

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF THE SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

Division of Health

AGENCY: Department of Health and Human Resources TITLE NUMBER: 64

CITE AUTHORITY W. Va. Code § 27-5-9(g)

AMENDMENT TO AN EXISTING RULE: YES NO

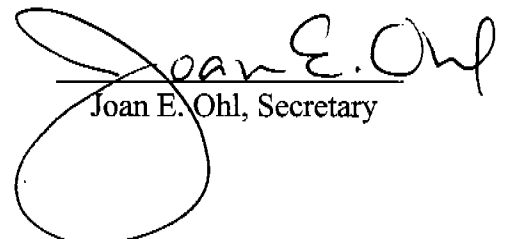
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 74

TITLE OF RULE BEING PROPOSED: Behavioral Health Consumer Rights

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Joan E. Ohl, Secretary

\$12.50

BEHAVIORAL HEALTH CONSUMER RIGHTS, 64CSR74

BRIEF SUMMARY OF THE RULE

This proposed rule defines the rights of individuals with behavioral health needs. It provides for procedures for informing consumers of their rights and outlines grievance procedures when an individual believes his or her rights have been violated.

The rule was developed by a task group composed of providers, family members, consumers, and Department personnel, which was formed through a Memorandum of Agreement. The task group obtained and reviewed the highest standards for rights of persons with mental illness, mental retardation or addiction and prepared this proposed rule based on those standards.

BEHAVIORAL HEALTH CONSUMER RIGHTS, 64CSR74

Statement of Circumstances Which Require the Proposed Rule

This proposed Rule was developed in response to a Request for Resolution discussed and agreed by the parties to the *Hartley* Consent Decree. The proposed Rule was created after the passage, in the 1999 Legislative Session of a requirement that such a Rule be promulgated by July 1, 1999.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 4, 1999

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

Division of Health

FROM: (Agency name, Address & Phone No.) Department of Health and Human Resources

State Capitol Complex, Building 3, Room 265, Charleston, WV 25305

Telephone: (304) 558-5598

LEGISLATIVE RULE TITLE: Behavioral Health Consumer Rights, 64CSR 74

1. Authorizing statute(s) citation: WV Code Section 27-5-9(g)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

June 29, 1999

b. What other notice, including advertising, did you give of the hearing?

Notice of the proposed rule is provided to all licensed providers, hospitals with psychiatric inpatient programs, provider and consumer representative organizations, and family member representatives.

c. Date of Public Hearing(s) or Public Comment Period ended:

July 29, 1999

- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing (be exact):

August 4, 1999

- f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule (please type):

Beth Marquart, Director, Office of Regulatory Development

Department of Health and Human Resources

Building 3, Room 265, Capitol Complex

Charleston, West Virginia 25305

(304) 558-5598 FAX: (304) 558-6051 bethmarquart@wvdhhr.org

- g. IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule (please type):

Ted Johnson, Director

Division of Mental Health and Community Rehabilitation

Office of Behavioral Health Services

Building 6, Room 717 - Capitol Complex

Charleston, West Virginia 25305 (304) 558-8994

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place a hearing for the taking of evidence and a general

description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Series 74 -- Behavioral Health Consumer Rights

Type of Rule: **Legislative** **Interpretive** **Procedural**

Agency: Division of Health
Department of Health and Human Resources

Address: Building 3, Capitol Complex
Charleston, W. Va. 25305

1. Effect of the Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
Personal Services					
Current Expense					
Repairs & Alterations					
Equipment					
Other					
Revenue	0	0	0	0	0

2. Explanation of above estimates.

This rule describes in detail the rights afforded to people with behavioral health needs. Most of the rule is a reiteration of the rights listed in § 27-5 et seq. The rule is also a response to the requirement that the Secretary promulgate rules [§ 27-5-9(g)]. Individuals with behavioral health needs who believe their rights have been violated currently have an opportunity to submit a grievance to the Secretary of the Department of Health and Human Resources, as provided for this rule. There will be no additional costs to implementing this rule.

3. Objectives of this rule:

- (1) Promulgate a rule as required by WV Code § 27-5-9(g).
- (2) Meet a requirement in the *Hartley* Consent Decree.

4. Explanation of Overall Economic Impact of Proposed Rule.

N/A

A. Economic Impact on State Government.

N/A

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens.

An individual with behavioral health needs who wins a judgement against a behavioral health provider for violating one or more rights specified in § 27-5-9 may be awarded damages, payable by the provider. This may have an economic impact on the provider. The potential for such damage awards already exists; this rule does not create this possibility.


C. Economic Impact on Citizens/Public at Large.

N/A

Date:

6/29/99

Signature of Agency Head or Authorized Representative



Joan E. Ohl, Secretary
Department of Health and Human Resources

**TITLE 64
LEGISLATIVE RULES
DIVISION OF HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

**SERIES 74
BEHAVIORAL HEALTH CONSUMER RIGHTS**

FOR PUBLIC COMMENT

**TITLE 64
LEGISLATIVE RULES
DIVISION OF HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

**SERIES 74
BEHAVIORAL HEALTH CONSUMER RIGHTS**

TABLE OF CONTENTS

§ 64-74-1. General.	1
§ 64-74-2. Definitions.	1
§ 64-74-3. Applicability to Other Standards.	4
§ 64-74-4. Consumers' Bill of Rights.	4
§ 64-74-5. Advance Psychiatric Directive Right.	5
§ 64-74-6. Informed Consent Right.	6
§ 64-74-7. Right to Treatment.	6
§ 64-74-8. Right to Refuse Treatment.	7
§ 64-74-9. Right to Refuse Research and Experimental Treatment.	8
§ 54-74-10. Rights Regarding Seclusion and Restraints.	8
§ 64-74-11. Right of Confidentiality.	8
§ 64-74-12. Right to Unrestricted Communication.	10
§ 64-74-13. Rights Regarding Labor, Earnings, and Funds.	10
§ 64-74-14. Juveniles' Additional Rights.	10
§ 64-74-15. Right of Advocacy and Grievance Procedure.	11

64CSR74

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**TITLE 64
LEGISLATIVE RULES
DIVISION OF HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

Aug 4 3 37 PM '99

OFFICE OF THE CLERK OF THE SENATE
SECRET

**SERIES 74
BEHAVIORAL HEALTH CONSUMER RIGHTS**

§ 64-74-1. General.

1.1. Scope. -- This legislative rule establishes personal rights of individuals with behavioral health needs.

1.2. Authority. -- W. Va. Code § 27-5-9(g).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Construction. -- This rule shall be liberally constructed to effectuate the rehabilitative goals of Chapter 27 of the West Virginia Code, consistent with the protection of consumer rights and dignity.

1.6. Applicability. -- This rule applies to individuals with behavioral health needs.

§ 64-74-2. Definitions.

2.1. Abuse. --

2.1.a. Physical Abuse. -- Any act or failure to act by an employee of a behavioral health service that was knowingly, recklessly, or intentionally performed, or that was failed to be performed, and that caused, or may have caused, injury or death to an individual, including, but not limited to:

2.1.a.1. The rape or sexual assault of an individual;

2.1.a.2. The striking of an individual;

2.1.a.3. The use of excessive force when placing an individual in bodily restraints; and

2.1.a.4. The use of physical or chemical restraints that is not in compliance with federal or State law.

64CSR74

2.1.b. Verbal Abuse. -- The use of language, tone or inflection of voice that would likely be construed by an impartial observer as a threat to, or, harassment, derogation or humiliation of a consumer. Verbal abuse includes, but is not limited to: the use of a threatening or abusive tone or manner in speaking to a consumer; the use of derogatory, vulgar, profane, abusive or threatening language, verbal threats, teasing, pestering, deriding, harassing, mimicking or humiliating a consumer; derogatory remarks about the consumer, his or her family or associates; or sexual innuendo, sexually provocative language or verbal suggestion.

2.2. Advance Psychiatric Directive. -- Any instruction written and signed by a consumer, describing preferences in health care written when the consumer is competent and psychiatrically stable and implemented when the consumer is not able to make informed decisions in the absence of an advance psychiatric directive.

2.3. Behavioral Health. -- Mental health, developmental disabilities, or substance abuse.

2.4. Behavioral Health Service. -- An inpatient, residential or outpatient service for the care and treatment of individuals with mental illness, developmental disabilities or substance abuse.

2.5. Consumer. -- An individual receiving treatment or services in or from a behavioral health service.

2.6. Individualized Program Plan (IPP). -- A master behavioral health treatment plan which is a written, individualized plan specifically tailored to individual needs, including a complete, thorough review of the consumer's strengths, weaknesses, response to initial interventions and prognosis for resolution of acute symptoms, and other components as indicated in this rule.

