

## **8.7. Investigation Procedure**

*Describe agency procedures related to investigations, report of findings, hearings and appeals, if applicable.*

Once a complaint (formal and informal) is accepted for processing, the Title VI Coordinator will immediately contact the Tennessee Human Rights Commission, assign a tracking number, and develop an Investigative Case File. A log will be maintained of all complaints and appeals. The complaint will be noted in the log by case number based on region, fiscal year, month, and sequence in which the complaint was received (e.g. A complaint received from East Tennessee Region in July, 2014, which is the second complaint received in 2014 will be case number E (region) 14 (year) 07 (month)-002 (sequence).

The Investigative Case File is a structured compilation and repository of all documents and information pertaining to the case. An Investigative Case File will be established for each complaint that is accepted for investigation. A six-section folder will be used for this purpose. A Case File will not be maintained on those complaints that are administratively closed for lack of jurisdiction, because they are untimely filed; for failure to exhaust local remedies, or for failure to state a claim over which DIDD has jurisdiction.

The purpose of the Investigative Case File is to establish a methodology for the systematic compilation and structured storage of all documents, records, and information associated with the case. This is done in such a manner that the Case File:

- (a) Provides the basis and supporting documentation for the coordinator's draft report, and
- (b) Allows a reader of that report to easily verify the facts upon which it is based.

### **8.7.1. Format for the Investigative Case File**

Investigative Case File will include the following:

*Section I - Contents/Log* - This section has two types of entries and is attached to the inside left-hand of the file folder.

- *Table of Contents.* This entry describes each section in the Case File and

identifies each entry under that section. The Table of Contents is attached as the top page of Section I.

- *Case File Log.* The purpose of the Case File Log is to record all contacts and activities relevant to processing the complaint for which there is no paper trail. The log is to be used as a reference of the actions taken by the coordinator on the case, including the date, summary of actions, and the name of the individual annotating the actions. Under "Action," a brief description of the activity, including any outcome and future action required, will be recorded.

*Section II - External Correspondence* - All external correspondence will be included under this section, and will be attached immediately opposite Section I on the first page of the file folder. External correspondence will be filed chronologically (*i.e.*, most recent first), assigning sequential letters of the alphabet (*i.e.*, A, B, C, D) to identify each exhibit.

*Section III - Determination/Settlement Agreement* - This section will contain copies of the coordinator's determination and, where appropriate, a conciliation agreement.

*Section IV - Investigator's Documents* - This section will contain copies of all documents generated by and pertinent to the coordinator's handling of the complaint, including any analysis made by the coordinator (e.g., statistical tabulations, application of statistical techniques to a body of data, etc.) which will later become a part of the investigative report.

*Section V - Evidence* - This section will contain all documentary evidence relating to the case -- records, interview statements, etc. where the recipient or complainant submitted a document being used as an exhibit. The letter transmitting the document will be filed in Section II - External Correspondence (with a copy of the cover letter), and its accompanying Analysis Form will be filed in this section.

*Section VI - Internal Correspondence Exhibits* - All internal correspondence will be included under this section. Internal correspondence exhibits will be entered chronologically so that the most current exhibit is on top, assigning sequential letters of the alphabet to identify each exhibit.

The Title VI Coordinator will initiate the investigation by first contacting the complainant by telephone within three (3) working days of receiving the complaint. The complainant will be informed that he/she has a right to have a witness or representative present during the interview and can submit any documentation he/she perceives as relevant to proving his/her complaint. The alleged discriminatory service or program official will be given the opportunity to respond to all aspects of the complainant's allegations.

If, based on the investigation, the Title VI Coordinator concludes that there is no discrimination, the complaint will be dismissed.

Under appropriate circumstances, the Title VI Coordinator may seek comment(s) from the recipient, and/or complainant(s) on preliminary data analyses before making an initial finding concerning disparate impact.

A finding of disparate impact provides the recipient the opportunity to rebut the Title VI Coordinator's finding, propose a plan for mitigating the disparate impact, or "justify" the disparate impact. If the recipient successfully rebuts the Title VI Coordinator's finding, or if the recipient elects to submit a plan for mitigating the disparate impact, and, based on the review, the Title VI Coordinator agrees that the disparate impact will be mitigated sufficiently pursuant to the plan, the parties will be so notified. Assuming that assurances are provided regarding implementation of such a mitigation plan, no further action on the complaint will be required.

