

115 CMR: DEPARTMENT OF DEVELOPMENTAL SERVICES

115 CMR 9.00: INVESTIGATIONS AND REPORTING RESPONSIBILITIES

Section

- 9.01: Scope, Authority and Purpose
- 9.02: Definitions
- 9.03: Notice of 115 CMR 9.00
- 9.04: Orientation and Training
- 9.05: Scope of Responsibilities of the Department's Investigations Unit
- 9.06: Filing of Complaint
- 9.07: Logging and Disposition of Complaint
- 9.08: Conduct of Investigation
- 9.09: Issuance of Decision Letter
- 9.10: Issuance and Implementation of Action Plan
- 9.11: Appeal
- 9.12: Role of Human Rights Committee
- 9.13: Records, Forms and Notices
- 9.14: Miscellaneous Provisions
- 9.15: Reporting Injury Resulting from Suspected Abuse by a Service Provider or Caretaker
- 9.16: Incident Reporting
- 9.17: Reporting Suspected Criminal Activity or Criminal Charges
- 9.18: Reporting Deaths

9.01: Scope, Authority and Purpose

(1) Scope.

- (a) 115 CMR 9.00 applies to all offices of the Department and all programs and services operated, licensed or contracted by the Department.
- (b) Any decision made pursuant to 115 CMR 9.00 shall be consistent with bargaining agreements and other provisions of labor law then in effect.

(2) Authority. 115 CMR 9.00 is adopted by the Department pursuant to M.G.L. c. 19B, §§ 1, 10, and 14, c. 123B, §§ 2 and 14, and c. 19C.

(3) Purpose. 115 CMR 9.01 through 9.04 is promulgated to promote the reporting and thorough investigation of allegations of incidents or conditions alleged to be illegal, dangerous or inhumane, and suspicious deaths, and other matters investigated pursuant to 115 CMR 9.00. If such allegations are substantiated, 115 CMR 9.01 through 9.04 is intended to provide for swift rectification of any conditions causing or contributing to the matter.

- (a) 115 CMR 9.00 does not provide for an adjudicatory hearing within the meaning of M.G.L. c. 30A, § 1(1). 115 CMR 9.00 is not intended to constitute an administrative remedy under the doctrine of exhaustion of administrative remedies or otherwise.
- (b) 115 CMR 9.00 is not a vehicle for complaints against individuals who have challenging behaviors addressed in their ISP, except where another individual is or potentially will be seriously harmed thereby.
- (c) 115 CMR 9.00 shall only apply to particular matters affecting the rights of individuals.

(4) Director of Investigations. There shall be a Director of Investigations responsible for overseeing the implementation of 115 CMR 9.00. Such Director shall have the authority to review all documentation received and generated by the Investigations Unit.

9.02: Definitions

For purposes of 115 CMR 9.00 *only*, the following terms shall have the following meanings:

Complainant means any person who files a complaint under 115 CMR 9.00.

115 CMR: DEPARTMENT OF DEVELOPMENTAL SERVICES

9.02: continued

Complaint means an allegation communicated to the Department of an incident, condition or other occurrence which meets any of the criteria set forth in 115 CMR 9.05, regardless of whether the allegation is also required to be reported to the DPPC under M.G.L. c. 19C.

Dangerous means poses or posed a danger or the potential of danger to the health and safety of an individual regardless of whether injury resulted.

Day means a working day and therefore shall exclude Saturdays, Sundays and legal holidays in the Commonwealth.

DPPC means the Disabled Persons Protection Commission.

Frivolous means utterly devoid of merit. All complaints filed pursuant to 115 CMR 9.05 through 9.14 are presumptively non-frivolous unless the senior investigator determines that the complaint

- (a) involves matters not within the scope of the Department's regulations, 115 CMR;
- (b) is clearly impossible on its face; or
- (c) asserts identical allegations to a complaint previously filed concerning the same parties and allegedly occurring at the same time, and that have proven to be unsubstantiated.

General Counsel means the person serving as chief legal counsel to the Commissioner as set forth in M.G.L. c. 19B, § 5.

Incapable means:

- (a) Having been determined in one's latest ISP to be incompetent in fact to make informed decisions in specific areas regarding the conduct of one's personal or financial affairs; or
- (b) Otherwise deemed by the human rights committee notified under 115 CMR 9.07(2) to be unable to effectively draft a written complaint, understand the complaint procedure, or effectually participate in the complaint process.

Inhumane means something that is or was demeaning to an individual or inconsistent with the proper regard for human dignity.

Medicolegal Death means:

- (a) a death of any individual if the Medical Examiner takes jurisdiction;
- (b) death that appears to have resulted from unusual or suspicious circumstances;
- (c) death which may have been caused by violence, including sexual abuse; or
- (d) any other death required by M.G.L. c. 38, § 6, to be reported to the Medical Examiner.

Party means:

- (a) the complainant;
- (b) the person or persons complained of or thought or found to be responsible for any incident or condition subject to investigation;
- (c) the guardian of the complainant or person complained of, if any;
- (d) any other individual harmed (or reasonably believed to be harmed) as a result of the incident or condition, and his or her guardian, if any;
- (e) the human rights committee of the involved provider.

