

118 CMR 5.00: INVESTIGATIONS

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5.01: Scope and Purpose

118 CMR 5.00 establishes the requirements for investigations conducted by and on the behalf of the Commission, the standards to be used in delaying or deferring the investigation, and the review and oversight standards to be used by the Commission.

5.02: Conduct of Abuse Investigations

All investigations conducted pursuant to M.G.L. c. 19C shall be conducted by all investigators in accordance with 118 CMR 5.00 and with any standards approved and adopted by the Commission for the conducting of such investigations.

(1) Minimum Requirements of Abuse Investigations. Each investigation conducted pursuant to M.G.L. c. 19C, § 5 by the Commission or the referral agency, at a minimum, shall be conducted in accordance with 118 CMR 5.02 and with any additional standards for the conduct of investigations adopted by the Commission including, but not limited to:

- (a) an interview with the person with a disability who was allegedly abused. Such an interview does not require the prior permission of the guardian of the alleged victim, however the guardian may be notified that such an interview is to take place, unless it is determined by the assigned investigator that giving such notification to the guardian would not be in the best interests of the alleged victim. Such an interview shall include a review of the allegations and a discussion with the person with a disability regarding the needs and wishes of that person regarding protective services. The interview must take place, unless it will create a foreseeable risk of harm to the person with a disability. The interview shall occur at such time and in such place that it may be conducted without a risk of harm to the person with a disability;
- (b) a visit to and evaluation of the site of alleged abuse, including, the victim's residence and day program. The evaluation shall include a determination of the risk of physical or emotional injury to the victim or other persons with disabilities at the same location;
- (c) a determination of the nature, extent, and cause or causes of the injuries, if possible; or a determination of whether abuse *per se* exists;
- (d) use of the preponderance of evidence standard to substantiate or unsubstantiate the existence of abuse leading the investigator to conclude that it is more likely than not that abuse does or does not exist;
- (e) a determination or confirmation, if possible, of the identity of the alleged abuser(s), whether named or not named in the Intake, and who shall be referred to as an "alleged abuser", by whose act or omission the person with a disability has incurred a serious physical injury, serious emotional injury, or has been subjected to abuse *per se*;
- (f) a determination of the identity of the person(s) who was/were responsible for the health and welfare of the alleged victim(s) when the alleged incident occurred, whether said person(s) is/are named or not named in the Intake;
- (g) an initial assessment of the immediate protective services needs of the person with a disability who is the alleged victim of abuse (*See* 118 CMR 7.03: *Protective Services Assessment* for requirements of the protective services assessment);
- (h) an interview with all available witnesses to the abuse, subject to the following conditions:

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1. If any said witness falls within the category of a mandated reporter, he or she has an obligation pursuant to M.G.L. c. 19C to cooperate in the investigation and truthfully provide to the investigator all information he or she may possess that is relevant to the matter under investigation. Refusal to be interviewed or to otherwise cooperate in the investigation will be made a part of the report, and if the witness is an employee of a state agency, unless a mandated reporter's response to a question could be used against him or her in a criminal proceeding, his or her failure to cooperate shall be reported to the person's supervisor and to the appropriate public agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any relevant collective bargaining agreement or any other contract;
  2. Said witness may be accompanied during an interview by a person of his or her own choice who is 18 years of age or older, provided that said companion shall not be a supervisor or administrator employed by the alleged abuser's employer, unless requested by said witness and agreed to by the investigator; or is not otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not participate in the actual conduct of the interview;
  3. Said witness shall be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter be disclosed.
- (i) an interview with the alleged abuser(s), unless such an interview would create additional risk of harm to the person with a disability;
  - (j) a determination that all relevant physical evidence of the alleged abuse has been preserved, if possible, including taking measures to ensure that such evidence is preserved by the person having control of the evidence;
  - (k) the review and obtaining of copies of all documents which are not plainly irrelevant to the matter under investigation, as permitted by M.G.L. c. 19C, § 5(1), from a mandated reporter or a mandated reporter's employer acting as custodian of the documents including, but not limited to:
    1. medical and clinical records pertaining to any injury sustained by any person with a disability involved in the matter under investigation;
    2. any other medical and clinical records of the alleged victim, or of any other party with a disability involved in the matter under investigation including, but not limited to, any records designated as subject to the "peer review privilege" pursuant to M.G.L. c. 111, § 204 and any psychotherapeutic records including, but not limited to, hospital admissions, hospital discharges, dates of hospitalization, purpose of admission, notations of objective *indicia* of emotional disturbance, and objective accounts of a patient's past medical and psychiatric histories which may include earlier hospitalizations, treatments and diagnoses. If such psychotherapeutic records contain the communications or notes of communications between the patient and the psychotherapist, such communications or notes of communications between the patient and the psychotherapist shall be deleted before the remaining portions of the psychotherapeutic record are provided to the investigator. If the investigator submits a release of the psychotherapeutic records executed by the patient or the patient's guardian, the entire psychotherapeutic record, including the communications or notes of communications between the patient and the psychotherapist, shall be released to the investigator;
    3. any incident report filed pursuant to the requirements of any state agency;
    4. relevant portions of the case records of any person with a disability provided services and involved in the matter under investigation;
    5. any restraint forms completed in connection with any person with a disability who is involved in the matter under investigation;
    6. personnel records including, but not limited to, documents regarding employee disciplinary action, employee evaluations, employee training, employment application and an employee's medical information that is plainly not irrelevant to either the allegation of abuse being investigated by the Commission or to the Commission's ability to ensure appropriate protective services to the alleged victim of abuse;
    7. any policies, procedures or guidelines of the state agency or of the service provider involved in the matter under investigation or employing the alleged abuser;
    8. any existent photographs of any physical injury or property damage plainly not irrelevant to the incident being investigated;

