

112 CMR: COMMISSION FOR THE DEAF AND HARD OF HEARING

112 CMR 1.00: ADMINISTRATIVE REVIEW AND FAIR HEARING

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1.01: Statement of Scope and Purpose

112 CMR 1.00 governs the appeals process for clients who are receiving or requesting services of the Massachusetts Commission for the Deaf and Hard of Hearing.

The purpose of 112 CMR 1.00 is to provide an orderly system for informal review of agency action where an applicant for or recipient of Case Management services is dissatisfied with the denial or delivery of such services by the Massachusetts Commission for the Deaf and Hard of Hearing. Should the individual be dissatisfied with the result of the Administrative Review, a Fair Hearing will follow such review.

1.02: Definitions

The definitions in 112 CMR 1.02 apply to terms used throughout 112 CMR 1.00. As used in 112 CMR 1.10 through 1.21, 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.

Administrative Review. The administrative review is an optional first step in the appeals process designed to provide a client with a prompt informal review of decisions made or the furnishing or denial of services in the client's case. It includes, but is not limited to, interviews, fact gathering, negotiations, mediation, and document review.

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

Appeals Coordinator refers to the Commission employee who is responsible for scheduling fair hearings and communicating with individuals, advocates, family members and Commission staff about appeal requests.

Authorized Representative refers to an individual's parent, parents, guardian or another person whom the individual designates to represent or speak for the individual.

1.02: continued

Commission refers to the Massachusetts Commission for the Deaf and Hard of Hearing.

Commissioner refers to the Commissioner of the Massachusetts Commission for the Deaf and Hard of Hearing.

Decision. A course of action taken by an employee of the Commission, resulting in either the delivery or refusal to deliver services to a client of the Commission for the Deaf and Hard of Hearing, or an individual applying for or requesting services.

Deputy Commissioner refers to the Deputy Commissioner for Policy and Programs of the Massachusetts Commission for the Deaf and Hard of Hearing.

Impartial Hearing Officer refers to an individual who is assigned to conduct hearings pursuant to 112 CMR 1.00 and refers to an individual who is assigned to conduct a fair hearing for a client who is receiving or seeking services from the Commission's Case Management program provided that the individual assigned shall:

- (a) have knowledge of the delivery of case management services and programs, the state rules governing such services and programs, and have the training with respect to performing the official duties of a hearing officer;
- (b) not have been involved in previous decisions regarding the case management of the client who has requested the appeal;
- (c) have no personal or financial interest that would be in conflict with the hearing officer's objectivity;

Presiding Officer refers to an impartial hearing officer or fair hearing officer and is used interchangeably with those terms.

1.03: Time Limits

(1) Communications to the Commission concerning an appeal shall be considered filed on the date on which the appeal is actually received by the central administrative office in Boston. All communications from the Commission, including correspondence about the appeals 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.

(2) Computation of any period of time referred to in 112 CMR 1.00 shall begin on the first day following the day on which the client receives the notice. If the last day of the period is a day on which the office or offices of the Commission are closed, the period shall run until the end of the next following business day. The offices of the Commission are closed on Saturdays, Sundays and legal holidays.

(3) The administrative review officer may extend time limits applicable to the administrative review.

1.04: Issues Which May Be Appealed

An individual may request an administrative review in the following situations:

- (1) The denial of an application or the denial of the right to apply or reapply for services provided by the Commission;
- (2) Determination of eligibility for equipment and services for the Assistive Technology fund;
- (3) Any Commission decision or action concerning suspension, reduction, or termination of services or inaction related to such services;
- (4) Unresolved disputes pertaining to the scope of services provided to the individual; and
- (5) Coercive or otherwise improper conduct on the part of any Commission employee involved in a client's case.