2.7. Legal Representative¹. -- A person or agency with legal authority to exercise some degree of control over a consumer's affairs; namely, one of the following that is the most appropriate to the decision to be made:

2.7.a. A conservator, temporary conservator or limited conservator appointed pursuant to the West Virginia Legal Guardianship and Conservatorship Act, W. Va. Code §44A-1-1 et seq., within the limits set by the order;

2.7.b. A guardian, temporary guardian or limited guardian appointed pursuant to the West Virginia Guardianship and Conservatorship Act, W. Va. Code §44A-1-1 et seq., within the limits set by the order;

¹ Behavioral health services should note that the various types of legal representatives do not necessarily have the lawful authority to act on behalf of the resident in all matters that shall require action by a legal representative. For example, a conservator has responsibility for financial affairs, but not personal affairs, such as medical care.

64CSR74

2.7.c. An individual appointed as committee or guardian prior to June 9, 1994, within the limits set by the appointing order and W. Va. Code §44A-1-2(d);

2.7.d. A person having a medical power of attorney pursuant to the West Virginia Medical Power of Attorney Act, W. Va. Code §16-30A-1 et seq., within the limits set by the law and the appointment;

2.7.e. A representative payee under the U.S. Social Security Act, Title 42 US Code §301 et seq., within the limits of the payee's legal authority;

2.7.f. A surrogate decision-maker appointed pursuant to the West Virginia Health Care Surrogate Act, W. Va. Code §16-30B-1 et seq., or the West Virginia Do Not Resuscitate Act, §16-30C-1 et seq., within the limits set by the appointment;

2.7.g. An individual having a durable power of attorney pursuant to W. Va. Code §39-4-1, or a power of attorney under common law, within the limits of the appointment;

2.7.h. An individual identified pursuant to W. Va. Code §16-3C-4 to grant consent for HIV-related testing and for the authorization of the release of test results;

2.7.i. A parent or guardian of a minor; or

2.7.j. An individual lawfully appointed in a similar or like relationship of responsibility for a consumer under the laws of this State, or another legal jurisdiction, within the limits of the applicable law.

2.8. Mechanical Supports. -- Devices used to support an individual's proper body position or alignment.

2.9. Neglect. -- A negligent act or an omission that caused or may have caused injury or death to a consumer, or that placed a consumer at risk of injury or death, that was committed or omitted by an individual responsible for providing services in a behavioral health service. Neglect includes, but is not limited to:

2.9.a. Failure to establish or carry out a consumer's individualized program plan or treatment plan;

2.9.b. Failure to provide adequate nutrition, clothing, or health care;

2.9.c. Failure to provide a safe environment; and

2.9.d. Failure to maintain sufficient, appropriately trained staff.

2.10. Restraint. -- A temporary behavior control intervention.

64CSR74

2.10.a. Chemical Restraint. -- The use of medication as a behavior control mechanism to substitute for seclusion or other restraint.

2.10.b. Physical Restraint. -- Any manual method or physical or mechanical device that the individual cannot remove easily, and that restricts the free movement of, normal functioning of, or normal access to a portion or portions of a consumer's body. Examples of manual methods include therapeutic or basket holds and prone or supine containment. Examples of mechanical devices include arm splints, posey mittens, helmets and straight jackets. Excluded are physical guidance, prompting techniques of brief duration, and mechanical supports.

2.11. Seclusion. -- The placement of a consumer alone in a room or enclosed space with closed doors that a consumer cannot open from inside.

2.12. Secretary. -- The Secretary of the West Virginia Department of Health and Human Resources or his or her designee.

2.13. Treatment Plan. -- A written, behavioral health plan based on a consumer's needs, including a complete review of a consumer's strengths, problems, response to initial interventions and prognosis for resolution of acute and other symptoms.

§ 64-74-3. Applicability to Other Standards.

When an individual receives care or treatment from a behavioral health service, state and federal requirements, accreditation standards applicable to the behavioral health service and the standards set forth in this rule apply. If there is a conflict between those requirements, accreditation standards and the standards specified in this rule, the more stringent standard applies, unless the federal standard must be met for the purposes of Medicare or Medicaid participation, then the federal standard prevails. Behavioral health service providers accredited by a national accreditation agency are deemed to be in compliance with this rule.

§ 64-74-4. Consumers' Bill of Rights.

4.1. A consumer with behavioral health needs has the following general rights:

4.1.a. The right not to be discriminated against because of race, creed, color, gender, age, national origin, physical or mental disability, or duration of residence;

4.1.b. The right to exercise his or her civil rights, except as abrogated by court order or for the reasons provided in this rule;

4.1.c. The right to be informed of these rules and, if an inpatient in a behavioral health service, the right to be given a copy of them;

64CSR74

4.1.d. The right of a consumer, who resides in congregate living arranged for by a behavioral health service provider, to be housed with other consumers of similar age and need unless otherwise specified in the consumer's individualized program plan or treatment plan;

4.1.e. The right to privacy and the right to move about freely, unless his or her safety or the safety of others is threatened;

4.1.f. The right not to be deprived of any right as punishment or for clinical reasons, except when an incident occurs related to the exercise of a right, the right may be deprived for clinical reasons, but only for as long as is necessary to permit correction of a situation; and

4.1.g. The right of a consumer receiving care and treatment to receive it in accordance with accepted behavioral health and medical practice standards.

§ 64-74-5. Advance Psychiatric Directive Right.

5.1. A consumer with psychiatric or mental health needs has a right to an advance psychiatric directive prepared at a time when the individual has not been adjudged to be incompetent. Any advance psychiatric directive written and signed by a consumer may be withdrawn at any time verbally or in writing.

5.2. A consumer has the right to be informed by a behavioral health service of the availability and applicability of an advance psychiatric directive and to receive education and assistance from the behavioral health service in preparing such a document.

5.3. A consumer has the right to refuse to create an advance psychiatric directive.

5.4. A consumer with an advance psychiatric directive has the right to have it entered into his or her clinical record at the behavioral health service at which he or she is receiving or may receive care or treatment;

5.5. An advance psychiatric directive shall be honored unless:

5.5.a. It is withdrawn verbally or in writing by a consumer;

5.5.b. The behavioral health service lacks sufficient resources;

5.5.c. A professional staff member of the behavioral health service believes that the directive would endanger the consumer's life or be dangerous to others.

5.6. A consumer has the right to be informed of the behavioral health service's reason for not honoring his or her advance psychiatric directive.

64CSR74

5.7. Nothing in this section should be interpreted to prevent any individual with behavioral health needs from entering into an advance directive related to preferences in health care or conduct of business.

§ 64-74-6. Informed Consent Right.

6.1. In order for a consumer to give informed consent for care or treatment, a behavioral health service shall inform him or her of the following:

6.1.a. The rights provided under this rule;

6.1.b. The nature of his or her condition and the treatment proposed;

6.1.c. Any reasonable alternative treatments available;

6.1.d. That consent for any part of treatment may be withdrawn at any time in writing or verbally to a member of the treatment staff. Revocation of consent shall be documented on the consent form, and further treatment shall not be provided except as authorized in an emergency;

6.1.e. The reason for taking a proposed medication, including the likelihood of the consumer's condition improving or not improving without the proposed medication;

6.1.f. The type, dosage, including the use of PRN (as needed) orders, the method of administration (oral or injection), and the duration of taking the proposed medication; and

6.1.g. The common side effects, any side effects probable with the particular consumer, and additional side effects that may occur when taking the proposed medication longer than three (3) months.

6.2. In the absence of written consent, if treatment is provided to a consumer, he or she has the right to documentation of the precipitating causes for providing the treatment.

6.3. The procedures outlined in this section shall not apply to those individuals who:

6.3.a. Need life-saving medication for chronic medical conditions, such as diabetes or heart disease; or

6.3.b. Have been taking medications prior to admission and have not refused to continue the medication, even though they may not be able to give informed consent.

§ 64-74-7. Right to Treatment.

7.1. A consumer has the right to treatment in the least restrictive setting possible.

64CSR74

7.2. A consumer has the right to treatment that is provided humanely in an environment that affords them full protection of their rights.

7.3. A consumer has the right to treatment by trained and competent personnel capable of implementing the consumer's individualized program plan or treatment plan.

7.4. A consumer has the right to periodic evaluations related to his or her needs no less frequently than every one hundred eighty (180) days while an active consumer of a behavioral health service.

