

MASSACHUSETTS
DEPARTMENT OF MENTAL HEALTH

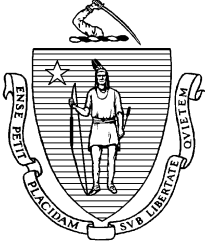
HUMAN RIGHTS
HANDBOOK

JUNE 2005

DEPARTMENT OF MENTAL HEALTH
HUMAN RIGHTS HANDBOOK
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June 2005

Dear Colleagues,

Over the past several years, the Department of Mental Health has taken a close look at the Human Rights structure, the protection of Human Rights and how integral this is to our mission. The Human Rights Policy, revised in January 2003, is an important outcome of that effort. The policy and this handbook clarify and strengthen the mechanisms by which we protect clients' rights. They serve as an important resource as the Department strives to integrate these values into the day-to-day delivery of DMH services.

In addition to revising the policy, the Department has examined the sometimes complex dynamics that arise while ensuring the protection of rights and delivering quality clinical care. I firmly believe that excellent care is congruent with respecting clients' rights. As the policy clearly states: ". . . the protection and enhancement of Human Rights is a common objective to be shared by all. Senior staff and managers have a responsibility to provide the leadership and model the values necessary to proactively implement this policy, and to ensure that DMH maintains a service environment that promotes respectful and responsive interactions with Clients."

Thank you for your shared commitment to the mission of the Department of Mental Health and your dedication to the continued protection of human rights.

Sincerely,

Elizabeth Childs, M.D.
Commissioner

II. ACKNOWLEDGEMENTS

We first want to thank Bill Crane, former DMH Special Assistant for Human Rights who wrote the original Human Rights (“pink”) handbook on which this one is based, that has been an invaluable resource to many people over the years.

We also wish to acknowledge the assistance of many individuals who helped in rewriting this handbook.

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If we have forgotten to mention anyone who contributed to this project, we apologize and ask that you contact the Human Rights Office.

Bernadette Drum

Director of Human Rights for Children and Adolescents

Carol O’Loughlin

Former Director of Human Rights for Adults

III. HOW TO USE THE HUMAN RIGHTS HANDBOOK

The Human Rights Handbook is meant to be a companion to the Human Rights Policy (Appendix 1). On pages five through seven of the policy there is a chart of rights that is in alphabetical order. The handbook is designed to define and explain the regulations, statutes and policies establishing the rights listed on those pages.

In the Human Rights Policy, the topics are listed as either applying to a facility or a community program. In this handbook, the table of contents will direct you to the page where a specific right is discussed. You will first read a general statement about a right and then it will explain how it applies to the facility, community and DMH child/adolescent programs licensed by OCCS.

Section V of the handbook explains the Human Rights Infrastructure. Section VI, the Appendix, contains relevant materials mentioned in the handbook such as the Human Rights Policy, the Five Fundamental Rights Law, as well as contact information for legal, educational, and advocacy resources.

As laws, regulations and DMH policies change, this handbook will be revised.

We hope the handbook proves to be a useful resource to you. For copies of DMH regulations or policies or if you have any questions that are not readily answered in this handbook, please feel free to contact the Human Rights Office.

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IV. HUMAN RIGHTS AND RESPONSIBILITIES OF CLIENTS

A. ACCESS TO ATTORNEY OR LEGAL ADVOCATE

(See Appendix 2a and 2b -“Five Fundamental Rights” Law)

1. Facility and community: general

A program or facility must ensure access to a client by his/her attorney and/or legal advocate working under the supervision of an attorney, at any reasonable time. Every client must be provided with reasonable assistance in contacting and receiving visits or telephone calls from attorneys or legal advocates. Whenever possible, such visits and telephone calls shall occur in private areas. The client also has the right to refuse a visit or telephone call from an attorney or legal advocate. An attorney or legal advocate who represents a client must be given access to the client, the client’s record, the hospital staff responsible for the client’s care and treatment and any meetings concerning treatment or discharge planning where the client would be or has the right to be present.¹ The program or facility may ask an attorney, or legal advocate working under the supervision of an attorney, to verify that he or she, in fact, is representing the client.

2. Facility

In a facility, a client:

- a. has the right to receive or refuse visits and telephone calls from his/her attorney or legal advocate, physician, psychologist, clergy or social worker at any reasonable time, regardless of whether the patient initiated or requested the visit or telephone call.
- b. upon admission and upon request at any time thereafter, must be provided with the name, address, and telephone number of the Mental Health Legal Advisors Committee, Committee for Public Counsel Services, and authorized Protection and Advocacy organizations, and shall be provided with reasonable assistance in contacting and receiving visits or telephone calls from attorneys or legal advocates from such organizations; provided that the facility shall designate reasonable times for unsolicited visits and for the dissemination of educational materials to patients by such attorneys or legal advocates.² (See Appendix 3 for a listing of legal and advocacy resources.)

¹ M.G.L.c. 123,§ 23(e); 104 CMR 27.17(6)(b); and 104 CMR 28.09(1)(b)

² 104 CMR 27.13(5)(e) and (f)

3. Community

In a community program, a client:

- a. has the right to receive or refuse visits and telephone calls from an attorney or legal advocate, physician, psychologist, clergy or social worker at any reasonable time, regardless of whether the client initiated or requested the visit or telephone call; and
- b. has the right to be represented by an attorney or legal advocate of his/her own choice, including the right to meet in a private area at the program with the attorney or legal advocate.³

4. Community: DMH child/adolescent programs licensed by OCCS

When contracting with a child/adolescent program licensed by the Office of Child Care Services (OCCS), DMH must insure that the Program allows DMH child/adolescent clients to have access to an attorney or legal advocate in accordance with the Five Fundamental Rights Law.⁴

5. Attorneys for clients regarding commitment or guardianship and/or Rogers matters (See also section of Handbook entitled “Informed Consent” (Section IV.O. p. 25)

An attorney who represents a client in a commitment or guardianship and/or Rogers matter must be given access to:

- a. the client;
- b. the client’s record;
- c. the hospital staff responsible for the care and treatment of the client; and
- d. any meetings concerning treatment planning or discharge planning where the client would be or has the right to be present.⁵

6. Attorneys or legal advocates from protection and advocacy organizations

Upon admission to a facility or program and upon request at any time thereafter, the facility or program must provide clients with the name, address and telephone number of the following organizations:

- a. Disability Law Center (Massachusetts Mental Health Protection and Advocacy Project);
- b. Mental Health Legal Advisors Committee;
- c. Committee for Public Counsel Services; and

³ 104 CMR 28.03(1)(d)(3) and (1)(e)

⁴ Id.

⁵ M.G.L. c. 123 § 23(e); 104 CMR 27.17(6)(b); and 104 CMR 28.09(1)(b)

- d. Any other legal service agencies funded by the Massachusetts Legal Assistance Corporation, under the provisions of chapter 221A, to provide free legal services.⁶

In addition, the Massachusetts Mental Health Protection and Advocacy Project may have additional rights of access to the client or the client's record under federal or state law.

B. CIVIL AND FORENSIC COMMITMENTS AND OTHER ADMISSIONS
(See Appendix 4, Massachusetts General Laws Chapter 123-Commitments and Other Admissions)

1. Involuntary admission for adults and minors

The term "individual" in this section refers to both adults and minors.

- a. If an individual is admitted against his/her will to a facility under the provisions of M.G.L. c. 123, §12 ("Section 12"), he/she has the right to meet with an attorney appointed to represent him/her by the Committee for Public Counsel Services (CPCS) Mental Health Litigation Unit (1-617-482-6212). Upon admission, the facility must advise the individual of this right and the facility will contact CPCS if the individual so requests. CPCS is required to appoint an attorney who shall meet with the person promptly. The individual, of course, may decline to have CPCS contacted on his/her behalf.⁷
- b. If an individual is sent to a facility on a "Section 12," he/she may be admitted involuntarily if the admitting physician (who must be a designated physician in accordance with DMH regulations)⁸ thinks that he/she suffers from a mental illness and, because of such illness, would be dangerous to him/herself or others if not admitted.⁹ The individual may be held for examination and treatment for up to three (3) business days. Within this time, the facility must release him/her, accept his/her conditional voluntary admission, or petition the local District Court for a commitment. If the individual thinks that his/her involuntary admission arises from abuse or misuse of the prescribed process, he/she may seek an emergency hearing in the District Court. Such hearings are required to take place on the next business day. The admitting facility should be prepared to supply forms for emergency petitions to the individual and/or his/her attorney. A facility is entitled to respond to such petitions.
- c. If the facility files a petition for the individual's commitment, under the provisions of M.G.L. c.123, sec. 7, the court must hold the hearing within

⁶ M.G.L. c. 123 § 23(e)

⁷ M.G.L. c. 123, § 12(b)

⁸ 104 CMR 33.03

⁹ 104 CMR 27.05(1) defines mental illness and M.G.L. c. 123, §1 defines likelihood of serious harm.

five (5) business days after the petition is filed, unless the patient agrees to a delay. The initial order of commitment after a hearing will be for a period of up to six (6) months. If the facility files a petition for further commitment after the initial six (6) month period, the hearing must be held within fourteen (14) days after the petition is filed, unless the individual agrees to a delay. The second or any subsequent commitment(s) will be for a period of up to twelve (12) months.¹⁰

- d. If the facility files a petition for commitment, the individual must remain at the facility until the hearing is held and a judge has decided the matter. Although judges usually decide the cases quickly, a judge has up to 10 days after the hearing ends to make his/her decision. If the judge orders the individual committed, the individual has a right to appeal.

2. Voluntary admission

- a. Persons age 16 years or older - Any individual 16 years of age or older, or his/her Legally Authorized Representative (LAR), has the right to apply for voluntary admission to a psychiatric facility. A voluntary admission is granted when the individual meets the clinical criteria for admission and there is not a likelihood that serious harm would result if the individual left the facility. As a general rule, only unlocked psychiatric facilities accept patients voluntarily without conditions on their admissions. An individual on a voluntary admission status may leave the facility at any time.
- b. Individuals under the age of 16 years - Only the parent(s) or LAR of a child/adolescent under the age of 16 years has the right to apply for voluntary admission of the individual. The parent(s) or LAR may remove the child/adolescent from the facility at any time.

3. Conditional voluntary admission

- a. Individuals age 16 years or older - An individual 16 years of age or older has the right to apply for a conditional voluntary admission to a psychiatric facility.¹¹ He/she may consult a lawyer or legal representative before taking this action. In general, locked psychiatric facilities only accept voluntary admissions with the conditions described in this section. This is because locked psychiatric facilities generally treat patients who present a concern or a likelihood of serious harm if they leave the facility. If the individual meets the criteria for admission and is found competent to make that decision, the application for conditional voluntary status should be accepted. A person on conditional voluntary status must give the facility three (3) business days notice of his/her intention to leave. By the end of the three (3)-day period, the facility must either discharge him/her

¹⁰ M.G.L. c. 123, sec. 8

¹¹ M.G.L. c. 123, § 10

or, if the facility thinks he/she is mentally ill and dangerous, petition the court for the individual's commitment.

The parent(s) or LAR of individuals age 16 and 17 also has the right to:
a) sign for a conditional voluntary admission on behalf of the child; and
b) provide notice of intent to remove the child from a facility.

- b. Individuals under the age of 16 - Only the parents or LAR of a child under the age of 16 are authorized to apply for a conditional voluntary admission, and to provide notice of intent to remove the child from a facility.

4. Right to a hearing and representation

A lawyer will be appointed by the Committee for Public Counsel Services (the public defender's office) to represent the individual, unless the individual has a private lawyer or wishes to represent him/herself. The attorney should meet with the individual promptly after his/her appointment and should explain the individual's rights in the court proceeding, including the right to seek a psychiatric examination and testimony from an independent expert.

Whenever a court hearing is held under the provisions of M.G.L. c. 123 for the commitment or further retention of an individual with conditional voluntary status in a facility, the individual has the right to a timely hearing and representation by counsel under the law.¹²

5. Forensic commitments

Under Massachusetts General Laws, Chapter 123, §§15-18, courts with appropriate jurisdiction may order certain pre-trial criminal defendants, criminal defendants after a finding on a criminal charge, and state prison or county house of correction inmates, to be committed to a state operated mental health facility, or in some instances, to Bridgewater State Hospital for a period of evaluation for competence to stand trial, criminal responsibility, or aid in sentencing, or for treatment following a finding of not guilty by reason of insanity or incompetence to stand trial, or for treatment upon transfer from a place of detention. **These commitment sections are described briefly on the table of legal sections found in Appendix 4, Massachusetts General Laws Chapter 123-Commitments and Other Admissions.**

¹² M.G.L. c. 123, §§ 5 and 7; and 104 CMR 27.13(9)

C. CLIENT FUNDS

1. Facility and community: general

In general, an adult client has the unrestricted right to manage and spend his/her own money unless he/she has a guardian, conservator or representative payee.¹³

Whenever possible, client funds maintained by a facility or program should be deposited in an interest-bearing account. If the amount of the funds exceeds one thousand dollars (\$1,000), then the client's name must be entered onto the account.¹⁴

Assistance should be provided to a client to allow the client maximum independence and control over his/her funds, consistent with his/her ability.¹⁵ The client or his/her fiduciary may request and obtain an accounting of how his/her funds were spent.¹⁶

Note: A Representative Payee is authorized to manage only federal benefits such as SSI and SSDI funds. A guardian of the estate or a conservator usually is authorized to manage all of a client's funds.

2. Facility: general

A facility director has the ultimate responsibility for the management and expenditure of all dependent funds.¹⁷ In a facility, including Intensive Residential Treatment Programs (IRTPs) and Behaviorally Intensive Residential Treatment Programs (BIRTs) for patients 18 years of age or older, an evaluation of the patient's ability to manage his/her funds must take place within thirty (30) days of admission. The patient must receive notice of the evaluation and an explanation of the evaluation process at least seven (7) days in advance. He/she has the right to be assisted by a person of his/her choice during the evaluation process. He/she also must be informed as to the availability of legal assistance and/or the Human Rights Officer as resources for such assistance. In addition, a facility must have procedures for conducting emergency evaluations when the seven (7) days notice is not required, that is when a patient's use of his/her funds presents a significant risk to the patient, others, or the funds themselves.¹⁸

DMH Policy #97-6, concerning patient funds in facilities, states: "...the fact that a patient may make 'bad' fiscal decisions is not a proper basis for determining

¹³ 104 CMR 30.02(3)(a)(4) and (5); DMH Policy #97-6, (V)(1)(C) and (V)(3)(A) and (B)

¹⁴ 104 CMR 30.02(7)(a) and 30.03(5)(d) and (e); and DMH Policy # 97-6, (V)(1)(B)

¹⁵ 104 CMR 30.03(5)(b)

¹⁶ 104 CMR 30.02(7)(d) and 104 CMR 30.03(5)(e)

¹⁷ 104 CMR 30.02(6)(a)

¹⁸ 104 CMR 30.01(3)(a-d)

that he/she is unable to manage and spend his/her funds; only if the patient's fiscal judgment is significantly impaired...should such a determination be made.”¹⁹

Dependent funds are those funds belonging to a patient which are located at a facility or received by a facility if:

- a. the patient is unable to manage these funds as determined by an evaluation in accordance with 104 CMR 30.01(3);
- b. the patient is unable to manage these funds as determined by a court in a guardianship or conservatorship proceeding;
- c. the patient is unable to manage these funds as determined by the Social Security Administration or Veterans Administration in accordance with their requirements;
- d. the funds were received as dependent funds from a guardian, conservator or representative payee, or other representative of the patient; or
- e. the funds belong to a patient who is a minor.²⁰

Independent funds are defined as, “all of a patient's funds which are located at the facility and which are not dependent funds.”²¹

A facility may use dependent funds only for purposes directly beneficial to the client, taking into consideration the client's needs and desires. (See 104 CMR 30.02(6) for the standards for managing and spending these client funds.) If the evaluation determines that a client is able to manage part or all of his/her money that has been turned over to the facility, the client has the unrestricted right to manage and spend part or all of this money.²²

3. Community: general

In community programs, the program director may hold funds given to him/her by a client, or the client's fiduciary, and the client has an unrestricted right to manage and spend these funds unless the client is a minor or has a legal guardian, conservator or representative payee.²³ However, if a clinical evaluation determines that the client is not capable of managing part or all of his/her funds, the program must develop procedures to advise and assist the client to manage and spend these funds, in accordance with the client's needs and interests.²⁴

Programs operated, contracted for, or licensed by DMH and at which a client earns or maintains funds must have written procedures for the shared or delegated management of client funds. The purpose of the procedures is to advise and assist those clients who have been deemed incapable of managing or spending any part

¹⁹ DMH Policy #97-6, (V)(2)(B) (p. 3)

²⁰ 104 CMR 30.02(3)(a); See also DMH Policy #97-6, (IV)(1) (p. 2)

²¹ 104 CMR 30.02(3)(c) and DMH Policy #97-6, (IV)(5) (p. 2)

²² 104 CMR 30.01(3)

²³ 104 CMR 30.03(5)(a)

²⁴ 104 CMR 30.03(5)(b)

of their funds and who do not have a fiduciary.²⁵ DMH regulations set forth other requirements applicable to managing client funds in the community. See 104 CMR 30.03(5)(c)(1)(7).

