

110 CMR: DEPARTMENT OF CHILDREN AND FAMILIES

110 CMR 10.00: FAIR HEARING AND GRIEVANCES

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10.01: Policy

The Department strives to provide services to clients equitably and fairly. Toward that end, clients shall have the opportunity to appeal certain matters via a Fair Hearing Process, and to present other matters to the department via a Grievance Process. The Fair Hearing Process is designed to enable a client who is dissatisfied with certain actions or inactions by the Department or a provider under contract with the Department to present his or her position in an informal hearing and to receive a just and fair decision from an impartial hearing officer based on the facts and applicable policies, regulations, statutes and/or case law. The provisions of 801 CMR 1.01: *Formal Rules* through 1.03: *Miscellaneous Provisions Applicable to All Adjudicatory Proceedings* shall not apply to the Department's Fair Hearings. The Grievance Process is likewise designed to offer an informal dispute resolution process for clients.

10.02: Definitions

As used in 110 CMR 10.00, unless the context otherwise requires, the following terms shall have the following meanings:

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Adolescent. An individual between 14 and 18 years of age.

Aggrieved Party. Any individual who challenges a decision of the Department pursuant to 110 CMR 10.36 through 10.38.

Alleged Perpetrator. An individual who the Department has identified, by substantial evidence, as responsible for the abuse or neglect of a child, referred the person's name to the District Attorney's office under M.G.L. c. 119, § 51B(k), and listed the person on the Department's Registry of Alleged Perpetrators.

Appellant. Any individual who challenges a decision of the Department pursuant to 110 CMR 10.03 through 10.36.

Authorized Representative. Any person, such as a lawyer, advocate, relative or friend, who is authorized in writing by any party to represent that party.

Client. An applicant for or recipient of Department services. Foster parents, pre-adoptive parents or adoptive parents in their status as such shall be considered clients for purposes of 110 CMR 10.00.

Clinical Review Team. A team of not less than five individuals, each of whom must have extensive social work experience, convened by a Regional Director for the purpose of reviewing a decision referred to the team pursuant to 110 CMR 10.08.

Director of Areas. The term Director of Areas when used in 110 CMR 10.00 means the director of the Department's Area Office and shall include the director of any provider.

Fair Hearing Office. The centralized hearing office for Fair Hearings statewide, located at the Central Office of the Department and within the Office of the General Counsel.

OCA. The Office of the Child Advocate pursuant to M.G.L. c. 18C.

Provider. An organization with a contract with the Department to provide services for Department Clients.

Young Adult. An individual between 18 and 22 years of age.

10.03: Hearings Officers

The Department shall employ one or more impartial hearings officers, whose sole duty shall be to conduct Fair Hearings statewide. No officer shall hear, or involve themselves in any way, in any matter in which they have, or have had, any direct or indirect interest, personal involvement or bias. Said officer shall attest to this impartiality in his or her written decision.

In the event that the assigned Fair Hearing Officer is unable to hear the matter due to a lack of impartiality, the officer shall notify the Director of Fair Hearings or designee, in writing, that the officer must recuse himself or herself from the matter. The Director of Fair Hearings or designee shall appoint another officer to hear the case.

The Hearing Office, as defined in 110 CMR 10.02, shall be under the direction of the Department's Director of Fair Hearings. Fair Hearing Officers employed by the Department shall have, at a minimum, two years of direct service experience as well as legal training and/or experience.

In addition, each Fair Hearing Officer shall receive the following hours of in-service training: 40 hours of pre-service training before he or she is eligible to conduct Fair Hearings, and, on an annual basis, shall receive 25 hours of training in the following areas, including but not limited to: legal/administrative, trauma/abuse, health, poverty, conflict resolution, and conflict of interest. However, the failure to comply with 110 CMR 10.03 shall not prevent an individual from serving as a Hearing Officer.

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10.03A: Reports

The General Counsel's Office shall report, on an annual basis, the activities of the office, including but not limited to, the number of fair hearing requests, the number of hearings held, the number of decisions issued and the number of open Fair Hearings cases.

10.04: Providers

110 CMR 10.00 shall apply to clients who obtain or apply for services from the Department or from any Department provider. Providers may not avail themselves of the Fair Hearing or Grievance processes.

10.05: Standards for Review

A Fair Hearing shall address whether, based upon the evidence and the hearing record as a whole:

- (a) the Department's or Provider's decision or procedural action violated applicable statutory or regulatory requirements, including but not limited to 110 CMR, or the Department's or Provider's policies or procedures, and resulted in substantial prejudice to the Appellant; or
- (b) if there is no applicable statute, policy, regulation or procedure, the Department or Provider failed to act with a reasonable basis or in a reasonable manner which resulted in substantial prejudice to the Appellant;
- (c) for a decision to support a report of abuse or neglect, whether based on the record as a whole, and giving due weight to the clinical judgments of the Department social workers, there is reasonable cause to believe that a child has been abused or neglected; or
- (d) for a decision to list a person on the registry of alleged perpetrators, whether based on the record as a whole, there is substantial evidence that the person is responsible for the abuse or neglect.

