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Summary of Disability Rights California's Authority under State and Federal Law

WHAT IS DISABILITY RIGHTS CALIFORNIA?

Disability Rights California (DRC) is an independent, private, nonprofit agency established in 1978 pursuant to the Developmental Disabilities Assistance and Bill of Rights Act. 42 U.S.C. § 15001 *et seq.* ["DD Act"]. Congress mandated that each state receiving funds under the DD Act establish such an advocacy system to protect the rights and interests of persons with developmental disabilities. DRC is the advocacy system for California. Congress subsequently expanded the responsibilities of the existing protection and advocacy system to include advocacy for all persons with disabilities, including psychiatric and other disabilities. 29 U.S.C. § 794e *et seq.* ["PAIR Act"]; 42 U.S.C. § 10801 *et seq.* ["PAIMI Act"].

In 1991, the California legislature enacted legislation which acknowledged the authority of DRC under federal law and brought state law into compliance with federal requirements. CAL. WELF. & INST. CODE § 4900 *et seq.* In 2003, SB 577 was enacted, bringing state law into compliance with the subsequent expansion of federal law and regulations. See S.B. 577, 2003-04 Leg. Sess. (Cal. 2003).

WHAT ACTIVITIES DOES DRC ENGAGE IN?

In protecting and advocating for the rights of persons with disabilities, DRC may do the following:

- **Investigate incidents of abuse and neglect** if the incident is reported to DRC or if DRC determines that there is probable cause to believe the incident occurred.
- **Pursue administrative, legal, and other appropriate remedies** or approaches to ensure the protection of rights of eligible persons with disabilities.
- **Provide information, referral and training** concerning programs and services addressing needs of eligible individuals, and training about individual rights and services available from DRC.

ACCESS TO SERVICE PROVIDERS, FACILITIES, AND PROGRAMS

DRC is granted reasonable access to service providers, facilities, or programs providing care and treatment to persons with disabilities. This access permits DRC to conduct abuse or neglect investigations, provide information and training about the rights of individuals with disabilities, and monitor the service provider, facility, or program's compliance with respect to the rights and safety of service recipients.¹ In the case of investigations into allegations of abuse or neglect, DRC shall have reasonable unaccompanied access to individuals with disabilities and their service providers, programs, or facilities at all times necessary to conduct a full investigation.² This authority includes the opportunity to interview individuals with disabilities, service provider employees, or other persons who might have knowledge of the alleged abuse and neglect, and access to all relevant records.³ In carrying out all other functions, DRC has access to facilities, programs, service providers, and service recipients during normal working hours and visiting hours or other reasonable times.⁴ Formal information and training sessions must be scheduled at times mutually agreeable to DRC and program or facility management.⁵

DRC is entitled to access to both public and private service providers, facilities, or programs that provide services, support, care, or treatment to

¹ 42 U.S.C. §§ 10805, 15043; CAL. WELF. & INST. CODE § 4902.

² WELF. & INST. § 4902(a); 42 C.F.R. § 51.42(b); 45 C.F.R. § 1326.27(b).

³ WELF. & INST. § 4902(a)(1); 42 U.S.C. § 10805; 45 C.F.R. §§ 1326.25(a), 1326.27(b).

⁴ WELF. & INST. § 4902(b)(2); 42 C.F.R. § 51.42(c). 45 C.F.R. § 1326.27(c).