7.5. A consumer has the right to treatment based on diagnosis and assessment of their needs.

7.6. A consumer has the right to treatment based on a treatment plan that identifies immediate needs and interventions and responsibility for implementing the plan.

7.7. A consumer has the right to have treatment plans updated every ninety (90) days or as his or her needs change.

7.8. A consumer has the right to participate in the development of his or her individualized program plan or treatment plan and any revisions.

7.9. A consumer has the right to have a copy of his or her individualized program plan or treatment plan.

7.10. A consumer has the right to have present at any treatment planning or discharge planning meeting representatives of all disciplines providing treatment to the consumer and any other individual, including the consumer's case manager and family members.

7.11. A consumer has the right to have recorded all treatments administered in accordance with his or her treatment plan.

7.12. A consumer who resides in an inpatient behavioral health service for more than fourteen (14) days has the right to outdoor exercise and activity programming conforming with the Division of Health rule, "Behavioral Health Client Rights," 64CSR59, §§14.1-14.3.

§ 64-74-8. Right to Refuse Treatment.

8.1. As a participant in the program planning process, a consumer has the right to object to or refuse any aspect of the individualized program plan or treatment plan.

8.2. If informal discussion and negotiation do not resolve differences, a consumer's right to object to or refuse treatment shall be recognized as legitimate, and shall be responded to in accordance with the provisions of the behavioral health service's consumer grievance procedure.

64CSR74

8.3. A consumer who has refused psychotropic medications or other recommended therapy has the right to have an agreed-upon effective alternative treatment offered, and it shall be provided if the consumer consents and if within the scope of the behavioral health service's practice.

8.4. A consumer has the right to orally refuse medication or other treatment that overrides prior written consent, except in emergency situations in which it is documented that the absence of medication or other treatment would be harmful to the consumer or others.

§ 64-74-9. Right to Refuse Research and Experimental Treatment.

9.1. A consumer has the right to refuse to participate in or be subjected to research or experimental treatment. Participation by a consumer shall require voluntary, informed and written consent, and an opportunity for consultation with independent specialists and with his or her legal representative.

§ 64-74-10. Rights Regarding Seclusion and Restraints.

10.1. A consumer has the right to freedom from seclusion and restraints unless the restraints are documented as clinically necessary and all other less restrictive measures have been exhausted.

10.2. A consumer with a single diagnosis of mental retardation or another developmental disability has the right not to be secluded or restrained, but time-out procedures may be used when they have been developed specifically for the consumer and described in the consumer's treatment plan.

10.3. A consumer has the right to not have seclusion used as punishment. Seclusion may be used only as an emergency measure to control imminent destructive behavior that is a threat to a consumer or to others.

10.4. A consumer has the right to not have physical restraints used as punishment or as a convenience of staff.

10.5. A consumer has the right for drugs or medications to not be used as punishment, as a convenience of staff, as a substitute for adequate staffing, or as a substitute for an individualized program plan or treatment plan.

§ 64-74-11. Right of Confidentiality.

11.1. A consumer has the right to have all information about his or her diagnosis and treatment kept confidential.

11.1.a. Confidential information includes, but is not limited to:

64CSR74

11.1.a.1. Information obtained during diagnosis or treatment, including the fact that an individual is or has been a consumer;

11.1.a.2. Information provided by a consumer or his or her family for purposes related to diagnosis or treatment;

11.1.a.3. Information provided by the treatment staff;

11.1.a.4. Diagnoses, opinions or remarks made by treatment staff that relate to a consumer's treatment;

11.1.a.5. Advice, instructions, or prescriptions issued in the course of diagnosis or treatment; and

11.1.a.6. Any record of a consumer's treatment.

11.1.b. Confidential information does not include: information which does not identify a consumer; information from which a person acquainted with a consumer would not recognize the consumer; and encoded information from which there is no possible means to identify a consumer.

11.2. A consumer has the right to have information relating to his or her treatment disclosed only:

11.2.a. In a proceeding under W. Va. Code § 27-5-4 to disclose the results of an involuntary examination made pursuant to W. Va. Code §§ 27-5-2 or -3;

11.2.b. In a proceeding under W. Va. Code § 27-6A-1 et seq. to disclose the results of an involuntary examination made pursuant to those provisions;

11.2.c. Pursuant to a court order;

11.2.d. To protect against a clear and substantial danger of imminent injury by a consumer to self or another; and

11.2.e. For internal review purposes of the behavioral health service, to the treatment staff, to other health professionals involved in a consumer's treatment, on the consumer's request to anyone designated, or in compliance with applicable federal law.

11.3. A consumer has the right to be informed about the limits of confidentiality in this rule.

11.4. Consent for Disclosure.

64CSR74

11.4.a. A consent for the disclosure of confidential information shall be in writing and signed by the consumer, or by his or her legal representative. A consumer who signs a consent has the right to a copy of the consent.

11.4.b. A consumer shall not be denied treatment on the basis of refusing to provide consent to disclose confidential information, except when and to the extent disclosure is necessary for treatment, or for the substantiation of a claim for payment for treatment from a source other than the consumer.

§ 64-74-12. Right to Unrestricted Communication.

12.1. A consumer has the right to unimpeded and private communication by any means with whomever a consumer chooses, except as specified in this rule.

12.2. A consumer's right to communication, except for that with his or her legal representative, may be restricted or denied if authorized by the treatment staff or the attending physician for a specified time not to exceed thirty (30) days, after which time the restriction may be reviewed and reinstated.

§ 64-74-13. Rights Regarding Labor, Earnings, and Funds.

13.1. A consumer has the right not to be required to perform uncompensated labor that involves the operation and maintenance of a behavioral health service, but may voluntarily perform it with compensation in accordance with the requirements of relevant State and federal requirements.

13.2. A consumer shall not suffer consequences for refusing to perform uncompensated labor for a behavioral health service.

13.3. A consumer may perform vocational training tasks that do not involve the operation and maintenance of the behavioral health service when the assignment:

13.3.a. Is an integrated part of a consumer's individualized program plan or treatment plan;

13.3.b. Has been approved as a program activity by the treatment staff; and

13.3.c. Is supervised by a staff member.

13.4. A consumer has unlimited access to his or her funds except as provided by West Virginia law, or by regulations promulgated by the Social Security Administration.

§ 64-74-14. Juveniles' Additional Rights.

64CSR74

14.1. A consumer under the age of eighteen (18) has the right to be housed separately from emancipated consumers over the age of eighteen (18).

14.2. A consumer under the age of eighteen (18) has the right to an education.

14.3. A consumer under the age of eighteen (18) has the right to appropriate contact and communication with his or her family members and legal representative.

14.4. A consumer under the age of eighteen (18) has the right to be informed about behavior expectations for the protection of others.

14.5. All other rights under this rule apply to consumers under the age of eighteen (18).

§ 64-74-15. Right of Advocacy and Grievance Procedure.

15.1. A consumer has the right to be informed of and receive a written copy of the behavioral health service grievance procedure.

15.2. A consumer, or another person acting on a consumer's behalf, has the right to file a grievance with the behavioral health service concerning any alleged violation of the rights afforded by this rule.

15.3. A consumer has the right to discuss a grievance with their professional behavioral health care provider or with an advocate of his or her choosing.

15.4. A consumer has the right to receive a reasonable and timely written decision from the behavioral health service.

15.5. A consumer may, after receipt of the decision or lack of a timely decision on his or her grievance, request a hearing by the Secretary or bring action in circuit court against the behavioral health service.

15.6. A consumer has the right to withdraw his or her grievance at any time.

15.7. The final order by the Secretary after a hearing shall be binding upon the parties, unless appealed in accordance with W. Va. Code §§ 29A-5 and -6.

15.8. A consumer has the right to pursue other relief even if he or she does not file a grievance.

15.9. A consumer has the right to report any reasonable suspicion of abuse or neglect to civil and criminal authorities in accordance with the applicable adult protective services act (W. Va. Code § 9-6-1 et seq.) or child protective services act (W. Va. Code § 49-6A-1 et seq.), in addition to using the grievance procedure of the behavioral health service.

64CSR74

PUBLIC COMMENTS AND DEPARTMENT RESPONSES

BEHAVIORAL HEALTH CONSUMER RIGHTS, 64CSR74

A public comment period on the proposed rule, Behavioral Health Consumer Rights, 64CSR74, was held beginning June 29, 1999 and ending July 29, 1999.

Comments are summarized below, and the Department's responses are detailed.

