

# 111 CMR: MASSACHUSETTS COMMISSION FOR THE BLIND

## 111 CMR 1.00: CASE CONFERENCE, ADMINISTRATIVE REVIEW, VOLUNTARY MEDIATION, AND FAIR HEARING

### Section

- 1.01: Statement of Purpose
- 1.02: Definitions
- 1.03: Time Limits
- 1.04: Notice of Right to Review of Agency Action
- 1.05: Form to Initiate Review
- 1.06: General Terms and Provisions
- 1.07: Continuation of Services or Benefits Pending Review
- 1.08: Participants and Roles
- 1.09: Case Conference
- 1.10: Administrative Review
- 1.11: Mediation
- 1.12: Fair Hearing
- 1.13: Judicial Review
- 1.14: Vending Facility Program Arbitration
- 1.15: Severability

#### 1.01: Statement of Purpose

The purpose of 111 CMR 1.00 is to provide an orderly system for review of agency action where applicants for or recipients of services are dissatisfied with delivery or denial of such services by the Commission for the Blind. 111 CMR 1.00 permits an individual dissatisfied with agency action to participate in a Case Conference, Administrative Review, Fair Hearing and:

- (a) solely in the case of licensees or applicants of the Vending Facility Program described at 111 CMR 3.00: *Vending Facilities Program*, to participate in arbitration under certain circumstances; and
- (b) solely in the case of applicants for or recipients of vocational rehabilitation services, to participate in a voluntary mediation process.

#### 1.02: Definitions

Administrative Review. A review by a three member panel designated by the Commissioner to assess the correctness of agency action with the ultimate purpose of reversing, modifying or upholding such action.

Administrative Review Panel. The three persons designated by the Commissioner to hold an Administrative Review.

Advisory Board. The Advisory Board of the Commission as set up under M.G.L. c. 6, § 129, also referred to as the Statutory Advisory Board.

Agency Action. Any decision made by an employee of the Commission which affects an individual's eligibility for services from the Commission or the manner of delivery of services to a Commission consumer in any federal, state or combined federal-state program administered by the Commission.

Authorized Representative. An attorney, legal guardian or other person authorized by a party to represent that party in a proceeding described by 111 CMR 1.00.

Deputy Commissioner. The Deputy Commissioner at the Commission for the Blind.

Case Conference. Refers to the first step in the administrative review process, and involves convening the complainant, the complainant's authorized representative, if any, the employee whose action is contested and such employee's supervisor(s) with the ultimate purpose of identifying, clarifying, or resolving the matter for which review is sought.

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Commission. The Massachusetts Commission for the Blind.

Commissioner. The Commissioner of the Massachusetts Commission for the Blind.

Complainant. The consumer contesting the action or failure to act of the Commission.

Consumer. An individual receiving and/or applying to receive services from the Commission.

Fair Hearing. An adjudicatory appeal of an Administrative Review decision before the Statutory Advisory Board or before an Impartial Hearing Officer with the ultimate purpose of reversing, modifying or upholding the Administrative Review Panel's decision.

Impartial Hearing Officer. An individual who is assigned to conduct a Fair Hearing for a complainant who is receiving or seeking services from the Commission's vocational rehabilitation program or independent living program, provided that the individual assigned:

- (a) has knowledge of the delivery of vocational rehabilitation services, the Commission's plans for vocational rehabilitation and independent living services, the Federal and Massachusetts laws, regulations, and policies governing such services, and training with respect to performing the official duties of a hearing officer;
- (b) has not been involved in previous decisions regarding independent living services, or the vocational rehabilitation of the consumer who has requested the appeal;
- (c) has no personal, professional, or financial interest that would be in conflict with the hearing officer's objectivity;
- (d) is not an employee of the Commission, except that payment by the Commission solely for services as a hearing officer shall not constitute employment by the Commission for the purposes of determining the individual's impartiality or status as "employee";
- (e) is not a member of the State Rehabilitation or Independent Living Council; and
- (f) be selected from among a pool of qualified individuals who have been identified jointly by the Commission and the state Rehabilitation Council.

