ARKANSAS DEPARTMENT OF HUMAN SERVICES

Office of Chief Counsel
P.O. Box 1437, Slot S260, Little Rock, AR 72203-1437
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December 16, 2022

Secretary of State John Thurston
500 Woodlane Ave., Suite 026
Little Rock, AR 72201-1094

Re: Expedited Rule Repeal pursuant to Act 65 of 2021

Please find attached the following REPEALED rules for the DHS Office of Chief Counsel (OCC). These rules have been REPEALED in accordance with Act 65 of 2021. The Arkansas Legislative Council approved the repeal of the rules on December 16, 2022.

Pursuant to Act 65, the repeal was effective immediately and their repeal is not subject to the Arkansas Administrative Procedure Act. Act 65 requires DHS to notify your office within 10 days of repeal.

- DHS Policy 1009 – Equal Opportunity Policy, SOS Rule # 016.14.14-002
- DHS Policy 1078 – American with Disabilities Act, SOS Rule # 016.18.09-001; Revised 016.14.11-005
- DHS Policy 1094 – DHS DRC Cooperation Rule, SOS Rule # 016.14.11-008

If you have any questions or need additional information, please contact Mac Golden, Office of Rules Promulgation at 501-320-6383 or by emailing Mac.E.Golden@dhs.arkansas.gov.

Sincerely,

Sarah Linam
Chief Counsel

SL:kc

Attachments

CC: Arkansas State Library
Ms. Rebecca Miller-Rice, Bureau of Legislative Research

~~1009 EQUAL OPPORTUNITY POLICY~~

~~I. Purpose:~~

~~This establishes the Arkansas Department of Human Services Equal Opportunity policy. This policy is applicable to all employees, applicants seeking employment within the Arkansas Department of Human Services, and to all persons or organizations seeking or receiving services, benefits, contracts, agreements, grants, sub-grants, programs, and projects funded through or from the Arkansas Department of Human Services, including employees, clients, customers, and applicants of grantees and sub-grantees.~~

~~II. Assurances:~~

~~(A) The Arkansas Department of Human Services shall provide fair and equal opportunity in employment, service delivery, and grant administration regardless of a person's race, color, religion, sex, age, national origin, political beliefs, or disability as defined in the Americans with Disabilities Act.~~

~~(B) The Arkansas Department of Human Services shall actively promote equal opportunity through the establishment and application of personnel policies and procedures to include: recruitment, selection, promotion, demotion, transfer, reclassification, layoff and recall, training, termination and other benefits, and terms and conditions of employment.~~

~~(C) The Arkansas Department of Human Services shall ensure non-discrimination and equal opportunity in compliance with all applicable federal laws, regulations, executive orders, and civil rights rules or regulations.~~

~~III. Definitions:~~

~~(A) "Complaint" or "complaint of discrimination" means a complaint alleging unlawful discrimination, harassment, or retaliation by the Arkansas Department of Human Services; any contractor or grant recipient or sub-recipient of the Arkansas Department of Human Services; or one or more employees of the Arkansas Department of Human Services or its contractors, grant recipients, or sub-recipients acting in their official capacity or under their official authority.~~

~~(B) "Contract" as used in this policy means a contract subject to the Arkansas Procurement Law, Ark. Code Ann. §§ 19-11-201, et seq.~~

~~(C) "Harassment" means any unwelcome, repetitive behavior intended to threaten, disturb, or upset another person. Harassment based on any of the protected classes listed above may be reported under this policy. Harassment which is not based on a person's membership in a protected class is nonetheless prohibited at the Arkansas Department of Human Services and may be addressed through disciplinary, security, legal, or other action.~~

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(D) "Protected conduct" means opposing unlawful discrimination, harassment, or retaliation, such as by making a complaint or filing a charge that alleges discrimination, harassment, or retaliation, or participating in an investigation, a proceeding, or a hearing regarding alleged unlawful discrimination, harassment, or retaliation.

(E) "Retaliation" means materially adverse action, including but not limited to employment discipline, non-selection, harassment, or termination of a contract, a grant, or employment as punishment for an individual engaging in protected conduct.

(F) "Unlawful discrimination or harassment" means discrimination or harassment, based on a person's race, color, religion, sex, age, national origin, political beliefs, or disability as defined in the Americans with Disabilities Act.

IV. Responsibilities:

(A) The overall responsibility for coordination of equal opportunity policies, programs, and employment practices within the Arkansas Department of Human Services has been assigned to the Administrator of the Arkansas Department of Human Services Office of Employee Relations and Office of Equal Opportunity.

(B) Any Arkansas Department of Human Services staff member who receives a written complaint of discrimination from any person shall forward the complaint immediately to his or her division director for referral to the Office of Employee Relations and Office of Equal Opportunity.

(C) Any Arkansas Department of Human Services supervisor or manager who receives a verbal complaint of discrimination from any person shall encourage that person to submit a written complaint. Regardless of whether the complaint is made in writing, the supervisor or manager receiving the complaint shall provide the person making the complaint a copy of form DHS-2808, and immediately notify his or her division director in writing for follow-up or referral to the Office of Employee Relations and Office of Equal Opportunity as appropriate.

V. Complaints of Discrimination

(A) Any person to whom or entity to which this policy applies may use form DHS-2808, Complaint of Discrimination, to file a complaint, regardless of whether the complaint directly concerns Arkansas Department of Human Services or its employees. Complaints filed using other means, such as by letter or email, should contain substantially the same information as that requested on DHS-2808.