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- 9. any documents relating to previous cases involving the alleged victim or the alleged abuser in which a complaint was filed or investigated pursuant to M.G.L. c. 19C or pursuant to the authority of any other agency of the Commonwealth; and
- 10. any other documents specifically identified by the investigator and which are plainly not irrelevant to the matter under investigation.

- (l) an interview with the reporter;
- (m) a determination in cases in which abuse is not substantiated as to whether the allegation reported to the Commission constitutes a false report and if so, an explanation of the investigator's rationale which supports this conclusion;
- (n) any other tasks that, in the discretion of the Commission, are deemed appropriate and are plainly not irrelevant to the investigation; and
- (o) if an investigator does not perform one or more of the requirements in 118 CMR 5.02(1)(a) through (n), the investigator shall detail in the Investigation Report why the requirement was not met and the Commission shall determine whether said requirement(s) is material to the investigation.

(2) Substantiated Investigations of Abuse of Persons with an Intellectual or Developmental Disability.

(a) Each investigation conducted pursuant to M.G.L. c. 19C, §§ 5 and 15 by the Commission or the referral agency as assigned by the Commission, shall be conducted in accordance with 118 CMR 5.02(1), and if substantiated for abuse of a person with an intellectual or developmental disability, must also meet the following additional standards including, but not limited to:

- 1. a determination of the identity of the caretaker, and whether the caretaker is a care provider;
- 2. a determination of whether the care provider is employed by the department or an employer;
- 3. obtaining a copy from the department or employer of the personnel, training, and disciplinary records of the care provider at the time of the substantiated finding of abuse or abuse *per se* and verifying and documenting the care provider's name, date of birth, and any other unique identifiers such as last four digits of Social Security number, and any known aliases; and
- 4. if there is reasonable cause to believe that an employer or the department failed to comply with M.G.L. c. 19C, § 15(d), provide the basis for this belief.

(b) If, after an investigation conducted pursuant to 118 CMR 5.02(2)(a), a caretaker is determined to be a care provider employed by the department or an employer, the Commission shall find that registrable abuse occurred.

(3) Rights of the Alleged Abuser. During interviews, the alleged abuser shall have the following rights:

- (a) to be accompanied during an interview by a person of his or her own choice who is 18 years of age or older, provided that said companion shall not be a supervisor or administrator employed by the alleged abuser's employer, unless requested by the alleged abuser and agreed to by the investigator; or is not otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not participate in the actual conduct of the interview;
- (b) to be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter be disclosed;
- (c) to be informed that if he or she falls within the category of a mandated reporter, he or she has an obligation pursuant to M.G.L. c. 19C to cooperate in the investigation and truthfully provide to the investigator all information he or she may possess that is relevant to the matter under investigation;
- (d) if alleged victim is a person with an intellectual or developmental disability, to be informed of the existence of the Registry and its potential impact on his or her employment status; and

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(e) to be informed that his or her refusal to be interviewed or to otherwise cooperate in the investigation will be made a part of the report, and that if the person is an employee of a state agency, unless his or her response to a question could be used against him or her in a criminal proceeding, his or her failure to cooperate shall be reported to the person's supervisor and to the appropriate public agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any relevant collective bargaining agreement or any other contract.

(4) Requirements of Evaluation and Investigation Reports.

