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118 CMR 1.00: SCOPE AND AUTHORITY

Section

- 1.01: Scope and Purpose
- 1.02: Commentaries
- 1.03: Construction
- 1.04: Severability

1.01: Scope and Purpose

(1) Scope.

(a) 118 CMR applies to all cases of abuse and retaliation reported to, investigated by or on the behalf of the Disabled Persons Protection Commission and remediated as a result of such investigations pursuant to M.G.L. c. 19C and 118 CMR.

(b) 118 CMR does not provide for an adjudicatory hearing within the meaning of M.G.L. c. 30A, § 1(1). 118 CMR is not intended to constitute an administrative remedy under the doctrine of exhaustion of administrative remedies or otherwise.

(2) Purpose. The purpose of 118 CMR is to establish the procedures and standards the Commission utilizes to effectuate the purposes of the Commission including but not limited to, the investigation and remediation of abuse of persons with disabilities who reside in the Commonwealth of Massachusetts, or of non-resident persons with disabilities who are abused while in the Commonwealth of Massachusetts, and the investigation and remediation of instances of retaliation against a person for having reported such abuse or cooperated in the investigation of abuse. In pursuing its statutory purposes, the Commission shall endeavor to respect the privacy, self-determination rights and dignity of persons with disabilities.

1.02: Commentaries

Commentaries may be used throughout 118 CMR to clarify certain issues, concepts, or problems, as well as to give specific examples of typical situations that may arise under 118 CMR. These commentaries are intended to be illustrative only, and do not apply to fact situations different from those specifically described in 118 CMR.

1.03: Construction

(1) In interpreting 118 CMR, words and phrases shall be construed according to common and approved usage; provided, however, that technical words and phrases and such others as may have acquired a special and appropriate meaning in law shall be construed and understood according to such meaning.

(2) The generally-accepted rules of construction shall be observed in 118 CMR unless their observance requires a construction inconsistent with the manifest intent of M.G.L. c. 19C or is repugnant to its context.

(3) The time frames for performing acts required by M.G.L. c. 19C and 118 CMR shall be determined as follows: a time requirement which refers to "business days" shall refer to Mondays through Fridays, excluding legal holidays; a time requirement which refers to "calendar days," shall refer to all the days of the week within the time frame, provided that if the final day of the time frame regarding either "business days" or "calendar days" is a Saturday or Sunday or a legal holiday, the time requirement shall be extended to the next regular business day. References to "days" shall refer to calendar days unless otherwise specifically indicated.

1.04: Severability

If any regulation, section, sub-section, division, subdivision, sentence, clause, phrase, word, or portion of 118 CMR is found to be invalid by a court of competent jurisdiction for any reason, said portion shall be deemed a separate, distinct, and independent provision, and the validity of the remainder of 118 CMR shall be unaffected.

REGULATORY AUTHORITY

118 CMR 1.00: M.G.L. c. 19C, §§ 2, 3(b), 4(b) and 11.

118 CMR 2.00: DEFINITIONS

Section

2.01: Scope and Purpose

2.02: Meaning of Terms

2.01: Scope and Purpose

118 CMR 2.00 provides definitions for terms frequently used in M.G.L. c. 19C and 118 CMR. The terms are based on M.G.L. c. 19C and Disabled Persons Protection Commission usage common to the implementation of the Commission's duties and obligations.

The terms used in 118 CMR have the meanings ascribed in M.G.L. c. 19C unless otherwise specified in 118 CMR 2.00, elsewhere in 118 CMR, or unless the context otherwise requires. In any event no term shall be given a meaning that is either inconsistent with the manifest intent of M.G.L. c. 19C or repugnant to its context.

2.02: Meaning of Terms

Abuse. An Act or Omission which results in Serious Physical Injury or Serious Emotional Injury to a Person with a Disability.

However, no person shall be considered to be abused for the sole reason that such person is being furnished or relies upon treatment in accordance with the tenets and teachings of a church or religious denomination by a duly accredited practitioner thereof; nor for the sole reason that, consistent with the stated or implied wishes of a competent person or a duly appointed representative of an incapacitated person, he or she is not receiving medical treatment or care.

Abuse Per Se. An Act or Omission of a Caretaker that includes or results in the following, regardless of whether a Serious Physical Injury or serious emotional injury is manifested:

- (a) Sexual Abuse;
- (b) the withholding of adaptive aids used by the Person with a Disability, provided that said withholding is unrelated to safety, care or treatment;

Commentary: For purposes of 118 CMR 2.02: Abuse Per Se(b), examples of the withholding of adaptive aids include, but are not limited to, prevention of access to and/or removal of the sole means of communication, in the case of a deaf or hard-of-hearing person or other Person with a Disability with communication deficits, or of the sole apparatus to assist mobility, in the case of a person with a physical disability.

(c) a pattern of touching neither required nor appropriate for tending to the safety and welfare of a Person with a Disability. For purposes of 118 CMR 2.02: Abuse Per Se(c) only, the term "pattern" shall mean "Two or more separate instances of touching";

(d) the intentional, wanton or reckless application of a physical force in a manner that inflicts physical pain or Serious Emotional Injury as determined by an evaluation of the totality of the circumstances. For the exclusive purposes of 118 CMR 2.02: Abuse Per Se(d), when a person as a result of his or her disability is unable to express or demonstrate a Serious Emotional Injury or a reaction to physical pain, the investigator may use the reasonable person standard solely for the purposes of evaluating whether the intentional, wanton or reckless application of a physical force inflicted physical pain or Serious Emotional Injury. Using the reasonable person standard, the investigator determines whether, by a preponderance of the evidence, given the same set of factual circumstances, a reasonable person would have experienced Physical pain or Serious Emotional Injury.

Reasonable person shall mean "A person who in similar circumstances would exercise the qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of himself or herself and the interest of others."

Accident. It shall be considered an Accident and not Abuse when a Person with a Disability incurs a Serious Physical Injury or Serious Emotional Injury and/or is subjected to Abuse *Per Se*, and the injury at the time it is incurred:

2.02: continued

- (a) is not the result of a Caretaker's negligent Act;
- (b) is not the result of a Caretaker's reckless Act;
- (c) is not the result of a Caretaker's Omission;
- (d) is caused by a Caretaker's application of an appropriate degree of physical force given the circumstances; or
- (e) is caused by a Caretaker's good faith attempt to prevent physical injury, pain or Serious Emotional Injury to the Person with a Disability.

Act. A Caretaker's intentional, reckless, or negligent action, regardless of whether the Act is performed with an intent to harm.

Capacity to Consent. The ability of the Person with a Disability to make informed decisions concerning his or her own person or property, including but not limited to, whether or not to accept Protective Services.

Caretaker. Any State Agency or any individual responsible for the health and welfare of a Person with a Disability by providing for or directly providing assistance in meeting a Daily Living Need, which cannot otherwise be performed by the Person with a Disability without assistance, regardless of the location at which such assistance occurs. Minor children and adults adjudicated incapacitated by a court of law shall not be deemed to be Caretakers. Caregiver and Caretaker may be used interchangeably without changing the meaning of either.

Commission. The Disabled Persons Protection Commission.

Commissioners. The Commissioners of the Disabled Persons Protection Commission.

Daily Living Needs. The essential requirements necessary to safeguard the well-being, physical and mental health and welfare, and basic safe daily functioning of a Person with a Disability, including but not limited to, the provision of medical care for physical and mental health needs, assistance with personal hygiene, the provision of food, clothing, heated and ventilated habitable shelter, transportation, and protection from health and safety hazards.

Disclosure of Documents. The right of the assigned investigator to inspect and copy any document required to be made available pursuant to M.G.L. c. 19C, § 5(1), including any document plainly not irrelevant to any matter under investigation pursuant to M.G.L. c. 19C and in the possession of any mandated reporter or any State Agency or any other entity which employs a mandated reporter and which is acting as custodian of the documents; provided that a written request has been submitted by the assigned investigator.

Emergency. A situation involving an allegation of the presence of imminent Serious Physical Injury or Serious Emotional Injury, or both, to a Person with a Disability that requires an immediate response to protect the Person with a Disability from such Serious Physical Injury or Serious Emotional Injury.

Emergency Protective Services. Those services provided in response to an Emergency to mitigate and/or eliminate imminent Serious Physical Injury or Serious Emotional Injury, or both, to a Person with a Disability.

False Report. A report of Abuse which at the time it is made is known by the reporter not to be true and is maliciously made for: the purpose of harassing, embarrassing or harming another person; the personal financial gain of the reporter; acquiring custody of the Person with a Disability; or the personal benefit of the reporter in any other private dispute. A False Report does not include a report of Abuse of a Person with a Disability that is made in good faith to the Commission and subsequently is unsubstantiated or screened out for lack of jurisdiction under M.G.L. c. 19C.

Formal Investigation. Any discretionary investigation conducted at the direction of the Commissioners pursuant to M.G.L. c. 19C, § 8 and 118 CMR 6.00: *Formal Commissioners' Investigations.* A Formal Investigation may also be known as a Commissioners' Investigation.

2.02: continued

Intake Form. The document generated by the Commission based upon the initial report of an allegation of Abuse of a Person with a Disability.

Long-term Care Facility. A convalescent home, nursing home, rest home, or charitable home for the aged licensed by the Department of Public Health under the provisions of M.G.L. c. 111, § 71.

Non-emergency. A situation of alleged Abuse that is not an Emergency.

Omission. A Caretaker's failure, whether intentional or not, to take action to protect a Person with a Disability, or to provide for the Daily Living Needs of a Person with a Disability, including, but not limited to, failing to prevent another person from committing Abuse or Abuse *Per Se* against a Person with a Disability.

Partially Dependent. A determination made by the Commission that as a result of a disability, a Person with a Disability is unable to meet some, but not all, of his or her Daily Living Needs without the intervention of at least a single caretaker.

