

PROTECTIVE CUSTODY

WILLIAMSTOWN POLICE DEPARTMENT POLICY & PROCEDURE NO. 3.06	EFFECTIVE DATE: 02/04/2022
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I. POLICY

The Police Department shall comply with the requirements of Section 8 of Chapter 111B of the Massachusetts General Laws when taking an intoxicated person into protective custody.

The Police Department shall comply with the requirements of Section 9A of Chapter 111E of the Massachusetts General Laws when taking an incapacitated person into protective custody.

II. PROCEDURES FOR PERSONS INCAPACITATED BY ALCOHOL

DEFINITIONS

- **Facility:** Any public or private place, or portion thereof, providing services especially for the detoxification of intoxicated persons or alcoholics.
- **Incapacitated:** The condition of an intoxicated person who, by reason of the consumption of intoxicating liquor, is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly.

TAKING CUSTODY GENERALLY

- An officer may take custody of a person who is intoxicated by the consumption of intoxicating liquor and:
 - Unconscious;
 - In need of medical attention;
 - Likely to suffer or cause physical damage or harm; and/or
 - Disorderly.
- The officer may assist the person with or without his/her consent to:
 - His/ her residence
 - A treatment facility
 - The police station

PROTECTIVE CUSTODY FROM THE HOME: A person may be taken into protective custody from his or her own home.

ARRESTS: In addition to protective custody, persons may also be placed under arrest. In such cases, qualifications for bail as well as protective custody release apply.

USE OF FORCE: An officer may use such force as is reasonable and necessary to carry out the procedure herein, with the exception of tests for determining intoxication. Persons may not be forced to take a breath test or to perform sobriety tests.

In the absence of an accompanying crime, an officer shall not arrest an intoxicated person. If the situation does not warrant an arrest, but action is necessary, a police officer has the authority to assist an incapacitated person, with or without his/her consent, to his/her residence, to a treatment facility, or to the police station. While not required, officers are urged to obtain consent where possible.

In order to determine whether or not a person is intoxicated, an officer may request such person to submit to reasonable tests of coordination, coherency of speech, and breath. Examples of such tests are listed at the end of Section I of this Policy and Procedure.

Any incapacitated person assisted to the police station shall have the right after arriving at the station to request and be administered a breathalyzer test and shall immediately be informed of such right, with said communication appropriately documented.

NOTE: The following notice will be provided.

NOTICE OF RIGHTS

THIS IS TO INFORM YOU THAT PURSUANT TO CHAPTER 111B, SECTION 8 OF THE MASSACHUSETTS GENERAL LAWS, YOU HAVE THE RIGHT TO REQUEST AND BE ADMINISTERED A BREATHALYZER TEST. IF YOU ARE TO BE HELD IN PROTECTIVE CUSTODY, YOU ALSO HAVE THE RIGHT TO MAKE ONE TELEPHONE CALL AT YOUR OWN EXPENSE ON YOUR OWN BEHALF.

Breathalyzer test results shall be utilized as follows:

- If the reading (which indicates the percentage of alcohol in a person's blood) is .10 or more, the person shall be presumed to be intoxicated, and shall be placed in protective custody at the police station or transferred to a facility.
- If the reading is .05 or less, the person shall be presumed not to be intoxicated and shall be released from custody immediately.
- If the reading is more than .05 and less than .10, no presumption based solely on the breathalyzer test shall be made. In this event, a reasonable test of coordination or speech coherency must be administered to determine if the person is intoxicated.

Any person presumed intoxicated and to be held in protective custody at a police station shall, immediately after such presumption, have the right and be informed of the right to make a telephone call at his/her own expense and on his/her own behalf and shall be informed forthwith upon arriving at the facility of said right. (See above Notice of Rights in the Booking Area).

The parent or guardian of any person under the age of eighteen to be held in protective custody at a police station shall be notified forthwith upon arrival at said station or as soon as possible thereafter. Upon the request of the parent or guardian, the juvenile or such person shall be released to the custody of the parent or guardian.

Nothing in these procedures shall be construed to require or permit a police officer to hold a person in protective custody against his/her will unless suitable treatment at a facility is not available.

If such treatment is not available, the person may be held in protective custody at the station for the following periods, whichever is shorter:

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- up to 12 hours;
- until he/she is no longer incapacitated.

An officer may use such force as is reasonable and necessary to carry out the procedures herein.