(B) The Office of Employee Relations and Office of Equal Opportunity shall receive complaints relating to any Arkansas Department of Human Services division or office, program, project, service, contract, or grant, regardless of whether the person making the complaint or the person against whom the complaint is made

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~~is an employee of Arkansas Department of Human Services.~~

~~(C) The Office of Employee Relations and Office of Equal Opportunity shall establish written criteria for determining when a complaint shall be referred to an outside agency or office, such as the U.S. Equal Employment Opportunity Commission, the U.S. Department of Health and Human Services Office of Civil Rights, the U.S. Department of Justice Office for Civil Rights, the U.S. Department of Labor, or other state or federal investigative or enforcement agencies.~~

~~(D) Complaints which allege discriminatory, harassing, or retaliatory conduct by any Arkansas Department of Human Services employee shall be investigated by the Office of Employee Relations and Office of Equal Opportunity or the Arkansas Department of Human Services Office of Quality Assurance, as determined by the Office of Employee Relations and Office of Equal Opportunity Administrator. The Office of Employee Relations and Office of Equal Opportunity and the Arkansas Department of Human Services Office of Quality Assurance will conduct prompt investigations of complaints and issue written determinations of any findings.~~

~~(E) When the Arkansas Department of Human Services investigates a complaint that involves a federal civil rights law over which the U.S. Department of Justice Office for Civil Rights has jurisdiction, the U.S. Department of Justice Office for Civil Rights retains the authority to:~~

~~(1) Conduct a supplementary or de novo investigation;~~

~~(2) Approve, modify, or reject recommended findings;~~

~~(3) Approve, modify, or reject any proposed voluntary resolution; and~~

~~(4) Initiate formal enforcement action.~~

~~(F) Complaints which are not referred for investigation by the Arkansas Department of Human Services, including complaints which allege discriminatory, harassing, or retaliatory conduct by persons who are not Arkansas Department of Human Services employees, shall be referred to other appropriate state or federal investigative or enforcement agencies, consistent with the written criteria established under part V, section (c), above.~~

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~~VI. Investigations:~~

~~(A) Nothing in this policy shall prevent, prohibit, or delay an Arkansas Department of Human Services division, office, or institution from investigating violations of policy or monitoring compliance with contractual or grant obligations.~~

~~(B) When an Arkansas Department of Human Services employee is accused of unlawful discrimination, harassment, or retaliation under this policy, the employing division may defer disciplinary action until resolution of the investigation by the Office of Employee Relations and Office of Equal Opportunity or the Arkansas Department of Human Services Office of Quality Assurance.~~

~~(C) Deferring disciplinary action for alleged discrimination, harassment, or retaliation does not prevent a division from administering discipline up to and including termination for violation of other Arkansas Department of Human Services policy, behavior, or performance expectations.~~

~~VII. Posting Requirement:~~

~~English and Spanish versions of PUB-284, "Discrimination is Prohibited," will be posted in a conspicuous place in each Arkansas Department of Human Services office and facility, easily visible to Arkansas Department of Human Services employees, clients, customers, and applicants.~~

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1078.0.0 AMERICANS WITH DISABILITIES ACT

1078.1.0 Purpose

It is the policy of the Arkansas Department of Human Services that a qualified person with a disability will not be excluded from participating in any program or be denied benefits of any program or be subjected to discrimination under any program, service, activity or employment opportunity in violation of the Americans with Disabilities Act of 1990 (ADA),.as amended, or the Rehabilitation Act of 1973, as amended in 2008.

1078.2.0 Definitions

1078.2.1 ADA - The Americans with Disabilities Act of 1990, including changes made by the ADA Amendments Act of 2008 (P.L. 110-325), which became effective on January 1, 2009.

1078.2.2 Appeal from Employee - a formal request to the DHS Personnel Compliance Official (FMLA, ADA, Workers' Compensation) to approve or modify a reasonable accommodation.

1078.2.3 Complaint Alleging Discrimination - A DHS-2808 filled out by the complainant or the complainant's representative. Documentation of disability or documentation supporting the allegation that the person is regarded as having a disability must be attached to the DHS-2808. Alternative means of filing complaints, such as personal interviews or a tape recording of the complaint will be made available for persons with disabilities upon request. (See Attachment A)

1078.2.4 DHS - The Arkansas Department of Human Services, its divisions, offices and programs.

1078.2.5 DHS Personnel Compliance Official - The person appointed by the DHS Director or designee as the administrator of personnel compliance activities, including ADA, FMLA, and Workers' Compensation.

1078.2.6 Division ADA Coordinator - A person appointed by each Division Director or designee to serve as a liaison between the DHS Policy and Administrative Program Management Unit (PAPM), the DHS Personnel Compliance Official, the public, and division employees regarding ADA issues. Designees may also be assigned for institutional programs or county offices.

1078.2.7 Equal Employment Opportunity Commission - The U.S. Equal Employment Opportunity - Commission enforces Federal laws prohibiting employment discrimination.

1078.2.8 Essential Functions of the Job - Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. They are the tasks that are considered to be fundamental, critical, primary, and necessary. Supervisors are required to determine what functions are actually performed in the job, and which, if eliminated, would fundamentally alter the nature of the job.

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1078.2.9 Interactive Process - The process of cooperative dialogue or discussions between the employee and DHS management representatives, including immediate supervisor/manager, division ADA coordinator, and division personnel staff. The DHS Policy and Administrative Program Management Unit (PAPM), and the DHS Personnel Compliance Official or the Office of Chief Counsel should be contacted for guidance. The process begins when an employee or applicant informs his or her supervisor or hiring official of an impairment and requests a barrier removal, work-related accommodation or change in the work environment or procedures, or needs special tools (other than personal use items) to participate in the application process or perform the essential functions of the job. The purpose of the interactive process is as follows:

A. evaluating whether the medical condition qualifies as a disability under ADA;

B. determining the disability's effect upon the essential functions of the job;

C. crafting an effective accommodation to enable the individual to participate in the application process or to perform the essential functions of the job; and

D. taking prompt action to offer and implement the reasonable accommodation.

1078.2.10 Qualified Person with a Disability

A. A customer or client with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for receipt. of services or participation in DHS programs or activities.

B. An employee or applicant with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such in4ividual holds or desires. For the purposes of this policy, consideration shall be given to the hiring official's judgment as to what functions of a job are essential, and if the hiring official has prepared a written functional job description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job (DHS-1158).