1.05: Opportunity for Appeal and Time Requirements

- (1) The Commission shall afford the opportunity for an administrative review to any individual who makes a timely appeal request concerning matters within the scope of 112 CMR 1.00. However, an individual who seeks continuation of services that are currently being provided shall be scheduled for a fair hearing and may obtain an administrative review only within the discretion of the Commission.
- (2) Upon filing an appeal for a fair hearing, an individual may request the appeals coordinator to initiate an administrative review without prejudice to his or her right to a *de novo* fair hearing, provided however, that the individual's choice of an administrative review shall be deemed to waive fair hearing time requirements, except those which follow the close of the fair hearing.
- (3) The time sequences, which apply to the Commission's appeal process, require that:
 - (a) An individual who seeks an administrative review or fair hearing must file a written request within 30 days after receiving notice of the action or decision which the individual seeks to challenge;
 - (b) In order to continue services being provided by Case Management, an individual must file a request for a fair hearing within ten days of receipt of notice of service termination, suspension or reduction;
 - (c) Within 20 days of the date when the administrative review decision is mailed, the individual may request that a *de novo* fair hearing be scheduled to consider the issues addressed by the administrative review decision;
 - (d) The appeals coordinator shall, within 15 days of the filing of a fair hearing request, schedule a date and site convenient for the parties. The date scheduled shall be within 45 days of the filing, except that when an individual seeks an optional administrative review, the fair hearing shall be held following the completion of the administrative review.
 - (e) The commission reserves the right to immediately terminate the services if the client threatens the safety of the commission personnel

1.06: 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:
 - (a) of the right to appeal service decisions and issues;
 - (b) of the method whereby an administrative review and fair hearing may be obtained and the names and addresses of individuals with whom such appeals may be filed;
 - (c) of the functions of the Client Assistance Program of the Massachusetts Office on Disability and its address and telephone number.
- (2) The Commission shall notify an individual in writing at least 15 days before taking any action to suspend, deny eligibility or terminate services.
- (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 while continuing to receive the current services being provided to the client.
- (4) In order to assure continuation of such services, the individual must file an appeal request within ten days of receiving the notice that services shall be suspended, reduced or terminated.
- (5) All written notice of right to appeal and decisions rendered by the Commission shall be sent to the client by certified, return receipt requested mail.

1.07: Form of Initiating an Appeal

- (1) The appeals process encompasses both the fair hearing and the administrative review. An appeal is initiated by a request for fair hearing, at which time a request for an optional administrative review may also be made.

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1.07: continued

(2) An appeal shall be initiated by a written request, either on the form provided by the local office or program unit from which the individual seeks services or otherwise. It shall be addressed to the attention of the Client Appeals Coordinator at the Massachusetts Commission for the Deaf and Hard of Hearing, Administrative Office at 210 South Street, 5th Floor, Boston, Massachusetts 02111, or any subsequent address for the Commission's Administrative Office, with a copy to the local office or program unit.

(3) An individual's request for a fair hearing or administrative review shall state that the individual is aggrieved by a Commission decision, 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.

(4) The appeal request shall also indicate that the individual wishes an administrative review before the fair hearing is scheduled.

1.08: Administrative Review Process

(1) The assigned administrative review officer shall contact the individual who has requested an administrative review and the appropriate Commission representatives to arrange a time to meet and discuss the individual's grievance concerning issues which may be appealed.

(2) The individual or his or her authorized representative may review either prior to or at the administrative review, such portions of the individual's record as are pertinent to the issues presented, subject to 112 CMR 1.08(3).

(3) Before the day on which an administrative review meeting is scheduled, an administrative review officer may change the date, time or place of the review or meetings with the parties upon notice to the parties involved.

(4) In the event either party fails to appear at the administrative review without notice, the administrative review officer may reschedule the meeting or issue a decision in order to resolve the matter on a timely basis.

(5) The individual or the individual's representative and the Commission staff responsible for the decision shall participate in the administrative review. Others may participate, but the form, duration and extent of their participation is within the discretion of the review officer in the interests of achieving timely resolution of the issues in dispute.

(6) The administrative review officer may facilitate a mutually agreeable resolution, or reach a decision considering the information presented, the defined issues, good case management practice and the Commission regulations and policies.

(7) The administrative review officer has the authority and the discretion to terminate an administrative review because of lack of cooperation or failure to present relevant information by either party.

1.09: Administrative Review Decisions

The administrative review decision shall be a brief written statement by the administrative review officer containing the following elements:

(1) A statement of the issue or issues involved; reference to relevant regulations, Commission policies or procedures, and good professional case management practices; a concise statement of the conclusions that are relevant to the issues and remedies sought in the administrative review.

(2) The administrative review officer shall issue a written decision within 20 days of the close of the review. If the administrative review officer has requested additional information, the decision shall be issued within ten days of the date of receipt of such information, and all parties shall be notified of the revised date for issuing the decision.

