

201 CMR 19.00: CUSTOMIZED WHEELCHAIR ARBITRATION

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19.01: Purpose and Definitions

(1) Purpose. 201 CMR 19.00 sets forth the procedures for the operation and administration of a state administered, customized wheelchair arbitration program. It is designed to promote the speedy, efficient, and fair disposition of disputes arising from a consumer's private purchase or lease of a new, but defective, customized wheelchair when the consumer has paid all or some costs out of pocket.

(2) Scope. 201 CMR 19.00 shall apply to state administered, customized wheelchair arbitration services for consumers who have paid all or some costs out of pocket for their private purchase or lease of a new customized wheelchair.

(3) Definitions. Unless otherwise stated, terms used in 201 CMR 19.00 are as defined or used in M.G.L. c. 93, § 107.

Applicant. The consumer under M.G.L. c. 93, § 107, who files a request, on an approved form, for arbitration before an OCABR approved arbitrator claiming a defective customized wheelchair.

Arbitrator. The individual or entity approved and appointed by the Undersecretary of the Office of Consumer Affairs and Business Regulation to conduct customized wheelchair arbitrations.

Award/Appeal Period. The 21-day period for compliance with or appeal of a finding in favor of the consumer by the arbitrator.

Continuing Costs. All incidental costs accrued during that period after the hearing and before the consumer has been tendered a full refund for or replacement of the customized wheelchair as ordered while the consumer is still in possession of the defective, customized wheelchair.

Customized Wheelchair. A new manual or motorized wheeled device which is adapted to meet the specific needs of a particular individual's disability, excluding an automobile, van or truck and for which a consumer pays all or some costs out of pocket for their private purchase or lease.

Consumer.

- (a) The purchaser of a new customized wheelchair if such wheelchair was purchased from a customized wheelchair dealer or manufacturer for purposes other than resale;
- (b) A person to whom the customized wheelchair is transferred for purposes other than resale, if such transfer occurs before the expiration of an express warranty applicable to such wheelchair;

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- (c) A person who may enforce the warranty; or
- (d) A person who leases a customized wheelchair from a customized wheelchair lessor under a written lease. Excluded from Consumer is any individual who received a customized wheelchair provided by or through the Commonwealth, its agencies, bureaus, boards, commissions, authorities, quasi-public agencies, or any of its political subdivisions, or any nonprofit organization.

Customized Wheelchair Dealer. A person in the business of selling customized wheelchairs.

Customized Wheelchair Lessor. A person who leases a customized wheelchair to a consumer or who holds the lessor's rights under a written lease.

Manufacturer. A person or his agent who manufactures or assembles customized wheelchairs, including an importer, distributor, factory branch, distributor branch and warrantors of the manufacturer's customized wheelchair; provided, however, Manufacturer shall not include a customized wheelchair dealer.

Nonconformity. A condition or defect that substantially impairs the use, value or safety of a customized wheelchair and which is covered by an express warranty applicable to the customized wheelchair or to a component of the customized wheelchair. Nonconformity shall not include a condition or defect which results from abuse, neglect or the unauthorized modification or alteration of the customized wheelchair by a consumer.

OCABR. The Office of Consumer Affairs and Business Regulation.

Reasonable Attempt To Repair. Any of the following occurring within the term of an express warranty period applicable to a new customized wheelchair within one year after delivery of the customized wheelchair to a consumer, whichever occurs first:

- (a) A nonconformity within the warranty is subject to repair at least four times by the manufacturer, customized wheelchair lessor, or any of the manufacturer's authorized dealers and the nonconformity continues; or
- (b) The customized wheelchair is out of service for an aggregate of at least 30 days because of a warranty nonconformity.

Request for Arbitration Form. The form provided by the Undersecretary of OCABR to applicants filing for arbitration.

