

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

Do not mark in this box
Filing Date

JAN 23 2 30 PM '99

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

WV Traumatic Brain/Spinal Cord Injury Rehabilitation Fund Board
West Virginia Division of
Rehabilitation Services

AGENCY: TITLE NUMBER: 197

CITE AUTHORITY: §18-10~~k~~-3

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED:

TITLE OF RULE BEING AMENDED:

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 1

TITLE OF RULE BEING FILED AS AN EMERGENCY: West Virginia Traumatic Brain/Spinal
Cord Injury Rehabilitation Fund Board

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME
EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY
AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE
AS FOLLOWS:

Use additional sheets if necessary

\$5.00


Sandra Barkey Signature
Chair

DEPARTMENT OF EDUCATION AND THE ARTS
Office of the Secretary

State Capitol Bldg. 5, Room 205
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
Telephone: (304) 558-2440
Fax: (304) 558-1311

Cecil H. Underwood
Governor

January 13, 1999

David R. Ice
Cabinet Secretary

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

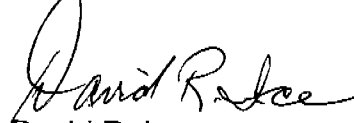
Dear Secretary Hechler:

I hereby grant consent as pursuant to West Virginia Code §5F-2-2 for the promulgation of the following Emergency Legislative Rule of the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund administered by the West Virginia Division of Rehabilitation Services:

Title 197, Series 1: West Virginia Traumatic Brain and Spinal Cord Injury
Rehabilitation Fund.

A copy of the rule is attached.

Sincerely,



David R. Ice
Cabinet Secretary

Attachment

cc: James S. Jeffers, Director
WV Division of Rehabilitation Services

Sandra Barkey, Chairperson
WV Traumatic Brain and Spinal Cord Injury
Rehabilitation Fund Board

Sandra Barkey
1599-A Quarrier Street
Charleston, West Virginia 25311

January 13, 1999

The Honorable David R. Ice, Cabinet Secretary
Department of Education and the Arts
Building 5, Room 205
Charleston, West Virginia 25305

Dear Secretary Ice:

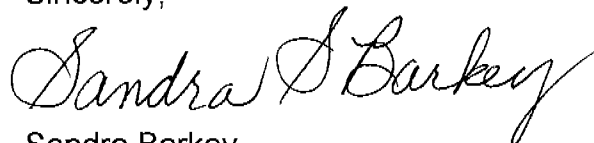
On behalf of the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Board, I am forwarding a notice of adoption of the following Emergency Legislative Rule:

Title 197, Series 1: West Virginia Traumatic Brain and Spinal Cord Injury
Rehabilitation Fund

This rule, following extensive review by the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Board, was approved.

Could you please review the attached and, if you approve, forward to the Secretary of State for filing. Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Sandra Barkey".

Sandra Barkey
Chairperson

cc: James S. Jeffers, Director
WV Division of Rehabilitation Services

EMERGENCY RULE QUESTIONNAIREDATE: January 13, 1999TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEEFROM: (Agency Name, Address & Phone No.) West Virginia Division of Rehabilitation ServicesP. O. Box 50890, 1900 Kanawha Blvd., East, Charleston, WV 25305-0890
304-766-4997

EMERGENCY RULE TITLE: _____

1. Date of filing of proposed legislative rule: _____
2. Statutory authority for promulgating emergency rule:

§18-10J-3

3. Date of filing of proposed legislative rule: _____
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule? This emergency rule adopts new language.

5. Has the same or similar emergency rule previously been filed and expired?

NO

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.

The statutory authority was passed during the 1998 Regular Session of the Legislature and the funds attached to the statute cannot be expended until there are rules in place to do so. This will delay the effectiveness of the West Virginia Traumatic Brain/Spinal Cord Injury Rehabilitation Fund Board in the development, implementation and delivery of services to individuals with these type of injuries who are in critical need.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

N/A

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

The rule is necessary for the West Virginia Traumatic Brain/Spinal Cord Injury Rehabilitation Fund Board to identify people in need of services and determine the types of services necessary to make them as independent as possible. This reduces the potential for further medical intervention or reliance on the public service system.

SUMMARY

Title 197

Legislative rules

**West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund
Series 1**

This rule establishes procedures and standards applicable to the implementation of the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Act.

CIRCUMSTANCES

TITLE 197

Legislative Rules

West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Series 1

The purpose of this rule is to guide the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Board and the West Virginia Division of Rehabilitation Services in the implementation and administration of the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund as delineated in WV Code §18-10J-3.

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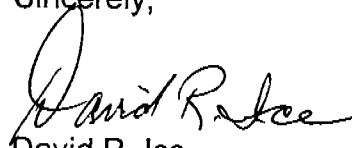
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A copy of the rule is attached.

Sincerely,



David R. Ice
Cabinet Secretary

Attachment

cc: James S. Jeffers, Director
WV Division of Rehabilitation Services

Sandra Barkey, Chairperson
WV Traumatic Brain and Spinal Cord Injury
Rehabilitation Fund Board

LEGISLATIVE RULE

WEST VIRGINIA TRAUMATIC BRAIN AND SPINAL CORD INJURY
REHABILITATION FUND

TITLE 197

LEGISLATIVE RULE

WEST VIRGINIA TRAUMATIC BRAIN AND SPINAL CORD INJURY
REHABILITATION FUND

SERIES 1

§197-1-1. General.

1.1. Scope. These rules are being filed pursuant to West Virginia Code §§ 29A-3-1 et seq. and West Virginia Code § 18-10J-3. These rules establish procedures and standards applicable to the implementation of the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Act. Under this Act, the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Board may make funding available for services to qualified individuals for approved purposes in accordance with this rule.

1.2. Authority. West Virginia Code §§ 29A-3-1 et seq. and 18-10~~J~~-3.

1.3. Filing Date.

1.4. Effective Date.

§197-1-2. Description of Program.

2.1. General Purpose. The West Virginia Legislature created and established the West Virginia Traumatic Brain And Spinal Cord Injury Rehabilitation Fund (hereafter referred to as the Fund) from which the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Board (hereafter referred to as the Board) may pay for services for eligible individuals who have suffered a traumatic brain injury or a spinal cord injury. Services will be provided to increase opportunities for and enhance the achievement of functional independence and enable a return to a productive lifestyle. Moneys from the Fund may also be used to enable the Board to investigate the needs of citizens with traumatic brain and spinal cord injuries, identify any gaps in services to these citizens, and issue an annual report to the Legislature with recommendations for meeting the identified needs, improving coordination of services and summarizing its actions during the preceding year.

§197-1-3. Definitions.

3.1. “Board” means the West Virginia Traumatic Brain And Spinal Cord Injury Rehabilitation Fund Board.

3.2. “Fund” means the West Virginia Traumatic Brain And Spinal Cord Injury Rehabilitation Fund.

3.3. “Traumatic brain injury” means an acquired injury to the brain, including brain injuries caused by anoxia due to near drowning. “Traumatic brain injury” does not include brain dysfunction caused by congenital or degenerative disorders, nor birth trauma.

3.4. “Spinal cord injury” means a traumatic injury to the spinal cord that results in a permanent loss of sensation and voluntary movement below the level of the lesion.

§197-1-4. Board Membership.

4.1. The Board shall consist of twenty-three members, including: (1) The secretary of the department of education and the arts, ex officio, or his or her designee; (2) The secretary of health and human resources, ex officio, or his or her designee; (3) The state superintendent of schools, ex officio, or his or her designee; (4) The secretary of the department of military affairs and public safety, ex officio, or his or her designee; (5) The director of the bureau of behavioral health within the department of health and human resources, ex officio or his or her designee; (6) The director of the division of rehabilitation services, ex officio, or his or her designee; (7) The director of the bureau of medical services, ex officio, or his or her designee; (8) The director of the office of emergency services, ex officio, or his or her designee; (9) The commissioner of the bureau of employment programs, ex officio, or his or her designee; (10) to (16) Seven members appointed by the Governor to represent public and private health organizations or other disability coalitions or advisory groups; and, (17) to (23) seven members appointed by the Governor who are either survivors of traumatic brain or spinal cord injury or family members of persons with traumatic brain or spinal cord injury.

4.1.a. The citizen members appointed by the governor serve for terms of three years, except that of the members first appointed, two of the representatives of public and nonprofit private health organization, disability coalitions or advisory groups and two of the representatives of survivors of family members of person with traumatic brain or spinal cord injuries serve for terms of one year, two of the representatives of each of those respective groups serve for terms of two years, and the remaining three representatives of each of those respective groups serve for terms of three years. All subsequent appointments are for three years. Members serve until the expiration of the term for which they have been appointed or until their successors have been appointed and qualified. In the event of a vacancy the governor may appoint a qualified person to serve for the unexpired term. No member may serve more than two consecutive three-year

terms. State officers or employees may be appointed to the board unless otherwise prohibited by law.

§197-1-5. Board Attendance and Officers.

5.1. In the event an appointed Board member fails to attend more than twenty-five percent (25%) of the scheduled board meetings in a twelve-month period, the Board may, after written notification to that member and the Secretary of Education and the Arts, request in writing that the Governor remove the member and appoint a new member to serve his or her unexpired term.

5.2. The Board shall elect from its membership a chairperson, treasurer and secretary as well as any other officer as appropriate. The term of the officers is two (2) years in duration and they may not serve more than two (2) consecutive terms.

§197-1-6. Expenses of Board.

6-1. Members of the Board shall receive reimbursement for reasonable and necessary expenses actually incurred in the performance of their duties as members of the board in accordance with state travel regulation. Members with disabilities may receive reimbursement for expenses including costs associated with personal assistance, interpreters and disability-related accommodations when those costs are incurred in the course of conducting the business of the Board. Any reimbursement authorized in this section shall be paid from moneys in the Fund.

§197-1-7. Administration of Fund.

7.1. The Fund, established in the state treasury as a special revenue account, shall be administered by the West Virginia Division of Rehabilitation Services. The Fund may receive any gifts, grants, contributions or other money from any source which is specially designated for deposit in the Fund.

7.2. The Division of Rehabilitation Services may retain an amount not to exceed ten percent (10%) per annum of the balance of the Fund to cover any costs of administration of the Fund.

7.3. Fund Use.

7.3.1. All moneys collected, received and deposited into the state treasury and credited to the Fund shall be expended by the Board exclusively in accordance with the uses, criteria for services, general purposes and expense reimbursement provisions of these rules.

7.3.2. Direct Services that are eligible for payment by the Fund shall include, but not be limited to:

- 7.3.2.a. Case management;
- 7.3.2.b. Rehabilitative therapies and services;
- 7.3.2.c. Attendant care;
- 7.3.2.d. Home accessibility modifications;
- 7.3.2.e. Equipment necessary for activities; and
- 7.3.2.f. Family support services.

7.3.3. Funds shall be expended according to the priorities and criteria for disbursement established by the Board.

7.3.4. All applications for moneys under this Fund are confidential. No person(s) may release any information about a person filing an application without the written authorization of that person, or that person's parent, conservator or guardian.

§197-1-8. Criteria and Priorities For Use of Fund.

8.1. The Board hereby establishes the following criteria and priorities for disbursement of moneys from Fund for services.

8.2. Persons who are: (1) Eligible under these rules; (2) Needing a service not being provided or needing a service which is not otherwise available; (3) Not eligible to receive services from any other source; and, (4) requesting services that would assist the individual to achieve functional independence shall be served prior to persons who are currently receiving a service from another resource. Provided that: The Board shall establish an application review team consisting of one board member and other members designated by the Director of the Division of Rehabilitation Services to review applications for services and to authorize funding of services for individuals based upon priorities established by the board.

8.3. The board will appropriate funds for services to persons meeting the following criteria:

- 8.3.a. the service is not provided by other resources available to the applicant;
- 8.3.b. the service is necessary to meet an identified and emergent need of an applicant; and,
- 8.3.c. the service will be provided by a licensed or otherwise qualified provider.

8.4. When the Board determines that additional services should be eligible for payments from the Fund, the chairperson shall provide written notice to the Director of the Division of Rehabilitation Services directing that those services be eligible for payment by the Fund.

8.5. The Board shall investigate the needs of citizens with traumatic brain injuries and spinal cord injuries, identify any gaps in services to these citizens, and issue an annual report to the Legislature with recommendations for meeting the identified needs, improving coordination of services and summarizing its actions during the preceding year.

§197-1-9. Fund As Payer of Last Resort.

9.1. Moneys expended for services described under these rules shall be as a payer of last resort and only for citizens of this state. An individual shall use comparable benefits and services that are available prior to the expenditure of moneys available to that individual through the Fund. For the purposes of this rule, payer of last resort means that the application review team has determined: (1) that the individual requesting services has applied for and been denied services by all other agencies mandated to provide such services; (2) that the individual has been denied insurance benefits or payments for such services; or, (3) the application review team has determined it would be futile to require the individual to apply for services from another agency. Provided that, funding may be provided for services under these rules to an individual who needs such services pending a final appeal decision from another agency or pending an appeal from an insurance benefit denied. Provided further that the Fund shall be entitled to and shall seek reimbursement from another agency or insurance carrier for services provided by the Fund during any appeal process if the appeal is resolved in favor of a fund recipient.

9.1.a. Every eligible person submitting an application for funding for services under this rule agrees and assigns to the Board his or her right to recovery from personal insurance or other sources, including, but not limited to, liable third parties, to the extent of the cost of services paid for by the Fund. This assignment of rights does not extend to benefits expressly exempt under federal or other state law. At the time the application is made, the Division of Rehabilitation Services shall include a statement along with such application that explains that the applicant has assigned all such rights and the legal implications of making such assignment as provided in this section.

9.1.b. If assistance is paid or will be paid to a service provider on behalf of a recipient of services under this rule, and another person is legally liable for such expense, either pursuant to contract, negligence or otherwise, the Board has a right to recover full reimbursement from any award or settlement for such assistance from such other person, or from the recipient of such assistance if he or she has been reimbursed by the other person.

9.1.c. The Board shall be assigned the rights of the recipient against the person so liable, but only to the extent of the reasonable value of the assistance paid for which the recipient has received recovery for damages. When an action or claim is brought by a recipient or by someone on his or her behalf against a third party who may be liable for the injury or disability, any settlement, judgment or award obtained is subject to the claim of the Board for reimbursement of an amount sufficient to reimburse the Fund the full amount of benefits paid on behalf of the recipient. The claim of the board assigned by

such recipient shall not exceed the amount paid by the Fund on behalf of the recipient.

9.1.d. The right of subrogation created in this rule includes all portions of the cause of action, by settlement, compromise, judgment or award, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to the subrogation. Any settlement, compromise, judgment or award that excludes or limits the cost of services or care shall not preclude the Board from enforcing its rights under this section. The Board may compromise, settle and execute a release of any such claim, in whole or in part.

9.1.e. Whether by judgment or settlement, from the amount required to be paid to the Fund, there shall be deducted the attorney fees attributable to such amount in accordance with and in proportion to the fee arrangement made between the recipient and his or her attorney of record so that the Fund shall bear the pro rata portion of such attorney fees. Nothing in this section shall preclude any person who has received assistance from the Fund from settling any cause of action which he may have against another person and delivering to the Board, from the proceeds of such settlement, the sums received by him or her from the Fund or paid by the Fund for his or her assistance. If such other person is aware of or has been informed of the interest of the Board in the matter, it shall be the duty of the person to whose benefit the release inures to withhold so much of the settlement as may be necessary to reimburse the Board to the extent of its interest in the settlement.

9.1.f. No judgment, award of or settlement in any action or claim by a recipient of services under this rule to recover damages in which the Board has an interest, shall be satisfied without first giving the Board notice and reasonable opportunity to establish its interest. The Board shall have sixty days from receipt of such written notice to advise the recipient or his or her representative in writing of the Board's desire to establish its interest through the assignment. If no such written intent is received within the sixty-day period, then the recipient may proceed and in the event of full recovery forward to the Board the portion of the recovery proceeds less the Board's share of attorney's fees and costs expended in the matter. In the event of less than full recovery the recipient and the Board shall agree as to the amount to be paid to the Board for its claim.

9.1.g. If there is no recovery, the Fund shall under no circumstances be liable for any costs or attorneys fees expended in the matter. If, after being notified in writing of a subrogation claim and possible liability of the recipient, guardian, attorney or personal representative for failure to subrogate the Board, a recipient, his or her guardian, attorney or personal representative disposes of the funds representing the judgment, settlement or award, without the written approval of the Board, that person shall be liable to the Board for any amount that, as a result of the disposition of the fund, is not recoverable by the Board. In the event that a controversy arises concerning the subrogation claims by the Board, an attorney shall interplead, pursuant to rule twenty-two of the rules of civil procedure, the portion of the recipient's settlement that will satisfy the Board exclusive of

attorneys fees and costs regardless of any contractual arrangement between the client and the attorney.

§197-1-10. Rule Waiver.

10.1. Waiver of Rule. The Board may waive any requirement of these rules, except to the extent that the requirement is mandated by West Virginia Code, in cases where the deviation from the rules is insubstantial, is not contrary to the purposes of the program, or where necessary to effect the intent of the program.

§197-1-11. Appeals.

11.1. Any person, denied services by the application review team has the right to appeal that decision. Any appeal must be submitted in writing in the form of a letter to the chairperson of the Board and must be received by the chairperson within 30 days of receipt of an adverse decision by the appellant. There shall be a three member appeals panel appointed to hear the appeal. Two members of the panel shall be members of the Board appointed by the Chairperson and the balance of the panel shall be selected by the person filing the appeal. The appeals panel shall select a chairperson and it shall have the authority to render a decision by majority vote. The appeals panel shall issue a written decision within 30 days after the hearing or within 30 days of receipt of the appeal letter if a hearing on the matter is waived by joint agreement of the parties. The decision of the appeals panel is the final administrative decision. Either party may appeal the final administrative decision to the circuit court.

11.2. A person requiring assistance in making an application for moneys under this Fund will be advised of his/her rights to appeal any decision. The person will also be advised on where he/she may seek assistance for help in making an appeal. The person is entitled to have a representative of his/her choice present at an appeals hearing.