

104 CMR 28.00: LICENSING AND OPERATIONAL STANDARDS FOR COMMUNITY PROGRAMS

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28.01: Legal Authority to Issue and Scope

(1) Legal Authority. 104 CMR 28.00, is promulgated under authority of M.G.L. c. 19, §§ 1, 12, 16, 18 and 19 and M.G.L. c. 123, § 2.

(2) Scope. 104 CMR 28.00 applies to all community mental health programs which are operated, licensed, or contracted for by the Department; provided, however, that programs that are subject to licensure by the Department of Early Education and Care pursuant to M.G.L. c. 28A, are not subject to licensure or regulation under 104 CMR 28.00. A person who receives mental health services from a program subject to 104 CMR 28.00 shall be a client for purposes of 104 CMR 28.00.

SUBPART A: OPERATIONAL AND PROGRAM STANDARDS FOR COMMUNITY PROGRAMS

28.02: Standards to Promote Client Recovery and Resiliency

The Department establishes the following standards to promote recovery and resiliency, and to increase clients' capacity for independent living in the community. Programs shall provide services which promote:

- (1) Human dignity;
- (2) Humane and adequate care, treatment and treatment environments;
- (3) Self-determination and freedom of choice;
- (4) The opportunity to receive services which are, to the maximum extent possible, culturally competent, adequate, responsive to the clients' needs, and least restrictive of the clients' freedom;
- (5) The opportunity to move toward independent living;
- (6) The opportunity for normal life experiences, even if such experiences may entail an element of risk; provided, however, that a client's safety or well-being or that of others shall not be unreasonably jeopardized.

28.03: Legal and Human Rights of Clients

(1) The utmost care shall be taken to protect the legal and human rights of all clients in programs subject to 104 CMR 28.00. These rights shall not be exercised in a manner as to infringe on the rights of other clients and staff. These rights include, but are not limited to, the following:

- (a) The right to be free from unlawful discrimination on the basis of race, creed, national origin, religion, sex, sexual preference, age, physical or mental disability or degree of disability, or such other bases as may be prohibited by law. However, classifications based on age, sex, or category or degree of disability shall not be considered discriminatory if based on written criteria of client selection developed by a program and approved by the Department;
- (b) The right to religious freedom and practice without compulsion according to the preference of the client;
- (c) The right to vote, unless a minor or under guardianship which expressly restricts such right. Clients shall receive reasonable assistance when desired in registering and voting. Such assistance shall be provided in a non-partisan and non-coercive manner;
- (d) The right to communicate, including:
 - 1. The right to have reasonable access to a telephone and to make and receive confidential calls and to assistance, when desired and necessary to implement this right, provided that such calls do not constitute a criminal act or represent an unreasonable infringement of other persons' rights to make and receive telephone calls;
 - 2. The unrestricted right to send and receive uncensored and unopened mail, to be provided with writing materials and postage in reasonable amounts and to reasonable assistance when desired and necessary in writing, addressing and posting letters and other documents;
 - 3. 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;
- (e) The right to be represented by an attorney or advocate of the client's own choice, including the right to meet in a private area at the program with an attorney or advocate;
- (f) The right to be protected from commercial exploitation;
- (g) The right to be visited and visit with others, daily and in private, provided that reasonable restrictions may be placed on the time and place of the visit but only to protect the privacy of other clients or to avoid serious disruptions in the normal functioning of the program. Hours during which visitors may be received shall be sufficiently flexible as to accommodate individual needs and desires of clients and their visitors;
- (h) The right to a humane psychological and physical environment. Where applicable to the program model, clients shall be provided living quarters and accommodations which afford privacy and security in resting, sleeping, dressing, bathing and personal hygiene, reading and writing, and in toileting. 104 CMR 28.03 shall not be interpreted as requiring individual sleeping quarters;
- (i) The right to file complaints and to have complaints responded to in accordance with 104 CMR 32.00;
- (j) The right to informed consent. Informed consent means knowing consent, voluntarily given by a client who has the capacity to weigh the risks and benefits of the particular treatment being proposed. If a client does not have the capacity to provide informed consent, authorization for medical treatment may be obtained from a court of competent jurisdiction or the client's legally authorized representative, with the following exceptions:
 - 1. Extraordinary medical care as it is defined by statute or court decision, including but not limited to treatment with antipsychotic medication and electroconvulsive treatment (ECT), shall only be provided pursuant to a court order or upon the consent of a legally authorized representative who has been granted specific authority to authorize such medical care.
 - 2. If the client 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 shall only be authorized upon recommendation of the treating physician that such care is necessary and appropriate, and provided the client agrees to such care, the client is not a minor or under guardianship, and has been found to lack capacity to make informed decisions about his or her medical care at his or her last service planning review.

28.03: continued

3. Prior to an adjudication of incapacity, and court approval of a treatment plan, if applicable, a client retains the right to accept or refuse treatment as prescribed.

(2) A notice of the client rights as set forth in 104 CMR 28.03(1)(a) through (j) shall be posted in appropriate and conspicuous places to which clients and family members have access in the program, and available to any person upon request. The notice shall be written in language that is easy to understand and, to the extent practicable, shall be translated into the requesting person's preferred language.

28.04: Protection from Mistreatment

(1) No program subject to 104 CMR 28.00 shall mistreat a client or permit the mistreatment of a client by staff subject to its direction. Mistreatment includes any intentional or negligent action or omission which exposes an individual to a serious risk of physical or emotional harm. Mistreatment includes but is not limited to:

- (a) Corporal punishment or any unreasonable use or degree of force or threat of force;
- (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 for the convenience of staff;
- (f) Any act in retaliation against a client for reporting any violation of the provisions of 104 CMR or other provisions of law.

(2) The program director or designee shall investigate or report to the Department allegations of mistreatment in accordance with the requirements of 104 CMR 32.00: *Investigation and Reporting Process*.

- (a) Program staff shall cooperate with Department investigations of incidents or allegations of mistreatment in accordance with 104 CMR 32.00.
- (b) Program staff shall also comply with applicable reporting requirements as required by law including reporting allegations of abuse or neglect to the Disabled Persons Protection Commission in compliance with M.G.L. c. 19C, the Executive Office of Elder Affairs in compliance with M.G.L. c. 19A, or the Department of Children and Families in compliance with M.G.L. c. 119.

(3) The identity of persons making reports under 104 CMR 28.04 shall not be disclosed by the program director or designee or by the Department, except as necessary to investigate the subject matter of the report.

28.05: Physical Restraint

(1) Programs subject to 104 CMR 28.00 shall not employ the use of medication restraint, mechanical restraint or seclusion.

(2) Physical restraint and other limitations of movement may only be utilized in cases of emergency. For purposes of 104 CMR 28.05, physical restraint means the use of bodily physical force to limit an individual's freedom of movement.

- (a) Physical restraint does not include the holding of a client for less than five minutes by a staff person in a firm but gentle manner for the protection of the client or other persons.
- (b) Physical restraint may only include bodily holding of a client with no more force than is necessary to limit the client's movement.
- (c) Physical restraint shall be utilized to the minimum extent and for the minimum duration necessary and then only after less restrictive means of protection have failed.
 - 1. Each program shall maintain appropriate documentation of restraint, including all less restrictive means attempted and the reasons for their failure.
 - 2. If a client requires the repeated or prolonged use of physical restraint, or more than one incident of a firm but gentle hold of less than five minutes duration, within a 24-hour period, the residence or program director shall immediately initiate a review of the client's individualized action plan or treatment plan as applicable to evaluate the need for appropriate clinical interventions.
 - 3. Physical restraint shall be employed to allow the client the greatest possible comfort, and to avoid physical injury and mental distress.

