

107 CMR: MASSACHUSETTS REHABILITATION COMMISSION

107 CMR 1.00: THE APPEAL PROCESS

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101: Scope and Purpose

107 CMR 1.00 governs the appeal process for individuals who are applicants or who are receiving vocational rehabilitation program services.

1.02: Definitions

The definitions in 107 CMR 1.02 apply to terms used throughout 107 CMR 1.00. As used in 107 CMR 1.10 through 1.17 these definitions supplement 801 CMR 1.02(2)(b).

Adjudicatory Proceeding shall also be taken to mean a fair hearing and the terms shall be used interchangeably. 801 CMR 1.02 of Standard Adjudicatory Rules of Practice and Procedure shall have applicability for proceedings held by the Commission.

Appeals Coordinator is the Commission employee who is responsible for scheduling informal administrative reviews, fair hearings, and referring requests for mediation to the Massachusetts Office of Dispute Resolution as well as communicating with individuals, advocates, family members and Commission staff about appeal and mediation requests.

Authorized Representative is an individual's parent, guardian or any person whom the individual designates to represent or speak for him or her throughout the appeal process.

Client Assistance Program is a program operated by an independent state agency, the Massachusetts Office on Disability, to assist applicants and eligible individuals in advocacy and representation in disputes with the Commission.

Impartial Hearing Officer is an individual who:

- (a) is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education) and;
- (b) is not a member of the State Rehabilitation Council;
- (c) has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;
- (d) has knowledge of the delivery of vocational rehabilitation services, the State plan, and the Federal and Massachusetts State laws and regulations governing the provision of services;
- (e) has received training with respect to the performance of official duties; and
- (f) has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual. An individual is not considered to be an employee of a public agency for the purposes of 107 CMR 1.02: Impartial Hearing Officer solely because the individual is paid by the agency to serve as a hearing officer.

1.02: continued

Informal Administrative Review is an optional first step informal non-adversarial process that the Commission offers to individuals to resolve differences promptly. It includes, but is not limited to, interviews, fact gathering, negotiations, and document review.

Informal Administrative Review Officer is a Commission employee who is assigned to conduct an informal administrative review, does not work in the unit where the individual is being served and who was not involved in the disputed service decision.

Mediation means the act or process of using an independent third party to act as a mediator, intermediary, or conciliator to assist persons or parties in settling differences or disputes prior to pursuing fair hearings or other legal remedies.

Qualified and Impartial Mediator is an individual who:

- (a) is not an employee of a public agency (other than an administrative law judge, hearing examiner, employee of a State office of mediators, or employee of an institution of higher education) and;
- (b) is not a member of the State Rehabilitation Council
- (c) has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;
- (d) is knowledgeable of the vocational rehabilitation program and the applicable Federal and Massachusetts State laws, regulations, and policies governing the provision of vocational rehabilitation services;
- (e) has been trained in effective mediation techniques consistent with any Commonwealth approved or -recognized certification, licensing, registration, or other requirements; and
- (f) has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual during the mediation proceedings.

An individual serving as a mediator is not considered to be an employee of the designated State agency or designated State unit for the purposes of 107 CMR 1.02: Qualified and Impartial Mediator solely because the individual is paid by the designated State agency or designated State unit to serve as a mediator.

1.03: Time Limits

(1) A Fair Hearing must be held by an impartial hearing officer within 60 days of an applicant or other eligible individual's request for a review of a determination made by the Commission unless informal resolution or a mediation agreement is achieved prior to the 60th day or both parties agree to a specific extension of time.

(2) All requests to the Commission concerning a fair hearing shall be considered filed on the date on which they are actually received by the central administrative office. All communications from the Commission, including correspondence about the process shall be considered to be filed on the date on which they are deposited in the United States mail, properly addressed, postage prepaid, or delivered in person. Electronic communication or correspondence shall be considered filed at the central administrative office during usual business hours but not later than 5:00 P.M., however all electronic correspondence regarding a fair hearing must be followed by a written and signed request by the individual or his/her representative or advocate.