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1.09: continued

- (3) The administrative review officer shall mail a copy of the decision to the individual, any individual advocate authorized by the individual, and appropriate Commission staff including the Commission's legal office and the appeals coordinator.
- (4) Any decision which is adverse to an individual shall include a statement informing the individual of his or her right to request that a fair hearing be scheduled and the time limit for exercising that right.
 - (a) The decision shall state that the fair hearing is conducted under the Informal/Fair Hearing Rules of the Uniform Adjudicatory Rules of Practice and Procedure (801 CMR 1.02) as supplemented by the Commission's appeals regulations (112 CMR 1.00).
 - (b) It shall also provide the name, mailing address and telephone number of the Commission Appeals Coordinator, who shall be available to answer questions concerning fair hearings.
- (5) The effective date of the decision shall be stated in the administrative review decision.
- (6) The decision of the administrative review officer shall be binding on the Commission. The Commission shall initiate implementation of the decision within 20 days of its receipt. No employee of the Commission shall interfere with the implementation of the decision.

1.10: Scope and Purpose of 112 CMR 1.10 through 1.21: Fair Hearing

- (1) The informal 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 801 CMR 1.03, 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 Massachusetts Commission for the Deaf and Hard of Hearing. Notice by the Commission need not state the foregoing. 801 CMR 1.03 is applicable to all hearings held pursuant to 112 CMR 1.00.
- (2) 112 CMR 1.10 through 1.21 are promulgated pursuant to M.G.L. c. 30A, § 9, with the approval of the Commissioner of Administration and Finance.

1.11: Definitions Applicable to Fair Hearings

The definitions contained in 801 CMR 1.02(2)(b) shall be applicable to 112 CMR 1.10 through 1.21, except as supplemented by the definitions set forth in 112 CMR 1.02 and 1.11. As used in 112 CMR 1.02 through 1.21, these definitions supplement 801 CMR 1.02(a)(b).

Adjudicatory Hearing: The term Adjudicatory proceeding shall also be taken to mean a fair hearing and the terms shall be used interchangeably.

Agency Action. Any action taken by an employee of the Commission for the Deaf and Hard of Hearing which effects the eligibility of an individual for services from the Commission or the manner of delivery of services to a client of the Commission in any state programs administered by the Commission for the Deaf and Hard of Hearing, to the extent such review is permitted by state law.

Case Manager or Director. Refers to the Commission employee responsible for the decision at issue in an appeal. Such terms include supervisory personnel and are used interchangeably.

Client. Refers to a person who has applied for or requested or is receiving services from the Commission's Case Management and Social Service Department .

Client Appeals Coordinator. Refers to the Commission employee who is responsible for communicating with clients about their appeal requests, docketing and scheduling fair hearings, assigning appeals to hearing officers, and notifying the administrative review office about client requests for administrative reviews.

1.11: continued

Client Assistance Program. Refers to the Client Assistance Program of the Massachusetts Office on Disability

Fair Hearing is an adjudicatory appeal of determination made by a case manager or supervisor concerning the furnishing or denial of services in the client's case. It is a *de novo* Adjudicatory proceeding which is conducted by an impartial hearing officer or fair hearing officer under 112 CMR 1.02 and 1.15 through 1.21 and the informal fair hearing section of the Standard Adjudicatory Rules and Procedures promulgated by the Executive Office of Administrative and Finance (801 CMR 1.02 and 1.03). The hearing officer is responsible for considering the evidence presented by the client and any representative or advocate chosen by the client and representative(s) of the Commission and making a decision based on the evidence, applicable regulations and good professional practices in the field. The hearing officer's proposed decision is subject to review at the option of the Commissioner. If the Commissioner gives notice that he intends to review the proposed decision, the client must be given the opportunity to submit additional evidence and information relevant to the decision before it becomes final.

Fair Hearing Officer. Refers to an individual who is assigned to conduct a fair hearing for a client who is receiving or seeking services from the Commission's Case Management program.

1.12: Representation

112 CMR 1.12 supplements 801 CMR 1.02(3). A party who requests an Adjudicatory proceeding shall be notified by the Commission that he or she has the right to be accompanied and represented by an authorized representative, including a legal counsel, lay advocate, relative or other spokesperson. If fees are charged by legal counsel, the party is responsible for payment. Any individual who requests an Adjudicatory appeal shall be notified about the function of the Client Assistance Program of the Massachusetts Office on Disability and its address and telephone number.

1.13: Grounds for Fair Hearings

112 CMR 1.13 is a substitution for 801 CMR 1.02(6)(a) and (6)(b). An individual may request a fair hearing in the following situations:

- (1) The denial of an application or the denial of the right to apply or reapply for services provided by the Commission;
- (2) Any Commission decision or action concerning suspension, reduction or termination of services or inaction related to such services;
- (3) Unresolved disputes pertaining to the scope of services provided to the individual;
- (4) Coercive or otherwise improper conduct on the part of any Commission employee involved in a client's case, including unwarranted or illegal conditions of eligibility for receipt of services.