28.05: continued

- (d) An emergency situation justifying the use of physical restraint shall be limited to:
1. Substantial risk of serious self-destructive behavior;
 2. Occurrence of serious self-destructive behavior;
 3. Substantial risk of serious physical assault; or
 4. Occurrence of serious physical assault.

Substantial risk shall be interpreted to include only the serious, imminent threat of bodily harm, where there is the present ability to enact such harm.

(e) Physical restraint shall not be used without the prior written authorization of the program director or a designated physician. Where neither person is available, restraint may be used, provided that the authorization of the program director or the designated physician is obtained as soon as possible, and in no event later than four hours after the initial occurrence. For all programs, the program director may appoint a designee for the purpose of authorization of physical restraint between the hours of 10:00 P.M. and 8:00 A.M.

(f) All use of physical restraint shall be noted in the client's record. This notation shall include:

1. The nature of the restraint;
2. The reason for the restraint;
3. The types of less restrictive alternatives, if any, which were utilized and their effect;
4. The person authorizing the restraint;
5. The time or times the restraint was administered;
6. The duration of the restraint.

(g) No person may write a "PRN" or "as required" authorization of physical restraint.

(3) At the end of any month in which physical restraint was utilized in a program, the program director shall submit a report to the Human Rights Committee on the nature and frequency of physical restraint in the program during that month.

(a) A copy of this report shall be kept on file at the program;

(b) The Human Rights Committee shall review such reports to determine if there has been an inappropriate reliance on the use of restraint, either as to the program as a whole or as to any individual client(s) in the program, and to determine if restraint may be used in a more effective or appropriate manner;

(c) The Human Rights Committee may make recommendations concerning necessary technical assistance or modification of the program to the program director and the appropriate Area Director.

(4) The Human Rights Committee shall review all complaints concerning the threat or use of restraint and, where appropriate, refer complaints for investigation in accordance with the requirements of 104 CMR 32.00: *Investigation and Reporting Process*.

(5) Programs subject to 104 CMR 28.05 shall also comply with the supplementary requirements established by 104 CMR 27.12 concerning definitions applicable to restraint and the requirements concerning authorization, use and documentation of restraint.

28.06: Medication

(1) The following terms as used in 104 CMR 28.06 shall be interpreted as follows:

(a) Non-self Medicating means personally consuming and applying medication in the manner directed by the prescribing practitioner with more than minimal assistance or direction by program staff, in accordance with Department policy and criteria.

(b) Self-medicating or Self-administration of Medication means personally consuming or applying medication in the manner directed by the prescribing practitioner, without or with less than minimal assistance, or direction by program staff, in accordance with Department policy and criteria.

(2) Prescription medication to be administered in a program shall be prescribed by a licensed physician, or a licensed psychiatric nurse clinical specialist, licensed nurse practitioner, or licensed physician assistant acting within the scope of applicable authority.

28.06: continued

(3) Psychotropic Medication shall be prescribed by a psychiatrist, a licensed physician trained or experienced in the use of psychotropic medication, or a licensed psychiatric nurse clinical specialist, licensed nurse practitioner, or licensed physician assistant acting within the scope of applicable authority and trained or experienced in the use of psychotropic medication, who has seen the client and is familiar with the case history or, in an emergency, is at least familiar with the case history.

(a) Each client receiving psychotropic medication shall be seen at clinically appropriate intervals, but no less than every three months, by the practitioner prescribing the medication, who shall note in the client's record, at a minimum, the following:

1. The appropriateness of the current dosage;
2. All medications being taken by the client and the appropriateness of the mixture of medications;
3. Any signs of neurologic side effects including tardive dyskinesia, metabolic syndrome, or other side effects;
4. The reason for the use of the medication;
5. The effectiveness of the medication.

(b) Each client receiving psychotropic medication shall receive a yearly physical examination, with consent. The results of the examination shall be reviewed by the practitioner prescribing psychotropic medication, who shall note his or her observations in the client's medical record.

(4) In the case of persons under the age of 18, psychotropic drugs shall be prescribed by a child psychiatrist, a licensed physician who is experienced with the treatment of emotionally disturbed children, or a licensed psychiatric nurse clinical specialist, licensed nurse practitioner, or licensed physician assistant acting within the scope of applicable authority who is experienced with the treatment of emotionally disturbed children.

(5) Information relating to common risks and side effects of the medication, the procedures to be taken to minimize such risks, and a description of any clinical indications that might require suspension or termination of the drug therapy shall be available to clients and staff in every program. Such information shall also be available to a client's legally authorized representative, if applicable.

(6) Medication shall not be arbitrarily withheld or used as punishment, or in quantities that are excessive in relation to the amount necessary to attain the client's best possible functioning.

(7) Medication shall not be used for the convenience of staff or as a substitute for programming.

(8) Prescription medication shall be administered in accordance with the written prescription of a practitioner and the provisions of M.G.L. c. 94C and 105 CMR 700.003 and, for non-self medicating clients, by licensed professional staff or by other community program staff who have successfully completed the Department-approved medication administration training program and have been certified by the Department for such activities.

(9) Certified program staff of community programs may administer prescription medications to non-self medicating clients, provided that the community program is registered with the Department of Public Health in accordance with 105 CMR 700.004 and meets the following requirements:

(a) No medication shall be administered by unlicensed program staff unless they have successfully completed the training requirements established in 105 CMR 700.003 and 104 CMR 28.06 and have been certified by the Department as having successfully completed such training. The original documentation of completion shall be provided to and maintained by the program.

(b) The training program shall be taught by a registered nurse, nurse practitioner, physician assistant, pharmacist, or physician who meets applicable requirements for a trainer established jointly by the Department of Public Health and the Department. The Department of Public Health and, as appropriate, the Department shall have the authority to monitor the training program for compliance with established standards.

28.06: continued

(c) Certification will be valid for two years and may be renewed upon the person meeting the standards for retraining and/or retesting established by the Department. For anyone who holds a valid certification from the Department of Developmental Services, the Department may certify that person to administer medication without having to undergo the full training program required of all other applicants for certification.

(d) Certification may be withdrawn or rejected if the Department finds, after an informal hearing, any of the following regarding the holder of the certification:

1. has been convicted of a crime involving controlled substances; or
2. furnished or made any misleading or false statement in the application for, or renewal of, certification; or
3. has failed to exercise proper regard for the health, safety and welfare of community program residents; or,
4. is unfit to perform the duties for which the certification was granted.

The hearing is not an adjudicatory proceeding within the meaning of M.G.L. c. 30A and the decision of the Department is final.

(e) The program shall establish, maintain, and operate in accordance with policies that ensure that prescription medication is administered only by properly trained and certified staff.

(f) The program shall maintain a current listing of those staff who have successfully completed the Department-approved training program and who are authorized by the program to administer prescription medications.

(g) The Department of Public Health is permitted by the program to inspect program and clients' records pertaining to the use and administration of medication and is permitted announced or unannounced on-site visits or inspections of common areas and such other inspections as the Department of Public Health is authorized to make in order to monitor the program's compliance with 104 CMR 28.06.