9.03: Notice of 115 CMR 9.00

The regional, case management, or facility director, as applicable, shall have responsibility for enforcing the following:

- (1) Notice of 115 CMR 9.00 is included in information posted by every provider or otherwise provided to every individual served or his or her guardian, if any, within 30 days after the effective date of 115 CMR 9.00;

115 CMR: DEPARTMENT OF DEVELOPMENTAL SERVICES

9.03: continued

- (2) Every new resident of a Department-operated facility or a community-based residential program, or his or her guardian, if any, is notified upon admission of the existence of 115 CMR 9.00 and of his or her right to file a complaint under 115 CMR 9.00;
- (3) Such notification and blank copies of the forms for complaint and appeal under 115 CMR 9.00 are posted in a prominent place in plain sight in every unit of every facility, at every regional and case management team office; and at every community day and residential program; and
- (4) Such notification, forms, and copies of 115 CMR 9.00 are available at the facility, program, or case management team upon request by any person at any time.

9.04: Orientation and Training

- (1) All providers and directors shall provide to all service coordinators and direct contact staff working under their supervision an initial and subsequent, periodic orientation on the purpose and principal provisions of 115 CMR 9.00. Training shall include the Department's standard Abuse Protocol.
- (2) All providers shall provide to all individuals served an initial and subsequent, annual training on when and how to file a complaint or obtain assistance under 115 CMR 9.00. Such training shall include use of alternative means of communication where the individual is hearing or speech impaired or unable to communicate without assistance or an interpreter.
- (3) The Department shall provide initial and periodic training to all investigators in investigatory techniques, confidentiality issues and contemporary modes and principles of service delivery. Investigators shall not conduct investigations unless they have been trained in accordance with 115 CMR 9.04.
- (4) Only individuals hired by the Department as investigators shall conduct investigations, with the exception of such individuals as may be designated by the Commissioner or designee to conduct an investigation pursuant to 115 CMR 9.14(6). No individual hired by the Department as an investigator shall be made or permitted to undertake any additional job responsibilities not directly related to conducting investigations or preparing investigation reports and recommendations.

9.05: Scope of Responsibilities of the Department's Investigations Unit

- (1) The Department's Investigation Unit shall investigate or otherwise determine the merit or facts of any of the following, in accordance with 115 CMR 9.05 through 9.14:
 - (a) Any non-frivolous complaint of any other condition or incident involving an individual served by the Department which is
 1. mistreatment;
 2. illegal;
 3. dangerous; or
 4. inhumane.
 - (b) Medicolegal deaths of individuals served by the Department unless investigated by another authorized agency, except that the Director of Investigations may determine that investigation by the Department of such medicolegal deaths is in the best interest of the public or of the Department.
 - (c) Any matter for which the Commissioner or designee determines that investigation is warranted as in the best interests of an individual served by the Department, or in the best interests of the public or the Department.
- (2) Notwithstanding 115 CMR 9.05(1), the following shall be deemed to be outside the scope of the Investigations Unit's responsibilities:
 - (a) Allegations about the need for or appropriateness of services for an individual which the Senior Investigator determines can be resolved through the service planning (ISP) process, shall be addressed pursuant to the ISP regulations, 115 CMR 6.00.

9.05: continued

(b) Allegations about violations of program standards set forth in 115 CMR 7.00 which the Senior Investigator determines can be resolved through the licensing process, shall be addressed pursuant to regulations governing licensing inspections, 115 CMR 8.00.

9.06: Filing of Complaint

(1) Any individual or the human rights committee of any provider may file a complaint by communicating the complaint to the senior investigator for the region.

If asked to do so by an individual, a Department or provider employee shall assist the individual in making an oral or written complaint to the senior investigator or shall direct the individual to the appropriate staff who shall assist the individual in making an oral or written complaint.

(2) A Department or provider employee is mandated to and shall immediately file a complaint under 115 CMR 9.00 with the senior investigator for the region when he or she has reason to believe that there is a non-frivolous allegation of mistreatment, an illegal, dangerous, or inhumane condition or incident, or a medicolegal death of an individual. Failure to so file shall be grounds for appropriate disciplinary action. Where the employee has reason to believe that *serious physical or emotional injury resulted* to an individual from an act or omission by a caretaker, he or she is also mandated to file a report with the DPPC under M.G.L. c. 19C. A "caretaker" is the individual's parent, guardian, provider staff or other person or agency responsible for the individual's health or welfare, whether in the same home as the individual or any other day or residential setting.

(3) The senior investigator shall take steps to make certain that any complaint is accurately and completely reduced to writing on a complaint form.

(4) If the senior investigator concludes at any time during the course of the investigation that immediate action is necessary to protect the safety of welfare of an individual involved in the complaint, he or she shall immediately communicate, orally and in writing, the nature of the allegations and the identity of the alleged victim and the alleged abuser (if applicable) to the regional director, and the case management team director, or facility director.

(a) The Regional Director or designee shall notify the provider, who shall be responsible for taking immediate action;

(b) The head of any provider notified of a complaint alleging any physical abuse including any sexual activity between an individual and an employee of the provider shall immediately remove such employee from all direct contact responsibilities pending resolution or investigation of the complaint.

9.07: Logging and Disposition of Complaint

(1) Logging. When the complaint is filed, the senior investigator shall immediately log the complaint and assign its log number upon receipt.

(2) Notice of Complaint to Human Rights Committee Chair. In all cases, the senior investigator shall send a copy of the complaint and any investigator appointment to the chairperson of the appropriate human rights committee within three days of logging. The names of the reporter and the alleged abuser shall be redacted from the copy of the complaint so forwarded.

(3) Determination of Disposition.

