

**VAA Definitions Subcommittee Meeting**  
**Monday, April 7, 2008**  
**2:30-4:30pm**  
**Discussion Topics, Minutes, and Proposed Revisions**

Attendance:

- Doug Beardsley (Care Providers of MN)
- Barb Doherty (MNALL)
- Deb Holtz (Ombudsman – LTC)
- Jennifer Kirchen (DHS – Adult Protection)
- Maura McNellis-Kubat (DHS – Licensing)
- Sam Orbovich (Orbovich & Gartner)
- Deb Tulloch (MACSSA)
- Deb Siebenaler (DHS – Adult Protection)
- Kevin Hansen (ECRA intern)
- Alicia Jaworski (ECRA intern)

**Discussion**

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*Department of Health new definition of common entry point regulations.*

- Pull nursing facilities from facilities definition or from VAA?
- SSI (data transfer not available yet). CEP across the state isn't always social services so there is a middle person prior to social services receiving the report. Crisis line is going to come to social services to SSI but the actual report is faxed to lead agency. There are 3 counties that do not accept reports at social services. The volume of calls: 12 to 14 per day.

Reviewing current definitions in Minn. Stat. § 626.5572

- What works and what doesn't work
- Common Entry Point
  - CMS appendix (not a statute or federal regulation; guideline)
  - regulation: facility must ensure all alleged violations...are reported immediately to the administrator of the facility and according to state law
  - Social Services Information System (SSIS)
    - better data to give out to individuals
    - every CEP has access to the SSIS as of April 2008
    - electronic data transfer system is not available yet
  - last weekend in March DHS launched this SSIS system
    - health and licensing
    - what's being done with reports coming in that aren't CEP reports
    - if no allegation of maltreatment, then it couldn't be a CEP report
  - in 1992, legislature didn't want CEP or facilities making judgment calls
    - one number in St. Paul to call into
  - conflict between state and federal requirements

- criminal sanction for not reporting
  - possible problems with reporting to the incorrect entity
  - MDH can't change state law through a bulletin
- MDH cannot require providers to do something new without enacting an administrative rule or statute requiring them to do so
- legal review of the CMS guideline
- Abuse
  - eliminate "sexual and aggressive intent"
  - allow contact in the context of therapeutic conduct (even accidental contact)
    - Minn. Stat. § 626.5572 Subd. 2(a)(4)
      - adding language in that says "unless the conviction has been reversed or expunged by a court" (making a court the final arbiter rather than a state agency/office)
    - Subd. 2(b)
      - what is the interpretation of the conduct by the potential victim?
      - moving language in (b)(2) to (b) ... using "reasonable person standard"
      - removing "treatment" ... changing it to "conduct toward a VA"
    - conduct which is not an accident or therapeutic conduct

## **In examining definitions starting at "Abuse":**

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### Subd. 2: Abuse

MM: In criminal sexual conduct intent is required. If we went to sexual contact in addition to criminal sexual conduct. Contact of sexual parts and not for therapeutic purposes. So under Subd. 2 (a), add (5) that includes a caregiver's contact with those body parts (outlined in 609.341). Basically removing intent from it as it's the only place where we have to prove intent. Subd. 2(c) also refers to criminal code requiring intent. Intent fairly high standard when you have the sexual contact.

SO: We should put it under Subd. 2(b) conduct section rather than perhaps in effect water down criminal statutes. Why not strike "as defined in § 609.341" in Subd. 2(c).

JK: So then we'd have to define it.

MMK: Therapeutic conduct would not be a problem. You want to put sexual conduct not in the process of therapeutic conduct.

SO: What about using term battery?

MMK: Idea is to eliminate sexual and aggressive intent but to allow touching in context of therapeutic conduct.

SO: After Subd. 2(a)(4): "A violation includes any action that meets the elements of the crime, regardless of whether there is a criminal proceeding or conviction." I would like to add, "Unless the conviction has been reversed or expunged by a court." The court has to be the final arbiter about whether or not something occurred not a state agency and if there is an expungement or reversal, DHS has to abide by that.

