

97 ADM-002

Protective Services for Adults:
Chapter 395, of the Laws of 1995:
Adult Abuse Amendments



NEW YORK STATE

DEPARTMENT OF SOCIAL SERVICES

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Acting Commissioner



ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 97 ADM-002

TO: Commissioners of
Social Services

DIVISION: Services and
Community
Development

DATE: January 15, 1997

SUBJECT:	Protective Services For Adults (PSA): Chapter 395, of the Laws of 1995: Adult Abuse Amendments
SUGGESTED DISTRIBUTION:	Directors of Services Protective Services for Adults Staff Agency Attorneys Staff Development Coordinators
CONTACT PERSON:	Any questions concerning this release should be directed to: Kathleen Crowe (518) 486-3451 or USERID ROF017 Carole Fox (518) 474-3167 or USERID AX5050 Michael Monahan (518) 474-9590 or USERID AY3860
ATTACHMENTS:	A - Chapter 395, laws of 1995 (not on line) B - Revised Regulations to Reflect Chapter 395 (not on line) C - Division of Criminal Justice Services Memorandum To Law Enforcement Agencies (not on line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
92 INF-26	95 INF-38	357	Art. 9-B SSL		
94 INF-14		457	Art. 81 MHL		
95 INF-10			Art. 27-F		
95 INF-20			PHL		
95 INF-38			Art. 17-A		
95 INF-47				S.C.P.A	

I. **PURPOSE**

The purpose of this release is to advise local social services districts of the steps that must be undertaken to implement the provisions of Chapter 395 of the Laws of 1995, which contain several provisions to strengthen the ability of the State and local governments to respond to the problem of adult/elderly abuse. The provisions of Chapter 395 and their implications for local districts, which were described in 95 INF-38, are further clarified with this release. Please note that 95 INF-38 has been cancelled by this directive.

II. **BACKGROUND**

The abuse, neglect and exploitation of elderly and impaired adults is a serious and growing problem in our society. The Public Policy Institute of American Association of Retired Persons estimates that each year 1 to 2 million Americans are victims of elderly or neglect in domestic settings. Since the abuse of elderly and impaired adults is often a hidden problem, greater awareness about this disturbing issue is essential. This release will discuss how the provisions of Chapter 395 will improve the ability of state and local governments to respond to situations involving the abuse, neglect and exploitation of impaired adults, the specific actions which must be undertaken by social services districts to implement this law, and the relationship between this law and other initiatives of the Department.

A description of the provisions of Chapter 395 is presented below. A copy of this law is included as Attachment A.

- o Section 1 of Chapter 395 repeals Sections 544 and 545 of the Executive Law, which pertained to the responsibilities of the State Office for the Aging's (SOFA) Ombudsman Program for the investigation and resolution of complaints made by, and on behalf of, residents of long term care facilities. These provisions are replaced by a new Section 544 of the Executive Law that contains more specific requirements for the Ombudsman Program which should increase the effectiveness of this program.
- o Section 1 of Chapter 395 also adds a new Section 544-b to the Executive Law which authorizes SOFA, in conjunction with the State Department of Social Services, to establish, within the amounts appropriated, an Elderly Education and Outreach Program. The purpose of this program is to provide education and outreach to the general public, including elderly persons and their families and caregivers, in order to identify and prevent the abuse, neglect and exploitation of the elderly. This provision of Chapter 395 also authorizes SOFA to award grants to area agencies on aging to establish local elderly abuse, education and outreach programs.