(a) No later than three days after receipt of the complaint, the senior investigator shall determine, and set forth in a written Disposition Letter, whether the complaint shall be

1. dismissed;
2. resolved without investigation;
3. referred for resolution to the regional director as beyond the scope of the responsibilities of the Investigations Unit;
4. designated as requiring investigation but deferred pending investigation by outside authorities.
5. assigned to an investigator for active investigation; or

9.07: continued

- (b) A matter complained of may be resolved through a combination of dispositions.
- (c) The senior investigator shall send a copy of the Disposition Letter to the regional director, the case management team director or facility director, the complainant, and the chairperson of the Human Rights Committee for any provider involved, and shall note the manner of disposition in the log. A copy of the complaint, from which the names of the reporter and alleged abuser have been redacted, shall also be sent to the chairperson of the Human Rights Committee.
- (d) The regional director or designee shall notify the alleged victim, and the guardian of the alleged victim and the family unless the alleged victim knowingly objects.

(4) Dismissal. A complaint may be dismissed where:

- (a) it is frivolous;
- (b) the allegations were previously investigated and no new facts or evidence have materialized; or
- (c) the matter alleged is not within the scope of 115 CMR 9.05.

Where a complaint has been dismissed, the Disposition Letter required by 115 CMR 9.07(3)(a) shall set forth the reasons for the dismissal.

(5) Expedited Resolution. A complaint may be resolved by the Investigations Unit without investigation if the matter complained of involves no dispute as to the facts, or may be resolved fairly and efficiently within a five day period.

(6) Referral for Resolution to Regional Director. The senior investigator shall refer the matter alleged to the regional director for resolution where:

- (a) the matter alleged falls outside the scope of 115 CMR 9.05(1), but falls within the scope of other of the Department's regulations; or
- (b) the matter falls within the scope of 115 CMR 9.05(1), but
 1. appears to be or is alleged to be the result of implementation of, or the failure to implement, an individual's ISP; or
 2. concerns or alleges program conditions that are in violation of the Department's regulations on program standards, 115 CMR 7.00;

provided that, if the matter involves an allegation of a medicolegal death it shall be retained by the Investigations Unit for disposition by some manner other than referral to the regional director.

- (c) Within 14 days of receipt the Regional Director shall notify the complainant of how the matter will be addressed.
- (d) All complaints which are disposed of in this manner must be logged at the time of filing.

(7) Assignment of Investigator. If the senior investigator determines that the matter complained of cannot be fully resolved without investigation, the senior investigator shall, no later than 24 hours after receiving the complaint, prepare a written, dated appointment of an investigator (who, in the judgment of the senior investigator, is capable of proceeding with the investigation in an impartial and objective manner but who shall not be any of the persons directly involved in the incident or condition requiring investigation). The senior investigator shall upon appointment give the case file to the investigator.

(a) Change in Disposition. If after commencing the investigation in accordance with 115 CMR 9.08, the investigator determines that the complaint requires a disposition other than such investigation, he or she shall return the investigation file to the senior investigator, within one day of reaching such determination, together with a memorandum supporting the recommended change in disposition.

1. The senior investigator must determine within one day of receiving the investigation file and memorandum whether a change in disposition is warranted.
2. Any resulting change in disposition shall be noted in the log and generate a Change in Disposition Letter. Such Change in Disposition Letter shall be issued and sent to the parties and any human rights committee previously notified no later than one day after the senior investigator receives the investigation file and memorandum.

9.07: continued

(8) Deferral of Investigation. If the matter has also been reported to the DPPC in accordance with 115 CMR 9.16, or has been reported to and is being investigated by criminal justice or other outside authorities, the senior investigator may determine that the Department's investigation pursuant to 115 CMR 9.08 shall be deferred pending completion of the DPPC investigation pursuant to M.G.L.c. 19C or the other authorities. The decision to defer an investigation shall be made in accordance with 115 CMR 9.14(7).

9.08: Conduct of Investigation

(1) Training Manual. All investigations shall be conducted in accordance with 115 CMR 9.08 and with any standards for the conduct of investigations set forth in the Department's training manual for investigators, as approved by the Director of Investigations.

(2) Interviews.

(a) The investigator shall hold a private, face-to-face interview to discuss the complaint with the following individuals, preferably, but not necessarily, in the following order:

1. the complainant; however, where the complainant is the victim, the investigator may conclude that under the circumstances interview of the complainant would cause further harm and therefore shall not occur;
2. the victim, if not the complainant; however, the investigator may conclude that under the circumstances interview of the victim would cause further harm and therefore shall not occur;
3. any known eye-witnesses to the matter alleged;
4. any other person the investigator deems appropriate;
5. the person(s) complained of or thought to be responsible for the matter alleged.

(b) In scheduling face-to-face interviews (and again at the interview but only with respect to the person being interviewed), the investigator shall inform the person to be interviewed and his or her guardian, if any (unless the guardian is the person complained of or the individual otherwise objects):

1. of the existence of the complaint, the general nature of the allegations and his or her role as the investigator; but the investigator shall not inform the person to be interviewed of the identity of the complainant;
2. that he or she may be represented by one of the following: an attorney, legal advocate, union representative, or competent lay person of his or her own choice who is 18 years or older and who is not otherwise involved in the investigation;
3. that he or she has an obligation to cooperate in the investigation and that failure to cooperate may result in disciplinary action, including termination, or in departmental action adverse to the provider.

(c) Whenever a person refuses to be interviewed, the investigator shall set forth such refusal in the investigation report. If the investigator does not interview the victim for reason other than refusal to be interviewed, the investigator shall set forth in the investigation report the reasons why such interview did not occur, including the basis for any determination that the interview would cause harm.