BD: From civil perspective you could have a civil finding that puts them on a different background list rather than a criminal background check. Certain things can happen that won't be charged and if charged, they may be reversed.

JK: There can be a substantiated claim that hasn't met criminal burden of proof.

SO: Take out the word reversal. To meet the burden of proof for expungements, that's a high standard. (Will look into burden of proof for expungements)

MMK: If record has been expunged, then it shouldn't be used for disqualification purposes.

MMK: Next, subd. 2(b): defining emotional distress. You need to meet (b) and the things you do to meet (b) can be described in (1)-(4). I don't think that emotional distress is not particularly clear.

JK: If we leave emotional distress as it is and clarify Subd. 2(b)(2).

MMK: You have to meet the (b) so you can't clarify it further below because you have to have general base requirements. If no one else has an issue with it then we can leave it. Some of these shouldn't be subject to meeting (b) first. If you do some of these they should automatically meet definition of abuse rather than having to have physical pain, etc.

JK: Back to Subd. 2(b), couldn't that accident or therapeutic conduct go down under (b)(3) with aversive or deprivation procedures. Let's have "hitting" standing alone and putting therapeutic or accidental conduct moved elsewhere.

SO: Perhaps we should look at definitions of domestic violence [to address more family oriented caregiver issues].

SO: In *Stahley* court had problem with "reasonably be expected to produce pain or injury or emotional distress." But VAA uses a reasonable person standard.

JK: Is there a reason to leave (b)?

SO: We absolutely do not want an exclusive list.

JK: Take out that first part where you're defining it.

DB: Seems to me that really the word "treatment" is a big problem.

SO: Amend to, "conduct that is not an accident or therapeutic conduct that would be considered by a reasonable person to be disparaging, derogatory, harassing, or threatening." Take the reasonable person standard and put it up in (b) so then it applies all the way down to everything.

SO: And for subd. 2(b)(2) use "conduct toward" instead of "treatment of".

SO: Then read Subd. 2(b)(2) would read: "use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or conduct toward a vulnerable adult."

MMK: Perhaps one person should come up with what has been said.

KH: We can develop all three interpretations and submit them to you for review.

JK: Reasonable person should be in (b) as precursor to everything listed below.

BD: Just put reasonable person in (b).

JK: My only issue then would be going back to the "repeated" or "malicious."

SO: Should we just remove totally the word "repeated"?

MMK: "Repeated" is easier to show. Proving maliciousness is different.

DB: There are examples where repeated helped the case when malicious couldn't be proven.

MMK: It is an "or."

SO: Let's leave it then.

JK: Executive decision to move on from "abuse."

BD: subd. 2(g)(2) is often very fuzzy as to what you do and do not permit. A PCA can start a relationship afterwards.

SO: That didn't come out of 94 Working Group.

Subd. 3: Accident

Fine, moved on.

#### Subd. 4: Caregiver

JK: Do we need something in there similar to abuse that says “all but not limited to”. We could spell out exactly what it is.

SO: “Care” has a medical connotation, you could broaden it with phrase “care or support”.

DB: You definitely want both in there as alternatives, which is a broader definition for the community. We may have to then define supportive services.

JK: We don’t want to limit this to formal support services, however. What if we take out support and add “care or services”?

DH: It might be more formal than you want. We want to cover families, neighbors, more casual relationships.

KH: added “care of and services for” in 2 places.

DB: It gives you a lot more to work with in the community.

#### Subd. 5: Common entry point

MMK: one of the issues that came up at large group meeting is that there should be some record of all calls that come in and that’s currently isn’t in statute.

SO: Should we even have counties doing it? Should we consider the question of going to 1 number rather than 87 numbers? And further, should we increase authority of lead agencies to order the counties to do things?

MMK: There are issues currently both in how it works and what is required where not everybody’s needs are met.

DB: But here this is just the definitions.

#### Subd. 6: Facility

KH: What about adding in assisted living facilities into the definition?