Individualized Plan for Employment (IPE). A plan, developed jointly by the counselor and consumer, as required by the Rehabilitation Act of 1973, as amended, which defines the consumer's vocational goal and outlines the responsibilities of the consumer and the Commission and the vocational rehabilitation services to be provided to achieve that goal.

Mediation. 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. A consumer may make a request for a voluntary mediation as part of the request for a fair hearing in accordance with 111 CMR 1.05(1). If both parties agree to the mediation, one will be scheduled by the Commissioner.

Presiding Officer. In a Case Conference, the senior-most Commission employee present or that employee's designee; in an Administrative Review, the Deputy Commissioner or that employee's designee; in a Fair Hearing, the Commissioner or Impartial Hearing Officer, as the case may be; in an Arbitration, the Arbitrator identified by the Arbitrators initially chosen by the consumer and Commission. In a Mediation, the Qualified Mediator chosen to perform the mediation by the consumer and Commission.

Proceedings. Case Conference, Administrative Review, Fair Hearing or Arbitration as described in 111 CMR 1.00. Voluntary Mediation is a separate proceeding as described in 111 CMR 1.11.

Qualified and Impartial Mediator. An individual who:

- (a) is not an employee of the Commission, except that payment by the Commission solely for services as a hearing officer shall not constitute employment by the Commission for the purposes of determining the individual's impartiality or status as "employee";
- (b) is not a member of the State Rehabilitation Council or of the State Independent Living Council;

1.02: continued

- (c) has not been involved previously in the vocational rehabilitation or independent living services of the applicant or eligible individual;
- (d) has knowledge of the delivery of vocational rehabilitation services, the Commission's plans for vocational rehabilitation and independent living services, the Federal and Massachusetts laws, regulations, and policies governing such 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 conflict with the objectivity of the individual during the mediation proceedings.

1.03: Time Limits

(1) A Fair Hearing must be held before the Advisory Board and Commissioner, unless the decision involves the Commission's vocational rehabilitation program or independent living program, in which case the complainant shall be entitled to a Fair Hearing before an Impartial Hearing Officer. A hearing before an Impartial Hearing Officer must be held within 60 days of an applicant or other eligible individual's request for a review of a determination made by the Commission, unless:

- (a) resolution *via* a case conference or administrative review, or a mediation agreement is achieved prior to the 60<sup>th</sup> day; or
- (b) 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 Deputy Commissioner's office. Notice of actions and other communications shall be presumed received upon the day of hand delivery or if mailed, three days after deposit in the U.S. mails. Electronic communication or correspondence shall be considered filed at the Deputy Commissioner's office during normal 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 or her representative or advocate.

(3) Unless otherwise specifically provided by law, computation of any time period referred to in 111 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period so computed is to be included unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Commission is closed, in which event the period shall run until the end of the next following business day. When the time period is less than seven days, intervening days when the Commission is closed shall be excluded in computation.

(4) It shall be within the discretion of the presiding officer, or in the case of a case conference not yet convened, in the discretion of the Deputy Commissioner, for good cause shown, to extend any time limit contained in 111 CMR 1.00 consistent with applicable state or federal law or regulation. All requests for extensions of time shall be made by written request before the expiration of the original or previously extended time period. The filing of such request in writing shall toll the time period sought to be extended until the presiding officer or Deputy Commissioner acts on the request. 111 CMR 1.03(4) shall not apply to any limitation of time prescribed by federal or state law.

1.04: Notice of Rights to Review of Agency Action

(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 agency action where applicants for or recipients of services are dissatisfied with delivery or denial of such services
- (b) how to contact the Client Assistance Program of the Massachusetts Office on Disability.

1.04: continued

(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.

1.05: Form to Initiate Review

(1) An applicant for or recipient of services from the Commission who is dissatisfied with any specific decision of the Commission with regard to the furnishing or denial of services under any of the programs administered by the Commission may file a request for review and redetermination of that decision by letter addressed to the Deputy Commissioner no later than 30 days after receipt of written or oral notice of that decision.