- o Section 2 of Chapter 395 amends Section 473.(1) of the Social Services Law (SSL) by including in the statutory definition of the PSA eligibility criteria the specific types of situations which fall within the scope of PSA. These situations include physical abuse, sexual abuse, emotional abuse, active, passive or self neglect and financial exploitation. Corresponding amendments are contained in Section 457.1(c) of the Department's regulations. These terms are defined in Section 4 of Chapter 395 (Section 473(6) of the SSL) and in Section 457.1(b) of the Department's regulations. While these definitions clarify the scope of PSA, they do not change the basic principles of PSA regarding the client's right to self determination and the authority and responsibility of PSA to pursue the appropriate legal interventions on behalf of impaired adults who are at risk of harm and unable to make decisions on their own behalf. A copy of the Department's revised regulations which reflect the provisions of Chapter 395 are included as Attachment B.
- o In addition, Section 2 of Chapter 395 amends Section 473(1)(c) of the SSL by deleting references to conservatorship and committeeship, which were repealed (except for existing conservators and committees) with the enactment of Article 81 of the Mental Hygiene Law. As you know, Article 81 sets forth the process for the appointment of guardians for mentally incapacitated adults. Section 2 of Chapter 395 also amended Section 473.1(f) SSL by deleting a reference to the Consolidated Services Plan and replacing it with a more appropriate reference to Department regulations as the authority for those protective services for adults which are not specifically delineated in statute.

Section 3 of Chapter 395 adds a new Section 473(5) to the SSL which requires that wherever a social services official (commissioner) or his/her authorized designee (PSA worker) has reason to believe that a criminal offense (felony or misdemeanor) has been committed against a person who is receiving PSA or who is being assessed for PSA, he/she must report this information to the appropriate police or sheriff's department. The law also requires a social services official or his/her designee to report this information to the district attorney's office when such office has requested this information to reported. This provision of law, which is reflected in Section 457.15 of the regulations, is consistent with the policy set forth in the model PSA/Police Protocol developed by the Department and the Division of Criminal Justice Services. This protocol, which was issued to the 58 local districts as 95 INF-10, and to the more than 600 police agencies in New York State, sets forth the responsibilities of PSA and the police regarding the investigation of situations involving allegations of abuse, neglect and/or exploitation of an impaired adult.

- o Section 4 of Chapter 395 adds a new Section 413(6) to the SSL which defines the terms physical abuse, sexual abuse, emotional abuse,

active neglect, passive neglect, self-neglect and financial exploitation. Please refer to Section 4 of Chapter 395 (Attachment A) or to Section 457.1(b) of the regulations (Attachment B) for the definition of these terms.

- o Section 5 of Chapter 395 adds a new Section 473-e to the SSL which establishes specific criteria for protecting the confidentiality of information which pertains to a person who is the subject of a Protective Services for Adults referral or application or a person who has or is receiving such services. This section of law also establishes criteria for disclosing such information to certain persons, including service providers, the courts, law enforcement officials and other legally entitled persons in certain situations. In addition, this section of law contains provisions for protecting the confidentiality of PSA referral sources and other collateral sources in certain situations. Please refer to Section 5 of Chapter 395 (Attachment A) or to Section 457.16 of the Department's regulations (Attachment 8) for the specific provisions on confidentiality.

III. **PROGRAM IMPLICATIONS**

The provisions of Chapter 395 should improve the ability of local social services districts to intervene in situations involving the abuse, neglect or exploitation of impaired adults who are unable to protect themselves from harm. The impact of the specific provisions of Chapter 395 are discussed below.

The clarification of the P5\ eligibility criteria and the related definitions of terms contained in Section 473(1) and (6) of the SSL (Sections 2 and 4 of Chapter 395) could result in a slight increase in the number of PSA referrals received by social services districts due to the increased public awareness about the scope of PSA that these amendments will generate. If funds are made available in subsequent fiscal years to implement the Elderly Education and Outreach Program authorized by Section 1 of Chapter 395, a larger increase in the number of PSA referrals can be anticipated.