1.14: Initiation of Fair Hearing

112 CMR 1.14 supplements 801 CMR 1.02(6)(c).

- (1) Any individual request for a fair hearing shall be initiated by a written request, in the form prescribed by 112 CMR 1.07
- (2) Except as provided in 112 CMR 1.16(3), an individual must file a request for a fair hearing within 30 days of receiving notice of the decision or action which he individual seeks to challenge.

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1.14: continued

(3) An individual who requests a fair hearing may also simultaneously request an informal administrative review, which is conducted under the rules in 112 CMR 1.02 through 1.09. Within the discretion of the Commission, an individual who seeks continuation of current services through the fair hearing decision may obtain an administrative review, provided that such a review will not unduly delay the completion of a fair hearing.

(4) A fair hearing shall be scheduled within 45 days of the Commission's receipt of a scheduling request.

1.15: Request for Scheduling a Fair Hearing Following an Administrative Review

112 CMR 1.15 supplements 801 CMR 1.02(6)(b).

(1) An individual who is dissatisfied with an administrative review decision and wishes to appeal the issues further shall, within 20 days of receipt of the administrative review decision, request the individual 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.

(2) Within 15 days of receipt of an individual's request for a fair hearing, the client appeals coordinator shall schedule a fair hearing for a date no later than 45 days after the scheduling request was received by the Commission.

1.16: Continuation of Services Pending an Appeal

(1) The Commission shall notify an individual in writing at least 15 days before taking any action to suspend, reduce or terminate services.

(2) 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.

(3) In order to assure continuation of services, the individual must file an appeal request within ten days of receiving the notice that services will be suspended, reduced, or terminated.

1.17: Discovery

(1) 112 CMR 1.17 supplements 801 CMR 1.02(8) and governs access to individual records for the purpose of a fair hearing, notwithstanding any other regulations promulgated by the Commission.

(2) The presiding officer shall rule on all disputed requests for discovery.

(3) If the presiding officer allows access to a case file by an individual or the individual's authorized representative, but finds that to release such records to a individual may be harmful to the physical or mental health of the individual, the presiding 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.

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1.18: Presiding Officer's Duties and Powers at Hearings

- (1) The presiding officer has the authority and discretion to conduct the hearing in accordance with the informal Adjudicatory rules as found at 801 CMR 1.02.
- (2) The presiding officer shall be responsible to make appropriate evidentiary rulings regarding relevance of testimony and/or documents; issues of privilege and authentication of documents as well as limit testimony to relevant and defined issues.
- (3) The informal Adjudicatory rules of procedure shall govern the evidentiary standards of the Fair Hearing.

1.19: Rights and Duties of Parties

- (1) 801 CMR 1.02(10)(h)1. sets forth the individual's rights. 112 CMR 1.19 substitutes for 801 CMR 1.02 (10)(h)2.
- (2) Commission personnel shall present the case for the Commission. A Commission attorney may represent such personnel, so long as the Commission attorney or other Commission personnel:
 - (a) is responsible for an adequate investigation before reaching a decision as to eligibility or provision of services;
 - (b) must appear at the proceeding to justify the action or inaction of the Commission;
 - (c) is responsible for submitting at the proceeding complete information on which any decision at issue is based;
 - (d) must ensure that the case record is present at the proceeding;
 - (e) should introduce from the case record only the material which pertains to the issue or issues;
 - (f) may examine and introduce any other pertinent Commission documents;
 - (g) may present and establish all relevant facts and circumstances by oral testimony and documentary evidence;
 - (h) may advance any pertinent arguments without any undue interference; and
 - (i) may question or refute any evidence or testimony and have an opportunity to confront and cross-examine adverse witnesses.

1.20: Scheduling

112 CMR 1.20 supplements 801 CMR 1.02(10)(j).

- (1) The individual appeals coordinator shall, within 15 days of the filing of a fair hearing request, schedule a date and site convenient for the parties. The date scheduled shall be within 45 days of the filing, except that when an individual seeks an optional administrative review, the fair hearing shall be held after completion of the administrative review within 45 days of the individual's request for scheduling the fair hearing.
- (2) For each appeal concerning the case management services or programs, the appeals coordinator shall assign an impartial hearing officer to conduct the fair hearing, provided that the assigned individual has been selected on a random basis from the pool of qualified persons who have been jointly identified by the Commission. In appeals involving state-funded programs, the appeals coordinator may assign a fair hearing officer.
- (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 case management or programs, 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 the hearing.