Commentary. Partial Dependence is not established by the mere existence of a disability. Partial dependence is established by the existence of both a disability and the individual's partial inability to provide for his or her Daily Living Needs without assistance because of the underlying disability.

Person with a Developmental Disability. A person with a severe, chronic disability that is attributable to a mental or physical impairment resulting from intellectual disability, autism, Smith-Magenis syndrome or Prader Willi syndrome; is manifested before the individual attains 22 years of age; is likely to continue indefinitely; results in substantial functional limitations in three or more areas of major life activity; and reflects the individual's need for a combination and sequence of special, interdisciplinary or generic services, supports or other assistance that is of a lifelong or extended duration and is individually planned and coordinated; as delineated and more specifically defined in the statute and regulations of the Department of Developmental Services at M.G.L. c. 123B and 115 CMR 2.01.

Person with a Disability. A person 18 through 59 years of age, who is a Person with an Intellectual Disability or a Person with a Developmental Disability, as used in M.G.L. c. 123B, § 1, or who is otherwise mentally or physically disabled, and, such mental or physical disability prevents or restricts the individual's ability to provide for his or her own Daily Living Needs; provided, however, that a person who is temporarily dependent upon a medically prescribed device or procedure to solely treat a transitory physical ailment or injury shall not be considered a Person with a Disability for the purposes of M.G.L. c. 19C unless that person otherwise meets the definition of a Person with a Disability.

Person with an Intellectual Disability. A person who has an intellectual disability, characterized by significant limitations in both intellectual functioning and adaptive behavior beginning before 18 years of age, as expressed in conceptual, social and practical adaptive skills as delineated and more specifically defined in the statute and regulations of the Department of Developmental Services at M.G.L. c. 123B and 115 CMR 2.01: *Definitions*, and consistent with the most recent definition provided by the American Association on Intellectual and Developmental Disabilities.

Person with a Mental Disability. An individual having a condition, not including an intellectual or developmental disability, causing mental dysfunction or emotional impairment as determined by a mental health professional.

Person with a Physical Disability. A person with a permanent or long-term physical impairment.

Professional Capacity. The activities that are performed in conjunction with an individual's employment or volunteer service during which they may come in contact with Persons with Disabilities.

2.02: continued

Commentary. The purpose of mandating certain professions to report instances of Abuse is to require reports from those individuals who, as part of their employment, have contact with Persons with Disabilities and thus a greater opportunity to observe Abuse or its effects. As a result, the mandate applies, as specifically stated in the statute, when the mandated reporter, working in a Professional Capacity, has Reasonable Cause to Believe that Abuse exists.

Protective Services. The services arranged for or implemented by a protective service agency as designated by the Commission pursuant to M.G.L. c. 19C, § 3(d) and provided to a Person with a Disability who has been determined to be in a state of Abuse or neglect. Protective Services include, but are not limited to, social casework, case management, arranging for medical/psychiatric evaluations, home care, day care, social service, health care and other services as may be required to ensure that the Person with a Disability is protected from Abuse or neglect and that the effects of Abuse or neglect are remediated.

Reasonable Cause to Believe.

(a) For purposes of reporting and screening allegations of Abuse pursuant to M.G.L. c. 19C, §§ 4, 5(4) and 10, Reasonable Cause to Believe is a threshold function of judgment triggered by a presentation of facts either directly observed or obtained from reliable sources that creates a suspicion that Abuse exists.

(b) For purposes of substantiating or un-substantiating the existence of Abuse after investigation, Reasonable Cause to Believe pursuant to M.G.L. c. 19C, §§ 5 and 8 is a basis for judgment that rests upon specific facts, either directly observed or obtained from reliable sources, which leads to a conclusion regarding whether Abuse and/or Abuse *Per Se* occurred based upon the preponderance of the evidence.

Records. All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, videotapes, digital files, electronic files, or other documentary material, regardless of physical form or characteristics, collected or generated as a result of a report or investigation of abuse or retaliation pursuant to M.G.L. c. 19C. Such records shall not be considered "public records" and the disclosure of the material and data contained therein shall be limited to the extent required by M.G.L. c. 19C, § 3, c. 66, c. 66A, and c. 4, § 7, cl. 26.

Referral Agency. An agency of the Commonwealth that receives from the Commission a report of Abuse of a Person with a Disability in order to perform investigations, protective service assessments, or to provide Protective Services pursuant to M.G.L. c. 19C, §§ 4, 5 and 6.

Reportable Condition. A Serious Physical Injury or Serious Emotional Injury incurred by a Person with a Disability and for which there is Reasonable Cause to Believe resulted from the Act or Omission of a Caretaker or an Act or Omission of a Caretaker that a reporter has Reasonable Cause to Believe constitutes Abuse *Per Se*.

Screener. A Commission employee who determines the urgency and nature of each report of alleged Abuse received by the Commission and who refers it for investigation and/or Protective Services pursuant to M.G.L. c. 19C, § 4 and 118 CMR.

Serious Emotional Injury. An injury to the intellectual functioning or emotional state of a Person with a Disability caused by either the verbal or nonverbal conduct of a Caretaker, including but not limited to, coercion; harassment; the inappropriate isolation of a Person with a Disability from family, friends or regular activity; and verbal assault, including but not limited to, ridiculing, intimidating, yelling or swearing. A Serious Emotional Injury is evidenced by an observable and measurable reduction in the person's ability to function from the person's customary range of performance or customary behavior including, but not limited to, a state of anxiety, fear, depression or withdrawal; or the development of post-traumatic stress disorder, including but not limited to, symptoms resulting from being forced to engage in un-assented to sexual activity.



## 2.02: continued

Commentary. A Serious Emotional Injury is determined by examining the effect of the Act or Omission of the Caretaker(s) upon the ability of the Person with a Disability to function. Finding a reduction of function is not solely dependent upon the duration of the reduction. The fact that the resulting reduction of function from the person's customary range of performance or customary behavior does not extend for a particular period of time does not preclude a finding that a Serious Emotional Injury has occurred. The length of time the reduction in function lasts must be evaluated in conjunction with the severity of the reduction in function in determining whether a Serious Emotional Injury has occurred.

Serious Physical Injury. Impairment of the physical condition of a Person with a Disability resulting from an Act or Omission of a Caretaker, including, but not limited to:

- (a) death;
- (b) brain damage; permanent disfigurement; fracture of any bone; subdural hematoma; intramuscular injury;
- (c) bedsores or similar condition;
- (d) any significant: bleeding; bruising; burn; sunburn; abrasion; laceration; or puncture of the skin;
- (e) any significant impairment of a: bodily system; function; limb; or organ, including human skin;
- (f) harmful symptoms resulting from the use of medication or chemicals without informed consent or appropriate authorization; or
- (g) malnutrition or dehydration.

Commentary. In determining whether there is Reasonable Cause to Believe that the injury is a Serious Physical Injury resulting from Abuse, the Commission shall consider the significance of the injury in the totality of the circumstances, including, but not limited to:

- the shape, size, number and/or pattern of the injury(ies), including indicators that the injury(ies) may have been sustained by the application of force from an identifiable object (*i.e.*, belt, hand, blunt object);
- the location of the injury on the alleged victim;
- prior injuries of a similar nature;
- the level of dependence of the alleged victim, including but not limited to: his or her supervision requirements; ability to ambulate; the requirements of his or her care; and the extent to which the individual is able to participate in activities of daily living;
- the effect the injury had on the alleged victim's ability to function physically;
- the nature and history, if any, of prior self-injurious behavior by the alleged victim; and
- the nature and extent of any medical treatment needed to address the injury.

Sexual Abuse. Occurs when a Caretaker forces, tricks, threatens, coerces, exploits or otherwise engages a Person with a Disability or permits another person to force, trick, threaten, coerce, exploit or otherwise engage a Person with a Disability in an un-assented to sexual activity. Sexual activities may include but are not limited to unwanted or inappropriate touching, kissing, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes or genitalia; or any un-assented to sex act including but not limited to: sexual intercourse; sexually explicit photographing, including the use, publication or dissemination of nude or sexually explicit photographs or recordings to exploit, manipulate, threaten or coerce; or exposure to sexually explicit material, activity or language. Sexual Abuse also includes, but is not limited to, instances in which:

- (a) the Person with a Disability lacks the capacity to assent to the sexual activity with the Caretaker or other person, even if the Person with a Disability has purportedly assented; or
- (b) due to the nature of his or her disability, fear of retribution or hardship, or the inequality of position and power, the Person with a Disability was inappropriately engaged in the sexual activity with the Caretaker or other person.

Commentary. Sexual Abuse does not include a touching which is part of a necessary examination, treatment or care by a Caretaker acting within the scope of the practice or employment of the Caretaker; or the exchange of a brief touch or hug between the Person with a Disability and a Caretaker for the purpose of reassurance, comfort, or casual friendship.

2.02: continued

Special Investigative Unit. The investigative unit within the Commission to which state police are assigned to coordinate and conduct investigations of reports of Abuse received by the Commission where there is an allegation of criminal conduct pursuant to M.G.L. c. 19C, §§ 3(i) and 4.

Staff Investigation. An investigation conducted by the staff of the Commission that is not a Formal Investigation pursuant to M.G.L. c. 19C, § 8 and 118 CMR 6.00: *Formal Commissioners' Investigations.*

State Agency. Any agency of the Commonwealth that provides services or treatment to Persons with Disabilities, as well as private agencies or other entities providing any services or treatment pursuant to a contract, license, or agreement including, but not limited to, a contract, license, or agreement for reimbursement, with an agency of the Commonwealth.

Wholly Dependent. A determination made by the Commission that as a result of a disability, a Person with a Disability is completely unable to meet all of his or her Daily Living Needs without the intervention of at least a single Caretaker.

Commentary. The state of being Wholly Dependent is not established by the mere existence of a disability. The state of being Wholly Dependent is established by the existence of both a disability and the individual's complete inability to provide for all of his or her Daily Living Needs without assistance because of his or her underlying disability.