10.06: Allowable Grounds for Appeal

The following matters are the exclusive grounds that may be appealed via the Fair Hearing process pursuant to 110 CMR 10.00:

- (1) Applicant's Grounds for Appeal. An applicant for services has the right to appeal:
 - (a) the failure of the Department to follow 110 CMR, which resulted in substantial prejudice to the applicant;
 - (b) the computation of a fee for services in excess of the minimum fee set by the Department if the applicant is claiming that the fee was incorrectly calculated;
 - (c) the imposition of the minimum fee set by the Department if the applicant can show cause that he or she is exempt from that fee;
 - (d) any action or inaction of the Department involving the placement of children across state lines, pursuant to the provisions of 110 CMR 7.500: *Introduction to Interstate Placement Services*.
- (2) Biological Parents' Grounds for Appeal. In addition to any other matters which are appealable pursuant to 110 CMR 10.06(1) and (3), biological parents may appeal when a goal determination made at a Foster Care Review changes pursuant to 110 CMR 6.10(12): *Appeal of FCR Determination*.
- (3) Recipients' Grounds of Appeal. A recipient of services from the Department has the right to appeal the following actions by the Department or Provider:
 - (a) the suspension, reduction or termination of a service; however, there shall be no right to a Fair Hearing if:
 1. the termination of a service is due to a judicial determination that the recipient's parental rights were terminated;
 2. the termination of a service is due to a judicial determination that all of the recipient's minor children are under a permanent custody order to another individual pursuant to M.G.L. c. 119 § 26, and/or are under a guardianship to another pursuant to M.G.L. c. 190B;
 3. the service being terminated is to a parent(s) whose child has turned 18 years of age; or
 4. the service being terminated is to an individual 22 years of age or older.

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- (b) the calculation or recalculation of a fee if the recipient can show cause that the fee was calculated incorrectly;
- (c) the imposition of the minimum fee if the recipient can show cause that he or she is exempt from that fee;
- (d) the failure of the Department to follow 110 CMR, which resulted in substantial prejudice to the recipient.

(4) Foster Parents' Grounds of Appeal. A foster parent has a right to appeal the following actions by the Department although a right to appeal does not confer or create a liberty or property interest to a foster parent.

- (a) the removal a foster child from the foster home, except that no right of appeal exists if the child is to be removed in order to be placed:
 - 1. with his or her biological or adoptive parent(s);
 - 2. in one of the following placements, if the current placement is not such a placement, unless the foster parent(s) has applied to be a pre-adoptive or guardian placement for the child and has not been rejected by the Department as a pre-adoptive or guardian placement for the child, or there is a Fair Hearing appeal pending challenging the denial of the current foster parent as the child's pre-adoptive or guardian placement;
 - a. in a pre-adoptive home;
 - b. with a prospective guardian;
 - c. in a home where one or more of the child's siblings is residing; or
 - d. in a kinship home of the foster child if the current foster parent is not a kinship home of the foster child.
 - 3. in an independent living situation;
 - 4. in a different foster home because the child specific or kinship home was not approved as a foster/pre-adoptive home for the specific child, or was not reapproved after a reassessment under 110 CMR 7.113: *Reassessment of Foster/Pre-adoptive Parents and Foster/Pre-adoptive Homes*;
 - 5. in a different foster home because the foster parent's license is either terminated or is not renewed after a reassessment under 110 CMR 7.113: *Reassessment of Foster/Pre-adoptive Parents and Foster/Pre-adoptive Homes*;
 - 6. in a Department foster home, if that child is being moved from an intensive foster care home, and the child is no longer in need of intensive foster care, unless the intensive foster parent is seeking to become a pre-adoptive or prospective guardian placement and has not been denied by the Department.
- (b) closure of the foster home, termination of a license as a foster parent/home or denial of a renewal of a foster parent/home license;
- (c) denial of the foster parent as a legal guardian or adoptive parent for a child who has been in his or her foster home for at least six months;
- (d) the failure of the Department to follow 110 CMR, which resulted in substantial prejudice to the foster parent;
- (e) a Foster Care Review determination to change the service plan goal pursuant to 110 CMR 6.10(12): *Appeal of FCR Determination* to change a goal.

(5) Pre-adoptive and Adoptive Parents' Grounds of Appeal. A pre-adoptive and adoptive parent has the right to appeal the following decisions by the Department:

- (a) denial of an application to become a Pre-adoptive placement;
- (b) withdrawal of Department sponsorship of a Pre-adoptive placement;
- (c) removal of a child from a Pre-adoptive placement, except that no right of appeal exists if the child was or will be placed with his or her parents, in an independent living situation, or if the pre-adoptive parent is either not reapproved for a child specific or kinship home, or his or her license is either terminated or not renewed for an unrestricted adoptive home after an evaluation under 110 CMR 7.113: *Reassessment of Foster/Pre-adoptive Parents and Foster/Pre-adoptive Homes*;
- (d) decisions related to the adoption subsidy program, including:
 - 1. the denial, reduction, suspension or termination of an adoption subsidy, except that there shall be no right to challenge a decision to terminate a subsidy if the child is 21 years of age and has been receiving a Title IV-E subsidy, or the child is 22 years of age and has been receiving a state adoption subsidy;