(3) Review of Pertinent Documents. As part of the investigation the investigator shall review and shall have the right to obtain copies thereof, all pertinent documents, including, but not limited to:

- (a) medical or clinical records pertaining to any injury, if obtainable;
- (b) any incident report filed pursuant to 115 CMR 9.15;
- (c) relevant portions of the case records of any individual served and involved in the allegations;
- (d) any restraint forms completed in connection with the matter under investigation;
- (e) relevant personnel records;
- (f) any relevant policies, procedures or guidelines of the Department and the provider involved or employer of the person complained of;
- (g) photographs of any injury or property damage, if taken;
- (h) previous related cases complained of or investigated pursuant to M.G.L. c. 19C or 115 CMR 9.05 through 9.14;
- (i) any other document deemed appropriate by the investigator, if obtainable.

Providers shall make all records available to the investigator.

9.08: continued

(4) Site Visit. The investigator shall visit and inspect the site where the matter to be investigated occurred or exists, as a means of gathering additional evidence and gaining a better understanding of the context of the allegations.

(5) Additional Inquiries. The investigator may employ such other investigatory techniques as deemed appropriate in his or her professional judgment under the circumstances, including consultation with clinical experts.

9.09: Issuance of Decision Letter

(1) Immediate Protective Action. Prior to completion of the investigation and the issuance of the Decision Letter, the senior investigator shall notify the regional director by phone and in writing when, in his or her judgment, the information uncovered in the course of the investigation warrants immediate interim action to protect the safety, dignity, or welfare of the individual(s) involved. The director shall take or require such action as necessary for the immediate safety, dignity, or well-being of the individual(s).

(2) Time Line for Issuance of Decision Letter.

(a) For complaints concerning individuals, staff, or conditions at any of the facilities or Department operated ICF's/MR, the results of all investigations must be reported to the regional director within five days of the incident or condition, in accordance with the requirements of Title XIX of the Social Security Act.

(b) For all other complaints, the results of all investigations must be reported and a Decision Letter delivered to the regional director, and case management team or facility director, within 30 days of the investigator's appointment. The immediately foregoing provision does not apply to investigations conducted by the Department on behalf of the DPPC, the initial responses of which must be reported to the DPPC and to the regional director and CMT or facility director within ten days. However, a Decision Letter must be delivered to the relevant officials within 30 days of the investigator's appointment to conduct an investigation under 115 CMR 9.00, regardless of any DPPC investigation.

(3) Preparation of Decision Letter.

(a) For Matters that are Investigated.

1. Upon completion of the investigation, the investigator shall prepare and deliver to the senior investigator an investigation report, which shall, when adopted as the official investigation report, serve as the basis for the Decision Letter.

a. The investigation report shall describe the investigation and contain the investigator's findings of fact and conclusions.

b. The senior investigator shall review the investigation report for thoroughness, accuracy, and quality.

c. The senior investigator's signature on the investigation report signifies that the report has been officially adopted as thorough, accurate, and of acceptable quality.

d. The senior investigator may conclude that an investigation report prepared as part of a DPPC investigation or as part of an investigation by other outside authorities thoroughly and accurately addresses all the issues raised by the allegations and may be adopted as the Department's own official investigation report.

2. No later than 30 days after assignment of the investigator, the senior investigator shall send a dated Decision Letter, bearing the senior investigator's signature, and an investigation report to the regional director, and the case management team director or facility director.

3. The Decision Letter shall summarize the complaint, the evidence considered by the investigator and the findings of facts and conclusions contained in the official investigation report.

4. The Decision Letter is separate and apart from any letter or report required by M.G.L. c. 19C to be forwarded to the DPPC.

9.09: continued

- (b) For Matters Resolved by Expedited Resolution.
 - 1. Within six days after receipt of a complaint resolved by expedited resolution, the senior investigator shall issue a dated Decision Letter, bearing the senior investigator's signature, to the regional director, and the case management team director or facility director.
 - 2. The Decision Letter shall summarize the complaint, the undisputed facts of the matter and the senior investigator's conclusions as to what occurred.
- (c) Investigations of Medicolegal Deaths. In the case of a medicolegal death, a copy of the official investigation report and the Decision Letter shall also be submitted to the General Counsel and the Commissioner.

9.10: Issuance and Implementation of Action Plan

- (1) Designation of Staff Person. The regional director or his or designee shall designate the staff person responsible for preparing and overseeing implementation of an Action Plan. The designation shall be made within two days of the regional director's receipt of the Decision Letter.
- (2) Preparation and Issuance of Action Plan. Within ten days of being designated, the designated staff person shall review the Decision Letter and the investigation report, or the Disposition Letter, discuss the matter with any of the persons involved whom he or she may think appropriate, and prepare and formally issue a written, signed and dated Action Plan.
 - (a) Where the matter has been investigated by the Department or an outside authority, such Action Plan shall:
 - 1. state the specific actions to be taken in response to the Decision Letter, the date(s) such action are to be implemented and the person(s) responsible for implementation;
 - 2. notify the parties of their right to request reconsideration under 115 CMR 9.10(6) and their right of appeal under 115 CMR 9.11.
 - (b) Where the matter has been resolved by expedited resolution, such Action Plan shall:
 - 1. state the specific actions to be taken, if any to address the matters raised in the complaint, the date(s) such action are to be implemented and the person(s) responsible for implementation;
 - 2. notify the parties of their right to request reconsideration under 115 CMR 9.10(6) and their right of appeal under 115 CMR 9.11.
- (3) Distribution of Action Plan and Decision Letter.
 - (a) The designated staff person shall, within one day of completion of the Action Plan, send copies of the Action Plan and the Decision Letter to:
 - 1. the parties, (or their representatives, if any); with a notice of the opportunity to request reconsideration pursuant to 115 CMR 9.10(6) and a notice of appeal rights;
 - 2. the head of any provider responsible for implementing the Action Plan;
 - 3. the human rights committee of the provider;
 - 4. any service coordinator assigned to the individual;
 - 5. the Director of Investigations; and
 - 6. the Division of Quality Assurance of the Department's Office of Quality Enhancement.
 - (b) The designated staff person shall also send a copy of the Action Plan to the regional director, case management team director or facility director, senior investigator and investigator.
 - (c) Where the matter has been investigated, the senior investigator shall provide to the parties a copy of the official investigation report, with identifying information redacted, in accordance with M.G.L. c. 66A, within five days of receipt of a request.
- (4) Request for Reconsideration. Any party aggrieved by the Action Plan or the Decision Letter, may, within five days of receipt of the Action Plan, file a request for reconsideration with the regional director, specifying how the Action Plan or Decision Letter is deficient. The regional director shall send a copy of the request to the designated staff person, the Senior Investigator, and all other parties.
 - (a) Receipt of the Action Plan will be presumed to have occurred within seven days of mailing.