1.04: Procedures for Appeal

(1) Any applicant, eligible individual or authorized representative may request a timely review of any determination made by the Commission about a vocational rehabilitation program service with which he or she is in disagreement. The Commission's appeal process consists of: an optional informal administrative review, an optional mediation, and if issues remain unresolved, a fair hearing.

(2) Upon filing for a fair hearing, an individual may request the Commission to initiate an informal administrative review and/or mediation without prejudice to his or her right to a *de novo* fair hearing. The 60 day time limit may be extended by agreement of both parties in the event that a fair hearing is needed to resolve issues that were not settled through the informal administrative review and mediation processes

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The individual who chooses mediation as his or her first step in the appeal process and who is not satisfied with the decision, has the right to then choose a fair hearing but not an informal administrative review as the next step in the appeal process

- (3) Time parameters that apply to the Commission's appeal process require:
 - (a) an individual who seeks a review of a Commission determination must request that review in writing within 30 days after receiving notice of the action or determination that the individual seeks to challenge.
 - (b) the Commission's appeal coordinator shall schedule all reviews in a timely manner but no later than ten days after receipt of the request; the Commission reserves the right to waive the time requirement in the event of extraordinary circumstances or when the limitations imposed by the individual's disability have contributed to the delay in filing.
 - (c) all fair hearings must be held within 60 days of the receipt of the request, unless informal resolution or a mediation agreement is achieved prior to the 60th day or both parties agree to a specific extension of time.

1.05: Notice of Appeal Rights

- (1) Every individual shall be informed in writing at the time of application and at the time of notification of any Commission action affecting his or her services of:
 - (a) the right and the procedures to appeal service determinations including priority category designation
 - (b) how to contact the Client Assistance Program of the Massachusetts Office on Disability
- (2) The Commission shall notify an individual in writing before any service determination which will result in a denial, suspension, reduction, or termination of a vocational rehabilitation service or services that are identified in an individual's IPE (Individualized Plan for Employment).
- (3) The notice shall be dated and shall include a brief statement informing the individual of the reasons for the action to be taken. The notice shall also inform the individual of the procedures for challenging the proposed action.

1.06: Form for Initiating an Appeal

- (1) An appeal is initiated by a request for a fair hearing, at which time a request for an optional informal administrative review and/or mediation may also be made.
- (2) An appeal shall be initiated by a written request, either on the form provided by the local office or the program unit from which the individual seeks services. It shall be addressed to the attention of the Client Appeals Coordinator at the Massachusetts Rehabilitation Commission, Administrative Office at 27 Wormwood Street, Boston, Massachusetts 02210-1616 or any subsequent address for the Commission's Administrative Office.
- (3) An individual's request for an appeal shall state that the individual is challenging a Commission determination, action or inaction and summarize the nature of the grievance, be signed by the individual or representative and contain the individual's address and a phone number if possible, where the individual may be contacted.

1.07: Mediation

- (1) The Mediation process:
 - (a) shall be voluntary on the part of the parties;
 - (b) shall be not used to deny or delay the right of an individual to a hearing or to deny any other right afforded; and
 - (c) shall be conducted by a qualified and impartial mediator who is trained in effective mediation techniques. The Commission shall maintain a list of individuals who are qualified mediators and knowledgeable in laws (including regulations) relating to the provision of vocational rehabilitation services under the Rehabilitation Act, from which the mediators shall be selected, and shall bear the cost of the mediation process.

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(2) An agreement reached by the parties in the mediation process shall be set forth in a written mediation agreement. In the event that no agreement between the parties is reached in mediation, an applicant, an eligible individual or their authorized representative who are parties to the dispute have the right to resolve such disputes through a fair hearing.

(3) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The parties to the mediation process are required to sign a confidentiality pledge prior to the commencement of such process.

1.08: The Informal Administrative Review Process

(1) The informal administrative review officer is charged with facilitating a mutually agreeable resolution, or reaching a decision considering the information presented, the defined issues, good professional rehabilitation practice and the Commission regulations and policies.

(2) The assigned informal administrative review officer shall contact the individual who has requested an appeal and the appropriate Commission representatives to arrange a time to meet and discuss the issues which are the subject of the individual's appeal.

(3) The individual or his or her authorized representative may review the individual's record either prior to or at the informal administrative review.

