

## Legal Authorities for P&A Access

### Monitoring

The federal laws establishing the Protection and Advocacy System require that systems monitor the rights and safety of residents. Specifically, the federal laws authorize Disability Rights New Jersey to have reasonable unaccompanied access to facilities including all areas which are used by residents, are accessible to residents, and to programs and their residents at reasonable times, which at a minimum shall include normal working hours and visiting hours to monitor the compliance with respect to the rights and safety of residents.

42 C.F.R. § 51.42(c)(1)

45 C.F.R. § 1386.22(g)(2)

In general, the P&A has the authority to access locations where services and treatment is provided to individuals with disabilities to monitor compliance with respect to the “rights and safety” of the individuals with disabilities, or to speak with the individuals to provide information and training.

See 45 C.F.R. § 1326.27(c) PADD

42 C.F.R. § 51.42(c) PAIMI

Both the PAIMI and PADD regulations specifically allow for “inspecting, viewing and photographing” areas used by or accessible to individuals with disabilities. The PADD regulations further explicitly allow for video recording.

See 45 C.F.R. § 1326.27(c)

42 C.F.R. § 51.42(c)

The regulations provide authority for reasonable unaccompanied access to facilities including all areas which are used or accessible by individuals with disabilities.

The P&A has the authority to reasonable unaccompanied access, i.e.: without the presence of staff, to speak with individuals with disabilities to:

- Monitor compliance with respect to rights and safety of individuals with disabilities; and
- Provide information, training, and referral to programs addressing the needs of individuals with disabilities, including information about individual rights and P&A services.

45 C.F.R. § 1326.27(c) PADD

42 C.F.R. § 51.42(c) PAIMI

### Investigations

P&As have the authority to investigate abuse and neglect of individuals with disabilities if the incidents are reported to the system or if there is probable cause to believe the incidents occurred. These standards cover: investigations the P&A conducts upon receipt of a complaint; investigations conducted upon determination of probable cause of abuse or neglect. For purposes of investigations, the agency uses a definition of “abuse,” “neglect” and “probable cause” that is consistent with P&A authorizing legislation and the implementing regulations.

In order to conduct an investigation of abuse or neglect, the P&A shall have reasonable unaccompanied access to public and private:

- “service providers, programs in the State, and to all areas of the service provider’s premises that are used by individuals with developmental disabilities or are accessible to them”

45 C.F.R. § 1326.27(b) PADD (PAIR/PAAT/PATBI)

### **Disability Rights New Jersey**

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- “facilities and programs . . . which render care or treatment for individuals with mental illness, and to all areas of the facility which are used by residents or accessible to residents.”  
42 C.F.R. § 51.42(b) PAIMI

The P&A authority includes the opportunity to interview any individual with a disability, facility service recipient, employee, or other persons, including the person thought to be the victim of such abuse, who might be reasonably believed by the P&A to have knowledge of the incident under investigation.  
See 45 C.F.R. § 1326.27(b)  
42 C.F.R. § 51.42(b)

“Unaccompanied access” means “the opportunity to meet and communicate privately with . . . individuals regularly, both formally and informally, by telephone, mail and in person.”  
See 45 C.F.R. § 1326.27(d)  
42 C.F.R. § 51.42(d)

## **Access to Records**

1) A “client” of the system when the individual, or their guardian, conservator, or other legal representative has authorized access.

42 U.S.C. § 15043(a)(2)(I) (i)  
42 U.S.C. § 10805(a)(4)(A)

2) An individual with a disability

- i) cannot authorize access (incapacity, death, etc.);
- ii) there is no guardian, conservator, etc., or the guardian is the state; AND
- iii) through a complaint, monitoring, or other activities there is probable cause to believe the individual has been subject to abuse or neglect.

42 U.S.C. § 15043(a)(2)(I)(ii)  
42 U.S.C. § 10805(a)(4)(B)

3) An individual with a disability

- i) has a legal guardian
  - ii) through a complaint, monitoring, or other activities there is probable cause to believe the individual has been subject to abuse or neglect,
  - iii) the P&A has contacted the guardian
  - iv) The guardian is offered assistance; AND
  - v) The guardian fails or refuses to act on behalf of the individual. 42 U.S.C. § 15043(a)(2)(I)(iii);
- 42 U.S.C. § 10805(a)(4)(C)

## **Special Access Rule under PADD:**

Special access under PADD (PAIR/PAAT/PATBI):

The P&A can have immediate access (within 24 hours) to records without any consent if

- There is a determination of probable cause that the health or safety of an individual is in serious and immediate jeopardy or,
- In any case of death of an individual 42 U.S.C. § 15043(a)(2)(J)(ii)

## **Disability Rights New Jersey**