

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 87th General Assembly
3 Regular Session, 2009
4

A Bill

HOUSE BILL 1568

5 By: Representative Hobbs
6 By: Senator Bledsoe
7

For An Act To Be Entitled

10 AN ACT TO AMEND VARIOUS PROVISIONS OF THE ADULT
11 AND LONG-TERM CARE FACILITY RESIDENT MALTREATMENT
12 ACT; AND FOR OTHER PURPOSES.
13

Subtitle

14 AN ACT TO AMEND VARIOUS PROVISIONS OF
15 THE ADULT AND LONG-TERM CARE FACILITY
16 RESIDENT MALTREATMENT ACT.
17
18
19

20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
21

22 SECTION 1. Arkansas Code § 12-12-1703 is amended to read as follows:
23 12-12-1703. Definitions.

24 As used in this subchapter:

25 (1)(A) "Abuse" means with regard to any long-term care facility
26 resident or any patient at the Arkansas State Hospital by a caregiver:

27 (i) Any intentional and unnecessary physical act
28 that inflicts pain on or causes injury to an endangered person or an impaired
29 person, excluding court-ordered medical care or medical care requested by the
30 patient or long-term care facility resident or a person legally authorized to
31 make medical decisions on behalf of the patient or long-term care facility
32 resident;

33 (ii) Any intentional act that a reasonable person
34 would believe subjects an endangered person or an impaired person, regardless
35 of age, ability to comprehend, or disability, to ridicule or psychological
36 injury in a manner likely to provoke fear or alarm, excluding necessary care



1 and treatment provided in accordance with generally recognized professional
2 standards of care;

3 (iii) Any intentional threat that a reasonable
4 person would find credible and nonfrivolous to inflict pain on or cause
5 injury to an endangered person or an impaired person except in the course of
6 medical treatment or for justifiable cause; or

7 (iv) Any willful infliction of injury, unreasonable
8 confinement, intimidation, or punishment with resulting physical harm, pain,
9 or mental anguish.

10 (B) "Abuse" means with regard to any person who is not a
11 long-term care facility resident or a patient at the Arkansas State Hospital:

12 (i) Any intentional and unnecessary physical act
13 that inflicts pain on or causes injury to an endangered person or an impaired
14 person;

15 (ii) Any intentional act that a reasonable person
16 would believe subjects an endangered person or an impaired person, regardless
17 of age, ability to comprehend, or disability, to ridicule or psychological
18 injury in a manner likely to provoke fear or alarm; or

19 (iii) Any intentional threat that a reasonable
20 person would find credible and nonfrivolous to inflict pain on or cause
21 injury to an endangered person or an impaired person except in the course of
22 medical treatment or for justifiable cause;

23 (2) "Adult maltreatment" means abuse, exploitation, neglect, or
24 sexual abuse of an adult;

25 (3) "Caregiver" means a related person or an unrelated person,
26 an owner, an agent, a high managerial agent of a public or private
27 organization, or a public or private organization that has the responsibility
28 for the protection, care, or custody of an endangered person or an impaired
29 person as a result of assuming the responsibility voluntarily, by contract,
30 through employment, or by order of a court;

31 (4) "Department" means the Department of Human Services;

32 (5) "Endangered person" means:

33 (A) A person eighteen (18) years of age or older who:

34 (i) Is found to be in a situation or condition that
35 poses a danger to himself or herself; and

36 (ii) Demonstrates a lack of capacity to comprehend

1 the nature and consequences of remaining in that situation or condition; or

2 (B) A long-term care facility resident who:

3 (i) Is found to be in a situation or condition that
4 poses an imminent risk of death or serious bodily harm to the long-term care
5 facility resident; and

6 (ii) Demonstrates a lack of capacity to comprehend
7 the nature and consequences of remaining in that situation or condition;

8 (6) "Exploitation" means the:

9 (A) Illegal or unauthorized use or management of an
10 endangered person's or an impaired person's funds, assets, or property;

11 (B) Use of an adult endangered person's or an adult
12 impaired person's power of attorney or guardianship for the profit or
13 advantage of one's own self or another; ~~or~~

