

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, SS.

No. 07101

BEHAVIOR RESEARCH INSTITUTE, INC., ET AL.,
Plaintiffs, Appellees,

v.

DIRECTOR, OFFICE FOR CHILDREN,
Defendant,

COMMISSIONER OF MENTAL RETARDATION,
Defendant In Contempt Proceeding, Appellant.

ON DIRECT APPELLATE REVIEW FROM
A FINAL JUDGMENT OF THE
BRISTOL SUPERIOR/ PROBATE COURT

**BRIEF FOR AMICUS CURIAE
DISABLED PERSONS PROTECTION COMMISSION**

RALPH T. CALDERARO, BBO#069940
*Special Assistant Attorney General
General Counsel*
Disabled Persons Protection Commission
99 Bedford Street - Suite 200
Boston, Massachusetts 02111

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STATEMENT OF THE ISSUES

1. Whether the trial court has the statutory or inherent authority to issue an order which supplants the authority of the Disabled Persons Protection Commission in cases of abuse of students at Behavior Research Institute/ Judge Rotenberg Center.

2. Whether the plenary powers conferred on the Receiver by the trial court regarding abuse investigations involving students at Behavior Research Institute/ Judge Rotenberg Center are unconstitutional and in conflict with the authority of the Disabled Persons Protection Commission pursuant to G.L. c. 19C.

INTEREST OF THE AMICUS

The Disabled Persons Protection Commission (hereinafter referred to as "the DPPC") is an independent agency of the Commonwealth established pursuant to G.L. c. 19C. G.L. c. 19C, §2. The DPPC is charged with conducting investigations of allegations of abuse of disabled adults between the ages of eighteen (18) and fifty nine (59). G.L. c. 19C, §4. Pursuant to its statutory authority, the DPPC may conduct such investigations itself or designate an appropriate agency within the Executive Office of Health and Human Services to conduct the investigation. G.L. c. 19C, §§4(b) and (c). The basis for making such a designation is that the designated agency is that state agency, based upon the individual's disability, which is responsible for providing services to the disabled person. G.L. c. 19C, §§4(b) and (c).

In addition, the DPPC is authorized to ensure the implementation of emergency protective services where the risk of further abuse to the disabled person is imminent. G.L. c. 19C, §6. The DPPC is further authorized to issue protective service recommendations upon the completion of an

investigation that substantiates the existence of abuse. G.L. c. 19C, §5.

It is instructive to note that during the latest period for which records have been compiled, namely fiscal year 1995 (July 1, 1994 to June 30, 1995) of the 1800 abuse investigations either conducted by or for the DPPC, 1062 investigations were referred to, and conducted by the Department of Mental Retardation (hereinafter referred to as "DMR"). During that same period and based upon the complaints it received, the DPPC authorized sixteen (16) investigations of alleged abuse of students at Behavior Research Institute/ Judge Rotenberg Center (hereinafter referred to as "BRI/ JRC"). Of these sixteen (16) investigations, ten (10) were conducted by the DPPC itself, five (5) were conducted by DMR, and one (1) was conducted by another state agency pursuant to G.L. c. 19C §4(b)

Of the ten (10) investigations conducted by DPPC, allegations of abuse were unsubstantiated in six (6) cases, allegations were substantiated in three (3) cases, and one (1) investigation remained pending. Of the five (5) investigations conducted by DMR, the allegations of abuse

were unsubstantiated in three (3) cases, substantiated in one (1) case and undetermined in one (1) case. The remaining investigation conducted by the Department of Mental Health was undetermined.

Regardless of whether an investigation is conducted by the DPPC itself or assigned by the DPPC to another agency, such as DMR, G.L. c. 19C, §5 mandates that when the existence of abuse is substantiated, the investigator must enumerate protective service recommendations in the investigation report. G.L. c. 19C, §5, 118 CMR §5.01(2)(d). The purpose of these recommendations is to ensure the future safety of the disabled alleged victim from further abuse. Accordingly, these recommendations are forwarded by the DPPC for implementation to the state agency responsible for providing services to the disabled person. 118 CMR §7.02(2).

The Order issued by the trial court negatively affects the functioning of the DPPC and the implementation of its authority pursuant to G.L. c. 19C. In three distinct areas the trial court's order impermissibly impinges upon the statutory framework within which the DPPC operates:

First, the provision of the order which makes it applicable to " . . . anyone acting in concert with (the defendant, his agents,

attorney and employees). . . "Trial Court Order, Par. 7, Appellant App. p. 1341; Second, the provision of the order that empowers the Receiver to oversee all investigations conducted by DMR. Trial Court Order, Par. 19(5), Appellant App. p. 1346; and Third, the provision of the order which enjoins the Defendant (and anyone acting in concert with him) from issuing any orders or directives which interfere with outstanding treatment orders or decisions issued by the trial court. Trial Court Order, Par. 10, Appellant App. p. 1342.

Without more specification each of these provisions of the trial court's order impermissibly impinges upon the statutory authority of the DPPC. The order abrogates the independent authority of the DPPC to operate in the area of abuse investigations involving students at BRI/JRC.

The specific issue in which the amicus has an interest is the manner in which the order interferes with and usurps the independent mechanisms established by G.L. c. 19C to ensure the safety and well-being of the students at BRI/JRC. The practical effect of the trial court's order is to nullify the independent statutory authority of the DPPC to assign abuse investigations to DMR for completion, to oversee abuse

investigations conducted by DMR, to determine the existence of abuse, and to ensure the implementation of protective services to remediate substantiated cases of abuse.

STATEMENT OF FACTS AND STATEMENT OF CASE

The amicus will adopt the Statement of Facts and Statement of Case as presented by the Appellant, the Commissioner of Mental Retardation.

ARGUMENT**I. THE TRIAL COURT DOES NOT HAVE THE STATUTORY OR INHERENT AUTHORITY TO ISSUE ORDERS WHICH SUPPLANT THE AUTHORITY OF THE DISABLED PERSONS PROTECTION COMMISSION IN CASES OF ABUSE OF STUDENTS AT BEHAVIOR RESEARCH INSTITUTE/ JUDGE ROTENBERG CENTER.**

"Probate courts [are] courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction." G.L. c. 215, §2 By virtue of G.L. c. 201, §6A and G.L. c. 215, §6, the Probate and Family Court has broad powers to fashion equitable remedies in matters relating to the guardianship of mentally retarded persons. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 755 (1977); *Guardianship of Bassett*, 7 Mass. App. Ct. 56, 64 (1979). However, the Probate Court's authority to fashion broad remedies does not invest the Probate Court with the authority to issue orders over a non-party. *Matter of McKnight*, 406 Mass. 787, 791-793 (1990). See also *Department of Mental Retardation v. Kendrew*, 418 Mass. 50, p.56 (1994) wherein the court held that a district court judge, no matter how well intentioned, had no authority to issue an order

directing DMR to take certain specified action where DMR was not a party to the matter before the Court.

In the instant case, the DPPC was not a party to the action before the trial court. The legislature created the DPPC in 1986. G.L. c. 19C added as 19B by St. 1986, c. 655, §1; St.1987, c.465, §11 redesignated G.L. c. 19B, as added by St. 1986, c. 655, §1, as G.L. c. 19C. The Commission was charged ". . . to provide for the investigation and remediation of instances of abuse of disabled persons in the Commonwealth." G.L. c. 19C, §2. There is nothing in record or in the findings of the trial court which indicates that the DPPC was a party to the underlying court action or that the DPPC had failed in its legislative responsibilities. The trial court lacked jurisdiction over the DPPC.

Even if the order of the trial court is applicable to a non-party such as the DPPC, the trial court still lacked the authority to issue an order impinging on the DPPC's functioning. Neither the record nor the findings of the trial court indicate that the DPPC had failed its legislatively mandated responsibilities. Where, as here, equitable relief

arguably affects a public agency's exercise of its discretionary functions, courts must tread lightly in ordering action contrary to the agency's interpretation of its own regulations. *See Matter of McKnight*, 406 Mass. 787, 792(1990). There is no demonstrated basis for concluding that the DPPC has broadly abrogated its statutory duties in the face of a judicial direction to fulfill them, to justify the issuance of an order concerning the carrying out of its executive function. *See Bradley v. Commissioner of Mental Health* 386 Mass. 363, 365 (1982), and the cases cited therein.

Consequently, the trial court lacked the necessary statutory or the inherent authority to issue orders impacting the DPPC's authority pursuant to G.L. c. 19C.

II. THE PLENARY POWERS CONFERRED ON THE RECEIVER BY THE TRIAL COURT REGARDING ABUSE INVESTIGATIONS INVOLVING STUDENTS AT BEHAVIOR RESEARCH INSTITUTE/ JUDGE ROTENBERG CENTER ARE UNCONSTITUTIONAL AND IN CONFLICT WITH THE AUTHORITY OF THE DISABLED PERSONS PROTECTION COMMISSION PURSUANT TO G.L. C. 19C.

Article 30 of the Massachusetts Declaration of Rights requires a strict separation of powers between the executive,

legislative and judicial branches of government., The order of the trial court and the power it confers on the Receiver abrogates this principle. The principle as proclaimed by Article 30 is in a most explicit form and calls for a complete division of all powers among the three branches. *Opinion of the Justices*, 365 Mass. 639, 640 (1974); *New Bedford Standard-Times Publishing Co. v. Clerk of the Third District Court of Bristol*, 377 Mass. 404,410 (1979).

A court may have the right to order a department of the executive branch to do that which it has a legal obligation to do. However, a court may not properly exercise the functions of the executive branch of state government. *Care and Protection of Isaac*, 419 Mass. 602, 606 (1995), and the cases cited therein.

It is an established principle that where the means of fulfilling its legal obligation is within the discretion of the public agency, the courts normally have no right to dictate to that agency how to fulfill its obligation. *Bradley v. Commissioner of Mental Health*, 386 Mass. 363, 365 (1982); *Williams v. Secretary of the Executive Office of Human Services*, 414 Mass. 551, 570 (1993), and the cases cited therein.

In the instant case, the scope of the trial court's order is very broad. In addition, the order confers very broad powers upon the Receiver. It is this very breadth of scope and authority that makes the order impermissibly applicable to the DPPC and invasive of the DPPC's independent, statutory authority.

Particularly problematic is the following language contained in the order:

First, the provision of the order which makes the order applicable to ". . . anyone acting in concert with (the defendant, his agents, attorney and employees). . ." Trial Court Order, Par. 7, Appellant App. p. 1341; Second, the provision of the order which empowers the Receiver to oversee all investigations conducted by DMR. Trial Court Order, Par. 19(5), Appellant App. p. 1346; and Third, the provision of the order which enjoins the Defendant, (and any one acting in concert with him) from issuing any orders or directions which interfere with outstanding treatment orders or decisions issued by the trial court. Trial Court Order, Par. 10, Appellant App. p. 1342.