19.02: Arbitration Requests

- (1) To apply for customized wheelchair arbitration, a consumer must submit a "request for arbitration" form, which will be supplied on request by the Office of Consumer Affairs and Business Regulation (OCABR).
- (2) To be accepted for customized wheelchair arbitration, the consumer's request for arbitration must:
 - (a) be submitted on the designated form and received by the OCABR within 18 months of the date the owner took possession of the new customized wheelchair;
 - (b) state that the consumer believes the customized wheelchair's use, value, or safety is substantially impaired by the nonconformity(s) complained of;
 - (c) state that the nonconformity(s) complained of is not the result of owner negligence, damage caused by accident (except as a result of the nonconformity(s)), vandalism, attempts to repair the customized wheelchair by a person other than the manufacturer, its agent or authorized dealer, or any attempt to substantially modify the customized wheelchair without the manufacturer's authorization;
 - (d) state that the consumer either gave the manufacturer, the agent or authorized dealer at least four attempts to correct the same substantial defect, or that the customized wheelchair was out of service for an aggregate of at least 30 days because of a warranty nonconformity within the term of protection;

19.02: continued

- (e) state that the consumer gave the manufacturer its seven business day final opportunity to cure the nonconformity(s) after the limits set forth in 201 CMR 19.02(2)(d) were met or exceeded;
- (f) include a narrative description of the claimed nonconformity(s) and a chronology of the repair attempts; and
- (g) be in compliance with all other rules, regulations, procedures and provisions of law.

(3) List of Approved Arbitrators. The director of OCABR shall maintain a list of arbitrators who have been approved to arbitrate customized wheelchair disputes under M.G.L. c. 93, § 107 and 201 CMR 19.00. Such list shall be public and shall be made available upon request.

19.03: Processing of Arbitration Forms

(1) Submitted arbitration forms will be date-stamped and assigned a case number upon receipt. A request for arbitration form shall be deemed to be timely filed if it is date-stamped or post marked within 18 months of the date the owner took possession of the new customized wheelchair.

(2) Customized wheelchair request for arbitration forms shall be reviewed for completeness and compliance with 201 CMR 19.02.

(a) Incomplete forms shall be returned to the consumer promptly for completion. Such forms when completed must be received by the OCABR within 30 days or within the consumer's period of eligibility for filing the request, whichever is later. The OCABR may reject a request that is not timely returned.

(b) Forms found not in compliance with 201 CMR 19.02 will be rejected, with the reason for rejection sent to the consumer.

(3) Completed arbitration forms shall be date-stamped to indicate their acceptance for arbitration. This acceptance date shall trigger the 45-day period in which the arbitrator must render a decision in the case, and shall be deemed to be the date received.

(4) The OCABR may rescind any acceptance granted in error or because of incomplete or erroneous information.

19.04: Notification and Scheduling of Arbitration Hearings

(1) When scheduling hearings, the OCABR shall attempt to accommodate the geographic and time-of-day needs of the parties.

(2) The OCABR shall mail a notice to the consumer and to the respondent-manufacturer (or its designee), or respondent-lessor as the case may be, within seven days of acceptance of a request for arbitration. The notice shall indicate that the consumer's request for arbitration has been accepted and shall also include general information about the arbitration process, a copy of the consumer's request for arbitration and accompanying narrative.

(3) The foregoing notice shall constitute sufficient notice to the manufacturer that it must cure the nonconformity(s) within seven business days, if the consumer had not previously given such opportunity to the manufacturer.

(4) The hearing shall be held within 44 days of the date that the request for arbitration was accepted. The hearing shall be held no earlier than 21 days after the date of the notice of acceptance unless agreed to by both parties. Notice of the date, time, location of the hearing, and name of the arbitrator shall be mailed by the OCABR to both parties no later than ten days prior to the hearing.

(5) No later than seven days prior to the hearing, the arbitrator or OCABR may call both parties to confirm the hearing date. This call shall constitute sufficient notice should either party claim non-receipt of the notice provided for in 201 CMR 19.04(4).

19.04: continued

(6) Within ten days of the date of the notice of acceptance of the consumer's request for arbitration, the respondent-manufacturer or respondent-lessor as the case may be, shall mail to the OCABR a specific response to the facts and issues raised in the consumer's request for arbitration form. General denials shall not satisfy the requirements of 201 CMR 19.04(6).

(7) The arbitrator shall notify all parties and OCABR of all procedural rulings and shall seek assistance from OCABR if necessary.

19.05: Rescheduling Arbitration Hearings

(1) Either party may request that the arbitrator reschedule the arbitration hearing. The arbitrator shall grant such a request only if received prior to the day of the hearing and only for good cause shown.

(2) Requests to reschedule hearings on the day of the hearing shall be treated according to 201 CMR 19.06.