NOTIFICATION OF DETOX FACILITY: If an incapacitated person is assisted to the police station, the officer shall immediately notify the McGee Substance Abuse Unit of the Berkshire Medical Center at 413-445-9228 that an incapacitated person is being held under protective custody. If suitable treatment services are available, inform the detainee of this, and officers shall thereupon arrange for the transportation of the person to the facility if the detainee voluntarily wants to go to the McGee Unit.

SEARCH AND TRANSPORTATION

An officer is authorized to make a search of an incapacitated person and his/her immediate surroundings whenever the following conditions exist:

- the officer reasonably believes that the officer's safety or the safety of other persons present requires the search;
- the search is limited to the extent necessary to discover any dangerous weapons that on that occasion may be used against the officer or other persons present.
 - **NOTE:** The Massachusetts Supreme Judicial Court ruled in 1989 that a "pat down" search of an incapacitated individual who is being taken into protective custody which detected the presence of drugs was lawful. The Court ruled that the inevitable discovery exception to the exclusionary rule was applicable since the same evidence would have been inevitably discovered when an inventory search was conducted upon arrival at the police station.¹ A similar result was obtained when the same Court in 1987 ruled that a gun discovered in a pat down search of an incapacitated individual was lawfully seized.²

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Commonwealth v. O'Connor, 406 Mass. 112, 546 N.E.2d 336 (1989).

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Commonwealth v. Tomeo, 400 Mass. 23, 507 N.E.2d 725 (1987).

- If an officer comes upon, or responds to a call-in regard to, an incapacitated person, the officer shall be aware of and immediately consider the possibility of other ailments.
- An incoherent, unsteady, or unconscious person, for example, might be suffering from an epileptic seizure, insulin shock, diabetic coma, stroke, heart attack, or brain injury.
- If the officer, relying on his/her own judgment and field experience, believes the above or similar conditions may be present, he/she shall immediately make arrangements for medical treatment in accordance with departmental procedures, as approved by the department's medical director.
- Officers shall extend the same considerations to an incapacitated person that they would offer to a person suffering from any other illness.

SAFEGUARDING AT POLICE STATION

- An incapacitated person held in protective custody at the police station shall have the following property taken from him/her for safekeeping in accordance with departmental procedures:
 - belts, shoelaces, drawstrings, neckties, neck chains, matches, and cigarette lighters;
 - all other articles which may pose a danger or harm to such person or to others;
 - personal property and other valuables.
- **NOTE:** Such property shall be kept in a secure place, and an inventory shall be maintained.
- An unconscious person shall never be placed in a cell unattended at any time. In such cases, immediate medical care shall be provided in accordance with departmental procedures.
- The Officer-in-Charge, or his/her designee, shall take every precaution to ensure that all persons held in protective custody are prevented from harming themselves in any way by carefully observing them at intervals of not more than thirty (30) minutes. A record shall be maintained of the time of such observations in accordance with departmental procedures.

- **NOTE:** Individuals who are released on bail following an arrest may be placed in protective custody if they are still "incapacitated" as defined in Chapter 111B. The foregoing considerations regarding release will govern a decision to release such individual from protective custody.

REPORTING REQUIREMENTS

A report of protective custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the Officer-in-Charge, whether the person held in custody exercised his/her right to make a phone call, whether the person held in custody exercised his/her right to take a breathalyzer test, and the results of the breathalyzer test, if taken. Such record shall not be treated, for any purposes, as an arrest or criminal record.

Officer(s) shall file a report indicating the nature of the incident which gave rise to any police involvement, the method of handling the problem, and any injuries observed on the incapacitated person including their cause and medical treatment, if any.

Officers should be aware that M.G.L. c.123, s.35 authorizes police officers (and certain other persons) to file a petition in an appropriate district court requesting that a person who is an alcoholic (or drug dependent person) be committed for a period not to exceed ninety (90) days to an in-patient public or private facility approved by the Department of Public Health.³ Where appropriate, police officers should advise the family and friends of a problem alcoholic of the procedures available under this law. (Section 35 is in Department Forms)

NOTE: Police officers are immune from civil suits for damages for restraining, transporting, applying for the admission, or admitting any person to a facility if the officer acts pursuant to the provisions of Chapter 123.⁴

TESTS FOR DETERMINING INTOXICATION

One Leg Stand:

Have the subject stand on one foot with his/her arms outstretched; repeat with the other foot. Next, have the subject stand with his/her feet together, arms by his/her side, and eyes closed. Note any loss of balance, swaying, and jerky motions by the subject.