(h) The Division of Food and Drugs within the Department of Public Health shall be promptly notified by the program of any suspected shortages or diversion of prescription medications. The program shall also promptly report to the Department on a form approved jointly by the Department and the Department of Public Health any suspected misuse of prescription medication arising from the administration of medication in a manner inconsistent with the practitioner's prescription or in violation of 104 CMR 28.00 which staff has reason to believe created a risk of harm to the client. Such form shall be provided, upon request, to the Department of Public Health.

(i) The program shall provide or arrange for technical assistance and advice to be provided as needed by a Registered Nurse, Registered Pharmacist or other Licensed Practitioner when questions arise regarding appropriate medication administration practices or the effects of medications. The program shall establish policies and procedures which ensure reasonable access to such assistance and advice.

(10) Storage. In accordance with 105 CMR 700.005, drug security and storage requirements of federal and state laws shall be enforced at all storage locations. The following requirements shall also be followed:

(a) Medications shall be stored under proper conditions of sanitation, temperature, light, moisture, ventilation, segregation and security.

(b) Medications for all clients who are not self medicating, shall be labeled and stored in a locked container or area, in which nothing except such medications are stored. Medications required to be refrigerated must be stored in a locked container within the refrigerator. The program shall have a written policy describing the persons and the conditions under which persons may have access to such container or area and restrictions for access to the locked container.

(c) Medications for clients who are self-medicating shall be stored in such a way as to make them inaccessible to all other clients. Such medications shall be stored in a locked container or area in which nothing except such medications are stored, unless the head of the program makes a determination that unlocked storage of the medication poses no threat to the health or safety of the client taking the medication or other clients, provided, however, that all narcotics, tranquilizers and barbiturates shall be stored in a locked container or area.

28.06: continued

- (d) Outdated medications, medications which have not been administered due to a change in the prescription or a stop order, and medications with worn, illegible or missing labels shall be disposed of and the disposal shall be documented in accordance with policies established by the program, provided, that prescription medications are disposed of through incineration or other acceptable means in the presence of at least two witnesses and in accordance with any directives of the Department of Public Health.
- (e) Prescription pads may be kept only at psychiatric day treatment programs and partial hospitalization programs, and shall be stored in a locked area or container with access only by the prescriber or other authorized person.
- (f) Medications or ointments used externally shall be stored separately from medications taken internally.
- (11) Packaging and Labeling. All medications shall be properly packaged and labeled in accordance with M.G.L. c. 94C, § 21 and the following requirements:
- (a) Program staff shall not repack or relabel prescription medications which are taken or applied at any location or program regularly or frequently attended by the client. All such medications shall be packed and labeled by a pharmacist or, in the case of medication dispensed for immediate treatment, by the dispensing practitioner.
- (b) Where prescription medication is taken or applied by a client at two or more locations on a regular or frequent basis, the medication shall be stored in a separate, properly packaged and labeled medication container at each location. In circumstances where this is not practical or feasible, the Department shall establish an alternative procedure approved by the Department of Public Health.
- (c) The program shall have policies for obtaining a properly labeled container where there is a change in prescription or where the client frequently or regularly receives medication at two or more locations.
- (12) Administration. All prescription medications shall be administered in accordance with M.G.L. c. 94C, applicable Department regulations, and the following requirements:
- (a) All prescription medications shall be administered in accordance with the written prescription of a practitioner.
- (b) Prescribed medications shall only be administered to or taken by the individual for whom the prescription has been written.
- (c) The program shall have a policy which specifies the administrative procedures to be followed, the staff persons to be notified, the person(s) responsible for decision-making and the physician, clinic, emergency room or comparable medical back-up to be contacted when there is a medical emergency. Such policy shall include provisions for an up-to-date list of names and telephone numbers of staff persons and medical personnel to be contacted in an emergency. This information must be readily available to staff, and must clearly indicate who is to be contacted on a 24-hour-a-day, seven-days-a-week basis. The medical personnel to be contacted shall include the prescribing practitioner or, if unavailable, another licensed practitioner or appropriate emergency room personnel.
- (d) Certified staff of programs registered with the Department of Public Health may only administer prescription medications which are oral, topical, ophthalmic, otic, intranasal, suppository or products which are administered by inhalation.
- (e) Parenteral drugs generally intended for self-administration or drugs administered by gastric tube may be administered by staff who have successfully completed a specialized training program in such technique taught by a physician, physician assistant, pharmacist, registered nurse, or nurse practitioner and approved by the Department and the Department of Public Health. Such technique shall be used only with the written authorization and in accordance with the written instructions of the prescribing practitioner.
- (f) Whenever possible, a prescription for medication shall be limited to a 30 day supply and one refill.
- (g) For all clients who are non-self-medicating, and who receive prescription medication at a location other than the program site where staff are certified to administer medication (off-site), the program shall, whenever possible, identify an individual responsible for administering the medication and make available to that person instructions as to how the medication is to be administered.

28.06: continued

- (h) An over-the-counter drug may be consumed or applied by a non-self medicating client who is already receiving prescription medication only:
 1. with the prior approval of a physician; or
 2. after consultation with a pharmacist or registered nurse; or
 3. in accordance with applicable guidelines established by the Department with the approval of the Department of Public Health.
- (i) Programs shall permit and encourage self-medication by individuals capable of self-medication, provided that:
 1. the risks of misuse or abuse to the individual and other persons within the program are minimal; and
 2. the program provides the individual with adequate training assistance and supervision.
- (j) All clients who are non-self-medicating shall receive training to obtain or enhance self-medication skills.
- (k) Medication may not be administered PRN for restraint purposes, but may be administered PRN for treatment purposes. For individuals who are prescribed medication PRN for treatment, the program shall obtain from the prescribing practitioner a statement of specific criteria, in the form of observable symptoms, for determining when medication is needed.

(13) Documentation and Communication. All prescriptions for, and administration of medication shall be documented in accordance with 105 CMR 700.003 and the following requirements:

- (a) All prescriptions for medication shall be noted in the client's record on medication and treatment forms developed by the Department and approved by the Department of Public Health. The forms shall specify for each client, the type and dosage of medication, the condition for which the medication is prescribed, when and how the medication is to be administered, instructions for self-medication if applicable, any contraindications or possible allergic reactions, common risks and side effects and appropriate staff responses and special instructions including steps to be taken if a dose is missed.
- (b) The program shall establish appropriate policies and procedures to address how program staff shall obtain relevant prescription information in accordance with the requirements of 104 CMR 28.06(13)(a). In addition such policies and procedures shall ensure that telephone medication orders and/or medication changes are received from licensed practitioners and properly documented in the client's record.
- (c) The program shall ensure that staff have ready access to the information specified in 104 CMR 28.06(13)(a) by maintaining on site an appropriate reference approved by the Department of Public Health or, for each drug administered, a copy of the pertinent section of such reference or a medication-specific drug information sheet which states in plain language generally why the drug is used, when it is to be administered, how it should be administered, any special instructions or precautions, proper storage conditions, possible side effects and what is to be done if a dose is missed.
- (d) To ensure proper communication among all programs providing services to the same client, a program that is responsible for a non-self medicating client's medication shall ensure that all other service providers are appropriately informed of any prescription or non-prescription medications which the client is taking on a regular basis, and are provided with a copy of the approved medication and treatment forms meeting the requirements of 104 CMR 28.06(13)(a) for each medication which the client receives.
- (e) The program shall ensure that the appropriate consent or court order for medication is documented in the client's record in accordance with 104 CMR 28.03(1)(j).
- (f) The administration of medication for non self-medicating clients, including practitioner ordered over-the-counter drugs, shall be documented in the client's record as follows:
 1. The time that the medication is administered to the client.
 2. Any off-site administration of medication which would normally be administered at the program site.
 3. Any inconsistencies from the physician's prescription regardless of whether such inconsistencies resulted in harm or a risk of harm.