Without more specification each of these provisions of the trial court's order impermissibly impinges upon the

statutory authority of the DPPC. The prescription of "concerted activity" is applicable to the DPPC. By dint of its statutory authority, the DPPC is empowered to assign abuse investigations to be conducted by other agencies, including DMR, G.L. c. 19C, §§4[b] and 4[c]; 118 CMR §4.04 (2) &(3); empowered to oversee all abuse investigations, G.L. c. 19C, §4(b)and 4(c); 118 CMR §4.08 & §5.03; and empowered to determine the existence of abuse of a disabled person, G.L. c. 19C §5; 118 CMR §5.01 (2)(C). In addition, the DPPC is authorized to ensure the provision of protective services by service providing agencies, such as DMR and BRI/JRC, to prevent further abuse in cases investigated under its auspices. G.L. c. 19C, §6; 188 CMR §7.01 & §7.02. Consequently, by the explicit terms of its enabling statute, the DPPC works with DMR to investigate and remediate cases of abuse of disabled individuals; the DPPC has authority to oversee all abuse investigations, including those conducted by DMR; and the DPPC has authority to determine the existence of abuse, even if it occurs as part of a court-approved treatment plan. It should be noted that in the course of conducting past investigations involving students at BRI/JRC, the trial court's and the DPPC's determinations regarding the applicability of

"abuse" to treatment orders have differed. The DPPC previously has brought this issue to the attention of both the trial court and this Court. See Amicus Addendum, pp. 1 to 6.

The order of the trial court abrogates the independent authority of the DPPC to operate in each of these areas. Specific statutory and regulatory language places the authority to assign and oversee investigations of abuse, to determine the existence of abuse, and to ensure the provision of protective services to the abused disabled person within the sole discretion of the DPPC. G.L. c. 19C; 118 CMR §§1.00 *et seq.* Consequently, if a case reported to the DPPC involves a student at BRI/JRC, the statute and regulations authorize the DPPC alone: first, to determine which agency will conduct the investigation; second, to oversee the investigation, even if its conducted by DMR; third, to determine whether abuse can be substantiated; and fourth, to ensure the implementation of remedial protective services by the service providing agency. By granting the Receiver plenary authority over abuse investigations involving BRI/JRC students, the trial court's order supplants the statutory authority of the DPPC. Similarly, by precluding the issuance of orders and directives by the DPPC which are at variance with treatment orders and

decisions of the trial court, the order impermissibly impinges on the authority of the DPPC to determine the existence of abuse and to ensure the provision of protective services to remediate the abuse.

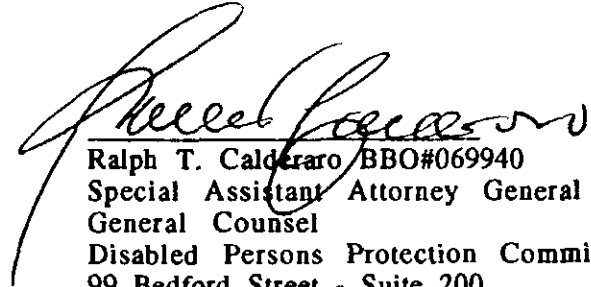
The trial court substitutes a judicially created mechanism - the Receiver - for a legislatively created one - the DPPC - to oversee the investigation and remediation of abuse involving BRI/JRC students. The trial court is without authority to exercise the function of the DPPC. *See In the Matter of McKnight*, 406 Mass. 787, 792 (1990). Within a variety of different contexts, this Court has held that judicial attempts to control the performance of statutorily established discretionary duties of an executive or administrative officer to be unsound and extra-judicial in nature. *See Stretch v. Timilty*, 309 Mass. 267, 270 - 271 (1941), and the cases cited therein. Indeed the trial court's order ". . . constitutes an impermissible 'poaching by the judicial branch on executive and legislative territories.'" *Guardianship of Anthony*, 402 Mass. 723, 727 (1988), and the cases cited therein.

CONCLUSION

For the reasons set forth above, the judgment of the trial court should be reversed and the relief granted should be vacated.

Respectfully submitted,

Disabled Persons
Protection Commission



Ralph T. Calderaro BBO#069940
Special Assistant Attorney General
General Counsel
Disabled Persons Protection Commission
99 Bedford Street - Suite 200
Boston, Massachusetts 02111
(617) 727 - 6465 ext 123

Date: October 30, 1996

ADDENDUM



The Commonwealth of Massachusetts
Disabled Persons Protection Commission
99 Bedford Street Room 200
Boston, Massachusetts 02111-2217

WILLIAM F. WELD
GOVERNOR

KATHLEEN M. VESEY
CHAIRPERSON

ANTHONY J. D'ARCANGELO
COMMISSIONER

MICHAEL CAVALLO
COMMISSIONER

MICHAEL J. BROOKS
EXECUTIVE DIRECTOR

(617) 727-6465 V/TDD
1-800-245-0062 V/TDD
FAX (617) 727-6469
HOTLINE 1-800-426-9009 V/TDD

**STATEMENT OF THE DPPC COMMISSIONERS
REGARDING COMMISSIONERS' INVESTIGATION AT BRI**

We have reviewed the investigation reports produced as a result of the Commissioners' Investigation into allegations of abuse of disabled persons at the Behavior Research Institute (now the Judge Rotenberg Educational Center) hereinafter referred to as BRI. We accept the conclusions of the investigators in those cases. In addition to reviewing them as cases involving particular disabled persons, we have reviewed them, as required by M.G.L. c. 19C, §8, to determine "the nature and extent of such abuse" and, as required by that section, "to make recommendations with respect to such occurrences." Following consultation with the staff of the Commission in conjunction with review of the investigation reports, we make the following recommendations *in addition* to those presented in the individual cases.

1. Based on the information contained in conclusion 1 below, the Commission recommends that the Supreme Judicial Court of Massachusetts, using its power of general superintendance of the courts, review the monitoring system developed by the Bristol Probate and Family Court in order to insure the elimination or reduction of risk to students at BRI from the application of aversive procedures. The Commission recommends that this review include determining the thoroughness, independence and effectiveness of the monitoring, including the randomness of visits to BRI by the Court Monitor. Given the controversial nature of the treatment provided at BRI, the review should also seek to insure future appropriate public examination of the results of monitoring at BRI so that public scrutiny can serve to enhance the safety of the students at the program without unduly impinging on the privacy rights of the students.

2. Based on the information contained in conclusion 2 below, the Commission recommends that the Bristol County Probate and Family Court, which has assumed the responsibility of monitoring the use of aversive treatment at BRI, should, as part of this responsibility, examine the system of providing medical care in place at BRI. If the Court determines a need, it should make appropriate orders to insure that the students at BRI have available to them a system of responsive medical care which includes appropriate protocols for record-keeping, communication, and the specific

responsibilities of the BRI medical staff, including the physician retained by BRI, regarding the application of aversive treatment.

3. Based on the information contained in conclusion 3 below, **the Commission recommends that the Bristol County Probate and Family Court, as part of its monitoring process, should insure that the court monitor attends all functional diagnostic trials** as part of the monitor's regular duties and provide to the Court and all parties a written report on the conduct and results of the trials.

4. Based on the information contained in conclusion 4 below, **the Commission recommends that the Bristol Probate and Family Court reopen the question of the need for the use of aversive procedures which obtain their value from the infliction of pain or discomfort.**

These recommendations are based upon the following conclusions which we reach after reviewing the reports comprising the Commissioners' Investigation. The Supreme Judicial Court should review the monitoring system developed by the Bristol Probate and Family Court due to questions which arose in the investigation about that monitoring.

1. It is concluded in one of the reports that a risk of abuse to students at BRI exists. This is based on several findings. These include:

- the failure of a BRI physician to attend functional diagnostic trials to determine medical contraindications, if any, and to review relevant court orders authorizing the use of aversive procedures. (For example, the physician could not recollect whether court-ordered regular weekly medical examinations were required when, in fact, they were.)
- as discussed below regarding recommendation 3, the court monitor does not attend all functional diagnostic trials during which the effect and effectiveness of different aversive procedures is determined.
- the investigation reports contains statements by former BRI staff which raise the question of risk and the monitoring system presently being used. Statements by two former staff persons raised the question of whether the court monitor visits BRI randomly or at the same time each month or week, or, in fact, how often the court monitor visits BRI. A former BRI staff person recalled a conversation between the two BRI administrators about the court monitor not being informed that an aversive procedure had been applied prior to court authorization, and also recalled a conversation between the court monitor and a BRI administrator, during which the monitor stated that he was not aware that a particular aversive was being utilized with a student and that he had not been notified.

The court monitor's assertion of a privilege (which the Commission believes does not apply in this instance) also reduced the Commission's ability to determine the answers to these questions.

2. The investigations conducted by DPPC investigators as part of the Commissioners' Investigation, as well as another 19C investigation conducted by the Department of Mental Retardation under the oversight of the Commission, reveal problems in the system of providing and monitoring medical care at BRI. *This is an issue independent of any dispute about the value of aversive treatment.* In summary, the following conclusions, which support recommendation 2, were reached by investigators regarding the system of providing medical care at BRI.

a. In a case investigated by DMR, which involved the death of a student following poor response by BRI to her behavior and symptoms, the Investigator noted several failings of BRI staff in responding to the critical needs of the disabled person for whom they were caretakers. These failings included:

- an unacceptable delay in initiating observation and/or monitoring given the behavior and symptoms of the student;
- inadequate documentation;
- insufficient gathering of recent medical history to assist in assessments;
- poor medical judgments, including:
 - a registered nurse attributing symptoms to behavioral issues rather than medical ones, contrary to the student's behavioral history, resulting not only in delay of appropriate medical response but in the application of aversive treatment during a period when the student was sick;
 - a decision by the registered nurse to delay calling for emergency medical intervention
 - inadequate interventions by nursing staff
- the BRI registered nurse involved in the matter was not certified as an emergency school nurse/teacher as required by Rhode Island for private special education facilities such as BRI.
- poor communication between shifts, resulting in delay in treatment which was determined to be a contributory cause of the death of the student; and
- lack of policies regarding required responses to medical problems.

b. In matters investigated by the Commission, concerns were also noted regarding the system of providing medical care. These include:

- the physician retained by BRI who determines the medical appropriateness of the use of aversive procedures on BRI students, does not, as part of his review process, attend functional diagnostic trials of the application of various aversive treatments where it is determined which aversive treatment is most effective in obtaining the desired change in behavior.
- the BRI-retained physician does not examine a copy of relevant court orders authorizing aversive treatment as part of his determination, although the orders contain the only official statement of the treatment which the court has authorized.
- the Commission is unable to determine whether Dr. John Daignault, the court monitor of the provision of aversive treatment, attends functional diagnostic trials of aversives applied to students at BRI as a regular part of his duties; however, he did not attend the trial which was examined as part of one of the investigations.
- BRI staff did not follow hospital orders requiring bed rest for a student who had suffered a fracture, resulting in the student experiencing pain while being forced to commute to and attend the program at BRI during his recovery.

3. The court accepted the responsibility to monitor the application of aversive treatment, and, to fulfill this crucial responsibility, the court established the position of a court monitor to act as the court's agent to perform such monitoring. Dr. Daignault's failure to attend all functional diagnostic trials deprives the court of information which can

insure adherence to the parameters for application of aversive treatment which the court has established to insure the safety of the students at BRI.