(3) If a request for rescheduling is granted, the arbitrator shall record the date it was received, and assign a new hearing date and location falling within the original 44-day period provided for in 201 CMR 19.04(4) if one is available. Notice of such new date shall be made to both parties by any means appropriate for the time then remaining before the hearing.

(4) The arbitrator or OCABR may reschedule any hearing for good cause. In such case, the procedures outlined in 201 CMR 19.04 will be used.

19.06: Defaults

(1) If a party fails to appear at the hearing or requests a rescheduling on the day of the hearing, the arbitrator shall enter judgment by default against that party.

(2) If the defaulting party, within three business days after the hearing, demonstrates good cause to the arbitrator for defaulting, the arbitrator will set aside the default. A new hearing will then be scheduled pursuant to 201 CMR 19.05.

19.07: Withdrawal

(1) A consumer may withdraw his request for arbitration at any time prior to the mailing of a written decision by the arbitration firm.

(2) If the arbitrator receives a request for withdrawal prior to the day of the hearing, such request will constitute a withdrawal without prejudice from the arbitration system. In such case, the timeliness of a consumer's request for arbitration will be preserved for two months after the consumer's voluntary withdrawal or the respective time period provided for customized wheelchair filing as specified in 201 CMR 19.03, whichever is later.

(3) If the arbitrator receives a request for withdrawal on or after the day of the hearing it will be deemed a withdrawal with prejudice. After a withdrawal with prejudice, a consumer will be permitted to participate in state-certified arbitration only if the manufacturer, lessor or dealer, as the case may be, voluntarily consents to such proceedings.

19.08: Requests for Information

(1) Any party may request information from another provided that it is in writing, will reasonably assist the requesting party in presenting its case, and allows for a reasonable period of time for the gathering of information. The response must be delivered to the requesting party (with a copy to the arbitrator) no later than three business days before the hearing.

19.08: continued

- (2) Within seven days of any request, any dealer or repair facility or shop which services the consumer's customized wheelchair shall provide a copy of all requested work orders, diagnoses, bills, or other relevant documents or information.
- (3) The parties involved are encouraged to provide the foregoing documents at no charge. However, if the number of individual pages requested exceeds 50, the party providing the copies may charge the requesting party the actual cost of all photocopying, not to exceed ten cents per page.
- (4) Upon reasonable request received no later than seven days before the scheduled date of the hearing, the consumer shall permit the manufacturer, lessor or dealer to examine and test the customized wheelchair. The consumer shall have the right to be present during any examination or test. The manufacturer, lessor or dealer shall use no tools other than diagnostic tools, and shall not make any repairs or adjustments. The examination shall not be used as a repair attempt.
- (5) The parties shall comply with any requests for additional information made by the arbitrator within seven days, or within such period as the arbitrator designates.
- (6) The arbitrator may make procedural rulings, in an equitable and efficient manner to resolve any disputes which arise from the foregoing requests for information.

19.09: The Arbitrator

- (1) A single arbitrator shall conduct each hearing, unless otherwise determined by OCABR. The choice of the arbitrator is not subject to the approval of either party.
- (2) The arbitrator shall not have a personal interest in the outcome of any hearing, nor be acquainted with any of the participants, nor hold any prejudice or bias toward any party or class of parties which might be involved in the proceedings. The arbitrator must disclose such fact to the parties prior to the hearing.
- (3) If either party has a reasonable basis to believe that an arbitrator has violated 201 CMR 19.09(2), the party may request that the arbitrator be disqualified by submitting the request in writing to the OCABR before the hearing if based on information known at that time.
- (4) The arbitrator shall be guided by the standards of ethical conduct established in *The Code of Ethics for Arbitrators in Commercial Disputes* prepared by a Joint Committee consisting of a Special Committee of the American Arbitration Association and a Special Committee of the American Bar Association.

19.10: The Hearing

- (1) The conduct of the hearing will encourage a full and complete disclosure of the facts.
- (2) Arbitration Hearing Record. The arbitrator shall record the hearing. Said recording shall be the official record of the hearing and the parties may not make independent recordings of the hearing. Copies of the official recording may be obtained from OCABR for a nominal fee.
- (3) The arbitrator shall administer an oath or affirmation to each individual who testifies.
- (4) The formal rules of evidence shall not apply. The parties may introduce any relevant evidence that will assist the arbitrator in making a decision. It shall, however, be in the arbitrator's sole discretion whether to allow such evidence and the arbitrator may exclude unduly repetitious or clearly irrelevant evidence.
- (5) The consumer or their representative will present their evidence first, then the respondent-manufacturer or its representative or lessor will present its evidence.