General Comment 1: After reviewing this proposed rule I feel it necessary to point out that this project was initially taken on to address specific areas...which dealt with regulatory issues for both the institutions and community programs. As you know, Rule 64 for the facilities has been completed and operational for several years and this is the attempt to deal with the piece for the community. The main theme and purpose for establishing these rules was to have in legislation/law a process by which DHHR can hold their facilities and community providers accountable for the services in which they provide, hence allowing the Courts from playing a less direct role in monitoring of service delivery.

Response: This proposed rule describes the rights to which any individual with any behavioral health need, being served by any provider, is entitled. Individuals with behavioral health needs are entitled to these rights whether being served by an agency licensed by the Department, an agency contracting with the department, or an agency with no affiliation with the Department. This rule specifies grievance procedures, including a hearing by the Secretary. The issue of the rule is to detail rights, not procedures for providers.

General Comment 2: ...I wish to submit our comments in support of the adoption of (this rule). (This agency) was a participant, along with other providers, family members, consumers, and Department personnel, who actively worked to develop a rule which would clearly define the rights of individuals with behavioral health needs. In addition, the rule has been written in a way that will facilitate providers' implementation of this rule in an orderly fashion. We look forward to working with the Department and our member institutions on the implementation of the rule as soon as it is adopted.

Response: The Department, in combination with advocacy organizations, will provide a series of regionally-based training sessions regarding this rule and its implementation.

General Comment 3: Overall...the West Virginia Department of Health and Human Resources has vacated its responsibility for providing services to individuals under the Hartley Court Order and the Medley Consent Decree. Likewise, the Department...has shifted its responsibility for protecting client rights to the comprehensive behavioral

health centers.

Response: This rule is unrelated to providing services generally or providing services under any court order. The emphasis of this rule on rights of individuals with behavioral health needs. In addition, the rule does not relate specifically to comprehensive behavioral health centers. It does relate to individuals with behavioral health needs. All providers of behavioral health services are responsible, through this rule, to guarantee that persons using behavioral health services are informed of their rights, assure that those rights are respected, and have grievance procedures in the event a consumer believes her or his rights are abrogated.

General Comment 4: (The rule) falls far short from ensuring that persons with disabilities are protected from anything while receiving services in the community...nowhere in the rule does it speak to who will make sure that the consumers have the opportunity to exercise their rights.....this is self-governance with little or no centralized administrative oversight from DHHR.

Response: The rule enumerates rights of individuals with behavioral health needs. It lists the rights for grieving perceived and real violation of those rights. It includes the Department's oversight, through hearing grievances, of any grievances not satisfactorily resolved. The Department has contracted with advocates to provide State-wide advocacy services for persons with behavioral health needs. The Department, in conjunction with advocates, will provide training regarding this rule and describe its expectations related to this rule for agencies it licenses and/or contracts with.

General Comment 5: The definitions used in the proposed rule are not in conformity with the existing federal statutes, federal regulations, state statutes, and state policies. The individual rights of consumers are contravened in violation of constitutional and statutory protections.

Response: The group that wrote this rule was careful to research existing laws, rule, and policies to assure conformity. A more specific response is not possible without descriptive references to the lack of agreement between existing rules and this rule.

General Comment 6: ...the emphasis should be on client services rather than client treatment and restrictions.

Response: This rule deals with the rights of consumers of behavioral health services. The emphasis is on rights.

General Comment 7: ...recommends that the drafting committee be reconvened and more consumer and advocate input solicited.

Response: The drafting committee included consumer and advocate representation. Prior to this rule being filed as an emergency rule, the Department took the extraordinary step of soliciting comments from consumers, providers, advocates, and family members of consumers. Several comments were received, resulting in changes to the rule and resolve to provide training in the application of the rule. In addition, the proposed rule was reviewed and commented on by attorney for plaintiffs in the *Hartley* Consent Decree. Changes were made as recommended by that attorney.

General Comment 8: The rule as it is now written shows Department, consumer and provider input and reflects positive movement toward the continued protection of consumer rights....strongly suggest that a complete list of consumer rights in the form of a Bill of Rights be developed. Said Bill of Rights could then be provided to each consumer as they enter service.

Response: The rule was written with the input of consumers, advocates, providers, Department personnel from several bureaus, and with comment from plaintiffs' attorney in the *Hartley* consent decree. The Department, with the assistance of advocates, is presenting a series of training activities related to the rule and is planning a "bill of rights" publication to summarize the rights listed in this rule.

General Comment 9:suggest the definitions used in the Behavioral Health Consumers Rule 64CSR74 be consistent with the definitions found in the Behavioral Health Centers' Licensure Rule 64CSR11....recommend that Behavioral Health Consumers Rights Rule 64CSR74 be cited in Behavioral Health Centers' Licensure Rule 64-11-8 as the Consumer Rights rules to be followed for behavioral health licensure. The integration of Rules and Regulation whenever possible helps avoid the potential for multiple interpretations and contested findings.

Response: These comments should have been directed as comments to the proposed amendments to Behavioral Health Centers' Licensure Rule 64CSR11.

§2 Comment: The definitions reflected in this Rule should also be the same as or at least consistent with the definitions found in 64CSR11.

Response: The committee drafting this rule frequently reviewed the existing and the then-existing proposed amendments to 64CSR11 and believes definitions are consistent. Further comment is not possible without specific reference to conflicting definitions and suggestions as to which definition should prevail.

§2.1. Comment: The definition of abuse should be as in Chapter 49 of the West Virginia Code. The issue in §2.1.a.4 would need to clarify whether use of a medication without a direct link to a diagnosis and current behaviors would be interpreted as "use

of a...chemical restraint that is not in compliance..."

Response: The definition of abuse includes that which is found in law and that which relates to the *Hartley* Consent Decree. §2.1.a.4 clearly suggests that physical and chemical restraint must be compliance with law.

§2.9. Comment: This definition goes beyond the definition of neglect in Chapter 49 and Chapter 9 of West Virginia law. Should licensure not utilize the legal definitions of both abuse and neglect? This would be much clearer.

Response: The definition meets not only the requirements of the laws cited, but extends to requirements of the *Hartley* Consent Decree. In addition, the definition is consistent with §27-5-9.

§2.9. Comment: Definition of neglect needs to be the same as in the West Virginia Code. How will you define 2.9.c and 2.9.d? Would this include only those items identified by regulatory body standards of physical environment and supervision? The issue of safety is related to staff complement in many cases. However, most providers are not paid at a level commensurate with expenses.

Response: The definition is consistent with law and provisions with the *Hartley* Consent Decree. It is expected that in most cases a behavioral service that is licensed will meet standards of physical environment and safety.

§2.9.d Comment: The entire field of developmental disabilities in WV and the U.S. is now in crisis because states are reimbursing providers at such a low rate that providers are having severe problems keeping direct care staff. There needs to be some caveat that does not punish providers because they cannot appropriately maintain sufficient staff.

Response: It is anticipated that any licensed behavioral health provider will need to maintain sufficient staff to retain a license to operate. This will not negate the possibility of disputes related to a provider's definition of "sufficient staff" and definitions from advocates. Such matters are likely to be grieved and, perhaps, ultimately resolved by the Department.

§2.9.d Comment: The terms "sufficient" and "appropriately trained staff" will have to be defined to assure consistency.

Response: Accreditation standards and licensing regulations have a role in the definition of staffing levels and training requirements. It is probable that these regulations and standards will be cited in the event of a grievance based on this right.

§2.10.a. Comment: Add a parenthetical phrase at the end which says "(See Section 64-74-2.1.a.4.)"

Response: §2.10 and paragraphs under it are related to the definition of restraint. §2.1 and paragraphs under it are related to abuse. A cross reference to abuse in a definition of restraint may inadvertently create an automatic assumption that restraint is, but definition, abuse. If restraint is provided for the reasons and using methods as discussed in this rule, it would not be abuse. Thus, the cross reference will not be made as suggested.

§2.13 Comment: Rewrite this way: "A behavioral health plan written by an Individualized Treatment Team (IDT) and based on" etc.

Response: This rule was written regarding the rights of individuals with behavioral health needs wherever they receive services. Requirements of an Individualized Treatment Team are found in regulations of entities providing reimbursement for services, in certain licensing regulations, and in Department policy for agencies contracting with the Department. Some providers of behavioral health services are not subject to this specific procedural requirement for treatment planning.

§3. Comment: Acceptance of national accreditation would be a good step. If an agency operates in line with a national standard, we should be exempt from review.

Response: National accreditation standards typically meet or exceed the standards in this rule.

§4 Comment: A complete listing of Client Rights would be appropriate to supplement the general rights as listed.

Response: The Department is planning such a publication.

§4.1.d Comment: The right to be housed with those of similar age should not be permitted to be modified in a program or treatment plan. This exception will only allow for manipulation of a system.

