itself, not against an employee of the provider. If the provider does not agree with the action taken by the DBHDS, it can appeal through the Administrative Process Act. The DBHDS does not have any authority to take action against a provider's individual employees. It asks for this information, however, so that it can monitor any potential trends and make sure any problems are remedied. If, for instance, the DBHDS noticed that a particular employee of a provider was involved in multiple incidents, we may ask the provider to give us an explanation of what is being done to address this.

I hope this information is helpful in alleviating any concerns providers may have about reporting requested information in CHRIS.

1/5/13