1.21: Decision

112 CMR 1.21 substitutes for 801 CMR 1.02(11).

- (1) Within 30 days of the close of the hearing, the presiding officer shall submit to the Commissioner a full written report of the findings and grounds for a proposed decision, which shall be based exclusively upon the evidence, testimony, materials and legal rules presented at the hearing and good professional practices in Case Management. Any evidence, testimony, materials, and legal rules presented after the close of the proceeding shall be excluded unless the proceeding is reopened by the presiding officer, provided however, that the presiding officer may rely upon such legal rules as the officer deems relevant, even if not introduced by either party during the proceeding.
- (2) The presiding officer shall simultaneously mail or deliver a copy of the proposed decision to the individual or his or her authorized representative.
- (3) The Commissioner may review the presiding officer's proposed decision before it becomes final. If the Commissioner decides to review the proposed decision, in whole or in part, he shall notify the individual and the individual's representative of such review within 20 days of the date when the presiding officer mailed the proposed decision to the individual. If the Commissioner elects not to review the proposed decision, the individual shall be notified that the proposed decision is final and binds the Commission within 20 days of the date when the presiding officer mailed it to the individual.
- (4) If a notice of the Commissioner's intent to review the presiding officer's proposed decision is sent to the individual, he/she shall have the right to file written objections and submit to the Commissioner in written format additional evidence and information which is relevant to the decision within 20 days of the date when the notice was mailed. If the Commissioner seeks to review the proposed decision, no final decision shall be made until the individual or the individual's authorized representatives have had the opportunity to file such written objections and evidence or the 20-day time period for filing such additional evidence and objections has expired.
- (5) The Commissioner shall ensure that the final decision of the Commission is made in writing, and includes a full report of the findings and grounds for such a decision. If the Commissioner elects to review the proposed decision, the Commissioner's final decision shall be made within 30 days of providing notice of intent to review the proposed decision unless further time is agreed to by the individual or the individual's authorized representative.
- (6) The presiding officer's proposed decision and the Commissioner's final decision must be rendered in accordance with the law, which includes the duly promulgated regulations of the Commission and other Massachusetts agencies, state and federal statutes, federal regulations, the Constitutions of the United States and the Commonwealth of Massachusetts, as well as court decisions of Massachusetts and the United States and administrative policies of the Commission. Neither the Commissioner nor the presiding officer shall render decisions which require the determination of the legality of the Commission regulations. Such matters may be decided by the courts without any necessity of going through the fair hearing process.
- (7) In rendering a proposed or final decision, the presiding officer or the Commissioner may, take one of several courses of action which include, but are not limited to, the following:
 - (a) find in favor of the individual; or
 - (b) uphold the decision, action or inaction of the Commission; or
 - (c) accept a written withdrawal of the appeal which is signed by the individual or the client's authorized representative; or
 - (d) accept a settlement of the issues agreed to by the parties; or
 - (e) default any party who fails to appear and does not request a rescheduling of the appeal, in accordance with 801 CMR 1.02(10)(e).

1.21 : continued

(8) Both the presiding officer's proposed decision and the Commissioner's final decision shall be based upon substantial evidence. The Commissioner may not overturn or modify a proposed decision, which supports the individual's position or any part of such a decision unless the Commissioner concludes, based on clear and convincing evidence, that the decision of the independent hearing officer is clearly erroneous on the basis of being contrary to federal or state law, including Commission regulations and policies.

(9) Both the presiding officer's proposed decision and the Commissioner's final 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 and other legal bases for the decision;
- (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 actions to be taken by the Commission if appropriate to the case.

(10) The Commissioner shall mail a copy of the final decision to the individual and the individual's authorized representative, appropriate Commission staff, and the legal office of the Commission. The copy to the individual shall be mailed certified mail, return receipt requested.

- (a) If the final decision is favorable to the individual, the Commissioner shall notify the individual of the right to prompt implementation and the name of the individual who is responsible for implementation with advice to the Deputy Commissioner by letter if prompt implementation does not occur.
- (b) If the final decision is adverse to the individual, the Commissioner shall include in the notice of final decision a statement informing the individual of the right to further review and the time period within which that right must be exercised.

(11) 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:

112 CMR 1.00: M.G.L. c. 6, § 192.