



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF AN EMERGENCY RULE

AGENCY: Health TITLE-SERIES: 64-26
RULE TYPE: Legislative Amendment to Existing Rule: No
RULE NAME: Procedures Pertaining to the Dangerousness
Assessment Advisory Board

CITE STATUTORY AUTHORITY FOR PROMULGATING EMERGENCY RULE:

27-6A-2(h)

IF THE EMERGENCY RULE WAS PROMULGATED TO COMPLY WITH A TIME LIMIT ESTABLISHED BY CODE OR FEDERAL STATUTE OR REGULATION, CITE THE CODE PROVISION, FEDERAL STATUTE OR REGULATION AND TIME LIMIT ESTABLISHED THEREIN:

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

In accordance with W. Va. Code 29A-3-15(f), the proposed emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and to prevent substantial harm to the public interest. Pursuant to W. Va. Code 27-6A-13, the Dangerousness Assessment Advisory Board was established to protect the public and patients by providing independent and objective clinical expertise to circuit court judges who are considering the potential release, discharge, or placement of forensic patients who have been charged with a crime such as, but not be limited to, murder, attempted murder, sexual violence, and other violent offenses. As such, the boards mission to provide clinical guidance to circuit court judges regarding proper clinical placements of forensic patients is intended to preserve the peace and safety and to prevent the potential for substantial harm to the public. The proposed emergency rule should be effective immediately upon filing because the board is receiving referrals from a circuit court judge for independent and objective clinical expertise and the appointed boards members were not confirmed by the West Virginia Senate until January 11, 2022. Pursuant to W. Va. Code 27-6A-2, the proposed rule has been provided to the West Virginia Supreme Court of Appeals for review and comment.

DOES THIS EMERGENCY RULE REPEAL A CURRENT RULE? No

HAS THE SAME OR SIMILAR EMERGENCY RULE PREVIOUSLY BEEN FILED AND OR EXPIRED? No

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

n/a

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

n/a

C. ECONOMIC IMPACT ON THE STATE OR ITS RESIDENTS:

n/a

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			0
Personal Services			0
Current Expenses			0
Repairs and Alterations			0
Assets			0
Other			0
2. Estimated Total Revenues			0

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

n/a

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

April L Robertson--By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 64
LEGISLATIVE RULE
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

SERIES 26
PROCEDURES PERTAINING TO THE DANGEROUSNESS
ASSESSMENT ADVISORY BOARD

§64-26-1. General.

1.1. Scope. -- This rule explains the responsibilities and administration of the Dangerousness Assessment Advisory Board.

1.2. Authority. -- W. Va. Code §27-6A-2(h) and §27-6A-13.

1.3. Filing Date. -- February 4, 2022.

1.4. Effective Date. --

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect upon the expiration of five years from its effective date.

§64-26-2. Application and Enforcement.

2.1. Application. -- This rule applies to the Dangerousness Assessment Advisory Board and the review and consideration of referrals from circuit courts to the board.

2.2. Enforcement. -- This rule is enforced by the Office of Health Facilities, West Virginia Department of Health and Human Resources.

§64-26-3. Definitions.

3.1. Administrator. -- The person appointed by the Secretary to oversee the administrative affairs of the board and to facilitate the operation of the board.

3.2. Board. -- The Dangerousness Assessment Advisory Board created within the Department of Health and Human Resources pursuant to W. Va. Code §27-6A-13 to provide opinion, guidance, and informed objective expertise to circuit courts as to the appropriate level of custody or supervision necessary to ensure that forensic patients who have been judicially determined to be incompetent to stand trial and not restorable or not guilty by reason of mental illness are in the least restrictive environment available to protect the forensic patient, other persons, and the public generally.

3.3. Case Referral. -- A written request by a circuit court judge by order or other writing that seeks opinion, guidance, or objective expertise from the board regarding the proposed placement plan or the proposed less restrictive placement of a forensic patient.

3.4. Evaluation. -- A forensic competency evaluation, forensic criminal responsibility evaluation, dangerousness risk assessment, or any forensic evaluation of a forensic patient.

3.5. Forensic Placement Audit. -- When considering case referrals, the board may identify placement obstacles or barriers and develop one or more confidential recommendations for review and consideration by the Secretary to potentially redress such issues.

3.6. Forensic Patient. – A person who has been found incompetent to stand trial and not restorable or not guilty by reason of mental illness in accordance with W. Va. Code 27-6A-1 et seq. and who has been committed to or ordered to be placed at a mental health facility.

3.7. Medical Director. – The chief medical officer of William R. Sharpe, Jr., Hospital as defined by W. Va. Code §27-6A-1(13) who convenes a meeting of the board in accordance with W. Va. Code §27-6A-13(c).

3.8. Mental Health Facility. – A mental health facility as defined by W. Va. Code §27-1-9.

3.9. Secretary. -- The secretary of the Department of Health and Human Resources.

§64-26-4. Severability.

4.1. Severability. -- If any sections or subsections of this rule are determined to be invalid, it shall not be construed to invalidate any of the provisions not otherwise affected.

§64-26-5. Conduct of Dangerousness Assessment Advisory Board.