1078.2.11 Reasonable Accommodation - A modification in the work environment that enables a qualified person with a disability to perform the essential functions of a job without undue hardship to the employer. An individual (employee or qualified applicant) with a disability may request a reasonable accommodation during the job application process or during the period of employment. (See Attachment B)

1078.2.12 Reasonable Medical Documentation - A DHS-2812-B completed by a health care or rehabilitation professional, as well as any medical information or documentation necessary to:

A. establish that a person has an ADA disability.

B. determine that the disability necessitates a reasonable accommodation.

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C. establish whether an accommodation will enable a person to perform the essential functions of that person's job.

1078.2.13 Request for Reasonable Accommodation – an employee request for a barrier removal, work-related accommodation or change in the work environment or procedures, or for special tools (other than personal use items) to participate in the application process or perform the essential functions of the job. (See Attachment B)

1078.2.14 Staffing Review Committee – a committee (consisting of DI-IS management representatives, including immediate supervisor/manager, Division ADA Coordinator, and division personnel staff) to determine a response to an employee's request for reasonable accommodation.

1078.2.15 Undue Hardship to Employer – An action requiring significant difficulty or expense when considered in light of a number of factors including the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Undue hardship is determined on a case-by-case basis. If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that would not pose such a hardship

1078.3.0 Employment

DHS does not discriminate on the basis of disability against qualified individuals with disabilities in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment.

1078.4.0 Request for Reasonable Accommodation (See Attachment B)

1078.4.1 If an employee requests reasonable accommodation of a disability, the employee should work with his or her supervisor to complete a Request for a Reasonable Accommodation (DHS-2812-A) and ensure that the Functional Job Description (DHS-1158) is current, accurate and up-to-date.

1078.4.2 Upon receipt of a request for reasonable accommodation from an employee, applicant, or supervisor, the division ADA coordinator will request reasonable medical documentation and a completed Health Care Provider Information form (DHS;..2812-B) regarding the nature of the disability and functional limits of the disability if the functional limitations are not obvious.

A. The division ADA coordinator may request the employee to execute a limited release allowing DHS to submit a list of specific questions pertinent to the employee's health care or the employee's position. The employee may review the questions before executing the release.

B. The employee is responsible for submitting the DHS-2812-B,the DHS-1158, and any questionnaire to his/her physician or health care provider for completion, and ensuring the completed forms are returned to the division ADA coordinator in a timely manner.

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C. The division ADA coordinator shall provide notice of a date by which the medical certificate must be returned or the request for accommodation will be deemed withdrawn.

1078.4.3 Once the medical documentation is received, the Staffing Review Committee shall review the request and documentation and determine whether the employee is a qualified individual with a disability.

1078.4.4 DHS will make a reasonable accommodation for qualified individuals with disabilities if the reasonable accommodation does not create an undue hardship and is consistent in fulfilling the essential duties of the job. Examples of accommodation include, but are not limited to:

A. Acquiring or modifying work related equipment or devices, including, but not limited to: monitors with magnification capability, desk chairs with appropriate back support, telephone amplification equipment, or voice recognition software. This does not include personal use items, such as hearing aids, eyeglasses, wheelchair, prosthetic limb, or similar devices if they are also needed off the job.

B. Transferring or modifying the work location to make the area useable and accessible.

C. Modifying the employee's work schedule.

D. Restructuring the employee's job duties, including reassigning or exchanging non essential functions with co-workers, or altering when or how an essential function is performed. DHS is not required to eliminate an essential job function or fundamental duty of the position to make an accommodation.

E. Providing the employee reassignment to another position in an equal or lower pay grade if such a position is available within DHS and if there are no other types of accommodations to be offered. (See Attachment C)

1078.4.5 The Staffing Review Committee and the employee or applicant will fully participate in the interactive process. This may involve one or more meetings or discussions to determine what accommodation, if any, will be made. The employee or applicant's input is an essential part of the interactive process. The final decision of what accommodation will be offered rests with the Staffing Review Committee or division management.

1078.4.6 If the division's determination in response to the request for a reasonable accommodation does not, in the opinion of the requesting employee, satisfactorily resolve the issue, the requesting employee may initiate an appeal with the DHS Personnel Compliance Official by submitting the DHS-2812-D and written appeal request within five business days of the determination,

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1078.5.0 Employee Conduct and Performance

1078.5.1 DHS is not required to eliminate essential job functions or to alter conduct or job performance standards in response to an ADA accommodation request. Qualified employees with disabilities:

A. Must maintain satisfactory conduct and performance.

B. Are subject to the same evaluation, correction, and discipline processes as all other employees; and

C. Are not subject to any adverse action, such as discipline or a reduced performance score, on the basis of a disability.

1078.5.2 A disability is no excuse for absenteeism or chronic tardiness to work. Reporting to work on time as scheduled is an essential function of any job. The qualified employee with a disability may request a different work schedule and DHS management may grant such request if it does not create an undue hardship or interfere with DHS operations.

1078.5.3 If an employee is unable to perform the essential functions of his or her job and no reasonable accommodation can be identified, or a reasonable accommodation is offered but refused, the employee may be terminated without prejudice after the reasonable accommodation inquiry is complete.

1078.6.0 Confidentiality of Medical Information

I 078.6.1 The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. As a result, supervisors may not request, and employees are asked not to provide, genetic information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

I 078.6.2 All medical information received from employees or applicants shall be kept strictly confidential. Medical information, including an employee's disability status, shall not be disclosed to co-workers. Supervisors may need to anticipate and deflect questions from co-workers in some circumstances when reasonable accommodations are granted, particularly when an accommodation involves job restructuring or other action affecting other staff. Unauthorized disclosure of medical information is grounds for disciplinary action pursuant to DHS Policy I 084. Disclosure is required or appropriate under the following circumstances:

A. To the employee's supervisors and managers when necessary to assess job assignments or reasonable accommodations

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B. To government authorities to demonstrate compliance with the ADA or m accordance with workers' compensation laws

C. Each division, office, or unit shall maintain copies of employee medical records in a separate file in a locked file cabinet, with access restricted to the unit head and the Division ADA Coordinator.

D. The DHS Policy and Administrative Program Management Unit (PAPM) is the custodian of official medical records received from, on behalf of, or regarding any division employee or applicant including documentation related to requests for reasonable accommodation, fitness for duty examinations and certifications, and information regarding an employee's illness or medical condition in connection to leave requests.