4. Community: DMH child and adolescent programs licensed by OCCS

Child/adolescent community programs, including Clinically Intensive Residential Treatment Programs (CIRTs), must provide opportunities for the child/adolescent in their care for more than 45 days to learn the value of money through earning, spending, giving and saving.²⁶ The programs also must have written policies that address allowances.²⁷

5. Financial Custodians

- a. Guardians - A guardian is appointed by a court to make personal and/or financial decisions for the client if the client is not competent to make these decisions him/herself. A guardian can have general or limited authority. To determine the extent of a guardian's authority, the court decree or order appointing the guardian must be carefully reviewed. The kinds of limitations include: person only, estate only, specific treatment authority, etc. A guardian of a person can only make personal decisions (e.g., medical) for the individual. A guardian of the estate can only make financial decisions for the individual.

A guardianship can be temporary or permanent. To determine if a guardianship is still valid, the decree or order should be reviewed and/or legal counsel consulted. A temporary order, unless otherwise stated in the decree or order, expires ninety (90) days after the date of appointment.

For clients under the age of 18 years, the parent(s) is the custodian of the client unless a court determines that someone else should be the client's guardian. Once a client reaches the age of 18 years, he/she is considered legally competent and the law no longer considers his/her parent(s) a custodian, absent court appointment of the parent(s) as guardian of the person and/or estate. The client's change to legal adulthood happens automatically on the client's 18th birthday whether or not he/she is competent.

- b. Conservators - A conservator's authority is limited to control over the client's financial resources. DMH does not have the authority to pursue a conservatorship, but some clients may have a conservatorship in place. A guardian of the estate has the same authority over a client's financial resources as a conservator. A conservatorship can be temporary or permanent. To determine if a conservatorship is still valid, the court order

²⁵ 104 CMR 30.03(5)(c)

²⁶ 102 CMR 3.07(8)(a)

²⁷ 102 CMR 3.07(8)(b)

or decree appointing the conservator should be reviewed and/or legal counsel consulted.

- c. Representative Payees - A Representative Payee is appointed by the Social Security Administration (SSA) or the Veterans Administration (VA) to handle a client's Social Security or Veterans' benefits, which have been deemed dependent funds.

An adult who is unhappy with his/her Representative Payee can request that someone else be appointed. Such a request must be in writing and should be sent to the SSA or VA. It is best to have a replacement Representative Payee in mind, but the SSA or VA will provide assistance in locating a payee if the client has no one identified and is unable to locate an appropriate substitute Payee.

In the case of **minors**, the parent(s) with custody of the minor is the preferred Representative Payee. However, in some instances, another person will be appointed.

An adult who feels he/she no longer needs a Representative Payee may ask the SSA or VA to pay him/her directly. To become independent of a Representative Payee, a person must submit evidence to the SSA or VA demonstrating that he/she no longer needs assistance to manage his/her funds. Evidence may be in the form of a letter from his/her doctor or counselor stating that he/she can manage money to provide for his/her basic needs.

Any suspected abuse of a client's funds by a Representative Payee should be reported directly to the SSA or VA, in addition to other applicable reporting entities, such as the DMH or Disabled Persons Protection Commission or Elder Affairs. If fraud is suspected, the fraud office of the Inspector General can be contacted at 617-565-2662.

D. CLOTHING

1. Facility and community (DMH): general

A client in a facility or program has the right to wear his/her own clothing. However, a facility director or his/her designee may limit this right for good cause.²⁸ A statement of the reason(s) for limiting the right must be entered into the individual client's treatment record.²⁹

²⁸ M.G.L. c.123, § 23

²⁹ *Id.*

2. Community: DMH child/adolescent programs licensed by OCCS

OCCS licensed child and adolescent residential programs must furnish residents with clean, adequate, and seasonable clothing as required for health, comfort and physical well being.³⁰ In addition, a minor in a program is entitled to participate in the selection and wearing of his/her own clothes that are appropriate to age, sex, and individual needs. Upon discharge, the minor may keep this clothing.³¹

E. COMMERCIAL EXPLOITATION

1. Facility and community: general

Commercial exploitation of clients is not acceptable.³²

Commercial exploitation occurs when someone other than the client stands to gain from the use of a client's image(s) in advertising or other publications.

Before using the client's name, image, or personal information in commercial publications, mass media, and/or other types of publications, express written permission from the client and, if applicable, his/her guardian, must be obtained. Publications for the purpose of research, fund-raising and publicity also are subject to this rule.

2. Community: DMH child/adolescent programs licensed by OCCS

These programs shall not allow a client to participate in any activities unrelated to the client's service plan without the written consent of the parents or a person other than the parent with custody of the child, and the written consent of the client if over 14 years of age. Among the activities to which this applies are research, fund-raising and publicity, including photographs and/or mass media communications.³³

F. COMPLAINTS/ INVESTIGATIONS AND REPORTING ABUSE

1. Facility and community: general

DMH complaint, investigation and reporting regulations apply to DMH operated, licensed and contracted for facilities and programs.³⁴ The regulations define the "person in charge" as the person with day-to-day responsibility for the facility or program or his/her designee.

³⁰ 102 CMR 3.07(4)

³¹ 102 CMR 3.07(4)(c) and (d)

³² 104 CMR 28.03(1)(f) and DMH Policy #03-1, (V)(C)(1) (p. 7)

³³ 102 CMR 3.06(10)

³⁴ 104 CMR 32.01(1)(a)

2. Informal resolution of complaints

If a client, family member or other person has a human rights concern, that individual may file a formal complaint with the person in charge of the program or facility or may seek to address the concern informally.

The client (or other person acting on behalf of the client) may seek the assistance of the Human Rights Officer for advice or advocacy in resolving a concern informally. The role of the Human Rights Officer is to advocate for the client. In some situations, the Human Rights Officer may be able to negotiate a resolution satisfactory to the client. For example, the Human Rights Officer may be able to determine whether the client has a particular right under DMH regulations or policy and if so, then he/she may be able to educate the staff regarding this right. Also, the Human Rights Officer may be able to discuss an issue separately with staff and find out whether there may be an alternative solution satisfactory to both the client and the staff.

However, regardless of what informal mechanisms are available to the client, the client always retains the right to file a formal complaint with the person in charge of the program or facility regarding any matter which the client believes is dangerous, illegal or inhumane. A complaint should always be filed regarding an allegation of abuse or other serious human rights violation so that any necessary corrective action can be taken. The Human Rights Officer and other program and facility staff should be available to help a client file a complaint.

3. Filing a complaint with the person in charge

A client (regardless of age or competence) or any other person, at any time, may make an oral or written complaint to the person in charge of the program/facility, alleging a dangerous, illegal or inhumane incident or condition. (See Appendix 5, the DMH complaint form). The form is also available on the DMH website. The use of this form is not required.

The regulations further provide that an employee has a responsibility to file a complaint with the person in charge, if the employee has reason to believe that there has been a dangerous, illegal or inhumane incident or there exists a dangerous, illegal or inhumane condition.³⁵

The person in charge of the program/facility must ensure the complaint forms and appeal forms are available at well-identified locations and are provided to individuals upon request.³⁶ A notice of the availability and general content of the DMH complaint process must be “conspicuously posted” at the program or facility and must be given to each client and any guardian upon admission.³⁷

³⁵ 104 CMR 32.05(1)(c)

³⁶ 104 CMR 32.05(2)(b)

³⁷ 104 CMR 32.05(2)(a)

The DMH regulations provide that the program/facility's Human Rights Officer has a responsibility to assist clients in filing complaints and must use best efforts to ensure that an incapable client's interests are protected through representation by an independent attorney or advocate, if necessary or appropriate.³⁸ The regulations require that staff help clients file complaints upon the client's request.³⁹ Employees have this responsibility regardless of their views about the appropriateness of a complaint.

4. Complaint procedure under the DMH regulations

(Refer to the Office of Investigation diagram on the complaint process in Appendix 6.)

- a. Person in charge - Once a complaint is filed, the DMH regulations require the person in charge of the facility/program or his/her designee to **either**:
 - i. conduct the necessary fact finding, and issue a written decision within ten (10) days⁴⁰ (The decision must notify the parties of the right to request reconsideration and the right to appeal); **or**
 - ii. refer the complaint to the DMH Central Office, if the complaint falls within any one of the following seven categories:
 - medicolegal death;
 - sexual assault or abuse;
 - physical assault or abuse;
 - attempted suicide which results in serious physical injury;
 - commission of a felony;
 - restraint or seclusion practice not in accordance with DMH regulations which results in serious physical injury; or
 - the person in charge believes that the complaint is sufficiently serious or complicated as to require an investigation by the DMH Office of Investigations even though the complaint does not fall within one of the other six categories listed above.⁴¹
- b. Central Office - The complaints referred to the DMH Central Office are sent to either:
 - i. the Office of Investigations (if the complaint involves a program or facility operated or contracted by DMH) or
 - ii. the Director of Licensing (if the complaint involves a facility that is licensed by DMH, but not under contract with DMH). The Director of

³⁸ 104 CMR 32.05(3)

³⁹ 104 CMR 32.05(1)(a)

⁴⁰ 104 CMR 32.05(2)(c)

⁴¹ 104 CMR 32.05(2)(d)

Licensing coordinates the investigation of these complaints with the Office of Investigations.⁴²

These complaints must be investigated within 30 days (unless an extension is granted).⁴³ An Area Director, Assistant Commissioner of Child and Adolescent Services, or Director of Licensing will issue a written decision on the complaint within 10 days of the receipt of the investigation report.⁴⁴

- c. **Reconsideration** - After the person in charge (DMH Area Director, Assistant Commissioner of Child/Adolescent Services or Director of Licensing) makes a written decision regarding the complaint, any party to the complaint may request in writing, reconsideration of the written decision. The request must be made within ten days of receipt of the decision. The request for reconsideration must assert that there was a failure either to interview an essential witness or to consider an important fact or factor.⁴⁵
- d. **Right to appeal** - In addition, the client or any individual or entity acting on behalf of a client may appeal the written decision to DMH. The person within DMH to whom the client may appeal will vary depending on who issued the written decision.⁴⁶ See Appendix 6 for a diagram of the complaint process.

5. Retaliation prohibited

The regulations explicitly prohibit retaliation against any person who files a complaint with DMH pursuant to 104 CMR 32.00.⁴⁷ The DMH Human Rights Policy #03-1 (p.13) describes the process that is to be followed if retaliation is believed to have occurred.

6. Other reporting of abuse and neglect

In addition to filing a DMH complaint, many staff who work in a mental health facility or program are required to report immediately any alleged incidents of abuse and neglect to certain state agencies. (See the section in this Handbook entitled “Mistreatment” (p. 33) for additional information regarding what might constitute abuse.)

- a. **Adults 18 - 59** - All DMH staff must report to the **Disabled Persons Protection Commission (DPPC)** any act or omission which results in

⁴² 104 CMR 32.03(3)

⁴³ 104 CMR 32.05(5)

⁴⁴ 104 CMR 32.05(6)(b)

⁴⁵ 104 CMR 32.03(5)

⁴⁶ 104 CMR 32.03(6)

⁴⁷ 104 CMR 32.03(7)

serious physical or emotional injury to a client aged 18 through 59, inclusive. A written report also must be filed.⁴⁸

(The 24-hour DPPC hotline phone number is 1-800-426-9009, or call DPPC at 1-617-727-6465 during regular business hours.)

- b. Minors (under age 18) - All DMH staff working in children's units or programs must report the abuse or neglect of minors to the **Department of Social Services (1-800-792-5200)**. A written report also must be filed.⁴⁹

Sometimes an adult client will provide information regarding the abuse of a child. Certain staff working with adult clients are mandated reporters of the abuse or neglect of minors, if their work falls into a specific category including, but not limited to: hospital personnel engaged in examination, care or treatment; psychologists; nurses; social workers; allied mental health and human services professionals; and psychiatrists. A written report also must be filed.⁵⁰

If the work of a DMH employee who works with adult clients does not fall into one of the categories specified in the statute, this does not mean that information regarding abuse should be ignored. The employee should speak with his/her supervisor, and it may be helpful to contact the DMH Legal Office.

- c. Adults 60 or older - The statute authorizes and requires mandated reporters to contact the **Executive Office of Elder Affairs (1-800-922-2275)** regarding the abuse, neglect or financial exploitation of persons aged 60 and over. Mandated reporters are employees holding certain specific job titles, including, but not limited to, the following: social worker, physician, nurse and licensed psychologist. **Mandated reporters also must file written reports.**⁵¹

Note: Any other person (i.e., a client, family member, advocate or friend) also may file a complaint of abuse or neglect with the agencies listed above.

Community: DMH child/adolescent programs licensed by OCCS

In addition to the above DMH process, any person may file a complaint that affects the health, safety or welfare of a minor in an OCCS licensed program. To find out which regional licenser to contact, call the OCCS at 1-617-988-6600.

⁴⁸ M.G.L. c. 19C, §§ 1 and 10

⁴⁹ M.G.L. c. 119, § 51A

⁵⁰ *Id.*

⁵¹ M.G.L. c. 19A, §§ 14 and 15

Privacy Complaints⁵²

The Health Insurance Portability and Accountability Act (HIPAA) is a federal law (Public Law 104-191) that, in part, protects both an individual's right to keep and/or transfer his/her health insurance when moving from one job to another, and the privacy of the individual's Protected Health Information (PHI). In addition to HIPAA, there are state statutes and regulations that protect the privacy of client information. In some instances, these are more restrictive than HIPAA as to how information can be used.⁵³

Questions regarding privacy can be directed to the DMH Privacy Officer who can be reached by e-mail at PrivacyOfficer@DMH.state.ma.us or by telephone at 1-617-626-8160. Also, additional information regarding privacy can be found in Section IV. X. of this Handbook (entitled "Record Access").

An individual whose Protected Health Information (PHI) is created and/or maintained by DMH or his/her Personal Representative may file a Privacy Complaint at any time concerning:

- a. DMH's response to his/her request:
 - i. to access PHI;
 - ii. for restrictions on the use and/or disclosure of PHI;
 - iii. for confidential communications;
 - iv. to amend PHI; and/or
 - v. to receive an audit trial of the disclosures of PHI made by DMH.
- b. DMH's PHI privacy policies and procedures; and
- c. DMH's compliance with its PHI privacy policies and procedures including, but not limited to, concerns about the maintenance and unauthorized uses and/or disclosures of PHI.

Any individual whose PHI is created and/or maintained by DMH or his/her personal representative may file a Privacy Complaint. All complaints must be in writing. The DMH 104 CMR 32.00 complaint form may be used to file a Privacy Complaint. A Privacy Complaint may be filed at any DMH Area or Site Office, Facility or State-operated Program or with the DMH Privacy Officer. All Privacy Complaints will be treated as 104 CMR 32.00 complaints until determined to be a Privacy Complaint only. If a Privacy Complaint also is a 104 CMR 32.00 complaint and/or is filed in conjunction with a 104 CMR 32.00 complaint, the Privacy Officer, or designee, will work with the applicable 104 CMR 32.00 investigator and will follow 104 CMR 32.00 timelines for investigating and responding to the complaint. Similarly, if a privacy portion of a complaint is substantiated, the Privacy Officer, or designee, will coordinate decisions regarding the corrective actions to be taken with the applicable

⁵² Detailed information can be located in DMH's Privacy Handbook. The privacy complaint process is addressed in Chapter 16 of said handbook.

⁵³ Key state provisions for programs and facilities are M.G.L. c. 123, §36; 104 CMR 27.17 (facilities); and 104 CMR 28.09 (programs)

104 CMR 32.00 decision-maker.

With regard to a complaint that is a Privacy Complaint only, the DMH Privacy Officer or designee will determine if a violation of the DMH's privacy policies and procedures occurred; and/or if the DMH policies and procedures are inconsistent with state or federal law; and what course of action is to be taken in response to a Privacy Complaint. The time frames for processing 104 CMR 32.00 complaints shall be used for processing all Privacy Complaints. A privacy complaint shall not be deemed "out of scope" until after a fact-finding or investigation occurs. It is believed that most Privacy complaints will require fact-finding rather than an investigation.

Complaint Outcomes:

At the completion of the fact-finding or investigation, the Person in Charge shall consult with the DMH Privacy Officer as to whether a privacy violation occurred and if so, the appropriate sanctions and /or corrective actions that should be taken.

The Person in Charge shall send a decision letter to the complainant. The decision letter will serve as both DMH's response to the Privacy Complaint and, where applicable, a 104 CMR 32.00 complaint. A copy of the decision letter concerning a Privacy Complaint must be sent to the DMH Privacy Officer.

