DLC Disability Law Center, Inc.

August 4, 2016
(electronically)

Office of the General Counsel
Department of Developmental Services
500 Harrison Avenue
Boston, MA 02118

Re: Proposed Amendments to 115 CMR 1.00, 115 CMR 9.00, and 115 CMR 13.00

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed amendments to 115 CMR 1.00, 115 CMR 9.00, and 115 CMR 13.00, the regulations setting forth the standards and procedures for DDS incident reporting and investigations.

As you know, the Disability Law Center (DLC) is the Commonwealth's Protection and Advocacy system, representing the interests of people with developmental disabilities under the federal mandate of Protection and Advocacy for Persons with Developmental Disabilities Act (42 U.S.C. 15041-15045). One aspect of this role is the authority to engage with policymakers on issues of concern to our constituents with developmental disabilities. 42 U.S.C. sec. 15043 (a)(2)(L).

Our comments are set forth below:

115 CMR 9.02 & 9.05: Definitions and Scope of the Investigations Division's Responsibility

- The proposed amendments to 115 CMR 9.00, particularly 9.02 and 9.05, significantly limit the complaints that the Department will investigate. The current language of 9.05(1) requires the investigation of any non-frivolous complaint of any condition or incident which is mistreatment, illegal, dangerous, or inhumane. Under the proposed amendment, in addition to investigating complaints delegated to it by Disabled Persons Protection Commission (DPPC) and matters at the specific direction of the Commissioner, the Department would only investigate complaints alleging "abuse, assault, sexual assault, or financial exploitation."

  DLC strongly disagrees with the removal of "dangerous," "inhumane," and "mistreatment" in the proposed amendment to 115 CMR 9.05(1) and 9.02, and believes all should remain in 9.05(1). We are concerned that the removal of dangerous, inhumane and mistreatment coupled with the proposed narrow definitions of abuse, omission, serious physical injury, and serious emotional injury will result in the failure to investigate serious incidents. An administrative review or review by the proposed Complaint Review Team (CRT) does not equate to a thorough investigation under 115 CMR 9.10. While we understand some investigations may be time and resource intensive, the proposed regulations rather dramatically limit complaints that the Department will investigate and limit the rights of individuals, guardians, and Human Rights Committees to appeal decisions beyond the regional office level.

  The proposed amendments define "abuse" as "an act or omission that constitutes abuse as the term is defined in 118 CMR 2.00." As defined in 118 CMR 2.00 (specifically in 115 CMR 2.02), "abuse" requires that the act or omission "results in serious physical or emotional injury to the person with a disability." Therefore, under the proposed amendments, for a matter to meet the proposed "abuse" definition and to require investigation under the proposed 115 CMR 9.05(1), there must be a resulting serious physical or emotional injury.

  The current regulations define an incident, condition or occurrence as "dangerous" if it "poses or posed a danger or the potential of danger to the health and safety of an individual regardless of whether injury resulted." Under the current regulations, a complaint regarding the same would be investigated and could be appealed to the Commissioner. An example of such a situation could be a day program staff person leaving an individual who requires supervision alone in a van in an unfamiliar area for a significant amount of time while the staff person tended to personal matters. This situation may not result in a serious physical or emotional injury as those terms are strictly defined. Under the proposed amendments, it would not constitute abuse, and this matter would not be investigated. Instead, it would be sent to either administrative review or for CRT review, neither of which allow for an appeal to the Commissioner.

The current regulations define "inhumane" as meaning "something that is or was demeaning to an individual or inconsistent with the proper regard for human dignity." Under the current regulations, a complaint regarding the same would be investigated and could be appealed to the Commissioner. An example of such a situation could be a staff's verbal abuse of and demeaning comments towards an individual with a severe intellectual disability who is non-verbal. This situation may not result in a serious physical or an observable emotional injury as those terms are strictly defined, and, under the proposed amendments, it would not constitute abuse and would not be investigated. Instead, it would be sent to either administrative review or, more likely, for CRT review, neither of which allow for an appeal to the Commissioner.