19.10: continued

- (6) The arbitrator shall allow each party to question the other after his or her presentation and shall allow questions of each witness after his or her testimony. The arbitrator may question any party or witness at any time.
- (7) Each party is responsible for presenting all his or her evidence in a concise manner on the day(s) of the hearing.
- (8) All written testimony shall include a statement signed by the witness under oath that his or her testimony is true.
- (9) The consumer shall bring the customized wheelchair to the hearing unless the consumer provides a reasonable basis to believe that it is inoperable or unsafe to operate. The arbitrator may, in his or her discretion, examine the customized wheelchair.
- (10) After a warning, the arbitrator may terminate any hearing that becomes unmanageable due to the behavior of either party and enter judgment by default against the party whose behavior made the hearing unmanageable.
- (11) The arbitrator shall have discretion to allow a party to present its case by telephone or other medium, upon a showing of good cause by the party making such request, and provided that the party has given no less than two hours advance notice to the arbitrator and to the other party. In such cases, the party requesting the hearing by telephone or other medium shall pay all costs associated therewith including, but not limited to, costs for long distance calls, conference calls, and telephone amplification equipment.
- (12) Unless the arbitrator receives a consumer's written consent to a delayed decision, the arbitrator may keep the record open only for additional evidence that the arbitrator requests if that will not interfere with the timely rendering of a decision. Such additional evidence shall be provided to both parties.

19.11: The Decision

- (1) All decisions shall be in writing, dated and signed by the arbitrator, and sent to OCABR. The arbitrator shall submit an arbitration decision to OCABR, unless the arbitrator requests and is granted a reasonable extension by OCABR upon a showing of good cause. The OCABR shall send a copy of the decision to both parties.
- (2) The arbitrator may make an oral decision at the hearing however, it shall not be binding until a written decision is sent, and shall not be used to determine compliance with any time-sensitive deadlines. The arbitrator's decision is final.
- (3) The full written decision shall contain a summary of the evidence presented, a finding of facts, a conclusion of whether the customized wheelchair meets the standards for refund or replacement, a clear calculation of the monetary award if the customized wheelchair meets such standards, and an order if appropriate.
- (4) The arbitrator shall send a decision in each case within 45 days of the acceptance date stamped on the request for arbitration form. Failure to send the decision within such time period, or to hold the hearing within 44 days of acceptance of the request for arbitration, shall not invalidate the decision.
- (5) The date on which the decision is sent shall determine compliance with the 45-day requirement and be the date used to calculate appeal deadlines.
- (6) The arbitrator's decision shall only determine whether the customized wheelchair does or does not meet the standards for refund or replacement.
- (7) Any monetary award for customized wheelchair arbitration shall be calculated in accordance with M.G.L. c. 93, § 107, but may be affected by any previous awards or settlements made to the consumer.

19.11: continued

- (8) The consumer shall be reimbursed for all continuing costs upon return of the defective customized wheelchair if the consumer has previously submitted documentation to the manufacturer and OCABR that such costs have been accrued.
- (9) The arbitrator shall make the following findings with respect to customized wheelchairs:
- (a) As long as the arbitrator determines that:
 - 1. The nonconformity(s) complained of substantially impairs the use, value, or safety of the customized wheelchair; and
 - 2. The consumer gave the manufacturer, lessor or dealer a reasonable number of attempts to repair the customized wheelchair as defined in M.G.L. c. 93, § 107(A)(1); and
 - 3. All other requirements of M.G.L. c. 93, § 107 have been met, the arbitrator must find for the consumer, and order the manufacturer, dealer or lessor to make a refund or replacement at the consumer's option within 30 days of the finding in favor of the consumer.
 - (b) In determining compliance with 201 CMR 19.11(9)(a), the arbitrator shall consider the entirety of the circumstances in each case including, but not limited to, one or more of the following:
 - 1. Whether the customized wheelchair's market value is at least 10% lower than it would have been but for the nonconformity(s);
 - 2. How seriously the nonconformity(s) interferes with the consumer's use of the customized wheelchair; and
 - 3. Whether the nonconformity(s) creates or has the potential to create a substantial danger to the consumer, others, or to property; provided however, that evidence that the nonconformity(s) can be repaired given an additional attempt(s) subsequent to the hearing shall not be taken into consideration by the arbitrator in determining whether the customized wheelchair is substantially impaired.