If the recipient can neither rebut the finding of the disparate impact nor develop an acceptable mitigation plan, the recipient may seek to demonstrate that he/she has a substantial, legitimate interest that justifies the decision to proceed with the action, notwithstanding the disparate impact. Even where a substantial, legitimate justification is offered, the Title VI Coordinator will consider whether it can be shown that there is an alternative that would satisfy the state's interest, while eliminating or mitigating the disparate impact.

### **8.7.2. Appeal Process**

Complainant may appeal an investigative finding to the Commissioner of DIDD. The

appeal to the Commissioner constitutes the final level in the department's internal complaint system.

Upon an appeal, the Title VI Director and the DIDD General Counsel will assist the Commissioner of DIDD in reviewing the matter and making determinations. Procedures can include, but are not limited to, discussing the complaint with the complainant and/or the alleged offender.

According to federal regulations, a complaint to the U.S. Commission on Civil Rights must be filed no later than 180 calendar days after the alleged discrimination occurred. Thus, to accommodate sequential external complaint filing, should the complainant wish to file a complaint with the federal authority, the following schedule of time limits must be followed in the filing, appeal, and disposition of a complaint:

No later than 30 calendar days after the alleged discrimination occurred— a complainant must file a written complaint within DIDD,

No later than 30 calendar days after the written complaint is filed within DIDD— the Director of Civil Rights shall review and investigate the complaint and issue a written determination of findings, and, if there is a finding of Title VI violation, propose remedial action (information regarding appeal rights) shall also be provided at that time,

No later than 20 calendar days after the Title VI Coordinator's written determination—the complainant may file a written appeal with the Commissioner of DIDD, and

No later than 30 calendar days after the appeal is filed with the Commissioner—the Commissioner shall review and investigate the complaint and issue a written determination in the matter.

If a complainant remains unsatisfied with the findings or the proposed remedial action, the complainant will still have time to file externally, with the U.S. Commission on Civil Rights, within the stated time limit of 180 calendar days.

Throughout the complaint process, it shall be the responsibility of the complainant and the Director of Civil Rights to ensure that DIDD's General Counsel has a complete record of all documents, proceedings, findings, appeals, and dispositions related to a complaint. The DIDD General Counsel and the Director of Civil Rights shall have

responsibilities as repositories of such information, as well as, advisors to departmental authorities regarding complaints

### **8.8. Service Provider Complaint Procedures**

In accordance with the terms of all contracts, each professional service provider shall, upon request, show proof of nondiscrimination and shall post in conspicuous places, available to all employees and individuals receiving services, notices of nondiscrimination. Proof of nondiscrimination may require documentation of standard complaint processes (along with the records resulting from such) for both service provider employees and service provider program beneficiaries.

### **8.9. Retaliation**

In accordance with Title VI of the Civil Rights Act of 1964 {45 C.F.R. Part 80.7(e)}, no DIDD personnel or service provider shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Section 601 or the Act, or because the individual has made a complaint, testified, assisted, or participated in any manner in a discrimination investigation, proceeding, or hearing.

## 8. COMPLAINT PROCEDURES

**Purpose:** Any person who believes that a department or agency receiving Federal financial assistance has discriminated against someone on the basis of race, color or national origin may file a complaint.

### 8.1 DIDD Title VI Complaints FY 2014

List the total number of complaints received for the most recent State Fiscal Year (SFY) in this section.

Prior to filing a Title VI complaint against a regional office, developmental center, or service provider, a potential complainant will be encouraged to review the regional office, developmental center or service provider's complaint process and use that process to have the complaint resolved. A complainant is not required by law to use an internal grievance process before filing a complaint. If a complainant uses an internal grievance process and also chooses to file a complaint, the complaint must be filed within sixty (60) days after the last act of the internal grievance process.

**8.1.1. Number of Title VI complaints received during FY 2013: 3**

**8.1.2. Number of Title VI complaints closed: 3**

Reason

Administrative: 0

Failure to meet a prima facie case: 3

Settlement and/or resolution: 0

**8.1.3. Number of complaints referred to another state or federal agency: 0**

### 8.2 Title VI Complaint Log

Include a copy of the agency's complaint log with the plan.