Written notice of the findings and corrective action(s) to be taken shall be given to all appropriate DMH managers and officers, including, but not limited to, any appointed fact finder. Written notice also shall be provided to the individual or Personal Representative who filed the Privacy Complaint.

Privacy Complaints also may be filed with the Secretary of Health and Human Services, Office for Civil Rights, U.S. Department of Health and Human Services, JFK Federal Building, Room 1875, Boston, MA 02203. The procedures for filing a complaint with the U.S. Department of Health and Human Services and a copy of its complaint form can be found at <http://www.hhs.gov/ocr/privacyhowtofile.htm>.

Retaliation is prohibited against any party for filing a Privacy Complaint or for exercising rights under the provisions of HIPAA and/or DMH Policy #03-02 (Management of Protected Health Information).

G. CONTRACT

Facility and community: general

An adult client has the right to enter into a contract unless a court has limited the right and/or declared the client to be incompetent.

State law and regulation prohibit deeming an individual incompetent to enter into a contract based solely on the fact that the individual has been admitted to a program or admitted or committed to a facility.⁵⁴

H. DIET

Facility and community: general

DMH Policy #03-1 states that programs and facilities that provide meals as part of their service are responsible for providing a nutritious diet consistent with medical requirements and the clients' religious and cultural beliefs and, to the extent possible, in accordance with personal preferences.

I. DISCRIMINATION

1. Facility and community: general

Every client has the right to be free from any unlawful discrimination including, but not limited to, discrimination on the basis of race, color, national origin, religion, gender, sexual preference, language, age, veteran status, disability or HIV status.⁵⁵

A person may not be excluded, denied opportunities or benefits, or otherwise discriminated against because he/she had, currently has, or is regarded as having a mental illness or physical disability. Federal and state laws prohibit disability-based discrimination in housing, employment, places of public accommodation (such as restaurants, movie theatres and banks), health care facilities and other services and benefits generally offered to the public. **Persons who feel they may have been discriminated against should be referred to a legal advocacy organization for assistance.**

2. Housing

A landlord may not deny housing to someone because of the individual's mental illness, history of mental illness or physical disability. Federal law also protects

⁵⁴ MGL 123, § 24; 104 CMR 27.13(1); and 104 CMR 28.10(1)

⁵⁵ DMH Human Rights Policy #03-1, (V)(A) (p.5)

persons from housing discrimination.⁵⁶ The landlord has a responsibility to make a reasonable accommodation to its rules, policies, practices, services and the premises if necessary to allow the tenant full use and enjoyment of the apartment. The landlord does not have to make an accommodation if it would impose an undue hardship on the landlord.⁵⁷

An accommodation, when reasonable, might include relocating the tenant within the building, inserting soundproofing materials in the apartment, educating security persons regarding any special needs of a tenant with mental illness, allowing the tenant sufficient time and opportunity to obtain counseling or other assistance, or making a reasonable modification to the normal rules or expectations in the apartment building. With an accommodation, the tenant must be able to meet the usual requirements of tenancy, such as timely payment of rent.

Community Residence Tenancy Act: This law is intended to ensure that clients are protected from inappropriate evictions from community residential programs that are outside the traditional landlord-tenant relationship. The law provides clients with a hearing before an impartial hearing officer who must determine whether a proposed eviction is proper.⁵⁸ (See appendix 7 for more information on this policy and when this law can be applied.)

3. Employment

State and federal laws also prohibit discrimination against people with mental illness, history of mental illness or physical disability in regard to employment. To be protected, the person must be able to perform the essential functions of the job he/she desires or holds with or without a reasonable accommodation. The employer need not make an accommodation if it would impose an undue hardship on the employer or other employees.⁵⁹ An accommodation might include restructuring the job, allowing a job coach to assist the employee, allowing employees to modify work schedules, or permitting the employee additional time off to seek counseling or other treatment or assistance. Medication monitoring is not considered a reasonable accommodation, so an employee cannot be forced to take medicine or face workplace discipline. Asking that a current supervisor modify supervision methods may be a reasonable accommodation, but asking for a new supervisor is not considered reasonable. To seek reasonable accommodation, a person need not use that term, but may express his/her need for a workplace adjustment. An applicant or employee may be asked to document the disability and the need for reasonable accommodation. If an applicant or

⁵⁶ M.G.L. c. 151B, § 4(6-7), prohibiting discrimination in all rental housing other than owner-occupied two-family housing; Federal Fair Housing Act, 42 U.S.C. 3601 et seq.

⁵⁷ M.G.L. c. 151B, § 4subs.7A

⁵⁸ M.G.L. c. 186, § 17A

⁵⁹ M.G.L. c. 151B, § 1(16-17) and § 4(16). This law does not cover employers with fewer than 6 employees. M.G.L. c. 151B, § 1(5); See also the Americans with Disabilities Act.

employee with a mental illness does not need reasonable accommodation, he/she is not required to share information regarding his/her condition.

4. Places of public accommodation

All public buildings are required to comply with the Americans with Disabilities Act (ADA) with regard to wheelchair accessibility. In a facility or in a program, clients and their visitors need to be able to meet in private in a space that accommodates a wheelchair.

J. EDUCATION

1. Facility and community: general

Every client under the care of DMH has the right to education and training, as specifically defined below.

2. Instruction and education

In cooperation with other state agencies, DMH shall arrange for instruction and education for clients in its facilities as may be appropriate for such persons to undertake, especially if the person is unable to engage in programs for patient-trainees.⁶⁰

3. Patients under the age of 22

Individuals under the age of 22 who are in DMH facilities shall receive education and training appropriate to their needs in accordance with M.G. L. 71B and the related regulations.⁶¹ See also Appendix 3 for educational advocacy resources.

4. Community: DMH child/adolescent programs licensed by OCCS

Residency programs licensed by OCCS must describe in writing a plan for identifying and meeting the educational needs of the residents served. The program must arrange for the education of each resident, in compliance with federal, state and local law, as appropriate to the needs of each resident and consistent with the individual education plan.⁶²

⁶⁰ M.G.L. c. 123, § 29

⁶¹ 104 CMR 27.13(4)

⁶² 102 CMR 3.06(5)

K. HABEAS CORPUS

Any person involuntarily committed to a facility who believes, or has reason to believe, he/she no longer should be retained may make written application to the Superior Court for a judicial determination of the necessity of continued commitment pursuant to M.G.L. c. 123, §9(b).⁶³

L. HEALTH CARE PROXY

Facility and community: general

Any competent person **18 years of age or older** is allowed to make a health care proxy. A health care proxy is a legal document, but it does not have to be drafted or executed by a lawyer to be valid. However, it must conform to the requirements of M.G.L. c. 201D. By the proxy, the client names a health care agent who will make decisions for the client regarding medical and psychiatric care, if and when the client is not competent or able to communicate his/her own wishes and/or decisions.⁶⁴

A client may revoke his/her appointment of a health care agent at any time.

A proxy can be specific or general. A client can give his/her health care agent specific instructions, general guidance, or no instructions or guidance in the proxy. For example, a client may inform the health care agent what his/her specific preferences are regarding antipsychotic medications. Also, a client may inform the health care agent about the kinds of treatment he/she wants to receive if he/she becomes terminally ill.

The decisions regarding whether or not to have a health care proxy and who is to be designated as the health care agent are entirely up to the client. In addition, the client may or may not choose to specify treatment preferences as part of his/her proxy. However, if no restrictions are in a proxy, a health care agent can make all health care decisions that otherwise could have been made by the client. This may include voluntary admission to a psychiatric hospital.⁶⁵

Therefore, when completing a health care proxy, it is important for a client to discuss medical and psychiatric health care treatments, as well as voluntary psychiatric admission with his/her proposed health care agent. The client also should specify on the form whether or not he/she wants to limit the authority of the agent. **A client may object to a health care decision that is made by his/her agent. The client's decision will prevail unless the client is determined to lack capacity to make health care decisions by court order.**⁶⁶

⁶³ See also 104 CMR 27.13(8)

⁶⁴ M.G.L. c. 201D

⁶⁵ Cohen v. Bolduc, 435 Mass. 608 (2002)

⁶⁶ M.G.L. c. 201D

A health care agent may be a relative, a friend, or anyone on whom the client feels he/she can rely on who is willing to follow the client's choices and make decisions for the client when he/she cannot make them for him/herself. **Staff cannot be named as a client's health care agent.**

For more information about health care proxies, clients may contact the Human Rights Officer at a program or facility or DMH's Office of Consumer and Ex-Patient Relations: 1-800-221-0053. They can assist a client in obtaining a health care proxy form or contacting someone else knowledgeable about a health care proxy.

M. HOLD AND CONVEY PROPERTY

Facility and community: general

An adult client has the right to hold and convey property unless a court has limited the right and/or declares the client to be incompetent.

State regulation and the DMH Human Rights policy prohibit deeming a client incompetent to hold and convey property based solely on the fact that the client has been admitted to a program or admitted or committed to a facility.⁶⁷

N. HUMANE PSYCHOLOGICAL AND PHYSICAL ENVIRONMENT

(See Appendices 2a and 2b "Five Fundamental Rights" Law)

Facility and community: general

Every client in a facility or a residential program has the right to a humane psychological and physical environment, such as living quarters and accommodations which afford privacy and security in resting, sleeping, dressing, bathing and personal hygiene, reading, writing, and toileting. Nothing in this section shall be interpreted to require individual sleeping quarters.⁶⁸

Every client should experience an environment where he/she is treated skillfully, professionally and with dignity and respect. Clients' values and differences, including cultural, sexual and religious preferences need to be respected. Clients may not be verbally, physically, psychologically or sexually abused or neglected. Clients also have the right to not be humiliated. The strengths of clients should be emphasized while fostering their dignity and autonomy.

Humane physical quarters include facilities and programs that are not overcrowded and meet, or exceed, applicable state code standards for housing.

⁶⁷ 104 CMR 27.13(1) and DMH Policy #03-1, (V)(A) (p. 4)

⁶⁸ M.G. L. c. 123, § 23(d)

Community: DMH child/adolescent programs licensed by OCCS

When contracting with a child/adolescent program, DMH must insure that the program allows the DMH child/adolescent the right to a humane psychological and physical environment in accordance with the Five Fundamental Rights Law.

O. INFORMED CONSENT

1. Facility and community: general

Every client has the qualified right to control his/her own treatment and services and to request alternative or additional treatment or services.

DMH is committed to the universal application of the practice of informed consent to safeguard human rights and to promote an optimal health care environment.

The doctrine of informed consent, clearly set forth in DMH regulation and policy, means that the acceptance or rejection of treatment must be based upon a voluntary and informed decision. Informed decision-making is based upon a person's ability to understand the risks and benefits of the proposed treatment as well as the alternatives, including no treatment.

To be voluntary, a decision must be made freely, without coercion or threats. Every adult is presumed competent to make an informed decision. A minor (excluding emancipated and/or mature minors), by reason of age, is presumed incompetent except in very limited situations (See #6, p. 28, Minors). A competent client may make treatment decisions on his/her own behalf. For a client deemed legally incompetent by reason of age or mental status, informed consent to treatment must be obtained through an alternative process, which may involve parents, guardians or, in some circumstances, a judicial determination.

Every consent form signed by a client shall be placed in his/her record. A copy of the consent form must be given to the client. If the client gives verbal consent, this must be noted on the consent form by the clinician.⁶⁹

2. When informed consent must be obtained

According to DMH policy, no psychiatric treatment can be administered or performed without a client's informed consent, or that of his/her legally authorized representative, or with court approval.⁷⁰

Specific informed consent must be obtained from the client, his/her legally authorized representative, or a court of competent jurisdiction for treatment with antipsychotic medication, electroconvulsive treatment (ECT), psychosurgery,

⁶⁹ DMH Policy #96-3R (p.5)

⁷⁰ 104 CMR 27.10(1)(a) (inpatient) and 104 CMR 28.03(1)(j) (community)

involuntary sterilization or abortion, and other highly intrusive or high-risk interventions.⁷¹ In the case of an adult client incapable of giving informed consent, these interventions may not be administered or performed without prior review and approval by a court or without the consent of a client's legally authorized representative, who must have been granted specific authority by a court to authorize such treatment(s) or procedure(s).

3. Right to refuse psychiatric treatment

Absent a determination by a judge that a client is incompetent, court approval of his/her treatment, or appointment of a guardian to consent to the client's treatment, a client retains the right to accept or refuse treatment. A client temporarily may lose the right to refuse treatment only in rare circumstances where a clinician determines that the client is incompetent and that the treatment is necessary to prevent an immediate, substantial, and irreversible deterioration of his/her mental illness.⁷²

While the DMH regulations described above require informed consent for antipsychotic medications, DMH Policy #96-3R extends these same informed consent principles to all psychiatric medications. This policy applies to all DMH-operated and contracted facilities and programs.

Finally, DMH expects that the client and clinician will discuss all proposed treatments, even if a court or a legally authorized representative is providing the informed consent.

4. Obtaining valid informed consent

According to the DMH Informed Consent Policy, the informed consent process must include the following elements:

- a. an assessment of the client's ability to appreciate and have insight into the fact that he/she has a mental illness, to understand that there is a treatment that might help, and to have the capacity to recognize and report side effects;
- b. a description of the condition being treated;
- c. an explanation of the proposed treatment;
- d. an explanation of the risks, side effects and benefits of the proposed treatment;
- e. an explanation of alternatives to the proposed treatment as well as the risks, benefits and side effects of the alternatives to the proposed treatment;
- f. an explanation of the right to freely consent to or refuse the treatment without coercion, retaliation or punishment, including loss of privileges, threat/use of restraints, discharge, guardianship or Rogers orders. Such

⁷¹ 104 CMR 27.10(1)(b) (inpatient) and 104 CMR 28.03(1)(j)(1) (community); *See also Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489 (1983)

⁷² 104 CMR 27.10(1)(d)

interventions only may be utilized in accordance with applicable legal and clinical standards. When a competent client refuses a recommended treatment, a clinically appropriate alternative treatment that is acceptable to the client, including no treatment, shall be explored and offered where possible;

- g. an explanation of the right to withdraw one's consent to treatment, orally or in writing, at any time; and
- h. a set of materials provided to the client that are written in common, everyday language, and explain the benefits, risks and side effects of the prescribed medication.⁷³

5. Routine and preventive treatment

Routine and preventive treatments include standard medical examinations, clinical tests, standard immunizations and treatment for minor illnesses and injuries.

- a. Facility DMH regulations provide that a client who is capable of giving informed consent regarding routine and preventive treatment has the right to refuse such treatment. However, the facility director, without special court authorization, may override the refusal when the treatment consists of:
 - i. a complete physical examination and associated routine laboratory tests, required by law to be conducted upon admission and at least annually thereafter; or
 - ii. immunizations or treatment required by law or necessary to prevent the spread of infection or disease.⁷⁴
- b. Community: general DMH regulations provide that if the client has been found to be incapable at his/her last periodic review and has no legally authorized representative, the program director may consent to routine or preventive medical care, including standard medical examinations, clinical tests, standard immunizations and treatment for minor illnesses and injuries. However, such medical care may only be authorized upon recommendation by the treating physician that such care is necessary and appropriate, and provided that:
 - i. the client agrees to such care;
 - ii. the client is not a minor or under guardianship;⁷⁵

⁷³ DMH Policy #96-3R, (V)(B) (pp.3-4)

⁷⁴ 104 CMR 27.10(3)

⁷⁵ 104 CMR 28.03(1)(j)(2)

6. Minors

- a. General Parents of **minors** retain the authority to give informed consent on behalf of their child, unless the court has appointed someone else as guardian.
- b. Electroconvulsive treatment Electroconvulsive treatment is prohibited for clients under the age 16 years unless the DMH Commissioner or designee authorizes its use.⁷⁶
- c. Consent of guardian – exceptions Consent for the treatment of clients under 18 years of age must be obtained from the Legally Authorized Representative (LAR) with the following exceptions:
 - i. Mature Minor - Pursuant to the “mature minor” rule, a facility or program may administer treatment on the basis of a minor’s (rather than the parents’) consent and must honor the minor’s right to refuse treatment unless there is an emergency or court order. The “mature minor” rule was first articulated by the Supreme Judicial Court of Massachusetts when it concluded that where the minor is “capable of giving informed consent to treatment,” and it is not in the best interests of the child to notify the parents of the intended treatment, the “mature minor” rule may apply.⁷⁷

Note: This determination rarely is made and only should be made in consultation with legal counsel.

- ii. Emancipated Minor –An “emancipated minor” is considered an adult for purposes of the informed consent rule. According to state law, an “emancipated minor” is a person under the age of 18 who is:
 - married, widowed or divorced; or
 - the parent of a child; or
 - a member of the armed forces; or
 - pregnant or believes herself to be pregnant; or
 - living separate and apart from a parent or legal guardian and managing his/her own financial affairs; or
 - has or reasonably believes he/she has a disease dangerous to the public health or is drug-dependent. Minors in this category may consent only to medical care related to the specific disease or drug dependency.⁷⁸

Required by law - In certain circumstances, state law specifically allows minors to give consent to treatment (e.g. HIV testing). See M.G.L. c.112,

⁷⁶ 104 CMR 27.10(2)(a)

⁷⁷ Baird v. Attorney General, 371 Mass. 741 (1977) and 104 CMR 25.03

⁷⁸ M.G.L. c. 112, § 12F

§§12E and F. Additionally, as discussed in Section IV.B.3. of this Handbook, 16 and 17-year-olds have the right to sign themselves in and out of psychiatric facilities.

