

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

Form #4

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF RULE MODIFICATION OF A PROPOSED RULE**

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

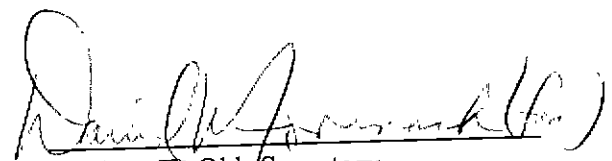
IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 74

TITLE OF RULE BEING PROPOSED: Behavioral Health Consumer Rights

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

  
Joan E. Ohi, Secretary

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

**SERIES 74  
BEHAVIORAL HEALTH CONSUMER RIGHTS**

**MODIFIED BY THE  
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

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

**SERIES 74  
BEHAVIORAL HEALTH CONSUMER RIGHTS**

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TITLE 64  
LEGISLATIVE RULES  
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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 construed 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

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2.1.b. Verbal Abuse. -- Means any use of oral, written or gestured language by which abuse occurs. This includes demeaning and derogatory terms to describe persons with disabilities. Verbal abuse includes, but is not limited to:

Yelling or using demeaning, derogatory, vulgar, profane or threatening language;

Threatening tones in speaking;

Teasing, pestering, molesting, deriding, harassing, mimicking or humiliating a consumer in any way; or

Making sexual innuendo.

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 Representative<sup>1</sup>. -- 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;

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<sup>1</sup> 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.

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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;

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 a pattern of actions or events 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 by an individual responsible for providing services in a behavioral health service. Neglect includes, but is not limited to:

2.9.a. A pattern of failure to establish or carry out a consumer's individualized program plan or treatment plan that placed or may have placed a consumer at risk of injury of death;

2.9.b. A pattern of failure to provide adequate nutrition, clothing, or health care;

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

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

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

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. -- Means a written design based on the assessment of a consumer's needs and strengths that identifies problems, sets client-centered goals and objectives and describes all services, programs and activities currently required to support the achievement of the goals and objectives.

### **§ 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. General 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 the receipt of behavioral health services.

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;

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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;

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.

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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.

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.

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### § 64-74-7. Right to Treatment.

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

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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.

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.

### **§ 54-74-10. 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.

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

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 the attorney of the consumer, whether or not in connection with pending judicial proceedings;

11.2.e. To agencies requiring information necessary to make payments to or on behalf of the consumer pursuant to contract or in accordance with law, provided that only such information shall be released to third-party payers as is required to certify that covered services have been provided;

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

11.2.g 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, within the meaning of W. Va. Code § 27-5-9(e) and/or § 27-5-9(3)(i).

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

11.4. Consent for Disclosure.

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

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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.**

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.

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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.