Per 115 CMR 5.05, "mistreatment" includes "any intentional or negligent action or omission which exposes an individual to a serious risk of physical or emotional harm." This section provides a non-exhaustive list specific examples of "mistreatment," including but not limited to, infliction of verbal abuse such as screaming or any other activity which is damaging to the individual's self-respect as well as any act that violates 115 CMR 5.00 (Standards to Promote Dignity). Under the current regulations, a complaint regarding mistreatment would be investigated and could be appealed to the Commissioner. The example above regarding verbal abuse could also fall under "mistreatment" and, again, may not result in serious physical or an observable emotional injury as those terms are strictly defined. Again, this matter would not meet the proposed definition of abuse and would not be investigated. The complaint would be sent to either administrative review or to the CRT, neither of which allow for an appeal to the Commissioner.

Given the large possibility of many serious complaints falling outside of the scope of the proposed language in 115 CMR 9.05(1) for investigations and the loss of the right to appeal to the Commissioner, DLC's position is that "dangerous," "inhumane" and "mistreatment" remain in 115 CMR 9.02, require investigation, and maintain the right to appeal to the Commissioner.

- DLC commends the Department for including complaints regarding "financial exploitation" in the list of matters the Investigations Division will investigate. DLC disagrees, however, with the required amount of over $250. Instead, we feel that the illegal or improper use of any amount of an individual's financial resources for personal profit or gain should constitute financial exploitation. Moreover, financial exploitation at low monetary levels often leads to exploitation at greater monetary levels. Therefore, government agencies charged with protecting individuals should act at the earliest possible point in time.

- The definition of "abuse" in the proposed amendments is the same as DPPC's definition of the term and requires a serious physical or emotional injury. Given this shared definition, it is unclear what allegations of abuse, as its defined, would

fall outside of DPPC's jurisdiction and end up with the Department to investigate. Instead, it seems the Department would not investigate allegations of abuse under its own authority or jurisdiction but, instead, only when a complaint is delegated by DPPC. This makes the inclusion of "abuse" in the short list of complaints the Department will investigate misleading.

- The definition of "serious emotional injury" in the proposed amendments is unnecessarily and dangerously restrictive. This definition ignores the fact that an emotional injury may be serious regardless of whether it outwardly affects an individual's ability to function, whether it is temporary or permanent, or whether it is observable and measurable. While a serious emotional injury *may* be evidenced by observable distress or change in function, not all individuals, particularly some individuals with the most severe cognitive, communication and/or physical challenges, will show an "observable and measurable reduction" in their functional ability.

  For example, under the proposed amendments, it appears that it could be clear that a staff person verbally abused an individual who has a severe intellectual disability and is non-verbal and/or not able to express him/herself; however, if the victim does not clearly show an observable and measurable change in function, there would be no "serious emotional injury" and, consequently, no abuse, as that term is defined, to investigate. Such a situation is an unacceptable result and requires less restrictive definitions and requirements. As such, the definition of "serious emotional injury" should, at a minimum, remove the phrase "is evidenced" and replace it with "may be evidenced."

- If the Department's intention is to align its definitions with DPPC through these proposed amendments, DLC fails to see why it did not also incorporate DPPC's commentary regarding "serious emotional injury" in which DPPC notes the finding of a reduction in functioning is not solely dependent upon the duration of the reduction and that there is no particular period of time for which the reduction in functioning must occur. If the Department keeps "serious emotional injury" in the proposed amendments, it should be adjusted to include this clarifying information.

- If the Department's intention is to align its definitions with DPPC through the proposed amendments, DLC fails to see why it did not also incorporate DPPC's definition of abuse *per se* in 118 CMR 2.02. In these situations, the manifestation of a serious physical or emotional injury is not required. Moreover, in its explanation of abuse *per se*, 118 CMR 2.02 states:

  > In instances of a person with a disability who is unable to express or demonstrate a reaction to physical pain or serious emotional injury, it is presumed that abuse exists; provided that, given the same set of factual circumstances the assigned investigator determines by a preponderance of the evidence that a reasonable man would have expressed or

demonstrated a reaction to the physical pain or serious emotional injury inflicted.

The Department's proposed amendments unfairly contain no similar language for individuals who are unable to express or demonstrate such a reaction.