9.10: continued

(b) Upon receipt of a request for reconsideration, the regional director shall consider the deficiencies alleged, proceeding as if he or she has just received the Decision Letter as provided in 115 CMR 9.09(3)(b).

(5) Implementation of Action Plan. Any individual or provider required to implement corrective action or protective services set forth in the Action Plan shall provide documentation to the designated staff person that the corrective action or protective services have been implemented in accordance with the time-lines set forth in the Action Plan. The designated staff person is responsible for enforcing this provision.

9.11: Appeal

(1) Grounds for Appeal.

(a) Any party, except an employee who chooses to grieve a matter as specified in 115 CMR 9.11(3), may appeal the following on any of the grounds stated in 115 CMR 9.11(1)(b):

1. a disposition other than assignment of an investigator or deferral of investigation pending investigation by outside authorities;
2. the Decision Letter; or
3. the Action Plan.

(b) The grounds for appeal shall be as follows:

1. The disposition selected was not in accordance with 115 CMR 9.07;
2. The Decision Letter is based on an investigation which was not conducted in accordance with 115 CMR 9.08;
3. The Decision Letter is based on an investigation report that does not comply with 115 CMR 9.09(3)(a)1.;
4. The Decision Letter reaches conclusions not supported by the official investigation report;
5. The Decision Letter fails to reach conclusions compelled by the official investigation report;
6. The Decision Letter reaches conclusions not supported by the undisputed facts;
7. The Decision Letter fails to reach conclusions compelled by the undisputed facts;
8. The investigation report on which the Decision Letter rests contains findings that are not supported by the weight of the evidence;
9. The Action Plan does not sufficiently assure the safety, dignity or welfare of the individual(s) involved in the complaint;
10. The Action Plan calls for action which is not supported by the Decision Letter and which is to the detriment of any person involved in the complaint;

(2) Appeal Procedure.

(a) Any party, except an employee who chooses to grieve the matter as specified in 115 CMR 9.11(3), who is aggrieved by the manner of disposition of a complaint, by the Decision Letter or by the Action Plan may, within ten days of receipt of the Action Plan, denial of a request for reconsideration, or a determination after reconsideration (whichever is later) file a notice of appeal with the Commissioner.

1. Receipt of decisions which may be appealed will be presumed to have occurred within seven days of mailing.
2. Notices of appeal filed prior to issuance of the Action Plan become valid only upon issuance of the Action Plan.

(b) Within three days of receiving a valid notice of appeal, the Commissioner shall send a copy of the notice to the senior investigator, who shall, within one day of receiving it, send copies of the notice to the other parties and their representatives, and to the regional director, the designated staff person and the investigator.

(c) Within three days of receiving the notice of appeal, the senior investigator shall forward the entire case file to the Commissioner.

(d) Within 30 days of receiving the case file the Commissioner shall review the notice and the investigation file, discuss the matter with any of the persons involved whom he or she may think appropriate, and prepare and distribute a written, dated Appeal Decision which shall do any combination of the following:

9.11: continued

1. Affirm or reject the manner of disposition, with a statement of reasons, and, if appropriate, specify a different manner of disposition;
 2. Affirm, modify or reject the Action Plan, with a statement of reasons. The regional director shall then deliver an Addendum to the Action Plan to the Commissioner within the following five days. Upon receipt thereof, the Commissioner shall proceed as provided above in 115 CMR 9.11(2)(c), except that he or she shall make and distribute his or her decision within five days of receipt of the Addendum.
 3. Affirm the Decision Letter in whole or in part with respect to the findings or conclusions contained therein, with a statement of reasons;
 4. Reject any findings or conclusions contained in the Decision Letter, with a statement of reasons.
 - a. The Commissioner may send the matter back to the investigator for further investigation where appropriate. In that event, the Commissioner shall so notify the senior investigator, who is then responsible for seeing that the further investigation is completed.
 - b. Where the matter has been sent back for further investigation, the senior investigator is responsible for seeing that an Addendum to the Decision Letter is delivered to the regional director the 15 days following receipt of receipt of the Commissioner's decision. The regional director is then responsible for seeing that an Addendum to the Action Plan as necessary to reflect the Addendum to the Decision Letter are delivered to the Commissioner within the following five days.
 - c. Where the Commissioner rejects any portion of the Decision Letter but does not require further investigation, the regional director is responsible for delivering an Addendum to the Action Plan to the Commissioner within the following five days.
 - d. Upon receipt of any Addenda, the Commissioner shall proceed as provided in 115 CMR 9.11(2)(c), except that he or she shall make and distribute his or her decision within five days of receipt of the Addenda.
 - e. Each party and his or her chosen representative shall be invited to any informal inquiry convened by the Commissioner.
 - f. The Commissioner shall distribute copies of his or her decision to the parties, and to the regional director and the senior investigator, and shall also return the case file to the senior investigator.
 - g. All corrective actions and protective services required by the Action Plan shall be implemented pending appeal.
 - h. The decision of the Commissioner shall be final.
- (3) Any employee who is a party aggrieved by the manner of disposition of a complaint, by the Decision Letter or by the Action Plan, and who has a right to a hearing under a collective bargaining agreement or civil service law, may grieve the matter as specified therein. Where the employee elects such procedures, they shall be the exclusive procedures for resolving the employee's grievance. The invocation of such procedures shall not alter the Department's responsibility under 115 CMR 9.00 to respond to, investigate, and make decisions concerning complaints and appeals initiated by or concerning individuals it serves.