#### REGULATORY AUTHORITY

118 CMR 2.00: M.G.L. c. 19C, §§ 1 and 3(b).

118 CMR 3.00: REPORTERS

Section

3.01: Scope and Purpose

3.02: Contents of Reports of Abuse

3.03: Mandated Reporters

3.04: Non-mandated Reporters

3.05: Reports Involving Deaths of Individuals with Disabilities Whose Caretaker was a State Agency, an Agency of Any Subdivision of the Commonwealth or a Private Entity Contracting with or Licensed

by the Commonwealth

3.06: Reporter Immunity

3.07: Penalties for Failure of a Mandated Reporter to Report

3.08: Penalties for Retaliation Against Reporters

3.01: Scope and Purpose

118 CMR 3.00 establishes the requirements for reporting abuse and/or death of persons with disabilities to the Commission, the penalties for not reporting and the protections afforded to reporters and participants in investigations conducted pursuant to M.G.L. c. 19C.

3.02: Contents of Reports of Abuse

Each oral and written report of abuse and/or death of a person with a disability made to the Commission shall contain information as deemed appropriate and relevant by the Commission.

3.03: Mandated Reporters

(1) A mandated reporter as defined by M.G.L. c. 19C, § 1 shall immediately make to the Commission's Hotline an oral report of suspected abuse when the mandated reporter has reasonable cause to believe that a reportable condition exists.

(2) A mandated reporter is required to report suspected abuse without regard to professional privileges established by statute, code of ethics or court decision. However, no mandate to report exists after a person with a disability invokes a privilege established by law or professional code and thereby requests that a report not be made. The invocation of such a privilege by a person with a disability shall convert a mandated reporter to a non-mandated reporter.

(3) In addition to making an oral report to the Commission's Hotline, a reporter, whether mandated or not, shall also send to the Commission a written report regarding the existence of a reportable condition as prescribed by M.G.L. c. 19C, § 10.

(4) In all events in which the reportable condition being reported is of a death which the mandated reporter has reasonable cause to believe was the result of a reportable condition, the mandated reporter shall file a written report with the Commission, the District Attorney for the county in which the death occurred, and the Office of the Chief Medical Examiner.

(5) If an investigator designated by the Commission has reasonable cause to believe that a person with a disability has died as a result of abuse, the investigator shall immediately report said death to the Commission, the Attorney General, the District Attorney for the county in which such death occurred, and the Office of the Chief Medical Examiner.

(6) It is the personal responsibility of each mandated reporter to ensure that he or she makes a report to the Commission when he or she has reasonable cause to believe that a reportable condition exists based upon the facts known to him or her. However, when more than one mandated reporter is aware of the same situation of suspected abuse, one mandated reporter may report on behalf of all the mandated reporters by making a report which contains the names of all the mandated reporters. If such a report by multiple reporters is received by the Commission, that single report shall satisfy the reporting requirement for all the named mandated reporters. It shall be the responsibility of each of the mandated reporters to ensure that such a report is actually made on his or her behalf in order to satisfy his or her responsibility to report pursuant to M.G.L. c. 19C, § 10.

3.04: Non-mandated Reporters

Any person, who is not a mandated reporter and has reasonable cause to believe that a reportable condition may exist, may make a report to the Commission pursuant to the requirements contained in 118 CMR. Said reporter shall be referred to in 118 CMR as a "non-mandated reporter."

3.05: Reports Involving Deaths of Individuals with Disabilities Whose Caretaker Was a State Agency, an Agency of Any Subdivision of the Commonwealth or a Private Entity Contracting with or Licensed by the Commonwealth

(1) Upon the death of a person with a disability whose caretaker was a state agency, an agency of any subdivision of the Commonwealth or a private entity contracting with or licensed by an agency of the Commonwealth, even if there is no suspicion that the death is the result of abuse, the caretaker agency is required to immediately provide an oral report of said death to the Commission's Hotline, and to local law enforcement officials and to provide within 24 hours a written report to the Commission and to local law enforcement officials.

(2) Each oral and written report of a death made to the Commission shall contain information as deemed appropriate and relevant by the Commission.

3.06: Reporter Immunity

(1) A mandated reporter shall not be liable in any civil or criminal action by reason of having made a report under M.G.L. c. 19C; provided, however, that if said report is a false report, the protections provided by M.G.L. c. 19C, §§ 10 and 11 shall not be available to the mandated reporter.

(2) A non-mandated reporter shall not be liable in any civil or criminal action by reason of having made a report under M.G.L. c. 19C; provided, however, that if said report is a false report, the protections provided by M.G.L. c. 19C, §§ 10 and 11 shall not be available to the non-mandated reporter.

(3) In no event shall a person who abuses a person with a disability be exempt from civil or criminal liability for such abuse by reason of his or her reporting such abuse.

3.07: Penalties for Failure of a Mandated Reporter to Report

Upon completion of an investigation and determination by the Commission that:

(1) a mandated reporter has failed to report either a reportable condition or a death when required; and

(2) the person with a disability has not knowingly invoked a privilege in accordance with M.G.L. c. 19C, § 10;

The Commission may cause a fine of up to \$1,000.00 to be imposed upon a mandated reporter who fails to comply with the requirements of M.G.L. c. 19C, § 10.

3.08: Penalties for Retaliation Against Reporters

(1) Any person who is discharged, disciplined or in any manner discriminated against for filing a report with or providing information to the Commission or to any agency conducting an investigation under M.G.L. c. 19C shall have the right to have the Commission review and, at its discretion, further investigate an allegation of retaliation.

(2) Upon the completion of an investigation and a determination by a preponderance of the evidence by the Commission that the alleged retaliation occurred as a result of the complainant's filing a report with or providing information during an investigation conducted pursuant to M.G.L. c. 19C, the Commission, at its discretion, may:

(a) request from the Attorney General appointment of Commission's counsel as a Special Assistant Attorney General to prosecute such cases, and if so appointed, file an application for a complaint at the state District Court for the judicial district in which the alleged violation of M.G.L. c. 19C, § 11 occurred; or

3.08: continued

(b) refer the matter for prosecution to the Attorney General, or the District Attorney for the county where the alleged violation occurred. If the Commission reports a case to the Attorney General or to a District Attorney, consistent with the provisions of M.G.L. c. 19C, § 3, a copy of the Commission's investigation report and all relevant information in the possession of the Commission shall be sent to the Attorney General or to the appropriate District Attorney.

(3) When an individual notifies the Commission of alleged retaliation or provides the Commission with information during the course of an investigation, all information that the individual provides to the Commission, including his or her own identity, shall be maintained as confidential information. The Commission shall not release such information except as provided in 118 CMR, M.G.L. c. 19C, § 3, c. 66 and c. 66A.

#### REGULATORY AUTHORITY

118 CMR 3.00: M.G.L. c. 19C, §§ 3(b), 5(4), 10, 11 and 13; c. 66, and c. 66A.

NON-TEXT PAGE

118 CMR 4.00: SCREENING OF REPORTS AND REFERRALS TO OTHER AGENCIES

Section

- 4.01: Scope and Purpose
- 4.02: Screening
- 4.03: Determination of Jurisdiction
- 4.04: Determination of Urgency
- 4.05: Referral to Other Agencies
- 4.06: Reports Involving Deaths of Individuals with Disabilities
- 4.07: Reports Involving Suspected Criminal Activity
- 4.08: Reports not within the Jurisdiction of M.G.L. c. 19C
- 4.09: Monitoring of Referrals, Concurrent or Joint Investigations, and Agency Deferral

4.01: Scope and Purpose

118 CMR 4.00 establishes the procedures and requirements to be followed to determine the nature of the reports received by the Commission and the processing of those reports based upon that determination.

4.02: Screening

(1) Immediately upon its receipt, a report of abuse of a person with a disability shall be evaluated to determine:

- (a) whether the Commission has jurisdiction over the complaint;
- (b) the urgency of the complaint; and
- (c) the appropriate action to be taken by the Commission.

(2) If the Commission is unable to make a screening decision based upon the information received from the reporter, the Commission shall immediately seek such further information as is necessary to facilitate the making of such a decision.

4.03: Determination of Jurisdiction

(1) Based upon the information contained in any report received and any additional information otherwise obtained by the Commission, the Commission shall determine whether it has jurisdiction over the matter reported.

(2) A jurisdictional determination shall be based upon the following factors:

- (a) Whether the alleged victim is a person with a disability as defined by M.G.L. c. 19C and 118 CMR.
- (b) Whether the alleged abuser is a caretaker, as defined by M.G.L. c. 19C and 118 CMR, of the alleged victim.
- (c) Whether it appears the acts or omissions of the alleged victim's caretaker have resulted in the alleged victim suffering serious physical injury or serious emotional injury, or both, or because of the nature of the caretaker's act or omission it is reasonable to conclude that abuse *per se* may have occurred.

4.04: Determination of Urgency

(1) The Commission shall determine the urgency of all reports it receives based upon the information which the Commission deems appropriate to collect in all such cases. The urgency of these reports shall be classified:

- (a) Emergency; or
- (b) Non-emergency

(2) Emergencies.