- DLC is concerned that an incident, condition, or occurrence that presents a "serious risk of harm" (*see* 115 CMR 9.02) to an individual, but fails to fit neatly within 9.05(1)(b) (i.e. injury sustained), will not be subject to investigation. Instead, this matter is referred to the regional director or designee for administrative review without a complete investigation and without the right to appeal to the Commissioner. If, for example, a serious emotional injury is not evidenced as the narrow definition requires and as described in the example provided above, a serious incident of verbal abuse would go through the system without an investigation. And, if dissatisfied with the process and/or result, the individual or guardian, if applicable, no longer has the right to appeal to the Commissioner.

  Under the current regulations, such a matter would be appropriately investigated as an incident that is, at the very least, "dangerous," if not also "inhumane" or constituting "mistreatment." We do not agree that the litmus test for investigations of serious incidents should be whether or not an individual actually sustained a serious physical or emotional injury or whether the individual was in a situation that exposed him/her to such an injury. The exposure vs. evidencing actual injury differentiation is inappropriate here given the substantially different processes provided for each situation. An administrative review does not require a thorough investigation, including interviews, site visits, and review of documents nor does it provide for any avenue of appeal to raise the matter to Central Office and the Commissioner. As is the case under the current regulations, the Investigations Division should investigate matters that meet the definition of dangerous, inhumane or mistreatment.

- Similar to concerns expressed regarding administrative review, DLC is concerned about the proposed regulations removing responsibilities previously held by the Investigations Division and giving them to CRTs through 115 CMR 9.05(3). The proposed amendments charge CRTs with, among other things, reviewing and resolving complaints that "raise a concern for the individual's health and welfare" and warrant review. When applying the current regulations, such matters may have triggered an investigation under the "dangerous," "inhumane" or "mistreatment" standards. A CRT review, on the other hand, does not require a specially training investigator to conduct a thorough investigation, including interviews, site visits, and review of documents. Same as with an administrative review, if the victim or guardian, if applicable, is dissatisfied with the CRT process and/or result, they have no right to appeal to the Commissioner or to raise the matter to any Central Office level. Complaints that meet the current definitions of dangerous, inhuman or mistreatment should remain within the scope of the Investigations Division's responsibility for investigation.

- 115 CMR 9.05(4)(b) of the proposed amendments should be re-written as it suggests that an incident that falls under 9.05(1) or (2) is excluded from Chapter 9.00 entirely solely because it could also fall under the auspices of licensing and certification. An incident that requires investigation or administrative review could also constitute a violation of standards for services but should not be dealt with only through licensing certification. For example, incidents of verbal abuse about one's culture or religion should be investigated, not dealt with through licensing and certification because the incident also touched upon violations of 115 CMR 7.04(1)(a), which requires respect for the individual and his/her culture and religion. A dangerous possible reading of the proposed regulatory language would lead to this incident falling under 9.05(4) since the incident is also a violation of standards for services and supports in chapter 7.00.

115 CMR 9.06: Filing of Complaints

- DLC disagrees with the proposed changes to 115 CMR 9.06 and believes the avenue of filing a complaint with the region's senior investigator should remain an option for complainants. As an initial matter, it is unclear what the legal basis is by which the Department can require a complainant to file with another agency, especially an agency that lacks jurisdiction over matters the Department must investigate. It seems to be restructuring that can only be done by the legislature.

- While a single point of entry for lodging a complaint has some possible benefits, in this context, it could also create barriers for individuals and/or families. In a situation in which an individual or family member/guardian may not believe a troubling incident meets the DPPC abuse and neglect standard, they may not report to DPPC as it would be a waste of time in their mind to complain to an agency that cannot help. It is more intuitive to file a complaint with the Department in such a situation, and the option to file with the region's senior investigator should remain. Additionally, it seems that having all complaints go through DPPC may create inaccurate statistics for both DPPC and DDS.

115 CMR 9.07: Protective Services

- The proposed language essentially retains the language regarding protective services as it appears in the current version of 115 CMR 9.06(4). In doing so, it states that, "[i]f a senior investigator concludes at any time during the course of the *investigation* that immediate action is necessary to protect the safety or welfare of an individual..." (emphasis added). Therefore, protective services would only be available to incidents under investigation in accordance with 115 CMR 9.05(1). Protective services would not be available for an individual subject to a "serious risk of harm" or for an individual whose "health and welfare" is at risk as those situations would fall under administrative review and review by the CRT respectively. This subsection should make protective services available in

any situation in which they may be warranted, not solely for incidents within the narrow categories the Department proposes to investigate.