9.12: Role of Human Rights Committee

- (1) Responsibilities for Incapable Individuals or Individuals who Require Assistance to Communicate.
 - (a) The human rights committee shall use its best effort to see that an incapable individual, or an individual determined in his or her latest ISP to be unable to communicate without assistance or an interpreter, who is involved in the complaint is represented by an independent attorney or advocate, if necessary or appropriate, in order to ensure that his or her interests are adequately protected. A list of such attorneys or advocates shall be maintained by the human rights committee and made available to any individual when requested.

9.12: continued

Where the human rights committee fails to act to obtain representation for an individual or to advocate on his or her behalf, the investigator may request the assistance of the service coordinator in ascertaining the capability of the individual and seeking an attorney or advocate to represent the individual.

(b) At the request of an individual, or on its own motion, where appropriate, the human rights committee shall assist an individual in filing a complaint.

(2) Party to Complaints or Proceedings. The human rights committee of a provider shall be a party to all complaints involving individuals served by the provider, and, as such, it shall receive copies of all reports, appeals, notices and other significant documents relevant to the resolution of the complaint and be able to appeal any finding or decision on the grounds that there has been a violation of 115 CMR 9.05 through 9.14.

(3) Human Rights Committees shall treat as confidential all information and documents which they receive in their capacity as a party.

9.13: Records, Forms and Notices

(1) Case File.

(a) Contents of Case File. A file, known as the case file shall be kept for each complaint received by the Department. The case file shall include:

1. the complaint and the public log number assigned;
2. the Disposition Letter;
3. a copy of the memorandum appointing the investigator;
4. the names of all persons interviewed and the dates of those interviews;
5. either taped or written interviews or summaries thereof;
6. a summary of documents reviewed;
7. copies of notes or memoranda generated by the investigation;
8. a copy of the official investigation report; and any such report shall be admissible in any employee disciplinary hearing related to the investigation;
9. the Decision Letter;
10. the Action Plan;
11. documentation of corrective action or protective services implemented; and
12. all documents relating to any appeal.

(b) Confidentiality. Any person who is mentioned in the case file shall have access to, and may have a copy of, that portion of the record in which he or she is mentioned, consistent with the Fair Information Practices Act, M.G.L. c. 66A, § 2(i).

1. Union representatives or legal representatives (in their representative capacity) may obtain a redacted copy of the official investigation report for a scheduled disciplinary, grievance, or appeal inquiry, upon presentation of written authorization from the employee for release.

2. The Commissioner may determine that publicity accorded the investigation is so extensive that mere removal of identifying data would be insufficient to protect existing privacy interests, or that disclosure would probably so prejudice the possibility of an effective investigation by law enforcement agencies that such disclosure would not be in the public interest. In such event, the Commissioner shall file in the case file a statement of this determination, with a specification of the document(s) to be withheld as an exemption to the definition of public records set forth in M.G.L. c. 4, § 7, cl. 26, and the conditions of withholding and a brief statement of reasons. Such withholding shall be governed by the Fair Information Practices Act, M.G.L. c. 66A, § 2(i).

3. The identity of a complainant shall not be disclosed by any provider involved, assuming it has knowledge of such identity, or by the Department, except to representatives of investigating state agencies (including the Department) or local police or the district attorney's office as necessary for investigation, review, and monitoring of the subject matter of the complaint.

(c) Custody. The senior investigator shall be the custodian of the case file, provided that:

1. where a matter is actively investigated, the investigator shall be given authority to access the case file; and

9.13: continued

2. where the matter is appealed, the Commissioner shall hold the case file until the appeal is completed.
- (2) Public Log. Each senior investigator shall, for his or her region, maintain a public log of medicolegal deaths and all complaints filed pursuant to 115 CMR 9.06, in such form as the Commissioner may from time to time prescribe.
- (a) The log shall not include personal identities, and shall be a public record, available for inspection and copying by members of the public as provided in M.G.L. c. 66, § 10.
 - (b) The log will include a statement as to whether the complaint was substantiated, whether an appeal was filed, and the outcome of any appeal.
 - (c) The log shall note the manner of disposition of each complaint.
 - (d) The senior investigator shall forward all new information posted in his or her log each month to the office of the Director of Investigations, in which place the information shall be placed in parallel logs or databases and shall be similarly accessible to the public.