(2) The letter shall contain the:

- (a) Name, address and telephone number of the person seeking review;
- (b) Specific service claimed to have been denied or furnished in an unsatisfactory manner;
- (c) Name of the Commission employee directly responsible for the decision being grieved; and
- (d) Signature of the individual seeking review or of that person's authorized representative.

(3) When an individual is represented by another party, a letter shall be accompanied by a written statement signed by the complainant identifying the representative and authorizing the Commission to receive all information from relevant entities and to release all information in its possession which relates to the individual requesting the review. No information shall be disclosed by the Commission without such authorization.

1.06: General Terms and Provisions

(1) With respect to proceedings:

- (a) All information relevant to the matter under consideration shall be allowed to be presented at the Case Conference, Administrative Review, Fair Hearing, and Arbitration. All evidence, including any records, investigative reports, documents, and stipulations to be relied upon in making a decision must be offered and made a part of the record. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.
- (b) The rules of evidence observed by courts do not apply to these proceedings, but the presiding officer shall observe the rules of privilege recognized by law. The presiding officer shall consider only evidence and testimony which is pertinent and the kinds of evidence upon which reasonable persons are accustomed to relying in the conduct of serious affairs.
- (c) The presiding officer shall exclude unduly repetitious or irrelevant evidence.
- (d) Materials submitted to the presiding officer shall be shared with the parties.
- (e) Proposed and final decisions at every step of the review process shall be based upon substantial evidence.
- (f) The weight attached to any evidence rests within the sound discretion of the presiding officer or panel, as the case may be. The presiding officer may in any case require either party to submit additional evidence on any matter relevant to the proceeding, with appropriate notice to the other party.
- (g) With regard to Fair Hearings associated with vocational rehabilitation or independent living services, the Commissioner may not overturn or modify a proposed decision of an impartial hearing officer supporting the consumer's position or any part of such a decision unless the Commissioner concludes, based on clear and convincing evidence, the decision of the impartial hearing officer is clearly erroneous as it is contrary to federal or state law, including Commission regulations and policies.

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- (2) The fact that a request for a case conference, administrative review, voluntary mediation, or fair hearing has been filed does not prohibit the parties from making an adjustment in the matters at issue prior to a proceeding. If, as a result of an adjustment, the consumer is satisfied and wishes to withdraw all or part of the request for a Fair Hearing, the consumer or the authorized representative shall transmit to the Deputy Commissioner a signed, written withdrawal. However, neither the employee nor the Deputy Commissioner may delay or cancel a case conference, administrative review, voluntary mediation, or fair hearing because of a possible adjustment that is under consideration unless the consumer requests a delay or cancellation.
- (3) If the complainant fails to appear at a proceeding, the presiding officer shall notify the complainant in writing that the complainant's request for case conference, administrative review, mediation, or fair hearing shall be deemed abandoned if the complainant fails to request a rescheduled proceeding, and show good cause for the failure to appear, within ten days of the proceeding.
- (4) Hearings shall be as informal as may be reasonable and appropriate under the circumstances. The presiding officer shall ensure the conduct of the parties will at all times be orderly.
- (5) On request, access to effective communication will be provided through provision of auxiliary aids and services consistent with federal and state requirements.
- (6) In the case where the parties have agreed to voluntary mediation, the mediator may provide guidance similar to 111 CMR 1.06(1) in accordance with 111 CMR 1.11.
- (7) 111 CMR 1.00 shall be construed to secure a just and speedy determination in every proceeding.

1.07: Continuation of Services or Benefits Pending Review

Unless the complainant so requests, or, in an appropriate case, a parent, family member, guardian, advocate or authorized representative of such complainant so requests, pending a final determination under 111 CMR 1.00, the Commission shall not institute a suspension, reduction or termination of services being provided under the individualized Plan for Employment unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct by or on behalf of the complainant.