Response: The origin of this comment would seem to indicate concern about juveniles. This section of the rule would enable housing emancipated adolescents with young adults.

§5 Comment: The right for a consumer to have an advance directive also implies the consumer has the right to not have an advanced directive.Recommend that in section 5.2 the phrase "and if the consumer does not wish to have an advanced

directive, the declination will be recorded in the consumer's record."

Response: §5.3 indicates the right to refuse to have an advance directive. This rule was designed to enumerate consumer rights. The committee drafting the rule refrained from specifying procedural requirements for providers of services.

§6 Comment: There should be specific language in this section of "informed consent" including the use of medication versus the use of behavior management in treatment. The language should reflect the need to use the least intrusive means to effect change.

Response: While language is concerning this is not in the section specifically cited, it is found at §10.5.: "A consumer has the right for drugs or medications to not be used as punishment, as a convenience of staff, as a substitute for adequate staffing, or as a substitute for an individualized program plan or treatment plan.

§6.1.c Comment: "Reasonable alternative treatments available" needs to be defined.

Response: It will be necessary for the behavioral health service provider to determine the basis of "reasonable alternative treatments." If the consumer believes another, reasonable alternative is available, it should be discussed. The rule makes provisions for grieving this and other decisions.

§7.1 Comment: "Least restrictive setting" needs to be defined.

Response: It will be necessary for the behavioral health service provider to determine the basis of "least restrictive setting." If the consumer believes a less restrictive alternative is available, it should be discussed. The rule makes provisions for grieving this and other decisions.

§7.4 Comment: Currently children must be evaluated every 90 days.

Response: Certain regulations require evaluation every 90 days for some recipients of behavioral health services. If these individuals are evaluated on that schedule, their right to be evaluated every 180 days will have been honored.

§7.8 Comment: The right of a client to review all information contained in his/her record is not clearly defined. Whether this fits in this section or would fit better in "Consumers' Bill of Rights" is a matter for determination. In addition, the client's right to a copy of materials contained in his/her record, and a limitation as the cost associated with such, should be included.

Response: An individual has the right to any record reflecting medical treatment, including treatment meeting a behavioral health need. The rule is, in essence, a "Consumer Bill of Rights," including this section of the rule. State law has determined the cost for such records.

§7.9 Comment: The consumer has the right not to have the individualized program plan or treatment also. The phrase "upon request" added to this section would help protect the consumer's rights.

Response: Requiring a request for the record establishes a procedure for the right. The committee drafting this rule refrained from establishing procedures.

§8.3 Comment: The issue of 8.3, while protective in nature, does not truly assist those seeking relief outside of medication or therapy. An effective alternative may not be available for the situation, and while the client has a right to refuse who ultimately will decide for a minor that their right to refuse is not in his/her best interest as it relates to "least restrictive placement". This is a particularly difficult issue as it relates to the treatment of children. Children oftentimes do not wish to take medications, whether they assist in managing behaviors or not, while the guardian may determine that it would be best for the child. This issue really involves the true definition of who the consumer is in the case of a minor child, is it the child or the guardian?

The right not to be restrained as it related to minor children with a diagnosis of mental retardation or other developmental disability presents a problem. Time out procedures which are individually identified for this particular consumer are the only ones which can be used. This provision does not allow for the treatment of chronic behaviors which are in need of intensive treatment, which may include, but not be limited to physically restrain in order to teach behavior management techniques.

Response: An individual with mental retardation or developmental disability may not be secluded. There is no such reference to restraint. Chapter 27 provides a guidance concerning who the consumer is: involuntary treatment procedures must be initiated for persons aged 12 or older, if the individual is in need of treatment but refuses to accept it voluntarily.

§10.2 Comment: This seems to imply that restraint should never be used with consumers with only MR or DD diagnoses. What about emergencies? The original language was better.

Response: The section quoted does not reference restraint. Additionally, there is not "original language" in that this is a new rule.

§11.2.c Comment: This is a part of the law that a lot of people do not understand. Some individuals think that a subpoena is a court order. The original language was much clearer.

Response: The courts are cognizant of the differences between a subpoena and a court order. Trained medical records clerks know to determine the validity of the request(s) for a record. This is a new rule; there is no original language other than the current language.

§11.2.e End of 2nd line, add "on the consumer's written request."

Response: This paragraph is a part of a series of conditions under which a consumer's written request would not be necessary.

§12.2 Comment: The Right to Unrestricted Communication (12.2) allows for denial by the treatment staff or attending physician with 30 day interviews. The parent or guardian's role is not clear here, in that it is implied that they do not have any say either way. The legal guardian should have to be informed of and approve of this decision. This is contradicted in 14.3 when it indicates that a consumer has the right to contact with family members.

Response: §14 is a section titled, "Juvenile's Additional Rights." Thus, unimpeded appropriate communication with family members is an *additional* right specifically for juveniles.

§14.1 Comment: Consumers under the age of eighteen should have the right to be housed only with those under eighteen.

Response: Agreed. Nothing in this rule would prevent honoring such a right.

§14.2 Comment: Add "A consumer under 23 with developmental disabilities has a right to an education."

Response: The right to an education for an individual with developmental disabilities is provided for in other law and regulation. §14 concerns specific, additional rights for juveniles. It would not be appropriate to reference the rights of any individual up to the age of 23 in this section.

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
111 COURT STREET, ROOM 519
CHARLESTON, WEST VIRGINIA 25301-2136



A. ANDREW MACQUEEN
JUDGE

TELEPHONE 304/357-0469
FAX 304/357-0461

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OFFICE OF THE COURT MONITOR
AND THE COURT REPORTERS AND VIDEO SERVICES

July 7, 1999

Beth Marquart, Director
Office of Regulatory Development
Building 3, Room 265
Charleston, WV 25305

RE: BEHAVIORAL HEALTH CONSUMER RIGHTS, 64CSR74

Dear Ms. Marquart:

I have had the opportunity to review the proposed "Behavioral Health Consumer Rights" emergency rule which my office received on June 14, 1999. First I want to say that I know an enormous amount of work on the part of several stakeholders has occurred to produce this product. And their efforts should be commended as I know this hasn't been an easy task to complete.

After reviewing this proposed rule I feel it necessary to point out that this project was initially taken on to address specific areas in the court's order which dealt with regulatory issues for both the institutions and community programs. As you know, Rule 64 for the facilities has been completed and operational for several years and this is the attempt to deal with the piece for the community. The main theme and purpose for establishing these rules was to have in legislation/law a process by which DHHR can hold their facilities and community providers accountable for the services in which they provide, hence allowing the Courts from playing a less direct role in monitoring of service delivery.

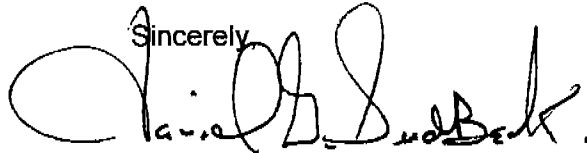
My evaluation of this proposed rule is that it falls far short from ensuring that persons with disabilities are protected from anything while receiving services in the community. The proposed language in the rule speaks to the "consumer has the right to...", but nowhere in the rule does it speak to who will make sure that the consumers' have the opportunity to exercise their rights'. For example : the consumer has the right to not be mechanically or physically restrained...where is the word "prohibit" in this rule in addition, the rule indicates that a consumer has a right to treatment in the least restrictive setting possible when available and appropriate...where is the word "shall" in this rule? This kind of language is weak and shifts the accountability and management of this rule back to the individual provider. So, in other words, this is self- governance with little or no centralized administrative oversight from DHHR. This, I believe, is a recipe for disaster and is not the original intent of the Courts order. The Court wants DHHR to take direct responsibility to supervise their provider community by establishing legislation/laws which assist the Department in

Beth Marquart
July 7, 1999
Page 2

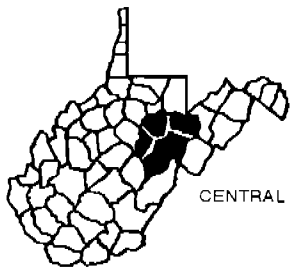
providing programmatic supervision and a process which holds the provider community accountable. Inherent in this strategy should be a Departmental position statement which addresses consequences for rule violations.

I appreciated the opportunity to respond to this proposed rule.

Sincerely,

A handwritten signature in black ink, appearing to read "David G. Sudbeck". The signature is fluid and cursive, with a large initial "D" and "S".

