


TO: Representative Martin LaLonde, Chair, House Judiciary Committee
FROM: Joe Nusbaum, DAIL Division of Licensing & Protection Director 
DATE: March 13, 2023
SUBJECT: H.171 (Draft No. 3.1); Including Negligent Standard for Abuse and Neglect Definitions

This memo is in response to the March 1, 2023 memo submitted by a coalition of Vermont Healthcare Organizations.¹ That memo asserted that the expansion of mens rea to include “negligently” in the draft bill H. 171 ultimately “threatens patient safety” by requiring medical professionals to report mistakes or errors that occur within a medical setting. Specifically, the new language states as of draft 3.1:

(1) “Abuse” means:

(A) Any medical treatment that purposely, knowingly, recklessly, or negligently places the life, health, or welfare of a vulnerable adult in jeopardy or is likely to result in impairment of health to the vulnerable adult.

(20) “Neglect” means:

(A) Purposeful or, knowing, reckless, or negligent failure or omission by a caregiver that has resulted in, or could be expected to result in, physical or psychological harm, including a failure or omission ...

The proposed language in H. 171, however, either mirrors or is less strict than the language used by all three of the states bordering Vermont, as well as the language used by Texas, the state currently viewed as having model adult protective legislation.

New York’s statute uses the negligently standard for physical abuse and neglect, using the language “non-accidental” and “non-willful” in its definitions.² It also uses the knowingly standard, phrased as “willful infliction,” but only in relation to allegations of emotional abuse.

Both New Hampshire and Massachusetts disregard mens rea entirely and provide a strict liability standard for both abuse and negligence.³

Lastly, Texas also adopts the acting negligently standard, describing “the negligent or willful infliction of injury ...” in its statute.⁴ This is considered an emerging national best practice that Vermont is attempting to emulate with the language currently in this draft bill.

In conclusion, the inclusion of “negligently” in H. 171 would not be an overreach. Rather, it would serve to bring Vermont in line with regional and national standards.

¹ The Vermont Association of Hospitals and Health Systems, Vermont Health Care Association, Vermont Medical Society, VNAs of Vermont, Vermont Association of Adult Days, American Nurses Association - Vermont

² New York Consolidated Laws, Social Services Law - SOS § 473. Protective services

³ 1989, 7:1. 2002, 36:2, eff. July 1, 2002. 2016, 59:1, eff. July 4, 2016. ; 651 Mass. Reg. 5.02

⁴ TX Hum Res Code § 48.002 (2022)

APS "Abuse" and "Neglect" Definitions Summary:

While definitions differ between states, most states' statutes hold no specified level of intent (i.e., mens rea) in defining "abuse" and "neglect." Therefore they are considered to have strict liability statutes.

The Texas APS statute is recognized as a leading statute by the National APS Association, NAPSA. The Texas statute establishes a "negligent" mens rea standard for their definition of abuse to provide a distinction between professionally negligent acts and those that are purely accidental.

Texas APS Statute definitions:

(2) "Abuse" means:

(A) the negligent or wilful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly person or person with a disability by the person's caretaker, family member, or other individual who has an ongoing relationship with the person; or...

(4) "Neglect" means the failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caretaker to provide such goods or services.

Neighboring State definitions:

Massachusetts

"Abuse", an Act or omission which results in serious physical or emotional injury to an elderly person or financial exploitation of an elderly person; or the failure, inability or resistance of an elderly person to provide for him one or more of the necessities essential for physical and emotional well-being without which the elderly person would be unable to safely remain in the community; provided, however, that no person shall be considered to be abused or neglected for the sole reason that such person is being furnished or relies upon treatment in accordance with the tenets and teachings of a church or religious denomination by a duly accredited practitioner thereof. ("Neglect" is captured under "Abuse" and is not defined separately.)

New Hampshire

"Abuse" means any one of the following:

(a) "Emotional abuse" means the misuse of power, authority, or both, verbal harassment, or unreasonable confinement which results or could result in the mental anguish or emotional distress of a vulnerable adult.

(b) "Physical abuse" means the use of physical force which results or could result in physical injury to a vulnerable adult.

(c) "Sexual abuse" means contact or interaction of a sexual nature involving a vulnerable adult without his or her informed consent.

"Neglect" means an act or omission which results or could result in the deprivation of essential services or supports necessary to maintain the minimum mental, emotional or physical health and safety of a vulnerable adult.

New York

(d) "Active neglect" means willful failure by the caregiver to fulfill the care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment, willful deprivation of food, water, heat, clean clothing and bedding, eyeglasses or dentures, or health related services.

(e) "Passive neglect" means non-willful failure of a caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment or denial of food or health related services because of inadequate caregiver knowledge, infirmity, or disputing the value of prescribed services.

"Physical abuse" means the non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.

"Sexual abuse" means non-consensual sexual contact of any kind, including but not limited to, forcing sexual contact or forcing sex with a third party.

"Emotional abuse" means willful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or isolating an adult.

National APS Association definitions⁵:

Neglect: The failure of a caregiver or fiduciary to provide the goods or services necessary to maintain the health or safety of a person. Includes acts of omission and of commission (including willful deprivation, etc.).

Physical Abuse: The use of force or violence resulting in bodily injury, physical pain, or impairment. Excludes sexual abuse.

Sexual Abuse: Non-consensual sexual contact of any kind, including sexual contact with any person incapable of giving consent.

⁵ From the 2020 National Adult Maltreatment Reporting System: https://acl.gov/sites/default/files/programs/2021-10/2020_NAMRS_Report_ADA-Final_Update2.pdf