- (a) If the Commission determines that an emergency exists, the Commission shall:
  - 1. immediately refer the case to the appropriate agency pursuant to the requirements of M.G.L. c. 19C, § 4 and 118 CMR 4.05 to ensure immediate action is taken to end the emergency situation; and

4.04: continued

2. subsequently refer the report for investigation, if appropriate.
  - (b) The designated investigator shall conduct and complete an initial response within 24 hours of the investigating agency's receipt of the report of the existence of an emergency and shall submit an Initial Response form as required by 118 CMR 5.02(3)(a)1: *Requirements of Initial Response*.
  - (c) The designated investigator shall subsequently prepare and submit to the Commission an Investigation Report as required by 118 CMR 5.02(3)(a)2: *Requirements of Investigation Report*.
  - (d) In the event that the report concerns a situation involving an immediate danger to the alleged victim, the Commission shall take appropriate steps to end the abusive situation including, but not limited to, calling local police authorities or referring the report pursuant to 118 CMR 4.05 for the provision of protective services before making a screening decision, as set out in 118 CMR 4.03.
- (3) Non-emergencies. If the Commission determines that a non-emergency exists, the Commission shall:
- (a) note that the report has been designated a non-emergency; and
  - (b) refer the report to the appropriate agency within 24 hours of the day of receipt of the report; or
  - (c) refer the report to the appropriate agency on the next business day if the report is received by the Commission during non-business hours.
- (4) Downgrading Urgency Determination.
- (a) In cases designated an emergency, the referral agency shall:
    1. investigate the matter as required by M.G.L. c. 19C and 118 CMR;
    2. ensure that the emergency is ended and that the person with a disability is safe from further abuse through the implementation of protective services;
    3. report to the Commission what protective actions have been offered/taken to ensure the safety of the person with a disability and confirm that the emergency situation no longer exists.
  - (b) Based upon all the information received by the Commission, the Commission will determine whether and when the urgency determination originally made should be downgraded.

4.05: Referral to Other Agencies

- (1) Reports Regarding Elders, Children, or Patients/Residents of Certain Long-term Care Facilities.
  - (a) Upon receipt of a report alleging abuse of an elderly person (defined as an individual who is 60 years of age or older), the Commission shall immediately refer such report to the Executive Office of Elder Affairs for appropriate action pursuant to M.G.L. c. 19A.
  - (b) Upon receipt of a report alleging abuse of a child (defined as an individual who is younger than 18 years old), the Commission shall immediately refer such report to the Department of Children and Families for appropriate action pursuant to M.G.L. c. 119.
  - (c) Upon receipt of a report alleging abuse of a patient or resident of a long-term care facility as defined in M.G.L. c. 111, § 71 and 118 CMR, the Commission shall immediately refer such report to the Department of Public Health for appropriate action pursuant to M.G.L. c. 111.
- (2) Reports Regarding Individuals Whose Caretaker is a State Agency.
  - (a) Upon receipt of a report alleging abuse of a person with a disability whose caretaker is a state agency, the Commission, after making the jurisdictional and urgency determinations required by 118 CMR 4.03 and 4.04, shall refer the report for investigation to either an investigator of the Commission, or to the investigation division of the agency within the Executive Office of Health and Human Services that has jurisdiction over the entity providing services or treatment to the person with a disability or that provides or has contracted for or licensed the provision of services or treatment to the person with a disability.



## 4.05: continued

(b) For purposes of investigation, when a person with a disability has multiple caretaker agencies, the agency which is designated as the referral agency shall be that agency which is deemed by the Commission to be the agency with sufficient contacts with the person with a disability and the circumstances of the alleged abuse so as to allow for the most efficient and expedient investigation of the alleged abuse and the provision of protective services. Unless the Commission intervenes in the case pursuant to 118 CMR 4.09(2)(b) or (c), each referral agency shall collaborate, as needed, with other agencies in the investigation of cases involving such individuals, but shall retain the responsibility for completing the investigation and preparing an investigation and evaluation report.

(c) If the referral agency objects to the Commission's designation of that agency as the appropriate referral agency, the referral agency shall immediately contact the Executive Director of the Commission, or his or her designee, and request an immediate ruling on the designation. The ruling of the Executive Director or designee shall be final.

(3) Reports Regarding Individuals Whose Caretaker Is Not a State Agency.

(a) Upon receipt of a report alleging abuse of a person with a disability whose caretaker is not a state agency, and the person with a disability has a single type of disability, the Commission, after making the determinations required by 118 CMR 4.03 and 4.04, shall refer the report for investigation to either an investigator of the Commission or to the appropriate agency as specified in 118 CMR 4.05(3)(b) and (c) which agency shall appoint an investigator who shall conduct an investigation pursuant to the time requirements of M.G.L. c. 19C, § 5 and 118 CMR 5.01(2). Unless the Commission intervenes in the case pursuant to 118 CMR 4.09(2)(b), each referral agency shall collaborate, as needed, with other agencies in the investigation of cases involving such individuals, but shall retain the responsibility for completing the investigation and preparing an investigation and evaluation report.

(b) The case shall be referred by the Commission as follows:

1. When, as can best be determined from the intake, the alleged victim is a person with a developmental disability or a person with an intellectual disability, as defined by M.G.L. c. 123B, the case shall be referred to and investigated by the Department of Developmental Services or an investigator of the Commission.

2. When, as can best be determined from the intake, the alleged victim has a mental disability which is not the result of a head injury nor is the alleged victim a person with a developmental disability or person with an intellectual disability, the case shall be referred to and investigated by the Department of Mental Health or an investigator of the Commission.

3. When, as can best be determined from the intake, the person who is the subject of the abuse report has a head injury or one or more other physical disabilities and does not have a mental disability, the case shall be referred to and investigated by the Massachusetts Rehabilitation Commission or an investigator of the Commission.

4. When a person with a disability who is the subject of an abuse report has more than one type of disability, the agency which is designated as the referral agency shall be that agency deemed by the Commission to be the agency with sufficient contacts with the person with a disability and the circumstances of the alleged abuse so as to allow for the most efficient and expedient investigation of the alleged abuse and the provision of protective services.

(c) If the referral agency objects to the designation of that agency as the appropriate referral agency, the referral agency shall immediately contact the Executive Director of the Commission, or his or her designee, and request an immediate ruling on the designation. The ruling of the Executive Director or designee shall be final.

4.06: Reports Involving Deaths of Individuals with Disabilities

(1) Reports Involving Deaths of Individuals with Disabilities as the Result of Abuse. Upon receipt of a report of death as the result of abuse, the Commission shall process and assign said report for investigation in conformance with the provisions of 118 CMR 4.00.

4.06: continued

(2) Reports Involving Deaths of Individuals with Disabilities Whose Caretaker Was a State Agency, an Agency of Any Subdivision of the Commonwealth or a Private Agency Contracting with or Licensed by the Commonwealth. Upon receipt of a report involving the death of an individual with a disability whose caretaker was a state agency, an agency of any subdivision of the Commonwealth, or a private agency contracting with or licensed by the Commonwealth, the Commission, pursuant to the authority contained in M.G.L. c. 19C, § 13 shall make an initial determination of whether there is reasonable cause to believe that abuse contributed to the death of a person with a disability. If said preliminary investigation concludes that there is reasonable cause to believe that abuse contributed to the death of the person with a disability, the Commission shall authorize further investigation of the death. Said further investigation shall be assigned and conducted pursuant to the provisions of M.G.L. c. 19C and 118 CMR regarding investigations of abuse conducted by and for the Commission. In addition, the Commission shall give notice of the death to the Attorney General, the Office of the Chief Medical Examiner and the District Attorney for the county in which the death occurred.

4.07: Reports Involving Suspected Criminal Activity

Upon the receipt of a report that indicates to the Commission that there is reasonable cause to believe that a person with a disability is the victim of criminal activity, the Commission shall:

- (1) Review and screen the report;
- (2) Refer the matter to the Special Investigations Unit assigned to the Commission for further evaluation, investigation and/or referral, including:
  - (a) Referring the matter to the Attorney General or to the District Attorney for the county in which the criminal activity allegedly occurred in cases involving sexual abuse; assault or battery; or where it is indicated the person with a disability has suffered brain injury, loss or substantial impairment of a bodily function or organ, substantial disfigurement, or a serious bodily injury as a result of a pattern of repetitive actions or inactions by a caretaker; and
  - (b) Referring, as it may determine, any report indicating criminal activity to the Attorney General or to the District Attorney for the county or the local police department in the municipality in which the criminal activity allegedly occurred.

4.08: Reports not within the Jurisdiction of M.G.L. c. 19C

Upon the receipt of a report or a request for assistance which does not fall within the jurisdiction of M.G.L. c. 19C and 118 CMR, the Commission shall make all reasonable efforts to refer the reporter and the matter to an appropriate agency, including, but not limited to, legal services, law enforcement, advocacy, and/or human services agencies.

4.09: Monitoring of Referrals, Concurrent or Joint Investigations, and Agency Deferral

- (1) All adult protective services (APS) investigations which are referred by the Commission to other agencies to be conducted pursuant to M.G.L. c. 19C shall be conducted subject to the Commission's oversight authority and subject to the Commission's authority to conduct its own investigations.
- (2) The Commission shall exercise its authority in this matter as follows:
  - (a) The Commission shall monitor the APS investigation conducted by any referral agency to ensure such an investigation is completed in accordance with M.G.L. c. 19C, § 5 and 118 CMR 5.00: *Investigations*.
  - (b) If the Commission determines that the best interests of the person with a disability require that the Commission conduct a staff investigation in place of, concurrent with, or jointly with that of the referral agency, the Commission shall so inform the referral agency and commence such an investigation; and
  - (c) If, based upon the circumstances of the case, the Commission determines that the Commission should conduct its staff investigation under M.G.L. c. 19C prior to or in place of that of the referral agency, the Commission shall inform the referral agency to defer its investigation under M.G.L. c. 19C until further notice from the Commission.

4.09: continued

(3) All criminal investigations which are referred by the Commission to its Special Investigations Unit, the Attorney General, the appropriate District Attorney or the local police department in the municipality in which the criminal activity allegedly occurred shall be coordinated with any APS investigation being conducted pursuant to M.G.L. c. 19C and shall be conducted so as to ensure the safety of the victim with a disability.

(4) Where the Commission has agreed to defer or delay the APS investigation being conducted pursuant to M.G.L. c. 19C during the pendency of a criminal investigation, the Commission shall monitor the progress of the criminal investigation and shall determine, after consultation with the Special Investigations Unit and/or the law enforcement agency(ies) conducting the criminal investigation, when or whether the Commission's investigation should be initiated or resumed.