1.08: Participants and Roles

- (1) The consumer and/or authorized representative, the employee and the employee's supervisor(s) shall participate in these proceedings.
- (2) The form, duration and extent of participation of other persons is within the discretion of the presiding officer in the interests of achieving timely and fair resolution of the issue or issues in dispute.
- (3) Role of Consumer.
  - (a) The consumer may present the case or may be assisted by an authorized representative.
  - (b) The consumer should be prepared to briefly explain what is being sought from the Commission and to offer relevant information.
  - (c) The consumer may make a presentation orally or otherwise and present relevant documents and papers to the presiding officer.
- (4) Role of Employees.
  - (a) The employee whose action or inaction is the subject of the proceeding or the employee's supervisor shall present the Commission's case and is responsible for:
    1. making an adequate investigation before reaching a decision about eligibility or the provision of services;

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2. briefly explaining the decision, action or inaction of the Commission in the complainant's case;
  3. ensuring that the case record is available to the presiding officer, as appropriate.
- (b) The supervisor is responsible for explaining Commission procedures or other matters relevant to the complainant's case.
- (5) Role of Presiding Officer.
- (a) The presiding officer is responsible for considering the information presented, defining the issues and reaching a decision to resolve the matter in accordance with relevant law including the Commission's regulations, and relevant policy and procedure.
- (b) The presiding officer shall:
1. schedule a time or times for reviewing the case;
  2. define the issues;
  3. receive and consider all relevant evidence and exclude irrelevant evidence;
  4. ensure a brief and orderly presentation of the issues and evidence when a meeting of the parties is convened;
  5. secure statements, documents and appropriate information relevant to the issues in the proceeding.

1.09: Case Conference

- (1) Within 15-calendar days of receipt of a request for Case Conference or Administrative Review consistent with 111 CMR 1.05(2), the Deputy Commissioner shall convene a case conference which shall include the individual, his or her authorized representative, if any, the employee whose action is contested and the employee's supervisor(s).
- (2) The purpose of the Case Conference shall be identification of the area of the individual's dissatisfaction, clarification of the employee's position, and creation of an opportunity for the parties to identify a mutually satisfactory course of action for the delivery of services or, in the alternative, to provide a clear picture of the matter for which further review is sought.
- (3) Failure of a complainant to appear at a Case Conference shall result in waiver of the right to seek Administrative Review and the termination of the Administrative Review process.

1.10: Administrative Review

- (1) Within 15 days of the completion of the Case Conference, the Deputy Commissioner shall schedule an Administrative Review by convening a three-member panel appointed by the Commissioner whose members have not taken direct part in the action under consideration, one of whom, whenever possible, shall be the Deputy Commissioner who shall serve as Panel chairperson.
- (2) The complainant and/or the complainant's personal representative and the Commission's employees shall be entitled to appear and present relevant information orally or in writing, examine witnesses and present arguments relevant to matters under review.
- (3) Within ten days of termination of the Administrative Review, the Deputy Commissioner shall issue the decision of the Panel including therewith any relevant determination of fact and application of law or policy considered in the ultimate decision of the Review Panel.
- (4) As part of the decision letter, the Deputy Commissioner shall include a copy of the Commission regulations for Fair Hearings and a statement explaining the complainant's right to appeal the Panel's decision by requesting the same in writing within 30 days of the mailing of the final decision of the Administrative Review Panel.
- (5) If the complainant does not appeal the decision within 30 days, it shall become final, and the appropriate employee(s) shall initiate its implementation.

1.11: Mediation

- (1) The Mediation process:
  - (a) shall be voluntary on the part of the parties;
  - (b) shall not be 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.
- (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.