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G.L. c. 123, § 35.

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G.L. c. 123, § 22.

Walk & Turn:

Have the subject walk, in a heel to toe manner, a straight line of about 20 feet. Just before the subject reaches the end of the line, direct him to quickly turn and walk heel to toe back to the starting point. Note any deviations from the line by the subject as well as any difficulty or loss of balance experienced by him in walking and turning.

**Finger to
Nose:**

Have the subject stand with his/her feet together, arms extended to the side, and eyes closed. Direct him/her to touch the tip of his/her nose with the index finger of his/her right hand; repeat with the left index finger. Note if and where the index fingers touch and the degree of certainty with which the subject moves.

Alphabet:

Ask the subject to recite the alphabet (A to Z) and note any omissions or difficulties.

Indications of Alcohol Consumption: Only persons who are incapacitated by consumption of alcohol (not other drugs) may be taken into protective custody under this section. In addition to conducting tests to determine intoxication, officers must be careful to observe and make note of all indications that the intoxication is due to the consumption of alcohol. The odor of alcoholic beverages on the subject's breath; the presence of open alcoholic beverage containers on his/her person or in his/her car when stopped; any admission by the subject that he/she has been drinking or is drunk; any statements to the same effect by his/her companions and any other indications of alcohol use should be so noted.

G. JUVENILES - PROTECTIVE CUSTODY FOR ALCOHOL G.L. C.111B, §§ 8 AND 10

Officer must have "specific facts" to believe minor under 18 is incapacitated due to liquor (not drugs). Under G.L. c. 111B, §3, "incapacitated" is the condition of a person who, by consuming liquor, is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly.

Decision may be based on field sobriety tests. Officer only needs a reasonable suspicion of incapacitation to order sobriety testing. (Walking in the road late at night with odor of alcohol sufficient)

“Reasonable force” may be used to carry out “authorized responsibilities.” Officer may search the person and immediate surroundings to discover weapons.

- With or without minor’s consent, officer may assist child to:
- Residence. Do not leave an intoxicated child at his or her home unless a parent or guardian takes responsibility and custody.
- Treatment facility. Make sure the facility will accept the juvenile. Call beforehand.
- Police Station.

When child is taken to the station the officer must:

- Allow minor to make a phone call.
- Inventory the minor’s personal possessions.
- Notify the parent or guardian of the minor “as soon as possible.”
- Provide breathalyzer rights in writing.

Under §8, a breathalyzer of .10 establishes a presumption of incapacitation (not like .08 for OUI). Between .05 and .10 creates no presumption; however, police are advised to keep the minor based on their field sobriety findings. Finally, a reading of .05 or below entitles the person to immediate release from custody. However, given that the minor is, by definition, an underage drinker when registering any reading on the breathalyzer (.02 causes OUI consequences for under age 21 drivers), officers should still insist on releasing the child to a parent, guardian, or responsible adult.

Duty to release or transfer the minor:

- 1st priority: Release minor upon request of parent or guardian. However, hold the child and call DCF if the parent / guardian arrives incapacitated or fails to act responsibly.
- 2nd priority: If treatment is available, transport the minor to a treatment facility.
- 3rd priority: If treatment is unavailable, hold the minor in non-secure detention. Never place in a cell; keep in an unlocked area under continuous visual supervision, and try to get a parent, guardian, or responsible person to remove the child from station as soon as reasonable possible.

Civil Liability: under G.L. c. 111B, §13, “[p]olice officers, facility administrators or other persons acting in a responsible manner and pursuant to the provisions of this chapter shall not be held criminally or civilly liable for such acts.” However, failure to act may subject officer’s liability. (A police officer who violates his responsibility to take an incapacitated person into custody “risks tort liability for his employer”)

H. PROTECTIVE CUSTODY: CHILD UNDER 18 EXPOSED TO CLASS A, B OR C G.L. C. 94C, § 36

Officers are not required to utilize G.L. c. 94C, § 36 but, if they do, they must:

- Reasonably believe that the child is under 18 and has knowledge of and is present with controlled substances in Class A, B, or C (not D). Notice that this statute only applies when the juvenile is present with classes A, B, and C, but not D, which excludes marijuana.
- Hold the juvenile in protective custody for no longer than 4 hours and be sure to follow federal guidelines concerning the non-secure detention of status offenders.
- Make every effort to notify the child's parent or guardian. The child should be released as soon as possible to the parent or guardian but, in any event, should not be held for over 4 hours at the station.
- File a mandatory report of abuse or neglect – the 51A Report. If the child is living outside the home and not particularly amenable to DCF help, DCF may be reluctant to open a case. But it is good to notify them anyway so they can make the choice.