Clients who are self-medicating shall not be required to document their own self-administration of medication.

28.06: continued

- (g) Any change in medications or dosage levels of a medication shall be treated as a new medication order for the purposes of documentation.
- (h) The program shall establish procedures to document the date that a client's prescription is filled and the quantity of medication dispensed by the pharmacy.
- (i) Except for persons who are self-medicating, the program shall maintain a documented accounting of the quantities of narcotics, tranquilizers, and barbiturates stored by the program, which shall be updated at the end of each shift unless otherwise approved by the Department of Public Health.
- (j) Whenever a non-self-medicating client is taking an over-the-counter medication in addition to a prescription medication or another over the counter medication, the consultation with the appropriate practitioner required under 104 CMR 28.06(12)(h) shall be documented in the client's record.

28.07: Labor

- (1) No client shall be required to perform labor which involves the essential operation and maintenance of the program or the regular care, treatment or supervision of other clients; provided, however, that:
 - (a) client who resides at a program site may be required to perform labor involving normal housekeeping and home maintenance functions;
 - (b) Clients may perform labor in accordance with a planned and supervised program of vocational and rehabilitation training as set forth in the client's individual service plan or individualized action plan.
- (2) The requirements of federal and state laws relating to wages, hours of work, worker's compensation and other labor standards shall be met to the extent that such laws apply to such required and voluntary labor.

28.08: Possessions

- (1) No program subject to 104 CMR 28.00 shall interfere with the right of a 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; or
 - (b) in accordance with the provisions of 104 CMR 30.03 or 30.07; or
 - (c) the client possesses contraband or any item prohibited by law; or
 - (d) ordered by a court of competent jurisdiction; or
 - (e) possession of such property poses an imminent threat of serious physical harm to the client or others. If the program takes possession of the property on the grounds of imminent and serious physical harm, the program shall issue a receipt to the client and place the object in safekeeping.
- (2) Any restriction on the possession of personally-owned property shall be documented in the client's record, and reviewed and monitored by the human rights officer and Human Rights Committee.
- (3) Clients have the right to be free from unreasonable searches of their person or property.
- (4) Each program subject to 104 CMR 28.00 shall develop a written policy, consistent with applicable law and the requirements of 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 shall, at a minimum, require that, in all except emergency circumstances, clients:
 - (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, in order to avoid imminent risk of harm, and the client is not present during the search, the nature of the emergency and the reasons the client is not present should be documented in the record.

28.09: Records and Record Privacy

- (1) A program shall maintain an individual record of services provided to each client who receives services from the program. Such record shall contain accurate, complete, timely, and relevant information, and shall be sufficiently detailed to enable a person to identify the types of services the client receives.
 - (a) Records shall be maintained in a consistent format that facilitates information retrieval. Records may be handwritten, printed, typed or in electronic digital format, or any combination thereof.
 - (b) A program shall employ reasonable physical, technical and administrative safeguards to ensure the confidentiality, integrity and availability of records, and shall comply with all applicable federal and state laws and regulations.
 - (c) A client who is the subject of a record, or the client's legally authorized representative, who believes that the record contains inaccurate or misleading information, may request that it be amended.

- (2) Records of a client who is currently receiving or has received services from a program shall be private and not open to inspection except as provided in 104 CMR 28.09.

- (3) Inspection by Client, Legally Authorized Representative or Client's Attorney.
 - (a) A client and the client's legally authorized representative shall be permitted to inspect the client's records unless the Commissioner or designee, being a licensed health care professional, determines that:
 1. inspection by the client is reasonably likely to endanger the life or physical safety of the individual or another person;
 2. the record makes reference to another person (other than a health care provider) and its inspection is reasonably likely to cause substantial harm to such other person; or
 3. inspection by the legally authorized representative is reasonably likely to cause substantial harm to the client or another person.
 - (b) If access to a record is denied based on the criteria in 104 CMR 28.09(3)(a), the client or legally authorized representative may appeal such denial, and shall be informed of the right to appeal. The determination on appeal must be made by a licensed health care professional, other than the person who made the initial decision to deny access, and such determination shall be final.
 - (c) The client's attorney shall be permitted to inspect the record upon request. The Commissioner or designee may require that the request be in writing and may further require appropriate verification of the attorney-client relationship.
 - (d) Staff may offer to read or interpret the record when necessary for the understanding of the client or his or her legally authorized representative. However, in no circumstance may an individual be denied access to a record solely because he or she declines the offer of staff to read or interpret the record.
 - (e) The records of emergency medical or dental treatment of a client under 18 years of age who consented to such care in accordance with M.G.L. c. 112, § 12F shall be confidential between the minor and physician or dentist and shall not be released except upon the written authorization of the client under 18 years of age or a proper judicial order.

- (4) Inspection by Other Persons.
 - (a) Records of a client shall be open to inspection upon proper judicial order, whether or not such order is made in connection with pending judicial proceedings.
 1. For the purpose of 104 CMR 28.09, "proper judicial order" shall mean an order signed by a justice or special justice of a court of competent jurisdiction, or a clerk or assistant clerk of such court acting upon instruction of such a justice. A subpoena shall not be deemed a "proper judicial order."
 2. Whenever practicable, a client and the client's legally authorized representative shall be informed of a court order for the production of the client's record.
 - (b) Records or parts thereof shall be open to inspection by other third parties, upon receipt of written authorization from the client or the client's legally authorized representative, provided that such written authorization shall meet the requirements set forth in 45 CFR 164.508.
 - (c) The Commissioner or designee may permit inspection or disclosure of the records of a client where he or she has made a determination that:

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1. such inspection or disclosure would be in the best interest of the client; and
2. such disclosure is permitted by the privacy regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA) at 45 CFR Parts 160 and 164.

Prior to authorizing any release of records pursuant to 104 CMR 28.09(4)(c) or (d), the Commissioner or designee must make a determination that it is not possible or practicable to obtain the written authorization of the client, if he or she has capacity, or the client's legally authorized representative.

(d) Without limiting the discretionary authority of the Commissioner or designee to identify other situations where inspection or disclosure is in the client's best interest, if it is not possible or practicable to obtain the informed written authorization of the client, if he or she has capacity, or the client's legally authorized representative, such inspection or disclosure may be made in the client's best interest in the following cases:

1. to a physician or other health care provider who requires such records in the treatment of a medical or psychiatric emergency; provided however that the individual is given notice of such access as soon as possible;
2. to a medical or psychiatric facility currently caring for the client, where the disclosure is necessary for the safe and appropriate treatment and discharge of the client;
3. where the client has provided consent for a particular treatment or service, to those persons involved in such treatment or service;
4. between the Department and a contracted vendor regarding clients being served by the vendor for purposes related to services provided under the contract;
5. to enable the client or someone acting on his or her behalf, to obtain benefits, protective services, or third party payment for services rendered to such individual;
6. to persons conducting an investigation involving the individual pursuant to 104 CMR 32.00: *Investigation and Reporting Process*;
7. to persons authorized by the Department to monitor the quality of services being offered to the individual;
8. to persons engaged in research if such access is approved by the Department pursuant to 104 CMR 31.00: *Research Authorization and Monitoring*;
9. to The Joint Commission or other accrediting bodies;
10. reports of communicable and other infectious disease to the Department of Public Health and/or local board of health consistent with 105 CMR 300.000 *et seq.*;
11. in the case of death, to coroners, medical examiners, or funeral directors.