4. We conclude that the use of spatula spansks and finger pinches as an aversive treatment is abuse *per se* pursuant to the provisions of M.G.L. c. 19C. The basis for this conclusion is as follows:

a. The court order which authorizes the use of spatula spansks and finger pinches is issued pursuant to the judicial rule of substituted judgment. In the context of BRI and treatment provided to its students, a "substituted judgment" order is one by which the Bristol County Probate and Family Court, after concluding that a student is unable to make treatment decisions for him- or herself, substitutes its judgment for that of the student based on what the court determines the student would decide for him- or herself if he/she had the capacity to make that decision. This judgment of the court relates to consent to the aversive treatment, not whether or not the treatment is "abuse" as defined in M.G.L. c. 19C.¹ The substituted judgment order does not invalidate or revise c. 19C.²

b. Based upon the language of the DPPC statute and regulations, the concept of "abuse" under c. 19C does not require an intention to abuse on the part of an abuser in order for an act or omission to be considered abuse. Similarly, a disabled person cannot consent to being abused.

c. The records reviewed by DPPC Investigators and the statements of present and former employees of BRI provide compelling evidence that certain students suffered bruising as a result of the application of spatula spansks and finger pinches. For example, BRI records and the statements of BRI staff indicate that spatula spansks and finger pinches were used during the functional diagnostic trial of a BRI student. Certain BRI records indicate that bruising was caused by spatula spansks and finger pinches, as described below. Based upon a review of the aversive procedures applied to students, the Commission considers it reasonable to conclude that bruising resulted from the application of spatula spansks and/or finger pinches. That conclusion, together with information obtained from BRI staff that the application of spatula spansks and finger pinches would be discontinued on areas already bruised from the application of those aversives, supports the conclusion that students who were the subject of allegations in this case suffered "serious physical injury" as a result of the application of spatula spansks and/or finger pinches.

In addition:

- BRI body check nurses notes dated 6-23-89 indicate that a student was observed as having bruising to the legs, arms, and back, as well as finger pinches to the hands, arms, and feet. On this day, the student was taken "off physicals" to the right foot. This essentially means that no physical aversive procedures were to be applied to her right foot due to the existence of then-current injuries. According to records indicating the amount of physical aversives applied on 6-23-89, it is documented that the student received 95 spatula spansks.
- The total applications of physical aversives as documented in BRI documents dated June 26, 1989 indicates 20 applications of SIBIS, 17 spatula spansks, 1 continuous finger pinch, and 83 "physicals", which were not specifically defined in the record.
- The body check nursing notes for 6-27 reveal that the student was observed as having "bruised calves - sp.[spansks], fps [finger pinches] feet arms, sp.[spansks]

¹ In relevant part, chapter 19C defines abuse as "an act or omission which results in serious physical or emotional injury to a disabled person...".

² Chapter 19C became effective on March 24, 1987. The existence or provisions of c. 19C are not cited in the court's order.

butt & thighs.” The body check nursing notes further indicate that the application of physical aversives to the calves and left outer thigh was discontinued.

[It is noteworthy that bruising was noted in BRI records for June 23 and June 27, yet the body check nurses notes for June 26 cites no bruising whatsoever.]

- The Tabulation of Physical Aversives chart for 6-27-89 indicates that the student received 99 spatula spanks, 114 applications of SIBIS, 243 finger pinches, 7 spanks, and 8 muscle squeezes. A BRI document identified as [data regarding the student] 6-27 indicates that the student received 99 spatula spanks, 112 applications of SIBIS, and 217 physicals (non-specific).
- The body check nurses notes for June 30, 1989 indicate that aversives were discontinued to the left outer thighs and back of calves, that “bruises arms thighs and calves fading” and that “finger pinches arms and feet healing”.
- The body check nurses notes for 7-3-89 state, in part, “scattered bruises especially R. calf. Discussed with [staff] who is expected to attend [student]’s consequating; agrees to avoid calves and concentrate on relatively bruise free butts.”
- a present staff person stated that she observed bruises on the body of a student on areas approved by the court for the application of spatula spanks.
- a former BRI staff person stated that the use of spatula spanks left welts, bruises, broken skin, and marks.
- a former BRI staff person stated that in June, 1989 she observed multiple bruising over many parts of a student’s body as a result of the application of physical aversives.
- a former BRI staff person stated that she observed much bruising to a student’s outer extremities.
- a former BRI staff person stated that in the spring of 1989 she observed extensive bruising to a student’s arms and thighs.
- a former BRI staff person stated that following a day of probing, a student remained at the residence for “a couple of days” following this episode because of extensive bruising.
- a present BRI staff person stated that she has observed bruising to a student as the result of spatula spanks.
- a former BRI staff person stated that she observed marks and bruises on a student’s body as a result of the application of spatula spanks, pinches, and muscle squeezes.

While the question of the clinical effectiveness of aversive procedures was not addressed as part of this investigation, the Commission makes this recommendation for the following reasons:

- a. In authorizing the use of aversive procedures via a substituted judgment order, the Court did not and has not yet considered the relationship of such orders and the definition of “abuse” set forth in M.G.L. c. 19C. However, the legal determination by the DPPC that the application of spatula spanks and finger pinches is abuse *per se* as defined by c. 19C (discussed below) causes the Commission to recommend to the Court that it review whether these procedures, as well as other aversive procedures, should continue to be utilized as a treatment modality.
- b. The court should review the need for the use of painful aversives procedures in the context of treatments developed since the authorization of such procedures which could obviate the need for painful aversives and allow treatment for the students at BRI which is not based on the application of pain or discomfort.
- c. The expert consultant for the Commission, James Luiselli, Ed.D, notes in his report (which is appended to the report regarding cases #10869 and #10975) several issues regarding the conduct of the functional diagnostic trial for the student who was the subject of that report which should be considered by the Court in

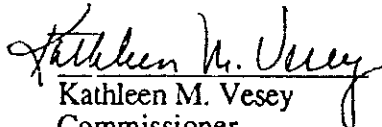
determining the present need and effectiveness of aversive procedures. These issues include:

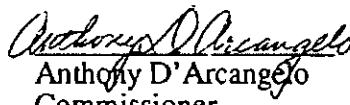
- difficulty in interpreting the data obtained during the functional diagnostic trial regarding the relative effectiveness of the aversive procedures which were utilized;
- the definition and selection of the behaviors which were observed and responded to with those procedures;
- the structure of the data, which does not allow for interpretation since specific data does not correspond to summary information;
- the lack of definitions for certain notations in the BRI records; and
- discrepancies between data regarding the same event but obtained from different sources [a problem noted in the report regarding cases #10869 and #10975].

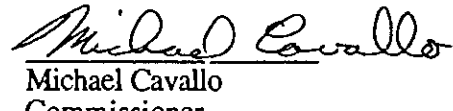
The consultant also notes concern about the conclusion of BRI about the effectiveness of SIBIS over spatula spank by noting that the effectiveness was relative to the other aversive procedures used in the trial, and not absolute.

We make this conclusion knowing that the students to which spatula spanks and finger pinches were and could be applied are self-abusive and that the injuries which they inflict on themselves could be more harmful than the bruising caused by the aversive procedures. It is our position that, given advances in behavioral sciences and the fact that M.G.L. c. 19C was not and has not been considered by the court in its decisions regarding the use of aversive procedures, the court should now reevaluate the need for using painful aversives which cause serious physical or emotional injury as defined by c. 19C.

Accordingly, we will direct that the reports completed by the Commission and this statement be forwarded to the Supreme Judicial Court, the Bristol County Probate and Family Court, as well as to the Executive Office of Health and Human Services, the Department of Mental Retardation (both as required by c. 19C) and the Governor's Commission on Mental Retardation.


Kathleen M. Vesey
Commissioner


Anthony D'Arcangelo
Commissioner


Michael Cavallo
Commissioner

March 14, 1995

MASS. GEN. LAWS c. 19C

CHAPTER 19C

DISABLED PERSONS PROTECTION COMMISSION

§ 1. Definitions

As used in this chapter, the following words shall, unless the context requires otherwise, have the following meanings:—

"Abuse", an act or omission which results in serious physical or emotional injury to a disabled person; provided, however, that 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.

"Caretaker", a disabled person's parent, guardian or other person or agency responsible for a disabled person's health or welfare, whether in the same home as the disabled person, a relative's home, a foster home or any other day- or residential setting.

"Commission", the disabled persons protection commission established pursuant to section two.

"Disabled person", a person between the ages of eighteen to fifty-nine, inclusive, who is mentally retarded, as defined by section one of chapter one hundred and twenty-three, or who is otherwise mentally or physically disabled and as a result of such mental or physical disability is wholly or partially dependent on others to meet his daily living needs.

"General counsel" or "counsel", the general counsel of the executive office of human services.

"Mandated reporter", any physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, dentist, psychologist, nurse, chiropractor, podiatrist, osteopath, public or private school teacher, educational administrator, guidance or family counselor, day care worker, probation officer, social worker, foster parent, police officer or person employed by a state agency within the executive office of human services as defined by section sixteen of chapter six A, or employed by a private agency providing services to disabled persons who, in his professional capacity shall have reasonable cause to believe that a disabled person is suffering from a reportable condition.

"Reportable condition", a serious physical or emotional injury resulting from abuse, including unconsented to sexual activity.

"State agency", any agency of the commonwealth that provides services or treatment to disabled persons, including private agencies providing such services or treatment pursuant to a contract or agreement with an agency of the commonwealth.

Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 465, § 11.

Chapter 19C, § 1, no longer defines "mentally retarded person."

Historical and Statutory Notes

St.1986, c. 655, § 1, approved Dec. 24, 1986, added this chapter consisting of this section and §§ 2 to 13 as c. 19B, without reference to c. 19B, §§ 1 to 13, added by St.1986, c. 589, § 9. St.1987, c. 465, § 11, redesignated the provisions of this chapter as c. 19C, § 1, et seq.

St.1987, c. 465, § 11, an emergency act, approved Nov. 3, 1987, renumbered the provisions of this section from c. 19B, § 1.

CHAPTER 19C

DISABLED PERSONS PROTECTION COMMISSION

§ 1. Definitions

As used in this chapter, the following words shall, unless the context requires otherwise, have the following meanings:—

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or relies upon treatment in accordance with the tenets and teachings of a church or religious denomination by a duly accredited practitioner thereof.

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"General counsel" or "counsel", the general counsel of the executive office of human services.

"Mandated reporter", any physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, dentist, psychologist, nurse, chiropractor, podiatrist, osteopath, public or private school teacher, educational administrator, guidance or family counselor, day care worker, probation officer, social worker, foster parent, police officer or person employed by a state agency within the executive office of human services as defined by section sixteen of chapter six A, or employed by a private agency providing services to disabled persons who, in his professional capacity shall have reasonable cause to believe that a disabled person is suffering from a reportable condition.

"Reportable condition", a serious physical or emotional injury resulting from abuse, including unconsented to sexual activity.

"State agency", any agency of the commonwealth that provides services or treatment to disabled persons, including private agencies providing such services or treatment pursuant to a contract or agreement with an agency of the commonwealth.

Added by St.1986, c. 465, § 1. Renumbered by St.1987, c. 465, § 1.