1078.6.3 Under 29 C.F.R. § 1630.14(c), information from medical examinations and inquiries, and information regarding the employee's ability to perform job-related functions, must be treated as confidential medical information and must be collected and maintained on separate forms that are not disclosed with the following exceptions:

A. Supervisors and managers may be informed regarding necessary restrictions of the work or duties of the employee and necessary accommodations.

B. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment.

C. Government officials investigating compliance with this part shall be provided relevant information on request.

1078.7.0 Program Accessibility

1078.7.1 DHS does not deny the benefits of its programs, activities and services to individuals with disabilities because its facilities are inaccessible whether owned, leased or utilized by DHS. The facilities must comply with the Handicapped Accessibility Standards developed by the Arkansas Building Authority.

1078.7.2 DHS may not make modifications to programs, services, or facilities if it can demonstrate that to do so would result in a fundamental alteration to the nature of its programs or activities or cause an undue financial or administrative burden.

1078.8.0 Communications

1078.8.1 DHS will make appropriate auxiliary aids and services available when necessary to ensure effective communication.

1078.8.2 When an auxiliary aid or service is required, DHS will provide an opportunity for individuals with disabilities to request the auxiliary aid and service of their choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program or activity or cause an undue financial and administrative burden.

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1078.9.0 Contracting and Licensing

1078.9.1 DHS does not discriminate on the basis of disability in contracting for the purchase of goods and services.

1078.9.2 DHS does not discriminate on the basis of disability in its licensing certification and regulatory activities.

1078.10.0 Complaint Procedure Alleging Discrimination

Anyone who wishes to formally allege discrimination on the basis of disability in the provision of services, activities, programs, benefits, employment opportunity, or employment by DHS shall complete DHS-2808. (See Attachment A) The completed DHS-2808 should be sent to:

DHS 9FFICE OF EMPLOYEE RELATIONS/OFFICE OF EQUAL OPPORTUNITY
P.O. BOX 1437 – SLOT N250
LITTLE ROCK, AR 72203-1437
TELEPHONE: (501) 682-6003
FAX: (501) 682-8926
TDD: (501) 682-7958

OR

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF CIVIL RIGHTS, REGION VI
1301 YOUNG STREET-SUITE 1169
DALLAS, TX 75202
TELEPHONE: (214) 767-4056
FAX: (214) 767-0432
TDD: (214) 767-8940

1078.11.0 Originating Section/Division Contact

Office of Chief Counsel
P.O. Box 1437 – Slot S260
Little Rock, Arkansas 72203-1437
Telephone: (501) 682-8934

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~~A. Purpose~~

~~This complaint procedure is established to meet the requirements of the Americans with Disabilities Act (ADA). It may be used by anyone who wishes to file a complaint alleging discrimination on the basis of disability in the provision of services, activities, programs, benefits, employment opportunity, or employment by DHS.~~

~~B. DHS Complaint Procedure under ADA~~

~~1. Any person complaining that he or she has been discriminated against in a manner prohibited by the ADA should file a completed DHS-2808 with the DHS Office of Employee Relations.~~

~~2. DHS OFFICE OF EMPLOYEE RELATIONS/OFFICE OF EQUAL OPPORTUNITY~~
~~P.O. BOX 1437-SLOTN250~~
~~LITTLE ROCK, AR 72203-1437~~
~~TELEPHONE: (501) 682-6003~~
~~FAX: (501) 682-8926~~
~~TDD: (501) 682-7958~~

REPEAL

A. Purpose

This ADA Request for Reasonable Accommodation procedure is established to meet the requirements of the Americans with Disabilities Act (ADA). It may be used by anyone who wishes to initiate a Request for Reasonable Accommodation on the basis of disability in the provision of services, activities, programs, benefits, employment opportunity, or employment by DHS.

B. The Request for Reasonable Accommodation Process:

1. The DHS employee will notify his/her supervisor of a Request for Reasonable Accommodation.

2. Within five business days of receipt of the DHS-2812-A submitted jointly by the DHS employee and supervisor, the appropriate Division ADA Coordinator will notify the DHS employee of receipt of the information.

    a. A Staffing Review Committee (consisting of DHS management representatives, including immediate supervisor/manager, division ADA coordinator, and division personnel staff) may decide that medical information is needed and request the employee to submit a DHS-2812-B to the employee's physician or health care provider for further information.

    b. If the Staffing Review Committee is unable to agree upon a unanimous response, upper management officials within the division will be consulted.

    c. No later than twenty business days from the receipt of the Request for Reasonable Accommodation (providing that all necessary medical information has been received), the Division ADA Coordinator along with the supervisor will issue a response letter to the employee. Depending upon the extent of medical documentation, the employee will be notified if there is a need for extension.

C. The Reasonable Accommodation Appeal Process:

1. Within five business days of the response letter to the employee's DHS-2812-A, the employee may appeal the Division ADA Coordinator's decision to the DHS Personnel Compliance Official (FMLA, ADA, Workers' Compensation).

2. Within thirty days of the appeal, the DHS Personnel Compliance Official (FMLA, ADA, Workers' Compensation) will consult with the appropriate Division Director and issue a response that will:

    a. Be in writing, and where appropriate, in a format accessible to the complainant, such as large print, Braille, or audio tape.

    b. Explain the position of DHS and the alternatives available to DHS, if any, for substantive resolution of the complaint.

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c. The DHS Personnel Compliance Official will forward copies of all documentation of the ADA record file to DHS Policy and Administrative Program Management Unit (PAPM) as the official custodian of ADA records.

d. Each employee retains the right to file a complaint with the Equal Employment Opportunity Commission or to pursue other legal remedies. The complaint must be filed within 180 days of the date of the alleged act(s) of discrimination, unless the time for filing is extended by the federal agency for good cause.