⁵ WELF. & INST. § 4902(b)(2).

persons with disabilities.⁶ This specifically includes, but is not limited to, a hospital, long-term health care facility, community living arrangement for people with disabilities (including a group home, board and care home, individual residence, or apartment of a person with a disability where services are provided), day program, juvenile detention facility, homeless shelter, jail, or prison, any facility that is unlicensed but is not exempt from licensure, and a public or private school or other institution or program providing education, training, habilitation, therapeutic, or residential services to persons with disabilities.⁷

ACCESS TO RECORDS

DRC has authority to access records of people with disabilities, including:⁸

- Any person who is a DRC client, if that person, or a legal guardian, conservator, or other legal representative of that person, has authorized DRC to have access to information and records;⁹
 - A legal guardian, conservator, or legal representative is the person who has legal authority to consent to health or mental health care or treatment on behalf of the individual;¹⁰
- Any person, including any person who cannot be located, to whom all of the following conditions apply:
 - The individual, due to his or her mental or physical condition, is unable to authorize DRC to have access to his or her records;¹¹
 - The individual does not have a legal guardian, conservator, or other legal representative, or the individual's representative is a public entity, including the state;¹² and

⁶ WELF. & INST. § 4902(b); 42 C.F.R. § 51.42(b); 45 C.F.R. §1326.27(b).

⁷ WELF. & INST. § 4900(e); 42 C.F.R. § 51.2

⁸ "Disability" means a developmental disability as defined in the DD Act, a mental illness as defined in the PAIMI Act, a disability within the meaning of the Americans with Disabilities Act, or a disability within the meaning of the California Fair Employment and Housing Act. See 42 U.S.C. §§ 10802(4), 12102(1), 15002(8); WELF. & INST. § 4900(d); CAL. GOVT. CODE §§ 12926(j), (m), (n).

⁹ WELF. & INST. § 4903(a)(1); 42 U.S.C. § 10805(a)(4); 45 C.F.R. § 1326.25(a)(1).

¹⁰ "Legal guardian," "conservator," or "legal representative" means a person appointed by a state court or agency empowered under state law to appoint and review the legal guardian, conservator, or legal representative, as appropriate. These terms include the parent of a minor who has legal custody of the minor. These terms do not include a person acting solely as a representative payee, a person acting solely to handle financial matters, an attorney or other person acting on behalf of an individual with a disability solely in legal matters, or an official or his or her designee who is responsible for the provision of treatment or services to an individual with a disability. See 42 U.S.C. §§ 10805(a)(4)(A), 15043(a)(2)(I)(i); WELF. & INST. § 4900(f); 42 C.F.R. § 51.2; 45 C.F.R. § 1326.19.

¹¹ 42 U.S.C. §§ 10805(a)(4)(B)(i), 15043(a)(2)(I)(ii)(I); WELF. & INST. § 4903(a)(2)(A).

¹² 42 U.S.C. §§ 10805(a)(4)(B)(ii), 15043(a)(2)(I)(ii)(II); WELF. & INST. § 4903(a)(2)(B).

- DRC has received a complaint that the individual has been subject to abuse or neglect, or has determined probable cause exists to believe that the individual has been subject to abuse or neglect;¹³
- Any person who is deceased, and for whom DRC has received a complaint that the individual has been subject to abuse or neglect, or has determined that probable cause exists to believe that an individual has been subjected to abuse or neglect.¹⁴ DRC is entitled to access such records without consent from another party;¹⁵
- Any person who has a legal guardian, conservator, or other legal representative with respect to whom a complaint has been received by DRC, or with respect to whom DRC has determined that probable cause exists to believe that the person has been subjected to abuse or neglect, whenever all of the following conditions exist:
 - DRC has contacted the representative upon receipt of the representative's name and address;¹⁶
 - DRC has offered assistance to the representative to resolve the situation;¹⁷ and
 - The representative has failed or refused to act on behalf of the person.¹⁸

TYPES OF RECORDS

The records available to DRC include, but are not limited to:

- Information and records prepared or received in the course of providing intake, assessment, evaluation, education, training, or other supportive services, including medical records, financial records, monitoring reports, or other reports, prepared by facility, program, or service staff;¹⁹
- Reports prepared by an agency or organization charged with investigating reports of incidents of abuse, neglect, injury, or death, or

¹³ 42 U.S.C. §§ 10805(a)(4)(B)(iii), 15043(a)(2)(I)(ii)(III); WELF. & INST. § 4903(a)(2)(C).