DRUGS – CHAPTER 111E, SECTION 9A

The new law provides that “any person who is incapacitated” may be placed into protective custody by a police officer. The law defines “incapacitated” to mean the condition of a person who, by reason of the consumption of a controlled substance or toxic vapor or other substance other than alcohol is: (i) unconscious; (ii) in need of medical attention; (iii) likely to suffer or cause physical harm or damage property; or (iv) disorderly.

The law only authorizes police officers to place individuals into protective custody under G.L. c. 111E, s. 9A.

Other first responders (such as emergency medical service and fire-fighting personnel), and medical professionals (such as doctors and nurses) are not vested with the power to place a person into protective custody under G.L. c. 111E, s. 9A.

Persons Under the Age of 18

Officers shall notify a parent or guardian of the person that he/she was placed into protective custody and transported to the hospital.

Use of Force

Police can use such force as is reasonably necessary to carry out the officer's authorized responsibilities. As always, officers are cautioned that the level of force used should be appropriate under the totality of the circumstances involved in each situation. The law empowers officers to force an individual to be transported to the hospital provided the officer determines the person to be “incapacitated” under the law.

A person placed into protective custody is not considered to be under arrest and no entry of custody will be treated as an arrest. While the person shall not be booked, officers will file an Incident Report that must include the date, time, place of custody, name of assisting officer(s) and the name of the Officer in Charge. Officers will also record the facts and circumstances relied upon in making the determination that the person was “incapacitated” and what steps and actions the officer took in response thereto.

The law provides that “Any person who is incapacitated may be placed into police custody by a police officer without the person’s consent for the purpose of immediately transporting the person to a medical facility.” Therefore, upon taking a person into police custody, persons will be transported by ambulance to the hospital. Police can “hold” a person to the extent of time necessary to transport to the hospital.

Officers will escort the ambulance to ensure that the police custody status is enforced.

May a person who has been placed into protective custody under G.L. c. 111E, s. 9A be charged if the officer discovers contraband during a search?

It depends. Remember that G.L. c. 94C, s. 34A only applies to provide immunity from prosecution for possession of a controlled substance if a person, in good faith, seeks medical assistance for himself/herself or another person, experiencing a drug-related overdose. Unless that has occurred, then the person could be charged if contraband is found on a person during a search pursuant to G.L. c. 111E, s. 9A.

III. PROCEDURES FOR PERSONS INCAPACITATED BY DRUGS AND SUBSTANCES OTHER THAN ALCOHOL

DEFINITIONS

- **Acute Care Hospital:** Any hospital licensed under G.L. c. 111, § 51, which contains a majority of medical-surgical, pediatric, obstetric, and maternity beds, as defined by the department.⁵
- **Incapacitated:** The condition of a person who, by reason of the consumption of a controlled substance or toxic vapor or other substance other than alcohol is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly. For the purposes of this Policy and consistent with the guidance issued by the Executive Office of

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Defined in G.L. c. 111, § 51½.

Public Safety and Security along with the Municipal Police Training Committee, a person who has been administered nasal naloxone in connection with a drug overdose is still deemed to be “incapacitated” as a person “in need of medical attention”.

- **Satellite Emergency Facility:** A health care facility that operates on a 7 day per week, 24 hour per day basis, that is located off the premises of a hospital, but is listed on the license of the hospital, which is authorized to accept patients transported to the facility by ambulance.⁶

TAKING CUSTODY

- In the absence of an accompanying crime, an officer shall not arrest an incapacitated person. If the situation does not warrant an arrest, but action is necessary, a police officer has the authority to place an incapacitated person into protective custody and transport the incapacitated person, with or without his/her consent, to an acute care hospital or satellite emergency facility or otherwise to immediately obtain appropriate emergency medical treatment.
- In order to determine whether or not a person is incapacitated, an officer may request such person to submit to reasonable tests of coordination, coherency of speech, and breath. Examples of such tests are listed at the end of Section II of this Policy and Procedure. A police officer may place the person into protective custody when such tests or other information or observations indicate that the person is incapacitated.
- A person taken into protective custody for incapacitation shall not be taken to the police station or the person’s residence and must be immediately transported to an acute care hospital or satellite emergency facility or otherwise to immediately obtain appropriate emergency medical treatment.
- Nothing in these procedures shall be construed to require or permit a police officer to hold a person in protective custody against his/her will beyond the time required to complete the person’s immediate transport to an acute care hospital or satellite emergency facility or otherwise to immediately obtain appropriate emergency medical treatment.
- An officer may use such force as is reasonable and necessary to carry out the procedures herein.