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~~DHS POLICY 1078-AMERICANS WITH DISABILITIES ACT-ATTACHMENT C~~

~~A. Purpose~~

~~The purpose is to facilitate reassignment or transfer of a qualified employee or applicant with a disability to another vacant position if one is available presently or expected in the next sixty days. The employee or applicant must meet the state minimum hire standards to be eligible for the reassignment or transfer. The procedure is established to meet the requirements of the Americans with Disabilities Act (ADA) and may be used by DHS as a guide in providing reassignment of a DHS employee as a reasonable accommodation.~~

~~B. Purpose of Reassignment:~~

~~Reassignment is the reasonable accommodation of last resort and may be found necessary after one of the following determinations:~~

~~1. There are no other effective reasonable accommodations that will enable the employee to perform the essential functions of his/her current position.~~

~~2. All other reasonable accommodations would impose undue hardships or would pose a direct threat to the employee or other employees.~~

~~C. Reassignment Within a Division~~

~~1. Before beginning the reassignment process, the Staffing Review Committee must establish whether the employee is a qualified individual with a disability who is entitled to reassignment under the ADA. Specifically, the Committee must establish whether the employee:~~

~~a. Has an ADA qualifying condition. To make this determination the Committee, in consultation with the DHS Policy and Administrative Program Management Unit (PAPM), the DHS Personnel Compliance Official and the Office of Chief Counsel, shall review the medical records supplied by the employee and the employee's health care provider(s).~~

~~b. Ever adequately performed the essential functions of the current job with or without a reasonable accommodation. To make this determination, the Committee should review the employee's personnel records, including any files maintained by the employee's supervisor.~~

~~c. If the answers to both questions are yes, proceed to the reassignment process.~~

~~2. Before making a reassignment, the Staffing Review Committee must identify one or more vacant positions that the division intends to fill and establish whether the employee is qualified to perform the essential functions of the vacant position(s) with or without a reasonable accommodation. To make this determination, the Committee must review at least the following.~~

~~a. Any preferences and benchmarks previously established for the vacant position(s);~~

~~b. Medical records supplied by the employee and the employee's health care provider(s) (at the employee's request); and~~

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c. Other relevant, reliable documentation submitted by or on behalf of the employee.

NOTE: For the purpose of reassignment within the division, a vacancy is defined as a vacant position the division intends to fill, or a position expected to become vacant within a reasonable period of time (such as when an incumbent employee has given notice of retirement or resignation).

3. If the Staffing Review Committee determines that the employee is qualified for reassignment, the division ADA coordinator shall notify the employee in writing that reassignment is being considered. The Committee must consider the following:

a. Prior performance evaluations, if any. If the employee has not held his or her current position long enough to receive an annual or mid-term evaluation, personnel file and relevant documentation from the supervisor regarding the employee's satisfactory or unsatisfactory performance may be considered.

b. Supervisor's notes from the reasonable accommodation interview and other related information.

4. If the Staffing Review Committee determines reassignment is appropriate, the division ADA coordinator shall notify the employee in writing:

a. The employee has five working days from the date of notification to submit a State of Arkansas Employment Application and personal resume to the employee's designated division personnel representative, at which time the division will attempt to identify an appropriate vacancy for reassignment, based upon the employee's qualifications, the functional limitations identified by the employee's health care provider, and the essential functions and minimum qualifications of any vacancies within the division.

b. The employee may indicate an interest in other geographic locations for reassignment.

5. The employee is solely responsible for relocation expenses. If an employee fails to submit a State of Arkansas Employment Application and personal resume or any requested medical information within the timeframes specified in this policy, the employee will be considered to have withdrawn his or her interest in reassignment as a reasonable accommodation and the process will end.

6. All original documentation will be sent to DHS Policy and Administrative Program Management Unit (PAPM).

D. Reassignment Outside the Division

1. If a vacancy within the originating division is not identified within seven working days of receipt of the State of Arkansas Employment Application, the division ADA coordinator will forward the request and all applicable documentation to the DHS Personnel Compliance Official and DHS Recruiting and Placement.

2. Within two business days of receiving a reassignment referral and every five business days thereafter for sixty calendar days, DHS Recruiting and Placement shall

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review the employee's application and resume and identify all vacancies for which the employee meets the minimum qualification requirements.

NOTE: For the purpose of reassignment outside the division, a vacancy is defined as a position for which a DHS-1138 Job Vacancy Request form has been submitted to DHS Recruiting and Placement, which has not expired or been withdrawn, and for which no job offer has been made to any applicant.

3. Once one or more vacancies are identified as potentially appropriate for reassignment, the hiring process for those positions shall be placed on temporary hold. Unadvertised positions will not be advertised, however, positions that have been advertised will remain open for applications for the full advertising period, and the register will be processed as normal. Interviews may be scheduled and conducted. No offer will be made to any applicant while the hold is in place. The hold will continue until the hiring •official is notified by DHS Recruiting and Placement that it has been lifted.

4. DHS Recruiting and Placement will contact the hiring official(s) for any position identified above, advise him or her of the hold, and request a copy of the functional job description, interview questions, and benchmark criteria. The hiring official will have five working days to provide this information.

NOTE: Information regarding the request for reassignment shall not be provided to the hiring official at this time, and may not be disclosed at any time unless necessary for job assignments or reasonable accommodation.

5. DHS Recruiting and Placement will meet with the DHS Personnel Compliance Official to review the information from the hiring official, the employee's qualifications, and the functional limitations identified by the employee's health care provider. A determination will be made as to whether the employee is qualified for the vacant position. An employee must meet the minimum qualifications of the position and be able to perform the essential functions of the job with or without reasonable accommodation to be considered qualified. If the position is one for which benchmarking has been or may be applied due to the number of applications received, the employee must meet the minimum qualifications of the benchmarking group that has been or would otherwise be interviewed.

6. If it is determined that both criteria are met, DHS Recruiting and Placement will notify the hiring official of the impending placement. The division ADA coordinator shall then offer the position to the employee.

   a. If more than one position meets the criteria, DHS Recruiting and Placement, in consultation with the DHS Personnel Compliance Official, may select the position most closely matching the employee's education and experience.

   b. If the employee's education and experience match two or more available vacancies equally, the employee's preference will be considered.