9.14: Miscellaneous Provisions

- (1) Individual, Complainant and Witness Protection. The regional director or any official before whom a complaint or appeal is pending shall take immediate action pending investigation as he or she deems warranted to protect the health, and safety of any individual, complainant or witness. Any such action taken shall be documented and the documentation forwarded to the senior investigator for placement in the case file.
- (2) Obstruction or Retaliation.
 - (a) Termination of Employment. Obstruction by any employee of an investigation properly conducted under 115 CMR 9.00, or retaliation by any employee against any person for making a complaint, complying with 115 CMR 9.00, or cooperating with an investigation, shall be grounds for discipline of such employee, up to and including dismissal.
 - (b) Revocation of Contract, License, or Other Action. Obstruction by a provider of an investigation properly conducted under 115 CMR 9.00, or retaliation by any provider against any person for making a complaint, complying with 115 CMR 9.00, or cooperating with an investigation, shall be grounds for adverse action against the provider, including without limitation revocation of the Department's contract with such provider or revocation of the provider's license.
- (3) Disqualification of Official.
 - (a) The regional director, the senior investigator, the investigator, or any other official with authority to act on a complaint shall disqualify himself or herself from so acting whenever the next higher official as set forth in 115 CMR 9.14(5) concludes, or he or she concludes that he or she cannot act on the matter impartially and objectively, in fact or in appearance.
 - (b) In the event of such a conclusion, the official shall prepare and forward within one day of receiving notice of the matter, a written, dated memorandum of his or her disqualification and the reasons therefor to the next higher official, as set forth in 115 CMR 9.14(5), who shall, within one day of receipt thereof, take such steps as are necessary to ensure the processing of the complaint in an impartial, objective manner.
 - (c) When a senior investigator has information leading him or her to believe that an investigator assigned to conduct an investigation cannot act impartially and objectively, in fact or in appearance, he or she shall disqualify the investigator and assign another. Such disqualification shall be documented in the case file.

115 CMR: DEPARTMENT OF DEVELOPMENTAL SERVICES

9.14: continued

(4) Request for Extension. The investigator, or any other official acting pursuant to 115 CMR 9.05 through 9.14 may request an extension of any time limit provided herein with the permission of the next higher official as set forth in 115 CMR 9.14(5), upon a showing of necessity and that the delay will not pose a threat to the safety or security of the individual involved. A request for such extension shall be in writing, with copies to the other parties and to the investigator, senior investigator and director (regardless of who is seeking the extension and who is the next higher official), and shall explain why an extension is needed and propose a new time limit which does not unreasonably postpone a final resolution of the matter. Such request shall be submitted to and acted upon by the next higher official prior to the expiration of the original time limit, who shall notify the parties.

(5) Next Higher Official. For purposes of forwarding a memorandum of disqualification, or requesting an extension of time for any official in Column 1, the memorandum or request shall be sent to the corresponding official in Column 2:

<u>Column 1</u>	<u>Column 2</u>
Investigator	Senior Investigator
Senior Investigator	Deputy Director of Investigations
Case Management Director or Facility Director	Regional Director
Regional Director	Deputy Commissioner

(6) Other Investigations. The investigation by the Department provided for by 115 CMR 9.05 through 9.14 is independent of any investigation conducted by or on behalf of the police, the District Attorney, or other outside authorities, including the DPPC. 115 CMR 9.00 is not intended to lessen the independent authority given to those entities, including the inherent authority granted to the Department by M.G.L. c. 19B, as exercised by the Commissioner.

(a) The senior investigator may defer the Department investigation until other authorities have completed their investigation, in recognition that some investigations require the highly technical skills of law enforcement personnel, or in recognition of the need in some circumstances to avoid duplicative investigative effort. The senior investigator must determine

1. that a delay will likely not adversely affect the immediate health and safety of individuals served by the Department; and
2. that the results of the investigation by outside authorities is likely to affect the conclusion of the Department's investigation or that the investigation by outside authorities will likely address or resolve all relevant issues.

(b) The senior investigator is responsible for directing overseeing collaboration and communication with other investigating authorities, to both expedite the investigation process and to enhance the possibility of successful prosecution in cases of a substantiated felony.

(c) Where the senior investigator has deferred Department investigation, he or she may at any time change the disposition of the matter to active investigation, if he or she determines that investigation by the Department will not compromise or duplicate outside investigations, or will not likely be affected by the results of such outside investigations. Any change in disposition to active investigation requires a Change of Disposition Letter and must be noted in the log.

(7) Annual Audit. The Office of Quality Enhancement shall conduct an annual systems audit to determine the effectiveness of the investigations procedures contained in 115 CMR 9.00 and to monitor their implementation.

9.15: Reporting and Investigating Injury Resulting from Suspected Abuse by a Service Provider or Caretaker

(1) If a Department or provider employee has reasonable cause to believe that serious physical (including fatal) or emotional injury of a person with disabilities, including any individual served, resulted from an act or omission by a service provider or caretaker, whether by act or omission, he or she shall:

- (a) immediately call the DPPC and file a complaint under M.G.L. c. 19C, where the suspected victim of the abuse is 18 years of age or older, but under 60 years of age.
- (b) immediately call the Department of Social Services and file a report under M.G.L. c. 119, § 51A, where the suspected victim is under 18 years of age.
- (c) immediately call the Department of Elder Affairs and file a report under M.G.L. c. 19A, § 15, where the suspected victim is 60 years of age or older.
- (d) immediately call the Department of Public Health and file a report under M.G.L. c. 111, § 72G, where the suspected victim resides in a nursing home or similar establishment required to be licensed or certified by the Department of Public Health.

A "caretaker" is the person's parent, guardian, provider staff or other person or agency responsible for the person's health or welfare, whether in the same home as the person or any other day or residential setting.

(2) Reports filed with the DPPC shall be investigated in accordance with the regulations and procedures of that agency. The filing of a report with the DPPC does not negate or satisfy the duty to file complaints under 115 CMR 9.06.