¹⁴ 42 U.S.C. §§ 10805(a)(4)(B), 15043(a)(2)(J); WELF. & INST. § 4903(a)(3).

¹⁵ 42 U.S.C. §§ 10805(a)(4)(B), 15043(a)(2)(J); WELF. & INST. § 4903(e)(2).

¹⁶ 42 U.S.C. §§ 10805(a)(4)(C)(i), 15043(a)(2)(I)(iii)(III); WELF. & INST. § 4903(a)(4)(A).

¹⁷ 42 U.S.C. §§ 10805(a)(4)(C)(ii), 15043(a)(2)(I)(iii)(IV); WELF. & INST. § 4903(a)(4)(B).

¹⁸ 42 U.S.C. §§ 10805(a)(4)(C)(iii), 15043(a)(2)(I)(iii)(V); WELF. & INST. § 4903(a)(4)(C).

¹⁹ WELF. & INST. § 4903(b)(1); 45 C.F.R. § 1326.25(b)(1).

by or for a program, facility, or service that describe any or all of the following:²⁰

- Abuse, neglect, or injury occurring at the facility;²¹
 - Steps taken to investigate the incidents;²²
 - Reports and records, including personnel records, prepared or maintained by the facility, in connection with such reports of incidents;²³ or
 - Supporting information that was relied upon in creating a report, including all information and records used or reviewed in preparing reports of abuse, neglect or injury such as records which describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings.²⁴
- Discharge planning records;²⁵
 - Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, and related assessments prepared for a facility by its staff, contractors, or related entities, subject to any other provision of state law protecting records produced by medical care evaluation or peer review committees;²⁶ and
 - Information in professional, performance, building, or other safety standards, demographic or statistical information relating to a facility.²⁷

DRC has the authority to access records whether written or in another medium, draft or final, including but not limited to handwritten notes, electronic files, photographs, videotapes, or audiotapes.²⁸

²⁰ 42 U.S.C. §§ 10806(b)(3)(A), 15043(c)(2); WELF. & INST. § 4903(b)(2).

²¹ WELF. & INST. § 4903(b)(2); 42 U.S.C. §10806(b)(3)(A); 45 C.F.R. § 1326.25(b)(2)(i).

²² WELF. & INST. § 4903(b)(2); 42 U.S.C. §10806(b)(3)(A); 45 C.F.R. § 1326.25(b)(2)(ii).

²³ WELF. & INST. § 4903(b)(2); 42 U.S.C. §10806(b)(3)(A); 45 C.F.R. § 1326.25(b)(2)(iii).

²⁴ WELF. & INST. § 4903(b)(2); 42 U.S.C. §10806(b)(3)(A); 45 C.F.R. § 1326.25(b)(2)(iv).

²⁵ WELF. & INST. § 4903(b)(3); 42 U.S.C. §10806(b)(3)(A); 45 C.F.R. § 1326.25(b)(3).

²⁶ WELF. & INST. § 4903(c)(1); 42 U.S.C. §10806(b)(3)(A); 45 C.F.R. § 1326.25(b)(2).

²⁷ WELF. & INST. § 4903(c)(2); 42 U.S.C. §10806(b)(3)(A); 45 C.F.R. § 1326.25(b)(4).

²⁸ WELF. & INST. § 4903(b); 42 C.F.R. § 51.41(c); 45 C.F.R. § 1326.25(b).