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2. the decision to provide a deferred subsidy or to continue a deferred subsidy after a request for re-determination;
 3. the existence of extenuating circumstances for an adoption subsidy after finalization of the adoption of a child with special needs;
 - (e) closure of a foster home which is also a Pre-adoptive placement;
 - (f) the failure of the Department to follow 110 CMR, which resulted in substantial prejudice to the Appellant.
 - (g) the delay or denial of the placement of a child for adoption when an approved family is available out of state.
- (6) Prospective Guardians' or Guardians' Grounds for Appeal. A Prospective Guardian or Guardian has the right to appeal the following actions by the Department:
- (a) denial of an application to become a guardian for a child in Department care or custody;
 - (b) withdrawal of the sponsorship of a guardianship;
 - (c) removal of a child from a prospective guardianship placement, except that no right of appeal exists if the child was or will be placed with her/his parents, in an independent living situation, or if the Prospective Guardian or Guardian is either not reapproved as a child specific or kinship home, or his or her license is either terminated or not renewed for an unrestricted adoptive home, after an evaluation under 110 CMR 7.113: *Reassessment of Foster/Pre-adoptive Parents and Foster/Pre-adoptive Homes*;
 - (d) decisions related to the guardianship subsidy program, including the:
 1. denial, reduction, suspension or termination of a guardianship subsidy, except that there shall be no right to challenge a decision to terminate a subsidy if the child has turned 18 unless a request for an extension has been granted under 110 CMR 7.303(13): *Extension of Guardianship Subsidy Over Age 18*;
 2. denial of a state funded guardianship which was requested on the ground that extenuating circumstances exist for a guardianship subsidy after finalization of the guardianship;
 3. denial of a request for an extension of a guardianship subsidy under 110 CMR 7.303(13): *Extension of Guardianship Subsidy Over Age 18* for a Young Adult unless the Young Adult has turned 22.
 - (e) a decision to close a foster home which is also a proposed guardianship placement;
 - (f) the failure of the Department to follow 110 CMR which resulted in substantial prejudice to the Appellant.
- (7) Foster and Pre-adoptive Parent Applicants' Grounds for Appeal. Foster and Pre-adoptive parent applicants have the right to appeal the Department's decision to deny an application to become a Foster parent or Pre-adoptive parent, except that no right of appeal exists if the decision is based on the applicant's failure to effect specified changes within the allotted time after receiving notice from the Department.
- (8) Adolescents' Grounds for Appeal. In addition to any other matters which are appealable pursuant to 110 CMR 10.06(1) and (3), an Adolescent has the right to appeal.
- (a) a Foster Care Review determination to change the service plan goal pursuant to 110 CMR 6.10(12): *Appeal of FCR Determination*;
 - (b) the denial of a request to receive services, including placement services, from the Department 18 years of age or older.
- (9) Children's Grounds for Appeal. In addition to any other matters which are appealable pursuant to 110 CMR 10.06(1) and (3), children younger than 14 years old has the right to appeal, through an attorney or authorized representative, a Foster Care Review determination to change the service plan goal made pursuant to 110 CMR 6.10(12): *Appeal of FCR Determination*.
- (10) Young Adults' Grounds for Appeal. In addition to any other matters which are appealable pursuant to 110 CMR 10.06(1) and (3), a Young Adult may appeal:
- (a) the denial of a request to continue to receive services, including placement services, from the Department 18 years of age or older;

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- (b) the denial of a request to return to the Department's care and receive services if the Young Adult was in the care or custody of the Department at the age of 18 and is not yet 22 years of age;
- (c) the termination of services, except that no right of appeal exists if the Young Adult has reached the age of 22.

(11) Supported Decision Appeal. Whenever the Department has supported a report of abuse or neglect of a child, any parent of the subject child, any caretaker who has been identified in the Department's Central Registry as the person believed to be responsible for the abuse or neglect, any caretaker of the subject child and any Adolescent, who is the subject child, has the right to appeal the Department's decision to support the report.

- (a) Following the Department's decision to support a report of abuse or neglect, the Department shall notify the parties involved that they have the right to appeal the support decision via the Fair Hearing Process.
- (b) In situations involving a support decision on a case not currently opened but opened after the support decision, the Fair Hearing will be conducted after an assessment has been completed or after the assessment period, whichever is earlier.

(12) Alleged Perpetrators' Grounds for Appeal.

- (a) An individual who is listed on the Department's Registry of Alleged Perpetrators may appeal such listing.
 - 1. based on information available during the initial investigation and/or any new information not available during the investigation, the Department's decision was not in accordance with 110 CMR 4.33: *Perpetrator/Caretaker*; or
 - 2. the Department's procedural actions were not in conformity with the Department's policies and/or regulations, and/or any applicable statute or case law, and resulted in substantial prejudice to the Appellant.
- (b) In reviewing a decision to list a person on the Registry of Alleged Perpetrators, the Area Office, and the Fair Hearing Officer shall review any related support decision. The Area Office shall notify the Fair Hearing Office of any support decisions and other determinations arising from the same incident that have been challenged by the Appellant. If the Director of Areas of the office which made the initial decisions reverses the underlying support decision, the determination to list a person(s) on the Registry of Alleged Perpetrators shall be changed to reflect that there is no longer reasonable cause to believe that the person is responsible for the abuse or neglect and the name shall be removed from the Registry of Alleged Perpetrators. See 110 CMR 4.32: *Decision to Support/Unsupport a Report* for procedures to follow if the Department finds that a 51A report is unsupported.

10.07: Disallowed Grounds for Appeal

No matter except those listed in 110 CMR 10.06 may be the subject of a Fair Hearing. Without limiting the generality of the foregoing, the following are specifically among the matters for which there is no right to a Fair Hearing.

- (1) When the only reason for the Department's failure to grant a request for services or increased services, or for the Department's reduction or termination of services, is the unavailability of funds, or the unavailability of a particular service, there is no right to a Fair Hearing if:
 - (a) services are authorized on a first come-first serve basis unless the Appellant submits an offer of proof that other individuals received the services before them although their application was received later than that of the Appellant. The Appellant may submit such offer of proof with the request for the Fair Hearing or upon request of the Hearing Office; or
 - (b) the reduction or termination is applied uniformly to all recipients of the particular service in that area office, unless the Appellant submits an offer of proof that such reduction or termination was not applied uniformly to all recipients of the particular service in that area office. The Appellant may submit such offer of proof with the request for the Fair Hearing or upon request by the Hearing Office.
- (2) A decision by the Department that a particular person, or that person's home, is not eligible to apply to become a foster/pre-adoptive parent for the Department, in accordance with 110 CMR 7.100: *Eligibility and Recruitment of Foster Parent and Pre-adoptive Parent Applicants*.

10.07: continued

- (3) A decision by the Department not to continue its comprehensive assessment for a foster/pre-adoptive parent when the Department has obtained new information, which if known at the time of the initial eligibility screening process, would have excluded the individual from applying to become a foster/pre-adoptive parent, as set forth at 110 CMR 7.100: *Eligibility and Recruitment of Foster Parent and Pre-adoptive Parent Applicants*.
- (4) A decision to remove a child from a foster/pre-adoptive home when
 - (a) a child specific or kinship family is not approved, or when a child specific or kinship family is not reapproved following a limited or annual reassessment or a licence renewal study in accordance with 110 CMR 7.113: *Reassessment of Foster/Pre-adoptive Parents and Foster/Pre-adoptive Homes*; or
 - (b) a licensed foster or pre-adoptive parent whose license is revoked, or is not renewed following a limited or annual reassessment, or license renewal study, in accordance with 110 CMR 7.113: *Reassessment of Foster/Pre-adoptive Parents and Foster/Pre-adoptive Homes*.