- The proposed language for 115 CMR 9.07(2) replaces "any physical abuse" in the current regulations with "intentional physical injury." DLC disagrees with this narrowing of situations in which a provider must remove an employee or volunteer from all direct contact responsibilities. It weakens the protections from abuse for individuals served by the Department and its provider agencies. The regulation should contain the current language of "any physical abuse" or "any physical injury" and should add "any emotional abuse." Such a change would provide better protections for individuals from ongoing physical and/or emotional abuse.

115 CMR 9.08: Reporting Suspected Criminal Activity or Criminal Charges

- The Department has removed several key aspects of the section formerly labeled 115 CMR 9.17, now 115 CMR 9.08. While the current regulations require the investigator to provide notice to the police, the District Attorney, and General Counsel when he/she has reason to believe a felony was committed, the proposed regulations require an investigator to notify DPPC if he/she determines that a crime was committed. DLC supports the changed language referring to a crime, rather than a felony, because it broadens the scope of harms against individuals that investigators must report.

- The proposed amendment, though, removes the requirement to report to the police, the District Attorney, and General Counsel. Although the state police unit working with DPPC screens complaints for referrals to the District Attorney, in our experience, "lesser" crimes, so to speak, may not be identified for such referrals. As such, given that the goal is to protect the rights and safety of individuals served by the Department, DLC believes that the requirements to notify the police and District Attorney should remain.

- It appears the Department has removed 9.17(1)(a)(1) and (2) due to the expansion from reporting felonies to all crimes; however, incidents of such a serious nature that they involved guns and sharp instruments as described in those subsections should continue to be reported to General Counsel and the Commissioner of Public Safety.

115 CMR 9.09: Logging and Disposition of Complaint

- As noted in the proposed language for 115 CMR 9.09(2)(d), the regional director must send the disposition letter to the Human Rights Committee chairperson, the executive director of the provider agency, the alleged victim and the guardian or legally authorized representative, if applicable and if not the alleged abuser. However, a copy of the redacted complaint is only sent to the Human Rights Committee chairperson. The Department should be required to send this same

redacted complaint to all parties, as the term "party" is defined in the proposed version of 115 CMR 9.02.

- The proposed regulations allow for a complaint to be resolved without an investigation if the allegations can be resolved "fairly and efficiently" within 10 days. The terms "fairly" and "efficiently" are not defined in 115 CMR 9.09(4). DLC believes this language is broad and vague and does not provide clear guidance as to what matters the Investigations Division will not investigate and, instead, place into this category.

- DLC supports the intent of 115 CMR 9.09(7)(b). However, the vague use of "information is discovered" does not set forth a clear standard or process by which the decision is made, nor is it clear whether the CRT chair is the only member of the CRT with authority to make this important choice, particularly if all other CRT members disagree with the chair.

- The current regulations require the senior investigator to send a Change in Disposition Letter to all parties, including the Human Rights Committee, when such a change occurs. The proposed amendments (115 CMR 9.09(7)) include no such requirement to notify the parties of any change in disposition. The requirement to send a Change in Disposition Letter as notice to the parties should remain in the regulations.

- DLC understands there are situations that may require the Department to defer its investigation while law enforcement investigates as contemplated in 115 CMR 9.09(8). For example, if there is a potential crime scene, it may make sense for the Department to defer its investigation during the pendency of law enforcement's investigation in that area for the days immediately following. However, if there is a long wait for a coroner's report, that should not stop the Department from acting. Although the subsections that follow seem to contemplate such distinctions, the language should be clearer and more specific to avoid an unnecessary delay and deferment. As the Department knows, witnesses interviewed many months after the incident under investigation may not recall details as well. Additionally, unnecessary delays exacerbate an already difficult time for the victim and his/her family.

115 CMR 9.10: Conduct of Investigations

- DLC disagrees with the removal of the face-to-face requirement for interviews. Under the current regulations, the investigators must hold private, face-to-face interviews. The proposed regulations remove this requirement for all interviews, except the alleged victim and alleged abuser. Conducting an interview over the phone with an eyewitness, for example, does not allow the investigator to assess important factors, such as the individual's body language or other non-verbal

communications. The requirement for face-to-face interviews should remain in the regulations.