Chapter 19B, § 1, no longer defines "mentally retarded person."

Historical and Statutory Notes

St.1986, c. 465, § 1, approved Dec. 24, 1986, added this chapter consisting of this section and §§ 2 to 12 as c. 19B, without reference to c. 19B, §§ 1 to 13, added by St.1986, c. 399, § 2. St.1987, c. 465, § 11, redesignated the provisions of this chapter as c. 19C, § 1, c. 465.

St.1987, c. 465, § 11, an emergency act, approved Nov. 3, 1987, renumbered the provisions of this section from c. 19B, § 1.

§ 2. Establishment of commission

There is hereby established, a commission for the protection of disabled persons, to be known as the disabled persons protection commission. The purpose of the commission shall be to provide for the investigation and remediation of instances of abuse of disabled persons in the commonwealth. The commission shall consist of three members to be appointed by the governor, one of whom he shall designate as chairman. Members of the commission shall serve for terms of three years. Any member whose term has expired shall continue to serve until such member's successor has been duly appointed and qualified. Any member shall be eligible for reappointment. Members may be removed by the governor for willful misconduct or neglect of duty or for inability to perform the powers and duties of the office. Members of the commission shall be compensated for work performed for the commission at such rate as the commissioner of administration shall determine and shall be reimbursed for their expenses.

Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 465, § 11. Amended by St.1991, c. 138, § 103.

§ 3. Powers and duties

The commission shall have the following powers and duties:—

(a) to employ, subject to appropriation, such staff as shall be necessary to carry out its duties pursuant to this chapter. Such staff shall serve at the pleasure of the commission and shall not be subject to the provisions of chapter thirty-one;

(b) to promulgate, pursuant to the provisions of chapter thirty A, rules and regulations to carry out the purposes of this chapter, including rules governing the conduct of hearings conducted pursuant to section eight;

(c) to provide for the investigation of alleged abuse of disabled persons initiated pursuant to section four;

(d) to designate other state agencies within the executive office of human services for the furnishing of protective services in accordance with the provisions of section six;

(e) to issue reports, including findings of facts and recommendations, upon concluding an investigation, and to refer matters upon which investigations have been completed pursuant to section nine;

(f) to take appropriate measures to notify state agencies, disabled persons and other interested parties of the provisions of this chapter;

(g) to maintain files, records of investigations and reports which shall be retained and made available in accordance with the provisions of chapters sixty-six and sixty-six A;

(h) to develop standards for deferral of investigations to the executive office of human services and to agencies within the executive office of human services under section twelve and in consultation with the secretary of the executive office of human services.

The commission shall promulgate rules and regulations establishing procedures to exclude personally identifiable information regarding the subjects of investigations and to carry out the responsibilities of this chapter in such a way as to disclose as little personally identifiable information as possible.

Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 463 § 11.

Historical and Statutory Notes

St.1987, c. 463, § 1, an emergency act approved Nov. 3, 1987, renumbered the provisions of this section from c. 19B, § 3.

§ 4. Referral of abuse reports

Upon receipt of a report of abuse of a disabled person, the commission shall:—

(a) refer immediately any such reports which allege the occurrence of abuse that is subject to the provisions of sections fourteen to twenty-six, inclusive, of chapter nineteen A, sections seventy-two F to seventy-two L, inclusive, of chapter one hundred and eleven, or sections fifty-one A to fifty-one F, inclusive, of chapter one hundred and nineteen to the appropriate agency for the implementation of measures provided in said sections.

(b) refer immediately any such reports, which allege the occurrence of abuse to a disabled person whose caretaker is a state agency, to an investigator of the commission and the general counsel of the office of the secretary of human services, or his designee, within such office and to the department within the executive office of human services which provides or which has contracted for the provision of services to the disabled person. Said department shall investigate such abuse as provided in section five, subject to the oversight of said office and the commission and subject to the power of the commission to conduct its own investigation.

(c) refer immediately any such reports which allege the occurrence of abuse to a disabled person whose caretaker is other than a state agency to the general counsel or to the department of mental health, in those cases where the disabled person is mentally retarded or otherwise mentally disabled, or to the Massachusetts rehabilitation commission, in those cases where the disabled person is physically disabled and said counsel or the department of mental health or the department of public health shall immediately, upon such referral,

designate an investigator who shall investigate such abuse as provided in section five.

Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 465, § 11.

Historical and Statutory Notes

St.1987, c. 465, § 11, an emergency act, approved Nov. 3, 1987, renumbered the provisions of this section from c. 19B, § 4.

§ 5. Investigation and evaluation of abuse reports; disclosure of information; case findings and recommendations; reports of deaths

Upon receipt of a report of abuse of a disabled person, an investigator designated by the commission, the general counsel, or a department within the executive office of human services shall:—

(1) Investigate and evaluate the information reported in said reports. Said investigation and evaluation shall be made within twenty-four hours if the commission, counsel or department of mental health or department of public health determines that there is reasonable cause to believe the disabled person's health or safety is in immediate danger from further abuse and within ten calendar days for all other such reports. The investigation shall include a visit to the disabled person's residence and day program, if any, an interview with the disabled person allegedly abused, a determination of the nature, extent and cause or causes of the injuries, the identity of the person or persons responsible therefor and all other pertinent facts. Such determinations and evaluations shall be in writing and shall be immediately forwarded to the commission, to the general counsel and to the department of mental health and the department of public health.

If requested in writing by the commission or by any agency it designates, any mandated reporter required to make a report pursuant to section ten, shall disclose such documents relevant to any investigation being conducted pursuant to this chapter to the department or to the agency. For the purposes of this section the word "documents" shall include, but not be limited to, any records, charts, reports, reviews, assessments, papers, correspondence and any other data or material.

Any privilege created by statute or common law relating to confidential communications or any statute prohibiting the disclosure of information shall neither preclude the disclosure of such documents to the commission or its designated agency nor prevent the admission of such documents in any civil or disciplinary proceeding arising out of the alleged abuse or neglect of the disabled person; provided, however, that absent the written consent of an individual to whom the requested documents relate, any information which is protected by the attorney-client privilege, the psychotherapist-client privilege, or the clergy-penitent privilege shall not be subject to such disclosure.

Any party required to provide documents in compliance with the provisions of this section shall not be liable in any civil or criminal action for providing such documents to the commission or any designated agency.

(2) Evaluate the environment of the facility named in the report, if any, and make a written determination of the risk of physical or emotional injury to any other residents or clients in the same facility.

(3) Forward to the commission, the general counsel, the department of mental health and the department of public health within a reasonable time after a case is initially reported pursuant to section four, a summary of the findings and recommendations on each case.

(4) If there is reasonable cause to believe that a disabled person has died as a result of abuse, immediately report said death to the commission, the general counsel, the attorney general, the district attorney for the county in which such death occurred, and to the medical examiner as required by section six of chapter thirty-eight.

Added by St.1986, c. 655 § 1. Renumbered by St.1987, c. 465, § 11. Amended by St.1993, c. 429.

Historical and Statutory Notes

St.1987, c. 465, § 11, an emergency act approved Nov. 3 1987, renumbered the provisions of this section from c. 19B, § 5.
St.1993, c. 429, in par. 11, added the second to fourth paragraphs.

St.1993, c. 429 was approved Jan. 11, 1994. Emergency declaration by the Governor was filed on the same date.

DISABLED PERSONS PROTECTION COMMISSION

19C §6

§ 6. Protective services

The commission, acting through state agencies within the executive office of human services designated by the commission, for the purpose of furnishing protective services, the general counsel acting through state agencies within the executive office of human services designated by the secretary of human services for the purpose of furnishing protective services, the department of mental health and the department of public health shall, as necessary to prevent further abuse in cases investigated by said commission, counsel or department:—

(1) furnish protective services to a disabled person either with his consent or with the consent of his current guardian;

(2) petition the court for appointment of a conservator or guardian or for issuance of an emergency order for protective services as provided in section seven; or

(3) furnish protective services to a disabled person on an emergency basis as provided in section seven.

Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 465, § 11.

Historical and Statutory Notes

St.1987, c. 465, § 11, an emergency act, approved Nov. 3, 1987, renumbered the provisions of this section from c. 195, § 6.

§ 7. Petitions for findings of incapacity; emergency orders

(a) If the commission, the general counsel, the department of mental health or the department of public health, has reasonable cause after initiation of an investigation to believe that a disabled person is suffering from abuse and lacks the capacity to consent to the provision of protective services, such commission, counsel or department may petition the court for a finding that the disabled person is incapable of consenting to the provision of protective services. Said petition shall set forth the specific facts upon which said commission, counsel or department relied in making such determination. The court shall hold a hearing on the matter within fourteen days of the filing of the petition. The court shall give notice to the disabled person who is the subject of the petition at least five days prior to the date set for the hearing. The disabled person who is the subject of the petition shall have the right to be present, be represented by counsel, present evidence, and examine and cross-examine witnesses. If the disabled person who is the subject of the petition is indigent, the court shall appoint counsel to represent such disabled person. If the court determines that the disabled person lacks the capacity to waive the right to counsel, the court shall appoint a guardian ad litem to represent the interests of such disabled person. If, after hearing, the court determines, based upon a preponderance of the evidence, that such disabled person has been abused, is in need of protective services and lacks the capacity to consent and no other person who is authorized to consent is available or willing to consent, the court may appoint a conservator, guardian, or other person authorized to consent to the provision of protective services; provided, however, that the court shall establish the least restrictive form of fiduciary representation that will satisfy the needs of such disabled person. In addition to or in the alternative, the court may issue an order requiring the provision of services. The order shall contain a specific description of the services to be provided and insure that the least restrictive alternatives are utilized.

(b) If an emergency exists and said commission, counsel or department, a member of the immediate family or a caretaker has reasonable cause to believe that a disabled person is suffering from abuse and lacks the capacity to consent to the provision of protective services, said commission, counsel or department, member of the immediate family or caretaker may petition the court for an emergency order of protective services. The court shall give notice to the disabled person who is the subject of the petition at least twenty-four hours prior to the hearing. The court may dispense with notice upon finding that immediate and reasonable foreseeable physical harm to the individual or others will result from the twenty-four hour delay and that reasonable attempts have been made to give such notice. If after the hearing, the court determines, based upon a preponderance of the evidence, that the disabled person has been or is being abused, that an emergency exists, and that the disabled person lacks the capacity to consent to the provision of services, the court may order the provision of protective services on an emergency basis. The court shall order only those services necessary to remove the conditions creating the emergency.