10.08: Fair Hearing Processes

- (1) Appellant's Initiation of a Fair Hearing.
 - (a) to initiate an appeal, the Appellant shall file a written request for a Fair Hearing with the Hearing Office of the Department within 30 calendar days from the decision complained of or, if notice of such decision is required under the Department regulations, policy or procedures, then 30 calendar days from receipt of such written notice.
 - (b) the Appellant is encouraged to use the form provided by the Department's Hearing Office to request a Fair Hearing, but a request which contains the following information is sufficient: the name, address, and telephone number of the Appellant, the date the alleged action occurred, the name and address of the office which made the decision being appealed, the decision being appealed, and a request for review of the decision. The Appellant must provide a copy of the request to the Director of Areas of the office where the challenged decision was made.
- (2) The Director of Areas Response. The Director of Areas or the designee of the office where the challenged decision was made,
 - (a) shall have 15 business days from receipt of a request for a Fair Hearing, or from the completion of an assessment following an initial support decision, whichever is later, to review the request for a Fair Hearing and the decision upon which it is based;
 - (b) may, at his or her sole discretion, hold a meeting with the Appellant prior to the Fair Hearing in order to resolve disputes and to clarify issues, with the goal of reaching an agreement which would dispose of the need for, or limit the issues to be resolved at the Fair Hearing;
 - (c) shall have the authority to reverse the underlying decision that is the basis for the Fair Hearing request, thereby nullifying the need for a Fair Hearing.
- (3) Referral to the Clinical Review Team.
 - (a) the Director of Areas or designee may refer the decision to the Clinical Review Team within the 15 day Review Period if he or she declines to reverse the decision pursuant to 110 CMR 10.08(2)(c): and
 1. the decision involves: the removal of a child from a Foster home or Pre-adoptive home; a mandatory referral to the District Attorney, or a change to Foster Care Review goal determination; or
 2. any other type of decision that the Director determines should be referred to the Clinical Review Team.
 - (b) the referral should be made during the 15 day review period, prior to the scheduled date of the Fair Hearing and after the completion of an assessment following an initial support decision.
 - (c) the Director of Areas or designee shall be a member of the Clinical Review Team.
 - (d) in considering a determination to list a person on the Registry of Alleged Perpetrators the Clinical Review Team will consider the underlying support decision.

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- (e) the Clinical Review Team shall, within ten calendar days issue written findings.
 - 1. the Clinical Review Team shall have authority to support the decision, reverse the decision, or remand the action to the area office for the purposes of gathering further information;
 - 2. if the Clinical Review Team recommends that a decision be reversed over the objection of the Director of Areas, the matter will be resolved by the Deputy Commissioner of Field Operations within 15 business days;
 - 3. the written report of the Clinical Review team may be admitted as evidence in the Fair Hearing.
- (f) the Director of Areas or designee shall notify the Fair Hearing Office of the determination to support the challenged decision, to reverse the decision or to remand to the area office for additional information. If the determination is to reverse or remand the decision, the Director of Areas or designee shall notify the Appellant of the determination.
- (g) the Director of Areas or designee, a member of the Clinical Review Team or a Regional Director shall not review any matter in which he or she has or has had any direct or indirect personal interest, involvement, or bias. In the event that the Director of Areas or designee is unable to review the matter due to the reasons stated above, the Regional Director shall review the matter. In the event that the Regional Director is unable to review the matter due to the reasons stated above, the Deputy Commissioner for Field Operations shall review the matter.

(4) The Director of Areas of the office which made the initial decision may review the decision and reverse it even if the decision has not been challenged by the client. If the reversal involves a support decision, any determination to list a specific person(s) on the Registry of Alleged Perpetrator that arises from the same incident shall also be reversed and the Department's records shall be adjusted to remove the person's name from the Registry of Alleged Perpetrators. All decisions which are reversed as a result of actions taken by a Director of Areas or designee or by the Clinical Review Team pursuant to 110 CMR 10.08(2) or (3) shall be documented by the Area Office which vacated the underlying decision.

10.09: Continuation of Service or Placement Pending Appeal

- (1) The filing of a request for a Fair Hearing shall not stay or otherwise affect the implementation of the challenged decision, except as provided in 110 CMR 10.09.
- (2) The filing of a request for a Fair Hearing regarding a decision to deny services or to reduce the quantity of services shall stay the effect of the challenged decision until after the final decision of the agency is made pursuant to 110 CMR 10.00, provided further that the Appellant continues to pay the pre-established fee, if any for the services in question.
- (3) The filing of a request for a Fair Hearing regarding a decision to remove a child from a foster or pre-adoptive placement shall stay the effect of the challenged decision until after the final decision of the agency is made pursuant to 110 CMR 10.00. A decision to remove a child from a foster or pre-adoptive placement on an immediate basis because the Director of Areas or Regional Director has determined that the child's physical, mental, or emotional well-being would be endangered by leaving the child in the foster home, as provided by 110 CMR 7.116: *Removal of Children from Foster/Pre-adoptive Homes*, shall not be stayed by the filing of a request for a Fair Hearing regarding that decision.
- (4) The filing of a request for a Fair Hearing regarding a decision to close a recipient's Department case shall stay the closure until after the final decision of the agency is made pursuant to 110 CMR.
- (5) The filing of a request for a Fair Hearing regarding a decision to suspend, reduce or terminate an adoption or guardianship subsidy shall stay the suspension, reduction or termination of the adoption or guardianship subsidy until the final decision of the agency is made pursuant to 110 CMR unless the reason for the termination of the subsidy is because the child reached 18 years of age and no request for an extension of subsidy had been received by the Department before the 18th birthday, or the Young Adult reached 21 years of age and qualifies for a Title IV-E subsidy or 22 years of age and qualifies for a state subsidy.