David G. Sudbeck
Hartley Court Monitor



THE APPALACHIAN COMMUNITY HEALTH CENTER

CENTRAL OFFICE • 725 YOKUM STREET • ELKINS, WV 26241 • PHONE 304-636-3232 • FAX 304-636-9243

Participating: BARBOUR, RANDOLPH, TUCKER, and UPSHUR COUNTIES

OFFICE OF THE ATTORNEY GENERAL
STATE OF WEST VIRGINIA
JUL 28 1999

July 28, 1999

Beth Marquart, Director Regulatory Development
Department of Health and Human Resources
Building 3, Room 265
State Capitol Complex
Charleston, WV 25305

Dear Ms. Marquart:

The Appalachian Community Health Center has reviewed the Behavioral Health Consumer Rights Legislative Rule 64CSR74 and offer the following:

General Comments: The Rule as it is now written shows Department, consumer and provider input and reflects positive movement toward the continued protection of consumer rights. The Center would strongly suggest that a complete list of consumer rights in the form of a Bill of Rights be developed. Said Bill of Rights could then be provided to each consumer as they enter service.

The Center further suggest the definitions used in the Behavioral Health Consumer Rights Rule 64CSR74 be consistent with the definitions found in the Behavioral Health Centers' Licensure Rule 64CSR11. The Center recommends that Behavioral Health Consumers Rights Rule 64CSR74 be cited in Behavioral Health Centers' Licensure Rule 64-11-8 as the Consumer Rights rules to be followed for behavioral health licensure. The integration of Rules and Regulation wherever possible helps avoid the potential for multiple interpretations and contested findings.

64-74-2 Definitions

General comment: The definitions reflected in this Rule should also be the same or at least consistent with the definitions found in 64CSR11.

2.9 Neglect

2.9.d. Failure to maintain sufficient, appropriately trained staff.

Comment: The terms "sufficient" and "appropriately trained staff" will have to be defined to assure consistency.

64-74-3. Consumers' Bill of Rights.

General comment: A complete listing of Client Rights would be appropriate to supplement the general rights as listed.

64-74-5. Advance Psychiatric Directive Right.

General Comment: The right for a consumer to have an advanced directive also implies the consumer has the right not to have an advanced directive. The consumer should be informed of the right to have an advanced directive and if the consumer wishes to have an advanced directive, the consumer should be allowed to develop and be assisted in developing the directive. If the consumer does not wish to have an advanced directive, this section of the Rule implies that the provider would have to be able to document that the consumer declined the offer or opportunity. Recommend that in section 5.2 the phrase “ and if the consumer does not wish to have an advanced directive, the declination will be recorded in the consumer’s record.”

64-74-7. Right to Treatment.

7.4 A consumer has the right to periodic evaluation related to his or her needs no less frequently than every one hundred and eighty (180) days while an active consumer of a behavioral health service.

Comment: Currently children must be evaluated every 90 days.

7.9 A consumer has the right to have a copy of his or her individualized program plan or treatment plan.

Comment: The consumer has a right not to have the individualized program plan or treatment plan also. The phrase “upon request” add to this section would help protect the consumer’s rights.

The Center would like to thank you for the opportunity to comment on 64CSR74. If you have any questions or concerns regarding the Center’s comments, please do not hesitate to contact me.

Sincerely,



Richard Kiley, PhD
Executive Director

**F
M
R
S**

MENTAL HEALTH COUNCIL, INC.

ADMINISTRATIVE OFFICE

Telephone: 304-256-7100
101 S. Eisenhower Drive
BECKLEY, W. VA. 25801

June 29, 1999

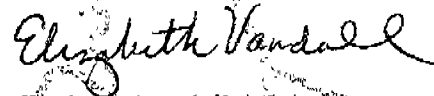
Beth Marquart, Director
Regulatory Development
Department of Health & Human Resources
Capitol Complex - Building 3, Room 265
Charlottesville, West Virginia 25305

Dear Ms. Marquart:

Please find attached our comments on Proposed Legislative Rule - Behavioral Health Consumer Rights.

Thank you for taking our comments and concerns into consideration.

Sincerely,



Elizabeth Vandall, M.A.
Quality Improvement Director

RECEIVED
JUL 29 1999
STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH & HUMAN RESOURCES

COMMENTS

Proposed Legislative Review Behavioral Health Consumer Rights

64-74-2 Definitions

2.9 Neglect. – A negligent act or an omission that caused or may have caused injury or death to a consumer, or that placed a consumer at risk of injury or death, that was committed or omitted by an individual responsible for providing services in a behavioral health service. Neglect includes, but is not limited to:

2.9.a Failure to establish or carry out a consumer's individualized program plan or treatment plan;

2.9.b Failure to provide adequate nutrition, clothing, or health care;

2.9.c Failure to provide a safe environment; and

2.9.d Failure to maintain sufficient, appropriately trained staff.

This definition goes beyond the definition of neglect in Chapter 49 and Chapter 9 of West Virginia law. Should licensure not utilize the legal definitions of both abuse and neglect? This would be much clearer.

54-74-10 Rights Regarding Seclusion and restraints

10.2 A consumer with a single diagnosis of mental retardation or another developmental disability has the right not to be secluded or restrained, but time-out procedures may be used when they have been developed specifically for the consumer and described in the consumer's treatment plan.

This seems to imply that restraint should never be used with consumers with only MR or DD diagnoses. What about emergencies? The original language was better.

“The use of physical restraint is an emergency control measure only, and may be used only as a last resort to control imminent destructive behavior that is a threat to the consumer or others and that has not responded to medications or other less restrictive measures”.

64-74-11 Right of Confidentiality

11.2. A consumer has the right to have information relating to his or her treatment disclosed only:

11.2.c Pursuant to a court order. This is part of the law that a lot of people do not understand. Some individuals think that a subpoena is a court order. The original language was clearer. "Pursuant to an order of any court based upon a finding that the information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section. Once a subpoena is received it is the duty of the custodian of the records to request a determination from the court having jurisdiction to make this finding before the records are provided."

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July 27, 1999


Ms. Beth Marquart
Director
Office of Regulatory Development
Building 3, Room 265 Capitol Complex
Charleston, WV 25305

Dear Ms. Marquart:

Please find attached my comments on proposed Behavioral Health Regulations Title 64, Series 74 and Title 64, Series 11. I trust that you will understand the comments which I have made, and I have cited the page number of the regulation as a reference.

I am mailing a hard copy of my comments to you at this time, in the event that the facsimile transmission is not adequate. Should you have any questions about my comments, please do not hesitate to contact me at **233-2367 extension 251**.

Sincerely,



Melanee W. Sinclair, ACSW
Executive Director

Comments on Proposed Behavioral Health Licensing Regulations 64 CSR 74

Pg 1 The definition of abuse should be as in Chapter 49 of the West Virginia Code. The issue in 2. 1. a.4 would need to clarify whether use of a medication without a direct link to a diagnosis and current behaviors would be interpreted as "use of a ... chemical restraint that is not in compliance..."

Pg 3 Definition of neglect needs to be the same as in the West Virginia Code. How will you define 2.9.c and 2.9.d? Would this include only those items identified by regulatory body standards of physical environment and supervision? The issue of safety is related to staff complement in many cases. However, most providers are not paid at a level commensurate with expenses.

Pg 4 Acceptance of national accreditation would be a good step. If an agency operates in line with a national standard, we should be exempt from review.

Pg 5 The right to be housed with those of similar age should not be permitted to be modified in a program or treatment plan. This exception will only allow for manipulation of a system.

Pg 6 "Reasonable alternative treatments available" (6. 1.c) needs defined. There should be specific language in this section of "informed consent" including the use of medication versus the use of behavior management as treatment. The language should reflect the need to use the least intrusive means to effect change.

"Least restrictive setting" needs to be defined. This could be defined in the manner of a continuum of care which shows services from least to most restrictive. This could be defined in terms of intensity of service as it relates to the setting. For example a client in a Level I program may be on medication, as opposed to being in a Level 3 program and be medication free.

The right of a client to review all information contained in his/her record is not clearly defined. Whether this fits in this section or would fit better in "Consumers' Bill of Rights" is a matter for determination. In addition, the client's right to a copy of materials contained in his/her record, and a limitation as to the cost associated with such, should be included.

Pg 8 The issue of 8.3, while protective in nature, does not truly assist those seeking relief outside of medication or therapy. An effective alternative may not be available for the situation, and while the client has a right to refuse who ultimately will decide for a minor that their right to refuse is not in his/her best interest as it relates to "least restrictive placement". This is a particularly difficult issue as it relates to the treatment of children.