19.12: Disputing the Arbitrator's Decision

- (1) The arbitrator or OCABR may make "technical corrections" to an arbitrator's decision. "Technical corrections" shall generally be defined as non-substantive computational corrections, typographical corrections, or other minor corrections.
- (2) Either party may request a technical correction in writing, setting forth the requested correction and reason therefor, and must be received by the OCABR within 14 days of the mailing of the arbitrator's full written decision. A request for technical corrections shall not stop the running of the 21-day appeal of award period.
- (3) All claims concerning procedural irregularities, or complaints concerning an arbitrator's conduct or legal errors should be made by parties in writing to the OCABR. This information is requested to assist the OCABR in its oversight of the arbitration process and will not constitute an appeal of any kind.
- (4) A dissatisfied manufacturer or dealer may, within 21 days from the issuance of the arbitrator's decision, file an appeal of such decision through a court of competent jurisdiction. In addition to any other rights and remedies, a dissatisfied consumer shall have the right to file suit against the manufacturer, dealer or lessor under M.G.L. c. 93 § 107(E) and (F).

19.13: Damaged Customized Wheelchair

- (1) If a customized wheelchair that is the subject of arbitration is damaged beyond reasonable wear and tear through no fault of the dealer, lessor or manufacturer, and that damage is unrelated to the defect, the consumer must:
- (a) repair the damage;
 - (b) pay to the dealer the reasonable costs of repair; or
 - (c) allow a deduction from the award for the reasonable costs of repair.
- (2) The consumer must notify the dealer, lessor or manufacturer of the existence and nature of such damage before the hearing, or, if the damage occurs after the hearing, within three days of occurrence.

19.13: continued

(3) If the issue of damage is raised at the hearing, the arbitrator may assess fault and the cost to repair the damage. If the arbitrator assesses fault, and if he or she determines that the damage is not the fault of the dealer, lessor or the manufacturer, the arbitrator shall deduct from the amount of the award the cost to repair the damage.

(4) If the issue of damage is not resolved by the arbitrator, the manufacturer, lessor or dealer may submit a request in writing to the arbitration firm for permission to delay issuing the award until the issue of damage is resolved. Unless such permission is granted, the manufacturer shall pay the full award, or appeal the arbitrator's ruling, within the award/appeal period.

19.14: Manufacturer Warranty Repairs

Defects that involve parts that are covered under an express warranty issued by the manufacturer of the customized wheelchair will be excluded from the warranty required by M.G.L. c. 93, § 107(B), provided that the following conditions are met:

- (1) the dealer gives the consumer a copy of the manufacturer's warranty at the time of sale;
- (2) the manufacturer's warranty has been duly assigned or transferred to the consumer;
- (3) the manufacturer's warranty is enforceable by the consumer according to its terms;
- (4) the manufacturer's warranty is not inconsistent with M.G.L. c. 93, § 107(B); and
- (5) the dealer assures that the defect(s) covered by the manufacturer's express warranty is repaired.

19.15: Notices to Consumers

(1) A Notice to Consumers shall be conspicuously displayed for consumers in the location or business where the customized wheelchairs are sold, offered for sale, or on display in the Commonwealth of Massachusetts.

Such Notice shall state:

ATTENTION CONSUMERS

The Massachusetts "Customized Wheelchair Lemon Law", M.G.L. c. 93, § 107, provides protection for consumers who have a defective, customized wheelchair and have paid out of pocket for all or part of the cost of the customized wheelchair.

UNDER THE CUSTOMIZED WHEELCHAIR LEMON LAW, YOU HAVE A RIGHT TO A REFUND OR REPLACEMENT OF THE CUSTOMIZED WHEELCHAIR IF:

- (a) there is a substantial defect(s); and
- (b) the defect still exists or has recurred after either:
 1. four or more repair attempts for the same defect; or
 2. being out of service for an aggregate of at least 30 days because of a warranty nonconformity, within one year after original delivery; and
- (c) the manufacturer has been notified of the defect and given one final repair attempt of no more than seven business days.