Community: DMH child/adolescents programs licensed by OCCS

A resident of these programs age 12 and older, consistent with his/her ability to understand, must be informed of the treatment, risks and any potential side effects of anti-psychotic medications that have been prescribed for that resident.⁷⁹

7. Guardianship

A guardianship is a legal relationship between a court-appointed individual (guardian) and an individual (ward) who was deemed by the court to be legally incompetent to manage his/her own personal and/or financial affairs. The authority of a guardian depends on the court order or decree appointing him/her. A guardianship remains in effect until vacated by the Court or the death of the ward. See Section IV.C. 5 (p. 11) of the Handbook for more information on guardians.

8. Rogers Monitors

A Rogers monitor is appointed when a Probate and Family Court judge authorizes the use of antipsychotic medication after a finding that the client is incapable of giving informed consent for the use of antipsychotic medications. The monitor's duty it is to ensure that the antipsychotic medication treatment plan approved by the Court is followed. A review of the treatment plan is done on a periodic basis at which time the treatment plan is extended, amended, and/or revoked by the Court.⁸⁰

9. 8B authorizations to treat (facility only)

An 8B Authorization to Treat is an order of a District Court made after entry of an order for involuntary commitment and a finding by the Court that the client is incapable of giving informed consent (incompetent) to the administration of antipsychotic medication or other medical treatment for mental illness. It is limited to the Court's authorization of a specific treatment plan designed to treat the person's psychiatric condition. The authority of this treatment order dissolves upon the client's discharge from the facility or upon conversion of the client's legal status to "voluntary" while at the facility.⁸¹

⁷⁹ 102 CMR 3.06(4)(k)(3)(e)

⁸⁰ M.G.L. c. 201, §§ 6 and 14

⁸¹ M.G.L. c. 123, § 8B

P. INTERPRETER SERVICES

1. Facility: general

DMH is committed to providing services that are culturally and linguistically appropriate at all times. Each facility must provide competent interpreter services for every non-English speaking, deaf or hard-of-hearing client.⁸²

2. Definitions

a. Facility means:

- i. DMH-operated hospital; or
- ii. DMH-operated Community mental health center with inpatient unit; or
- iii. DMH-operated psychiatric unit within a public health hospital; or
- iv. DMH licensed psychiatric hospital; or
- v. DMH licensed psychiatric unit within a general hospital.⁸³

b. Competent interpreter services means interpreter services performed by a person who is:

- i. fluent in English and in the language of a non-English speaker; and
- ii. trained and proficient in the skill and ethics of interpreting; and
- iii. knowledgeable about the specialized terms and concepts that need to be interpreted for purposes of receiving care or treatment.⁸⁴

c. Non-English speaker means: a person who cannot speak or understand, or has difficulty understanding the English language because the speaker primarily uses a spoken language other than English.

3. Additional guidelines

- a. Family members or friends are not encouraged to act as interpreters and minor children shall not be used as interpreters other than in exceptional circumstances.
- b. There must be written notification and a posting in the client's primary language of the right to and availability of interpreter services.
- c. The Americans with Disabilities Act (ADA) requires that reasonable accommodations be made for individuals with disabilities. With regard to interpreter services, the ADA does *not* apply to LEP (Limited English Proficiency) individuals who need a spoken language interpreter for communication. It *does* apply to individuals who are deaf or hard-of-hearing and who need a sign language interpreter or an assistive device for communication.

⁸² M.G.L. c. 123, § 23A

⁸³ 104 CMR. 27.18(1)(b)

⁸⁴ 104 CMR 27.18(1)(a)

- d. Section 504 of the Rehabilitation Act of 1974 also applies to individuals who are deaf or hard-of-hearing.

Note: For general information regarding available translations and interpreters (both spoken and sign language), contact the DMH Office of Multicultural Affairs at 617-626-8134.

Q. LABOR

1. Facility and community: general

Although clients may be asked to carry out tasks and activities related to daily living, they may not be required to perform unpaid labor. Clients may choose to perform additional work that is to be compensated according to applicable state and federal laws. Examples of daily tasks for which clients are not required to be compensated include maintaining a neat and clean living space and doing one's own laundry when facilities are available.

2. Facility

State law authorizes DMH to establish programs at its facilities for patients who would benefit from performing work/tasks. Such work and tasks are to be compensated according to payment schedules established by DMH in its regulations.⁸⁵

3. Community: adult

- a. In an adult program, no client shall be required to perform labor that involves the essential operations and maintenance of the program or the regular care, treatment or supervision of other clients, provided that,
 - i. in community residential or alternative programs, clients may be required to perform normal housekeeping and home maintenance functions; and
 - ii. clients may perform labor in accordance with a planned and supervised program of vocational and rehabilitation training as set forth in the client's treatment plan. Such labor shall be compensated to the extent of its economic value.⁸⁶
- b. Federal and state laws relating to wages, hours of work, workmen's compensation and other labor standards are to be followed to the extent that they apply to such required and voluntary labor.⁸⁷

⁸⁵ M.G.L. c.123, § 29

⁸⁶ 104 CMR 28.07

⁸⁷ *Id.*

4. Community: DMH child/adolescent programs licensed by OCCS

Programs must have a written plan that addresses meeting residents' vocational preparation needs. Programs must assist each child in their care for more than 45 days, assessing his/her vocational needs.⁸⁸ Each child must be fully involved in his/her vocational evaluation and the development of a vocational plan.⁸⁹

R. LICENSES: PROFESSIONAL, OCCUPATIONAL OR VEHICLE

1. Facility and community: general

Every client has the right to hold professional, occupational and driver's licenses unless age, limitation by the licensing agency or order of a court of competent jurisdiction precludes the exercise of this right.

State law and regulation prohibit considering an individual incompetent to hold a professional, occupational or driver's license, based solely on the fact that the individual has been admitted to a program or admitted or committed to a facility.⁹⁰

S. MAIL

(See Appendices 2a and 2b-“Five Fundamental Rights” Law)

1. Facility and community: general

According to the Five Fundamental Rights Law, every client has the right to send and receive sealed, unopened, uncensored mail. In addition, every client must be provided with a reasonable amount of writing materials and postage, and reasonable assistance in writing, addressing and mailing letters and other documents, upon request.⁹¹

2. Facility

a. Limiting this right in a facility

Only the director of a facility or designee may limit this right when there is good cause to believe that the mail may contain contraband. In this instance, facility staff, for the sole purpose of preventing the transmission of contraband, may open and inspect the item of mail **in front of the patient**. Staff may not read the content of the correspondence.⁹² There must be documentation of specific facts in the patient's record if this right is limited.

⁸⁸ 102 CMR 3.06(6)

⁸⁹ 102 CMR 3.06(6)(b)

⁹⁰ M.G.L. c.123, § 24; 104 CMR 27.13; and 104 CMR 28.10(1)

⁹¹ M.G.L. c. 123, § 23

⁹² *Id.*

b. Contraband

Although not specifically defined in the law, DMH policy defines contraband as “any substance or article that is likely to cause harm to the patient or others, that violates facility infection control requirements, or otherwise is illegal.”⁹³ Facilities must have procedures for disposing of or returning contraband.⁹⁴

3. Community: general

The right to send and receive unopened and uncensored mail cannot be restricted in community programs.

4. Community: DMH child/adolescent programs licensed by OCCS

When contracting with a child/adolescent program licensed by OCCS, DMH must insure that the program allows DMH child/adolescent clients to send and receive sealed, unopened, uncensored mail in accordance with the Five Fundamental Rights Law.

T. MARRIAGE

1. Facility and community: general

Adult clients retain the right to marry unless a court of competent jurisdiction makes a determination to the contrary.⁹⁵ In general, a person must be 18 years or older to marry in Massachusetts. However, there are exceptions that would allow a minor to marry, such as with parental or guardian permission or a court order. Contact legal counsel for clarification.

State regulation prohibits deeming a client incompetent to marry based solely on the fact that the client has been admitted to a program or admitted/committed to a facility.⁹⁶

U. MISTREATMENT

1. Facility and community: general

Program and facility staff may not mistreat a client or permit mistreatment of a client by staff, other clients or others. Mistreatment includes any intentional or

⁹³ DMH Policy #98-3, (p. 1)

⁹⁴ *Id.*(p.6)

⁹⁵ 104 CMR 27.13(1) and DMH Policy #03-1(V)

⁹⁶ *Id.*

negligent act or omission that exposes a client to a serious risk of physical or emotional harm.⁹⁷

DMH Community Regulations and DMH Policy #03-1 explicitly prohibit mistreatment of clients. Mistreatment includes, but is not limited to:

- a. Corporal punishment or any unreasonable use, threat, or degree of force or coercion;
- b. Infliction of mental or verbal abuse such as abusive screaming or name calling;
- c. Incitement or encouragement of clients or others to mistreat a client;
- d. Transfer or the threat of transfer of a client for punitive reasons;
- e. The use of restraint as punishment or primarily for the convenience of staff; and/or
- f. Any retaliation against a client for reporting any violation as defined in the DMH complaint regulations.⁹⁸

Allegations of mistreatment must be treated and investigated as a DMH complaint.⁹⁹

2. Community: DMH child/adolescent programs licensed by OCCS

OCCS regulations state: “[n]o program employee, member of the child care staff nor any other person with unsupervised access to residents shall inflict any form of physical, emotional or sexual abuse, or neglect upon a resident while in the program’s care and custody.”¹⁰⁰

3. Mandatory reporting of abuse and neglect

See Section IV.F.6 of this Handbook entitled, COMPLAINTS/REPORTING ABUSE for additional information regarding reporting mistreatment. (p. 16)

V. PERSONAL POSSESSIONS

1. Facility and community: general

Every client has the right to his/her own possessions, barring a threat to client safety. Massachusetts law affords clients the right to keep and use their own personal possessions, including toilet articles, and to have access to client storage spaces for private use.¹⁰¹

⁹⁷ DMH Policy #03-1, (p.8)

⁹⁸ 104 CMR 28.04(1) and DMH Policy #03-1, (p. 7)

⁹⁹ 104 CMR 28.04(2) and DMH Policy #03-1, (p. 7)

¹⁰⁰ 104 CMR 3.07(1)

¹⁰¹ M.G.L. c. 123, § 23

2. Facility

The facility director or designee may deny these rights for good cause. The good cause must be related to the likelihood of harm resulting from the client's having access to the possession. This determination must be made on an individual basis. The reasons for any such denial must be entered into the treatment record of the client whose possessions are being limited.¹⁰²

3. Community: general

Regulations state that a program may not interfere with the right of the client to acquire, retain, and dispose of personally owned property unless:

- a. the client is a minor, under guardianship or conservatorship, or has had a representative payee appointed; in accordance with the provisions of 104 CMR 30.03 (client funds in community programs); or
- b. the client possesses contraband or any item prohibited by law; or
- c. ordered by a court of competent jurisdiction; or¹⁰³
- d. possession poses an imminent threat of serious physical harm to the client or others.

In the event of a restriction of possession by a program on the grounds of imminent and serious physical harm, the program must issue a receipt to the client and safely store the object. Any restriction shall be documented in the client's record and subsequently reviewed and monitored by the Human Rights Officer and Human Rights Committee.

4. Community: DMH child/adolescent programs licensed by OCCS

Each individual in a residential program licensed by OCCS must be provided with personal grooming and hygiene articles.¹⁰⁴ He/she also must have accessible storage areas for these and other personal possessions¹⁰⁵

W. PHYSICAL EXERCISE AND OUTDOOR ACCESS

1. Facility and community: general

Every client has the right to a reasonable opportunity for physical exercise and access to the outdoors consistent with requirements for safety.¹⁰⁶ Access to fresh air and exercise should be valued not only as a right, but also as a vital aid to a person's mental and physical health.

¹⁰² *Id.*

¹⁰³ 104 CMR 28.08(1)

¹⁰⁴ 102 CMR 3.07(5)(a)

¹⁰⁵ 102 CMR 3.08(7)(i)

¹⁰⁶ DMH Human Rights Policy #03-1, (p. 8)

2. Facility

Although this right applies to all settings, access to the outdoors is an issue that arises most often for clients in the inpatient setting. For individual safety reasons, an individual's access to the outdoors may be limited temporarily. Limits on outdoor access must be determined on an individual basis.

As soon as an individual's safety level is determined, increased freedom of movement should occur in accordance with the person's ability to safely manage it. Refer to DMH Policy #96-1, Patient Privileges, for additional guidance regarding increasing individuals' freedom of movement in facilities.

In addition, indoor alternatives for exercise, such as access to exercise equipment and/or groups that encourage movement and activity, should be made available to clients.

Staff convenience should not be a factor in limiting physical activities and outdoor access. Although DMH policy is not specific on this issue, it is recommended that any restriction to outdoor access be evaluated daily. At a minimum, daily access to the outdoors should be facilitated and consistent with assessed individual safety.

3. Community: DMH child/adolescent programs licensed by OCCS

OCCS licensed residential programs that serve clients for more than 72 hours must have a written plan that addresses meeting the recreational needs of the residents.¹⁰⁷

X. RECORD ACCESS

1. In general

Clients, in general, have a right to access their records created and maintained by DMH. Also, clients have a right of privacy regarding said records, which are considered confidential. However, neither right is absolute; there are circumstances when a client's right to access may be limited and/or such records may be accessed by third parties.

In response to the Federal Health Insurance Portability and Accountability Act (HIPAA), DMH issued a policy on Management of Protected Health Information and developed a DMH Privacy Handbook.¹⁰⁸ Both the policy and the Handbook provide greater details on the material contained in this section of the DMH Human Rights Handbook. The policy and the Handbook also explain how state law, in some instances, supersedes HIPAA because state law offers more protection or more privacy.

¹⁰⁷ 102 CMR 3.06(7)

¹⁰⁸ See DMH Policy #03-2 and the DMH Privacy Handbook

2. Access by client to his/her records

- a. Facility: Adult and Child/Adolescent A patient, or his/her Personal Representative (PR), has a right (subject to certain limitations) to access his/her record.¹⁰⁹ A PR is someone who is authorized to make healthcare decisions on behalf of the patient. Examples of a PR include a health care agent, a guardian, a parent, or the Department of Social Services (DSS), when they are authorized to make healthcare decisions.¹¹⁰ Examples of information which may not be accessible are psychotherapy notes, “information compiled in reasonable anticipation” of court or administrative proceedings¹¹¹, forensic reports and records not used to make decisions about the patient.¹¹²

Denial of Access

A patient or his/her PR is allowed access to the patient’s records absent a determination by the Commissioner or designee (who must be a licensed health care professional) that:

- i. the inspection by the patient is reasonably likely to endanger the life or physical safety of the patient or another person;
- ii. the record makes reference to another person (other than the health care provider) and is reasonably likely to cause substantial harm to such other person; or
- iii. inspection by the legally authorized representative is reasonably likely to cause substantial harm to the patient or another person.¹¹³

If access to a record is denied based on one of the above criteria, the patient or PR shall be informed of the right to appeal. The individual making a determination on appeal must be a licensed health care professional, and such determination shall be final.¹¹⁴

There are some other circumstances under which an individual/PR does not have the right to access PHI. See DMH Privacy Handbook, chapter 11, II. B. 1. pp.1–2. These denials cannot be appealed.