Children oftentimes do not wish to take medications, whether they assist in managing behaviors or not, while the guardian may determine that it would be best for the child. This issue really involves the true definition of who the consumer is in the case of a minor child, is it the child or the guardian?

The right not to be restrained as it related to minor children with a diagnosis of mental retardation or other developmental disability presents a problem. Time out procedures which are individually identified for this particular consumer are the only ones which can be used. This provision does not allow for the treatment of chronic behaviors which are in need of intensive treatment, which may include, but not be limited to the need to physically restrain in order to teach behavior management techniques.

Pg 10 The Right to Unrestricted Communication (12.2) allows for denial by the treatment staff or attending physician with 30 day intervals. The parent or guardian's role is not clear here, in that it is implied that they do not have any say either way. The legal guardian should have to be informed of and approve of this decision. This is contradicted in 14.3 when it indicates that a consumer has the right to contact with family members

Pg 11 Consumers under the age of eighteen should have the right to be housed only with those under eighteen.

AUTISM SERVICES CENTER

received

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Huntington, WV 25710-0507

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Ruth Christ Sullivan, Ph.D.
Executive Director

July 29, 1999

Ms. Beth Marquart
Regulatory Development
DHHR
Capitol Complex, Bldg. 3, Room 265
Charleston, WV 25305

Faxed: 304-558-6051
Mailed

Re: Comments on Behavioral Health Rights Draft

Dear Ms. Marquart:

Here are a few comments re: the above-named Draft.

Under Definitions 64-74-2

Neglect 64.74.2.9.d (p.3)

Failure to maintain sufficient, appropriately trained staff.

Comment 1. Under neglect it is stated in such a way as to say that definition is for "an individual responsible for providing services in a behavioral health service."

BUT

2.9.d. says "Failure to maintain sufficient, appropriately trained staff" as though an individual is responsible, not a behavioral health agency.

Ms. Beth Marquart
July 29, 1999
Page 2

The entire field of developmental disabilities in WV and the U.S. is now in crisis because states are reimbursing providers at such a low rate that providers are having severe problems keeping direct care staff. There needs to be some caveat that does not punish providers because they cannot appropriately maintain sufficient staff.

Under 2.10.a. Physical Restraint: (p.4)

Comment: Add a parenthetical phrase at the end which says "(See Section 64-74-2.1.a.4.)"

Under 2.13. Treatment Plan (p.4)

Comment: Rewrite this way: "A behavioral health plan written by an Individualized Treatment Team (IDT) and based on" etc.

Under 11.2.e Right of Confidentiality (p.9)

Comment: End of 2nd line, add "on the consumer's written request"

Under 14.2

Comment: Add "A consumer under 23 with developmental disabilities has a right to an education."

I'd be happy to discuss the above with you.

Sincerely,



Ruth C. Sullivan, Ph.D.
Executive Director

RCS/cm

July 6, 1999

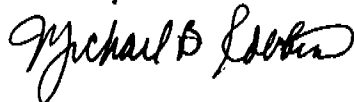
Beth Marquart, Director
Regulatory Development
Department of Health & Human Resources
Capitol Complex – Building 3, Room 265
Charleston, West Virginia 25305

Re: **Title 64 – Series 74 Legislature Rules**

On behalf of the West Virginia Hospital Association, I wish to submit our comments in support of the adoption of Title 64, Series 74 “Behavioral Health Consumers Rights” rule. WVHA was a participant, along with other providers, family members, consumers, and Departmental personnel, who actively worked to develop a rule which would clearly define the rights of individuals with behavioral health needs. In addition, the rule has been written in a way that will facilitate providers’ implementation of this rule in an orderly fashion. We look forward to working with the Department and our member institutions on the implementation of the rule as soon as it is adopted.

If you have any questions with regard to these brief comments, please do not hesitate to contact me at the Association at 344-9744.

Sincerely,



Michael B. Robbins
Vice President Financial Policy

MBR/jl

WVA**West Virginia Advocates*****The Protection and Advocacy System for West Virginia***

July 29, 1999

Beth Marquart
Director, Office of Regulatory Development
West Virginia Department of Health and Human Resources
Building 3, Room 265
Capitol Complex
Charleston, West Virginia 25305

Re: Title 64 Proposed Legislative Rule, Division of Health, Department of Health and Human Resources, Series 74, Behavioral Health Consumer Rights.

Dear Ms. Marquart,

West Virginia Advocates, the protection and advocacy system for the state of West Virginia appreciates the opportunity to provide comments to West Virginia Department of Health and Human Resources' Title 64 Proposed Legislative Rule, Division of Health, Department of Health and Human Resources, Series 74, Behavioral Health Consumer Rights.

Overall, West Virginia Advocates believes the Department of Health and Human Resources has vacated its responsibility for providing services to individuals under the Hartley Court Order and the Medley Consent Decree. Likewise, the Department of Health and Human Resources has shifted its responsibility for protecting client rights to the comprehensive behavioral health centers.

The definitions used in the proposed rule are not in conformity with the existing federal statutes, federal regulations, state statutes, and state policies. The individual rights of consumers are contravened in violation of constitutional and statutory protections.

West Virginia Advocates believes that the emphasis should be on client services rather than client treatment and restrictions.

West Virginia Advocates recommends that the drafting committee be reconvened and more consumer and advocate input solicited.

304-346-0847 or 1-800-950-5250 (V/TDD)

(Fax) 304-346-0867

Litton Building 4th Floor

1207 Quarrier Street, Charleston, West Virginia 25301-1842

Beth Marquart
July 29, 1999
Page 2

If you have any questions, or concerns, please contact me at your earliest convenience.

Sincerely,



Linda Leasure
Executive Director
West Virginia Advocates

KLB

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,

Petitioners,

v.

CIVIL ACTION NO. 81-MISC-58

MATIN, et al.,

Respondents.

FILED
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CLERK OF COURT
KANAWHA COUNTY
CIRCUIT COURT

ORDER

Upon review of the West Virginia Behavioral Health Care Delivery System Plan and amendments ordered by the Court, the parties have identified the unresolved issues in the above-styled proceeding as follows:

1. Weston Hospital

(a) The mandatory elements of the rehabilitation program (Plan § 3.03.03) must be met, and the staffing patterns and other requirements of the array of services for acute care must be met. (Plan § 3.02)

(b) There shall be retraining of staff in principles of normalization within 90 days of opening.

(c) The new hospital will be accredited by JCAHO.

2. Huntington Hospital

The mandatory elements of the rehabilitation program (Plan § 3.03.03) must be met. The staffing patterns and other requirements of the array of services for acute care (Plan § 3.02) must be met by December 31, 1996.

3. Community Placement

(a) Those persons with behavioral health needs in the long-term care and behavioral health institutions across the state, i.e., Pinecrest, Lakin, Colin Anderson, Hopemont, shall be given the opportunity for placement in the community. The Department shall complete its review of all of these facilities. Plans shall be developed for their placements to more appropriate living arrangements.

(b) Review of persons with mental illness diagnoses at Hopemont and Pinecrest Hospitals shall be conducted by June 30, 1994. The process will be to determine that individuals are/are not in need of nursing care, desire/do not desire to reside in a nursing facility, do need/do not need specialized treatment for a mental illness, and are receiving treatment if needed. Alternative disposition plans and other options will come from these reviews.

(c) A specific timetable for the community placement of appropriate Hartley clients at Pinecrest, Lakin, Colin Anderson, and Hopemont shall be presented to the Court by July 30, 1994. Such timetable shall not extend the process for final placement of these individuals beyond December 31, 1996.

(d) A plan shall be developed to assure adequate residential long-term care settings for Hartley clients by June 20, 1994. Existing levels of supplements for those living in adult family care, residential board and care, and personal care settings are inadequate.

4. Greenbrier Center

(a) Greenbrier Center was closed effective April, 1994. There shall be an ongoing monitoring of former residents' progress through April 30, 1996, and mechanisms established to carry this out. A monitoring plan shall be developed by the Department of Health and Human Resources by June 30, 1994 and submitted to the Court for approval.

5. Colin Anderson Center

(a) Colin Anderson Center shall be meet the standards of the Accreditation Council on Disabilities by December 31, 1995.

(b) The Department of Health and Human Resources will review the discharge process to assure that behavioral health centers fulfill statutory duties in connection with placement.

(c) The Department of Health and Human Resources will stop admissions to Colin Anderson by July 1, 1996.

6. Forensic Services

(a) The forensic unit at the South Central Regional Jail will be evaluated at the end of calendar years 1994 and 1995 for a determination of the adequacy and quality of the providers and services, and reports submitted to the Court.

(b) The Department of Health and Human Resources shall update on an annual basis its list of providers in the community who will conduct forensic evaluations.