The new Section 473(5) SSL, as added by Section 3 of Chapter 395, which requires a social services official or his/her designee, to make referrals to law enforcement agencies when there is a reason to believe that a criminal offense (felony or misdemeanor) has been committed against a person who is receiving or being assessed for PSA, should result in improved cooperation from police agencies and district attorneys. The Division of Criminal Justice Services (DCJS) has distributed memorandums on Chapter 395 to all police and sheriff's departments and district attorneys in New York State. These memorandums strongly encourage these agencies to establish cooperative working relationships with local districts to ensure the effective investigation of, and intervention in situations involving the abuse, neglect and exploitation of impaired adults. A copy of the memorandum sent to law enforcement agencies is included as Attachment C.

Improved cooperation from police agencies and district attorneys should increase the likelihood that persons who abuse, neglect or exploit impaired adults are prosecuted in accordance with the provisions of the Penal Law. Furthermore, in cases which do not result in prosecution, the increased involvement of law enforcement agencies in the investigation of these cases will provide important assistance for caseworkers which should result in more effective service interventions and outcomes.

For the most part, the confidentiality requirements regarding PSA records and related information, which are contained in the new Section 473-e of the SSL, are consistent with current Department policy set forth in 92 INF-026, "Confidentiality/Information Sharing for PSA Clients". However, the new law should result in more consistent application of these provisions throughout the state.

The most significant provision of the new confidentiality requirements is the one which permits the Department and local social services districts to withhold in whole, or in part, the release of any information in their possessions, which they are otherwise authorized to release if it is determined that:

- o the release of such information would identify a person who made a referral or an application for PSA on behalf of another person or cooperated in the investigation and assessment of a person's need for PSA; and
- o it is reasonably determined that the release of such information would be detrimental to the person's safety or interests.

Furthermore, the confidentiality of referral sources and other collateral contacts may be protected even when such information is being subpoenaed or otherwise sought as part of a legal proceeding. This should encourage the cooperation of individuals and other agencies in the PSA assessment and service delivery process, which should enhance a district's ability to address these situations.

IV. **REQUIRED ACTION**

A. Public Education and Outreach

1. Local districts must incorporate the definitions of physical, sexual and emotional abuse, passive, active and self-neglect and financial exploitation, which are contained in Section 473(6) SSL and Section 457.1(b) of the Department's regulations, into their mandated public education and outreach efforts. Resource materials which contain the new definitions include 95 INF-10, "PSA: Model Protocol Concerning the Working Relationship between Police and PSA"; a booklet, entitled: "Police and PSA: A Partnership" (publication #1332 or #1332 NYC); and "Adult Abuse: Hospital Trainers' Manual". These definitions also are consistent with definitions used by the American Association of Retired

Persons and the National Center on Elder Abuse. Including these definitions in public education efforts will maximize community understanding of the types of situations that fall under the jurisdiction of PSA. If the public education provisions included in Section 1 of Chapter 395 receive funding, the Department will ensure that statewide efforts in this area are coordinated with local district initiatives.

B. Mandatory Referrals to Law Enforcement

In order to effectively implement the provisions of Section 473(5) of the SSL and 457.15 of the Department's regulations, which require social services officials or their designees to make referrals to law enforcement agencies when they have reason to believe that a criminal offense has been committed against a person who is receiving or is being assessed for PSA, social services districts must implement the actions set forth below.

1. In determining whether there is a reason to believe that a criminal offense (misdemeanor or a felony) has been committed against a person who is being assessed for or receiving PSA, a social services official or his/her designee must review and evaluate, as necessary, the following:

- o information obtained from observing and interviewing the client;
- o information obtained from other persons, agencies, offices or organizations who are involved in providing services to the client, including the client's personal physician, other health care and services providers, law enforcement agencies and informal caregivers;
- o information obtained from others who have general knowledge about the client such as friends, neighbors, family members; and
- o information obtained from the person(s) who are suspected of committing a crime(s) against the client.

Please note that it is not necessary to contact each of the aforementioned information sources in every situation prior to making a report to the appropriate law enforcement agency(ies). The important point is that enough information must be gathered from one or more information sources so an informed decision can be made on whether or not to make a report to law enforcement. However, in all cases in which there is a reason to believe that a crime (felony or misdemeanor) has been committed against a person who is receiving or being assessed for PSA, a report must be made to the appropriate police agency and the district attorney's office, when such office has requested these reports.