9.16: Incident Reporting

(1) All incidents involving individuals served by the program which result in any of the following shall be reported by the program:

- (a) physical injury which requires any medical treatment beyond routine first aid;
- (b) emotional harm;
- (c) significant property destruction;
- (d) potential physical or emotional harm;
- (e) police involvement;
- (f) mistreatment.

(2) The staff person observing the incident must complete a written report of the incident within two hours of its occurrence, and file it with the service coordinator(s) assigned to the involved individual(s), the head of the provider, and the family or guardian, if any, within 24 hours.

(3) The incident report shall include:

- (a) the person(s) involved;
- (b) the date, time, and location of the incident;
- (c) events preceding the incident;
- (d) immediate action taken;
- (e) any witnesses to the incident
- (f) the extent of injury to the individual, if any, and any medical health care professional's comments on treatment, if medical treatment was necessary;

(4) Where an individual served by the program has a physical injury of unknown origin requiring medical treatment beyond routine first aid, the staff person first observing the injury shall complete and file the incident report.

- (a) The incident report in this instance shall indicate that the injury is of unknown origin.
- (b) The incident report for an injury of unknown origin shall address the elements listed in 115 CMR 9.16(3), but shall address these elements in terms of the discovery of the injury rather than in terms of the occurrence of an incident.

9.16: continued

(5) If the reporting staff person or head of the provider has reasonable cause to believe that serious physical or emotional injury of an individual served resulted from abuse or neglect, whether by act or omission, including non-consensual sexual activity, he or she shall *also*:

- (a) immediately call the DPPC and file a complaint under M.G.L. c. 19C, where the suspected victim of the abuse is 18 years of age or older, but under 60 years of age.
- (b) immediately call the Department of Social Services and file a report under M.G.L. c.119, § 51A, where the suspected victim is under 18 years of age.
- (c) immediately call the Department of Elder Affairs and file a report under M.G.L. c.19A, § 15, where the suspected victim is 60 years of age or older.
- (d) immediately call the Department of Public Health and file a report under M.G.L. c. 111, § 72G, where the suspected victim resides in a nursing home or similar establishment required to be licensed or certified by the Department of Public Health.

(6) Where the head of the provider has reasonable cause to believe that a felony has been committed in connection with an incident under 115 CMR 9.16(1), he or she shall file a report with the local police and district attorney.

(7) If an incident meets, or creates or results in a condition meeting, the requirements of 115 CMR 9.05, the head of the provider shall file a complaint with the Department under 115 CMR 9.06.

(8) Upon receipt of the incident report, the service coordinator shall prepare a written recommendation advising whether adjustments to the program or steps necessary to prevent similar incidents in the future are indicated, whether any component of the individual's ISP including behavior plans should be modified, and whether a complaint should be filed under 115 CMR 9.06, assuming one has not already been filed.

- (a) The service coordinator shall send the recommendation to the facility director or designee, where the program is connected to one of the facilities, to the regional director where the program is a state operated community program, or to the case management team director with a copy to the head of the provider in all other cases. A copy of the recommendation shall become part of the individual's record.
- (b) Where the service coordinator has reason to believe that serious physical or emotional injury of an individual resulted from abuse or neglect, whether by act or omission, including non-consensual sexual activity, and where the incident has not been reported as required by 115 CMR 9.16(5), the service coordinator shall make the required report.

(9) In cases where the dignity or rights of the individual(s) involved are in question, the service coordinator shall refer the matter to the provider's human rights committee.

(10) The identity of persons making reports of mistreatment, or making reports pursuant to 115 CMR 9.16(5), shall not be disclosed by the provider or the Department, except to representatives of investigating state agencies (including the Department) or local police or the district attorney's office as necessary for investigation, review, and monitoring of the subject matter of the report.

9.17: Reporting Suspected Criminal Activity or Criminal Charges

(1) The investigator shall notify the police, the District Attorney and the General Counsel whenever he or she has reason to believe that a felony has been committed, provided that such notification shall not be made by the investigator unless approved by the senior investigator.

- (a) In addition, the investigator shall notify the General Counsel and the Commissioner of Public Safety whenever there is:
 - 1. injury by gunshot or bullet wound, powder burn or any other injury due to the discharge of a firearm; or
 - 2. injury due to a knife or other sharp or pointed instrument if a criminal act may have been involved.

115 CMR: DEPARTMENT OF DEVELOPMENTAL SERVICES

9.17: continued

- (2) The director shall immediately notify the General Counsel when:
 - (a) An individual served brings criminal charges against a Department or provider employee;
 - (b) Criminal charges are brought against an individual served;
 - (c) A Department or provider employee or individual served is indicted because of any action required to be investigated by 115 CMR 9.00;
 - (d) An employee or individual served is convicted on the charges or indictment described in 115 CMR 9.17(2)(a), (b), or (c).
- (3) The reporting responsibilities set forth in 115 CMR 9.17, are in addition to all other reporting responsibilities set forth in 115 CMR 9.00.

9.18: Reporting Deaths

- (1) All deaths of individuals, regardless of cause, and regardless where the individual resided immediately prior to death, shall be reported to the Office of the General Counsel in the manner directed by that office.
- (2) Any Department or provider employee having reason to believe that an individual died a medicolegal death shall:
 - (a) file a complaint under 115 CMR 9.06 and 9.16; and
 - (b) notify the Medical Examiner, unless he or she has already taken jurisdiction of the case, who is required to inquire into the cause and circumstances of death and to take custody of the dead body if he or she is of the opinion that death may have resulted from violence or unnatural causes.

REGULATORY AUTHORITY

115 CMR 9.00: M.G.L. c. 19B, §§ 1, 10, and 14; c. 123B, §§ 2 and 14 and c. 19C.