(e) Records may be disclosed as required by law. In addition to the laws and regulations of the Department, such laws include, but are not limited to:

1. M.G.L. c. 6, §§ 178C through 178Q (the Sex Offender Registry Law);
2. M.G.L. c. 19A, § 23 (Executive Office of Elder Affairs - abuse of elderly persons, 60 years of age or older);
3. M.G.L. c. 19C, § 10 (Disabled Persons Protection Commission – abuse of disabled persons 18 years of age through 59 years of age);
4. M.G.L. c. 119, § 51A (Department of Children and Families – abuse or neglect of children younger than 18 years of age);
5. 42 U.S.C. 10806 (Protection and Advocacy for Mentally Ill Individuals);
6. M.G.L. c. 221, § 34E (Mental Health Legal Advisors Committee).

(f) Pursuant to M.G.L. c. 6A, § 16, the Department must offset the costs of the services which it provides directly or through contract by maximizing all Title XIX and other federal, state, and private health insurance reimbursement which might be available for such services.

Accordingly, records may be disclosed by the Department and/or its agents for the purpose of:

1. benefits/insurance coverage/availability inquiries;
2. for obtaining third party reimbursement;
3. for appeals of reimbursement denials; and
4. for charging fee payers as set forth in 104 CMR 31.04.

(g) Any disclosure under the exceptions enumerated in 104 CMR 28.09(4)(c) through (f) shall be limited to the minimum information necessary to achieve the purpose of the exception.

(5) Notwithstanding the provisions of 104 CMR 28.09(3) and (4), inspection or disclosure of records or information shall not be permitted in the following circumstances:

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- (a) if the record or information was obtained from someone other than a health care provider on a promise of confidentiality, and the requested disclosure would likely reveal the source;
- (b) on a temporary basis only, during the course of research involving treatment, where the subject of the research agreed to such temporary suspension of access when consenting to participation in the research study;
- (c) if the subject of the record is in the custody of a correctional institution and the correctional institution has requested that access not be provided for health and safety reasons;
- (d) if the records are restricted under the Federal Clinical Laboratory Improvement Amendments;
- (e) if the records are created in anticipation of litigation.

28.10: Legal Capacity, Guardianship and Conservatorship

- (1) No person shall be deemed to be incapacitated to manage his or her affairs, to contract, to hold a professional, occupational or vehicle operator's license, to make a will, to vote or to exercise any other civil or legal right solely by reason of admission to a program.
- (2) All clients who are 18 years of age or older shall be presumed to have the legal capacity to conduct their personal and financial affairs, unless otherwise determined by a court of competent jurisdiction.
- (3) In any assessment of capacity, an individual's need for a guardian, conservator, or for other protective services, shall be based on the following considerations:
 - (a) Generally, an individual shall be determined to be in need of guardianship, conservatorship, or other protective services only if the individual's capacity to make reasonable decisions concerning his or her life, property, or both is so limited that the absence of an individual with legal authority to make such decisions for him or her creates a serious risk to the individual's health, welfare or safety. The fact that an individual may even routinely make what others consider to be bad decisions is not a proper basis for recommending guardianship, conservatorship or protective services; only if the individual is not capable of making important decisions such that his or her health, welfare, or safety will be adversely impacted should a guardianship, conservatorship or protective services recommendation be made;
 - (b) Although the capacity of the individual to make important decisions is the central benchmark for determining the individual's need for guardianship, conservatorship or other protective services, the capabilities of the individual's family and other persons with whom the individual is associated, particular strengths and weaknesses in the individual's living circumstances, and the availability and utility of non-judicial alternatives to guardianships such as trusts, representative payees, citizen advocacy programs, or community support services should also be considered and may increase or lessen the degree of the individual's need;
 - (c) The assessment should identify the specific areas of the individual's functioning which are the basis of the recommendation relative to the need for a guardian, conservator or other protective services, such as inability to respond appropriately to health problems or consent to medical care, or inability to handle savings or routine expenses.
- (4) If at any time a client is determined to lack capacity to make informed decisions with regard to his or her health, welfare, or property and if non-judicial less restrictive alternatives such as trusts, representative payees, co-signatory bank accounts and citizen advocates are inadequate, the client's nearest living relatives shall be notified, if appropriate, and the program shall assist in the appointment of a conservator or guardian, as appropriate.
- (5) If at any time a client is determined to have regained the capacity to make informed decisions with regard to his or her health, welfare, or property, the program shall assist in the removal of the client's trustee, representative payee, advocate, conservator or guardian, as applicable.

28.10: continued

(6) The program shall implement procedures to ensure that suspected improprieties of a guardian, conservator, trustee, representative payee or other fiduciary are reported to the Department and other appropriate authorities.

28.11: Human Rights Committee; Human Rights Officer

(1) The program director of a program subject to 104 CMR 28.00 shall establish, appoint and empower a Human Rights Committee in accordance with the provisions of 104 CMR 28.11 and subject to the approval of the Department.

(2) A Human Rights Committee may be established jointly by more than one program director; provided, however, that the total number of clients served, or the number, geographical separateness, or programmatic diversity of the programs is not so great as to limit the effectiveness of the Committee in meeting the requirements of 104 CMR 28.11.

(3) The general responsibility of the Committee shall be to monitor the activities of the program with regard to the human rights of clients served by the program. The specific duties of the Committee shall include:

(a) Reviewing and making inquiry into complaints and allegations of client mistreatment, harm or violation of a client's rights and referral of such complaints for investigation in accordance with the requirements of 104 CMR 32.00: *Investigation and Reporting Process*.

(b) Reviewing and monitoring the use of physical restraint and other limitations on movement in accordance with 104 CMR 28.05.

(c) Reviewing and monitoring the methods utilized by the program to inform clients and staff of the clients' rights, to train clients served by the program in the exercise of their rights, and to provide clients with opportunities to exercise their rights to the fullest extent of their capabilities and interests.

(d) Making recommendations to the program and to the Department to improve the degree to which the human rights of clients served by the program are understood and enforced.

(e) Visiting the program, including all staffed residential sites as defined in 104 CMR 28.13, at least once per year, with prior notice, or without notice, provided good cause exists.

(4) Each Human Rights Committee shall be composed of a minimum of five members, a majority of whom shall be consumers of mental health services, family members of consumers, or advocates; provided, however, that no member shall have any direct or indirect financial or administrative interest in the program or in the Department.

(5) The Human Rights Committee shall meet as often as necessary upon call of the Chairperson, or upon request of any two members, but no less often than quarterly. Minutes of all Committee meetings shall be maintained and provided to the Department upon request. The Committee shall develop operating rules and procedures, as necessary.

(6) The Human Rights Committee may delegate its duties to one or more subcommittee(s) comprised of members of the Committee; provided, however, that any recommendation for action by such subcommittee(s) must be ratified by the Human Rights Committee.