(a) Evaluation and Investigation Report. The evaluation and investigation report required to be filed with the Commission pursuant to M.G.L. c. 19C, § 5(1) shall be composed of two distinct parts which shall be respectively known as the "Initial Response" and the "Investigation Report".

1. Requirements of Initial Response.

a. The initial portion of the report shall be known as the "Initial Response", and shall be submitted to the Commission by the investigator within 24 hours after a case is initially reported pursuant to M.G.L. c. 19C, § 4 if the case has been determined to be an emergency, and within ten calendar days for nonemergency reports of abuse. The Commission may extend these filing deadlines, provided protective services have been put in place to address risk.

b. The Initial Response shall contain all the information deemed appropriate by the Commission to ensure that the designated investigator has conducted a preliminary evaluation of the allegation of abuse reported to the Commission and determined whether the allegation is within the jurisdiction of M.G.L. c. 19C, whether the person with a disability is at risk, and if so, that appropriate protective action has been taken.

2. Requirements of Investigation Report.

a. The second portion of the report shall be known as the "Investigation Report", and shall be submitted to the Commission by the investigator within 45 calendar days from the date the report of abuse was referred by the Commission for investigation. The Commission may extend this filing deadline, provided protective services have been put in place to address risk.

b. The Investigation Report shall contain the information acquired during the completion of the required tasks set out in 118 CMR 5.02(1) and, when applicable 118 CMR 5.02(2), and all other information deemed appropriate by the Commission to ensure that the designated investigator has properly investigated and evaluated the allegation of abuse reported to the Commission; has made appropriate findings of fact and conclusions; and has made appropriate recommendations regarding the protective services required to remedy the situation when abuse is substantiated.

c. In addition, regardless of whether abuse is substantiated or not, the designated investigator may make a determination that a violation of other state statutes and/or regulations may exist and whether such a violation poses a risk of harm to persons with disabilities. If such a violation is suspected the investigator may make recommendations regarding actions needed to remedy the suspected violation including, but not limited to, referral of the matter to the appropriate agency of the Commonwealth that has jurisdiction over the violation. The investigator may also make recommendations for remedial actions based upon the statutory and regulatory authority of the agency conducting the investigation for the Commission.

d. If during the course of an investigation, the investigator has knowledge of or observes an animal whom he or she knows or reasonably suspects has been the victim of animal cruelty, abuse or neglect, the investigator may report the allegation to entities that investigate reports of animal cruelty, abuse or neglect as described in M.G.L. c. 22C, § 57, or any local animal control authority. Any applicable privilege that relates to confidential communication shall not prohibit the filing of such report, and any report made in good faith shall be immune from all criminal and civil liability.

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(b) Recipients of Report.

1. Initial Response. Consistent with its authority pursuant to M.G.L. c. 19C, § 3, as part of its case processing, the Commission shall distribute a copy of the Initial Response to the designated service-providing agency within the Executive Office of Health and Human Services.

2. Investigation Report. Consistent with its authority pursuant to M.G.L. c. 19C, § 3, as part of its case processing, the Commission shall forward a copy of the Investigation Report to the appropriate agency within the Executive Office of Health and Human Services and any other agency of the Commonwealth including, but not limited to, the Attorney General or appropriate District Attorney, who has jurisdiction over the alleged victim, the matter under investigation, or jurisdiction over professional misconduct, for possible prosecution or the imposition of remedial or disciplinary measures in accordance with the requirements of any applicable law or regulation.

5.03: Conduct of Retaliation Investigations

(1) Minimum Requirements of Retaliation Investigation. Each retaliation investigation conducted by the Commission, at minimum, shall include:

- (a) an interview of the alleged victim of retaliation;
- (b) an interview of the alleged retaliator;
- (c) interviews with any witnesses to the alleged retaliatory incident(s) subject to the following conditions:

1. If any witness falls within the category of a mandated reporter, he or she has an obligation pursuant to M.G.L. c. 19C to cooperate in the investigation and truthfully provide to the investigator all information he or she may possess that is relevant to the matter under investigation. Refusal to be interviewed or to otherwise cooperate in the investigation will be made a part of the report, and if the witness is an employee of a state agency, unless a mandated reporter's response to a question could be used against him or her in a criminal proceeding, his or her failure to cooperate shall be reported to the person's supervisor and to the appropriate public agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any relevant collective bargaining agreement or any other contract;

2. Said witness may be accompanied during an interview by a person of his or her own choice who is 18 years of age or older; provided that said companion shall not be a supervisor or administrator employed by his or her employer, unless requested by said witness and agreed to by the investigator; or is not otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not participate in the actual conduct of the interview; and