(5) While an investigation conducted by or on behalf of the Commission pursuant to M.G.L. c. 19C and 118 CMR is independent of an investigation conducted by any agency within the Executive Office of Health and Human Services pursuant to the respective statutory and regulatory authority of each such agency, in all cases in which an investigation is being conducted by or on behalf of the Commission (the M.G.L. c. 19C investigation), the referral agency within the Executive Office of Health and Human Services shall take reasonable steps to avoid unnecessary, unwarranted or counterproductive duplication between any investigation or inquiry being conducted by said agency and the investigation being conducted by or on behalf of the Commission by utilizing the M.G.L. c. 19C investigation in *lieu* of an investigation conducted by said agency.

(6) While an investigation conducted by or on behalf of the Commission pursuant to M.G.L. c. 19C and 118 CMR is independent of an investigation conducted by the police, the District Attorney, or the Attorney General, the Commission may establish policies and procedures pertaining to such investigations to avoid unnecessary, unwarranted, or counterproductive duplication of investigatory efforts.

#### REGULATORY AUTHORITY

118 CMR 4.00: M.G.L. c. 19C, §§ 3(b), (c), 4, 5(4), 11 and 13.

NON-TEXT PAGE

118 CMR 5.00: INVESTIGATIONS

Section

- 5.01: Scope and Purpose
- 5.02: Conduct of Abuse Investigations
- 5.03: Conduct of Retaliation Investigations
- 5.04: Delay or Deferral of Abuse Investigations
- 5.05: Commission Review of Investigation Report

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 and evaluation 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 un-substantiate 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:

## 5.02: continued

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/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;

## 5.02: continued

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 not plainly 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) 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; and
  - (d) 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.
- (3) Requirements of Investigation and Evaluation Reports.
- (a) Investigation and Evaluation Report. The investigation and evaluation 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 non-emergency reports of abuse. Upon request and for good cause shown, 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 investigation and evaluated the allegation of abuse reported to the Commission and evaluated whether the allegation is within the jurisdiction of M.G.L. c. 19C, whether the person with a disability has been abused, whether the person with a disability is at risk of further abuse, and if so, that appropriate protective action has been taken.

## 5.02: continued

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 30 calendar days from the date the report of abuse was referred by the Commission for investigation. Upon request and for good cause shown, 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 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.

(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



5.03: continued

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 (d), 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) 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 45 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. Upon request and for good cause shown, 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: 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:

(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 on-going 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

5.04: continued

(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.

5.05: Commission Review of Investigation Report

(1) Upon receipt by the Commission of the Initial Response and 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 and 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 re-submission 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 5.05(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), 5 and 12.

118 CMR 6.00: FORMAL COMMISSIONERS' INVESTIGATIONS

Section

- 6.01: Scope and Purpose
- 6.02: Initiation
- 6.03: Requirements of a Commissioners' Investigation
- 6.04: Investigatory Hearings
- 6.05: Actions Following a Commissioners' Investigation
- 6.06: Delay or Deferral of a Commissioners' Investigation

6.01: Scope and Purpose

118 CMR 6.00 establishes the requirements for initiation and conducting of a Commissioners' Investigation, the actions to be taken as a result of the conducting of such investigation and the requirements for the delay or deferral of a Commissioners' Investigation.

6.02: Initiation

(1) Pursuant to M.G.L. c. 19C, § 8, the Commission by a majority vote of the Commissioners may initiate a formal investigation which shall be referred to as a Commissioners' Investigation when:

- (a) upon completion of an investigation pursuant to M.G.L. c. 19C, § 5, where the caretaker of the person with a disability is a state agency and the investigation report finds that the allegation of abuse is substantiated; or
- (b) at their discretion, the Commissioners determine that the best interests of persons with disabilities would be served by the initiation of such an investigation to ascertain the scope, remedy for and recommendations regarding abuse of persons with disabilities whose caretaker is a state agency.

(2) In determining whether to initiate a Commissioners' Investigation, the Commissioners shall consider:

- (a) possible duplication of investigations;
- (b) the best interests of the particular person(s) with a disability(ies) involved; or
- (c) the best interests of persons with disabilities in general.

6.03: Requirements of a Commissioners' Investigation

A Commissioners' Investigation shall include:

- (1) The investigation requirements enumerated in 118 CMR 5.02: *Conduct of Abuse Investigations*; and
- (2) An investigatory hearing, unless it is determined by a majority vote of the Commissioners, following an investigation and a review of the results of the investigation, that a hearing is not required; and
- (3) Any other measures determined by the Commissioners as appropriate for and not plainly irrelevant to the investigation.

6.04: Investigatory Hearings

(1) Conduct of Investigatory Hearings.

- (a) The attendance of at least two Commissioners, which shall be a quorum, shall be required to conduct an investigatory hearing pursuant to this provision.
- (b) The Commissioners shall preside over the process of conducting investigatory hearings pursuant to M.G.L. c. 19C, § 8 and 118 CMR. The Commissioners shall:
  - 1. determine the parties to each hearing;
  - 2. determine which evidence they wish to consider;
  - 3. receive evidence;
  - 4. determine the conduct and scope of such hearing; and

6.04: continued

5. make findings at the conclusion of the hearing based upon the preponderance of evidence presented.
  - (c) General Counsel for the Commission shall represent the Commission at said hearings and shall act at the direction of the Commissioners.
  - (d) Unless an emergency investigatory hearing is convened by a majority vote of the Commissioners, in which case 72 hour telephone notice shall be given to all the parties enumerated in 118 CMR 6.04(2)(a), the Commission shall give written notice of an investigatory hearing at least ten business days prior to the commencement of the hearing.
  - (e) Unless otherwise required by 118 CMR, notice of said hearings shall be made:
    1. by posting said notice at the office of the Secretary of the Commonwealth;
    2. by certified or first class mail to required parties; and
    3. by mail to federal protection and advocacy agencies for persons with disabilities which have filed with the Commission a request to be so notified.
- (2) Parties to Investigatory Hearings.
- (a) Required parties to investigatory hearings shall be as follows:
    1. a representative from the state agency that provided services to the person(s) with a disability(ies) at the time of the alleged abuse;
    2. a representative from the state agency which is providing services to the person(s) with a disability(ies) at the time of the hearing, if different from that state agency providing services to the person(s) with a disability(ies) at the time of the alleged abuse;
    3. a representative from the referral agency which performed the initial investigation of the initial report of abuse, if not the Commission; and
    4. any other person or entity that the Commissioners, in their discretion, determine may provide relevant information to the Commission regarding the matter under investigation.
  - (b) Other interested parties may be allowed to participate in the hearing at the discretion of the Commissioners under such terms and conditions as the Commissioners may determine appropriate.
  - (c) The failure of a required party to attend a hearing after receiving notice shall not prevent a hearing from proceeding; however, the Commissioners may determine not to proceed without the absent required party.
- (3) Testimony.
- (a) Testimony taken at investigatory hearings shall be recorded by the Commission, either by electronic or video recording device or stenographic method. All other recording or transcription of hearings shall be prohibited unless specifically authorized by the Commissioners after a written request made to them at least two business days prior to the commencement of the hearing.
  - (b) At the discretion of the presiding Commissioners, testimony at any hearing may be taken under oath.
- (4) Witnesses.
- (a) Prior to testifying, each witness called by the Commission shall be given a copy of 118 CMR 6.00 and any protocols and procedures published thereto.
  - (b) Each witness shall have the right to be represented by counsel at a hearing.
  - (c) Each witness may refuse to submit evidence or give testimony if such evidence or testimony could tend to incriminate him or her, but witnesses who are mandated reporters who refuse to submit evidence or to give testimony unless a response to a question could be used against him or her in a criminal proceeding, shall have his or her failure to cooperate reported to the person's supervisor and to the appropriate state agency for possible disciplinary action.
- (5) Evidence.
- (a) The rules of evidence observed by courts shall not be observed in any hearing conducted pursuant to M.G.L. c. 19C and 118 CMR; however, subject to the exemptions contained in M.G.L. c. 19C, § 5(1), the rules of privilege as recognized by law shall be observed.
  - (b) Unless it is determined by the Commissioners that such disclosure is required to carry out the responsibilities of M.G.L. c. 19C, personally identifiable and confidential information shall not be revealed at a hearing.

6.04: continued

(c) If the Commissioners determine that during the course of the hearing disclosure of personally identifiable or confidential information will occur, the Commissioners or their designee shall:

1. give notice ten business days prior to the commencement of the hearing to the person whose data will be disclosed or to his or her authorized representative of the Commission's intent to disclose personally identifiable or confidential information;
2. give that person or authorized representative an opportunity to object to the disclosure prior to the commencement of the hearing;
3. presume that the person has no objection to such disclosure if the person fails to affirmatively notify the Commission of his or her objection regarding the disclosure of such information within five business days of being notified by the Commission;
4. seek a judicial determination regarding the proposed disclosure if the affected person is a person with a disability and deemed by the Commission to be incapable of exercising his or her rights to object to such disclosure and there is no authorized representative, or the authorized representative is the alleged abuser;
5. not disclose the information if the person with a disability, authorized representative or the Court, as the case may be, expressly objects to the disclosure;
6. disclose as little information as is necessary in the event disclosure of personally identifiable or confidential information is made during a hearing; or
7. vote to go into executive session in accordance with the provisions of the Open Meeting Law, M.G.L. c. 30A, §§ 18 through 25, and the requirements of M.G.L. c. 19C, §§ 3 and 8, to consider the reputation, character, physical condition or mental health of an individual.

6.05: Actions Following a Commissioners' Investigation

(1) Commissioners' Investigation Report.

(a) Upon completion of the investigative activities of the Commissioners' Investigation including the conducting of a hearing, if one is held, a report shall be prepared by the staff of the Commission, which shall be known as the Commissioners' Investigation Report.