7. The employee will have five working days from the date of the offer to accept the position. If the employee fails to respond or to accept the offer within five business days, the request for reassignment as a reasonable accommodation will be considered withdrawn.

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8. Reassignment consideration will be extended for a period of sixty day's from the date the employee's application and resume are forwarded to DHS Recruiting and Placement. If no vacancy at or below the employee's current salary range is identified for which the employee qualities, and which has essential functions that the employee can perform with or without reasonable accommodation, DHS Recruiting and Placement will notify the employee, the employee's supervisor, DHS Policy and Administrative Program Manageme11tlJnit (PAPM), the DHS Personnel Compliance Official and the Division ADA Coordinator. The notification will inform the employee that the attempt to accommodate him or her through reassignment has failed, and that he or she is subject to termination. Completion of termination paperwork if no reasonable accommodation can be made is the responsibility of the employee's division.

9. All documentation will be sent to DHS Policy and Administrative Program Management Unit (PAPM);

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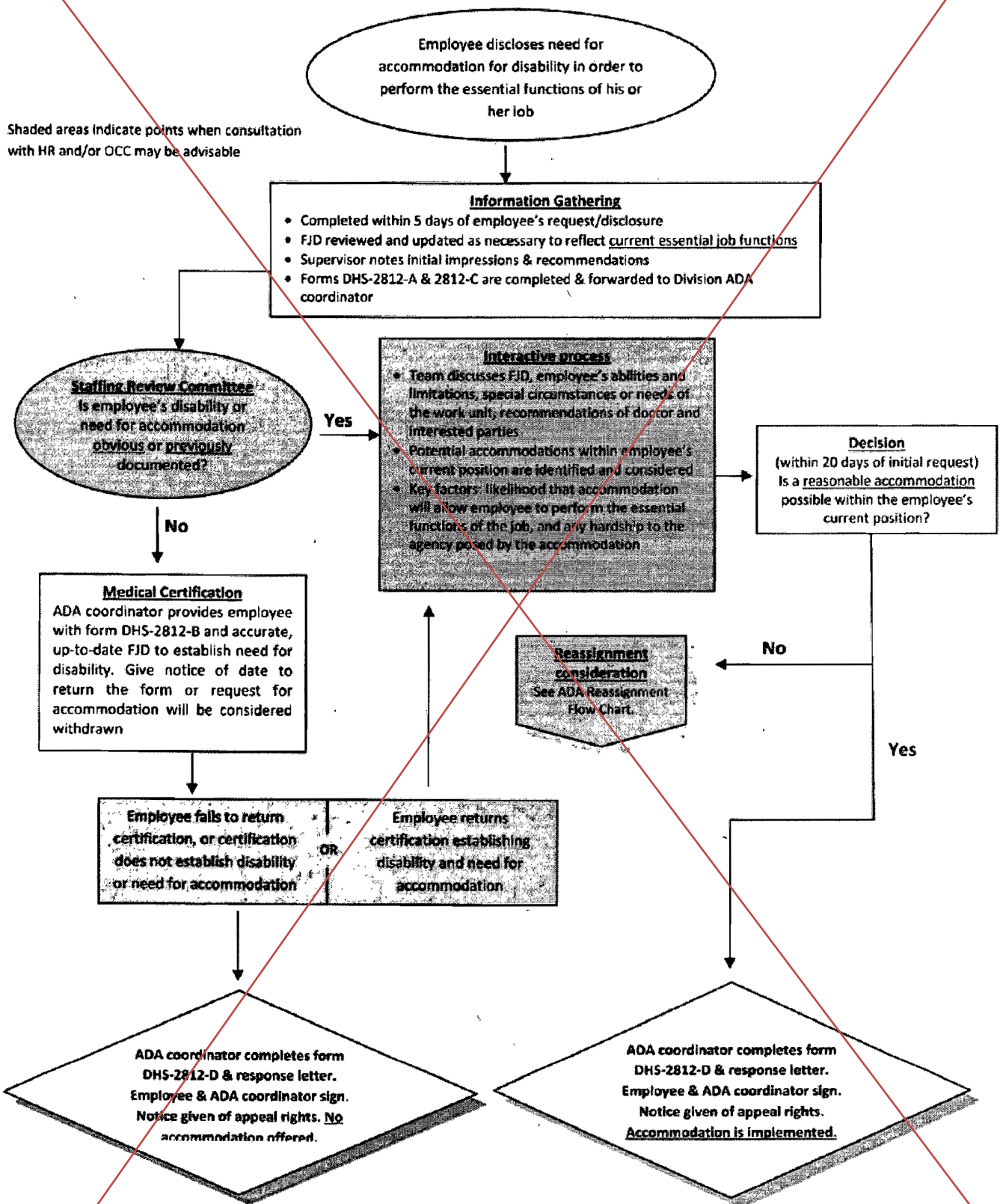
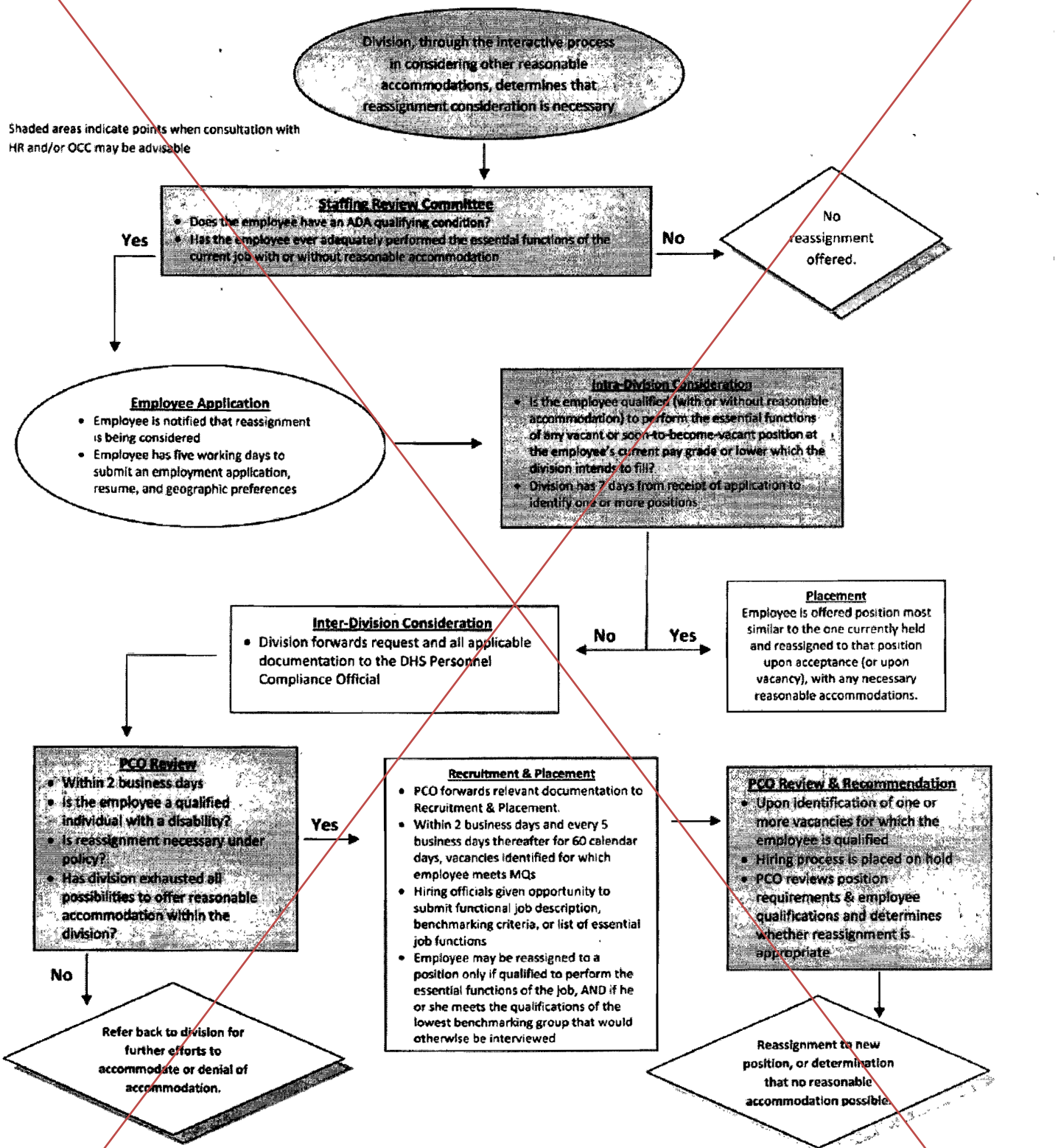
ADA ACCOMMODATION REQUEST FLOW CHART (Employee)