14 (C) The fraudulent or otherwise illegal, unauthorized, or
15 improper act or process of a person, including a caregiver or fiduciary, that
16 uses the resources of an endangered person or impaired person, or long-term
17 care facility resident for monetary or personal benefit, profit, or gain, or
18 that results in depriving the endangered person or impaired person, or long-
19 term care facility resident of rightful access to, or use of, benefits,
20 resources, belongings, or assets; or

21 ~~(C)(D)~~ Misappropriation of property of a long-term care
22 facility resident, that is, the deliberate misplacement, exploitation, or
23 wrongful, temporary, or permanent use of a long-term care facility resident's
24 belongings or money without the long-term care facility resident's consent;

25 (7)(A) "Fiduciary" means a person or entity with the legal
26 responsibility to:

27 (i) Make decisions on behalf of and for the benefit
28 of another person;

29 (ii) Act in good faith and with fairness; and

30 (B) "Fiduciary" includes without limitation:

31 (i) A trustee;

32 (ii) A guardian;

33 (iii) A conservator;

34 (iv) An executor;

35 (v) An agent under financial power of attorney or
36 health care power of attorney; and

(vi) A representative payee;

~~(7)~~(8) "Imminent danger to health or safety" means a situation in which death or serious bodily harm could reasonably be expected to occur without intervention;

~~(8)(A)~~(9)(A) "Impaired person" means a person eighteen (18) years of age or older who as a result of mental or physical impairment is unable to protect himself or herself from abuse, sexual abuse, neglect, or exploitation.

(B) For purposes of this subchapter, a long-term care facility resident is presumed to be an impaired person;

~~(9)~~(10) "Long-term care facility" means:

- (A) A nursing home;
- (B) A residential care facility;
- (C) A post-acute head injury retraining and residential facility;
- (D) An assisted living facility;
- (E) An intermediate care facility for individuals with mental retardation; or
- (F) Any facility that provides long-term medical or personal care;

~~(10)~~(11) "Long-term care facility resident" means a person, regardless of age, living in a long-term care facility;

~~(11)~~(12) "Long-term care facility resident maltreatment" means abuse, exploitation, neglect, or sexual abuse of a long-term care facility resident;

~~(12)~~(13) "Maltreated adult" means an adult who has been abused, exploited, neglected, physically abused, or sexually abused;

~~(13)~~(14) "Maltreated person" means a person, regardless of age, who has been abused, exploited, neglected, physically abused, or sexually abused;

~~(14)~~(15) "Neglect" means:

- (A) An act or omission by an endangered person or an impaired person, for example, self-neglect; or
- (B) An act or omission by a caregiver responsible for the care and supervision of an endangered person or an impaired person constituting:

1 (i) Negligently failing to provide necessary
2 treatment, rehabilitation, care, food, clothing, shelter, supervision, or
3 medical services to an endangered person or an impaired person;

4 (ii) Negligently failing to report health problems
5 or changes in health problems or changes in the health condition of an
6 endangered person or an impaired person to the appropriate medical personnel;

7 (iii) Negligently failing to carry out a prescribed
8 treatment plan; or

9 (iv) Negligently failing to provide goods or
10 services to a long-term care facility resident necessary to avoid physical
11 harm, mental anguish, or mental illness as defined in regulations promulgated
12 by the Office of Long-Term Care;

13 ~~(15)(A)~~(16)(A) "Physical injury" means the impairment of a
14 physical condition or the infliction of substantial pain on a person.

15 (B) If the person is an endangered person or an impaired
16 person, there ~~shall be~~ is a presumption that any physical injury resulted in
17 the infliction of substantial pain;

18 ~~(16)~~(17) "Serious bodily harm" means sexual abuse, physical
19 injury, or serious physical injury;

20 ~~(17)~~(18) "Serious physical injury" means physical injury to an
21 endangered person or an impaired person that creates a substantial risk of
22 death or that causes protracted disfigurement, protracted impairment of
23 health, or loss or protracted impairment of the function of any bodily member
24 or organ;

25 ~~(18)~~(19) "Sexual abuse" means deviate sexual activity, sexual
26 contact, or sexual intercourse, as those terms are defined in § 5-14-101,
27 with another person who is not the actor's spouse and who is incapable of
28 consent because he or she is mentally defective, mentally incapacitated, or
29 physically helpless; and

30 ~~(19)~~(20) "Subject of the report" means:

- 31 (A) The endangered person or impaired person;
- 32 (B) The adult's legal guardian;
- 33 (C) The natural or legal guardian of a long-term care
34 facility resident under eighteen (18) years of age; and
- 35 (D) The offender.