10.10: Scheduling

- (1) Time Requirements for Hearing. The hearing shall be scheduled to be held within 65 business days from receipt of a request for a Fair Hearing.
- (2) Notification. Within 20 business days of receipt of a request for a Fair Hearing, the Hearing Office shall send notification of the scheduled hearing date to the Appellant and to the appropriate area office of the Department.
- (3) Expedited Hearings. The Director of Fair Hearings or designee may, upon request, schedule a hearing in an expedited manner. Examples of appropriate reasons to expedite a hearing include: loss of licensure, employment-related issues or other good cause shown. In addition, the Department will expedite Fair Hearing requests that involve the removal of a child from a Foster/Pre-adoptive home or kinship home, the reduction or termination of services, denial of subsidy or the closure of a Department case. The Department shall use its best efforts to schedule expedited hearings within 45 business days of such request.
- (4) Content of Notice of Scheduled Hearing. The notice of scheduled hearing shall inform the aggrieved party:
 - (a) of the date, time and location of the hearing;
 - (b) that the Appellant may examine and request copies of those portions of his or her file which he or she is legally entitled to, subject to any confidentiality requirements;
 - (c) that the Appellant may bring witnesses and an Authorized Representative;
 - (d) that in accordance with 110 CMR 10.13 the Department may issue subpoenas for witnesses upon request made at least 15 calendar days in advance of the scheduled hearing;
 - (e) that a translator or interpreter and reasonable accommodations for handicapped persons will be provided if necessary;
 - (f) that the Appellant may request a rescheduling of the Fair Hearing for good cause and that if such continuance is granted, the Department will schedule the hearing within the next 45 business days, unless the Appellant requests more time and such is granted.
- (5) Stay of Fair Hearing for Support Decision and/or Alleged Perpetrators. If the Department receives a written request from any District Attorney's Office stating that there is an open criminal investigation pending or formal criminal charges have been instituted (*i.e.*, indictment or complaint returned or issued), the Department shall stay its review by Fair Hearing of the related agency decisions for six months and notify the parties.

10.11: Representation

- (1) An Appellant may appear on his or her own behalf and represent himself or herself, or may, if he or she chooses, be accompanied, represented, and advised by any Authorized Representative. Any child may be represented by an Authorized Representative which may include an attorney assigned to represent the child.
- (2) The Authorized Representative shall, prior to the scheduled hearing date, submit an appearance to the hearing office containing his or her name, address, telephone number, signature, and the date. The appearance may be on the Request for a Fair Hearing form.
- (3) The Authorized Representative may exercise all of the rights and powers of the aggrieved party.
- (4) The Department or Provider may appear through a representative and be represented by a departmental attorney. In those circumstances where the Department is represented by a departmental attorney, in order to avoid the appearance of a conflict of interest, that attorney shall not consult with or seek supervision from anyone supervising the Hearing Office or any Hearing Officer assigned to hear the matter.

10.12: Non-English Speaking Parties

- (1) Notice. All notices regarding appellate rights shall contain a provision printed in languages to be determined by the Department, that the document is important and should be translated immediately.
- (2) Interpreters. If the Appellant cannot fluently speak or read English, he or she may bring an interpreter or she or he may request at the time a Fair Hearing is sought that the Department provide an interpreter.

10.13: Fair Hearings - Subpoenas

- (1) Department or Provider Employees.
 - (a) The Appellant shall be able to require the attendance of any Department or Provider employee(s) who can provide information relevant to the decision that the Appellant is appealing by submitting a written request to the Hearing Officer at least 15 calendar days before the hearing.
 - (b) If the requested employee is not available to testify, written notification must be provided to the Appellant at least five calendar days before the hearing, indicating the identity of another employee with direct knowledge of the challenged decision who will be present to testify at the hearing.
 - (c) If the employee is not available and notice is given to the Appellant, the Appellant may request a continuance until such time as the employee is available; however, if the Appellant requests such continuance the time requirement for scheduling as set for in 110 CMR 10.10 shall not apply.
- (2) Other Persons.
 - (a) Child victims shall not be required to testify at a Fair Hearing, unless a compelling reason can be shown as to why the child's testimony is essential. In no event will a child be required to testify if the testifying will harm the child. Evidence demonstrating the harm shall be produced to the Fair Hearing Officer.
 - (b) Any party to a hearing shall have the right to subpoena witnesses and/or the production of documents pursuant to M.G.L. c. 30A, § 12(3). The party may have the subpoena issued in any way permitted by law or may request the Hearing Office to issue a subpoena. Any request that the Hearing Officer issue a subpoena must be made at least 15 calendar days prior to the scheduled hearing and must include the person's correct name and address. Upon the request of such subpoena, the Hearing Officer, the Director of Fair Hearings or designee may issue an Order to Quash such subpoena if it is determined that the subpoena is being used to intimidate, harass, is contrary to 110 CMR 10.13(2)(a), is overly burdensome or oppressive or lacks a reasonable period of notice. If such order issues, the Appellant may request the Hearing Officer, Director of Fair Hearings or designee to reconsider, provided said party submits additional information setting forth such facts as to why the subpoena should issue.
 - (c) In the event that a subpoena has been issued, any party or the person subpoenaed may file a written request with the Hearing Office to vacate or modify the subpoena pursuant to M.G.L. c. 30A, § 12(4). The Hearing Officer, Director of Fair Hearings or designee shall give notice of a request to vacate or modify the subpoena to all parties either orally or in writing. The notice shall recite the contents of the request or summarize the request. If time does not permit a party to respond to the request to vacate or modify the subpoena, the hearing on the merits shall be postponed long enough to permit the party to do so. No hearing on the request shall be required. Grounds to vacate or modify a subpoena shall include, but not be limited to, requests that are overly burdensome, seek privileged information, are irrelevant to the action, are unreasonable, or impose insufficient time for the party to comply.
 - (d) Pursuant to M.G.L. c. 30A, § 12(5), if any person fails to comply with a properly issued subpoena, which has not been vacated or modified by the Hearing Office, the party requesting the issuance of the subpoena may petition any justice of the superior court for an order requiring compliance with the terms of the subpoena.