DIDD received three (3) Title VI complaints during the reporting period. The following is a summary of each case:

Date Filed	Region Location	Allegation	Resolution
September 12, 2014	Middle Tennessee	Allegation from mother that DIDD protocols violate the Americans with Disabilities Act (ADA) regarding age, disability, and learning.	Complaint did not meet the prima facie case for Title VI. Services were approved.
January 1, 2014	West Tennessee	Staff members at the home of the supported person were subjected to racial slurs and inappropriate comments by the family conservator on a regular basis. The employees indicated that a hostile work environment was created for them and a letter was sent via attorney to the Conservator.	Complaint did not meet the prima facie case for Title VI. DIDD Office of Civil Rights provided assistance with the remediation of this issue.
March 28, 2014	Middle Tennessee	Individual receiving services made a rude and discriminatory comment her direct support staff.	Complaint did not meet the prima facie case for Title VI.  Individual received Title VI training.

### 8.3. Lawsuits Filed

*List any lawsuits during the most recent FY filed against the department or agency alleging discrimination on the basis of race, color or national origin under any federally funded program or activity.*

There were no lawsuits filed against DIDD alleging discrimination on the basis of race, color or national origin under any federally funded program or activity during the reporting period July 1, 2013 – June 30, 2014.

The department has two (2) Olmstead related lawsuits:

- The United States vs. State of Tennessee, et al. (Involves Arlington Developmental Center), also known as the Remedial Order***

In January 1992, the U.S. Department of Justice (DOJ) sued the State of Tennessee for violations of the Civil Rights of Institutionalized Persons Act (CRIPA) at the Arlington Developmental Center. A court-appointed monitor ensured that DIDD complied with the terms of the remedial order. Arlington

Developmental Center was officially closed in October 2010.

The State has filed a *Motion to Vacate All Outstanding Orders and to Dismiss the Case* with the Federal Court.

- ***People First of Tennessee, et al. vs. The Clover Bottom Developmental Center, also known as the Settlement Agreement***

In April 1996, DIDD entered into a Settlement Agreement with the advocacy group People First, which had sued the state, charging violations of CRIPA at CBDC and GVDC . The U.S. Department of Justice strongly suggested that the State settle, and, in December 1996, sued the State to become a party in the settlement negotiations. A four-member Quality Review Panel (QRP) monitors the developmental centers and community providers on an annual basis. In March 2006, a Federal Court in Nashville dismissed Greene Valley from the part of the lawsuit involving institutional conditions at the center. Work continues, and progress is being made on bringing CBDC into compliance with the Settlement Agreement.

In December 2009, the State announced its intent to close CBDC. Residents will be provided appropriate services and supports in alternative settings like small privately-operated ICF/IID community-based waiver services, state-operated ICF/IID, or other appropriate placements. DIDD will build nine (9), four-person ICF/IID licensed homes in and around Davidson County for medically fragile residents and two (2) homes to serve behaviorally challenged residents. The census at CBDC has declined over the past year from 101 residents to 42 residents.

The QRP established by this lawsuit, completed a review of CBDC in December 2011, and rated the facility to be in compliance or partial compliance with 90 percent of the requirements set out in the Settlement Agreement.

Olmstead refers to the 1999 U.S. Supreme Court judgment in the case *Olmstead vs. L.C.* The case was brought against the Georgia State Commissioner of Human Services (Tommy Olmstead) on behalf of two (2) women with developmental disabilities (known as L.C. and E.W.) that were diagnosed with mental illness (schizophrenia and personality disorder, respectively). The women were voluntarily admitted to Georgia Regional Hospital for treatment in a psychiatric unit (Atlanta Legal Aid Society 2004). After some time, the women indicated their preference for discharge and the professionals working with them assessed that they were ready to move into a community setting with appropriate support.

The women were not successfully discharged from the hospital, and in 1995 the Atlanta Legal Aid Society filed a lawsuit, which was eventually heard by the U.S. Supreme Court. The Supreme Court ruled that under Title II of the ADA (ADA, 1990) the women had the right to receive care in the most integrated setting appropriate, and, that their unnecessary institutionalization was discriminatory and violated the ADA.

According to the Center for Personal Assistance, the Olmstead ruling provided an important clarification about how states should comply with Title II of the ADA. The ADA applies to all public bodies and to the use of public funds and, therefore, has implications for publicly-funded Medicaid services to people with disabilities (Rosenbaum and Teitelbaum 2004). The Olmstead decision confirmed that states must ensure that Medicaid-eligible persons do not experience discrimination by being institutionalized when they have an opportunity to be served in a more integrated (community) setting (Rosenbaum and Teitelbaum 2004). This obligation is sometimes known as the ADA “integration mandate.”