36

1 SECTION 2. Arkansas Code § 12-12-1714(d)(6) concerning appointed
 2 counsel during investigations by the Department of Human Services, is amended
 3 to read as follows:

4 (6)(A) The allegedly maltreated adult has a right to counsel,
 5 including appointed counsel if indigent, and a right to a hearing within five
 6 (5) business days after ~~issuance of an~~ the allegedly maltreated adult is
 7 served with the ex parte order of investigation.

8 (B) If the allegedly maltreated adult is not indigent, the
 9 circuit court has the authority to appoint counsel to represent the allegedly
 10 maltreated adult and to direct payment from the assets of the adult for legal
 11 services received by the adult.

12 (C) If the department determines the allegedly maltreated
 13 adult is not endangered or impaired and releases the allegedly maltreated
 14 adult or ceases any assessment, a hearing under subdivision (b)(6)(A) is not
 15 required.

16
 17 SECTION 3. Arkansas Code § 12-12-1715 is amended to read as follows:

18 12-12-1715. Rights of subject of report – Investigative determination
 19 of the Department of Human Services – Notice of finding – Appeal.

20 (a) Upon completion of an investigation, the Department of Human
 21 Services shall determine that an allegation of adult maltreatment or long-
 22 term care facility maltreatment is either:

23 (1)(A) Unfounded, a finding that shall be entered if the
 24 allegation is not supported by a preponderance of the evidence.

25 (B)(i) An unfounded report shall be expunged one (1) year
 26 after the completion of the investigation.

27 (ii) Demographic information may be retained for
 28 statistical purposes; or

29 (2)(A) Founded, a finding that shall be entered if the
 30 allegation is supported by a preponderance of the evidence.

31 (B) A determination of founded but exempt shall ~~not~~ be
 32 entered ~~solely because~~ on a report if an adult practicing his or her
 33 religious beliefs is receiving spiritual treatment under § 5-28-105 or § 12-
 34 12-1704.

35 (C) A determination of founded but exempt shall be entered
 36 if the allegation"

1 (i) Was neglect; and
 2 (ii) Otherwise would be founded but for the fact
 3 that the offender is a spouse or child of the maltreated adult or maltreated
 4 long-term care resident and the department determines that the spouse or
 5 child had arranged for care or services or had provided care and services to
 6 the extent the spouse or child had the capacity to secure or provide the care
 7 or services.

8 (D) The department may investigate, provide services, and
 9 protect a maltreated adult or maltreated long-term care resident even if the
 10 report is determined to be founded but exempt.

11 (E) A report that is determined to be founded but exempt
 12 shall not be placed in the adult and long-term care facility resident
 13 maltreatment central registry.

14 (b)(1)(A) After making an investigative determination, the department
 15 shall notify in writing within ten (10) business days:

16 (i)(a) The person identified as the offender.

17 (b) However, in cases of unfounded self-
 18 neglect, no notice is required;

19 (ii) Either the:

20 (a) Person identified as the maltreated
 21 person;

22 (b) Legal guardian of the maltreated person;

23 or

24 (c) Natural or legal guardian of a long-term
 25 care facility resident under eighteen (18) years of age;

26 (iii) The current administrator of the long-term
 27 care facility if the incident occurred in a long-term care facility; and

28 (iv) If known by the Office of Long-term Care, the
 29 administrator of the long-term care facility that currently employs the
 30 offender if different from the long-term care facility in which the incident
 31 occurred.

32 (B) If the investigation determines that the report is
 33 founded, notification to the offender shall be by process server or by
 34 certified mail, restricted delivery.