10.14: Discovery

(1) The Appellant and/or his or her authorized representative may examine and/or request copies of the Appellant's file to which they are legally entitled, subject to the confidentiality requirements which govern the Department at 110 CMR 12.00: *Records*, by submitting a written request to the area office or provider at least 30 calendar days prior to the time the Appellant wishes to see the material.

(2) An Appellant shall be entitled to obtain a copy of the "51A and 51B" reports if any, which form the basis of the appeal. To request such documents, the Appellant shall make a written request to the Director of Areas, at least 30 calendar days in advance of the scheduled hearing date. The Area Office shall ensure that the record is available to the Appellant within 30 days from receipt of the request or ten calendar days prior to the hearing, whichever is earlier. In releasing copies of these reports the name of (and any other reasonably identifying data concerning) the reporter shall be redacted. Other information may be redacted if it is privileged (e.g. attorney-client communication) or if the release of the information would be contrary to the best interest of the child.

(3) Upon request, copies of papers contained in the Appellant's file shall be provided to the Appellant at a rate of \$.10 per page. However, the Department shall waive the fee for 20 or fewer pages.

(4) Requests for any other form of discovery must be made in writing and may be made any time after a request for a Fair Hearing has been filed and up to 30 calendar days before the scheduled hearing date. Such requests should include not only the type of discovery requested but the reasons for the necessity of such discovery. The Hearing Officer, Director of Fair Hearings or designee shall rule upon such requests, and shall give each party written notice of this ruling.

(5) It is the Department's specific intention that Fair Hearings not be abused as an opportunity for criminal or civil discovery. The Department's Fair Hearing Officers may, in his or her discretion, limit the Fair Hearing in order to ensure that the Fair Hearing is not so used.

10.15: Motions During Hearing

The Appellant, the Department, or the Provider may file written motions prior to or during the hearing. The Hearing Officer, the Director of Fair Hearings or designee shall rule on all such motions.

10.16: Consolidated Hearings

If requests for Fair Hearings involve the same issues of fact or law, the hearings may be consolidated upon motion by any party or on motion of the Hearing Officer, if all parties to the matters to be consolidated agree to the consolidation. Such consent to consolidation shall constitute a waiver of any claim of confidentiality for the sole purposes of the hearing.

10.16A: Dismissal for Failure to Go Forward

If the Appellant fails to file documents, respond to notices, appear at the scheduled hearing or otherwise indicates an intention not to pursue the request for a Fair Hearing, the Hearing Officer, the Director of Fair Hearings or designee may dismiss the matter with or without prejudice.

10.17: Rescheduling

The Hearing Officer, the Director of Fair Hearings or designee may reschedule a hearing for good and sufficient cause. The Hearing Officer, Director of Fair Hearings or designee shall consider how much advance notice of non-attendance was given and the reason for the request. Should any party be granted such request, the Department shall schedule the hearing within 45 business days, unless the Appellant requests additional time and such time is granted, and the time requirement for scheduling as set forth in 110 CMR 10.10(1) shall be extended by the number of continuance days granted.

10.18: Submission Without a Hearing

The Appellant may request in writing to waive a hearing and to have a decision issued based upon written documentation and written argument. The Director of the Fair Hearing Office or designee shall have the authority to grant or deny such a request. If the request to waive the hearing is granted the Appellant may submit documents or other material without appearing.

10.19: Conduct of Hearings

Hearings shall be as informal as possible, but the Hearing Officer shall ensure that the hearing is orderly.

10.20: Hearing Officer's Duties and Powers

The Hearing Officer shall have the duty to conduct a Fair Hearing so as to ensure that the rights of all parties are protected, and to render an impartial decision based upon the issues and evidence presented at the hearing and in accordance with the law. He or she shall have the following specific duties:

- (1) place witnesses under oath or affirmation and to sequester witnesses;
- (2) assist all the witnesses in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved;
- (3) ensure that all parties have a full opportunity to present their claims;
- (4) receive, rule on, exclude, or limit evidence (which shall include the right to request that any party produce additional evidence such as witnesses, documents, *etc.* but shall not include the right to require any party to do so);
- (5) permit introduction into the record of any regulations, statutes, memoranda, or other materials offered by any party which the Hearing Officer believes relevant;
- (6) define the issues;
- (7) regulate the presentation of the evidence and the participation of the parties to ensure an adequate and comprehensible record of the proceedings;
- (8) issue subpoenas upon request of a party;
- (9) examine witnesses;
- (10) reconvene the hearing prior to the decision upon ten calendar days written notice of the parties, if necessary.

10.21: Evidence

- (1) General. The Hearing Officer need not strictly follow the rules of evidence. The Massachusetts Rules of Evidence do not apply but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient and attorney-client privileges. Only evidence which is relevant and material may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.
- (2) Oral Testimony. Oral testimony shall be given under oath or affirmation; however, changes may be made in the oath if requested on the grounds of religious principles. All testimony shall be subject to the pains and penalties of perjury. Witnesses shall be available for examination and cross-examination.
- (3) Regulations. Statutes and regulations of a state or federal agency shall be admitted into evidence upon the submission of a copy.

10.21: continued

(4) Other Documents or Written Material. All documents and written material admitted into evidence shall be authenticated to the satisfaction of the Hearing Officer. Written material from the Appellant's Department file shall be admitted without further authentication.

(5) Stipulations. The parties may stipulate to facts or to testimony that a witness would have given.