(7) The program director of a program subject to 104 CMR 28.00 shall designate and empower a person or persons employed by or affiliated with the program to serve as Human Rights Officers, taking into consideration the number of clients served, or the number, geographical separateness, or diversity of the program sites. The number of Human Rights Officers so designated shall be sufficient to ensure that clients have timely access to a Human Rights Officer. Each Human Rights Officer must, as a formal component of his or her job description for the program:

(a) Participate in training programs for Human Rights Officers, including training provided by the Department;

(b) Serve as staff to the program's Human Rights Committee;

(c) Under the general direction of the Human Rights Committee and with the technical assistance of the Department, inform, train and assist clients served by the program in the exercise of their rights, including providing clients with a copy of, or access to, 104 CMR 28.00;

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- (d) Assist clients in obtaining legal information, advice and representation through appropriate means, including referral to independent attorneys or legal advocates;
- (e) Provide information to program staff regarding clients' rights.

28.12: Standards Applicable to All Programs

(1) Written Policies and Procedures. Each program subject to 104 CMR 28.00 shall have and implement written policies and procedures which are consistent with the requirements of 104 CMR 28.00 and which address:

- (a) Program philosophy and objectives;
- (b) Admission, intake and discharge, including criteria for admission into and discharge from the program;
- (c) Maintenance of client records, consistent with the provisions of 104 CMR 28.09 as well as all other applicable state and federal laws and regulatory requirements;
- (d) Development, implementation and review of individualized action plans, or treatment plans as appropriate;
- (e) Quality and utilization management;
- (f) Medication, for those programs prescribing or administering medications, consistent with 104 CMR 28.06;
- (g) Protection of client rights;
- (h) Searches of client property, consistent with 104 CMR 28.08;
- (i) Use of physical restraints, consistent with 104 CMR 28.05;
- (j) Billing third party payers and clients, cancellation procedures, fee reductions, and abandoned property consistent with 104 CMR 30.00: *Fiscal Administration* and any agreements with the Department;
- (k) Personnel, including job descriptions and minimal staff qualifications, staff supervision, and training;
- (l) Fire safety and other emergencies and disasters, including at least:
 1. Procedures for evacuating clients and staff;
 2. Provision for first aid, through the availability of first-aid supplies, and appropriate staff training;
 3. Provision for notification of fire, police, and hospital facilities for assistance;
 4. Training for clients and staff in emergency procedures and regular fire drill procedures;
 5. Ensuring the provision of transportation, when necessary;
 6. The identification of an alternate site for relocation, when necessary; and
 7. Notification and coordination with the Department and other state or federal agencies as applicable.
- (m) Implementation of appropriate protocols for when a client is missing.

(2) Staffing, Supervision and Consultation.

- (a) Program Director. The program director shall be responsible for the direction and control of all staff and services of the program. The program director shall possess sufficient training, education, and professional experience.
- (b) The program shall have adequate staffing and staff shall have relevant work, personal and educational qualifications to enable the program to satisfy the requirements of 104 CMR 28.00.
- (c) Staff shall receive an orientation to policies and procedures.
- (d) All staff, including volunteers shall receive on-going training as appropriate to their responsibilities, including training on clients' rights.
- (e) Staffing patterns must be appropriate to meet the linguistic and cultural needs of program clients.
- (f) Staff positions and qualifications shall be documented in writing through:
 1. An organization outline detailing the working relationships and responsibilities of staff.
 2. Documentation of individual staff training, education and experience.
 3. Individual job descriptions.
 4. Individual work schedules.

28.12: continued

- (g) The program shall provide regular supervision and/or consultation for all staff as appropriate to their responsibilities.
 - 1. The program shall provide adequate supervision of staff and shall maintain records concerning supervised staff.
 - 2. The supervisor shall have adequate training, knowledge and experience to supervise any service performed by the supervised staff member.

- (3) Location and Physical Plant.
 - (a) Programs shall be located in areas and among other buildings which are appropriate to the services provided, the general design of which does not emphasize the program's separateness or differences from the surrounding community in such a way as to stigmatize or devalue clients.
 - (b) Programs shall comply with applicable state and federal laws including physical accessibility for individuals with disabilities.
 - (c) Buildings shall meet all applicable fire, health, building, and safety codes.
 - (d) Requirements for fire drills.
 - 1. The program shall conduct fire drills at least quarterly and shall maintain written records of such fire drills.
 - 2. Programs that operate after 6:00 P.M. shall conduct at least two fire drills at night annually.
 - 3. The program shall maintain sufficient staff to ensure safe egress of all clients within 2½ minutes.
 - 4. The requirements of 104 CMR 28.12(3)(d) shall not apply to a residential site for up to four persons in which all of the residents are capable of self-preservation as provided in 104 CMR 28.14(4)(a).
 - (e) As appropriate, a program shall provide adequate space for administration needs, privacy in evaluation, and treatment. For programs that serve distinct client groups, *e.g.*, children, separate space shall be provided for use by the distinct groups, consistent with their program needs.

- (4) Notification of Legal Proceedings. Every program shall report in writing to the Commissioner any legal proceeding, within ten days of initiation of such proceeding, brought against the program or any person employed by the program, if such proceeding arises out of circumstances related to the care, treatment, training, supervision or, if applicable, living environment, of clients utilizing a licensed site.

- (5) Emergency Procedures. Each program shall:
 - (a) Have the capacity to access staff as appropriate to provide or arrange crisis intervention and stabilization support to meet the individual needs of clients.
 - (b) Have a written plan for providing or arranging emergency services during all hours of the program's operation.
 - (c) Be responsible for providing or arranging transportation in an emergency situation.
 - (d) Maintain an emergency fact sheet(s) for each client which shall be readily available to staff and held in more than one location. The emergency fact sheet shall include, to the extent available:
 - 1. Name (and nicknames, if any);
 - 2. Age;
 - 3. General physical characteristics, including sex, weight, height, build, hair and eye color;
 - 4. A recent photograph;
 - 5. General nature of abilities and physical disabilities;
 - 6. Strengths and limitations;
 - 7. Location of client's crisis plan, if any;
 - 8. Special medical problems, including allergies and the names and doses of medications used;
 - 9. Preferred language, and contact information for an interpreter, if available;
 - 10. Pattern of movement, if missing previously;
 - 11. Current addresses of family members, previous residence, place of employment, school, or day programs, and places frequented; and
 - 12. Name, telephone, and address of client's treating physician.