- The regulations should require the investigator to interview the guardian, provided there is one and he/she is not the alleged abuser. This may be of particular importance in situations in which the alleged victim is unable to express himself/herself in an interview.

- The subsection regarding site visits is mistakenly cited as 115 CMR 9.10(2) instead of 9.10(3). The investigator should be required to visit the site of the incident, occurrence or condition as a means of gathering evidence and gaining a better understanding of the context of the allegations. Presently, the proposed regulations do not require a site visit, but instead state the investigator "may" visit the site. We suggest replacing "may visit" with "shall visit."

- The proposed language for 115 CMR 9.10(4) contains no information as to whom the senior investigator or investigator directs the request for an extension of time. The regulation should clearly state the person to whom the senior investigator or investigator direct these requests for extensions.

115 CMR 9.11: Administrative Review

- DLC must again express its concern and disagreement with the failure of the proposed regulations to require the investigation of a complaint alleging an incident, condition, and occurrence that presents a "serious risk of harm" to the individual. Instead of a thorough investigation with required interviews, document reviews and other protocols conducted by a trained investigator, these complaints are referred only for administrative review. The proposed regulations do not require the regional director or designee to conduct interviews or review relevant documents.

- If the senior investigator determines that the disposition of a complaint is a referral to administrative review and, therefore, the complaint will not be investigated, the alleged victim, guardian, if applicable, or Human Rights Committee should have the right to appeal the disposition determination. The determination that an incident presenting a serious risk of harm to an individual will not be investigated is a pivotal determination. Under the proposed amendments, an appeal of this determination is not allowed. Without this right to appeal the disposition determination, a matter that is sent for administrative review can go no further than the regional office, even if the alleged victim, guardian, or Human Rights Committee adamantly disagree with the disposition, administrative review report, or resolution. DLC disagrees with this process and believes there should be a right to appeal the disposition when a matter is sent for administrative review.

- The proposed language has no timeline for the regional director or designee to complete the administrative review report and submit it to the CRT. The current regulations regarding referrals for resolution to the regional director, 115 CMR 9.07(6)(c), requires the regional director or designee to inform the complainant within 14 days how the matter will be addressed. In the proposed regulatory scheme, since the regional director or designee is not completing a full, thorough investigation, the timeframe for completion of the administrative review report should be similar to the current 14 day requirement. The timeframe should certainly be substantially less than the 45 days contemplated in the proposed regulations for investigations.

115 CMR 9.12: Complaint Resolution Team

- As a threshold matter, it seems the Department is delegating administrative powers to what appears to be a non-agency body. Aside from the Department's general powers to write regulations under M.G.L. 123B, it is unclear what the statutory basis is for this delegation.

- DLC must again express its concern and disagreement with the proposed regulations removing responsibilities previously held by the Investigations Division and giving them to CRTs. Please see our prior objections expressed on page four relating to complaints sent to CRTs instead of going through the formal investigation process with all of its related appeal rights.

- Given the large role that the proposed regulations contemplate for CRTs, the composition of the CRT and members' roles are important. The CRT chair is the area or facility director or designee and, per the proposed regulations, has final authority for CRT decisions, even if all other members disagreed with the chair. This significant authority may be particularly problematic at an institution where the chair is the facility director. An area director does not directly employ or supervise employees of provider agencies or run all programming for individuals served through that area office. A facility director, on the other hand, does. As such, it seems there is an inherent conflict of interest when a facility director has the final say in a matter that may implicate a member of his/her staff, his/her supervision of said staff, and the programming he/she is responsible for providing at the institution. It seems the facility director is investigating himself/herself and has the final say as to what happens to him/her. This situation illustrates the important role a neutral investigator can play when determining the facts and making conclusions about an incident. We suggest removing facility directors as CRT Chairs or removing the Chair's final authority on decisions.

- The proposed regulations do not explicitly speak to who should fill the role of CRT coordinator and what qualifications may be required. More specific information regarding the same should be included in the regulations.