Under state and federal law, DRC is the final arbiter of determining if there is probable cause to believe that an individual has been subject to abuse or neglect, or is at significant risk of being subjected to abuse or neglect.²⁹ The probable cause determination is based upon reasonable inferences drawn from individual experience or training regarding similar incidents, conditions, or problems that are usually associated with abuse or neglect. Information supporting a probable cause determination may arise from monitoring or other activities, including but not limited to, media reports and newspaper articles.³⁰

If DRC is denied access due to lack of authorization, the facility, program or service provider shall promptly provide DRC with the name, address, and telephone number of the legal guardian, conservator, or other legal representative of the individual with a disability for whom authorization is required.³¹ Reasons for delay or denial of access must be provided in writing to DRC promptly.³²

DRC's authority to access records is not affected by the regulations implementing the Health Insurance Portability and Accountability Act [HIPAA]. The HIPAA regulations provide additional protections regarding the release of protected health information by health care providers and other entities.³³

WHAT ARE THE TIME FRAMES FOR DRC ACCESS TO RECORDS?

DRC shall have access to the records that are relevant to conducting an abuse or neglect investigation, not later than three business days after DRC makes a written request for the records.³⁴ DRC shall have immediate access to the records, not later than 24 hours after DRC makes a request, without consent from another party, if DRC determines that the individual is

²⁹ See Requirements Applicable to Protection and Advocacy of Individuals with Mental Illness, 62 Fed. Reg. 53552 (Oct. 15, 1997). See also *Office of Protection and Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303, 321 (D. Conn. 2003) (citing *Arizona Center for Disability Law v. Allen*, 197 F.R.D. 689, 693 (D. Ariz. 2000)) (reaffirming that the P&As the final arbiter of probable cause).

³⁰ WELF. & INST. § 4900(h); 42 C.F.R. §§ 51.2, 51.31(g); 45 C.F.R. §§ 1326.19, 1326.25(a)(2)(iii).

³¹ WELF. & INST. § 4902(c); 42 C.F.R. § 51.43; 45 C.F.R. § 1326.26.

³² Welf. & Inst. § 4902(c); 42 C.F.R. § 51.43; 45 C.F.R. § 1326.26.

³³ 45 C.F.R. § 164.512(a)(1); 45 C.F.R. § 1326.25(e).

³⁴ 42 U.S.C. § 15043(a)(2)(J)(i); WELF. & INST. § 4903(e)(1).

in serious and immediate jeopardy, or in the case of a death of an individual with a disability.³⁵

WHAT CAN DRC DO WITH THE INFORMATION AND RECORDS THAT IT OBTAINS?

Confidential information kept or obtained by DRC shall remain confidential and may not be subject to disclosure.³⁶ However, DRC may do any of the following:

- **Share the information with the individual client** who is the subject of the record or report or other document, or with his or her legally authorized representative, subject to any limitation on disclosure to recipients of mental health services;³⁷
- **Issue a public report of the results of an investigation** that maintains the confidentiality of individual clients;³⁸
- **Report the results of an investigation to responsible investigative or enforcement agencies** including, but not limited to, agencies that are responsible for facility licensing or accreditation, employee discipline, employee licensing or certification suspension or revocation, or criminal prosecution;³⁹
- **Pursue alternative remedies**, including initiating legal action;⁴⁰
- **Report suspected elder or dependent adult abuse** pursuant to the Elder Abuse and Dependent Adult Civil Protection Act, Welf. & Inst. Code § 15600 *et seq.*⁴¹

³⁵ 42 U.S.C. § 15043(a)(2)(J)(ii); WELF. & INST. § 4903(e)(2).

³⁶ 42 U.S.C. § 10806(a); WELF. & INST. § 4903(f); 42 C.F.R. §§ 51.45(a), 51.46(a); 45 C.F.R. § 1326.28(a)-(b).

³⁷ WELF. & INST. § 4903(f)(1); 42 C.F.R. § 51.45(d).

³⁸ WELF. & INST. § 4903(f)(2); 42 C.F.R. § 51.45(b)(1); 45 C.F.R. § 1326.28(c).

³⁹ WELF. & INST. § 4903(f)(3); 42 C.F.R. § 51.45(b)(2); 45 C.F.R. § 1326.28(d).

⁴⁰ WELF. & INST. § 4903(f)(4).

⁴¹ *Id.* § 4903(f)(5).