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OFFICE OF THE ATTORNEY GENERAL  
SECRETARY OF STATE

**WEST VIRGINIA LEGISLATURE**  
**Legislative Rule-Making Review Committee**

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December 14, 1999

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Ted Johnson  
Behavioral Health Services  
Capitol Complex  
Building 6, Room 717

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Behavioral Health Consumer Rights, 64CSR74**

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

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 Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached.

ANALYSIS OF PROPOSED LEGISLATIVE RULES

DEC 10 10 33 AM '99

**Staff Counsel:** Rita A. Pauley  
**Date:** December 1, 1999  
**Agency:** Department of Health & Human Resources, Division of Health  
**Subject:** Behavioral Health Consumer Rights, 64 CSR 74

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PERTINENT DATES

Filed for public comment: June 29, 1999  
Public comment period ended: July 29, 1999  
Filed following public comment period: August 4, 1999  
Filed LRMRC: August 4, 1999  
Filed as emergency: Senate Bill 314, incorporated into SB 305 required the agency to file an emergency rule by July 1, 1999. This rule was filed as an emergency rule on June 29, 1999.

Fiscal Impact: None

ABSTRACT

The proposed rule is new. It defines the rights of all individuals with behavioral health needs regardless of what type of behavioral health services the consumer is receiving. The rule provides procedures for informing consumers (patients) of their rights and outlines grievance procedures for consumers who believe those rights have been violated.

The statute requiring promulgation of this rule has been in effect since 1974. However, the agency did not develop a rule on consumer rights until ordered to do so by the court in E. H. v. Martin, 168 W.Va. 248, 284 S.E.2d 232 (1981) and as part of the Hartley Consent Decree. The rule was proposed last year but withdrawn by the agency prior to final passage by the Legislature. The rule has been significantly revised by the agency in cooperation with the stakeholders.

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

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule. The rule applies to all individuals with behavioral health needs. It is to be liberally construed to effectuate the rehabilitative goals of Chapter 27 of the Code consistent with the protection of consumer rights and dignity.

Section 2 is the definition section. Behavioral health providers have expressed some concern over differences in definitions in this rule and the behavioral health licensure rule.

Section 3 establishes the applicability of this rule to other standards. If there is a conflict between any state or federal rule, regulation or accreditation standard, the more stringent applies unless a federal standard must be met for purposes of Medicare or Medicaid participation. This section also provides that any behavioral health service provider accredited by a national accreditation agency are deemed to be in compliance with this rule.

Section 4 entitled "Consumers' Bill of Rights", sets forth general consumer rights. These include the right not to be discriminated against; the right to know what a consumer's rights are; the right to privacy and freedom of movement and the right to receive care and treatment in accordance with accepted behavioral health and medical practice standards.

Section 5 provides that consumers have the right to establish advance psychiatric directives. Consumers may refuse to establish advance directives and may withdraw any advance directive that was previously established. Advance directives may not be honored if the behavioral health service lacks sufficient resources or if a professional staff member believes that the directive would endanger the consumer or others.

Section 6 sets forth the requirements for informed consent to treatment. Behavioral health care providers do not have to obtain a consumer's consent if medication is needed for chronic medical conditions or if the consumer has been taking the medication prior to admission and has not refused to continue taking the medication.

Section 7 contains the rights related to treatment. Consumers have the right to receive appropriate treatment in the least restrictive setting. Consumers have the right to participate in treatment planning; to have their treatment needs assessed at least at least once every six months; and to have a copy of their individualized treatment plan.

Section 8 explains the consumers' right to refuse treatment. A consumer who refuses treatment has the right to have alternative treatment offered. If a consumer does not agree with the treatment options offered he or she may file a grievance.

Section 9 provides that consumers have the right to refuse research and experimental treatment.

Section 10 provides that consumers have the right to be free from seclusion and restraints unless the restraints are documented as clinically necessary and all other less restrictive measures have been exhausted.

Section 11 sets forth consumers' rights of confidentiality. Diagnosis, treatment, identifying and family information is confidential and can be released with the consumer's consent or for specific reasons enumerated by statute.

Section 12 provides that consumers have the right to unrestricted communication with his or her legal representative. All other communication may be restricted if authorized by the treatment staff or the attending physician for a period of not more than 30 days. The restriction may be reviewed and reinstated.

Section 13 provides that consumers may not be required to work without pay in the operation or maintenance of the facility. Consumers may voluntarily work for pay and may perform vocational training tasks that do not involve the operation and maintenance of the facility.

Section 14 sets forth additional rights for juveniles. Consumers under the age of 18 have the right to be housed separately from consumers over 18. Juveniles have the right to an education; contact with family members and legal representative and the right to be told what behavior is expected of them.

Section 15 provides that consumers have the right to have an advocate and to file a grievance with the behavioral health service provider concerning any alleged violation of this rule. Consumers also have the right to appeal grievance decisions to the Secretary of DHHR and appeal the Secretary's decision to circuit court. Consumers have the right to pursue other relief regardless of whether or not a grievance is filed.

AUTHORITY

Statutory authority: W.Va. Code, §27-5-9(g), which provides as follows:

(g) The board of health shall promulgate rules and regulations to protect the personal rights of patients not inconsistent with this section.

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ANALYSIS

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

No.

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

Yes.

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

There is a potential conflict between some of the definitions in this rule and in the Behavioral health Centers Licensure, 64 CSR 11 rule.

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

Yes.

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

Yes.

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

No.

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

Yes.

VIII. OTHER.

Counsel has suggested technical modifications.