- In addition to the CRT chair and coordinator, the required composition of the CRT includes "a minimum of one citizen member" and "additional members and consultants as deemed appropriate by the area or facility director." Nowhere in the proposed regulations does it state that the CRT members must include a person with an intellectual or developmental disability, a family member, or another stakeholder or advocate. This failure to include self-advocates, in particular, is inconsistent with the Department's expressed values. DLC believes the CRT should be required to have at least one self-advocate, family member or other stakeholder or advocate.

- With respect to the required citizen member, the regulation should specifically prohibit people who are employed by or connected to the provider at issue or have been employed by the provider in the past.

- 115 CMR 9.12(1)(d) requires CRTs to meet "regularly" but no specific interval or additional guidance is provided. We suggest including a more explicit standard for CRTs by defining "regularly." We do not believe it is sufficient for the CRT to meet monthly, for example, as this would allow a matter to sit for almost an entire month without the CRT issuing required corrective action or reviewing it itself when referred directly from the senior investigator.

115 CMR 9.13: Issuance of Decision Letter

- DLC disagrees with extending the timeline for issuance of a decision letter from 30 days to 45 days and believes the 30 day limit in the current regulations is sufficient. As mentioned previously, lengthy delays can be problematic for the integrity of the investigation and can exacerbate an already difficult time for individuals and their families.

115 CMR 9.14: Issuance and Implementation of Action Plan or Resolution Letter

- DLC disagrees with the extension from 10 days to 30 days for the development of the action plan or resolution as stated in 115 CMR 9.14(3). Our understanding is that the Department wants to rely on CRTs to develop action plans and resolutions in an effort to have a more efficient and fast system. With that in mind, changing the timeframe fairly dramatically to 30 days seems too much and, if additional time is required, it should be more in the vicinity of 14 days.

- The proposed language of 115 9.14(4) notes the documents the CRT must send to the parties and to various Department employees. The coordinator should also be required to send the official investigation report, administrative review report, or any similar documents from the CRT to the parties and various Department employees. This comment extends to proposed 115 CMR 9.14(4)(c) as well.

- DLC disagrees with the change from seven days to three days in 115 CMR 9.14(4)(b). Given the extension of a number of timelines for the Department and

provider staff throughout the proposed regulations, it seems particularly unfair for alleged victims and their guardians, if applicable, to have timelines impacting their rights shortened. DLC suggests keeping the current standard of seven days.

- DLC disagrees with the five day timeline for submission of a written request for reconsideration. As noted previously, the proposed regulations expand a number of timelines for Department or provider staff throughout the proposed regulations. We believe an extension to at least 10 days is warranted. In our experience working with self-advocates and families, it is not unusual for people to miss the five day deadline or to feel their submission requesting reconsideration is incomplete because they felt rushed to meet the deadline.

- The Human Rights Committee for the provider should be added as a party that can make a request for reconsideration.

- As discussed in more detail below, DLC is concerned that the only avenue to dispute the determination that a complaint will be sent to administrative review and the only way to dispute the findings, conclusions or resolution related to the same is a request for reconsideration to the regional director. The regional director's determination is final, preluding victims and their families from pursuing a matter to a high level within the Department. Again, given the very serious incidents that would apparently fall within the context of an administrative review, we feel such incidents warrant an investigation conducted by a trained investigator.

115 CMR 9.17: Appeal

- If the senior investigator determines that the disposition of a complaint is a referral to Administrative Review or to the CRT for review and that the complaint will not be investigated, the alleged victim, guardian, if applicable, or Human Rights Committee should be able to appeal the disposition determination. The current regulations explicitly allow for such an appeal in 115 CMR 9.11(1)(a)(1), and this ground for appeal should remain. Under the proposed amendments, such an appeal is not allowed.

  The only recourse available is to request reconsideration of the resolution letter through the regional director or designee. The decision at this level is final and only addresses how the resolution letter may be deficient. The request for reconsideration does not allow for a reconsideration of the disposition determination. There is no vehicle by which the party may appeal the determination that the complaint is outside the scope of 115 CMR 9.05(1) to the Commissioner or anyone else outside of the regional office. The proposed amendments should include such an appeal right.