When interviewing persons who allegedly have been abused, neglected or exploited to determine whether a crime may have been committed, PSA caseworkers must keep in mind that denial of mistreatment by victims and

abusers is common. Victims of abuse may feel ashamed, protective of the abuser, fearful of not being believed, afraid of retaliation, abandonment or institutionalization, or resigned to a situation they perceive as hopeless. Effects of victimization may include depression, fear, withdrawal, confusion, anxiety and guilt. In order to effectively deal with these situations, districts must be knowledgeable about the indicators of abuse and review guidelines set forth in 95 INF-10, "PSA: Model Protocol Concerning the Working Relationship Between Police and PSA", and the aforementioned Hospital Trainers' Manual on Adult Abuse. PSA and legal staff also must be knowledgeable of the crimes that may be present in situations involving the abuse, neglect and exploitation of impaired adults. A list of these crimes is contained in 95 INF-10.

2. Local district staff must initiate efforts to develop strong working relationships with police agencies to effectively implement this law. To assist the districts in this area a number of statewide initiatives have been undertaken by the Department and the DCJS including the development of the model protocol set forth in 95 INF-10, a training video and booklet entitled: "The Police and PSA: A Partnership", and the inclusion of a module on the 'Abuse of the Elderly and Other Impaired Adults" in the Bureau of Municipal Police training curriculum which is provided to all law enforcement officers throughout the state. Accordingly, districts must develop local procedures based on these materials. An important issue to be addressed in your procedures is the situations in which the police will file charges against a perpetrator when it is contrary to the wishes of the victim or when the victim is unable to give informed consent. As stated above, DCJS has sent a memorandum to all police agencies encouraging them to cooperate with local districts in the implementation of Chapter 395 and the model Police/PSA protocol. Consequently, we anticipate the police agencies will be receptive to overtures from PSA.

3. Districts also must establish working relationships with their District Attorney's office to effectively implement this law. An issue that must be addressed is whether the district attorney wants to receive reports of suspected crimes against persons being assessed for, or receiving PSA in all, or only in certain situations. Other issues which must be addressed are: the role of the district attorney's office in the investigation of situations involving the abuse, neglect and/or exploitation of impaired adults; the situations in which the district attorney will pursue prosecution or present a case to the Grand Jury on behalf of victims who are either willing or unwilling to pursue prosecution and who are unable to give informed consent; and the documentation needed to support a prosecution. We expect district attorneys to be responsive to outreach efforts by PSA, since DCJS has notified all district attorneys about the provisions of Chapter 395 and has urged them to cooperate with local districts and the police regarding the implementation of this law. Since most district attorneys have not had much exposure to PSA, districts as part of their mandated public education and outreach efforts, should make available specialized training on PSA for district attorneys and their staff.

4. Local staff also must be knowledgeable about 95 INF-20, "The Family Protection and Domestic Violence Intervention Act of 1994", regarding the types of crimes that will result in the arrest of the suspected perpetrator in adult abuse cases; the legal remedies that are available to abuse victims under this law; the role of PSA staff in utilizing the provisions of this law on behalf of their clients; and related service delivery issues.

5. Districts must advise Community Guardian Programs established pursuant to Section 457.12 of the Department's regulations and other entities under contract to a local social services district to determine the need for, or to provide or arrange for PSA, of their responsibilities to make reports to law enforcement agencies under this provision of law.

6. As indicated in 95 INF-47, "Protective Services for Adults: PSA Data Set", information on the number of reports made to police, sheriffs and district attorneys must be included on the PSA Semi-Annual Activity Reports.

C. Confidentiality/Information Sharing Requirements

1. PSA and legal staff must be knowledgeable about the confidentiality provisions set forth in Section 473-e of the SSL and Section 457.16 of the Department's regulations and 92 INF-26, "Confidentiality/Information Sharing for PSA Clients", so they can be correctly applied.

2. Information on these confidentiality provisions must be included in the public education and outreach initiatives of the districts to ensure that health, mental health and other service providers, law enforcement agencies, the courts and other potential resources are aware of these provisions and their implications. As indicated above, districts should make special efforts to educate police agencies and district attorneys on the provisions of this law.

3. Since many PSA clients lack the ability to give informed consent, districts must be aware of the provisions of the law concerning authorized representatives and their implications. As defined in Section 473-e(1)(b) of the SSL and Section 457.16(a)(2) of the Department's regulations, an authorized representative means a person named in writing by an individual who is the subject of a PSA referral or an application for PSA, and who is receiving or has received PSA, to be the subject's representative for purposes of requesting and receiving records, or a person appointed by a court or otherwise authorized in accordance with the law to represent or act on behalf of the subject. This would include a guardian, a power of attorney (PSA), or a legal

counsel for the person. Prior to the release of any information, districts must receive documentation of such person's authority. Authorized representatives who are not POA's, guardians or counsel must present notarized statements signed by the client, unless the district is otherwise assured that the authority is genuine. Local staff also must be aware that the authority of an authorized representative, other than a durable power of attorney or court appointed guardian, ceases with the clients' loss of ability to give informed consent.

If a district suspects that the client lacked the capacity to give informed consent at the time a power of attorney or durable power of attorney was named, the district must obtain evidence supporting this belief in order to withhold information. Information which could provide guidance as to a person's mental capacity at the time the consent was given includes a review of medical reports, agency records, mental health assessments and anecdotal observations provided by family, friends or other service providers.

In cases in which it is determined that a power of attorney is not acting in the best interests of a mentally incapacitated adult, a social services district, as part of its PSA responsibilities, must take the necessary action to remedy the problem, including pursuing the appropriate legal action, when warranted, to remove the agent. A civil action under common law grounds alleging breach of fiduciary responsibility is one way to remove a power of attorney who is not acting in the best interest of his client. Additional case law information on this topic is contained in 94 INF-4, "Article 81 MHL: Training Approval and Other Implementation Issues". Likewise, if a local district becomes aware that a Guardian is not acting in the best interest of a person who otherwise meets the PSA eligibility criteria, the district must take the necessary action to remedy the problem, including initiating a proceeding to revoke the guardianship pursuant to Section 81.35 of the Mental Hygiene Law when such an action is warranted.

4. Districts must establish procedures to ensure that the confidentiality of PSA referral sources, persons who apply for PSA on behalf of another person and persons who cooperate in the investigation and assessment of a persons need for PSA is protected in appropriate situations, as specified in Section 473-e(3) SSL and Section 457.16(e) of the regulations. For referral sources and collateral contacts which are from agencies and organizations which are part of the PSA service delivery network, this requirement can be met by informing them of the conditions under which their confidentiality can be protected as part of a district's public education and outreach efforts. For other referral sources and collateral contacts, such as family members, friends and neighbors, staff will have to ascertain if the confidentiality protections apply during their contacts with these individuals and advise them accordingly.

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V. **SYSTEMS IMPLICATIONS**

None.

VI. **EFFECTIVE DATE**

February 5, 1997

A handwritten signature in cursive script, reading "Rose M. Pandozy", written over a horizontal line.

Rose M. Pandozy
Deputy Commissioner
Services and Community Development

18 Pages of Attachments are not currently included here:

Attachment A - Chapter 395, Laws of NY 1995, S.2419-A, p. 1188-1195, 8 pages

Attachment B - Revised Regulations to Reflect Chapter 395, 8 pages

Attachment C - Division of Criminal Justice Services Memorandum To Law Enforcement Agencies, 2 pages, From Deputy Commissioner Stephen M. Bernardi, March 27, 1996