DISABLED PERSONS PROTECTION COMMISSION

19C §8

§ 8. Abuse of disabled persons under state care; investigations and hearings

If, upon completion of investigation of a report of abuse of a disabled person whose caretaker is a state agency there is reasonable cause to conclude that such abuse did occur, or whenever, upon its own motion, the commission determines that a formal hearing is necessary to ascertain the scope and remedy of such abuse of disabled persons whose caretaker is a state agency, the commission may, upon a majority vote, initiate a formal investigation, including a hearing, to determine the nature and the extent of such abuse and what recommendations, if any, should be made with respect to such occurrence. Testimony in commission proceedings may, in the discretion of the commission, be recorded and taken under oath. The commission may, in its discretion, permit any party to testify, to call and examine witnesses, to introduce evidence or to cross-examine witnesses. Before testifying, all witnesses shall be given a copy of the regulations governing the commission proceedings. Each witness shall be entitled to be represented by counsel and may refuse to submit evidence or give testimony if such evidence or testimony could tend to incriminate him. All proceedings of the commission shall be public unless the commission votes to go into executive session. Any person whose name is mentioned during a proceeding under this section and who may be adversely affected by any action of the commission under section nine shall have the right to appear personally, to be represented by counsel in connection with the proceedings, to call and examine witnesses, to introduce evidence or to cross-examine witnesses.

Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 465, § 11.

Historical and Statutory Notes

St.1987, c. 465, § 11, an emergency act, approved Nov. 3, 1987, renumbered the provisions of this section from c. 19B, § 3.

§ 9. Completion of hearings; reports; referrals

Upon the completion of any formal investigation, the commission shall:—

(a) issue a written report and refer the same to the appropriate state agency. Such report shall contain findings of fact concerning the alleged occurrence of abuse that was the subject of the investigation, together with a finding as to whether or not such abuse did occur and, if so, what actions are necessary to remedy the causes of such abuse or to prevent its reoccurrence;

(b) refer any matters for which there is reason to believe that a crime has been committed to the attorney general, the United States attorney or a district attorney for the county wherein such crime was committed;

(c) refer any matters for which there is reason to believe that employee misconduct has occurred to the state agency employing such person for imposition of disciplinary measures in accordance with the requirements of any applicable law, regulation or collective bargaining agreement; or

(d) refer any matters for which there is reason to believe that misconduct has occurred by a contractor with a state agency or by such contractor's agent, to the state agency contracting with such party for termination of such contract or for such other action as may be deemed appropriate by such state agency. Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 465, § 11.

Historical and Statutory Notes

St.1987, c. 465, § 11, an emergency act approved Nov. 3, 1987, renumbered the provisions of this section from c. 198, § 9

§ 10. Reporters of abuse: liability; privileged communications

Except when prevented by the constraints of professional privilege as hereinafter provided, mandated reporters shall notify the commission orally of any reportable condition immediately upon becoming aware of such condition and shall report in writing within forty-eight hours after such oral report.

Mandated reporters who have reasonable cause to believe that a disabled person has died as a result of a reportable condition shall immediately report such death, in writing, to the commission, to the district attorney for the county in which such death occurred and to the medical examiner as required by section six of chapter thirty-eight.

Any person may file report¹ if such person has reasonable cause to believe that a disabled person is suffering from abuse or has died as a result thereof.

No mandated reporter shall be liable in any civil or criminal action by reason of submitting a report. No other person making a report shall be liable in any civil or criminal action by reason of submitting a report if such report was

made in good faith; provided, however, that no person who abuses a disabled person shall be exempt from civil or criminal liability by reason of their reporting such abuse.

No privilege established, by sections one hundred and thirty-five A and one hundred and thirty-five B of chapter one hundred and twelve, by section twenty or twenty B of chapter two hundred and thirty-three, by court decision or by professional code relating to the exclusion of confidential communications and the competency of witnesses may be invoked to prevent a report by a mandated reporter or in any civil action arising out of a report made pursuant to this chapter; provided, however, that a mandated reporter need not report an otherwise reportable condition if the disabled person invokes a privilege, established by law or professional code, to maintain the confidentiality of communications with such mandated reporter.

Any person required by this section to make oral and written reports, who fails to do so, shall be punished by a fine of not more than one thousand dollars.

Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 465, § 11. Amended by St.1989, c. 535, § 3.

¹ So in original.

Historical and Statutory Notes

St.1987, c. 465, § 11, an emergency act, approved Nov. 3, 1987, renumbered the provisions of this section from c. 19B, § 10

St.1989, c. 535, § 3 approved Nov. 17, 1989 in the 11th paragraph, substituted "sections one

hundred and thirty-five A and one hundred and thirty-five B" for "section one hundred and thirty-five"

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DISABLED PERSONS PROTECTION COMMISSION

19C §11

§ 11. Retaliation for reporting abuse

No person shall discharge or cause to be discharged or otherwise discipline or in any manner discriminate against or threaten any employee, client or other person for filing a report with the commission or testifying in any commission proceeding, or providing information to the commission, the general counsel or the secretary of human services, the department of mental health or the department of public health or any department within the executive office of human services in the course of an investigation of alleged abuse of a disabled person. Any person who willfully violates the provisions of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. The commission shall enforce the provisions of this section.

Added by St.1986, c. 655, § 1. Renumbered by St.1987, c. 465, § 11.

Historical and Statutory Notes

St.1987, c. 465, § 11, an emergency act, approved Nov. 3, 1987, renumbered the provisions of this section from c. 198, § 11.

DISABLED PERSONS PROTECTION COMMISSION

19C § 12

§ 12. Scope of chapter; delay or deferral of investigation

Nothing in this chapter shall be construed to be a limitation of the powers and responsibilities assigned by law to other departments or agencies, nor shall this chapter be construed to relieve any such department or agency of its obligations to investigate and respond appropriately to alleged incidents of abuse. If the commission determines that a formal investigation under section eight, or an investigation under sections four and five, would duplicate or interfere with an ongoing investigation by law enforcement officials concerning possible criminal conduct arising out of the same conduct, it may, in consultation with the secretary of human services, delay or defer such formal investigation. The commission may, in consultation with the secretary of human services, delay or defer a formal investigation during the pendency of an investigation of the alleged abuse by the state agency at whose facility or program such abuse was alleged to have occurred. Such investigations may be delayed or deferred by the commission only after it has determined: that the health and the safety of clients of state agencies will not be adversely affected thereby; that the commission's ability to conduct a later investigation will not be unreasonably impaired and that the investigation of the incident by another official or agency will be conducted in good faith by an impartial, qualified investigator. The commission shall monitor the progress of such other investigations in order to determine when or whether the commission's investigation of the alleged incident of abuse should be initiated or resumed.

Added by St.1986, c. 355 § 1. Renumbered by St.1987, c. 465 § 11.

Historical and Statutory Notes

St.1987, c. 465, § 11, an emergency act, approved Nov. 3, 1987, renumbered the provisions of this section from c. 19B, § 12.

§ 13. Notification by caretaker agency of death of disabled person; written report

Upon the death of any disabled person whose caretaker was a state agency or an agency of any subdivision of the commonwealth or a private agency contracting with the commonwealth, said caretaker agency shall immediately orally notify the commission and local law enforcement officials of such death, and shall forward to the commission and local law enforcement officials a written report of such death within twenty-four hours of the death. Said report shall contain the name of the disabled person, the name of the facility in which that person resided, and the facts and circumstances of the death. The commission shall take all appropriate measures regarding the report pursuant to its authority under this chapter, including investigating the death, and shall determine whether the cause of death is related to abuse. If it is determined that the death is related to abuse, the commission shall conduct further investigation, or shall oversee further investigation, pursuant to the provisions of this chapter.

Added by St.1995, c. 38, § 34.

Historical and Statutory Notes

1995 Legislation

St.1995, c. 38, § 34, was approved June 21, 1995, and by § 358 made effective July 1, 1995.

MASS. GEN. LAWS c. 201 §6A

§ 6A. Mentally retarded persons; appointment of guardians; commitment; treatment with antipsychotic medication

(a) A parent of a mentally retarded person, two or more relatives or friends of a mentally retarded person, a nonprofit corporation organized under the laws of the commonwealth whose corporate charter authorizes the corporation to act as guardian of a mentally retarded person, or any agency within the executive offices of human services or educational affairs may file a petition in the probate court asking to have a guardian appointed for such mentally retarded person. If, after notice as provided in section seven and a hearing, the court finds that the person is mentally retarded to the degree that he is incapable of making informed decisions with respect to the conduct of his personal and financial affairs, that failure to appoint a guardian would create an unreasonable risk to his health, welfare and property, and that appointment of a conservator pursuant to section sixteen B would not eliminate such risk, it may appoint a guardian of his person and estate. The court shall not so find unless the petition is accompanied by a report from a clinical team consisting of a physician, a licensed psychologist and a social worker, each of whom is experienced in the evaluation of mentally retarded persons, that it has examined the said person and has determined that he is mentally retarded to the degree that he is incapable of making informed decisions with respect to the conduct of his personal and financial affairs. The court shall not, pursuant to this section, appoint as guardian any person or organization which, in its opinion, has any interest, responsibilities or powers which would render such person or organization unable to perform the duties of guardian in the best interest of the mentally retarded person. A copy of such appointment shall be sent by mail by the register to the department of mental retardation. The court may require additional testimony as to the existence and degree of mental retardation, and may require the person subject to the petition to submit to examination.

(b) No guardian so appointed shall have the authority to cause to admit or commit such mentally retarded person to a mental health or retardation facility unless the court specifically finds the same to be in the best interests of such person and specifically authorizes such admission or commitment by its order or decree. The court shall not authorize such admission or commitment except after a hearing for the purposes of which counsel shall be provided for any indigent mentally retarded person.

(c) No guardian so appointed shall have the authority to consent to treatment with antipsychotic medication, provided that the court shall authorize such treatment when it (1) specifically finds using the substituted judgment standard that the person, if competent, would consent to such treatment and (2) specifically approves and authorizes an antipsychotic medication treatment plan by its order or decree. The court shall not authorize such treatment plan except after a hearing for the purpose of which counsel shall be provided for any indigent mentally retarded person. Said hearing shall be held as soon as is practicable; provided, however, that if the petitioner requests a temporary order on the grounds that the welfare of the ward requires an immediate authorization of treatment with antipsychotic medications, the court shall act on such request in accordance with the procedures set forth in section fourteen.

(d) The court may delegate to a guardian the authority to monitor the treatment process to ensure that an antipsychotic medication treatment plan is followed, provided a guardian is readily available for such purpose. Approval of a treatment plan shall not be withheld, however, because a guardian is not available to serve as monitor. In such circumstances, the court shall appoint a suitable person to monitor the treatment process to ensure that the antipsychotic medication treatment plan is followed. Reasonable expense incurred in such monitoring may be paid out of the estate of such person, by the petitioner, or, subject to appropriation, by the commonwealth, as may be determined by the court.

(e) At a hearing relative to authority to cause to admit or commit or authority to administer antipsychotic medication, the court shall require the attendance of such allegedly mentally retarded person unless the court finds that there exists extraordinary circumstances requiring his absence, in which event the attendance of his counsel shall suffice; provided that the court may base its findings exclusively upon affidavits and other documentary evidence if it (1) determines, after careful inquiry and upon representations of counsel, that there are no contested issues of fact and (2) includes in its findings the reason that oral testimony was not required. The court may also appoint one or more persons experienced in the evaluation, care and treatment of mentally retarded persons to examine such person and report their conclusions to the court.

(f) Reasonable expenses incurred in any examination conducted pursuant to this section shall be paid by the petitioner, the estate of such persons, or by the commonwealth as the court may determine.