- The proposed amendments to the appeal procedure remove the right of the Human Rights Committee to appeal. Under the current regulation governing

appeals, 9.11(1)(a), any party, with the exception of an employee who chose to grieve a matter, may appeal. The definition of "party" includes the Human Rights Committee. The current regulations went on to explicitly reference Human Rights Committee of the provider as a party to complaints or proceedings in 115 CMR 9.12(2). The proposed regulations should be adjusted to ensure that the Human Rights Committee may remain as a party complaints or proceedings.

- The proposed regulations have no timeframe within which the Commissioner must issue a decision on the appeal. The current regulations, 115 CMR 9.11(2), provide 30 days from the Commissioner's receipt of the case file for the issuance of the written appeal decision. Without any express timeline, a risk exists that an appeal would remain unresolved for a very long time. Such a situation is not desirable for the Department and is fundamentally unfair to the appellant. DLC suggests that the current 30 day timeline remain in effect and be expressly incorporated into the proposed amendments.

115 CMR 9.18: Role of Human Rights Committee

- DLC supports the proposed amendment to 115 CMR 9.12(1)(a), now 115 CMR 9.18(1)(a), as it replaced language that initially stated the committee would "use its best efforts" to ensure that individuals who are "unable to communicate without assistance or an interpreter... [are] represented by an independent attorney or advocate" with the declaration that the committee "shall" ensure individuals are adequately protected by providing assistance such as "interpreters, representation by an independent attorney or advocate, and assistive and supportive devices and technologies." This change emphasize that their duties are mandatory rather than merely beneficial and enumerate multiple types of possible assistance.

- The list of attorneys or advocates that the Human Rights Committee shall maintain should be made available to all, not just when an individual requests the information. An individual or his/her family may not know that such information is available through the Human Rights Committee. Since the committee is already required to maintain this list, it seems reasonable to adjust the language at the end of 115 CMR 9.18(1)(a) to reflect the list is automatically given out, not just "when requested."

- As previously mentioned, the Human Rights Committee should have the right to request reconsideration or appeal. Furthermore, the Human Rights Committee shall receive copies of the documents relevant to the resolution of the complaint. DLC suggests clarifying or specifically naming all documents/types of documents the Department should provide to the committee, including the official investigation report and any appeal decision from the Commissioner.

Miscellaneous Provisions

- The current version of 115 CMR 9.13(1)(a)(7) should remain in the amended section addressing the same. Specifically, copies of notes or memoranda generated by the investigation should be added to proposed 9.19(1)(a).

- The current version of 115 CMR 9.14(3) should remain in the proposed amended regulations. This subsection is important for maintaining impartiality and objectivity, in fact and in appearance. It is vital that the investigation and complaint system is impartial and objective.

- The requirement that the Office of Quality Enforcement conduct an annual systems audit to determine effectiveness of the investigations procedures and to monitor their implementation should remain as it is described in 115 CMR 9.14(7). If the Office of Quality Enforcement is a dated term, the annual audit should be done by the office or division of the Department responsible for such quality measures, such as the Office for Quality Management.

- DLC recommends that 115 CMR 9.15, 9.17, and 9.18 of the regulations currently in effect remain in Chapter 9.00 as each have important functions (reporting duties to various state agencies, reporting criminal activity, and reporting deaths) that do not appear to be captured explicitly elsewhere in the proposed regulations.

115 CMR 13.00: Incident Reporting

- Overall, DLC is concerned that the proposed amendments to 115 CMR 9.16 narrow the types of incidents that must be reported, weaken a fairly robust incident reporting scheme, and weaken the rights of individuals and their guardians, if applicable, with respect to notification and obtaining written documentation related to incidents. For the most part, DLC supports maintaining the current structure and contents of the current version of 115 CMR 9.16.

- DLC is concerned that the narrowing of reportable incidents in the proposed amendment of current 115 CMR 9.16. The proposed regulation, 115 CMR 13.02, includes a non-exhaustive list of reportable incidents. This section, though, leaves out several important reportable incidents from the regulation currently in effect, including all incidents resulting in physical injury which requires any medical treatment beyond routine first aid, emotional harm, potential physical or emotional harm, and police involvement. While the proposed list in 115 CMR 13.02 provides a longer enumerated lists of incidents, some of its changes leave more possible gaps in what must be reported. For instance, the proposed regulations only require reporting incidents requiring hospitalization, but the current regulations require reporting physical injury requiring medical treatment beyond first aid. It is DLC's position that the Department should err on the side of

caution and choose the definitions/categories that encourage the most reporting rather than the least.