(6) Fair Hearings of Support Decision and Alleged Perpetrator Listing. In any case in which an appellant is challenging a Department decision to support a report of abuse or neglect or to list a person's name on the Registry of Alleged Perpetrators, a copy of the report and investigation required by M.G.L. c. 119, §51A and B shall be admitted into evidence. When reviewing a support decision or an Alleged Perpetrator listing, the hearing officer may consider information available during the investigation and new information subsequently discovered or provided that would either support or detract from the Departments decision.

10.22: Order of Presentation

The Department or Provider will proceed first to produce evidence upon which its decision was based and to show that its decision was in conformity with the applicable regulation, policy, statute or case law. The Hearing Officer shall determine the order of presentation for all other parts of the hearing. After each witness is presented, the opposing party shall have the opportunity for cross-examination of that witness.

10.23: Burden of Proof

To prevail, the Appellant must show based upon all of the evidence presented at the hearing, by a preponderance of the evidence that:

- (a) the Department's or Provider's decision was not in conformity with the Department's policies and/or regulations and/or statutes and/or case law and resulted in substantial prejudice to the Appellant; or
- (b) that the Department's or Provider's procedural actions were not in conformity with the Department's policies and/or regulations, and resulted in substantial prejudice to the Appellant; or
- (c) if there is no applicable policy, regulation, or procedure, that the Department or Provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the Appellant; or
- (d) if the challenged decision is a supported report of abuse or neglect, that the Department has not demonstrated there is reasonable cause to believe that a child was abused or neglected; or
- (e) if the challenged decision is a listing on the alleged perpetrators list, that there is not substantial evidence indicating the person is responsible for the abuse or neglect of a child.

10.24: Memoranda

The Hearing Officer may order or permit that memoranda be filed at any time prior to issuance of the decision. The record shall remain open until the expiration of the date on which memoranda are due.

10.25: The Record

The record shall consist of the documents, other exhibits, and testimony accepted into evidence, as well as all pleadings, notices and decisions.

10.26: Recording of Hearing

All Fair Hearings shall be recorded. The choice of recordation shall be at the election of the Department, and at the expense of the Department, and shall be arranged by the Department. Such recordings shall be available to the parties upon request. The Hearing Officer may permit any party to make his or her own recording, but any such recording shall be unofficial and shall not constitute the record nor become part of the record.

10.27: Copies of Recording

If an Appellant desires a transcript it shall be prepared at the expense of the Appellant in accordance with M.G.L. c. 30A, § 11(6). Upon request, a copy of the recordation will be provided to the Appellant.

10.28: Special Requests

- (1) An Appellant may withdraw a request for a Fair Hearing at any time by filing a written withdrawal signed by the Appellant.
- (2) The Hearing Officer may shorten the notice period of scheduling a hearing, for good cause or for emergency purposes.

10.29: Decision

(1) The Hearing Officer shall render a written decision within 60 business days after the close of the record unless notice is provided to the Appellant that a longer period of time is needed to reach a decision and the time for issuance of such decision shall be extended for an additional 30 business days. The Hearing Officer may not extend such time for hearings deemed to be expedited hearings and must issue such decisions within 60 business days after the close of the record.

(2) The Hearing Officer may affirm the challenged decision, reverse the challenged decision or remand the decision to the Area Office or Provider to obtain additional information or to take further action. In making a determination on these questions, the Fair Hearing Officer shall give due weight to the clinical decision made by a Department social worker.

(3) If the Hearing Officer recommends to reverse the decision of the Area Office or provider, the Hearing Officer shall submit to the Commissioner or designee the Hearing Officer's written decision within the timeframe as set forth above. Simultaneously the Hearing Officer shall send to the Appellant notification that the Hearing Officer has submitted his or her decision to the Commissioner or designee recommending a reversal of the Area Office's decision. Such notice shall inform the Appellant that if the Commissioner or designee does not issue a decision within 21 business days, the recommendation of the Hearing Officer shall become the final decision of the Department. The Commissioner or designee may accept the Hearing Officer's recommendation or may overturn the Hearings Officer's decision. If the Commissioner or designee determines that he or she will overturn the Hearing Officer's decision to reverse the decision of the Department, the Commissioner or designee shall write the reasons why he or she does not agree with the decision of the Hearing Officer and why he or she holds that the analysis of the findings by the Hearing Officers is not accepted and shall append to the Hearings Officer's findings and recommendation to such decision. The Commissioner or designee may not make additional findings of fact to the Hearing Officer's findings, which shall be binding on the Commissioner. The decision to overturn the Hearing Officer shall be solely based upon an analysis of the Hearing Officer's findings and the Department's regulations, policy, procedures and the applicable statutes and case law. The decision to either accept or overturn the Hearing Officer's decision must be issued within 21 business days of the Hearing Officer's submitted decision and shall be the final decision of the agency. If the Commissioner or designee fails to issue any written order within 21 business days from the submitted decision, then the Hearing Officer's decision shall issue without such Commissioner's review and shall be the final decision of the agency. The Hearing Officer shall promptly forward a copy of the decision by mail to each of the parties.

(4) For the purposes of 110 CMR 10.29(3) the Commissioner's designee shall not be the General Counsel.

10.29: continued

(5) In the event a hearing officer becomes unavailable before completing the written decision, the Director of Fair Hearings or designee shall appoint a successor to assume the case and render a fair hearing decision. If the presentation of the evidence has been completed and the record is closed, the successor shall decide the case on the basis of the record, including reviewing all exhibits and the recording of the hearing. Otherwise, the successor may either proceed with evidence or require presentation of evidence again from the beginning.

10.30: Form of Decision

The decision will be in written form and in a manner consistent with M.G.L. c. 30A and may include the following: a summary of the issues considered; clear and concise findings of fact including credibility determinations; the reasons for the decision reached on each issue; the statute, case law, policy, practice and/or regulation, if any, on which the decision is based; and an order for relief if appropriate. The decision shall be signed and dated by the Hearing Officer and the Director of Fair Hearings or designee. All decisions shall notify the Appellant that the Fair Hearing decision, or where applicable, the decision of the Commissioner or designee, is the final decision of the agency and that the Appellant has the right to seek review under M.G.L. c. 30A.