IF THE MANUFACTURER DOES NOT REFUND OR REPLACE THE CUSTOMIZED WHEELCHAIR, YOU HAVE A RIGHT TO HAVE YOUR CASE ARBITRATED BY A STATE ADMINISTERED ARBITRATION PROGRAM ARBITRATOR.

19.15: continued

FOR MORE INFORMATION, REFER TO THE "CUSTOMIZED WHEELCHAIR LEMON LAW" INFORMATION PROVIDED WITH YOUR OWNERSHIP MANUAL MATERIALS, OR CONTACT:

Office of Consumer Affairs and Business Regulation

<http://www.mass.gov/ocabr/>

Customized Wheelchair Lemon Law Information: (617) 973-8733, 1-888-283-3757

(2) All customized wheelchairs still within the term of protection which are sold, or offered for sale in Massachusetts shall include with the ownership manual materials an information sheet, in not smaller than 12 point type:

ATTENTION CONSUMERS

"Customized Wheelchair Lemon Law" Information:

If You Have A Defective Customized Wheelchair

The Massachusetts "Customized Wheelchair Lemon Law", M.G.L. c. 93, § 107 provides protection for consumers who have a defective, customized wheelchair.

UNDER THE CUSTOMIZED WHEELCHAIR LEMON LAW, YOU HAVE A RIGHT TO A REFUND OR REPLACEMENT OF THE CUSTOMIZED WHEELCHAIR IF:

- (a) there is a substantial defect(s); and
- (b) the defect still exists or has recurred after either:
 - 1. four or more repair attempts for the same defect; or
 - 2. being out of service for an aggregate of at least 30 days because of a warranty nonconformity, within one year after original delivery; and
- (c) the manufacturer has been notified of the defect and given one final repair attempt of no more than seven business days.

IF THE MANUFACTURER DOES NOT REFUND OR REPLACE THE CUSTOMIZED WHEELCHAIR, YOU HAVE A RIGHT TO HAVE YOUR CASE ARBITRATED BY A STATE ADMINISTERED ARBITRATION PROGRAM ARBITRATOR.

This state-administered arbitration is different from any manufacturer-sponsored program to which you may also be entitled. Under the state program, you will be sent a decision within 45 days of when your request for arbitration is accepted.

Under the law, you must request state administered arbitration within 18 months of original delivery of the customized wheelchair.

THIS SHEET PROVIDES ONLY A SUMMARY OF YOUR RIGHTS.

To request arbitration, or to get further information, contact:

Office of Consumer Affairs and Business Regulation

<http://www.mass.gov/ocabr/>

Customized Wheelchair Lemon Law Information: (617) 973-8733, 1-888-283-3757

(3) The manufacturer shall be responsible for supplying the foregoing notices to dealers and lessors. The dealer and lessor shall be responsible for placing and displaying the notices for consumers in the location or business where the customized wheelchairs are sold, offered for sale or lease, or on display and for providing such notices to the consumer with the ownership or leasing materials.

19.16: Noncompliance with Award-notification to the Attorney General

If the customized wheelchair manufacturer, dealer or lessor fails to comply with the arbitrator's decision to refund or replace the customized wheelchair for the consumer, according to the terms set forth by the arbitrator in his or her decision, the consumer may notify the Attorney General who may initiate legal proceedings in superior court against said manufacturer, dealer or lessor to enforce such decision and for such other relief as may be appropriate.

19.17: Miscellaneous Provisions

- (1) All correspondence by parties to OCABR should be directed to the attention of the Customized Wheelchair Arbitration Program Coordinator.
- (2) Situations not covered in 201 CMR 19.00 shall be handled by OCABR or the arbitrator in an equitable and efficient manner.
- (3) OCABR may issue advisory opinions regarding issues arising in the arbitration program.
- (4) Upon a finding of extraordinary circumstances, OCABR may, in its sole discretion, waive any of 201 CMR 19.00, if such waiver would be in the public interest, and serve to carry out the purpose or intent of the Customized Wheelchair Arbitration Program.

REGULATORY AUTHORITY

201 CMR 19.00: M.G.L. c. 93, § 107.