¹⁰⁹ 45 CFR 164.524(a) and DMH Privacy Handbook c. 5(I)

¹¹⁰ 104 CMR 25.03 (Definitions)

¹¹¹ 45 CFR 164.524(a) and the DMH Privacy Handbook c. 11(II)(B)(1)(c)

¹¹² DMH Privacy Handbook c. 5(II)(B)(1)&(3)

¹¹³ 104 CMR 27.17(6)(c)(1-3)

¹¹⁴ 104 CMR 27.17(6)(c)(3)

- b. Facility: Child/Adolescent.
 A facility director may require the PR's consent before permitting a patient under the age of 18 to inspect his/her own records. However, if the patient is 16 or 17 years old and admitted him/herself to the facility pursuant to M.G.L. c.123 §§ 10 and 11, then the patient may inspect records of the admittance without consent of the PR.¹¹⁵ Also, a minor who, because he/she is emancipated is a mature minor pursuant to 104 MR 25.04, or by law consented to a treatment, has the right to access the PHI that DMH maintains relevant to such treatment.¹¹⁶ Emancipated minor and mature minor are discussed under Informed Consent (p.28)
- c. Staff Assistance:
 Clinical staff of a facility may offer to read or interpret a record to a patient or PR. However, access may not be denied solely on the basis of a patient or PR declining the offer.¹¹⁷
- d. Access to records in the community:
 Records are available (or may be denied) to a client or his/her PR in the community to the same extent they are available (or denied) to a patient in a facility. (See above).¹¹⁸

3. Access by 3rd parties to records created or maintained by DMH

DMH records are private and not open to inspection by a third party except:

- upon a proper judicial order
 - by an attorney of the patient or client
 - when the Commissioner or designee makes a determination that it is in the best interest of the patient or client to permit inspection or disclosure
 - certain disclosures to persons involved in the care of the individual
 - certain instances involving whistleblowers or workforce members who are victims of crime
 - as authorized by the individual
 - disclosure for health oversight activities
 - certain disclosures for research
 - as required by law¹¹⁹
- a. Proper judicial order. This term is defined in DMH regulations as “an order signed by a justice or special justice of a court of competent jurisdiction, or a clerk or assistant clerk acting upon instruction of such a justice.”¹²⁰ A subpoena is **not** considered a proper judicial order and, therefore, is not sufficient authority to release Protected Health Information

¹¹⁵ *Id.*

¹¹⁶ 104 CMR 25.04 and the DMH Privacy Handbook c.11(C)

¹¹⁷ 104 CMR 27.17 (6)(c)(3)

¹¹⁸ 104 CMR 28.09(1) and the DMH Privacy Handbook c.11(I)

¹¹⁹ See M.G.L. c.123, § 36; 104 CMR 27.17(6); and 104 CMR 28.09(2)

¹²⁰ 104 CMR 27.17(6)(a) (facility) and 104 CMR 28.09(2)(a) (community)

(PHI).¹²¹ If a subpoena for PHI is received, the DMH Legal Office should be consulted.

- b. Attorney. An attorney for a patient/client may have access to the records of said patient/client. If the records are at a facility, the attorney should provide a written request for the individual's records as well as appropriate verification of the attorney-client relationship.¹²² If the records are in the community, the attorney may be required to provide written authorization from the client or PR, if any, or a letter of appointment from the Court.¹²³
- c. Best interest determination: The Commissioner or designee may allow access to records to a third party based upon a "best interest determination." However, such access may only be given if the requirements of 104 CMR 27.17 or 28.09 are met. Such determination may only be made for treatment, payment or healthcare operation purposes. Examples of when a best interest determination could be made include:
 - i. from a sending facility to a receiving facility for purposes of transfer pursuant to M.G.L. c. 123, § 3.¹²⁴;
 - ii. to a physician or other health care provider who requires such records for the treatment of a medical or psychiatric emergency, provided that the patient/client is given notice of access as soon as possible;
 - iii. to a medical or psychiatric facility currently caring for the patient/client, where the disclosure is necessary for the safe and appropriate treatment and discharge of the individual;
 - iv. to persons involved in treatment or service where the individual has provided consent;
 - v. between DMH and a contracted vendor regarding individuals being served by the vendor for purposes related to services provided under the contract;
 - vi. to persons authorized by DMH to monitor quality control of services provided;
 - vii. to enable patient/client, or someone acting on his/her behalf, to obtain benefits, protective services, or third party payment for services so rendered;
 - viii. to persons conducting an investigation pursuant to 104 CMR 32.00;
 - ix. to persons engaged in research if approved by DMH under 104 CMR 31.00;
 - x. to the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) or other accrediting bodies;

¹²¹ *Id.*; See also DMH Privacy Handbook c. 6(IV)(A)(5)(Note)

¹²² 104 CMR 27.17(6)(b)

¹²³ 104 CMR 28.09(1)(c)

¹²⁴ 104 CMR 27.17(6)(g)(1)

- xi. to DPH or local board of health consistent with 105 CMR 300.00 *et.seq.* regarding reports of communicable or other infectious diseases; and
- xii. to coroner, medical examiner or funeral home director, in case of death.¹²⁵

Information disclosed based upon a best interest determination must be limited to the minimum information necessary to achieve the purpose of the disclosure.¹²⁶

Prior to making a best interest determination, “the Commissioner or designee shall have made a determination that it is not possible or practicable to obtain the informed written consent of the individual” or PR, if any.¹²⁷

d. Required by law

Records may be disclosed if required by law. Disclosures that DMH or its workforce members are required to make include but are not limited to, the following:

- i. Crimes Committed Upon Persons in care of Mental Health Facilities. MGL c.19, §10
- ii. Transfer Notices. M.G.L. c.123, §3
- iii. Periodic Review Notices. M.G.L. c.123, §4
- iv. Commitment Petitions/Appeals. M.G.L. c.123, §§7, 8, 9, 15 and 16
- v. Petition for Medical Treatment Orders. M.G.L. c.123, §8B
- vi. Emergency Hospitalizations. M.G.L. c.123, §12
- vii. Forensic Reports. M.G.L. c.123, §§15,16, 17, 18
- viii. Guardian or Conservator Appointments. M.G.L c.123, §25 and M.G.L. c.201, §§6, 6A, 6B, 7, 14, 16B, 17, 21
- ix. Unclaimed Funds Notice. M.G.L c.123, §26
- x. Administration of estate of deceased inpatient or resident by DMH. M.G.L. c.123, §27
- xi. Violent or Unnatural Death of DMH Clients. M.G.L c.123, §28
- xii. Unauthorized Absence of DMH Clients. M.G.L. c.123, §30
- xiii. Gun Licensing Authority Access to Mental Health Records. M.G.L. c.140, §§129B and 131
- xiv. Mental Health Legal Advisor's Committee access to records. M.G.L c.221, §34E
- xv. Medication Communications. 104 CMR 28.06
- xvi. Abuse of Elderly Person. M.G.L. c.19A, §15, 104 CMR 32.06
- xvii. The Disabled Person Protection Commission. M.G.L. c.19C, §15, 104 CMR 32.06

¹²⁵ 104 CMR 27.17(6)(g) and 104 CMR 28.09(2)(d)

¹²⁶ 104 CMR 27.17(6)(h) and 104 CMR 28.09(2)(f)

¹²⁷ 104 CMR 27.17(6)(f) and 104 CMR 28.09(2)(c)

- xviii. DSS-Persons required to report Cases of Injured, Abused or Neglect Children. M.G.L c.119, §51A
- xix. Persons Having Knowledge of Death to Notify Medical Examiner. M.G.L. c.38, §13, 104 CMR 32.06
- xx. Sex Offender Registry Law. M.G.L. c.6, §§178C through 178O
- xxi. Disclosures to the U.S. Secretary of Health and Human Services, if required by the Secretary in investigating DMH's compliance with HIPAA. 45 CFR 164.505(a)(2)
- xxii. Protection and Advocacy. 42 USC 10806.¹²⁸

e. Written authorization – by individual or PR

Inspection of records or parts thereof by third parties are permitted “upon the written authorization of the individual” or PR, “provided that such written authorization meet the requirements for authorization set forth in the federal HIPAA regulations (45 CFR 164.508).”¹²⁹ A valid authorization must be in writing and contain the following elements:

- a description of the information to be disclosed;
- a description of the purpose of each use or disclosure;
- the identification of the requester and recipient of this information;
- the identification of the entity authorized to release the information
- an expiration date, or event, for the authorization;
- a statement indicating the individual’s right to revoke the authorization;
- a statement indicating that the information may be subject to redisclosure by the recipient and may no longer be protected by federal or state privacy laws; and
- the signature of the individual or personal representative (and in the case of the PR, a description of the PR’s authority to act for the individual).¹³⁰

f. Persons involved in the care of an individual

Certain personal information may be disclosed to a family member, or other persons involved in the care, or payment for care, of a patient/ client if the patient/ client has agreed, verbally or in writing, to such disclosure, or who has been notified and has not objected to such disclosure.¹³¹

g. Whistleblowers or workforce members who are victims of crime

Certain personal information may be disclosed by a workforce member, if the workforce member believes in good faith that DMH has engaged in

¹²⁸ See DMH Privacy Handbook c.6(V)(B)(5)

¹²⁹ 104 CMR 27.17(6)(d) and 104 CMR 28.09(2)(b)

¹³⁰ 45 CFR 164.508(c)(i–viii)

¹³¹ See DMH Privacy Handbook c.6(V)(B)(10)

conduct that is unlawful or otherwise violates professional or clinical standards or that the care, services or conditions provided by DMH potentially endangers one or more individuals and the disclosure is made to (i) a public health authority, health oversight agency, or healthcare accreditation organization authorized to investigate or oversee the conduct at issue, or (ii) an attorney retained by the Workforce Member for the purpose of determining legal options of the Workforce Member with regard to said conduct. In addition the disclosure of the personal information must be necessary to accomplish the intended purpose and the amount of personal information that is used must be limited to the amount to that which is necessary for the intended purpose.¹³²

h. Health oversight activities

DMH is a health oversight agency for psychiatric facilities and residential programs that it licenses. In such role, DMH has the right to access personal information retained by such facilities and programs without authorizations. Such access, disclosures and exchanges are required by law. However, DMH must safeguard PHI that it obtains during health oversight activities in a manner consistent with federal and state laws and regulations, and DMH policies and procedures relating to PHI.¹³³

i. Research

Certain personal information retained by DMH may be disclosed for research purposes, but only with approval of the DMH Central Office Research Review Committee (CORRC), which “officially must waive the authorization requirement as part of its approval of a research protocol...”¹³⁴

Community: DMH child/adolescent programs licensed by OCCS

In residential programs for children and adolescents that are licensed by the Office for Child Care Services (OCCS), “Records shall be the property of the licensee who shall have written procedures which provide for,” among other things,

- i. accessing a resident’s records by resident (taking into account his/her capacity to understand), parent(s), a person other than the parent who has custody or a person not directly related to the service plan;
- ii. identifying person(s), if any, whose consent(s) is required before information in a resident’s records may be released;
- iii. releasing information contained in a resident’s record; and
- iv. making available summaries of progress reports in lieu of the entire case record.¹³⁵

¹³² See DMH Privacy Handbook c.6(V)(B)(12)

¹³³ See DMH Privacy Handbook c.6(VII)

¹³⁴ See DMH Privacy Handbook c.6(V)(B)(6)

¹³⁵ 102 CMR 3.10(5)(a),(b),(d) and (e)

“The licensee shall explain all service plans, reviews and discharge plans to all child care personnel responsible for implementing the service plan on a daily basis, to the child’s family or guardian, as appropriate, and to the resident in a manner consistent with her or his maturity and capacity to understand.”¹³⁶

The regulations reflect basic standards for operation of residential programs serving children and teen parents, but OCCS licensure “shall not relieve facilities of their obligation to comply with any other applicable state or federal regulatory requirements or requirements set forth in their contracts with the referral sources.”¹³⁷

4. Notice requirements

Under HIPAA, DMH is required to provide a Notice of Privacy Practices to each patient in a DMH facility and DMH client in the community.¹³⁸

5. Privacy complaint

If a client or patient believes that his/her privacy rights regarding records have been violated, the individual may file a complaint with DMH or with the Secretary of Health and Human Services.¹³⁹ For more information, contact the Human Rights Officer or the DMH Privacy Officer. (See also Section IV.F.p.18 for more information on privacy complaints).

Y. RELIGION

1. Facility and community

Every client in a facility or program has the freedom to practice his/her religion of choice without compulsion.¹⁴⁰

2. Community: DMH child/adolescent programs licensed by OCCS

Programs must make religious opportunities available to residents upon request and must respect their religious preferences.¹⁴¹

¹³⁶ 102 CMR 3.05(4)(e)

¹³⁷ 102 CMR 3.11(1)

¹³⁸ See DMH Privacy Handbook, Notice of Privacy Practices, c. 4

¹³⁹ See DMH Privacy Handbook c. 16(I)

¹⁴⁰ 104 CMR 28.03(1)(b) and DMH Policy #03-1

¹⁴¹ 102 CMR 3.06(8)

Z. RESEARCH

1. In general

Any research project that involves DMH clients as subjects (unless the research is not in any way related to DMH or a facility or program operated by DMH) must meet specific requirements as determined by the DMH Central Office Research Review Committee (CORRC). Any client choosing to participate in such a research project must do so voluntarily and may discontinue his/her participation at any time for any reason. DMH regulations specify the requirements established to protect clients who may participate in DMH approved research. These regulations address, in detail, the process of informed consent. The regulations also apply when any DMH employee, as an employee, participates as a research investigator or subject.

2. Institutional review board

Many research safeguards are in place to protect clients who choose to participate voluntarily in a DMH approved research project or when research involves the disclosure of DMH data. CORRC serves as the Institutional Review Board (IRB), complying with federal regulations for research. The requirements for the approval of research projects by the IRB clearly are articulated under federal regulation, ensuring strong regulatory oversight of all research involving human subjects.¹⁴²

All such research approved by CORRC is subject to monitoring on an ongoing basis. CORRC's primary responsibility is to protect the rights and welfare of research subjects.¹⁴³

3. Selected requirements

Proposals for research must address a number of points including, but not limited to, the following:

- the expected benefits of the research to the subjects, direct and indirect;
- identification of all foreseeable risks;
- how the care and treatment of subjects may be affected during and after the research;
- safeguards for maintaining confidentiality, including the manner in which the data is disposed at the termination of the research.¹⁴⁴

At a minimum, CORRC must consider the impact the research may have on subjects in terms of health and physical safety, confidentiality and privacy, human dignity, self-determination, freedom of choice, right to adequate care and

¹⁴² 45 CFR 46

¹⁴³ 104 CMR 31.05(2)(a)

¹⁴⁴ 104 CMR 31.04(e),(j),(l) and (n)

treatment, freedom from undue discomfort, distress and deprivation, and right to fair and equal treatment without discrimination.¹⁴⁵

CORRC cannot approve research involving a drug that has not been approved for trial in human beings by the FDA.¹⁴⁶

4. Informed consent

The informed consent process for participation in research is well defined in the regulations. Informed consent is defined as “...knowing consent given by a subject, or if the subject is legally incompetent (e.g., a minor), by the subject’s legally authorized representative or by a court of competent jurisdiction. The subject, or legally authorized representative, must be able to exercise free power of choice to participate in research without undue inducement or any element of force, deceit, duress or other forms of constraint or coercion. The subject or legally authorized representative must have the capacity to understand and weigh the risks and benefits of the proposed research for the research subject.”¹⁴⁷

An individual’s participation in a research project is entirely voluntary and must cease if the individual objects verbally or non-verbally, even when that individual is considered incompetent to consent and has a legally authorized representative who has consented.¹⁴⁸

5. Children/Adolescents as subjects

DMH regulations require that if CORRC reviews any research involving children, at least one member of CORRC must be knowledgeable about and experienced in working with children.¹⁴⁹

Although a minor is considered incompetent to give consent to participate in research, as with all adult subjects, his/her participation in a research project must cease if he or she objects, verbally or non-verbally, even though the legally authorized representative (i.e. parent or guardian) has consented on his/her behalf.¹⁵⁰

¹⁴⁵ 104 CMR 31.05(2)(a)

¹⁴⁶ 104 CMR 31.05(1)(a)

¹⁴⁷ 104 CMR 31.02

¹⁴⁸ 104 CMR 31.05(5)(e)

¹⁴⁹ 104 CMR 31.03(4)(d)

¹⁵⁰ 104 CMR 31.05(5)(e)

6. Community: DMH child/adolescent programs licensed by OCCS

OCCS-licensed programs serving children and adolescents shall not allow clients to participate in any activities unrelated to the client's service plan without the written consent of the parent(s) or a person other than the parent with custody of the child and the resident if over 14 years of age. Among the activities to which this applies are research, fund-raising and publicity, including photographs and/or mass media.¹⁵¹

7. Complaints

“Any person may file a complaint about a research project with the chairperson of the CORRC that approved the research.”¹⁵² In addition, if applicable, a client may file a complaint through the DMH complaint process.

AA. SEARCHES

1. Facility and community: general

Clients in community programs and facilities have the right to be free from unreasonable searches of their person or property.

2. Facility

DMH Policy #98-3 regarding searches at Inpatient Facilities serves as the policy for all DMH operated or contracted for facilities, including all DMH operated units at a DPH setting, and all IRTPs and BIRTs. Such facilities must establish procedures for searches of patients, their possessions and patient areas as well as for the inspection of visitors' possessions. The procedures must be consistent with DMH Policy #98-3.