SUBPART B: LICENSING REQUIREMENTS

28.13: Licensing: General Provisions

- (1) Programs Subject to Licensure. A program is required to obtain a license or licenses as follows:
- (a) Residential Site License. A site license is required for each residential site a program operates. A residential site is a site at which one or more clients reside, or are provided with sleeping accommodations, and in which the program has a direct or indirect ownership interest, or which the program leases or co-leases. If a program is a guarantor of a client's residential lease, the program is not required to obtain a residential site license for the leased property; provided, however, the program director shall provide the Area Director or designee with a letter attesting that the leased property meets applicable health, safety and fire codes. The Department may require a site inspection, providing good cause exists, to assess the general condition of the residence or unit.
 - (b) Program License. A program license is required for any program not operated or contracted for by the Department which operates a residential site and is organized primarily to provide treatment, rehabilitation, support and supervision for mentally ill persons.
- (2) General Requirements for Licensure.
- (a) To receive a residential site license, a program must be in compliance with the provisions of 104 CMR 28.13 and 28.14 (Subpart B).
 - (b) To receive a program license, a program must be in compliance with the provisions of Subpart A.
 - (c) Compliance with the provisions of 104 CMR 28.02 through 28.12 (Subpart A) by programs operated or contracted for by the Department is not subject to licensing, but to supervision or contract monitoring by the Area Director or designee.
- (3) Operation of Unlicensed Programs. When the Department has reason to believe that a program is operating without all required licenses being valid and current, and the program has failed to apply for a license within ten days after notice by the Department, the Department may:
- (a) Notify the District Attorney with jurisdiction over the program that the program appears to be operating in violation of M.G.L. c. 19, § 19;
 - (b) Petition the Superior Court with jurisdiction over the program to restrain its operation or to take such other actions as may be necessary in the interest of the clients utilizing the program;
 - (c) Undertake to provide alternative placements with the most adequate and appropriate alternative service arrangement available for clients as needed.
- (4) Reports and Notices. For programs that are licensed by the Department, but which are not contracted for or operated by the Department, reports or notices to the Area Director or the Department under 104 CMR 28.00 shall be submitted to the Department's Office of Community Licensing.
- (5) Duration of License. Licenses issued under 104 CMR 28.13 shall be valid for a term of two years and may be renewed for like terms, subject to revocation for cause.
- (6) Provisional License. A provisional license shall be used for a residential site or program subject to licensure under 104 CMR 28.00 which is not currently in operation or for which compliance cannot fully be determined without an evaluation of the site or program in operation. After the granting of a provisional license the Department shall conduct a timely evaluation to determine what action regarding licensure should be taken.
- (7) Application Process for License or Renewal.
- (a) Any program seeking to obtain a license specified in 104 CMR 28.00 Subpart B shall file an application in writing with the Department in a manner and on a form prescribed by the Department. Any program seeking to renew a license shall file an application for such renewal in writing with the Department, in a manner and on a form prescribed by the Department, not less than 90 days prior to the date of expiration of its current license. It shall be the responsibility of the Department to act upon an application within the 90-day period. Failure to do so shall not invalidate a previously existing license.
 - (b) A program shall maintain the following documentation which shall be made available to the Department upon request:

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1. For business corporations, a copy of an Administration and Finance Form 4-A which can be obtained from a Department Area Office, together with any special or periodic reports submitted in amendment or supplementation to the annual report. In addition, for corporations incorporated within the previous year, a copy of the Articles of Incorporation and by-laws.
2. For non-profit corporations, a certified copy of the last annual report filed with the Secretary of State pursuant to M.G.L. c. 180, § 26A, together with any special or periodic reports submitted in amendment or supplementation to the annual report, and a certified copy of the last annual report filed with the Office of the Attorney General pursuant to M.G.L. c. 12, § 8F; or for non-profit corporations incorporated within the previous year, a copy of the Articles of Incorporation and by-laws.
3. A list of the names of all persons with any financial interest in the program including, but not limited to, persons with ownership interests in the building or buildings used by the program, paid or unpaid directors, shareholders, partners, loan creditor mortgagees, salaried employees and consultants. The financial interest statement shall be updated as necessary to accommodate changes.
4. On forms provided by the Department and subject to audit or inspection by the Department, financial or other information to determine the qualifications of the program for licensure.

(c) The Department may visit the site or program for which license application is made and shall determine the compliance of the program with the requirements of 104 CMR 28.00 and any other applicable Department regulations.

(8) Departmental Action on License Application. Upon receipt and review of all required documentation to the satisfaction of the Department, and after any site visit and review pursuant to 104 CMR 28.13(6) and (7), the Department may take one of the following actions:

- (a) Issue the license if no deficiencies are outstanding;
- (b) Issue the license, subject to demonstrated progress by the program applicant in implementing a plan of correction approved by the Department;
- (c) Deny the license until such time as deficiencies are corrected;
- (d) Issue the license provisionally, subject to such conditions as the Department deems necessary.

(9) Visits by the Department. Any employee of the Department, including a consultant providing services for the Department, authorized by the Commissioner, may visit and inspect any program subject to 104 CMR 28.13 to determine whether such program is being operated in compliance with law, including the regulations of the Department.

(10) Departmental Inspection. The Department shall inspect each licensed residential site or program at least annually and more frequently if deemed necessary.

- (a) Inspections should ordinarily be made with prior notice and at reasonable times, giving due regard to the privacy of the clients and the interruption that inspection may cause. However, the Department shall have the right to inspect any site at any time without prior notice providing good cause exists.
- (b) Generally, inspections will be conducted under the supervision of the Commissioner or designee, who may designate such persons as he or she deems necessary to accomplish the purposes of the inspection; provided, however, that:
 1. The Department may exercise reasonable discretion in limiting the number of participants in any inspection;
 2. Confidential information concerning clients shall not be disclosed except in accordance with the confidentiality requirements of 104 CMR 28.09.
- (c) Refusal to permit an inspection in accordance with 104 CMR 28.13 shall be grounds for suspension, termination, or revocation of a license.
- (d) The personal belongings, clothing and storage spaces of clients, such as, but not limited to, closets, dressers and trunks, shall not be subject to inspection by the Department without the consent of the client.
- (e) The scope of the Department's inspections shall include any aspect of the operation of the residential site or program, and may include, but is not limited to confidential interviews with clients and staff, and examination and review of all records.

28.13: continued

- (f) The Department shall provide a copy of the inspection report to the program director.
- (g) The contents of a Department inspection report are subject to the Massachusetts Public Records law, including all exemptions to disclosure.

(11) Waiver of Requirements.

- (a) The requirements of 104 CMR 28.00 shall be strictly enforced and shall be waived by the Department only in accordance with the provisions of 104 CMR 28.13(11).
- (b) No waiver shall be granted by the Department without a petition by the program and a determination by the Department that:
 - 1. The health, safety or welfare of either clients or staff of the program shall not be adversely affected by granting the waiver;
 - 2. In petitioning for the waiver, the program has stated a substitute provision or alternative standard which is deemed by the Department to result in comparable services to the clients and to which the program agrees to be held accountable to the same degree and manner as any applicable provision of 104 CMR 28.00.
- (c) Waivers shall be granted for the duration of a license period and may be renewed.
- (d) The granting of a waiver for any single program or license period, shall not guarantee the granting of a waiver for any other program or license period.

(12) Deficiency Identification and Correction.

- (a) Whenever the Department finds upon inspection or through information that a program is not in compliance with any applicable law or regulation, other than in accordance with a waiver approved by the Department, the Department shall order the correction of the deficiency or the suspension or termination of the license.
- (b) Every such correction order shall be in writing and shall include a statement of the deficiencies found, the period within which the deficiency must be corrected, and the provision of law and regulation relied upon.
- (c) Within seven days of receipt of the correction order, the program may file a written request with the Department for administrative reconsideration of the findings or any portion thereof, which shall be granted forthwith.
- (d) If the program director fails to correct any deficiency within the period prescribed for correction, the Department shall enforce its correction order under 104 CMR 28.13 or in accordance with M.G.L. c. 19.