35 (2) The notification under subdivision (b)(1) of this section
 36 shall include the following:

1 (A) The investigative determination, exclusive of the
 2 source of the notification, including the nature of the allegation and the
 3 date and time of occurrence;

4 (B) A statement that an offender of a founded report has
 5 the right to an administrative hearing upon a timely request;

6 (C) A statement that the request for an administrative
 7 hearing shall be made to the department within thirty (30) days of receipt of
 8 the notice of determination;

9 (D) A statement that the administrative hearing will be by
 10 telephone hearing unless the offender requests an in-person hearing within
 11 thirty (30) days after the date of receipt of notice of the determination;

12 ~~(D)~~(E) A statement of intent to report in writing after
 13 the offender has had an opportunity for an administrative hearing the founded
 14 investigative determination to:

15 (i) The adult and long-term care facility resident
 16 maltreatment central registry; and

17 (ii) Any applicable licensing authority;

18 ~~(E)~~(F) A statement that the offender's failure to request
 19 an administrative hearing in writing within thirty (30) days from the date of
 20 receipt of the notice will result in submission of the investigative report,
 21 including the investigative determination, to:

22 (i) The registry; and

23 (ii) Any applicable licensing authority;

24 ~~(F)~~(G) The consequences of waiving the right to an
 25 administrative hearing;

26 ~~(G)~~(H) The consequences of a finding by a preponderance of
 27 the evidence through the administrative hearing process that the maltreatment
 28 occurred;

29 ~~(H)~~(I) The fact that the offender has the right to be
 30 represented by an attorney at the offender's own expense; and

31 ~~(I)~~(J) The name of the person making the notification, his
 32 or her occupation, and the location at which he or she can be reached.

33 (c)(1) The administrative hearing process shall be completed within
 34 one hundred twenty (120) days from the date of the receipt of the request for
 35 a hearing unless waived by the offender.

36 (2) The department shall hold the administrative hearing at a

1 reasonable place and time.

2 (3) For an incident occurring in a long-term care facility, the
 3 department may not make a finding that an offender has neglected a long-term
 4 care facility resident if the offender demonstrates that the neglect was
 5 caused by factors beyond the control of the offender.

6 (4) A delay in completing the administrative hearing process
 7 that is attributable to the offender shall not count against the time limit
 8 in subdivision (c)(1) of this section.

9 (5) Failure to complete the administrative hearing process in a
 10 timely fashion shall not prevent the department or a court from:

11 (A) Reviewing the investigative determination of
 12 jurisdiction;

13 (B) Making a final agency determination; or

14 (C) Reviewing a final agency determination under the
 15 Arkansas Administrative Procedure Act, § 25-15-201 et seq.

16 (6) If any party timely requests an in-person administrative
 17 hearing, the hearing officer may notify the parties that the hearing will be
 18 conducted by video conference.

19 (d)(1) When the department conducts an administrative hearing, the
 20 chief counsel of the department may require the attendance of witnesses and
 21 the production of books, records, or other documents through the issuance of
 22 a subpoena if the testimony or information is necessary to adequately present
 23 the position of the department or the alleged offender in a report.

24 (2) Failure to obey the subpoena may be deemed a contempt and
 25 ~~shall be~~ is punishable accordingly.

26 (e) If the department's investigative determination of founded is
 27 upheld during the administrative hearing process or if the offender does not
 28 timely appeal for or waives the right to an administrative hearing, the
 29 department shall report the investigative determination in writing within ten
 30 (10) business days to:

31 (1) The offender;

32 (2) The current administrator of the long-term care facility if
 33 the incident occurred in a long-term care facility;

34 (3) The administrator of the long-term care facility that
 35 currently employs the offender if different from the long-term care facility
 36 in which the incident occurred;

- 1 (4) The appropriate licensing authority;
- 2 (5) The adult and long-term care facility resident maltreatment
- 3 central registry; ~~and~~
- 4 (6) The maltreated person or the legal guardian of the
- 5 maltreated person; and
- 6 (7) If required under § 21-15-110, the employer of any offender
- 7 if the offender is in a designated position with a state agency.