5.1. Duties. The board shall review case referrals made to it and provide recommendations regarding such case referrals in accordance with W. Va. Code §27-6A-13(b). In its discretion, the board may perform a forensic placement audit in connection with any case referral. The board may elect a chairperson to preside at any regular or special meetings of the board.

5.2. Administrator. The Administrator will be the primary point of contact for board members on administrative and legal matters and for all circuit courts and their law clerks for all case referrals and procedural inquiries.

5.3. Regular Meetings. The board shall convene at least once each month to review pending case referrals and make recommendations regarding case referrals. A quorum consists of six members, two of whom must meet the criteria of W. Va. Code §27-6A-13(a)(6) and (7). Meeting location will be determined by the administrator and can be conducted in person or electronically via visual communication. The administrator will prepare a meeting agenda in consultation with the medical director and the board chairperson, if applicable, and provide the agenda to board members at least five days prior to a regular meeting.

5.4. Special Meetings. A special meeting at which a quorum is present may be convened at the request of the medical director; the written request of at least five members of the board to the administrator; or at the administrator's recommendation if a circuit court makes a case referral that requires consideration prior to the board's next regular meeting. The administrator will prepare a meeting agenda in consultation with the medical director and the board chairperson, if applicable.

5.5. Records for Case Referrals. The board shall have access to all court records and mental health records available to the circuit court and all documents consulted by the medical director regarding the treatment and potential placement of the forensic patient for whom a case referral is under

consideration. At a minimum, the documents of the forensic patient shall include all dangerousness risk assessments; all psychological testing or assessments at current mental health facility; the conditional release plan; all notes from community integration if applicable; all behavior notes; medical provider notes for last 90 days; medication administration list for last 90 days; placement date list (pink/orange sheet) maintained by the mental health facility; psychiatric evaluation(s); data from the START; and relevant pleadings, e.g., criminal complaint. The Forensics Department at William R. Sharpe, Jr., Hospital shall make all such documents available to board members via a secure and encrypted website.

5.6. Recommendations in Response to Case Referrals. The board shall develop its recommendations based solely on the records available as defined in subsection 5.5. The board may not conduct any adversarial, contested, or evidentiary hearings in developing its recommendations. Any recommendation by the board requires the approval of at least five board members (two of whom must meet the criteria of W. Va. Code §27-6A-13(a)(6) and (7)) at which a quorum is present. Recommendations by the board in response to a case referral shall be communicated to the requesting circuit court via letter by the administrator within 10 days after any regular meeting or special meeting at which the case referral was considered. The board shall provide responsive guidance to the court's inquiry and, when applicable, make one of the following recommendations to the requesting circuit court in response to a case referral:

5.6.1. Concur with the forensic patient's recommended placement;

5.6.2. Concur with the forensic patient's recommended placement with suggested modifications;

5.6.3. Reject the forensic patient's recommended placement and suggest an alternative placement or other suggested conditions; or

5.6.4. Reject the forensic patient's recommended placement and recommend continued placement at the existing setting.

5.7. Recusal. Any member of the board who within the prior two years has performed an evaluation of a forensic patient, received remuneration as a result of an evaluation of a forensic patient, or offered or provided supervisory review or approval of an evaluation of a forensic patient under the authority of his or her professional license shall be recused from any consideration of any case referral involving such forensic patient and shall not participate in any board proceedings or discussions related to any such case referral. Notwithstanding anything herein to the contrary, the board in consultation with the board's counsel may determine that recusal is unnecessary based on the peculiar circumstances of the case referral, the disclosures of the board member, and/or the nature of the prior evaluation.

5.8. Mail. The Office of Health Facilities, West Virginia Department of Health and Human Resources, located at 100 Dee Drive, Charleston, West Virginia 25311, shall be responsible for the receipt of all correspondence and case referrals from the courts.

§64-26-6. Confidentiality.

6.1. Subject to case referral recommendations required by section 5.6. of this rule, all proceedings and communications of the board and opinions expressed by members of the board and the administrator are confidential, not subject to subpoena, and not subject to public disclosure or

dissemination. The provisions of W. Va. Code §6-9A-1 et seq. and W. Va. Code §29B-1-1 et seq. are inapplicable to the board and the board's operations.

§64-26-7. Immunity.

7.1. Members of the board shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of any actual or alleged act, error, or omission that occurred within the scope of their duties or responsibilities on the board: *Provided*, That nothing in this subsection shall be construed to protect any person from suit or liability, or both, for any damage, loss, injury, or liability caused by the intentional or willful and wanton misconduct of that person or a board member who fails to recuse herself or himself from participating in any case referral as required by subsection 5.7.

§64-26-8. Compensation.

8.1. Each board member whose regular salary is not paid by the State of West Virginia shall be paid the same compensation and expense reimbursement that is paid to members of the Legislature for their interim duties as recommended by the Citizens Legislative Compensation Commission and authorized by law for each day or portion thereof engaged in the discharge of official duties. Reimbursement for expenses shall not be made, except upon an itemized account, properly certified by the members of the board. All reimbursement for expenses shall be paid out of the State Treasury upon a requisition upon the State Auditor.