(g) The guardian of a mentally retarded person shall act to protect the welfare of such person and may utilize the services of agencies and individuals to provide necessary and desirable social and protective services of different types appropriate to such person including, but not limited to, counseling services, advocacy services, legal services, and other aid as he deems to be in the interest of such person.

(h) Any privilege established by section one hundred and thirty-five of chapter one hundred and twelve or by section twenty B of chapter two hundred and thirty-three, relating to confidential communications, shall not prohibit the filing of reports or affidavits, or the giving of testimony, pursuant to this chapter, for the purpose of obtaining treatment of a mentally retarded person; provided, however, that such person has been informed prior to making such communication that they may be used for such purpose and has waived the privilege.

Added by St.1974, c. 845, § 4. Amended by St.1977, c. 567, § 2; St.1978, c. 478, § 95; St.1985, c. 525, § 2; St.1986, c. 599, § 47; St.1987, c. 465, § 56; St.1988, c. 199, §§ 39, 46.

MASS. GEN. LAWS c. 215 §2 & §6

§ 2. Superior jurisdiction; presumption

Probate courts shall be courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction, and no order, judgment, decree, sentence, warrant, writ or process made, issued or pronounced by them need set out any adjudication or circumstances with greater particularity than would be required in other courts of superior and general jurisdiction, and the like presumption shall be made in favor of proceedings of the probate courts as would be made in favor of proceedings of other courts of superior and general jurisdiction.

Amended by St.1975, c. 400, § 52.

§ 6. Equity Jurisdiction

The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction, except that the superior court department shall have exclusive original jurisdiction of all actions in which injunctive relief is sought in any matter growing out of a labor dispute as defined in section twenty C of chapter one hundred and forty-nine.

Probate courts shall also have jurisdiction concurrent with the supreme judicial and superior courts, of all cases and matters in which equitable relief is sought relative to: (i) the administration of the estates of deceased persons; (ii) wills, including questions arising under section twenty of chapter one hundred and ninety-one; (iii) trusts created by will or other written instrument; (iv) cases involving in any way the estate of a deceased person or the property of an absentee whereof a receiver has been appointed under chapter two hundred or the property of a person under guardianship or conservatorship; (v) trusts created by parol or constructive or resulting trusts; (vi) all matters relative to guardianship or conservatorship; and (vii) actions such as one described in clause (11) of section three of chapter two hundred and fourteen and of all other matters of which they now have or may hereafter be given jurisdiction. They shall also have jurisdiction to grant equitable relief to enforce foreign judgments for support of a wife or of a wife and minor children against a husband who is a resident or inhabitant of this commonwealth, upon an action by the wife commenced in the county of which the husband is a resident or inhabitant. They shall, after the divorce judgment has become absolute, also have concurrent jurisdiction to grant equitable

relief in controversies over property between persons who have been divorced. They shall also have jurisdiction of an action by an administrator, executor, guardian, conservator, receiver appointed as aforesaid or trustee under a will to enjoin for a reasonable period of time the foreclosure, otherwise than by open and peaceable entry, of a mortgage on real estate, or the foreclosure of a mortgage on personal property, which real estate or personal property is included in the estate or trust being administered by such fiduciary, if in the opinion of the court the proper administration of the estate or trust would be hindered by such foreclosure. They shall also have jurisdiction, concurrent with the superior court, of proceedings in which equitable relief is sought under sections seven to twelve, inclusive, of chapter one hundred and seventeen and section twenty-six of chapter one hundred and twenty-three.

Notwithstanding any contrary or inconsistent provisions of the General Laws, procedure in cases in the probate court within the jurisdiction granted by this section shall be governed by the Massachusetts Rules of Civil Procedure.

Amended by St.1933, c. 237, § 1; St.1937, c. 257; St.1939, c. 194, § 2; St.1950, c. 485, § 3; St.1951, c. 657, § 2; St.1954, c. 556, § 2; St.1958, c. 223; St.1963, c. 820, § 1; St.1970, c. 888, § 24; St.1973, c. 1114, § 63; St.1975, c. 400, § 55; St.1981, c. 616.

Pt.1, Art. 30 CONSTITUTION OF MASSACHUSETTS

Pt.I, Art. 30 CONSTITUTION OF MASSACHUSETTS

Art. XXX. Separation of legislative, executive and judicial departments

ART. XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

11-11-1990 11:11:11

118 CMR 1.00 *et seq.*

118 CMR: DISABLED PERSONS PROTECTION COMMISSION

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118 CMR: DISABLED PERSONS PROTECTION COMMISSION

118 CMR 1.00: SCOPE AND AUTHORITY

Section

- 1.01: Scope
- 1.02: Authority
- 1.03: Purpose
- 1.04: Commentaries
- 1.05: Changes
- 1.06: Severability
- 1.07: Construction

1.01: Scope

118 CMR *et seq.* sets forth the regulations governing the operation of the Disabled Persons Protection Commission.

1.02: Authority

The Commission was created pursuant to M.G.L. c. 19C.

1.03: Purpose

The purpose of the Commission is to receive reports of abuse of disabled persons, to insure that suspected cases of abuse of disabled persons are investigated, that disabled persons are protected from abuse, that the abusive situation is remedied, that disabled persons receive appropriate protective services, to issue reports, including reports to the Governor and Legislature, to inform state agencies, disabled persons, and other interested parties and the public of the provisions of M.G.L. c. 19C and generally to protect disabled persons from abuse pursuant to the provisions of M.G.L. c. 19C. In fulfilling its purpose, the Commission shall endeavor to respect the privacy and self determination rights and dignity of all citizens of the Commonwealth.

1.04: Commentaries

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

1.05: Future Changes

As changes to 118 CMR are implemented, substitute or additional sections and/or pages will be issued.

1.06: Severability

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

1.07: Construction

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

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

118 CMR: DISABLED PERSONS PROTECTION COMMISSION

1.07: continued

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

REGULATORY AUTHORITY

118 CMR 1.00: M.G.L. c. 19C, § 3(b).

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

Section

- 4.01: 24-hour Receipt of Reports
- 4.02: Screening
- 4.03: Information Required to be Given to Reporters
- 4.04: Referral to Other Agencies
- 4.05: Reports Which do not Fall Within the Mandate of M.G.L. c. 19C
- 4.06: Reports Involving Deaths of Disabled Individuals
- 4.07: Reports Involving Suspected Criminal Activity
- 4.08: Monitoring of referrals, concurrent or joint investigations, and agency deferral
- 4.08: Logs of reports

4.01: 24-hour Receipt of Reports

The Commission shall receive reports of suspected abuse of disabled persons, on a 24 hour basis, either through its staff or through designated telephone hotline workers.

4.02: Screening

The screener shall, immediately upon receipt of a report of abuse of a disabled person, evaluate the report to determine its nature and urgency, and then shall determine the appropriate response.

(1) Determination of Urgency of Report Upon receipt of a report and a determination that the report concerns alleged abuse of a disabled person by a caretaker, the screener shall determine the urgency of the report based upon the facts provided by the reporter and application of the definitions of extreme emergency, emergency, and non-emergency as set out in 118 CMR 4.00. The screener shall then respond as follows:

(a) Extreme emergency: if it is determined that an extreme emergency exists, the screener's first responsibility shall be to take such steps as are necessary to end the abusive situation. To that end, the screener shall gather only as much information as is necessary to take action to prevent or stop the immediate abuse. This information shall include the following:

1. Name of the disabled person allegedly abused;
2. Location of the disabled person at the time of the report;
3. Name or description of the alleged abuser;
4. Location of the alleged abuser at the time of the report;
5. Name, address, and telephone number of the reporter;
6. Nature of the immediate danger.

Upon a determination that an extreme emergency exists, a screener shall immediately take all appropriate action to insure that the extreme emergency ends, regardless of whether the alleged victim is a disabled person. When the alleged victim is a disabled person, the screener must immediately notify the proper authorities as follows:

- a. If the alleged abuse is occurring at a state-operated facility, e.g., state hospital, state school, public health hospital, or correctional facility, the screener shall notify the facility and take appropriate measures to end the abusive situation. Once the screener has determined that the alleged abusive situation no longer exists, the screener shall forward the case within two hours to the referral agency for investigation, and shall inform a representative of the facility that an investigator designated by the Commission will shortly contact the facility. If the screener is a hotline worker, he or she also shall report the case to the Commission immediately. The Commission investigator or referral agency investigator shall conduct and complete the investigation of an extreme emergency within 24 hours of their agency's receipt of the report of the existence of an extreme emergency. A written report of that investigation shall be prepared by the investigator as required by 118 CMR 5.01.

4.02: continued

b. If the alleged abuse is not occurring at a state-operated facility, the screener shall immediately call the police department for the city or town for the community in which the alleged abuse has occurred or is allegedly occurring and request immediate assistance. If the screener is a hotline worker, he or she shall report the case to the Commission immediately after contacting the police. The Commission investigator or referral agency investigator shall conduct and complete the investigation of an extreme emergency within 24 hours of their agency's receipt of the report of the existence of an extreme emergency. A written report of that investigation shall be prepared by the investigator as required by 118 CMR 5.01.

c. Downgrading of cases from extreme emergency or emergency status to non-emergency status may occur as set out in 118 CMR 5.01.

(b) Emergency:

1. If it is determined that an emergency situation exists, the screener shall complete the intake form used by the Commission and immediately refer the case to a Commission investigator. The investigator shall, within two hours of the receipt of the report of the emergency, refer the matter to the appropriate referral agency pursuant to the requirements of M.G.L. c. 19C, § 4 and 118 CMR 4.04.

2. If a Commission investigator is unavailable, the worker shall, within two hours of the receipt of the report of the emergency, refer the matter to the appropriate referral agency pursuant to the requirements of M.G.L. c. 19C, § 4 and 118 CMR 4.04.

3. If a Commission investigator in the first instance receives the report and determines that an emergency situation exists, the investigator shall complete the intake form used by the Commission, note that the report has been designated an emergency, and within two hours of the receipt of the report of the emergency refer the matter to an investigator of the Commission and to the appropriate referral agency pursuant to the requirements of M.G.L. c. 19C, § 4 and 118 CMR 4.04.

4. Downgrading of cases from extreme emergency or emergency status to non-emergency status may occur as set out in 118 CMR 5.01.

(c) Non-emergencies: A non-emergency exists when an abusive situation is neither an emergency nor an extreme emergency. If it is determined that such a situation exists, the screener, if a hotline worker, shall complete the intake form used by the Commission, note that the report has been designated a non-emergency, and refer the matter to an investigator of the Commission. The Commission investigator shall refer the report to the appropriate referral agency before the close of business on the day of receipt of the report. If the report is received by the Commission during non-business hours it shall be referred to the appropriate referral agency on the next business day.

(2) Determination of nature of report.

(a) Upon the receipt of any report, the screener shall make the following initial determinations:

1. Whether the subject of the report is disabled as defined by M.G.L. c. 19C, § 1 and 118 CMR, including whether the person, as a result of a disability, is wholly or partially dependent upon others for daily living needs;
2. The identity of the alleged abuser, if possible;
3. Whether the facts of the report constitute abuse as defined by M.G.L. c. 19C, § 1 and 118 CMR.