According to the DMH Policy #98-3, “All searches must be reasonably related to the objective of protecting the health and safety of all patients, staff and visitors, while at the same time respecting the importance of the privacy and dignity of the individual who is subject to a search.”¹⁵³

a. Definitions

Reasonable cause is defined in DMH Policy #98-3 as “a combination of facts and circumstances that would warrant a reasonable person to believe that a patient or visitor is holding or hiding contraband on his/her person or in his/her possessions. Reasonable cause exists if, in the opinion of the person authorized to approve the search, it is more likely than not that the patient or visitor is in possession of contraband. Reasonable cause cannot

¹⁵¹ 102 CMR 3.06(10)

¹⁵² 104 CMR 31.06(1)

¹⁵³ DMH Policy #98-3(IV), (p. 2)

be merely an opinion or hunch. The person must consider all facts and circumstances known to him/her.”¹⁵⁴

Contraband is defined in DMH Policy #98-3 as “any substance or article that is likely to cause harm to the patient or others, that violates Facility infection control requirements, or otherwise is illegal.”¹⁵⁵

b. Requirements

Each facility must include information about searches into written patient notices handed out to patients regarding patients’ rights.¹⁵⁶

If a search is permitted under a facility policy, a patient's consent to conduct a search is not required, however, every effort shall be made to inform the patient about the reasons for the search and obtain the patient's cooperation, absent a compelling reason. Before the search, the patient must be told why the search is being conducted and given the opportunity to surrender the suspected contraband. The patient should be given the opportunity to be present during the search.¹⁵⁷ If a search is conducted without a patient first being told about it, the person who authorized the search must ensure that the patient is notified about it as soon as possible.

The Human Rights Officer must be notified prior to a search whenever possible so that he/she may be present during the search.¹⁵⁸

The search must be documented according to DMH Policy #98-3. This includes the reason for the search and the result, and if conducted without prior notice to the patient, the compelling reasons that made it necessary. Specific requirements for the following types of searches are explicitly described in DMH Policy #98-3:

- Common area searches
- Searches of bedrooms and other areas with patient possessions
- Pat, wand and metal detector searches of possessions
- Non-invasive body searches
- Invasive body searches
- Possessions brought in by visitors¹⁵⁹

c. Visitors

A facility's procedures must address the inspection of possessions brought by visitors:

¹⁵⁴ DMH Policy #98-3(III), (p. 2)

¹⁵⁵ DMH Policy #98-3(III), (p. 2)

¹⁵⁶ DMH Policy #98-3(IV), (p. 2)

¹⁵⁷ DMH Policy #98-3(VII), (p. 4)

¹⁵⁸ DMH Policy #98-3(VII), (p. 4)

¹⁵⁹ See DMH Policy #98-3(VI-XI), (pp.4-7)

- Staff may request that visitors allow staff to inspect anything being brought onto the unit. If a visitor refuses the request, staff may ask the visitor to leave or staff may monitor the visit.
- In addition, if the staff person in charge of the unit at the time has reasonable cause to believe that a visitor is holding or hiding contraband, staff may request that the visitor's outer clothing (for example, a jacket or coat) be left outside the unit or, if the visitor prefers, that the outer clothing be inspected by staff. If a visitor refuses the request, staff may ask the visitor to leave or staff may monitor the visit.¹⁶⁰

3. Community: adult

Each program must develop a written policy, consistent with applicable law and 104 CMR 28.08, regarding client possessions and the implementation of searches and seizures within the program. Clients shall be informed of the policy prior to their admission to the program. The policy, at a minimum, must require that in all except emergency circumstances, clients must:

- a. be informed of a search prior to the search;
- b. be provided an opportunity to consent to the search; and
- c. be present during the search of their property.

If a search of a client's property needs to be performed in an emergency, to avoid imminent risk of harm, and the client is not present during the search, the nature of the emergency and the reasons that the client is not present should be documented in the client's record.¹⁶¹

4. Community: DMH child/adolescents programs licensed by OCCS

Programs licensed by OCCS are required to develop a written statement defining the policies, procedures and circumstances for the search of residents and their personal belongings. A copy of the written policy must be provided to a resident within 24 hours of his/her admission to the program and to the resident's parent(s) or guardian within 72 hours.¹⁶²

¹⁶⁰ DMH Policy #98-3(XI), (p. 7)

¹⁶¹ 104 CMR 28.08(3)

¹⁶² 102 CMR 3.07(11)

BB. SECLUSION AND RESTRAINT

(See Appendix 8, DMH Restraint and Seclusion Philosophy statement)

DMH is currently revising its regulations to reflect a prevention philosophy that sees the use of seclusion or restraint as a last resort, based on a national best practice model. The following information is based on the current regulations.

The use of seclusion and restraint is often a traumatic experience to both staff and clients. DMH has stringent requirements for when and how restraints may be used. Seclusion or restraint may be used only to prevent imminent harm. The regulations specify requirements for monitoring by the Human Rights Committee and HRO after restraint or seclusion is used.

See also Section V. of this Handbook on the roles of the Human Rights Officers and Human Rights Committees regarding monitoring the use of restraint and seclusion. (p. 70)

1. Definitions of Restraint and Seclusion from DMH regulation (summarized):

- a. Mechanical restraint: A mechanical restraint is any device used to confine or limit a client's freedom of movement, for example, a device to prevent the client from hurting himself/herself or others. However, a device necessary for orthopedic, surgical or similar medical treatment is not considered restraint if it is used to provide support for achievement of functional body position or proper balance, or to protect a client from falling out of bed, or to permit a client to participate in ongoing activities without the risk of physical harm.¹⁶³
- b. Physical restraint: Physical restraint is using bodily physical force to limit a client's freedom of movement. A client may be held with no more force than is necessary to safely limit the client's movement.¹⁶⁴ Holding a client for less than approximately five minutes in a firm and gentle manner for the protection of the client or other person is not considered "physical restraint" under DMH regulations and, therefore, would not require the special justification and documentation described in regulation.¹⁶⁵
- c. Seclusion: DMH regulations define seclusion as occurring any time a client is both confined and isolated, except when a client is placed in his/her room for the night. It may take several forms:
 - i. Closed door - physically or mechanically maintained: When a client is placed alone in a room with a closed door or exit **and** is confined such that any attempt by the person to leave the room or space will be

¹⁶³ 104 CMR 27.12(2)

¹⁶⁴ 104 CMR 27.12(3)(b)

¹⁶⁵ 104 CMR 27.12(3)(c)

blocked by a lock or other mechanical holding device or the physical intervention of staff.¹⁶⁶

ii. Open door in isolated room - physically maintained: When a person is placed alone in an isolated room or enclosed space with an open door or exit where staff or others are not present at the doorway or exit **and** is confined such that any attempt by the client to leave the room or space will be blocked by the physical intervention of staff.¹⁶⁷

iii. Closed door or open door in isolated room—other: When a client is placed alone in a room with a closed door or exit as in (i) above or when in a room with an open door as in (ii) above **and** the client is confined in such a way that any attempt by him/her to leave the room or space will, or is believed by the client that it will, result in the application of sanctions such as the loss of privileges.¹⁶⁸

d. Chemical restraint: Chemical restraint, with certain exceptions, occurs whenever a client is given medications involuntarily for the purpose of restraint.

2. In general: requirements

In all settings, if a restraint or seclusion takes place, it must meet specific authorization and documentation standards as outlined in DMH regulations. (See 104 CMR 27.12 for facilities, including IRTPs and BIRTs and 104 CMR 28.05 for community programs.)

Restraint or seclusion only may be used in an emergency, to keep clients from serious and immediate harm.

DMH regulations define "emergency" as the occurrence or serious threat of extreme violence, personal injury, or attempted suicide. Emergencies only include situations where there is a substantial risk or occurrence of serious self-destructive behavior or serious physical assault. A "substantial risk" includes only the serious, imminent threat of bodily harm, where there is the present ability to effect such harm.¹⁶⁹

Restraint or seclusion may not be used if less restrictive alternatives can be used to address the risk of harm.¹⁷⁰

No PRN (as often as necessary) or "as required" authorization of restraint or seclusion may be written.¹⁷¹

¹⁶⁶ 104 CMR 27.12(4)(a)

¹⁶⁷ 104 CMR 27.12(4)(b)

¹⁶⁸ 104 CMR 27.12(4)(c)

¹⁶⁹ 104 CMR 27.12(6)

¹⁷⁰ 104 CMR 27.12(6)(b)

¹⁷¹ 104 CMR 27.12(6)(d).

Once a determination is made that the restraint or seclusion is no longer needed, then the person shall be released according to provisions of 104 CMR 27.12(13)(d).

3. Facility: adults

Use of physical, mechanical or chemical restraint must meet the strict requirements of 104 CMR 27.12.

Use of seclusion with adults must meet the strict requirements of 104 CMR 27.12.

4. Facility: children and adolescents

Use of **physical, mechanical or chemical restraint** must meet strict requirements of 104 CMR 27.12(1-14).

In addition, use of **seclusion** in child/adolescent facilities requires special certification by DMH in accordance with 104 CMR 27.12(15)(a).

No minor shall be secluded for more than 2 hours in a 24-hour period in accordance with 104 CMR 27.12(15)(b).

Note: Any restraint or seclusion of a minor exceeding one hour in any 24 hour period shall be reviewed within two working days by the facility director who shall forward a copy of his/her report on each such instance of restraint to the human rights committee, where applicable, or to the Human Rights Officer of the facility in accordance with 104 CMR 27.12(15)(c)(2).

5. Community: adults

Adult Community programs cannot use a chemical restraint, a mechanical restraint device or seclusion at any time for any reason in accordance with 104 CMR 28.05(1).

Use of physical restraint and other limitations of movement may only be utilized in cases of emergency with adults in the community. Under the community regulations, physical restraint means the use of bodily physical force to limit an individual's freedom of movement. Physical restraint does not include the holding of a client for less than five minutes. See 104 CMR 28.05(2) for additional requirements.

6. Community: DMH child/adolescent programs licensed by OCCS

Child/Adolescent community programs licensed by OCCS must submit a written plan to OCCS if the program operates a "locked secure detention or treatment

program.”¹⁷² Specific requirements for using locked time-out rooms are stipulated in the OCCS regulations.¹⁷³

OCCS allows for the use of physical restraint in the residential programs they license, when the resident is demonstrating that he/she is dangerous to him/herself or others and no other intervention has been or is likely to be effective in averting the danger. Mechanical restraint can be used only when the program has been granted a variance by OCCS.¹⁷⁴

7. Additional regulatory requirements from DMH inpatient regulations

- a. Personal Dignity: Clients must be fully clothed consistent with client safety and dignity and staff must provide reasonable access to bathroom facilities, without compromising the safety of staff and clients.¹⁷⁵
- b. Temporary relief from restraint/seclusion: Except when the client is sleeping, or when precluded for safety reasons, the client must be allowed out of restraints or seclusion for a temporary relief period for at least 10 minutes every two hours from 8:00 AM to 8:00 PM and for at least ten minutes every four hours from 8:00 PM to 8:00 AM.¹⁷⁶
- c. Discontinuation of restraint/seclusion: As soon as restraint or seclusion is no longer necessary to protect clients or staff from serious harm, the client must be released.¹⁷⁷ Since continuous assessment is required, as soon as a client demonstrates that he/she no longer presents an imminent risk of harm to him/herself or others, the restraint must end. This assessment will be made by clinical staff, but the staff member in attendance may observe that an assessment to discontinue the use of restraint or seclusion should take place and the clinician should be notified of this as soon as possible. This assessment of a client’s readiness for the restraint or seclusion to end must be documented at least every 30 minutes.¹⁷⁸
- d. Client comment sheet: Within 24 hours of the end of a restraint or seclusion, the client must be given a copy of the restraint/seclusion form and a comment sheet.¹⁷⁹ If the client does not want to comment within 24 hours, staff should request comments at a later time.

¹⁷² 102 CMR 3.07(7)(n)

¹⁷³ 102 CMR 3.07(7)(n)(3)(a–c)

¹⁷⁴ 102 CMR 3.07(7)(j)

¹⁷⁵ 104 CMR 27.12(8)

¹⁷⁶ 104 CMR 27.12(13)(b)

¹⁷⁷ 104 CMR 27.12(6)(c) & (13)(d)

¹⁷⁸ 104 CMR 27.12(13)(a)

¹⁷⁹ 104 CMR 27.12(14)(c)

The client should be encouraged to give meaningful comments, verbally or in writing regarding the restraint/seclusion experience, how the restraint/seclusion might have been avoided and whether the client has any human rights concerns regarding the restraint/seclusion. These comments must be reviewed by the facility or program, used as a part of the debriefing process and responded to as necessary.

- e. Documentation and review requirements regarding restraint/seclusion: Each restraint/seclusion must be documented appropriately on the DMH restraint/seclusion form and must be authorized as provided for in the facility's procedures and DMH regulations. See 104 CMR 27.12(9) & (10) for authorization requirements. See 104 CMR 27.12(14) for documentation requirements. See 104 CMR 27.12(15) for additional requirements for minors. See Section V. of this Handbook on The Role of the HRO and HRC review Restraint/Seclusion forms.¹⁸⁰

The documentation requirements listed in the inpatient regulations also apply to a community program in the event that a physical restraint is used.

8. Staff training

The primary focus of training should be on prevention and early intervention skills. Training should cover the safe and humane use of restraint and seclusion in the event that prevention efforts are not successful.

At a minimum, training should include the following:

- how to avoid the use of restraint/seclusion using a strength-based model;
- when and where restraint/seclusion may be used;
- how to initiate a restraint safely and humanely in order to minimize the harm;
- what should be done while a person is in restraint/seclusion in order to minimize the harm;
- when a restraint/seclusion should end, and who must assess and authorize each instance of restraint or seclusion; and
- the process for learning from each instance of restraint or seclusion toward further reducing its use.

DMH regulations require a facility to train staff regarding the use of restraint and seclusion, and less restrictive alternatives.¹⁸¹ Best practice and standards dictate that no staff person shall attempt to use restraint or seclusion until the program or facility has adequately trained him/her. Thus, DMH recommends that training occur at orientation and annually thereafter.

¹⁸⁰ 104 CMR 27.12(14)(e)

¹⁸¹ 104 CMR 27.12(6)(g)

In addition, DMH Policy #93-1 (par. 7) provides that staff should experience restraints as part of their training. The purpose of this exercise is to develop a greater personal understanding.

STORAGE SPACE

Facility and community: general

Every client has the right to have access to individual storage space for private use.¹⁸² However, a facility director or his/her designee may limit this right for good cause.¹⁸³ A statement of the reason(s) for limiting the right must be entered into the individual client's treatment record.¹⁸⁴

DD. TELEPHONE ACCESS

(See Appendices 2a and 2b, "Five Fundamental Rights" Law)

1. Facility and community: general

- a. According to the Five Fundamental Rights Law, every client, regardless of age, has the right to reasonable access to a telephone to make and receive confidential calls and to receive assistance when desired and necessary. However, such calls cannot constitute a criminal act or represent an unreasonable infringement of another person's right to make and receive telephone calls.¹⁸⁵
- b. Every client has the right to receive or refuse to receive, telephone calls from his/her attorney or legal advocate, physician, psychologist, clergy member or social worker, at any reasonable time, regardless of whether the client initiated or requested the telephone call.¹⁸⁶ This right cannot be suspended.

2. Facility

- a. Suspending the right to telephone calls from those other than the professionals listed above.

In an inpatient facility, a patient's right to reasonable access to a telephone may be temporarily suspended only if the director or acting director of the facility, or his/her designee, concludes that, based on the experience of the patient's exercise of the right to a telephone, further access in the immediate future would present a substantial risk of serious harm to the

¹⁸² M.G.L. c. 123, § 23

¹⁸³ M.G.L. c.123, § 23

¹⁸⁴ *Id.*

¹⁸⁵ M.G.L. c. 123, § 23

¹⁸⁶ 104 CMR 27.13(5)(e)

patient or others, and less restrictive alternatives either have been tried and failed or would be futile to attempt. The suspension shall last no longer than the time necessary to prevent the harm.