10.31: Ex Parte Communications

The Hearing Officer shall not consider any evidence, whether written or oral, regarding any matter at issue in a Fair Hearing, unless such submission is part of the record or made in the presence of all parties. No person, other than the Director of Fair Hearings or designee, shall communicate directly or indirectly with the Hearing Officer about a pending matter from the time the hearing is requested until such time as a final agency decision is rendered unless such communication is in the presence of all the parties or submitted in writing with copies to all parties, except that the Commissioner or designee may discuss with the Hearing Officer or the Director of Fair Hearings any decision he or she is reviewing.

10.32: Special Provisions for Fee-paying Clients

When a fee-paying Appellant requests a Fair Hearing, the Hearing Officer shall include in the decision an order relative to the recoupment of fees as set forth below:

- (1) If the Appellant's challenge to the fee is successful, any extra fees paid shall be refunded within 14 days of the decision.
- (2) If the Appellant's challenge to the fee is unsuccessful, the Appellant shall be notified that he or she must pay any fees owed within 14 days of the decision, and that failure to pay such fees shall result in a termination of service without further hearing. 110 CMR 10.32 in no way negates the Appellant's obligation to continue to pay any pre-established fees pending the outcome of the hearing.

10.33: Confidentiality

The confidentiality requirements of 110 CMR 12.00: *Records* apply to the Fair Hearing process including the hearing, record, and decision(s). If the subject of the Fair Hearing involves a report and investigation of abuse or neglect that was sent to a licensing agency, the Department of Elementary and Secondary Education (ESE) and/or the OCA under M.G.L. c. 119, § 51B(1), the Department shall forward a copy of any Fair Hearing decision that reverses the 51B decision or reverses the listing of a person's name on the registry of alleged perpetrator's to such agency, ESE and/or the OCA. If such agency, ESE or the OCA requests a copy of any other Fair Hearing decision that involves a report previously sent to the agency, ESE or the OCA the Department may release the Fair Hearing decision to the agency, ESE or the OCA. If the subject of the Fair Hearing involves a report and investigation of abuse or neglect that was sent to a District Attorney's office pursuant to M.G.L. c. 119, § 51B, then upon request, the Director of the Fair Hearing Unit or designee may inform such District Attorney of the outcome of the Fair Hearing and may provide the District Attorney with a copy of the written decision.

10.34: Time

- (1) All papers which must be submitted to the hearing office will be considered to be filed as follows:
 - (a) Papers hand delivered during business hours shall be considered filed that day;
 - (b) Papers hand delivered after business hours or on weekends or holidays shall be considered filed the next business day;
 - (c) Papers which are mailed shall be considered filed on the date postmarked.
- (2) Any written notices or other papers mailed by the Department Hearing Office shall be considered to be received five days after mailing.
- (3) Time periods shall be computed starting with the day after the act which initiates the time period. If the final day falls on a non-business day, the deadline is extended to the next business day.
- (4) Any time limit in 110 CMR 10.00 may be extended if there is good cause for doing so and the extension is not inconsistent with state or federal law or regulation. Requests for extension of time must be in writing and must be filed before the deadline expires. Filing a request shall automatically extend the deadline until the Hearing Office rules on the request.

10.35: Fair Hearing Data Base

The Department shall maintain a database that shall include, among other data, information on requests and outcomes of fair hearings, including for each request, the number of days between the request and the hearing, the number of days between the hearing and the decision and the actual outcome of the hearing. This information shall be available for inspection and copying by the public during normal business hours of the Department.

10.36: Grievance Process

The grievance process is intended to supplement the Fair Hearing procedure. The grievance procedure, like the Fair Hearing procedure, is designed to offer an informal dispute resolution process. Any matter, except as excluded in 110 CMR 10.37, may be the subject of a grievance.

10.37: Grievances Allowable Subjects

The grievance process is not available to complain of conduct which can be the subject of a Fair Hearing. If an Aggrieved Party files a grievance involving such conduct, the grievance shall be treated as a request for a Fair Hearing. The grievance process is otherwise available for all Aggrieved Party complaints.

10.38: Grievances Procedures

- (1) To initiate the grievance procedure, the Aggrieved Party must file a written complaint with the Area Office, Regional Office or Foster Care Review Unit whose decision is complained of or which employs the employee whose conduct is complained of, within 30 days of the action or inaction complained of. The Director of Areas, Regional Director or Director of Foster Care Review shall assign the complaint to a Regional Clinical Director, Area Clinical Manager, Area Program Manager or to the Assistant Director of Foster Care Review as the case may be.
- (2) The Regional Clinical Director, Area Clinical Manager, Area Program Manager or Assistant Director of Foster Care Review shall review the decision or conduct complained of by the aggrieved party within 21 calendar days of receipt of the complaint. The review shall include any facts and/or arguments submitted by the aggrieved party in written form. The Regional Clinical Director, Area Clinical Manager, Area Program Manager or Assistant Director of Foster Care Review may, upon the approval of the Regional Director, Director of Areas, or Director of Foster Care Review, meet with the Aggrieved Party and/or with other Department or Provider agency staff in order to resolve the dispute.

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10.38: continued

(3) Upon completion of the review, the Regional Clinical Director, Area Clinical Manager, Area Program Manager or Assistant Director of Foster Care Review shall send written notice of his or her decision to the Aggrieved Party and to the employee(s) in question. The notice shall recite the grounds of the complaint, the facts of the case, and any action taken by the Department or Provider.

(4) The decision of the Regional Clinical Director, Area Clinical Manager, Area Program Manager or Assistant Director of Foster Care Review shall be final. If the Aggrieved Party is still dissatisfied, she or he has recourse to such further rights or remedies as are available by law.

REGULATORY AUTHORITY

110 CMR 10.00: M.G.L. c. 18B, §§ 3, 4 and 7; c. 30A.

NON-TEXT PAGE