(b) If the determination of the nature of the report indicates that the alleged victim is not a disabled person and/or that the facts of the report do not constitute abuse as defined by M.G.L. c. 19C or 118 CMR, the report shall be screened pursuant to 118 CMR 4.04(1) (reports of alleged child abuse or elder abuse or abuse of residents or patients of long-term care facilities) or pursuant to 118 CMR 4.05 (reports of cases not within the mandate of any state agency).

(c) If a screener is unable to make a screening decision under this chapter based upon the information received from the reporter the screener shall immediately seek such further information as is necessary to facilitate such a decision.

4.03: Information Required to be Given to Reporters

- (1) At the time a report is received the screener shall advise the reporter as follows:
 - (a) That any mandated reporter is required to forward to the Commission a written report within 48 hours of making the oral report;
 - (b) That if the report concerns the death of a disabled person as a result of abuse, a mandated reporter is required immediately to report such death, in writing, to the District Attorney for the county in which the death occurred, and to the Chief Medical Examiner, of the Commonwealth
 - (c) That the report is confidential, and every effort will be made by the Commission to maintain the confidentiality of the identity of the reporter, and to protect the reporter from adverse consequences from having reported abuse, including enforcement by the Commission of the provisions of M.G.L. c. 19C, § 11 regarding retaliation against reporters;
 - (d) That the reporter may be contacted again;
 - (e) That the reporter will be notified, upon written request, of the following information by the Commission in writing within 20 business days of the completion of the investigation:
 1. Whether the information contained in the report constituted a reportable condition;
 2. the name, address, and telephone number of the agency which conducted the investigation; and
 3. That there is reasonable cause to believe that abuse has occurred and whether protective services have been or will be provided; or
 4. That there is insufficient cause to believe that abuse has occurred.
- The screener shall ask the reporter the address at which the reporter wishes to receive this notification.

4.04: Referral to Other Agencies

- (1) Reports Regarding Elders, Children, or Patients or Residents of Certain Long-term Care Facilities. Upon receipt of a report alleging abuse of an elderly person (defined as an individual who has attained the age of 60 years of age), the screener shall immediately refer such report to the Executive Office of Elder Affairs for appropriate action pursuant to M.G.L. c. 19A. Upon receipt of a report alleging abuse of a child (defined as an individual who has not attained the age of 18 years), the screener shall immediately refer such report to the Department of Social Services for appropriate action pursuant to M.G.L. c. 119. Upon receipt of a report alleging abuse of a patient or resident of a long-term care facility as defined in c. 111, § 71 and 118 CMR, the screener of the report shall immediately refer such report to the Department of Public Health for appropriate action pursuant to M.G.L. c. 111. Such referrals shall initially be made orally and the oral report shall be followed by a written report within two days. In the event that the report concerns a situation involving an immediate danger to the subject of the report, the screener shall take appropriate steps to end the abusive situation, including calling local police authorities, before making a screening decision, as set out in 118 CMR 4.02(1).
- (2) Reports Regarding Individuals Whose Caretaker Is a State Agency.
 - (a) Upon receipt of a report alleging abuse of a disabled person whose caretaker is a state agency, the screener, after making the urgency determinations required by 118 CMR 4.02(1), shall refer, by the end of the business day, the report for investigation to an investigator of the Commission, the general counsel for the Executive Office of Human Services, and to the department within the Executive Office of Human Services which provides or has contracted for the provision of services to the disabled person.
 - (b) For purposes of investigation, when a disabled person has multiple caretaker agencies, the caretaker agency which is designated as the referral agency shall be that agency which is deemed by the Commission to be the agency with sufficient contacts with the disabled person and the circumstances of the alleged abuse so as to allow for the most efficient and expedient investigation of the alleged abuse. The referral agency may collaborate, as needed, with other agencies in the investigation of cases involving such individuals, but shall retain the responsibility for completing the investigation and preparing an investigation report.

4.04: continued

(c) If the referral agency objects to a screener's designation of that agency as the appropriate referral agency, the referral agency shall immediately contact the Executive Director of the Commission, or his or her designee, and request an immediate ruling on the designation. The ruling of the Executive Director or designee shall be final. The Executive Director or his or her designee shall be available by telephone during non-business hours.

(3) Reports Regarding Individuals Whose Caretaker Is Other Than a State Agency.

(a) Upon receipt of a report alleging abuse of a disabled person whose caretaker is other than a state agency, and the disabled person has a single disability, the screener, after making the determinations required by 118 CMR 4.02(1), shall refer, by the end of the business day, the report for investigation to an investigator of the Commission and the general counsel for the Executive Office of Human Services, and the appropriate agency as specified in 118 CMR 4.04(3)(c), which agency shall appoint an investigator who shall conduct an investigation pursuant to the time requirements of M.G.L. c. 19C, S. 5 and 118 CMR 5.01(2). The referral agency may collaborate, as needed, with other agencies in the investigation of cases involving such individuals, but shall retain the responsibility for completing the investigation and preparing an investigation report.

(b) For purposes of investigation, when a disabled person has more than one disability, the caretaker agency which is designated as the referral agency shall be that agency deemed by the Commission to be the agency with sufficient contacts with the disabled person and the circumstances of the alleged abuse so as to allow for the most efficient and expedient investigation of the alleged abuse.

(c) The case shall be referred by the screener as follows:

1. When, as can best be determined from the report, a disability of the person who is the subject of the abuse report is mental retardation, as defined by M.G.L. c. 123B, the case shall be referred to and investigated by the Department of Mental Retardation. The Department of Mental Retardation may collaborate as needed, with other agencies in the investigation of cases involving such individuals, but shall retain the responsibility for completing the investigation and preparing an investigation report.

2. When, as can best be determined from the report, a disability of the person who is the subject of the abuse report is a mental disability which is not the result of a head injury, and the disabled person is not mentally retarded, as defined by M.G.L. c.123B, the case shall be referred to and investigated by the Department of Mental Health. The Department of Mental Health may collaborate, as needed, with other agencies in the investigation of cases involving such individuals, but shall retain the responsibility for completing the investigation and preparing an investigation report.

3. When, as can best be determined from the report, the person who is the subject of the abuse report has a head injury or one or more other physical disabilities and does not have a mental disability, the case shall be referred to and investigated by the Massachusetts Rehabilitation Commission. The Massachusetts Rehabilitation Commission may collaborate, as needed, with other agencies in the investigation of cases involving such individuals, but shall retain the responsibility for completing the investigation and preparing an investigation report.

(d) If the referral agency objects to a screener's designation of that agency as the appropriate referral agency, the referral agency shall immediately contact the Executive Director of the Commission, or his or her designee, and request an immediate ruling on the designation. The ruling of the Executive Director or designee shall be final. The Executive Director or his or her designee shall be available by telephone during non-business hours.

4.05: Reports Which do Not Fall Within the Mandate of M.G.L. c. 19C

Upon the receipt of a report which does not involve a disabled person, as defined in M.G.L. c. 19C and 118 CMR, or is not covered by any other paragraph of 118 CMR 4.00, the screener shall make all reasonable efforts to refer the reporter to an appropriate agency, including, but not limited to, legal services, law enforcement, advocacy, and human services agencies.

4.05: continued

Commentary. M.G.L. c. 19C specifically refers to reports involving abuse of particular citizens deemed to be unable to protect themselves without assistance, *i.e.*, disabled persons between the ages of 18 and 59, inclusive; children under the age of 18; persons who are patients or residents of long-term care facilities; and persons 60 years of age and over. The statute sets out specific instructions regarding how such reports are to be screened. For example, the Commission is required to report to the Department of Social Services cases of suspected child abuse. 118 CMR 4.00 insures that other types of reports which the Commission screener may receive, *e.g.*, abuse of others not among those listed above, such as cases of spousal abuse of non-disabled adults, are appropriately referred as well.

4.06: Reports Involving Deaths of Disabled Individuals

Upon the receipt of a report which indicates to the screener that there is reasonable cause to believe that a disabled person has died as a result of abuse, the screener shall immediately make an oral report of such belief to the District Attorney for the county in which the death occurred, the Commission, the general counsel for the Executive Office of Human Services, the agency which provides services to the disabled person, if any, the Attorney General of the Commonwealth, and the Chief Medical Examiner of the Commonwealth. The screener, within 24 hours, also shall file a report in writing with the District Attorney for the county in which the death occurred, to the Commission, the general counsel for the Executive Office of Human Services, the Attorney General of the Commonwealth, and the Chief Medical Examiner of the Commonwealth.

4.07: Reports Involving Suspected Criminal Activity

Upon the receipt of a report which indicates to the Commission that there is reasonable cause to believe that a disabled person is the victim of criminal activity, the Commission shall review the information, and may inform the District Attorney for the county in which the criminal activity allegedly occurred of the facts of the report.

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

(1) Following the referral of an abuse report regarding a disabled person to a referral agency pursuant to M.G.L. c. 19C, § 4(b) and (c) and 118 CMR 4.00, the Commission shall monitor the referral agency to insure that investigations are completed in accordance with M.G.L. c. 19C, § 5 and 118 CMR 5.00. (*see* 118 CMR 5.03.)

(2) The referral agency shall conduct its investigation regarding a case where a state agency is the caretaker of the disabled person subject to the oversight authority of the Commission, and the authority of the Commission to conduct its own investigation. If the Commission determines that the best interests of the disabled person require that the Commission conduct an investigation in place of, concurrent with, or jointly with that of the referral agency, the Commission shall so inform the referral agency and commence such an investigation. If, after consideration of the circumstances of the case, the Commission determines that the Commission should conduct its investigation under M.G.L. c. 19C prior to or in place of that of a referral agency, the Commission, pursuant to its oversight authority, shall request the referral agency to defer its investigation under M.G.L. c. 19C until further notice from the Commission. This request shall refer and apply only to investigations under M.G.L. c. 19C and not to any investigations of other agencies required by or pursuant to other statutes or regulations.

REGULATORY AUTHORITY

118 CMR 4.00: M.G.L. c. 19C, § 3(b).

NON-TEXT PAGE

118 CMR: DISABLED PERSONS PROTECTION COMMISSION

118 CMR 5.00: INVESTIGATIONS

Section

- 5.01: Minimum Requirements of Investigations
- 5.02: Delay or Deferral of Staff Investigations
- 5.03: Commission Review of Investigation Report of Referral Agency

5.01: Minimum Requirements of Investigations

(1) Requirements of investigations. Each investigation and evaluation conducted by the Commission or the referral agency shall, at a minimum, include the following elements:

- (a) A visit to the disabled person's residence and/or day program, if any;
- (b) An interview with the disabled person who was allegedly abused. Such an interview shall include a review of the allegations and a discussion with the disabled person regarding the needs and wishes of that person regarding protective services. The interview must take place unless it will create a foreseeable risk to the disabled person. The interview shall occur at such time that it may be conducted without a risk to the disabled person.
- (c) A determination of the nature, extent, and cause or causes of the injuries, if possible;
- (d) A determination of the identity or description of the alleged abuser, if possible;
- (e) An evaluation of the facility or program named in the report of abuse, if any, with a determination of the risk of physical or emotional injury to other residents or clients in the same facility or program; and
- (f) An initial assessment of the immediate protective services needs of the disabled person. (see 118 CMR 7.02(1) for requirements of the protective services assessment). Each investigation and evaluation conducted by the Commission or a referral agency may include the following tasks, if pertinent to the investigation:
 - (g) An interview with a representative of the agency which provides services to the disabled person, if any, and any other appropriate person(s);
 - (h) An interview with all witnesses to the abuse;
 - (i) An interview with the alleged abuser, if possible and appropriate;
 - (j) A determination that all relevant physical evidence of the alleged abuse has been preserved, if possible, including taking measures to insure that such evidence is preserved by the person having control of the evidence;
 - (k) A review of the treatment record of the disabled person;
 - (l) An interview with the reporter; and
 - (m) Any other tasks which, in the discretion of the investigator, are pertinent to the investigation.