ADA REASSIGNMENT CONSIDERATION FLOW CHART



1094.0.0 DHS/DRC COOPERATION RULE

1094.1.0 Policy

1094.1.1 Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act in 1984 and the Protection and Advocacy for Mentally Ill Individuals Act in 1985 to protect the human and civil rights of individuals with mental or physical disabilities or both. Both Acts require that a state receiving federal funds to assist this population designate a protection and advocacy system (hereinafter P & A) that is independent from the state to protect the rights of these individuals. To accomplish this goal, federal statutes give a P & A access to records, facilities, and individuals under certain conditions. Although the provisions of the two statutes are not identical, courts read the acts together to ensure consistent interpretation of the statutory language.

1094.1.2 Disability Rights Center, Inc. (DRC) is the P & A for the State of Arkansas. This rule is intended to provide guidance for DHS employees in cooperating with requests made by DRC.

1094.2.0 Substantive Rules

1094.2.1 Definitions:

A. Client of DRC means an individual, as defined below, who personally or through a legal guardian/representative requests assistance or representation from DRC.

B. Complaint includes but is not limited to any report or communication, whether formal or informal, written or oral, received by DRC, including media accounts, newspaper articles, and telephone calls (including anonymous calls) from any source alleging abuse or neglect as defined by law.

C. Emergency Situation refers to a situation where DRC has probable cause to believe that the health or safety of an individual is in serious and immediate jeopardy.

D. Facilities means any public or private residential setting for individuals with mental or physical disabilities or both that provide care accompanied by treatment services. Examples of facilities are human development centers, the Arkansas State Hospital, and the Arkansas Health Center.

E. Individual is defined as:

1. An individual who is a "client" of DRC.

2. An individual, including a person who is dead or whose whereabouts is unknown, if all of the following conditions apply:

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a) The individual, due to his or her mental or physical condition, cannot give authorization to DRC; and

b) The individual does not have a legal guardian/legal representative or the individual's guardian is the State; and

c) A complaint or report has been received and DRC has determined the individual has been or may be subject to abuse or neglect.

3. An individual with a legal guardian/representative, if a complaint or report has been received by DRC or if DRC has determined probable cause exists to believe the health or safety of the individual is in serious and immediate jeopardy, if all the following conditions exist:

a) DRC has made a good faith effort to contact the individual's legal guardian/representative upon prompt receipt of the legal guardian/representative's name, address, and telephone number; and

b) DRC has offered assistance to the legal guardian/representative; and

c) The legal guardian/representative has failed or refused to act on behalf of the individual.

F. Legal guardian/representative includes a conservator, and is defined as a person whose appointment is made and regularly reviewed by a state court or agency empowered under state law to appoint and review such officers. A legal guardian/representative has authority to consent to health/mental health care or treatment for individuals with disabilities. This term does not include persons acting only as representative payee, persons acting only to handle financial payments, attorneys or persons acting on behalf of an individual with disabilities only in individual legal matters, or officials responsible for the provision of health or mental health services to individuals with disabilities, or their designees.

G. Probable cause means reasonable grounds to suspect that an individual has been or may be at significant risk of abuse or neglect.

H. Reasonable Access means the access to be afforded DRC to facilities and records as provided in this rule.

1. To facilities, means access as provided in this rule.

2. To records relevant to a DRC investigation of an alleged emergency, means access within twenty-four hours after receipt of DRC's written request, regardless of whether the individual consents to the disclosure (either directly or through a legally responsible party such as a guardian)

3. To records relevant to a DRC investigation where no emergency is alleged, means access within three business days after receipt of DRC's written request for records made on behalf of an individual.