(4) The date, time or place of the informal administrative review may be changed with the agreement of the parties involved and with good cause. The informal administrative review officer has the authority and the discretion to end an informal administrative review because of lack of cooperation or failure to present relevant information by either party.

(5) If the individual fails to appear at the informal administrative review and can not demonstrate good cause for his or her absence, the informal administrative review officer may refuse to reschedule the meeting.

(6) The individual and/or the individual's representative and the Commission staff responsible for the decision shall participate in the informal administrative review. The informal administrative review officer has the authority and the discretion to request that others participate or to request additional information in the interest of attaining a timely resolution.

1.09: The Informal Administrative Review Decision

(1) The informal administrative review decision may be a brief written statement that reflects a mutually agreeable resolution of the participants or a concise statement of the informal administrative review officer's conclusions that are relevant to the issues and remedies sought in the informal administrative review.

(2) The informal administrative review officer shall mail a copy of the written statement or decision to all parties within a reasonable amount of time but not later than 30 days of the close of the informal administrative review.

(3) In the event that an informal administrative review officer makes a decision which is not in favor of the individual; the individual may appeal the decision.

(4) Terms of the agreement or the informal administrative review officer's decision must be implemented by the Commission in a timely manner.

1.10: Scope and Purpose of 107 CMR 1.10 through 1.17. Fair Hearings

The fair hearing section of the Standard Adjudicatory Rules of Practice and Procedure promulgated by the Executive Office of Administration and Finance, 801 CMR 1.02, and the sections which follow herein which are substitutions and additions to the Standard Adjudicatory Rules, shall govern the conduct of fair hearings of the Vocational Rehabilitation Division and Independent Living Programs of the Massachusetts Rehabilitation Commission.

1.11: Request for Scheduling a Fair Hearing Following an Informal Administrative Review

An individual who is dissatisfied with an informal administrative review decision and wishes to appeal the issues further shall, within 30 days of receipt of the informal administrative review officer's decision, request the appeals coordinator to schedule a fair hearing. Failure to request that a fair hearing be scheduled within that time shall be deemed a waiver of the individual's right to a fair hearing. The Commission reserves the right to waive the time requirement in the event of extraordinary circumstances or if the limitations imposed by the individual's disability have contributed to the delay in filing.

1.12: Impact on Provision of Services Pending Appeal

- The Commission cannot suspend, reduce or terminate services to the individual unless:
- (a) the individual requests that his/her services be suspended, reduced or terminated; or
 - (b) services have been obtained by misrepresentation, fraud, collusion or criminal conduct on the part of the individual or the individual's representative; or
 - (c) VR services provided under an approved IPE are time limited

1.13: Discovery

- (1) The individual or the individual's authorized representative shall engage in voluntary discovery. They shall have adequate access to and opportunity for examination and copying of the entire case file and all other documents used by the Commission
- (2) The impartial hearing officer may rule on any disputed requests for discovery.
- (3) If the impartial hearing officer finds that the release of certain case records to a individual may be harmful to the physical or mental health of the individual, the hearing officer may, after informing the individual of such findings;
 - (a) grant access to a summary of information from such record to the individual, if acceptable to the individual; or
 - (b) grant access to the record or portion thereof, with appropriate recommendations to the individual's parent, guardian or other authorized representative; or
 - (c) grant access to the individual under the condition that the record is reviewed in the presence of a physician or licensed psychologist designated and paid by the individual, provided however, that if the individual is unable to pay for such services, the Commission shall provide the services of one of its providers or consultants who shall review the record with the individual.

1.14: Impartial Hearing Officer's Duties and Powers at Hearings

- (1) The impartial hearing officer shall conduct the hearing to ensure that the rights of all parties are protected in accordance with the informal adjudicatory rules as found at 801 CMR 1.02(10)
- (2) The impartial hearing officer shall be responsible to make appropriate evidentiary rulings regarding the relevance of testimony and/or documents, issues of privilege and authentication of documents as well as limit testimony to relevant and defined issues. The hearing officer also has the authority to dismiss the appeal in the event that an individual fails to appear or continually disrupts a hearing.

1.15: Rights and Duties of Parties in the Fair Hearing Process

- (1) 801 CMR 1.02 (10)(g)1. and 2. sets forth the parties' individual rights including those of the Commission.

