

**New York State Office of Children and Family Services
October, 2008**

**CHAPTER 323, LAWS OF 2008
SUMMARY OF CHANGES TO DEFINITIONS OF ABUSED
CHILD AND NEGLECTED CHILD IN RESIDENTIAL CARE**

Definitions

The definitions of abuse and neglect pertaining to children in residential care were moved from SSL § 412 to the new SSL § 412-a and revised substantially. The new definitions follow.

An "**abused child in residential care**" is one who is subjected to the following acts by a custodian, regardless of whether the child is injured:

- 1) being thrown, shoved, kicked, pinched, punched, shaken, choked, smothered, bitten, burned, cut, or stricken
- 2) the display of a weapon or other object that could reasonably be perceived as being meant to inflict pain or injury, in a threatening manner;
- 3) the use of corporal punishment;
- 4) the withholding of nutrition or hydration as punishment; or
- 5) the unlawful administration of any controlled substance or alcoholic beverage.

*Note: For all of the above actions, the statute presumes that such actions create risk of injury and classifies these actions as abuse **unless the action is accidental or is done as an emergency physical intervention to protect the safety of the child or another person.***

Or, an abused child in residential care is one who, by other than accidental means, has had inflicted upon the child a reasonably foreseeable injury that causes death or creates a **substantial risk** of:

- 1) death;
- 2) serious or protracted disfigurement;
- 3) serious or protracted impairment of the child's physical, mental or emotional condition; or
- 4) serious or protracted loss or impairment of the function of any organ.

Or, is subjected to a reasonably foreseeable and substantial risk of injury, by other than accidental means, which would be likely to cause:

- 1) death;
- 2) serious or protracted disfigurement;
- 3) serious or protracted impairment of the child's physical, mental or emotional condition; or
- 4) serious or protracted loss or impairment of the function of any organ.

Or, is the victim of sexual abuse (including sex offenses, use of a child for purposes of prostitution, use of a child for a sexual performance, and incest). However, the corroboration requirements of the Penal Law and the age requirements or age based elements of any such crime do not apply to this definition. *****No injury is needed for an allegation of sex abuse*****

A "**neglected child in residential care**" is a child who is impaired physically, mentally or emotionally or is at substantial risk of impairment because of failure to receive:

- 1) adequate food, clothing, shelter, medical, dental, optometric or surgical care consistent with the applicable rules and regulations of the licensing or operating State agency, provided that the facility has reasonable access to the provision of such services and that necessary consents for health care have been sought and obtained;
- 2) access to educational instruction in accordance with the compulsory education provisions in the Education Law;
- 3) proper supervision or guardianship, consistent with the applicable rules and regulations of the licensing or operating State agency.

A neglected child in residential care can also mean a child who is inflicted with a physical, mental or emotional injury, excluding a minor injury, by other than accidental means, or is subjected to the risk of a physical, mental or emotional injury, excluding a minor injury, by other than accidental means, where such injury or risk of injury was reasonably foreseeable.

A neglected child in residential care can also mean a child who is inflicted with a physical, mental or emotional injury, excluding a minor injury, by other than accidental means, or is subjected to the substantial risk of a physical, mental or emotional injury, excluding a minor injury, by other than accidental means, as a result of a failure to implement an agreed upon plan of prevention and remediation.

A neglected child in residential care can also mean a child who is subjected to the intentional administration of any prescription or non-prescription drug other than in substantial compliance with a prescription or order issued for the child by a licensed, qualified health care practitioner.

"**Physical injury or impairment**" and "impairment of physical condition" mean any confirmed harm, hurt or damage resulting in a significant worsening or diminution of a child's physical condition.

"**Mental or emotional injury or impairment**" and "impairment of mental or emotional condition" will be defined to mean a substantial diminution of a child's psychological or intellectual functioning which is determined by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker, or licensed mental health counselor.

"**Residential care**" now includes inpatient or residential settings certified by the Office of Alcoholism and Substance Abuse Services (OASAS) and designated as serving youth. This adds OASAS residential facilities serving youth to the jurisdiction of IAB. IAB investigations at OASAS facilities will be the responsibility of the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQCAPD), except for any stand-alone residential programs certified by

OASAS on the same premises as a foster care facility licensed by OCFS, which will be the responsibility of OCFS IAB.