For the creation of 115 CMR 13.02(1), we suggest combining it with the current regulation's list of reportable incidents as follows: unanticipated or suspicious death; inappropriate sexual behavior; significant behavioral incident; physical injury which requires any medical treatment beyond routine first aid; unexpected hospital visit; fire; suspected mistreatment; theft; missing person; criminal activity; transportation accident; emergency relocation; suicide attempt; property damage; police involvement; emotional harm; or potential physical or emotional harm.

- Through 115 CMR 13.02(2), the Department proposes that it have the power to change the categories and definitions of reportable incidents at its discretion, without going through the required process for proposed amendments to regulations. Instead, the Department proposes it periodically address such changes through its internal incident management guidelines. Given that the Department lists a number of categories of reportable incidents in 115 CMR 13.02(1), DLC believes any future change to specific categories in this non-exhaustive list would require an amendment to the regulation, including a public comment period. For an issue as important as what incidents require reporting, the more transparent regulatory process is appropriate. We believe the language of 115 CMR 13.02(2) attempts to circumvent this required process and should be removed.

- The proposed notice and reporting regulations in 115 CMR 13.04 now divide incidents into the categories "major level of review" and "minor level of review." A "major level of review" means the reported incident is subject to a broader review by the Department while a "minor level of review" is reviewed by the Service Coordinator. "Major level of review" and "minor level of review" are not defined in the regulations. Instead, the regulations refer to the incident management guidelines issued by the Department for definitions of these terms. It is our understanding that this guidance does not actually provide clear definitions for these terms. Aside from a mention of an unexpected or suspicious death requiring a major level review, the explanation of what substantively defines an incident as major is three guidelines given in relation to escalation. These state that an incident should be escalated from minor to major in the cases of incidents of suspected mistreatment where there is life-threatening injury or a public safety risk, incidents that have the potential for broad, negative publicity in the media, and incidents where law enforcement is involved in any capacity.

  DLC disagrees with the proposed amendments to the incident reporting section regarding this differentiation of major and minor levels of review. Incidents involving life-threatening injury, risks to public safety, law enforcement, or the possibility for negative publicity in the media should not be the only incidents in which a broader review within the Department occurs. DLC is concerned that the

proposed structure will allow for serious incidents to be categorized as minor or not reported at all.

- The proposed notice and reporting requirements inappropriately reduce the rights of individuals and guardians. 115 CMR 9.16 currently requires that the staff person who observed the incident must complete a written report within two hours and file it with, among others, the family or guardian within 24 hours. However, 115 CMR 13.04 merely requires that for major level of review, providers shall give verbal notification to the Area Office of a reportable incident as soon as the incident is discovered and that the guardian shall receive verbal notification "as soon as reasonably practicable after the incident is discovered." These requirements remove written notice requirements and do not specify who must inform the guardian of the incident, both of which may result in a lack of accountability and ultimately a failure to complete the required tasks. DLC believes the Department should not change the current requirements in 115 CMR 9.16(2) and (3).

- Unlike the regulations currently in effect, the proposed amendments do not specify hard deadlines for reporting incidents. For minor levels of review, the guardian should be notified in accordance with the preferences the guardian has documented in the individual's record, but there is no specified timeframe for this notification, nor is a written report or notification required. Even more troubling is the omission of any timeline for the completion of the Initial Incident Report and the Final Incident Report contemplated in 115 CMR 13.05. The regulations must contain clear timelines and clear processes by which the Department provides individuals and guardians with copies of these report.

- DLC believes 115 CMR 13.06 should replace "felony" with "crime." Such a change is consistent with the Department's proposed changes to 115 CMR 9.00.

- In addition to the comments above, DLC believes the Department's incident reporting regulation must continue to include the contents of 115 CMR 9.16(2), (3),(4), (7), (8), and (9) in order to maintain a robust incident reporting system that sufficiently protects the rights and safety of the individuals served by the Department.

Thank you for the opportunity to provide comments on the proposed amendments to 115 CMR 1.00, 115 CMR 9.00, and 115 CMR 13.00. Please feel free to contact us with any questions or concerns.

Sincerely,

(C.J.)

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