(b) Unless otherwise determined by the Commissioners, a Commissioners' Investigation shall be completed and the Commissioners' Investigation Report shall be issued within a reasonable time from the date on which the Commissioners initially authorized the investigation.

(c) The requirements enumerated in 118 CMR 5.02(3)(b): *Recipients of Report* shall apply to a Commissioners' Investigation Report.

(d) Upon completion of the report, the Commissioners shall vote to approve it by a majority vote.

(e) Upon its approval by the Commissioners, the report, with an Executive Summary appended, shall be issued by the Commission.

(2) Other Actions to Be Taken. Upon the completion of a Commissioners' Investigation and the issuance of the Commissioners' Investigation Report, the Commission shall:

(a) ensure that the matters contained therein, if appropriate, be referred to the Commission's Oversight Unit for protective service monitoring.

(b) take all other appropriate actions consistent with the provisions of M.G.L. c. 19C, § 3, to have the recommendations contained in the Commissioners' Investigation Report implemented; including but not limited to, those referral activities enumerated in M.G.L. c. 19C, § 9, referral to all parties to the Commissioner's Investigation, to the Commissioner of the public agency that licensed or approved the service provider against which there is reason to believe that professional misconduct has occurred, to the Commissioner of the public agency that has licensed or approved the service provider for state funding, to the Secretary of the Executive Office of Health and Human Services, and to any other agency which requested to be so notified.

6.06: Delay or Deferral of Commissioners' Investigation

(1) The Commissioners may determine, in their discretion, based upon the standards enunciated in M.G.L. c. 19C, § 12, to delay or defer the commencement of a Commissioners' Investigation pursuant to M.G.L. c. 19C, § 8 and 118 CMR 6.00 because they have determined that said Commissioners' Investigation would duplicate or jeopardize an investigation then being conducted by law enforcement officials or another agency of the Commonwealth.

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

- (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 on-going 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) the investigation of the incident by another official or agency will be conducted in good faith by an impartial, qualified investigator.

(3) If such determination to delay or defer the commencement of a Commissioners' Investigation is made, the Commission shall exercise its monitoring responsibilities pursuant to M.G.L. c. 19C, § 12 on a continuing basis until the conclusion of the investigation and issuance of a report in such other investigation.

REGULATORY AUTHORITY

118 CMR 6.00: M.G.L. c. 19C, §§ 3(b), (e), (h), 8, 9 and 12.

118 CMR 7.00: PROTECTIVE SERVICES

Section

- 7.01: Scope and Purpose
- 7.02: General Principles
- 7.03: Protective Services Assessment
- 7.04: Provision of Protective Services
- 7.05: Monitoring

7.01: Scope and Purpose

118 CMR 7.00 establishes the responsibilities and obligations of the Commission in ensuring that protective services are provided to persons with disabilities who are the subjects of reports made to the Commission and who require such protective services.

7.02: General Principles

Regarding the provision of protective services, the Commission shall:

- (1) ensure that protective services are provided in the least restrictive and most appropriate manner possible to a person with a disability with his or her consent, or that of his or her guardian, or by order of a court of competent jurisdiction as indicated in 118 CMR 7.02(4);
- (2) designate a state agency to act as a protective services provider, and cooperate with that agency and any other agency to provide those protective services that ensure that the person with a disability is protected from abuse and that the effects of abuse are remediated;
- (3) ensure the appropriate provision of emergency protective services by the designated protective services provider; and
- (4) petition the Probate and Family Court for the county in which the person with a disability resides, pursuant to M.G.L. c. 19C, § 7 and 118 CMR, for a judicial determination regarding the issue of the provision of protective services, the appointment or removal of a conservator, limited or general guardian, or for issuance of an order for protective services when a person with a disability refuses or is unable to consent to the provision of necessary protective services or when the guardian of a person with a disability is: unavailable or unwilling to consent to the provision of necessary protective services; suspected of involvement with the alleged abuse; or is not acting in the best interests of the person with a disability.

7.03: Protective Services Assessment

- (1) The initial determination of the need for and requirements of protective services shall be part of the investigative process conducted pursuant to M.G.L. c. 19C, §§ 4 and 5, shall be consistent with the protocols adopted by the Commission and shall be made part of the Initial Response submitted pursuant to M.G.L. c. 19C, § 5 and 118 CMR 5.00: *Investigations*. Said determination shall, at minimum, include the following:
  - (a) A finding regarding whether or not abuse is substantiated;
  - (b) A finding regarding whether the person with a disability is at risk of further harm; and
  - (c) A finding and recommendation identifying an appropriate protective service provider to respond to the abuse which occurred and to prevent further risk of harm to the person with a disability.
- (2) Upon receipt of the Initial Response completed by the referral agency or by the Commission, the Commission shall refer the matter to the designated state agency within the Executive Office of Health and Human Services for purposes of providing protective services and preparing a protective service plan.
- (3) The designated protective services provider shall complete and file with the Commission a protective services plan within 30 days of its designation as the provider. The plan shall contain, at minimum, the following information:

7.03: continued

- (a) a narrative description of the protective service activity(ies) or task(s) to be provided;
- (b) identification of the individual(s) responsible for supervising the provision of and for performing the identified protective service activity(ies) or task(s);
- (c) identification of the proposed or actual start date for the provision of the identified protective service(s); and
- (d) such other information the Commission may determine to be necessary to fulfill its responsibility to monitor the provision of protective services.

(4) After receipt of the protective services plan, the Commission shall review and approve the plan in accordance with its monitoring responsibilities.

7.04: Provision of Protective Services

(1) Protective services shall:

- (a) be provided by agencies of the Commonwealth and vendors who contract or license with such agencies pursuant to the approved protective services plan filed with the Commission;
- (b) be provided in the least restrictive manner possible; and
- (c) be provided to protect a person with a disability from abuse, to remedy the effects of abuse and to respond to the underlying abusive situation, to the extent possible.

(2) Protective services may include, but are not limited to:

- (a) Social services casework and case management, including, but not limited to, evaluations of functional capacity and resources, development of a service plan, appropriate referral services, and emergency response;
- (b) Counseling;
- (c) Homemaker/chore services;
- (d) Temporary shelter;
- (e) Dietary services;
- (f) Emergency services;
- (g) Respite services;
- (h) Alternative housing;
- (i) Housing assistance;
- (j) Special attendants;
- (k) Adaptive equipment;
- (l) Transportation;
- (m) Psychology services;
- (n) Health-related services;
- (o) Referral to legal services;
- (p) Recommendations for staff focused actions including, but not limited to, recommendations for staff training and corrective action; and
- (q) Recommendations for implementation of corrective agency policies and procedures.

(3) Unless the person with a disability has been found incapacitated and/or protective services are being implemented pursuant to a court order, the person with a disability may refuse any or all protective services.

7.05: Monitoring

(1) The Commission shall monitor the provision of protective services for each person with a disability who is determined to require protective services.

(2) The monitoring of each case shall continue until the Commission closes the case.

(3) The monitoring by the Commission for each case may include, but shall not be limited to:

- (a) a review of emergency protective services provided by the designated protective services provider;
- (b) a visit to the person with a disability;
- (c) a determination of the status of the alleged abuser, if identified;



7.05: continued

- (d) a review of case records of the Commission, of the referral agency which conducted the abuse investigation, and of the agency providing the protective services, if different from the referral agency, including, but not limited to, the protective service plan submitted to the Commission; and
- (e) a review of any plan for transition to any needed long-term services.

REGULATORY AUTHORITY

118 CMR 7.00: M.G.L. c. 19C, §§ 3(b), (d), 6 and 7.

NON-TEXT PAGE

118 CMR 8.00: PETITION FOR PROTECTIVE ORDER

Section

- 8.01: Scope and Purpose
- 8.02: Non-emergency petitions
- 8.03: Emergency Petitions
- 8.04: Modification or Rescission of Protective Orders

8.01: Scope and Purpose

118 CMR 8.00 establishes the requirements for the filing of a petition for court ordered protective services pursuant to M.G.L. c. 19C, § 7.

8.02: Non-emergency Petitions

Pursuant to the terms and conditions contained in M.G.L. c. 19C, § 7(a), after the initiation of an investigation pursuant to M.G.L. c. 19C and 118 CMR, when the Commission, the Department of Mental Health, the Department of Developmental Services, or the Massachusetts Rehabilitation Commission, has reasonable cause to believe that a person with a disability is suffering from abuse and lacks the capacity to consent to the provision of protective services, said Commission, Department of Mental Health, Department of Developmental Services, or Massachusetts Rehabilitation Commission may petition the Probate and Family Court for the county where the person with a disability resides, for a finding that the person with a disability lacks such capacity and requires the provision of protective services.

8.03: Emergency Petitions

(1) Emergency Petitions.

- (a) Upon determining that:
  - 1. an emergency exists; and
  - 2. the person with a disability lacks the capacity to consent to the provision of protective services, the Commission, the Department of Mental Health, the Department of Developmental Services, the Massachusetts Rehabilitation Commission, a caretaker or a member of the immediate family of the person with a disability may petition the Probate and Family Court for the county where the person with a disability resides, for an emergency order of protective services.
- (b) Each petition for an emergency order of protective services shall contain a statement of the specific facts upon which the petitioner relies in seeking such determination.

(2) Emergency Hearings.