Indicating Reports

To determine if a report can be indicated for abuse or neglect of a child in residential care, IAB staff will be looking for some credible evidence that a specific custodian is responsible (in whole or in part) for abuse or neglect.

For sex abuse cases, the question is whether the subject of the report committed, promoted or knowingly permitted sex abuse.

For cases in which a child was subjected to one of acts listed on page one under item 1, the question is whether the subject of the report committed the action at issue.

For cases involving the intentional administration of a prescription or non-prescription drug, the question is whether the subject of the report intentionally administered drug to the child.

For all other cases, the question is whether the subject of the report caused the injury or impairment of the child or the substantial risk of injury or impairment by:

- 1) direct action,
- 2) conduct and with knowledge or deliberate indifference allowing any such injury, impairment or risk,
- 3) failing to exercise a minimum degree of care,
- 4) failing to comply with a rule or regulation involving care, services or supervision of a child where it was reasonably foreseeable that such failure would result in the abuse or neglect of a child, or
- 5) failing to meet a personal duty imposed by an agreed upon plan of prevention and remediation arising from abuse or neglect of a child in residential care.

Responsibilities of OCFS and CQCAPD

Within 60 days of receiving a report of abuse or neglect of a child in residential care, **OCFS or CQCAPD (for OMH, OMRDD, and OASAS residential facilities)** must make the following determinations:

- a) whether the report is indicated or unfounded;
- b) is there a basis for a familial report to the SCR, and if so, OCFS or CQCAPD must make a separate report to the SCR, unless such a report has already been made;
- c) whether it appears likely that a crime may have been committed against the child, and if so, OCFS or CQCAPD must transmit a report of the allegations and findings to the appropriate law enforcement authority or confirm that such a report has already been transmitted; and
- d) whether it appears that there was a statutory or regulatory violation relative to the care and treatment of individuals receiving services, and, if so, OCFS or CQCAPD must provide that information to the director of the residential facility and the appropriate operating or licensing agency at that time.

Note: The list of determinations under the new law addresses reports that under existing law would be indicated for abuse or neglect of a child in residential care and those cases where the child would be found to be an institutionally neglected child. Cases that under present law would result in a finding that the child was institutionally neglected will be addressed under item (d) above as statutory and/or regulatory violations.

Procedures

If OCFS or CQCAPD determines that a report is indicated (or, it appears a crime was committed against a child, or there was a violation of the statutory, regulatory or other licensing requirements relative to the care and treatment of individuals) then **OCFS or CQCAPD must:**

- a) report its findings to the director of the facility and to the appropriate licensing or operating State agency;
- b) recommend to the facility and the licensing State agency that appropriate preventive and remedial actions, if any, be undertaken with respect to a residential care facility and/or the subject of the report;

And, the Facility and Licensing State Agency must:

- c) initiate any necessary and appropriate corrective action within a reasonably prompt period of time; and
- d) within a reasonably prompt period of time, the facility must submit to the appropriate licensing State agency and OCFS or CQCAPD, and the licensing State agency must submit to OCFS or CQCAPD (and send a copy to the facility) a written report of the actions taken to address the findings and such subsequent progress reports as OCFS or CQCAPD may require, including any actions to implement a plan of prevention and remediation.

Other

School-age child care programs: The definition of "subject of the report" in SSL § 412 is clarified to specifically include a director or operator of, or employee or volunteer in, a school-age child care program who allegedly caused or allowed injury, abuse or maltreatment of a child. Workers in school-age child care programs are also specifically included in the list of mandated reporters of suspected child abuse and maltreatment in SSL § 413.

Effective Date

The provisions of the new law that change the child abuse definitions and procedures take effect 180 days after enactment, which is January 17, 2009.

Please note also that, for purposes of transition between the current law and the new law, the effective date will apply to the date of actions that may (or may not) constitute child abuse or neglect. If a report comes in on or after January 17, 2009 that involves an incident or incidents that occurred before January 17, 2009, the current definitions of abuse and neglect of children in residential care will apply. The new definitions of abuse and neglect of children in residential care will apply only to incidents that occur on or after January 17, 2009.