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(2) Commission personnel shall present the case for the Commission. The Commission's presentation of the case must include: pertinent material from the individual's case record and other related documents, supportive oral testimony, applicable state and or federal regulations and evidence of good professional rehabilitation practice. Staff may be represented at the hearing by an attorney or other Commission employee.

(3) The individual must present his or her argument in support of his/her position. This includes giving oral testimony, presenting witnesses and submitting documentary evidence to support his or her case. The individual may be represented by an advocate, a public or private attorney or by any other representative of his or her choice. In the event, that the individual chooses a private attorney; the individual will be responsible for all related expenses.

(4) Both the Commission and the individual may examine all evidence and present testimony in cross examination and may also have an opportunity to question any and all adverse witnesses.

1.16: Scheduling

107 CMR 1.16 supplements 801 CMR 1.02.

(1) The appeals coordinator shall, within ten days of the filing of a fair hearing request, schedule a date and site convenient for the parties. The date scheduled shall be within 60 days of the filing, except that when an individual seeks an optional informal administrative review and/or mediation, the fair hearing shall be held after completion of the informal administrative review or mediation within 60 days of the individual's request for scheduling the fair hearing.

(2) For each appeal concerning the vocational rehabilitation program, the appeal coordinator shall assign an impartial hearing officer to conduct the fair hearing, provided that the assigned hearing officer has been selected on a random basis from the pool of qualified persons who have been jointly identified by the Commission and the State Rehabilitation Advisory Council.

(3) The appeals coordinator shall provide written notice to all parties and the Commission's legal office of the date, time and place of the fair hearing and shall provide the name of the hearing officer who has been assigned to conduct the hearing. Information about the fair hearing procedure and the individual's right to be represented by legal counsel or lay advocate shall be included with the notice and, in appeals involving vocational rehabilitation or independent living program services, the individual's right to assistance from the Client Assistance Program shall also be stated. Notice shall be mailed to all parties at least seven days before a scheduled hearing, except that time requirements may be waived by agreement of all parties. Any request for postponement must be made in writing for good cause and sent to the appeals coordinator no later than 48 hours prior to the hearing.

1.17: Decisions

(1) Within 30 days of the close of the hearing, the impartial hearing officer shall issue a full written decision, which shall be based exclusively upon the evidence, testimony, materials and legal rules presented at the hearing, good professional practices in rehabilitation, and the provisions of the State Plan and the Federal Vocational Rehabilitation Act. Any evidence, testimony, materials, and legal rules presented after the close of the proceeding shall be excluded unless the proceeding is reopened by the impartial hearing officer, provided however, that the impartial hearing officer may rely upon such legal rules as the officer deems relevant, even if not introduced by either party during the proceeding.

(2) The impartial hearing officer shall mail or deliver a copy of the decision to the individual or his or her authorized representative.

(3) The impartial hearing officer's decision must contain the following elements:

- (a) a statement of the issue or issues involved in the hearing
- (b) clear and complete findings of fact on all relevant factual matters, which are supported by evidence in the record;
- (c) reference to all laws, regulations, policies, procedures and practice;

1.17: continued

- (d) a concise statement of the conclusions drawn from the findings of fact and law, including the reasoning used in reaching the conclusions; and
- (e) any action to be taken by the Commission if appropriate to the case

(4) If the final decision is favorable to the individual, the appropriate Commission staff person shall notify the individual of the right to prompt implementation and the name of the individual who is responsible for implementation. If the final decision is adverse to the individual, the Commission shall include in the notice of the final decision a statement informing the individual of the right to further review and the time period within which that right must be exercised.

(5) M.G.L. c. 30A, § 14 provides that a party aggrieved by a final action of an agency may seek judicial review of the final decision by filing a complaint within 30 days of the receipt of the final decision in the appropriate superior court.

REGULATORY AUTHORITY

107 CMR 1.00: M.G.L. c. 6, § 75; 29 USC 721, 722(d), as amended by the Rehabilitation Act Amendments of 1992, P.L. 102-569.

(PAGES 15 AND 16 ARE RESERVED FOR FUTURE USE.)