- (a) Pursuant to the authority granted it by M.G.L. c. 19C, § 7, the Court shall:
  - 1. give notice to the person with a disability who is the subject of the petition at least 24 hours prior to the hearing. The court may dispense with notice upon finding that immediate and reasonably foreseeable harm to the person with a disability or others will result from the 24 hour delay and that reasonable attempts have been made to give such notice;
  - 2. appoint counsel to represent the subject of the petition if he or she is indigent;
  - 3. appoint a guardian *ad litem* to represent the interest of the subject of the petition regarding the right to counsel if the court determines that he or she lacks the capacity to waive the right of counsel;
  - 4. hold a hearing on an emergency petition for protective services no more than 72 hours of its being filed; and
  - 5. issue an appropriate order.
- (b) No more than 144 hours after the issuance date of the original order authorizing the provision of emergency protective services, the original petitioner may petition the court to:
  - 1. continue emergency protective services with the consent of the person with a disability pursuant to 118 CMR 7.02(1);
  - 2. continue emergency protective services pursuant to the previously entered order of the court for an additional duration as determined appropriate by the court; or

8.03: continued

3. entertain a petition for the appointment of a guardian or a conservator.
  - (c) If the court entertains a petition for the appointment of a guardian or conservator, the court, for good cause shown, may order continued protective services as part of its determination regarding such petition.
  - (d) If an order to continue emergency protective services is issued, it must state the services to be provided and designate an individual or agency to be responsible for performing or obtaining the services required by the person with a disability.

8.04: Modification or Rescission of Protective Orders

The person with a disability or his or her court-appointed representative, the Commission, the Department of Mental Health, the Department of Developmental Services, or the Massachusetts Rehabilitation Commission, may petition the court to have any order issued pursuant to M.G.L. c. 19C, § 7, modified or rescinded.

REGULATORY AUTHORITY

118 CMR 8.00: M.G.L. c. 19C, §§ 3(b) and 7.

118 CMR 9.00: RECORDS

Section

- 9.01: Scope and Purpose
- 9.02: Controlling Statutes
- 9.03: Release of Information

9.01: Scope and Purpose

118 CMR 9.00 governs the release of information in the possession of the Disabled Persons Protection Commission.

9.02: Controlling Statutes

All records of the Commission shall be subject to the provisions of M.G.L. c. 4, § 7, cl. 26, c. 19C, § 3, c. 66 and c. 66A.

9.03: Release of Information

(1) Limitation on Release of Information. For the purposes of dissemination, the records of the Commission shall not be considered "public records" and any release of said records shall be pursuant to the provisions of M.G.L. c. 4, § 7, cl. 26, c. 66, c. 66A, and 118 CMR 9.00. The following information shall be confidential and shall not be disclosed or otherwise made available to any person except duly authorized staff of the Commission and the duly authorized staff of an agency within the Executive Office of Health and Human Services to which the Commission has referred a report of abuse for investigation or for the provision of protective services:

- (a) all personal data contained within the initial report of abuse, including but not limited to, personally identifying information of the person with a disability who is the alleged victim of abuse, of the alleged abuser, of the person who made the report of abuse to the Commission, and of any other third party;
- (b) any and all notes, papers, documents or other investigative materials, including but not limited to interview summaries, collected or compiled by personnel duly authorized by the Commission during the course of an investigation.
- (c) all material subject to "peer review privilege" pursuant to M.G.L. c. 111, § 204(b) and within the possession of personnel duly authorized by the Commission.

(2) Release of Investigation Reports to Appropriate Governmental Agencies. Consistent with 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, to facilitate the performance of that governmental agency's statutory functions, including such releases authorized by 118 CMR 5.02(3)(b)2: *Investigation Report*.

(3) Discretionary Release.

- (a) Consistent with M.G.L. c. 19C, § 3, the Commission may release any records, documents, data, or information that serves a public interest. The exercise of the Commission's discretion shall be based upon a balancing of the respective interests of the public in the protection of persons with disabilities, the privacy of the person whose records are being considered for release, and that such a release serves a public interest in protecting citizens of the Commonwealth. In any event, the discretionary release of information shall contain only that much of the personally identifiable and confidential information the disclosure of which is required by the public interest underlying the release of the information; and
- (b) Personally identifying and confidential information of data subjects and of reporters of abuse that are contained in the records of the Commission shall be redacted from the records when disclosure of such information is not required by the public interest underlying the discretionary release of such records.

9.03: continued

- (4) Release Pursuant to Legal Process. Subject to the provisions of 118 CMR 9.00, whenever information or data contained in the documents or data in the possession of the Commission is sought by compulsory legal process in any civil or criminal proceeding, the Commission shall respond to the legal process as the Commission deems appropriate pursuant to M.G.L. c. 19C, § 3 and/or 118 CMR 9.00, which may include but is not limited to, requesting a protective order or an order quashing the process.
- (5) Disclosure of Records to the District Attorney and the Attorney General.
- (a) Where litigation or other legal proceeding has been threatened or instituted by a data subject against the Commonwealth, the Commission or a referral agency, or an official or employee of any said entity arising from his or her official duties or scope of employment on behalf of the Commission, any personal data concerning said data subject, held by the Commission, which is relevant to a determination of the issues in dispute, shall be furnished to the Attorney General or authorized assistant attorney general, who may further disclose such personal data to the extent he or she deems necessary for purposes of representing the defendant(s), subject to the conditions in 118 CMR 9.03(5)(a).1 and 2.:
1. Disclosure shall be furnished in response to a written request from the office of the Attorney General which shall indicate the purpose for which the personal data is requested and identify the data requested.
  2. Personal data of persons not parties to the litigation or other legal proceeding may be redacted by the Commission to protect the privacy interests of such persons.
- (b) In the event that the data maintained by the Commission indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising under a state law or regulation, rule or order issued pursuant thereto, consistent with M.G.L. c. 19C, § 3, the relevant data may be referred to the District Attorney for the county within which said violation occurred or may occur, to the Attorney General, and to the appropriate regulatory agency, as the case may be, to enforce or implement the statute, rule, regulation or order issued pursuant thereto, or to investigate or prosecute such violation.
- (c) Nothing in 118 CMR 9.03(5) shall be construed to authorize the Commission or a referral agency to release information the disclosure of which is prohibited by any statute other than M.G.L. c. 66A.
- (6) Release of Information to Data Subjects.
- (a) Generally.
1. Subject to the provisions of M.G.L. c. 19C, § 3 and c. 66A under which such disclosure may be made, any person who is mentioned in an investigation report shall have access to, and may have a copy of, that portion of the investigation report in which he or she is mentioned.
  2. To obtain a copy of such information, any data subject including, but not limited to, the person with a disability and the alleged abuser, or their respective legal representatives, must file a written request for such information with the Commission.
  3. The Commission shall respond to said request, subject to those restrictions in 118 CMR 9.00, pursuant to the time frames and procedures established in M.G.L. c. 66 and 66A.
- (b) The Person with a Disability.
1. Subject to 118 CMR 9.00, M.G.L. c. 19C, § 3 and c. 66A, information contained in the Commission's investigation report regarding the person with a disability shall be available to that person with a disability, his or her legal representative or his or her legally appointed conservator or guardian where the person with a disability has been determined by a court of competent jurisdiction to be incapacitated.
  2. When requesting records, the said legally appointed conservator or guardian shall provide the Commission with court documentation verifying his or her appointment by a court of competent jurisdiction.
- (c) The Alleged Abuser.
1. Subject to 118 CMR 9.00, M.G.L. c. 19C, § 3 and c. 66A, information contained in the Commission's investigation report regarding the alleged abuser shall be available to that person or his or her legal representative unless the Commission determines that the granting of the request would be contrary to the safety of the person with a disability.

9.03: continued

2. The decision of the Commission not to release such records shall be final and not subject to administrative review; however, the aggrieved party may exercise any other rights or remedies which may be available at law.

(7) Other Provisions.

(a) Prior to the release of any records pursuant to 118 CMR 9.03, the general counsel for the Commission or his or her designee shall review the records and remove any portion of the records which:

1. may be considered attorney work product or privileged;
2. may be personally identifying or confidential information regarding any third party data subject and the individual who reported the abuse to the Commission; and
3. is subject to any further provisions contained in 118 CMR 9.00, M.G.L. c. 19C, § 3, c. 66A, and/or c. 4, § 7, cl. 26.

(b) Upon the written request of any individual or any authorized representative of the individual as to whether the Commission has any records in its possession regarding that individual the Commission shall respond pursuant to 118 CMR 9.00, M.G.L. c. 19C, § 3 and/or c. 66A.

(c) The Commission may deny access to information which, at the time the request for such data is received by the Commission, is subject to further investigation by the Commission, a referral agency, or another law enforcement agency, provided that such denial of access shall not in any way affect a data subject's rights under judicial discovery procedures. Such denial and notification thereof shall be governed by M.G.L. c. 66A, and may continue until said further investigation has been completed, any resulting administrative or judicial proceeding has concluded or one year from the commencement of said further action, whichever is sooner.

(d) Neither the Commission nor the referral agency shall disclose any information about a pending investigation except as may be determined by the Commissioners or their designee to be necessary to fulfill the purposes of M.G.L. c. 19C.

(e) The Executive Director, General Counsel and/or a designee of either may determine, in their discretion, that due to either the specific nature of the request and/or the extensive publicity accorded an investigation, that mere removal of identifying personal data would be insufficient to protect existing privacy interests, or that disclosure would not be in the public interest; and that accordingly, certain documents or data otherwise subject to disclosure should not be disclosed. In such event, the Executive Director, General Counsel, or a designee shall file in the investigation case file a statement of such determination, together with a specification of the document(s) or data to be withheld as an exemption to the definition of a "public record" set forth in M.G.L. c. 4, § 7, cl. 26, the conditions of withholding such information and a brief statement of reasons for withholding such information. Such withholding of data shall be governed by M.G.L. c. 66A, § 2(i).

(f) Any employee of the Commission who is found to have breached the confidentiality of a data subject through the willful violation of 118 CMR 9.00, in addition to any other applicable penalty, shall be subject to disciplinary action including, but not limited to, reprimand, suspension, dismissal or other such action consistent with the rules and regulations of Massachusetts governing its employees, any relevant collective bargaining agreement or any other contract, and said employee may be denied future access to personal data.