(13) Suspension, Revocation and Refusal to Issue or Renew Licenses. After a hearing conducted pursuant to M.G.L. c. 30A, the Department may revoke, suspend, limit, refuse to issue or refuse to renew a license if it finds any of the following:

- (a) The program failed to comply with any applicable regulation or any applicable deficiency correction order;
- (b) The program refused to admit at any time any person authorized by the Commissioner to inspect the program in accordance with 104 CMR 28.13;
- (c) The program refused to submit any report or to make available any records required under 104 CMR 28.00 or other Department regulations;
- (d) The program made misleading or false statements or failed to furnish information or reports required under 104 CMR 28.00 or other Department regulations.
- (e) Staff or persons subject to the direction of a program subjected a client to mistreatment as outlined in 104 CMR 28.04(1).

(14) Suspension in Emergencies.

- (a) The Department may refuse to issue or renew or may suspend any license without a hearing if the failure of the program to comply with any applicable regulations appears to have resulted in an emergency situation which endangers the life, health or safety of clients or staff.
- (b) Immediately upon such refusal or suspension, the program shall notify the affected clients and their families, when appropriate, and clients' legally authorized representatives, and shall immediately provide or arrange for the most adequate and appropriate alternative service arrangements available for such clients, or take such other action as may be directed by the Department, including but not limited to placing Department employees within the program, as the Department deems necessary to protect the clients.

28.13: continued

(c) The Department shall hold a conference with the program and, if it has not done so before, provide a written statement as to its reasons for its action within three days of suspension or refusal to issue or renew a license.

(d) Upon written request of an aggrieved party to the Commissioner, a hearing shall be held within a reasonable amount of time after the license is refused or suspended, in accordance with the requirements of M.G.L. c. 30A.

(15) Change of Name, Ownership, Location or Services.

(a) Licenses shall not be transferable from one licensee to another individual or agency, or from one location to another.

(b) The program shall provide prior notification in writing to the Department of any change in ownership or of any change in the financial interests of persons associated with the program or with a residential site.

(c) The program shall notify the Department in writing of any change in the directorship of the program.

(d) The program shall notify the Department in writing of any changes in the physical plant of the program or of any other changes in the program which place the program out of compliance with any requirement of licensure within ten days of such change.

(e) The failure of a program to notify the Department of any change of name, ownership, location or services shall be grounds for suspension or termination of the program's license.

28.14: Site Requirements

(1) General Provisions. 104 CMR 28.14 sets forth licensing standards for programs requiring a residential site license.

(2) General Physical Requirements.

(a) Sites shall be located in a residential neighborhood or among other buildings which are appropriate to the services provided, the general design of which does not emphasize the site's separateness or differences from the surrounding community in such a way as to stigmatize or devalue clients.

(b) Sites shall meet all applicable building, sanitary, and safety requirements, as appropriate.

(c) Each site shall provide space for all the residential functions characteristic of a comfortable and homelike environment, including cooking, dining, recreation, socializing, sleeping, bathing and storing belongings.

(d) Each site, including its heating, plumbing, lighting and ventilation systems, furnishings and equipment shall be maintained in good repair to ensure safety and physical comfort.

(e) Major environmental controls, including those for lighting, plumbing, windows and shades, shall be operable by and accessible to clients.

(f) Each site shall store medication in accordance with 104 CMR 28.06(10).

(g) Clients shall be provided with bedroom space adequate for sleeping, dressing, personal care, and caring for personal possessions.

1. No more than two persons may occupy one bedroom.

2. Smoking shall be prohibited in resident sleeping rooms.

3. Each bedroom must meet minimum space requirements. Closet space shall not be included when calculating square footage:

a. a bedroom to be occupied by one client must be at least 100 square feet

b. a bedroom to be occupied by two persons must be at least 120 square feet.

4. Every bedroom shall have sufficient space to accommodate comfortably a bed, dresser, and closet space for each client.

(h) Each site shall provide bathroom facilities adequate for all clients and staff to carry out normal bathroom functions, including bathing and personal care, with staff assistance as needed.

(i) Each site shall have one means of egress and one escape route serving each floor and leading to grade. Any proven useable path to the open air outside at grade shall be deemed acceptable as an escape route, including, but not limited to, connecting doors, porches, windows within six feet of grade, ramps, fire escapes, and balcony evacuation systems.

(j) Each site shall have smoke detectors and carbon monoxide detectors in accordance with the following:

28.14: continued

1. A minimum of one smoke detector shall be provided for each 1200 square feet of area, or part thereof; provided however, one smoke detector shall be located outside each bedroom;
2. Carbon monoxide detectors shall be provided in accordance with the requirements of 527 CMR 31.00.
3. Programs are responsible for ensuring that smoke and carbon monoxide detectors are in good working condition at all times.

(k) All doors leading to areas where clients are not allowed under applicable building codes shall be maintained locked by program staff.

(3) Capacity. The capacity of each site shall be determined by the Department, and may vary depending on the size, location, and other characteristics of the residence, the ages and needs of the clients, the experience and capability of the program, and the requirements of the State Building Code (780 CMR).

(4) Classification of Clients.

(a) For purposes of 104 CMR 28.14, self-preservation means the capability both mentally and physically to take action to preserve one's own life, specifically to egress the building in which one resides unassisted with 2½ minutes.

(b) Programs shall classify clients residing at each licensed site as follows:

1. Impaired. An impaired client is a client who is not capable of self-preservation, who requires physical assistance to exit the building within 2½ minutes.
2. Partially Impaired. A partially impaired client is a client who is not capable of self-preservation, who is capable of exiting the building within 2½ minutes without physical assistance, but with supervision and/or instruction.
3. Unimpaired. An unimpaired client is a client who is capable of self-preservation, who is capable of exiting the building within 2½ minutes without physical assistance and/or supervision or instruction.

(c) Procedures and documentation requirements for client classification.

1. The program shall conduct a test of the client's ability to exit the building from the client's sleeping quarters, and common areas if more remote, prior to placement into the program; except that a program may classify a client as impaired without such a test.
2. Test documentation shall include the time required to exit the building, the type of assistance required, if any, either physical or verbal, date of testing, and name of the person(s) conducting the test.
3. Test results shall be documented in the client's record.
4. The program shall keep a central record of the classification of each client in the residential site.
5. Except for a residence or apartment for up to four persons in which all of the residents are capable of self-preservation, testing for client classification shall be conducted at least quarterly, and may be part of the quarterly fire drill.
6. No client shall have his or her status changed to a less restrictive classification without substantiating documentation for at least two consecutive tests, which shall be conducted at least one week apart.

(d) The program shall provide or arrange for provision of training in self-preservation, including knowledge of fire safety. The program shall maintain documentation of such training.

(e) If a client is classified under 104 CMR 28.14(4) as impaired or partially impaired, the program must develop and maintain a staffing pattern to ensure the safety of the client and egress of all clients within 2½ minutes.

(f) All staff shall be trained in evacuation procedures for impaired and partially impaired clients.

28.14: continued

(5) Inspection by the Department. Sites within the scope of 104 CMR 28.14 are subject to inspection by the Department in accordance with the requirements of 104 CMR 28.13. The scope of the Department's inspection of a site may include, but shall not be limited, to a review of the general condition of the building, apartment, furnishings and grounds and the adequacy and sanitary conditions of bathrooms, toilets, and mattresses, as appropriate.

REGULATORY AUTHORITY

104 CMR 28.00: M.G.L. c. 19, §§ 1 and 18; M.G.L. c. 123, § 2.

(PAGES 381 AND 382 ARE RESERVED FOR FUTURE USE.)