The imposition of the suspension shall be documented with specific facts in the patient's record.¹⁸⁷

b. Requirements when restricting rights

DMH Human Rights Policy #03-1 specifies the steps to be taken when restrictions to a right are considered. The relevant points applying to the restriction of telephone are summarized below:

- i. Duration of restriction: All telephone restrictions are considered temporary. In all instances where telephone access has been restricted, access shall be restored immediately when determination is made that the risk no longer justifies the restriction.
- ii. Time period for review: A restriction concerning telephone access in a facility must be reviewed and approved by the Facility Director or designee and documented daily by clinical staff for the first 14 days of the restriction. If the restriction is continued for more than 14 days, the Facility Director or designee must review and approve the continuation and, if continued, the reasons for the restriction shall be considered a treatment issue and must be incorporated into the client's treatment plan. The facility director or designee shall review all such restrictions monthly.
- iii. Notification: The Human Rights Officer and the client's LAR, if any, shall be notified of the restriction as soon as possible, and no later than 24 hours after it is imposed.
- iv. Documentation: Imposition of the restriction shall be documented with specific facts as to the reason for the restriction in the client's record. If a restriction is made due to a restraining order or other court order, then a copy of the restraining or other court order should be retained in the client's record. Such documentation also must include the less restrictive alternatives that were tried and failed or would be futile to attempt, as well as criteria for lifting the restriction.¹⁸⁸

3. Facility: child/adolescent

In determining serious harm, a Facility Director or designee may take into consideration the age and developmental level of such minor, as well as family and cultural issues relevant to his/her treatment. The Facility Director or designee may rely upon information supplied by the minor's legally authorized

¹⁸⁷ M.G.L. c. 123, § 23

¹⁸⁸ DMH Policy #03-1(VI)(B), (pp. 9-10)

representative (i.e., parent, DSS, guardian), records and information from prior treatment providers, or other sources of reliable information.¹⁸⁹

DMH Commissioner's Directive # 16, (Appendix 9) regarding Children/Adolescents in DMH facilities who are in DSS custody, states that M.G.L. c. 123 §23, which includes the right to access a telephone, is applicable to children/adolescents who are both in DSS custody and in a DMH facility. The Directive states that, in such cases, the child/adolescent's inpatient treatment team should take into consideration information DSS has concerning the child/adolescent's telephone use, and DMH must always comply with a court order. However, the child/adolescent has the right to make and receive confidential telephone calls in a facility, though that right may temporarily be suspended in accordance with the provisions of the law.¹⁹⁰

4. Community: DMH child/adolescent programs licensed by OCCS

When contracting with a child/adolescent program, DMH must insure that the program allows DMH child/adolescent clients to have telephone access in accordance with the Five Fundamental Rights Laws.¹⁹¹

EE. TREATMENT AND SERVICES

1. Receipt of treatment and services

- a. Facility and Community: General Clients of DMH facilities and community programs shall receive quality treatment and services that are individualized and appropriate to their needs, which respect their dignity and support their functioning at the highest level of independence possible.
- b. Facility: DMH regulations state: "Each patient admitted to a facility shall, subject to his or her giving informed consent, receive treatment suited to his or her needs which shall be administered skillfully, safely, and humanely, with full respect for dignity and personal integrity."¹⁹²

¹⁸⁹ *Id.*

¹⁹⁰ DMH Commissioner's Directive #16

¹⁹¹ M.G.L. c. 123 §23

¹⁹² 104 CMR 27.13(3)

- c. Community. DMH is responsible for providing or arranging for DMH continuing care services to adults with serious and long term mental illness, and children and adolescents with serious emotional disturbance who are determined eligible and are prioritized for such services.¹⁹³ Services shall be provided to eligible clients subject to the availability of services, funding, and DMH's determination of the priority of the client's need for services.¹⁹⁴

2. Participation in treatment planning

- a. General. The DMH Human Rights Policy emphasizes the importance of client participation in treatment planning. Clients and their LARs have the right to participate as fully as possible in the development and modification of their treatment plan (facility) or the Individual Service Plan (ISP) (community). The policy states "When clinically and age appropriate, all clients, including those with a LAR, shall have the opportunity to participate in and contribute to their treatment planning to the maximum extent possible." For both the community and inpatient setting, clients may request individuals of their choosing, including their attorney, to attend treatment and service planning meetings.¹⁹⁵ A client may request a modification to his/her treatment and/or service plan. In addition, a client may request a change in his/her facility, program, and treating physician or other clinician or case manager. According to the Human Rights policy, "best efforts shall be made to accommodate the request, consistent with (i) the clinical appropriateness of the request, (ii) the ability of the Facility or Program to grant the request, (iii) the need to provide treatment in an emergency situation, and (iv) the client's eligibility for admission to another service provider or agency (e.g., Veterans' Administration or Massachusetts Rehabilitation Commission)."¹⁹⁶

- b. Community.

Individual Service Plan (ISP) development

DMH community regulations specify the following steps for encouraging client participation in the development of his/her ISP.

All clients, including those who have a LAR, shall be given the opportunity to participate in and contribute to their individual service planning to the maximum extent possible:

¹⁹³ 104 CMR 29.03(1)

¹⁹⁴ 104 CMR 29.03(2)

¹⁹⁵ DMH Policy #03-1, (p. 8)

¹⁹⁶ *Id.*

- i. The client must be present at the service and treatment planning and review meetings unless the client is unwilling or unable to attend.
- ii. The client must be encouraged to identify and discuss his/her goals and preferred services and programs during these meetings and otherwise shall be supported to participate in a meaningful way in the discussions and decision-making process.

When a client is unable or unwilling to take part in a meaningful way in the service planning process, the case manager, with the assistance of the treatment team, must take steps to minimize obstacles to participation in service planning activities. This must include, but not be limited to:

- i. developing a plan for increasing the ability of the client to participate;
- ii. modifying the schedule or structure of the meetings or making other accommodations designed to increase the client's participation;
- iii. educating the client in order to facilitate and increase his/her participation;
- iv. continuing to engage the client in ways that assist him/her to make choices regarding his/her care and treatment to the maximum extent possible.¹⁹⁷

Acceptance or rejection of the ISP

Every community client who is not under a guardianship, or the LAR of a client under guardianship, has the right to reject and appeal part or all of the contents of any community based service plan.¹⁹⁸ The client or LAR may also request modification of a community based service plan.¹⁹⁹

No modification of a community treatment plan, service, service plan, or service provider may be made without acceptance of the client or LAR. However, in an emergency or when necessary to comply with state contracting requirements, a treatment plan or service plan may be modified (and services or service providers changed) without acceptance by the client or LAR. An emergency exists only if a modification is necessary to avoid a serious or immediate threat to the health, mental health or safety of the client or other persons.²⁰⁰

Any objection to the service plan should be made within 20 days of the date when the individual service plan is received. If the client (or his/her LAR) fails to object within 20 days, the service plan is considered to be accepted by the client and/or LAR.²⁰¹

¹⁹⁷ 104 CMR 29.03(4)

¹⁹⁸ 104 CMR 29.09(1) & 29.15(1)

¹⁹⁹ 104 CMR 29.11(1)

²⁰⁰ 104 CMR 29.11(3)

²⁰¹ 104 CMR 29.09(1)(b)

If an objection is made and cannot be resolved satisfactorily, the client (or LAR) may appeal the service plan.²⁰²

3. Periodic/annual review

- a. **Facility**. Each facility must conduct an initial assessment at admission and must conduct periodic reviews of clients who are there beyond 90 days after the first 90 days, the second 90 days and annually thereafter.²⁰³

For child and adolescent inpatient units, the periodic review must be conducted quarterly for the duration of the admission.²⁰⁴

The Facility Director or designee must give reasonable advance written notice of the review to each patient, his/her LAR, and, unless the patient knowingly objects, to the nearest relative, giving the date of the review and requesting his/her participation in the review.²⁰⁵

The inpatient regulations also specify that, at minimum, the following areas are to be covered during the initial examination and periodic review: a thorough clinical examination, an evaluation of competency and consideration of alternatives to hospitalization.²⁰⁶

The written record of each initial and periodic review becomes part of the patient's permanent medical record.

- b. **Community**. A review of the client's ISP, and the client's related Program Specific Treatment Plans (PSTPs) must be initiated by the case manager no later than 12 months after the ISP was completed or substantially modified, and annually thereafter.²⁰⁷ At least fifteen (15) days prior to the annual review, the case manager must contact the client, the LAR, if any, the involved family and/or the involved others [with the client or LAR's approval], and the representatives of each of the client's service providers.²⁰⁸ The regulations have provisions for waiving the annual review meeting if all parties agree.²⁰⁹

Community: DMH child/adolescent programs licensed by OCCS

In addition, for OCCS licensed programs, each client's progress, needs and service plan must be reviewed at least every six months.²¹⁰

²⁰² 104 CMR 29.09(1)(d)

²⁰³ MGL c. 123, § 4 and 104 CMR 27.11(1)

²⁰⁴ MGL c. 123, § 4 and 104 CMR 27.11(1)

²⁰⁵ MGL c. 123, § 4 and 104 CMR 27.11(2)

²⁰⁶ MGL c. 123, § 4 and *See* 104 CMR 27.11(3-6) for detailed requirements.

²⁰⁷ *See* 104 CMR 29.10 for the specific requirements for the annual review.

²⁰⁸ 104 CMR 29.10(1)(b)

²⁰⁹ 104 CMR 29.10(2)

²¹⁰ 102 CMR 3.05(5)(a)

4. Behavior management: child/adolescent facilities –Please note there are draft regulations currently being proposed-March 2005-that may change these Behavior management regulations

- a. Facilities: DMH has behavior management regulations which apply to facilities licensed by DMH that serve **children and adolescents** (i.e., acute or continuing care inpatient units and IRTPs and BIRTs). The regulations address behavior management planning for this group only. These regulations require child-serving facilities that intend to use behavior management to develop a plan for its use in each setting. The plan must be approved by DMH, and reviewed by the facility's Human Rights Officer and, where applicable, the facility's Human Rights Committee.²¹¹

The regulations set out parameters for individual behavior management plans. They provide guidance for and limitations to the range of interventions facilities can develop. Key requirements are listed below:

- i. No behavior modification techniques, which involve corporal punishment, infliction of pain or physical discomfort, or deprivation of food or sleep, may be used.
- ii. Seclusion and restraint may not be used for behavior management and may only be used in accordance with 104 CMR 27.12. See Seclusion and Restraint Section of this Handbook. (IV.BB.) (p. 49)
- iii. The treatment plan for each client for whom behavior management will be employed must contain specific individualized behavior management interventions, consistent with the program's behavior management plan. The treatment plan, including behavior management interventions, may not be instituted without the consent of the client or his/her LAR.
- iv. Each behavior management plan must describe behavior management interventions that may be used.
- v. When feasible and appropriate, clients must participate in the establishment of rules, policies and procedures for behavior management.
- vi. Upon admission, the facility must provide clients and their legally authorized representatives with a copy of the facility's behavior management plan.
- vii. The DMH regulations further provide that any facility behavior management plan which provides that a client may be separated from the group or facility activities must include at least:
 - guidelines for staff in the utilization of such procedures;
 - the persons responsible for implementing such procedures;
 - the duration of such procedures, including provisions for approval by the Facility Director or his/her designee of a period longer than 30 minutes;

²¹¹ 104 CMR 27.10(7)

- a requirement that clients be observable at all times and that staff shall be in close proximity at all times;
- a procedure for staff to directly observe the client every 15 minutes;
- a means of documenting the use of such procedures if used for a period longer than 30 minutes including, at a minimum, length of time, reasons for this intervention, who approved the procedure and who directly observed the client at least every 15 minutes;
- a time out room may not be locked; and
- any room or space used for the practice of separation must be physically safe.²¹²

Community: DMH child/adolescent programs licensed by OCCS

OCCS requires that child/adolescent community programs which separate a child or adolescent from the group or program activities have a behavior management policy, which contains the following elements:

- i. guidelines for staff utilizing such procedures;
- ii. persons responsible for implementing such procedures;
- iii. the duration of such procedures, including procedures for the approval of the chief administrative person or designee for a period longer than 30 minutes;
- iv. a requirement that the client is observable at all times and in all parts of the room and that staff must be in close proximity at all times;
- v. a procedure for staff to directly observe the client at least every 15 minutes; and
- vi. a means of documenting the use of such procedures if used for a period longer than 30 minutes including, at a minimum, length of time, reasons for this intervention, who approved the procedure and who directly observed the client at least every 15 minutes.²¹³

There are additional OCCS regulations concerning the use of time out rooms at OCCS licensed programs.²¹⁴

5. Privileges: facility only

- a. General: “Privileges are considered to be therapeutic aspects of inpatient hospital treatment and are never used for punitive purposes. While issues of safety remain of paramount importance, gradual increases in privileges, as clinically appropriate, encourage increased patient autonomy, self-

²¹² 104 CMR 27.10(7)

²¹³ 102 CMR 3.07(7)(k)

²¹⁴ 102 CMR 3.07(7)(n)(1-3)

esteem, quality of life, as well as provide a more normalized treatment environment in which to prepare for life after discharge”.²¹⁵

- b. Definition of privilege: a level of movement off the unit authorized for a patient. Privilege levels range from restricted to the inpatient unit (the most restricted privilege level) to authorization for the patient to leave the buildings and grounds without escort for a specified period of time (the least restrictive privilege level).²¹⁶
- c. Patient participation: The determination of the patient’s privilege level should include as much participation from the patient as possible. In the case of a minor, the determination should include as much participation from the LAR and child/adolescent in keeping with his/her developmental level.

Note regarding three day notices: A facility should not have a practice of automatically restricting the current privilege level of a patient on a Conditional Voluntary status when he/she files a three-day notice. Rather, any decision to restrict should be individualized based upon compelling safety concerns, and must have documentation in the patient’s record concerning the need for the restriction.

Special requirements concerning adult forensic patients: DMH Policy #00-1, Mandatory Forensic Review (MFR), establishes the procedures for determining privileges for certain adult forensic patients in DMH operated and contracted facilities. The Department's Division of Forensic Services through MFRs provides risk assessments and recommendations for appropriate risk management to aid treatment teams in making decisions concerning the granting of certain privileges and discharge. MFRs are performed according to the DMH policy and by forensic consultants appointed by the Assistant Commissioner for Forensic Services. A patient who has been charged with a serious violent offense (as specified in the policy) or has been transferred to a DMH facility following a commitment to Bridgewater State Hospital must have an MFR done prior to being granted supervised off- ground privileges, unsupervised privileges (either on or off-grounds) and/or the discharge from the facility.

The MFR consists of a review of selected portions of the patient’s clinical file, a clinical interview with the patient, consultation with the treatment team and a comprehensive written report assessing the risk management aspects of the privilege or discharge plan. A senior forensic supervisor, appointed by the Assistant Commissioner for Forensic Services, finalizes the findings and submits the report as well as an advisory letter to the patient's treatment team. The evaluation and report must be submitted within 25 business days of the MFR referral completion date.

The report and letter are **advisory** only. The treatment team makes final decisions regarding privileges and discharge.

²¹⁵ DMH Patient Privileges Policy # 96-1, (p. 1)

²¹⁶ *Id.*

It is important to note that if a court, when committing an individual to a facility, orders that the individual be restricted to the building grounds of the facility, such restrictions cannot be removed without the approval of the court.

FF. VISITORS

(See Appendix 2a and 2b -“Five Fundamental Rights” Law)

1. Facility and community: general

According to the Five Fundamental Rights law, a DMH client or resident, regardless of age, has the right to receive, at reasonable times, visitors of his/her own choosing daily and in private.²¹⁷

- a. Visiting hours may be limited only for the purpose of protecting privacy of other persons and avoiding serious disruptions in the normal functioning of the facility or program. Visiting hours shall be sufficiently flexible to accommodate individual needs and desires of clients and visitors.²¹⁸
- b. Every client has the right to receive or refuse to receive at any reasonable time, visits from his/her attorney or legal advocate, physician, psychologist, clergy or social worker even if not during normal visiting hours and regardless of whether the patient initiated or requested the visit.²¹⁹ This right cannot be suspended.

2. Facility

- a. Suspending the right to visitors in a facility other than from the professionals listed in 1(b) above: In a facility, the right to receive visitors of one’s choosing may be temporarily suspended only if the director or acting director of the facility or his/her designee concludes that, based on experience of the patient’s exercise of the right, further such exercise of this right in the immediate future would present a substantial risk of serious harm to that person or others, and less restrictive alternatives either have been tried and failed or would be futile to attempt. The suspension shall last no longer than the time necessary to prevent the harm and its imposition shall be documented with specific facts in such a person’s record.²²⁰
- b. Requirements when restricting rights. DMH Human Rights Policy #03-1 specifies the steps to be taken when restrictions to a right are considered.

²¹⁷ M.G.L. c. 123, § 23

²¹⁸ 104 CMR 27.13(5)(c)

²¹⁹ 104 CMR 27.13(5)(e)

²²⁰ 104 CMR 27.13(6)

The relevant points applying to the restriction of visits are summarized below:

- i. Duration of restriction: All restrictions to visitors other than the professionals listed in 1 (b) above are considered temporary. In all instances where visitor access has been restricted, access shall be restored immediately when the determination is made that the risk no longer justifies the restriction.
- ii. Time period for review: A restriction concerning visitor access in a facility must be reviewed and approved by the Facility Director or designee and documented daily by clinical staff for the first 14 days of the restriction. If the restriction is continued for more than 14 days, the Facility Director or designee must review and approve the continuation and, if continued, the reasons for the restriction shall be considered a treatment issue and must be incorporated into the client's treatment plan. The Facility Director or designee shall review all such restrictions monthly.
- iii. Notification: The Human Rights Officer and the client's LAR, if any, shall be notified of the restriction as soon as possible and no later than 24 hours after it is imposed.
- iv. Documentation: Imposition of the restriction shall be documented with specific facts as to the reason for the restriction in the client's record. If a restriction is made due to a restraining order or other court order, then a copy of the restraining or other court order should be retained in the client's record. Such documentation shall also include the less restrictive alternatives that were tried and failed or would be futile to attempt, as well as criteria for lifting the restriction.²²¹

3. Facility: child/adolescent

In determining serious harm, a facility may take into consideration the age and developmental level of such a minor, as well as his/her family and cultural issues relevant to his/her treatment. In addition, the facility may rely upon information and records supplied by the minor's legally authorized representative (i.e., parent, DSS, guardian) from prior treatment providers or other reliable sources.