(g) When any employee of a referral agency is found by the Commission to have breached the confidentiality of a data subject during the course of an investigation through a violation of 118 CMR 9.00, the Commission shall refer the matter to the appropriate agency of the Commonwealth for consideration by that agency of imposition of disciplinary measures in accordance with the requirements of any applicable law, regulation, or collective bargaining agreement.

REGULATORY AUTHORITY

118 CMR 9.00: M.G.L. c. 19C, §§ 3(b), 3(g), 3(i); chs. 4, 66, and 66A; Massachusetts Guide to Evidence Section 515.

NON-TEXT PAGE



## 118 CMR: DISABLED PERSONS PROTECTION COMMISSION

### 118 CMR 10.00: ANNUAL REPORT

#### Section

10.01: Scope and Purpose

10.02: Time and Recipients of Report

10.03: Contents of Report

#### 10.01: Scope and Purpose

118 CMR 10.00 identifies the manner in which the Commission shall make annual reports of its activities to the Governor and the General Court.

#### 10.02: Time and Recipients of Report

The Commission shall report annually to the Governor and the General Court regarding its activities during the previous fiscal year. Said report shall be filed on or about September 15<sup>th</sup>, and the original shall be presented to the Governor, with copies presented to the President of the Senate and the Speaker of the House of Representatives. Copies shall be filed with the State Library and made available to the public.

#### 10.03: Contents of Report

The annual report may contain:

- (1) statistics of the cases of suspected abuse of persons with disabilities reported to the Commission, including, but not limited to, information regarding reporters, referrals made by the Commission, results of and/or actions taken as a result of investigations, and information regarding the delivery of protective services;
- (2) recommendations of the Commission for proposed legislation regarding the protection of persons with disabilities;
- (3) review and analysis of the activities of the Commission's Special Investigation Unit staffed by State Troopers including, but not limited to, the number of criminal cases reported to the Commission, the number of such cases investigated and the type of crimes being committed against persons with disabilities and being reported to the Commission;
- (4) recommendations regarding resource development and unmet needs of persons with disabilities; and
- (5) any other information that the Commission deems relevant to the protection of persons with disabilities.

#### REGULATORY AUTHORITY

118 CMR 10.00: M.G.L. c. 19C, § 3(b).

NON-TEXT PAGE

118 CMR: DISABLED PERSONS PROTECTION COMMISSION

118 CMR 11.00: INTERAGENCY AGREEMENTS

Section

11.01: Scope and Purpose

11.02: Discretionary Authority to Enter Agreements

11.01: Scope and Purpose

118 CMR 11.00 identifies the circumstances and purposes for which the Commission may enter into interagency agreements in furtherance of the Commission's statutory mandate.

11.02: Discretionary Authority to Enter Agreements

The Commission may, at the discretion of the Commissioners, enter into agreements with state and federal agencies, agencies established by the federal government, and private entities to fulfill the mandate of M.G.L. c. 19C and the requirements of 118 CMR.

REGULATORY AUTHORITY

118 CMR 11.00: M.G.L. c. 19C, § 3(b).

NON-TEXT PAGE

118 CMR: DISABLED PERSONS PROTECTION COMMISSION

118 CMR 12.00: NON-DISCRIMINATION

Section

12.01: Scope and Purpose

12.02: Statement of Non-discrimination Policy

12.01: Scope and Purpose

118 CMR 12.00 identifies that in pursuing its statutory mandate the Commission will not discriminate against any party to an investigation.

12.02: Statement of Non-discrimination Policy

No subject of a report or recipient of protective services shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination in connection with any services provided or performed by the Commission, on the basis of race, creed, color, religion, age, ancestry, marital status, gender identity, sex, language, disability, national origin, or sexual orientation.

REGULATORY AUTHORITY

118 CMR 12.00: M.G.L. c. 19C, § 3(b).

NON-TEXT PAGE

118 CMR 13.00: ADVISORY COUNCIL

Section

13.01: Scope and Purpose

13.02: Nature and Purpose of The Advisory Council

13.01: Scope and Purpose

118 CMR 13.00 identifies the establishment of an Advisory Council to assist the Commission in developing policy that is consistent with and responsive to the needs of persons with disabilities.

13.02: Nature and Purpose of the Advisory Council

(1) The Commissioners shall appoint a council of citizens of the Commonwealth who shall advise the Commissioners on matters of policy regarding M.G.L. c. 19C. No employee of the Commission may be a voting member of the Advisory Council.

(2) The Advisory Council shall have no fewer than three but no more than 15 members. A Chairperson shall be selected from the membership of the Advisory Council by its members. Said chairperson shall serve in that position for one year, beginning on September 1<sup>st</sup>, and may serve successive terms.

(3) The Advisory Council shall meet at least annually at a place and time determined by the Council.

(4) For purposes of tort claims and conflicts of interest, all members of the Commission's Advisory Council shall be special state employees.

REGULATORY AUTHORITY

118 CMR 13.00: M.G.L. c. 19C, §§ 3(b) and 3(f).

NON-TEXT PAGE



118 CMR 14.00: FILING OBJECTIONS AND ADMINISTRATIVE REVIEW

Section

14.01: Scope and Purpose

14.02: Objections Filed Regarding an Investigation Report: Petitions for Review

14.03: Objections Filed Pursuant to M.G.L. c. 66A

14.01: Scope and Purpose

118 CMR 14.00 governs the petition process available to certain parties to a M.G.L. c. 19C investigation and the objection process available to data subjects.

14.02: Objections Filed Regarding an Investigation Report: Petitions for Review

(1) Parties Who May File Petitions for Review. The identified victim, the identified abuser, or their respective legal representatives, who are aggrieved by the disposition of an investigation conducted pursuant to M.G.L. c. 19C may file with the Commission an objection to the conclusion contained in the M.G.L. c. 19C investigation report, except for decisions regarding the screening of an intake, the assignment of an investigator or the deferral of an investigation pursuant to M.G.L. c. 19C, § 12.

(2) Grounds for Objection to an Investigation Report. The grounds for filing a Petition for Review are:

- (a) The investigation report is based on an investigation that was not conducted in accordance with 118 CMR 5.02(1): *Minimum Requirements of Abuse Investigations*;
- (b) The preponderance of evidence does not support the conclusions reached in the investigation report; or
- (c) The preponderance of evidence supports conclusions not reached in the investigation report.

(3) Petition Process.

(a) Petition for Review.

- 1. An objecting party shall file a Petition for Review which:
  - a. shall be in writing;
  - b. shall set forth with sufficient specificity, including supporting evidence and documentation, the grounds for the petition; and
  - c. shall be filed with the Executive Director of the Commission, or his or her designee.
- 2. Said Petition for Review shall be filed with the Commission within ten business days of the petitioner's receipt of a copy of the investigation report from the Commission, but in any case no later than six months after the issuance of the investigation report.

(b) Action Upon Petition for Review.

- 1. Within a reasonable time from the filing of the Petition for Review, the Executive Director or his or her designee shall:
  - a. render a decision in writing including a statement of the nature of the decision and the reasons underlying said decision; and
  - b. amend the M.G.L. c. 19C investigation report if an objection is found to be meritorious.
- 2. A decision rendered by the Executive Director or his or her designee shall be the final and conclusive determination of the objection raised in the filed petition in each case.

(c) Time Frames. The time periods contemplated herein may be extended by the Executive Director or his or her designee for good cause shown. The Commission's good faith failure to meet the time frames set forth in 118 CMR 14.00 shall not confer any rights, either expressly or impliedly, upon the petitioner.

14.03: Objections Filed Pursuant to M.G.L. c. 66A

(1) Objections by Data Subjects Regarding Data Held by the Commission.

(a) A data subject who objects to the accuracy, completeness, pertinence, timeliness, relevance or dissemination of personal data held by the Commission regarding him or her, may file an objection with the Executive Director of the Commission pursuant to M.G.L. c. 66A.

(b) The objection shall:

1. be in writing; and
2. set forth with specificity the reason(s) for the objection.

(c) Within a reasonable time after the receipt of such an objection, the Executive Director or his or her designee shall review the objection and:

1. correct or amend the personal data if there is no disagreement with the data subject as to whether the change or amendment should be made; or
2. if there is disagreement with the data subject as to whether the change or amendment should be made, assure the data subject's claim is noted and included as part of the data subject's personal data and included in any subsequent disclosure or dissemination of the disputed data; and

(d) notify the data subject in writing of a decision and the reasons underlying said decision.

(2) Objection by Data Subjects to Denial of Access to Data Held by the Commission.

(a) A data subject who objects to the Commission's denial of access to that person's own data held by the Commission may file an objection with the Executive Director of the Commission pursuant to M.G.L. c. 66A.

(b) Such objection shall be:

1. in writing; and
2. filed within 30 days of the data subject's receipt of notification of said denial to access to data held by the Commission.

(c) Within a reasonable time after the receipt of such an objection, the Executive Director or his or her designee shall review the objection and send written notification of his or her decision to the objector, including a statement of the nature of the decision and the reasons therefore. Said objection and decision shall be retained by the Commission.

(d) The action taken by the Executive Director or his or her designee pursuant to 118 CMR 14.03 shall be the final and conclusive administrative determination concerning denied access to the data held by the Commission.

(4) Time Frames. The time periods contemplated by 118 CMR 14.00 may be extended by the Executive Director or his or her designee for good cause shown. The Commission's good faith failure to meet the time frames set forth within 118 CMR 14.03 shall not confer any rights, either expressly or impliedly, upon the objector.

(5) Judicial Relief. Any data subject who wishes to challenge any decision of the Executive Director of the Commission regarding personal data may seek judicial review of said decision pursuant to M.G.L. c. 214, § 3B. In the event of any civil action filed pursuant to M.G.L. c. 214, § 3B, the failure to exhaust available administrative remedies shall be an absolute defense.

REGULATORY AUTHORITY

118 CMR 14.00: M.G.L. c. 19C, §§ 3, 3(b), 3(g), 3(i); c. 66 and M.G.L. c. 66A.