8

9 SECTION 4. Arkansas Code § 12-12-1716(a)(2), concerning the adult and

10 long-term care facility resident maltreatment central registry, is amended to

11 read as follows:

12 (2) The central registry shall contain investigative

13 determinations made by the department on all founded ~~allegations~~ reports of

14 adult maltreatment and long-term care facility resident maltreatment.

15

16 SECTION 5. Arkansas Code § 12-12-1718 is amended to read as follows:

17 12-12-1718. Availability of screened out, pending, and unfounded

18 reports.

19 (a) A record of a screened-out report of adult maltreatment or long-

20 term care facility resident maltreatment shall not be disclosed except to the

21 prosecuting attorney and an appropriate law enforcement agency and may be

22 used only within the Department of Human Services for purposes of

23 administration of the program.

24 ~~(a)(1)(b)(1)~~ A ~~screened-out report or a~~ pending report, including

25 protected health information, ~~shall be~~ is confidential and shall be made

26 available only to:

- 27 (A) The Department of Human Services, including the Death
- 28 Review Committee of the Department of Human Services;
- 29 (B) A law enforcement agency;
- 30 (C) A prosecuting attorney;
- 31 (D) The office of the Attorney General;
- 32 (E) A circuit court having jurisdiction pursuant to a
- 33 petition for emergency, temporary, long-term protective custody, or
- 34 protective services;
- 35 (F) A grand jury or court, upon a finding that the
- 36 information in the report is necessary for the determination of an issue

1 before the grand jury or court;

2 (G) A person or provider identified by the department as
3 having services needed by the maltreated person;

4 (H) Any applicable licensing or registering authority;

5 (I) Any employer, legal entity, or board responsible for
6 the person named as the offender;

7 (J) Any legal entity or board responsible for the
8 maltreated person; and

9 (K) The Division of Developmental Disabilities Services
10 and the Division of Aging and Adult Services as to participants of the waiver
11 program.

12 (2) The subject of the report may only be advised that a report
13 is pending.

14 ~~(b)(c)~~ Upon ~~completion of the administrative hearing process~~
15 satisfaction of due process and if an allegation was determined to be
16 unfounded, the investigative report, including protected health information,
17 ~~shall be~~ is confidential and shall be made available only to:

18 (1) The department, including the committee;

19 (2) A law enforcement agency;

20 (3) A prosecuting attorney;

21 (4) The office of the Attorney General;

22 (5) Any applicable licensing or registering authority;

23 (6) Any person named as a subject of the report or that person's
24 legal guardian;

25 (7) A circuit court having jurisdiction pursuant to a petition
26 for emergency, temporary, long-term protective custody, or protective
27 services;

28 (8) A grand jury or court, upon a finding that the information
29 in the record is necessary for the determination of an issue before the grand
30 jury or court;

31 (9) A person or provider identified by the department as having
32 services needed by the person;

33 (10) Any employer, legal entity, or board responsible for the
34 person named as the offender;

35 (11) Any legal entity or board responsible for the maltreated
36 person; and

1 (12) The Division of Developmental Disabilities Services and the
 2 Division of Aging and Adult Services as to participants of the waiver
 3 program.

4 ~~(e)(1)~~(d)(1) An unfounded report shall be expunged one (1) year after
 5 completion of the investigation.

6 (2) However, demographic information may be retained for
 7 statistical purposes.

8 ~~(d)(1)~~(e)(1) Except for the subject of the report, no person or agency
 9 to which disclosure is made may disclose to any other person a report or
 10 other information obtained under this section.

11 (2) Upon conviction, any person disclosing information in
 12 violation of this subsection is guilty of a Class C misdemeanor.

13 (f)(1) The department may not release data that would identify the
 14 person who made a report except to law enforcement, a prosecuting attorney,
 15 or the office of the Attorney General.

16 (2) A court of competent jurisdiction may order release of data
 17 that would identify the person who made a report after the court has reviewed
 18 in camera the record related to the report and has found that disclosure is
 19 needed:

20 (A) To prevent execution of a crime; or

21 (B) For prosecution of a crime.

22
 23 SECTION 6. Arkansas Code § 12-12-1720 is amended to read as follows:
 24 12-12-1720. Penalties.