SO: We have to be careful as to how that relates to defining what a vulnerable adult is.

#### Subd. 7: False

Fine.

#### Subd. 8: Final disposition

MM: The last “and”, it should really say “and/or”.

Subd. 9: Financial exploitation

MMK: subd. 9(a), they define fiduciary obligation in SF3196.

JK: Do we link to the interpretation in SF3196?

MMK: (a) mentions being recognized elsewhere in law which would probably include SF3196.

The language used in SF3196, subd. 12 is clearer.

MMK: How about we at least accept that criminal language shouldn't be met more easily than maltreatment language and comparing the two for possible changes.

SO: I don't have problem adding the fiduciary obligation definition. My problem comes in where they define in (a)(2), which isn't in the AG's language. I like the current (a)(2) language.

JK: So plug in language from SF3196, subdivision 12 and add it into subdivision 9a.

DB: Add it as a separate definition in the document. I.e. subdivision 9a would be definition of fiduciary obligation.

Subd. 13: Lead agency

DB: After nursing homes insert "intermediate care facilities for persons with mental retardation".

SO: in (b) you insert waiver programs from persons with developmental disabilities.

Subd. 16: Mandated reporter

MMK: There's discussion whether banks should be mandated reporters.

JK: It's difficult to put them in the mandated reporter category but what about putting them in a voluntary reporter.

DB: Other than banks, who would have a problem with them becoming mandated reporters? Likely biggest problem will be training all of them. Should we include all financial institutions?

JK: So then do we need to define financial institutions?

MMK: Let's just say we think it should be there and move on.

JK: Add it as (9) financial institutions.

DB: Let's add in "care of and services for" into (4).

JK: We should schedule another meeting, Tuesday afternoon at 2:30pm, the 15<sup>th</sup>.

## **New Version/Language for Changes Recommended:**

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### Subd. 2 – Abuse

(b) Conduct which is not an accident or therapeutic conduct as defined in this section, which would be considered by a reasonable person to produce or could reasonably be expected to produce physical pain or injury or emotional distress including, but not limited to, the following:

(1) hitting, slapping, kicking, pinching, biting, or corporal punishment of a vulnerable adult;

(2) use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or conduct toward a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening;

(3) [same]

(4) [same]

(c) Omit "as defined in section 609.341"

(g)(2) PCA can have a consensual sexual relationship regardless of when it began

[KEEP OR REMOVE THIS PART??]

### Subd. 4 – Caregiver

Caregiver means an individual or facility who has responsibility for the care of or [services for] a vulnerable adult as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of or [services for] a vulnerable adult voluntarily, by contract, or by agreement.

### Subd. 5 – Common Entry Point

- health concerns
- conflict with state law and CMS guidelines
- keeping a record of all calls coming in
- centralized reporting system

### Subd. 8 – Final Disposition

"... has substantiated maltreatment, the final disposition also identified, if known, which individual or individuals were responsible for the substantiated maltreatment, and/or whether a facility was responsible for the substantiated maltreatment."

Subd. 9 – Financial Exploitation

(a) In breach of a fiduciary obligation, including pertinent...

Subd. 9a – Fiduciary Obligation (ADD IN)

Fiduciary obligation means a person's obligation to a vulnerable adult who places confidence in the person and the person assumes a position of superiority or influence over the vulnerable adult. In addition to a fiduciary obligation recognized elsewhere in law, a fiduciary obligation occurs when a person is a joint tenant or tenant in common in real property, financial instruments, or financial accounts with a vulnerable adult.

Subd. 13 – Lead Agency

(a) "... home care providers, nursing, homes, intermediate care facilities for persons with mental retardation, residential care homes, ..."

Subd. 14 – Legal Authority

(1) "... a fiduciary obligation as defined under this section [Subd. 9a] or as recognized elsewhere in law ..."

Subd. 16 – Mandated Reporter

(4) "the care of or [services for] vulnerable adults

(9) Financial institutions as defined in [Minn. Stat. ??] (ADD IN)