SEARCH AND SEIZURE

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Defined in G.L. c. 111, § 51½.

An officer is authorized to make a search of an incapacitated person and his/her immediate surroundings whenever the following conditions exist:

- the officer reasonably believes that the officer's safety or the safety of other persons present requires the search;
- the search is limited to the extent necessary to discover any dangerous weapons that on that occasion may be used against the officer or other persons present.
- Any item taken shall be inventoried and secured, and, unless the item is contraband or otherwise unlawfully possessed, shall be returned to the person when the person is no longer incapacitated.
- If the officer discovers contraband or items unlawfully possessed on the incapacitated person, the officer shall take the appropriate actions to charge the person with the possession of such items. The primary consideration of the officer, however, should remain on immediately transporting the individual to an acute care hospital or satellite emergency facility or otherwise to immediately obtain appropriate emergency medical treatment. Officers shall not, however, charge an individual with possession of a controlled substance under G.L. c. 94C, §§ 34 or 35, if that person in good faith, seeks medical assistance for themselves or another person who is experiencing a drug-related overdose.

TRANSPORTATION

- The officer shall immediately call emergency medical services upon making a determination that an individual is incapacitated. The officer shall direct that emergency medical services personnel transport the incapacitated person. If emergency medical services personnel transport the incapacitated person, the officer should accompany the incapacitated person in the emergency medical services vehicle, or in the alternative, otherwise escort the emergency medical services vehicle to the destination.
- Unless articulable exigent circumstances exist in which an incapacitated person cannot be transported by emergency medical services personnel, officers shall not transport an incapacitated person in police vehicles. If such circumstances exist as to require the transport of an incapacitated person in a police vehicle, the transporting officer shall adhere to the departmental policies and procedures relative to the transport of an individual in a police vehicle.
- Before transporting an incapacitated person, the Officer-in-Charge shall be notified so that he/she may arrange for assistance, if available.

- At the destination, the officer shall escort incapacitated person into the facility, request that the person be evaluated, and relinquish custody of the person to facility personnel.
- If an officer comes upon, or responds to a call in regard to, an incapacitated person, the officer shall be aware of and immediately consider the possibility of other ailments.
 - An incoherent, unsteady, or unconscious person, for example, might be suffering from an epileptic seizure, insulin shock, diabetic coma, stroke, heart attack, or brain injury.
 - If the officer, relying on his/her own judgment and field experience, believes the above or similar conditions may be present, he/she shall immediately make arrangements for medical treatment in accordance with departmental procedures.
 - Officers shall extend the same considerations to an incapacitated person that they would offer to a person suffering from any other illness.
- Whenever an officer places into protective custody a person under the age of 18, the officer shall notify the parent or guardian of that person immediately.

REPORTING REQUIREMENTS

Once the transport is complete, a report of protective custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the Officer-in-Charge, the nature of the incident which gave rise to any police involvement, the method of handling the problem, what the officer relied upon in determining that the person was incapacitated, what modes of transport were requested, what mode of transport was made, the location to which the person was transported, any exigent circumstances justifying a different mode of transport, and any injuries observed on the incapacitated person including their cause and medical treatment, if any, the medical personnel who evaluated the person, and the facility personnel to whom the officer relinquished custody of the incapacitated person. A sample REPORT OF SECTION 9A PROTECTIVE CUSTODY form is attached to this policy. Officers do not have to fill this form out, but the information must be in the officer's report.

Police should be aware that Massachusetts Law authorizes police officers (and certain other persons) to file a petition in an appropriate district court requesting that a person who is a drug dependent person be committed for a period not to exceed fifteen days to an in-patient public or private facility approved by the Department of Public Health.⁷ Where appropriate, police officers should advise

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the family and friends of a problem alcoholic of the procedures available under this law.

NOTE: Police officers are immune from civil suits for damages for restraining, transporting, applying for the admission, or admitting any person to a facility if the officer acts pursuant to the provisions of Chapter 123.⁸

G.L. c. 123, § 35.

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G.L. c. 123, § 22.