

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #2

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2001 DEC -4 P 12:10

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: DHHR - Division of Health TITLE NUMBER: 64

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §16-30-8(a)(7)

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: 86

TITLE OF RULE BEING PROPOSED: Surrogates for Incapacitated Persons in Health Care Facilities
Operated by the Department of Health and Human Resources

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON January 4, 2002 AT 4:30 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Martha Barnitt
Office of Regulatory Affairs
DHHR - Building 3, Room 206
State Capitol Complex
Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

Paul L. Nustka
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

SCANNED

\$4.00

**Surrogates for Incapacitated Persons in
Health Care Facilities Operated by the
Department of Health and Human Resources**

Brief Summary of the Rule.

This rule designates individuals and entities authorized to act as surrogates for incapacitated persons in health care facilities operated by the Department, in accordance with W. Va. Code §16-30-8(a)(7). It also places restrictions on when and which Department employees may act as health care surrogates.

Statement of Circumstances Which Require the Proposed Rule.

The circumstances requiring the proposed rule are best set forth in the August 20, 2001 letter from Charlene Vaughan to David G. Sudbeck in the Hartley proceedings. In that letter, the Department acknowledged that it has an obligation under W. Va. Code §16-30-8(a)(7) to designate persons or entities to serve as a health care surrogate for protected (i.e. incapacitated) persons when no family member or close friend is able or willing to serve. This rule is pursuant to its obligation. In addition, the Department acknowledged there is an appearance of impropriety when it or its employees are named as health care surrogates for protected persons in health care facilities operated by the State. The restrictions on the Department's ability to act as a health care surrogate in such situations will ameliorate if not eliminate such apparent conflicts of interest.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Surrogates for Incapacitated Persons... Rule, 64csr86

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

Agency: Tom McNeely, Office of Finance
Department of Health and Human Resources

Address: Building 3, Room 430, Capitol Complex
Charleston, WV 25305

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

2. Explanation of above estimates.

The Department of Health and Human Resources estimates there to be no costs or revenues associated with the rule.

3. Objectives of this rule:

This rule designates additional persons and entities authorized to act as health care surrogates for incapacitated persons in health care facilities operated by the Department, in accordance with W. Va. Code §16-30-8(a)(7). It also places restrictions on when and which Department employees may act as health care surrogates.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There will be no economic impact resulting from this rule.

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

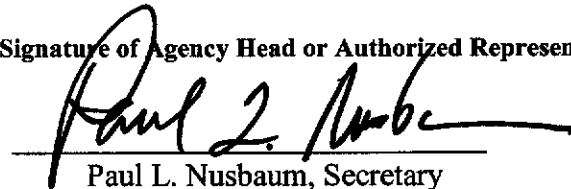
There will be no economic impact resulting from this rule.

C. Economic Impact on Citizens/Public at Large.

There will be no economic impact resulting from this rule.

Date: 12/3/01

Signature of Agency Head or Authorized Representative:



Paul L. Nusbaum, Secretary
Department of Health and Human Resources

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: December 4, 2001

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* DHHR - Division of Health
State Capitol Complex - Building 3, Room 201
Charleston, WV 25305
Attention: Martha Barnitt Tel: 558-5598

LEGISLATIVE RULE TITLE: Surrogates for Incapacitated persons in Health Care
Facilities Operated by the Department of Health and Human
Resources

1. Authorizing statute(s) citation W Va Code §16-30-8(a)(7)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
December 4, 2001

b. What other notice, including advertising, did you give of the hearing?
Notice of the rule has been provided by filing it with the Secretary of State, and
direct notice has been made to all Health Care Facilities operated by the
Department, the advocacy organizations operating in these facilities, the Plaintiff's
Counsel and the Court Monitor in the Hartley Proceedings.

c. Date of Public Hearing(s) *or* Public Comment Period ended:
January 4, 2002

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons
for amendments.
Attached N/A No comments received N/A

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

N/A

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

Martha Barnitt

DHHR - Office of Regulatory Affairs

Capitol Complex - Building 3, Room 201

Charleston, WV 25305

- 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)

Steve Small, Senior Assistant Attorney General

Bureau for Behavioral Health and Health Facilities

350 Capitol Street - Room 350

Charleston, WV 25305

Tel: 558-5386

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 of 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 therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

**TITLE 64
LEGISLATIVE RULES
BUREAU FOR PUBLIC HEALTH**

**SERIES 86
SURROGATES FOR INCAPACITATED PERSONS IN
HEALTH CARE FACILITIES
OPERATED BY
THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

FILED
2001 DEC -4 P 12:10

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§64-86-1. General.

1.1. Scope. – This legislative rule designates individuals and entities who are authorized to act as surrogates for incapacitated persons in Department health care facilities. This rule should be read in conjunction with W. Va. Code § 16-30-8 and the definitions in W. Va. Code § 16-30-3. The W. Va. Code is available in public libraries and on the Legislature's web page: <http://www.legis.state.wv.us/>.

1.2. Authority. – W. Va. Code §16-30-8(a)(7).

1.3. Filing Date. –

1.4. Effective Date. –

§64-86-2. Application and Enforcement Section.

2.1. Application. – This rule applies to incapacitated persons who are in need of surrogates and who are patients in Department health care facilities; Department designated surrogates; health care facilities; health care providers; and individuals and entities who are prohibited from serving as surrogates.

2.2. Enforcement. – This rule is enforced by the Commissioner of the Bureau for Public Health or his or her designee.

§64-86-3. Definitions.

3.1. The definitions in W. Va. Code §16-30-3 are applicable to this rule.

3.2. Department. – The West Virginia Department of Health and Human Resources.

§64-86-4. Designation of Individuals and Entities.

4.1. Except as provided in Section 5 of this rule, the following are designated as individuals and entities that may be selected in accordance with W. Va. Code §16-30-

8(a)(7) as surrogates for patients in Department health care facilities:

4.1.a. Any health care facility or health care provider;

4.1.b. Any organization authorized under state or federal laws, or under contract with the Department, to advocate for individuals in Department health care facilities;

4.1.c. Any organization authorized under federal or state laws, or under contract with the Department, to provide surrogacy, guardianship or conservator services for persons in Department health care facilities; and

4.1.d. Any Department employee, other than an employee of the incapacitated person's health care facility, if the person selecting the surrogate determines that there is no other designated individual or entity willing and able to act as a surrogate.

§64-86-5. Prohibited Surrogates.

5.1. The following individuals and entities are prohibited from serving as surrogates under W. Va. Code §16-30-8(a)(7) for an incapacitated person in a Department health care facility:

5.1.a. Any individual or entity unwilling or unable to act as a surrogate;

5.1.b. Any health care provider treating the incapacitated person and any individual or entity employed by or affiliated with that provider;

5.1.c. Any state governmental unit;

5.1.d. Any individual employed by the health care facility; or

5.1.e. Any individual or entity providing financial assistance or other substantial services to the incapacitated person.