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I. Records includes not only writings in draft or final form and hand written notes, but also records in other forms such as electronic files, photographs, and video and audio tape records:

1. Prepared by any staff of a facility rendering care and treatment, or reports prepared by an agency charged with investigating incidents of abuse, neglect, and injury occurring at a facility which describe incidents of alleged abuse, neglect, injury or death occurring at the facility, as well as steps taken to investigate such incidents;

2. Prepared or received in the course of providing intake, assessment, evaluation, education, training and other supportive services, medical and financial records, reports prepared or received by personnel providing care or treatment to the individual, and discharge planning records;

3. Prepared in connection with certification or licensure reviews, reports by professional accreditation organizations, and assessments prepared for the facility by its staff, contractors, or other similar entities;

4. Containing information on professional, performance, building or other safety standards and demographic and statistical information relating to a facility; or,

5. Comprising annual survey reports and plans of correction for cited deficiencies. Survey reports and plans of correction must be furnished within 30 days after the report or plan is complete as defined by federal or sate law.

1094.2.2 Application

This rule applies to all divisions within the Department of Human Services.

1094.2.3 Access to Residents and Facilities

DRC has reasonable unaccompanied access to public and private facilities for persons with mental disabilities, physical disabilities, or both, to conduct a full investigation of an incident of alleged abuse or neglect or to carry out its advocacy and protection responsibilities. DRC also has reasonable access to Division of Youth Services (DYS) facilities to investigate alleged abuse or neglect of persons with mental disabilities, physical disabilities, or both, at DYS facilities. DRC's authority includes the opportunity to do the following:

A. If abuse or neglect is suspected:

1. Interview any facility service recipient, employee, or other person, including the person thought to be the victim of such abuse, who might reasonably be believed by DRC to have knowledge of the incident under investigation.

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2. Inspect, view, and photograph all areas of the facility's premises that might reasonably be believed by DRC to have been connected with the incident under investigation.

B. As part of its protection and advocacy responsibilities:

1. Provide information and training on, and referral to, programs and services which address the needs of individuals with mental disabilities, physical disabilities, or both. DRC is authorized to provide information and training to disabled individuals, individual family members, and other persons who are not program staff to increase knowledge about protection and advocacy issues. DRC must be able to furnish its name, address, and telephone number, as well as other information including training about individual rights so that it can be contacted by residents or others.

2. Monitor compliance with respect to the rights and safety of the residents.

C. Unaccompanied access to residents of a facility includes the opportunity to meet and communicate in private with these individuals on a regular basis, both formally and informally, and by telephone, mail, and in person.

D. If no abuse or neglect is suspected, unaccompanied access to residents at a facility at reasonable times includes, at a minimum, normal working hours and visiting hours and which gives DRC access to all areas of the facility.

E. DRC must conduct its activities to minimize interference with facility programs, respect residents' privacy interests, and honor a resident's request to terminate an interview.

F. DRC is required to make every effort to ensure that the parents of minors or guardians of individuals in the care of the facility are informed that the system will be monitoring activities at the facility and may in the course of the monitoring have access to the minor or adult with legal guardian.

G. DRC may not take formal action on behalf of a resident with a legal guardian/ representative, or initiate a formal attorney/client or advocate/client relationship without appropriate consent, except in emergency situations (See II.A.3).

1094.2.4 Access to Employee Records

All information in an employee's file relating to allegations of abuse or neglect of individuals shall be promptly provided by central records upon request. All other employee information is subject to disclosure only in accordance with the Freedom of Information Act.

1094.2.5 Authority and Responsibility of DRC Federal statutes give DRC the authority to do the following:

A. Use any appropriate technique and pursue legal, administrative, and other appropriate remedies or approaches to protect and advocate on behalf of

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individuals with mental disabilities, physical disabilities, or both, to address abuse, neglect, or other violations of rights. Federal statutes encourage DRC to use non-adversarial processes such as negotiation, conciliation, and mediation to resolve disputes early in the protection and advocacy process. Note: DRC is required to exhaust all administrative remedies, where appropriate, prior to initiating legal action against the state or an agency of the state to enforce and protect the rights of individuals with mental disabilities, physical disabilities, or both.

B. Establish an ongoing presence in facilities that treat and care for individuals with mental disabilities, physical disabilities, or both , and provide programs which allow DRC to:

1. Interact regularly with individuals who are current or potential recipients of protection and advocacy services.

2. Interact regularly with staff providing care or treatment.

3. Obtain information and review records as described above.

4. Communicate with family members, social and community service workers, and others involved in providing care or treatment.

5. Support or provide training, including related travel expenses, for individuals with mental disabilities, physical disabilities, or both, the family members of such individuals, and other persons to increase knowledge about protection and advocacy issues, to enhance leadership capabilities, and to promote state and federal cooperation on these issues.

6. Monitor, evaluate, and comment upon the development and implementation of federal, state, and local laws, regulations, plans, budgets, projects, levies (impositions of a tax), policies, and hearings affecting individuals with mental disabilities, physical disabilities, or both.

1094.3.0 Procedural Rules

1094.3.1 Photocopies of Records: Photocopies of requested records shall be made for DRC which shall pay twenty-five cents per page as the reasonable cost for the reproduction of the records.

1094.3.2 Delay of Denial of Access: If access to facilities, programs, residents, or records is delayed or denied, DRC must be provided with a prompt written statement of reasons, including in the case of a denial for alleged lack of authorization, the name, address and telephone number of the resident's legal guardian/ representative.

1094.3.3 Employee Records: All requests for information from an employee's file shall be directed to the custodian of the file.

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1094.3.4 Administrative Due Process: Administrative due process shall be accomplished using existing DHS processes for appeals.

1094.3.5 Administrative Hearing: If DRC is entitled to an administrative hearing, the hearing must be held within a reasonable time after denial of access to facilities or records.

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