DMH Commissioner's Directive #16,(See Appendix 9), regarding Children/Adolescents in DMH facilities that are in DSS custody, states that the five fundamental rights law is applicable to children/adolescents who are both in DSS custody and in DMH facilities. The directive states that, in such cases, the child/adolescent's inpatient treatment team must abide by a court decree and should consider information that DSS has concerning certain visitors. Just as with

²²¹ DMH Policy #03-1 (VI)(B)

adults, a child/adolescent has the right to visitors in a facility, though that right temporarily may be suspended in accordance with the provisions of the law.²²²

4. Community: DMH child/adolescent programs licensed by OCCS

When contracting with a child/adolescent program licensed by OCCS, DMH must insure that the Program allows DMH child/adolescent clients to have visitor access in accordance with the Five Fundamental Rights Law.

GG. VOTING

1. Facility and community: general

Every client who is 18 years of age or older is presumed to be legally competent and has the right to vote. State law and regulation prohibit deeming an individual incompetent to vote based solely on the fact that the individual has been admitted to a program or admitted or committed to a facility.²²³

Unless that right has been specifically restricted by the Probate Court, a client under guardianship may vote.²²⁴

Staff in facilities and programs must provide reasonable assistance to a client to register and vote and must do so in a non-coercive and non-partisan manner.²²⁵

2. The National Voter Registration Act

This law, in part, requires that state agencies which provide services to persons with disabilities take proactive steps to ensure that clients applying for and receiving services from the agency have the opportunity to register and vote.²²⁶

Such proactive steps include:

- Provision of voter registration forms to all clients who may desire such a form;
- Provision of assistance in completing the forms; and
- Forwarding of the forms to the appropriate state officials.

²²² DMH Commissioner's Directive #16

²²³ MGL c. 123, § 24; 104 CMR 27.13(1); 104 CMR 28.03(1)(c); and 28.10(1)

²²⁴ 104 CMR 28.03(1)(c)

²²⁵ *Id.*

²²⁶ Federal Voter Registration Act of 1993 (42 U.S.C. 1973)

HH. WILLS

Facility and community: general

Every client who is 18 years of age or older is presumed to be legally competent and has the right to make a will. According to state law, no person shall be deemed to be incompetent to make a will solely by reason of his/her admission to a program or admission or commitment in any capacity to a facility.²²⁷

However, the validity of the will may depend on whether or not the person making it understands the extent of his/her estate, understands who are his/her legal heirs and significant others, and understands that he/she is giving instructions that will govern how his/her estate is dispersed after death. That is, it must be a “knowing” decision. The fact that someone has a guardian does not necessarily mean that he/she cannot make a valid will. In addition, the fact that a person is not under guardianship does not necessarily mean that he/she is competent to make a valid will.

²²⁷ M.G.L. c. 123, § 24; 104 CMR 27.13(1); and 104 CMR 28.10(1)

V. HUMAN RIGHTS INFRASTRUCTURE

A. GENERAL

DMH Policy #03-1 requires that DMH and its facilities and programs create and maintain a structure for protecting clients' rights. DMH has established the Office of Human Rights and the Human Rights Advisory Committee. For detailed information, see Appendix 1, the DMH Human Rights Policy, Section VII.

This handbook further describes the functions of the Area Human Rights Coordinators, Human Rights Officers and Human Rights Committees.

B. AREA HUMAN RIGHTS COORDINATOR

DMH Human Rights Policy #03-1 establishes the role of Area Human Rights Coordinator as the person responsible for overseeing human rights compliance within each DMH Area. The primary activities that the Coordinator is responsible for are the following:

1. Monitoring compliance with DMH regulations and policies governing Human Rights among all adult and child/adolescent client programs in the Area. These activities include, but are not limited to:
 - ensuring that each program location has a Human Rights Officer who is staff to a Human Rights Committee, which maintains rules of organization, keeps minutes of meetings and conducts annual site visits at all programs;
 - collecting and reviewing human rights committee minutes and responding to documented individual issues or trends;
 - ensuring that human rights training plans are developed and implemented; and
 - ensuring that, on an ongoing basis, all clients are offered education addressing their human rights;
2. Organizing and facilitating Area and/or Site-based Human Rights Officer training.
3. Meets bi-monthly with DMH Directors of Human Rights and the other Area Human Rights Coordinators to work on state-wide Human Rights agenda, including development of Human Rights Officer training curriculum, assisting with planning of state-wide conference and providing input into the policies which impact human rights.
4. Evaluating the need to establish additional forums for exploring human rights issues and offering support for Human Rights staff.
5. Providing consultation and technical assistance to DMH Area and Site offices, Mental Health Center(s), Human Rights Committees and provider agencies as required.
6. Addressing human rights issues as they relate to case management.
7. Serving on relevant Area committees.
8. Reviewing relevant data and reports to identify and address systemic human rights issues.

C. HUMAN RIGHTS OFFICER

1. In general

DMH regulations require that a Human Rights Officer be assigned to each facility that is operated, licensed or contracted for by DMH, as well as any community program that is operated, licensed or contracted for by DMH.

DMH Policy #03-1 provides that DMH and its facilities and programs must provide support for Human Rights staff. The Human Rights Officer must spend sufficient time at the program/facility site so that clients at the program/facility have regular and frequent opportunities to come in contact with and request assistance from the Human Rights Officer. Compliance with this provision may occur by appointing as Human Rights Officer either a staff person who works at the program/facility site or a staff person who visits the program/facility on a regular and frequent basis. However, the head of the program/facility may not be the Human Rights Officer.

The Human Rights Officer must have no day-to-day duties that are inconsistent with his/her responsibilities as a Human Rights Officer, including carrying out fact-finding activities under 104 CMR 32.00, DMH's investigation regulations.²²⁸

It is recommended that a Human Rights Officer for inpatients have no clinical responsibilities for patients of the facility. This is because an inpatient client's human rights concerns or complaints often involve decisions made by his/her clinicians.

2. Qualifications.

According to DMH Policy #03-1, it is preferable that a Human Rights Officer meet one or more of the following experience requirements prior to appointment as a Human Rights Officer by a Facility or Program:

- (i) The Human Rights Officer has been employed by the facility or program for at least three months, or
- (ii) The Human Rights Officer has been an advocate for clients' human rights for at least three months in any program or facility.

In addition, the Human Rights Officer must demonstrate a commitment to the protection and advocacy of clients' human rights. He/she must be able to work collaboratively and effectively with facility or program staff and the Human Rights Committee to ensure that clients' human rights are respected.²²⁹

²²⁸ DMH Policy #03-1, (p.15)

²²⁹ DMH Policy #03-1, (p.15)

3. Responsibilities of the Human Rights Officer

The Human Rights Officer must work closely with the facility or program leadership to ensure that the procedures and protections in place are in compliance with DMH policies and regulations in order to promote full respect and protection of clients' human rights.

DMH regulations and policy outline the specific responsibilities of the Human Rights Officer. Perhaps the most important responsibility is "to inform, train and assist clients served by the program/facility in the exercise of their rights."²³⁰ More specifically, the Human Rights Officer role involves the following:

a. Assisting clients in exercising their rights.

The Human Rights Officer has the responsibility to advocate for and assist any person served by the program/facility whose human rights allegedly have been, are being or are at risk of being denied. The Human Rights Officer should use whatever internal program/facility procedures and communications may be available to seek protections of the individual's rights. These mechanisms include, but are not limited to:

- making inquiry into allegations of the denial of rights;
- meeting with appropriate clinical and administrative staff;
- negotiating on behalf of a person served by the program/facility;
- assisting an individual in filing a complaint or filing a complaint on his behalf; or
- filing an individual service plan appeal.

Assistance may vary depending on the ability of the client. The Human Rights Officer should make a special effort to monitor and assist persons who are not capable of making a request for assistance to the Human Rights Officer or who are not capable of advocating for themselves. For those clients who are able to advocate for themselves, the Human Rights Officer may find it best to empower the client to advocate for him/herself by providing information and encouragement rather than acting on behalf of the client.

- b. Monitoring clients' rights. Working with the Human Rights Committee, the Human Rights Officer should monitor any limitations on rights. The Human Rights Officer should review all complaints and written decisions regarding complaints to understand the concerns of clients and to identify potential human rights violations. The Human Rights Officer may also monitor all accident and injury reports, incident reports, treatment plans, and other reports or documents reflecting a limitation on or an alleged violation of a client's rights.

²³⁰ 104 CMR 27.14(1)(b) (facility) and 104 CMR 28.11(7)(c) (community)

- c. Informing clients of their rights. The Human Rights Officer should take the steps necessary to inform all of the persons served by the program/facility of their human rights, including the opportunity to file complaints and the availability of the Human Rights Officer to assist them. This should include the distribution to newly admitted individuals of written materials (in language which a lay person can easily understand) describing their human rights and identifying the Human Rights Officer. It also should include periodically attending community meetings to discuss human rights, reminding clients of the role of the Human Rights Officer, advising individuals of their rights upon request and posting a notice of human rights and the name of the Human Rights Officer in a conspicuous place.
- d. Resource regarding privacy rights. The Human Rights Officer in a program or facility is also a resource to clients and guardians for information regarding the facility or the program's privacy policy (in accordance with the federal requirements under HIPAA and state law).²³¹
- e. Training clients. In addition to informing clients of their rights on an informal and an *ad hoc* basis as described in item c. above, the Human Rights Officer (or another person) should develop and implement a plan to train all of the program/facility's clients regarding their human rights. Training assistance from persons both within and outside the program/facility may be useful.
- f. Training staff. The Human Rights Officer (or another qualified person) should also educate staff regarding the rights of persons served by the program/facility. This training should occur as part of an annual staff orientation as well as at other formal and informal educational opportunities as appropriate.
- g. Referrals for legal information, advice and representation. DMH regulations provide that a Human Rights Officer 's responsibilities include assisting clients "...in obtaining legal information, advice and representation through appropriate means, including referral to independent attorneys or legal advocates", when appropriate.²³² The Human Rights Officer should develop and maintain a current referral list of attorneys and legal advocates. Such a list appears in Appendix 3, Legal and Educational Resources.

²³¹ DMH Policy #03-1

²³² 104 CMR 27.14(1)(c) (facility) and 104 CMR 28.11(7)(d) (community)

- h. Human rights training participation. The regulations require the Human Rights Officer to "participate in training programs for Human Rights Officers offered by DMH."²³³
- i. Knowledge of the rights of clients: To satisfy their responsibilities, Human Rights Officers must have a comprehensive knowledge of the rights of clients and how those rights may be exercised. Training programs can assist the Human Rights Officer in this regard, as well as provide needed collegial and professional support.
- j. Staff to the Human Rights Committee: DMH regulations provide that the Human Rights Officer is to serve as staff to the facility's/ program's Human Rights Committee (HRC).²³⁴ The Human Rights Officer should attend meetings of the HRC responsible for the program/facility. At HRC meetings, the Human Rights Officer should report his/her human rights activities and any particular human rights concerns or issues pertaining to the program/facility (for example, difficult individual human rights issues or program policies/practices impacting human rights). The Human Rights Officer may also perform certain tasks for the HRC (i.e. reviewing of restraint reports, suggesting agenda items for meetings and assisting with recruitment of new committee members) and may serve as a liaison between the committee, the head of the program/facility and other staff. However, as staff to the HRC, the Human Rights Officer is not a voting member of the committee.
- k. Additional responsibilities related to restraint and seclusion: In settings where restraint or seclusion (R/S) is used, the Human Rights Officer has additional responsibilities regarding restraint and seclusion, and other forms of room restriction. The Human Rights Officer must:
 1. promptly review a copy of each R/S form, including the client comment sheet, and follow through with clients and/or staff to address Human Rights concerns identified on R/S forms and client comment sheets;
 2. monitor extended use of R/S for individual clients and follow through with clinical and/or administrative staff to address any particular concerns;
 3. participate in the multidisciplinary team review of the assessments and treatment plans of clients who have experienced R/S;
 4. provide the HRC with the facility's aggregate data regarding R/S; and participate in efforts to reduce R/S;²³⁵ and
 5. consider whether or not a complaint should be filed on behalf of a patient related to a restraint, in accordance with DMH seclusion/restraint regulations.²³⁶

²³³ 104 CMR 27.14(1)(a) (facility) and 104 CMR 28.11(7)(a) (community)

²³⁴ 104 CMR 27.14(1)(c) (facility) and 104 CMR 28.11(7)(b) (community)

²³⁵ DMH Human Rights Policy #03-1, p.16

²³⁶ 104 CMR 32.05 (2)(d)6

4. Facility only

Resource regarding the Sex Offender Registry Board

The Human Rights Officer, in DMH operated facilities, is to act as a resource to clients to clarify procedures related to registration with the Sexual Offender Registry Board.²³⁷

D. HUMAN RIGHTS COMMITTEE (HRC)

1. In general (facility and community)

Each program and facility operated or funded by DMH must have a HRC. The HRC serves as an advisory committee to the head of the program/facility in order to help the program/facility protect the human rights of its clients.

2. Membership

Committee membership shall include a minimum of five people, the majority of whom must be consumers of mental health services, family members of consumers, or advocates. The membership should reflect the diversity of the communities served by the facility/program and, if possible, include other interested parties, such as clinicians, attorneys and guardians.

No member shall have any direct or indirect financial or administrative interest in the facility/program or in DMH. Membership on a DMH citizen advisory board or the board of trustees or board of directors of a facility/program shall not constitute such a financial or administrative interest. Neither receiving services from the facility/program nor being a family member of a client of the facility/program shall constitute such a financial or administrative interest.

A family member, guardian or attorney who represents one or more clients served by the facility/program may be a member of the HRC. However, neither the family member nor the guardian may participate as a committee member in any discussions or decisions regarding his/her family member or ward, and the attorney may not participate as a committee member in any discussions or decisions regarding his/her client's human rights, which are the subject of the attorney's representation.²³⁸

Potential members for committees which monitor DMH-operated facilities or programs must agree to a Criminal Offender Information (CORI) check before

²³⁷ Commissioner's Directive #15 "Procedure for Implementation of Sex Offender Registry Law for DMH Inpatient Facilities" (October 1, 2002)

²³⁸ 104 CMR 27.14(3); 104 CMR 28.11(5); and DMH Policy #03-1, (p. 17)

being appointed.²³⁹ Programs contracting with DMH are encouraged, but not required, to conduct CORI checks of potential committee members.²⁴⁰

3. Appointment

- a. Facility: The DMH Commissioner or his/her designee appoints members for the committees of facilities operated by or under contract with DMH.²⁴¹
- b. Program: For community programs, the program director shall appoint members to the committee.²⁴²

4. Rules of operation

Pursuant to 104 CMR 27.14 and 28.11, each HRC shall develop operating rules and procedures that include specific reference to quorum requirements, respecting client confidentiality, and dismissal of members. The term of office for HRC members is three years. No member shall be appointed to serve more than two consecutive three-year terms. A person must wait for at least one year after completing a second consecutive three-year term before becoming eligible for reappointment.²⁴³

The HRC is to meet as often as necessary upon the call of the chairperson or upon request of any two members, but no less often than quarterly. Minutes of all meetings are to be maintained and provided to DMH upon request.²⁴⁴

5. Responsibilities

The overall responsibility of each committee is to monitor the activities of the facility/program with which it is affiliated, in relation to the rights of clients the facility/program serves.²⁴⁵ More specifically, a HRC must:

- Review and inquire about complaints related to allegation of mistreatment, harm or other alleged violations of a client's rights, in keeping with DMH's complaint regulations;
- Review the use of any form of restraint or other limitations on movement that are allowed under regulation for the facility/program; (See 104 CMR 27.12 for facilities and 104 CMR 28.05 for community programs)

²³⁹ DMH policy 97-2 and DMH Policy 98-7

²⁴⁰ DMH Policy 97-2

²⁴¹ 104 CMR 27.14(2)

²⁴² 104 CMR 28.11(1)

²⁴³ DMH Policy # 03-1, (p.18)

²⁴⁴ 104 CMR 28.11(5)

²⁴⁵ 104 CMR 27.14(4) and 104 CMR 28.11(3).

- Review and monitor the facility/program’s methods of informing clients and staff of clients’ rights and of ensuring that clients have opportunities to exercise their rights to the fullest extent of their interests and capabilities;
- Recommend any improvements to the facility/program that enhance understanding and enforcement of clients’ rights; and
- Visit the facility/program at least annually with or without notice (the latter, when good cause exists).²⁴⁶

6. Multiple site committees allowed

A single HRC may oversee multiple program sites and/or multiple programs in the facility or community, provided that the number, geographic separateness or programmatic diversity of the programs and sites are not so great as to limit the effectiveness of the HRC.²⁴⁷

7. Child/Adolescent state-wide committee

The continuing care units, IRTPs, BIRTs and CIRTs participate in a state-wide child/adolescent human rights committee. Membership includes providers, parents, professionals, advocates and current or past residents from the facilities/programs

²⁴⁶ 104 CMR 27.14(4)(a-e); 104 CMR 28.11(3)(a-e); and DMH Policy #03-1.

²⁴⁷ 104 CMR 28.11(2), 104 CMR 27.14(2)

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