The Supreme Court made limited recommendations for the manner in which states might ensure compliance with the ADA in light of Olmstead. The Supreme Court indicated that states should make reasonable accommodations to their long-term care systems, but should not be required to make fundamental alterations. It suggested that compliance might be demonstrated by comprehensive, effectively working plans (Olmstead Plans) to increase community-based services and reduce institutionalization. This process may be accomplished by ensuring that waiting lists for services move at a reasonable pace (Smith and Calandrillo 2001). An analysis of rulings in community integration lawsuits after Olmstead has shown that lower courts have generally decided that evidence of active engagement and slow progress towards more community-integrated long-term care satisfies the ADA (Rosenbaum and Teitelbaum 2004).

To aid states in the compliance with Olmstead, the Federal Government issued guidance based on the opinions given by the judges. The Federal Government has also provided ongoing policy guidance encouraging review and development of state LTC policy (e.g., Olmstead plans), promoted the increased use of existing policy options for HCBS (e.g., encouraged states to apply for HCBS waivers), and announced rule

amendments to enable more flexibility in Medicaid HCBS (e.g., ability to provide retainers to personal assistants) (Rosenbaum 2001). While the Federal government's commitment to new initiatives (e.g., the New Freedom Initiative) has been welcomed, it has also been criticized on two counts: (1) a lack of an overall national policy framework for community integration of people with disabilities, and (2) inadequate stimulation of change in the long-term care system to eliminate unnecessary institutionalization of disabled people (Gran et al 2003).

The Olmstead ruling stimulated lawsuits raising similar issues in other states on behalf of people who are now institutionalized or at risk of institutionalization because of a lack of community-based services. These lawsuits often invoke two (2) different sets of federal laws: (1) civil rights laws (including the ADA, Olmstead ruling and the Rehabilitation Services Act 1973) and (2) Medicaid law {U.S. Department of Justice (DOJ) 2002}.

The Olmstead ruling also led to complaints being filed with the DOJ regarding community integration (Rosenbaum et al 2001, U.S. DOJ 2005). One study found that by May 2004, 627 complaints had been filed against state agencies claiming that people had not received services in the most integrated setting (Rosenbaum and Teitelbaum 2001). In addition, a recent report from the Office of Civil Rights describes community integration complaints from approximately 250 individuals across the nation which have been resolved by the Office of Civil Rights (OCR 2005).

### **8.3.1. DIDD Lawsuit Updates**

#### **8.3.1.(a) ARLINGTON UPDATE**

The requirements of the Exit Plan approved in January 2013 were met in October 2013 and based upon the Report and Recommendation for Entry of An Order Finding that the State completed Certain Material Provisions of the Exit Plan submitted by United States Magistrate Judge, Diane K. Vescovo on October 25, 2013 and since there were no responses with concerns brought forth by the parties, an Order Granting Joint Motion to Vacate All Outstanding Injunctive Relief and Dismissing the Case with Prejudice was issued on December 4, 2013 by Jon P. McCalla, U.S. District Court Judge for the Western District of Tennessee Western Division.

### **8.3.1. (b) GVDC & CBDC UPDATE**

The QRP conducted their 2013 Annual Systems Review for CBDC the week of September 9—13, 2013. The Panel noted compliance in a significant number of areas including direct care staffing ratios, assistive technology, communication services, dental services, psychiatric services, behavior management, quality assurance, physical environment, resident property, protection from harm, and First Amendment Rights. Only one Immediate Concern was issued by the Panel during the course of the review. The CBDC staff responded during the on-site review and corrective action was taken. Of the paragraphs reviewed, 59 were in Compliance, 23 in partial compliance.

The QRP conducted its Annual Systems Review of Sections IV, V and IX of the Settlement Agreement at GVDC the week of January 27, 2014. The formal report of the findings was published on April 1, 2014. Consistent with the Panel's findings in 2013, at the time of the review, class members residing at GVDC continue to be afforded opportunities to participate in community activities, work, and volunteer, attend community events, and were supported in the exercise of their First Amendment Rights.

The Panel noted compliance in a significant number of areas including conservator/family attendance at ISP meetings, quality assurance, staff training, and First Amendment Rights. Of the 30 paragraphs reviewed, 18 were found to be in compliance, eight (8) were in partial compliance, and three (3) were in non-compliance. One was listed as not applicable.

The QRP is scheduled to review CBDC and HJC the week of September 15, 2014.