3. Said witness shall be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter be disclosed.

(d) the review and obtaining of copies of all documents which are not plainly irrelevant to the matter under investigation, from a mandated reporter or a mandated reporter's employer acting as custodian of the documents, and of which disclosure is required pursuant to M.G.L. c. 19C, § 5(1), and 118 CMR;

(e) any other tasks which, in the discretion of the Commission, are deemed appropriate and are not plainly irrelevant to the investigation; and

(f) if an investigator does not perform one or more of the requirements in 118 CMR 5.03(1)(a) through (e), the investigator shall detail in the Investigation Report why the requirement was not met and the Commission shall determine whether said requirement(s) is material to the investigation.

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(2) Requirements of Retaliation Investigation Report. The Investigation Report of the investigation conducted by the Commission shall be submitted to the Commission's Director of Investigations within 60 business days from the date on which the allegation of retaliation was assigned for investigation. Said Report shall contain the information acquired during the completion of the required tasks set out in 118 CMR 5.03(1) and all other information deemed appropriate by the Commission to ensure that the designated investigator has properly investigated and evaluated the allegation of retaliation reported to the Commission and has made appropriate findings of fact and conclusions. The Commission may extend this filing deadline.

(3) Rights of the Alleged Retaliator. During an interview the alleged retaliator shall have the following rights:

- (a) to be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter of the complaint be disclosed;
- (b) to be accompanied during an interview by a person of his or her own choice who is 18 years of age or older, provided that said companion shall not be a supervisor or administrator, unless requested by the alleged retaliator and agreed to by the investigator; or not otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not participate in the actual conduct of the interview; and
- (c) to be informed that a refusal to be interviewed will be made a part of the report and that if the person is an employee of a state agency, unless his or her response to a question could be used against him or her in a criminal proceeding, his or her failure to cooperate shall be reported to the person's supervisor and to the appropriate state agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any collective bargaining agreement or any other contract.

5.04: Registry Compliance Investigations

The Commission may initiate an investigation upon learning of a suspected violation of any provision of 118 CMR 15.00: *Department and Employer Registry-related Hiring and Retention Procedures* by an employer or the department in the hiring or retention of a care provider.

(1) Minimum Requirements of a Registry Compliance Investigation. Each Compliance investigation conducted by the Commission at minimum, shall include:

- (a) an interview with a representative of the employer or department who is responsible for or knowledgeable of compliance procedures pursuant to 118 CMR 15.00: *Department and Employer Registry-related Hiring and Retention Procedures*;
- (b) an interview with all other relevant witnesses with regard to the employer's or department's compliance with provisions of 118 CMR 15.00: *Department and Employer Registry-related Hiring and Retention Procedures*;
  1. If any witness falls within the category of a mandated reporter, he or she has an obligation pursuant to M.G.L. c. 19C to cooperate in the investigation and truthfully provide to the investigator all information he or she may possess that is relevant to the matter under investigation. Refusal to be interviewed or to otherwise cooperate in the investigation will be made a part of the report, and if the witness is an employee of a state agency, unless a mandated reporter's response to a question could be used against him or her in a criminal proceeding, his or her failure to cooperate shall be reported to the person's supervisor and to the appropriate public agency for possible disciplinary action under that agency's regulations or pursuant to the provisions of any relevant collective bargaining agreement or any other contract;
  2. Said witness may be accompanied during an interview by a person of his or her own choice who is 18 years of age or older; provided that said companion shall not be a supervisor or administrator of the employer or department whose compliance is at issue, unless requested by said witness and agreed to by the investigator; or is not otherwise involved or has an interest in the matter under investigation. Other than being present during the interview, said companion shall not participate in the actual conduct of the interview; and

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3. Said witness shall be informed of the existence of the complaint and the general nature of the allegations. Under no circumstances shall the identity of the reporter be disclosed.

(d) the review and obtaining of copies of all documents which are plainly not irrelevant to the matter under investigation from the employer or department and of which disclosure is required pursuant to M.G.L. c. 19C, §§ 5(1) and 15, and 118 CMR;

(e) any other tasks which, in the discretion of the Commission, are deemed appropriate and are not plainly irrelevant to the compliance investigation; and

(f) if an investigator does not perform one or more of the requirements in 118 CMR 5.04(1)(a) through (e), the investigator shall detail in the Compliance Investigation Report why the requirement was not met and the Commission shall determine whether said requirement(s) is material to the compliance investigation.

