

## 118 CMR: DISABLED PERSONS PROTECTION COMMISSION

### 118 CMR 2.00: DEFINITIONS

#### Section

#### 2.01: Scope and Purpose

#### 2.02: Meaning of Terms

#### 2.01: Scope and Purpose

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

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

#### 2.02: Meaning of Terms

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

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

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

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

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

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

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

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a reasonable person would have experienced Physical pain or Serious Emotional Injury.

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

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

2.02: continued

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

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

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

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

Commission. The Disabled Persons Protection Commission.

Commissioners. The Commissioners of the Disabled Persons Protection Commission.

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

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

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

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

False Report. A report of Abuse which at the time it is made is known by the reporter not to be

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

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

2.02: continued

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

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

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

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

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

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

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

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

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

Person with a Mental Disability. An individual having a condition, not including an intellectual

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or developmental disability, causing mental dysfunction or emotional impairment as determined by a mental health professional.

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

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

2.02: continued

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

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

Reasonable Cause to Believe.

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

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

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

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

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

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

Serious Emotional Injury. An injury to the intellectual functioning or emotional state of a Person with a Disability caused by either the verbal or nonverbal conduct of a Caretaker, including but not limited to, coercion; harassment; the inappropriate isolation of a Person with a Disability from family, friends or regular activity; and verbal assault, including but not limited to, ridiculing, intimidating, yelling or swearing. A Serious Emotional Injury is evidenced by an

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observable and measurable reduction in the person's ability to function from the person's customary range of performance or customary behavior including, but not limited to, a state of anxiety, fear, depression or withdrawal; or the development of post-traumatic stress disorder, including but not limited to, symptoms resulting from being forced to engage in un-assented to sexual activity.

## 2.02: continued

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

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

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

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

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

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

Sexual Abuse also includes, but is not limited to, instances in which:

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

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

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

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

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

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

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

### REGULATORY AUTHORITY

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