1.12: Fair Hearing

- (1) A complainant who is dissatisfied with the decision of the Administrative Review Panel and files an appeal from that Panel's decision within 30 days from the date of the mailing of that decision to the complainant shall be entitled to a Fair Hearing before the Advisory Board and Commissioner, unless the decision involves the Commission's vocational rehabilitation program or independent living program, in which case the complainant shall be entitled to a Fair Hearing before an Impartial Hearing Officer. Failure to apply for a Fair Hearing within 30 days of the mailing of the decision of the Administrative Review Panel shall make such decision final and binding.
- (2) Within ten days of receipt of a request for a Fair Hearing, the Deputy Commissioner shall mail written notice to the complainant of the time and place of such hearing, at least 30 days in advance of such hearing. The Deputy Commissioner shall also inform appropriate employees of the request for a Fair Hearing, its time and place and the need or opportunity for their attendance.
- (3) Notice to the complainant shall inform the complainant of the right to be represented at the hearing by counsel or by other authorized representative if the individual so desires, and shall state the Commission will not be responsible for any costs incurred pursuant to the individuals appeal including, without limitation, attorney's fees.
- (4) Where appropriate, the Deputy Commissioner shall schedule the Fair Hearing before members of the Advisory Board at its regularly scheduled monthly meeting. Only Advisory Board members who have not taken part in the matter under consideration may participate in the Fair Hearing. In matters involving the vocational rehabilitation or independent living program, the Deputy Commissioner shall schedule the Fair Hearing before an Impartial Hearing Officer.
- (5) The complainant and/or his or her personal representative and Commission employees shall be entitled to appear and present relevant information orally or in writing, examine witnesses and present arguments relevant to matters under review.
- (6) Authority to make final decisions based upon the record shall be exercised solely by the Commissioner. Where an Impartial Hearing Officer has heard a case involving the vocational rehabilitation or independent living program, the Commissioner may not overturn or modify such Hearing Officer's decision, or part of such decision, that supports the position of the complainant unless the Commissioner concludes, based on clear and convincing evidence, the decision is clearly erroneous as it is contrary to federal or state law, including policy and procedure.

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(7) The verbatim transcript of the testimony and exhibits or an official report containing the substance of what transpired at the hearing, together with all papers and reports filed in the proceedings, and the recommendation of the Advisory Board or Impartial Hearing Officer shall constitute the exclusive record for a decision and shall be available to the complainant within a reasonable period of time.

(8) A final decision shall be made in writing by the Commissioner or the Impartial Hearing Officer where appropriate, and shall include a full report of the findings and the grounds for such decision. The Commissioner or Impartial Hearing Officer shall provide a copy of such decision to the complainant and where the hearing was conducted by an Impartial Hearing Officer, to the Deputy Commissioner, within 30 days after the close of hearing. Where a hearing has been re-opened to receive new evidence, a decision shall be rendered within 30 days after the close of the additional session.

1.13: Judicial Review

If the complainant is aggrieved by the Fair Hearing decision, the complainant may exercise the right of judicial review in accordance with M.G.L. c. 30A. The complainant seeking judicial review, must file a complaint with the Superior Court in the county where the complainant resides or where the complainant's principal place of business is located, or in Suffolk County within 30 days after receipt of the Fair Hearing decision. Complainant will be responsible for payment of any court charges and legal fees involved in the judicial review. The Commission shall notify the complainant and the complainant's authorized representative of this right to seek judicial review and of the time limits for seeking said review.

1.14: Vending Facility Program

Any licensee or program applicant dissatisfied with the results of the licensee's or program applicant's Fair Hearing regarding matters pursuant to the Vending Facility Program, as described at 111 CMR 3.00: *Vending Facilities Program*, may seek either judicial review as described at 111 CMR 1.13 or, if the vending facility is subject to the Randolph Shepard Act 20 U.S.C. c. 6A, § 107, request that an *ad hoc* arbitration panel be convened under 34 CFR Part 395.13.

1.15: Severability

The provisions of 111 CMR 1.00 and the various applications thereof are severable. If any provision of 111 CMR 1.00 or the application thereof is held to be invalid, such invalidity shall not affect other provisions or their application where not specifically held invalid.

REGULATORY AUTHORITY

111 CMR 1.00: M.G.L. c. 6, § 131J; 29 U.S.C. 721, 722(d); 20 U.S.C. c. 6A, § 107.