(2) Requirements of Investigation and Evaluation Reports. Each written investigation and evaluation report shall contain the information acquired during the completion of the required tasks of investigation set out in 118 CMR 5.01(1), and the following information:

- (a) A list of the individuals interviewed by the investigator and the dates of the interview(s);
- (b) A summary of the substance of the interviews;
- (c) A finding by the investigator regarding whether there is reasonable cause to believe that a reportable condition exists; that is, whether abuse is indicated, together with the basis of the finding, including specific information regarding the abusive incident; and
- (d) If there is reasonable cause to believe that a reportable condition exists, a statement regarding the appropriate protective services needed to remedy the situation, if any.

(3) Downgrading of Urgency Determination. Upon the receipt of a report which is designated an extreme emergency or emergency, the referral agency shall investigate the matter as required by M.G.L. c. 19C and 118 CMR. If the situation is an extreme emergency or emergency, the referral agency shall insure that the emergency is ended and that the disabled person is protected. These actions shall be reported to the Commission, which shall determine whether the situation as it exists following the actions taken warrant the downgrading of the urgency designation to a designation of non-emergency.

If the referral agency obtains information which indicates that the emergency situation no longer exists, that information shall be reported to the Commission for further consideration of the decision regarding the urgency determination of the case.

5.01: continued

If the referral agency obtains information which indicates that the emergency designation was incorrectly made, that information shall be reported to the Commission for further consideration of the decision regarding the urgency determination of the case.

In all cases involving extreme emergency or emergency situations, the Commission must be informed of the response of the referral agency to the alleged emergency. The Commission will then determine whether and when the urgency determination should be downgraded.

(4) Time Requirements and Recipients of Report. The determination of reasonable cause shall be made within 24 hours, in the case of an emergency situation, and within ten calendar days in all other cases. Said time requirements begin following a determination by a screener that there is reasonable cause to believe that a disabled person has been abused and the report has been referred to the referral agency. The investigator shall complete a written report within this time period and forward a copy to the following agencies and parties:

- (a) the Commission;
- (b) the general counsel for the Executive Office of Human Services; and
- (c) the agency which conducted the investigation.

(5) Commission Response to Mandated Reporter. After receipt by the Commission of an investigation and evaluation report prepared pursuant to M.G.L. c. 19C, § 5 and 118 CMR 5.00, and review of that report, the Commission, within 20 business days of such receipt and review, shall, upon written request by a mandated reporter, provide a written response to the mandated reporter, if any, who filed the report:

- (a) Whether the information contained in the report constituted a reportable condition;
- (b) The name, address, and telephone number of the agency which conducted the investigation; and
- (c) That there is reasonable cause to believe that abuse has occurred and whether protective services have been or will be provided; or
- (d) That there is insufficient cause to believe that abuse has occurred.

(6) Reports of Deaths as a Result of Abuse. If, at any time in the course of an investigation, the Commission investigator or referral agency investigator due to death has reasonable cause to believe that a disabled person has died as a result of abuse, such investigator immediately shall make an oral report of said belief to the Commission, the District Attorney for the county in which the death is believed to have occurred, the general counsel for the Executive Office of Human Services, the Attorney General of the Commonwealth, and the Chief Medical Examiner of the Commonwealth, as required by M.G.L. c. 38, § 6, and shall make a written report to the same agencies within 24 hours of a finding of reasonable cause.

5.02: Delay or Deferral of Staff Investigation

(1) The Commission, in consultation with the Executive Office of Human Services, may determine that an investigation pursuant to M.G.L. c.19C, §§ 4 and 5, and 118 CMR 4.00 and 5.00, referred to as a staff investigation, would duplicate or interfere with an investigation by a referral agency. If such a determination is made by the Commission, the staff investigation may be delayed or deferred.

(2) The Commission shall monitoring the progress of such other investigation by a referral agency in order to determine when or whether the investigation by the Commission pursuant to M.G.L. c. 19C, §§ 4 and 5 should be initiated or resumed.

5.03: Commission Review of Investigation Report of Referral Agency

(1) Upon receipt by the Commission of the investigation report prepared by a state agency after a referral pursuant to M.G.L. c. 19C, § 4 and 118 CMR 4.00, the Commission shall review all such reports and shall specifically determine whether the reports contain the information required by M.G.L. c. 19C, § 5 and 118 CMR 5.01(1) and 5.01(2), and whether the reports are completed within ten days in the case of non-emergency reports and 24 hours in the case of emergency reports.

5.03: continued

(2) If, following a review of the investigative report of the referral agency, the Commission determines that the referral agency must obtain further information for the report to be complete, and/or must perform additional work on a task previously begun or required for the report to be complete, the Commission shall require in writing that the referral agency obtain such information or perform such tasks.

(3) In addition to requesting further investigation as set out in 118 CMR 5.03(2), the Commission may conduct its own staff investigation in accordance with M.G.L. c. 19C, §§ 4 and 5 and 118 CMR 5.00. Such Commission staff investigation may commence at any time after receipt of a report of alleged abuse under M.G.L. c. 19C. The Commission shall notify the state agency which is designated as the referral agency of its decision to conduct its own staff investigation.

REGULATORY AUTHORITY

118 CMR 5.00: M.G.L. c. 19C, § 3(b).

NON-TEXT PAGE

118 CMR 7.00: PROTECTIVE SERVICES

Section

- 7.01: General Principles
- 7.02: Protective services assessment
- 7.03: Monitoring
- 7.04: Provision of protective services

7.01: General Principles

(1) The Commission shall perform the following functions regarding the provision of protective services:

- (a) Insure that protective services are provided to a disabled person with his or her consent, or that of his or her guardian, or by order of a court of competent jurisdiction; provided, however, that if the guardian is unavailable or unwilling to consent to the provision of protective services, or suspected of involvement with the alleged abuse, or is not acting in the best interests of the disabled person, the Commission may seek a judicial determination regarding the issue of consent.
- (b) Designate a state agency to act as protective services provider;
- (c) Insure the appropriate expenditure of funds for the provision of emergency protective services by a designated protective services agency;
- (d) Petition, as needed, the Probate and Family Court for the county in which the disabled person resides for appointment or removal of a conservator, guardian, limited or otherwise, or, in Probate and Family Court for the county or the District Court for the judicial district in which the disabled person resides, for issuance of an order for protective services as provided in M.G.L. c. 19C, § 7 and 118 CMR 8.00;
- (e) Furnish protective services to a disabled person on an emergency basis as provided in M.G.L. c. 19C, § 6 and 118 CMR 7.00.

(2) The Commission shall, in conjunction with the Executive Office of Human Services, and, when possible, following consultation with the disabled person, designate state agencies within the Executive Office of Human Services to provide protective services to disabled persons who have been abused.

(3) The Commission shall cooperate with the Department of Mental Health, the Department of Mental Retardation, and the Massachusetts Rehabilitation Commission, and any other state agency to insure that protective services are provided to disabled persons.

(4) In all cases in which, following an investigation, there is reasonable cause to believe that a disabled person has been abused, the Commission shall insure that protective services are provided as needed, and shall insure that those services are provided in the least restrictive and most appropriate manner possible, and are provided with the consent of the disabled person, his or her guardian, or by order of a court of competent jurisdiction.

7.02: Protective Services Assessment

(1) The initial determination of the need for and requirements of protective services shall be part of the investigation completed pursuant to M.G.L. c. 19C, § 4(b) and (c) and 118 CMR 5.01(1). This determination shall include the following:

- (a) A finding regarding whether or not abuse is indicated;
- (b) A finding regarding whether protective services are required; and
- (c) A finding and recommendation regarding which protective service(s) is(are) most appropriate.

(2) Upon receipt of the investigation report completed by the referral agency and/or by the Commission, the Commission shall designate a state agency to provide protective services and prepare a protective services plan. This designation shall be based upon the best interests of the disabled person.

118 CMR: DISABLED PERSONS PROTECTION COMMISSION

7.02: continued

- (3) The designated protective services provider shall be requested by the Commission to complete and file with the Commission a protective services plan within 30 days of its designation as the provider. The plan shall contain the following information:
 - (a) A statement of the underlying cause(s) of the abusive situation, if possible;
 - (b) An assessment of the level of risk in the setting in which the disabled person is living; and
 - (c) A statement of the service(s) to be used to remedy the abusive situation.
- (4) After receipt of the protective services plan, the Commission shall review the plan in accordance with its monitoring responsibilities.

7.03: Monitoring

- (1) The Commission or its designee shall monitor the provision of protective services for each disabled person who is determined to require protective services.
- (2) The monitoring of each case shall proceed until the case is closed by the Commission.
- (3) The monitoring by the Commission process for each case may include, but shall not be limited to, the following actions:
 - (a) A visit to the disabled person;
 - (b) A review of case records of the Commission, the agency which conducted the abuse report investigation, and the agency providing the protective services, if different from the referral agency;
 - (c) A determination of the status of the abuser, if identified;
 - (d) A review of the expenditure of emergency protective services funds by the designated protective services agency;
 - (e) A review of any plan for transition to long-term services, if needed.

7.04: Provision of Protective Services

- (1) Protective services shall be provided by state agencies and vendors who contract with state agencies. The Commission shall insure that protective services are provided as needed by appropriate agencies and programs.
- (2) Protective services shall be provided in the least restrictive manner possible.
- (3) Protective services shall be provided in order to protect a disabled person from abuse, and to remedy the abusive situation, if possible.
- (4) Protective services may include, but are not limited to, the following:
 - (a) Social services casework and case management, including, but not limited to, evaluations of functional capacity and resources, development of a service plan, appropriate referral services, and emergency response;
 - (b) Counseling;
 - (c) Homemaker/chore services;
 - (d) Temporary shelter;
 - (e) Dietary services;
 - (f) Emergency services;
 - (g) Respite services;
 - (h) Alternative housing;
 - (i) Housing assistance;
 - (j) Special attendants;
 - (k) Adaptive equipment;
 - (l) Transportation;
 - (m) Psychology services;
 - (n) Health-related services;
 - (o) Referral to legal services.

118 CMR: DISABLED PERSONS PROTECTION COMMISSION

7.04: continued

- (5) Protective services may be refused by a competent disabled adult.

REGULATORY AUTHORITY

118 CMR 7.00: M.G.L. c. 19C, § 3(b).

NON-TEXT PAGE