25 ~~(a)(1) Any person or caregiver required by this subchapter to report a~~
 26 ~~ease of suspected adult maltreatment or long-term care facility resident~~
 27 ~~maltreatment who purposely fails to do so shall be guilty of a Class B~~
 28 ~~misdemeanor. A person commits the offense of failure to report under this~~
 29 ~~subchapter in the first degree if he or she:~~

30 (A) Is a mandated reporter under § 12-12-1708;

31 (B) Has reasonable cause to suspect that an endangered
 32 person or impaired person has been subjected to conditions or circumstances
 33 that constitute adult maltreatment or long-term care facility resident
 34 maltreatment; and

35 (C) Knowingly fails to report or cause a report to be made
 36 to the adult and long-term care facility resident maltreatment hotline.

1 (2) Failure to report under this subchapter in the first degree
2 is a Class B misdemeanor.

3 (b)(1) A person commits the offense of failure to report in the second
4 degree if he or she:

5 (A) Is a mandated reporter under § 12-12-1708;

6 (B) Has reasonable cause to suspect that an endangered
7 person or impaired person has been subjected to conditions or circumstances
8 that constitute adult maltreatment or long-term care facility resident
9 maltreatment; and

10 (C) Recklessly fails to make the report or cause a report
11 to be made in the manner and time provided in this subchapter to the adult
12 and long-term care facility resident maltreatment hotline.

13 (2) Failure to report in the second degree is a Class C
14 misdemeanor.

15 ~~(b)(c)~~ Any person or caregiver required by this subchapter to report a
16 case of suspected adult maltreatment or long-term care facility resident
17 maltreatment who purposely fails to do so ~~shall be~~ is civilly liable for
18 damages proximately caused by the failure.

19 ~~(e) Any person, official, or institution willfully making false~~
20 ~~notification under this subchapter knowing the allegations to be false shall~~
21 ~~be guilty of a Class A misdemeanor.~~

22 ~~(d)(1) Any person, official, or institution willfully making false~~
23 ~~notification under this subchapter knowing the allegations to be false and~~
24 ~~who has been previously convicted of making false allegations shall be guilty~~
25 ~~of a Class D felony.~~ A person commits the offense of false reporting of
26 adult abuse if he or she purposely makes a false report to the adult and
27 long-term care facility resident maltreatment hotline knowing the allegation
28 in the false report to be false.

29 (2) For a first offense, false reporting of adult abuse is a
30 Class A misdemeanor.

31 (3) For a subsequent offense, false reporting of adult abuse is
32 a Class D felony.

33 ~~(e)(1) Any person who willfully permits and any other person who~~
34 ~~encourages the release of data or information contained in the adult and~~
35 ~~long-term care facility resident maltreatment central registry to a person to~~
36 ~~whom disclosure is not permitted under this subchapter shall be guilty of a~~

1 ~~Class A misdemeanor.~~ A person commits the offense of unlawful disclosure of
2 data or information under this subchapter if he or she purposely discloses
3 information to a person to whom disclosure is not permitted under § 12-12-
4 1717 or § 12-12-1718.

5 (2) Unlawful disclosure of data or information under this
6 subchapter is a Class A misdemeanor.

7 ~~(f)(1) Any person required to report a death as the result of~~
8 ~~suspected adult maltreatment or long-term care facility resident maltreatment~~
9 ~~who knowingly fails to make the report in the manner and time provided in~~
10 ~~this subchapter shall be guilty of a Class C misdemeanor.~~ A person commits
11 the offense of failure to report a death under this subchapter if he or she:

12 (A) Is required to report a death under § 12-12-1709;

13 (B) Has reasonable cause to suspect that an adult or long-
14 term care facility resident has died as a result of maltreatment; and

15 (C) Knowingly fails to make the report in the time and
16 manner required under this subchapter.

17 (2) Failure to report a death under this subchapter is a Class C
18 misdemeanor.

19 ~~(g) Any person required to report suspected adult maltreatment or~~
20 ~~long-term care facility resident maltreatment who knowingly fails to make the~~
21 ~~report in the manner and time provided in this subchapter shall be guilty of~~
22 ~~a Class C misdemeanor.~~

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