(2) Requirements of a Registry Compliance Investigation Report. The Investigation Report of the registry compliance investigation conducted by the Commission shall be submitted to the Commission's Director of Investigations within 60 business days from the date on which the allegation was assigned for investigation. Said Report shall contain the information acquired during the investigation of an alleged violation of 118 CMR 15.00: *Department and Employer Registry-related Hiring and Retention Procedures*, completion of the required tasks set out in 118 CMR 5.04(1) and all other information deemed appropriate by the Commission to ensure that the designated investigator has properly investigated and evaluated the allegation reported to the Commission and has made appropriate findings of fact and conclusions. Upon request, the Commission may extend this filing deadline.

(3) In the event the Registry Compliance Investigation Report finds the employer failed to comply with 118 CMR 15.00: *Department and Employer Registry-related Hiring and Retention Procedures*, the Report may recommend one or more of the following:

(a) the imposition of a monetary fine of not more than \$5,000;

(b) the revocation or downgrade of a license maintained by the employer; or

(c) the forfeiture of a state contract.

(4) The Commission may cause a fine of up to \$5,000.00 to be imposed upon an employer who fails to comply with the requirements of M.G.L. c. 19C, § 15.

(a) If the Commission seeks to impose a fine on an employer, the employer may request a hearing be held pursuant to 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure* by filing a Notice of Claim for a hearing and an answer within 21 days of receipt of the Compliance Investigation Report.

(b) A hearing officer shall be designated by the Executive Director. The hearing officer shall enter a recommended decision. A final agency decision shall be issued by the Executive Director or his or her designee. Hearings shall be in accordance with the provisions of 801 CMR 1.01: *Formal Rules*. Failure to request a hearing and file timely answers may be deemed a waiver of such right and a fine may be imposed by the Commission without further notice.

(5) The Commission may refer any recommendation made pursuant to 118 CMR 5.04 to the department or any other applicable state agency.

5.05: Delay or Deferral of Abuse Investigations

(1) The Commission may determine that an abuse investigation pursuant to M.G.L. c. 19C, §§ 4 and 5, and 118 CMR would duplicate or jeopardize either an ongoing investigation by law enforcement officials concerning possible criminal conduct involved in the case of abuse reported to the Commission, or any corrective action undertaken by the referral agency. If such a determination is made by the Commission, the M.G.L. c. 19C investigation may be delayed or deferred.

(2) The delay or deferral of investigations pursuant to M.G.L. c. 19C, § 12 can occur only after the Commission has determined that:

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- (a) appropriate protective services have been provided to ensure the continued safety of the alleged victim from further risk of harm;
- (b) the delay or deferral will not adversely affect the ongoing provision of protective services nor the health and safety of persons with disabilities found at risk of harm;
- (c) the Commission's ability to conduct a later investigation will not be unreasonably impaired; and
- (d) all corrective action taken by another official or agency will be conducted in good faith in an impartial manner by qualified personnel.

(3) The Commission shall monitor the progress of any criminal investigations and any corrective action taken by the referral agency to determine when or whether any investigation by the Commission pursuant to M.G.L. c. 19C, §§ 4 and 5 should be initiated or resumed. Such initiation or resumption of an investigation shall be at the sole discretion of the Commission.

5.06: Commission Review of Investigation Report

(1) Upon receipt by the Commission of the Initial Response or the Investigation Report prepared by the designated investigator, the Commission shall review each document and determine whether each document contains the information as required by the Commission; and whether the Initial Response or the Investigation Report are filed with the Commission within their respective time frames.

(2) If following a review of either the Initial Response or the Investigation Report, the Commission determines that the investigator must obtain further information for the document to be complete, and/or must perform additional work on a task previously begun or required for either document to be complete, the Commission shall require the obtaining of such information or performing of such tasks. Determination of the completeness of either document for the purposes of M.G.L. c. 19C is solely within the discretion of the Commission. Additional tasks as may be required by the Commission, and the resubmission of the revised Initial Response or Investigation Report, shall be completed within such timeframe as determined appropriate by the Commission.

(3) In addition, where the investigation has been conducted by a referral agency, the Commission not only may request further investigation as set out in 118 CMR 5.06(2), but the Commission, in its discretion, may conduct an investigation utilizing Commission staff in accordance with M.G.L. c. 19C, §§ 4 and 5, and 118 CMR 5.00. The Commission shall notify the designated referral agency of the Commission's decision to conduct an investigation utilizing Commission staff.

REGULATORY AUTHORITY

118 CMR 5.00: M.G.L. c. 19C, §§ 3(b), (c), (e), (h), 4, 5, 12 and 15.