The QRP began their annual review of the community services system in February 2014 and conducted their last review the week of August 18, 2014.

On May 7, 2014, Judge Sharp, District Court Judge for the Middle District of Tennessee, referred the Clover Bottom lawsuit to Magistrate Judge Juliet Griffin

for the purpose of conducting settlement conferences. Mediation sessions were held on July 8 and 9, 2014, and September 9 and 10, 2014. Additional mediation sessions have been scheduled for October 2 and 3, 2014, and October 22 and 23, 2014.

#### 8.4. FY 2014 Employee Discrimination Complaints

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit (retaliation). The following five (5) discrimination complaints were filed with the U.S. Equal Employment Opportunity Commission (EEOC) or Tennessee Human Rights Commission (THRC) between June 30, 2014 and June 30, 2014:

Protective Class	Ethnicity	Number of Complaints Filed
Race	African American	4
Color		
National Origin		
Pregnancy		
Disability (ADA)	Caucasian	1
Veterans Status		
Sex		
Religion		
Age		
Genetic Information		

#### 8.5. DIDD Complaint Procedures

*Describe complaint procedures followed by the department or agency.*

A complaint alleging discrimination against a service provider or any entity of DIDD may be filed with DIDD Regional Title VI Coordinator, DIDD Director of Civil Rights, or the Commissioner of DIDD. ***A complaint may also be filed externally with the Tennessee Human Rights Commission or the Department of Health and Human***

***Services Office for Civil Rights, Region IV, in Atlanta, Georgia.***

While this procedure is directed at the processing of Title VI complaints, as a general proposition, all discrimination complaints will follow the same processing procedures.

Any family member, individual receiving services or legally authorized representative on behalf of such individual may file a complaint of discrimination on the basis of race, color, national origin, disability, or age. The individual or organization filing the complaint may not be a victim of the alleged discrimination, but may complain on behalf of another person or group.

All complaints of alleged discrimination will be investigated. It is the policy of DIDD to encourage the informal resolution of all complaints with the participation of all affected parties. Attempts will be made to resolve the complaint at the lowest level possible. Anyone wishing to file a formal complaint of alleged discrimination against DIDD or any DIDD service provider may submit in writing to the Office of Civil Rights the following information in a letter or using the Discrimination Complaint Form available from DIDD Office of Civil Rights:

- ✓ A general description of the person(s) or class of persons injured by the alleged discriminatory act(s) {names of the injured person(s) are not required};
- ✓ The name and location of the service provider or developmental center that committed the alleged discriminatory act(s), and
- ✓ A description of the alleged discriminatory act(s) in sufficient detail to enable DIDD to understand what occurred, when it occurred, and the basis for the alleged discrimination (race, color, national origin, disability, or age).

Upon receiving a Title VI complaint, the regional Title VI Coordinator will acknowledge receipt of the complaint within 15 days. The Title VI Coordinator will review the complaint to determine whether DIDD has jurisdiction to investigate the complaint. The complaint must meet the following basic criteria to be accepted for investigation:

- The complaint must allege discrimination on a basis prohibited by Title VI of the Civil Rights Act of 1964.
- The complaint must allege that discrimination is occurring in a program or activity that receives financial assistance from DIDD.

- The subject matter (i.e., issues) addressed by the complaint must be covered by Title VI of the Civil Rights Act of 1964.
- The complaint must be timely filed, within 180 days of the alleged violation, unless the requirement is waived.

If there is insufficient information to determine whether the complaint meets these four (4) criteria, the complainant will be contacted to obtain this information. The following are examples of items that will not constitute a complaint, unless the item contains a signed cover letter specifically asking DIDD to take action concerning the allegations:

- an anonymous complaint,
- inquiries seeking advice or information,
- courtesy copies of court pleadings,
- courtesy copies of complaints addressed to other local, state, or federal agencies;
- newspaper articles,
- courtesy copies of internal grievances, or
- oral complaints.

All complaints will be reviewed. If the complaint does not meet the prima facie case, complainant will be notified in writing. The complaint may be forwarded to the DIDD Complaint Resolution section for review, a federal/state agency, or a local organization (e.g., National Association for the Advancement of Colored People, Mexican American Legal Defense and Education Fund, Urban League, National Organization for Women, etc.) to explore whether further action is warranted.

## **8.6. Title VI Complaint Form**

*Attach a copy of the complaint form utilized by the department or agency.*