7. Potomac Center

(a) The Department of Health and Human Resources shall review the mission and usage of the facility and develop a plan by September 30, 1994 to address its future usage. If any change in mission is contemplated, a motion shall be submitted to the Court.

(b) The parties shall determine whether or not the two regional facilities called for by Section 4.04.02 of the Plan shall be developed or deleted on or before September 30, 1994, and if it is to be pursued, a plan for the development thereof shall be completed not later than December 31, 1995.

8. Substance Abuse

(a) An evaluation of substance abuse systems in West Virginia shall be completed on or before October 1, 1994, and by agreement the Court ordered Plan shall be amended.

(b) A plan for alternative approaches to substance abuse treatment shall be developed by December 1, 1994, and full implementation shall be carried out by December 31, 1996.

9. Children

Section 6 of the Plan will be rewritten, including annual plans addressing implementation stages. At a minimum the following should be addressed: continuation and expansion of family resource coordination, family preservation services, interagency planning and placement in the community (IPPC process), foster care, a decrease in the numbers of youth who are placed out of state, deinstitutionalization of children. Target dates will be specified for each of the elements of the Plan.

10. Individuals with Mental Illness and Developmental Disabilities (MI/DD).

(a) The Department of Health and Human Resources must identify explicit case criteria in a managed health care plan which will outline the method which will support a multi-system collaboration for persons with MI/DD. At a minimum these criteria should address the following:

- (i) Short-term inpatient treatment;
- (ii) After-care plan;
- (iii) Community crisis intervention;
- (iv) Access route into mental health system;
- (v) Individualized program planning which should include residential supports and productive involvement during the day.

(b) By August 31, 1994, the Department of Health and Human Resources, in collaboration with the provider community, shall determine the number of additional community crisis services/supports needed across the state for persons with MI/DD, including cost and funding sources for developing these services.

(c) The Department of Health and Human Resources shall conduct a needs assessment with local community hospitals (situated regionally across the state) to ascertain what supports/services are needed to respond appropriately to emergency crisis situations involving an individual with MI/DD. The results of this survey shall be submitted to the Office of the Court Monitor by August 31, 1994. An implementation plan to

remedy these assessment findings shall be developed by November 1, 1994.

(d) The Department of Health and Human Resources shall re-examine and amend policies and procedures for psychiatric leave days by August 31, 1994. The issue is loss of beds in community programs while experiencing psychiatric problems requiring out-of-home placements. The Department of Health and Human Resources will also need to review the current standing court orders under E.H. v. Khan Matin and Medley and approach Plaintiffs' counsel in these cases for suggested changes.

(e) The Department of Health and Human Resources shall amend policies and procedures pertinent to individual program planning to ensure that all teams address crisis planning for those individuals with MI/DD. The crisis plans shall fully explain the mental health services needed and the providers or persons responsible for meeting these needs.

(f) The Department of Health and Human Resources shall develop a resource directory by July 1, 1994, which will identify agencies, hospitals, psychologists, psychiatrists, and other professional staff who have expertise as well as experience in working with individuals with MI/DD. This resource directory needs to be made available to providers and shared with interdisciplinary teams in order for them to adequately prepare crisis plans. This resource directory shall be updated at least annually.

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(g) By July 1, 1995, the Department of Health and Human Resources shall develop an education and training curriculum which will be used by providers. This curriculum shall address the education of all levels of professional staff.

(h) Full implementation shall be completed by December 31, 1995.

11. Advocacy

Facility and community advocacy shall be planned for the long term and clearly articulated in policy by August 31, 1994.

12. Psychogeriatric Services

The psychogeriatric sections of the Plan will be rewritten by September 30, 1994. The plan shall address an array of services for psychogeriatric care and will include such services at Lakin, Pinecrest, and Hopemont.

13. Comprehensive Continuum of Comprehensive Behavioral Health Care

(a) Community Case Management: The Department of Health and Human Resources shall implement case management which complies with the Hartley Plan 1:30 case management ratio. Averaging is insufficient in achieving this ratio. The Court expects that the 1:30 case management ratio will be the minimum standard that exists across all disability groups. The case management program should remedy insufficient training, evaluate salary issues, and pursue incentives to reduce high turnover in these positions.

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(b) **Community Case Finding:** The Department of Health and Human Resources shall provide one-on-one outreach to the homeless community and to other agencies, hospitals, and community groups in order to identify individuals not being served.

(c) **Community Outpatient Crisis Care:** The Department of Health and Human Resources shall insure that toll-free telephone services (or its equivalent) and on-call trained professional staff for face-to-face intervention shall be available twenty-four hours per day, seven days per week. The telephone services shall also be accessible by TDD.

(d) **Community Comprehensive Psychosocial Services:** The Department of Health and Human Resources shall provide for delivery of needed clinically appropriate treatment and employment or other productive daytime involvement for all disability groups. Consumers shall be transported to needed services, or the services taken to the consumer.

(e) **Housing:** The Department of Health and Human Resources shall provide for a range of supportive housing alternatives for all disability groups. The choices should be broad enough to allow each individual an opportunity to live in an environment which offers the support necessary for increased responsibility for their lives.

(f) **Residential Settings:** The community behavioral health centers shall identify all individuals from their catchment area who currently reside in personal care or

residential board and care homes, evaluate their behavioral health needs, and provide those services. The Department of Health and Human Resources shall develop a plan to assure that persons with behavioral health needs are in a residential setting that provides for an adequate, safe, meaningful and normalized living situation, taking into account the individual person's own wishes and desires. The plan shall include objective standards for assessing the adequacy of living situations, which shall, at a minimum, address: (1) bedroom size, (2) number of persons per bedroom and bathroom, (3) total capacity of home, (4) staffing ratios, (5) qualifications of staff, (6) productive involvement during the day, (7) residential satisfaction, and (8) required collaboration between behavioral health centers and home providers. The plan shall provide, however, that a competent individual's choice of living situation shall control over any other standard in the plan.

(g) Services for Non-Medicaid Individuals: The Department of Health and Human Resources shall identify the non-Medicaid eligible individuals approaching the system for services, determine the cost of providing services, and develop a strategy to compensate for this care. This information shall be submitted to the Court Monitor by August 30, 1994.

14. Community Crisis Stabilization Services

(a) The Department of Health and Human Resources shall, by July 31, 1994, determine the number of additional

crisis stabilization services needed across the state as well as the cost of developing these services.

(b) The Department of Health and Human Resources shall evaluate the need for expanded crisis residential services in Kanawha County after the current crisis stabilization outpatient program becomes fully utilized. Based on their findings, a preliminary report shall be submitted to the Court Monitor by July 1, 1994. The plan shall be fully implemented by July 1, 1996.

15. Comprehensive Implementation of Section Two Standards

There shall be a comprehensive review of Hartley standards applicable to the inpatient facilities to ensure that those standards are being met by December 31, 1994, and follow-up as indicated.

16. Comprehensive Resident Rights Policies and Regulations

Regulations shall be written by July 1, 1994 and finalized by May 1995. These should bring together all of the Section Two standards and update them for all inpatient facilities.

17. Review and Update of The Plan

Recent Court Orders need to be incorporated in the Plan, and the Plan needs to be updated to remove many of the timesables and goals that are outdated.

18. Developmental Maximization Units (DMU)

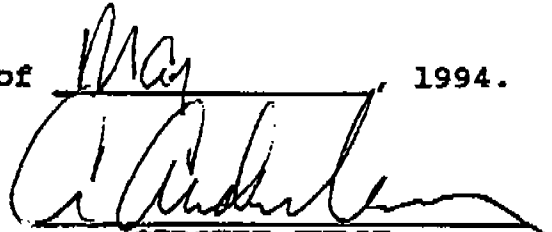
The Department of Health and Human Resources will study the need for DMUs for the developmentally disabled (§ 4.01 of the Court-ordered Plan) and make recommendations as to their development, and if deemed not appropriate, make a motion for amendment thereon.

19. Legislation

Proposals for updating Chapter 27 shall be drafted by December 31, 1994.

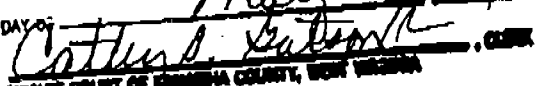
IT IS SO ORDERED.

ENTER this the 24 day of May 1994.


CIRCUIT JUDGE


For The Petitioners


For The Respondents

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.
I, CATHY S. GATEWAY, CLERK OF SAID COURT, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE
COPY OF THE ORDER OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 2nd
DAY OF May 1994.

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA