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**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #4

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NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

West Virginia Division of
AGENCY: Rehabilitation Services **TITLE NUMBER:** 197

CITE AUTHORITY §18-10K-3

AMENDMENT TO AN EXISTING RULE: YES___ NO~~XX~~

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 1

TITLE OF RULE BEING PROPOSED: West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

James S. Jeffers
Director

FILED

JUL 22 11 51 AM '99

LEGISLATIVE RULE**WEST VIRGINIA TRAUMATIC BRAIN AND SPINAL CORD INJURY
REHABILITATION FUND**OFFICE OF
SECRETARY OF
WEST VIRGINIA
POLICE**TITLE 197****LEGISLATIVE RULE****WEST VIRGINIA TRAUMATIC BRAIN AND SPINAL CORD INJURY
REHABILITATION FUND****SERIES 1****§197-1-1. General.**

1.1. Scope. This rule is being filed pursuant to West Virginia Code §§ 29A-3-1 et seq. and West Virginia Code § 18-10K-3. This rule establishes 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 §18-10K-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 from which the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund 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. Criteria and Priorities For Use of Fund.

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

3.2. Any person who: (1) is eligible under this rule; (2) needs a service not being provided or needs a service which is not otherwise available; (3) is not eligible to receive services from any other source; and, (4) requests 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.

3.3. The board shall appropriate funds for services to persons meeting the following criteria:

3.3.a. the service is not provided by other resources available to the applicant;

3.3.b. the service is necessary to meet an identified and emergent need of an applicant; and,

3.3.c. the service will be provided by a licensed or otherwise qualified provider.

§197-1-4. Fund As Payer of Last Resort.

4.1. Moneys expended for services described under this rule shall be as a payer of last resort and only for citizens of this state. A person 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 these services; (2) that the individual has been denied insurance benefits or payments for the 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 this rule to an individual who needs the services pending a final appeal decision from another agency or pending an appeal from a denied insurance benefit. Provided further that the Fund is 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.

4.1.a. Every eligible person submitting an application for funding for services under this rule shall agree and assign 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 the application that explains that the applicant has assigned all these rights and the legal

implications of making the assignment as provided in this section.

4.1.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 the expense, either pursuant to contract, negligence or otherwise, the Board may recover full reimbursement from any award or settlement for the assistance from the other person, or from the recipient of the assistance if he or she has been reimbursed by the other person.

4.1.c. The Board shall be assigned the rights of the recipient against the person who is 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.

4.1.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 claim, in whole or in part.

4.1.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 the 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 the attorney fees. Nothing in this section precludes any person who has received assistance from the Fund from settling any cause of action which he or she may have against another person and delivering to the Board, from the proceeds of the settlement, the sums received by him or her from the Fund or paid by the Fund for his or her assistance. If the other person is aware of or has been informed of the interest of the Board in the matter, it is the duty of the person to whose benefit the release inures to withhold as much of the settlement as may be necessary to reimburse the Board to the extent of its interest in the settlement.

4.1.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 has sixty days from receipt of the 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 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.

4.1.g. If there is no recovery, the Fund is under no circumstances 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 is 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.

§197-1-5. Appeals.

5.1. Any person, denied services by the application review team has the right to appeal that decision. Any appeal shall 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 other member of the panel shall be selected by the person filing the appeal. The appeals panel shall select a chairperson and it has 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.

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

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
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Cecil H. Underwood
Governor

David R. Ice
Cabinet Secretary

July 21, 1999

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

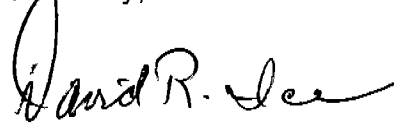
Dear Secretary Hechler:

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

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



WEST VIRGINIA DEPARTMENT OF EDUCATION AND THE ARTS
DIVISION OF REHABILITATION SERVICES

JAMES S. JEFFERS, DIRECTOR

July 21, 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:

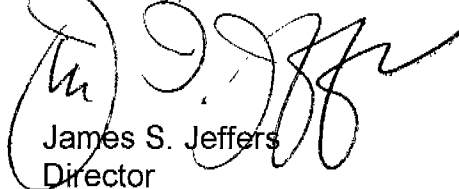
On behalf of the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Board, I am forwarding the agency modified Legislative Rule for promulgation with the Secretary of State:

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

This modified rule has been approved by the Legislative Rule Making Committee .

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

Sincerely,



James S. Jeffers
Director

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



FILED

JUL 15 9 13 AM '99

WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

OFFICE OF THE CLERK OF THE WEST VIRGINIA
LEGISLATURE
SECRETARY OF STATE

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*Senator Mike Ross, Co-Chairman
Delegate Mark Hunt, Co-Chairman
Debra A. Graham, Counsel*

*Joseph A. Altizer, Associate Counsel
Rita Pauley, Associate Counsel
Teri Anderson, Administrative Assistant*

July 11, 1999

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: James S. Jeffers, Director
WV Division of Rehabilitative Services
P.O. Box 50890
Charleston, WV 25305

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund,
197CSR1**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
 - (a) as originally filed
 - (b) as modified by the agency
2. Authorize the agency to promulgate part of the Legislative rule;
a statement of reasons for such recommendation is attached.
3. Authorize the agency to promulgate the Legislative rule with
certain amendments; amendments and a statement of reasons
for such recommendation is attached.
4. Authorize the agency to promulgate the Legislative rule as
modified with certain amendments; amendments and a
statement of reasons for such recommendation is attached.
5. Recommends that the rule be withdrawn; a statement of
reasons for such recommendation is attached.

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ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: West Virginia Traumatic Brain/Spinal Cord Injury
Rehabilitation Fund Board

Subject: West Virginia Traumatic Brain/Spinal Cord Injury
Rehabilitation Fund Board, 197CSR1

PERTINENT DATES

Filed for public comment: January 2, 1999
Public comment period ended: February 19, 1999
Filed following public comment period: April 27, 1999
Filed LRMRC: April 27, 1999
Filed as emergency: January 20, 1999

Fiscal Impact: None

ABSTRACT

The proposed rule is new. The following is a section by section synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 contains a description of the Program.

Section 3 sets forth the definitions from the statute.

Section 4 contains the statutory provisions regarding Board membership.

Section 5 contains the statutory provisions regarding Board attendance and officers.

Section 6 contains the statutory provisions regarding expenses of the Board.

Section 7 contains the statutory provisions regarding administration of the Fund. It also provides that applications to the Fund are confidential.

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WEST VIRGINIA
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Section 8 relates to criteria and priorities for use of the Fund. The general criteria and priorities which are set forth do no give much guidance beyond that which is in the statute.

Section 9 relates to the Fund as payor of last resort. It sets forth rights of the recipient and the Board. It permits the Board to allocate funding pending final appeal from a decision of another agency and also provides for the Board's right to subrogation.

Section 10 provides, incorrectly, that the Board may waive any provision of the proposed rule.

Section 11 sets forth an appeal process for persons who are denied services.

AUTHORITY

Statutory authority: W.Va. Code, §18-10K-3, which provides as follows:

The board may propose legislative rules for promulgation, in accordance with the provisions of article three, chapter twenty-nine-a of this code, necessary for the transaction of its business or to carry out the purposes of this article.

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

The proposed rule does very little to implement, extend, apply, interpret or make the statute more specific. In counsel's opinion, the Legislature intended for the Board to develop more specific criteria and priorities for the disbursement of moneys.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Most of the proposed rule is unnecessary in that it simply sets forth the provisions of the Code.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has technical modifications in addition to paring the proposed rule down by removing the Code provisions.