

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

Form #7

Do Not Mark In This Box  
Filing Date

**FILED**

2001 NOV 19 P 2:12

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Effective Date

**NOTICE OF AN EMERGENCY RULE**

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

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

EMERGENCY 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

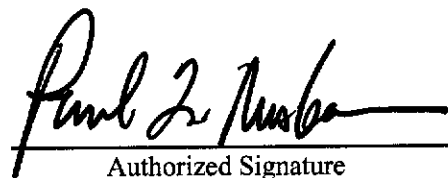
TITLE OF RULE BEING PROPOSED: Surrogates for Incapacitated Persons in Health Care Facilities  
Operated by the Department of Health and Human Resources

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

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See next page.

Use additional sheets if necessary

  
Authorized Signature

**SCANNED**

\$4.00

## **Statement of Circumstances Which Require the Emergency Rule**

Currently, there exists no person or entity designated under W. Va. Code § 16-30-8(a)(7) by the Department of Health and Human Resources to act as a surrogate for incapacitated persons in health care facilities operated by the Department. As a result, a person's physician selects the Department or an employee of the Department to act as a surrogate if no relative or close friend is willing or able to serve as a surrogate. As described below, this situation justifies an emergency rule under two of the criteria in W. Va. Code §29A-3-15(f).

First, the rule is necessary for the immediate preservation of the public peace, health, safety and welfare, because by designating additional persons and entities who may serve as surrogates, the rule will increase the choices of surrogates for incapacitated persons in health care facilities operated by the Department, and by prohibiting Department health care facility employees from acting as surrogates for patients in their facilities, the rule will avoid a current apparent conflict of interest.

Second, this rule will prevent substantial harm to the public interest. In the case of E. H. et al. v. Matin, et al., Number 81-MISC-585, Kanawha County Circuit Court ("Hartley"), the Court determined that the Department was not providing behavioral health services in accordance with the Code. As a result, the Court has been monitoring the Department's behavioral health program for over 20 years. Recent Court orders have held that this proceeding will be terminated, and the Department will be able to administer its behavioral health program, without Court oversight, by the end of 2001, if certain conditions are met.

One of these conditions involves Department employees acting as surrogates for patients in Department health care facilities. In a recent Hartley Consent Order, signed by Judge Bloom on July 3, 2001, the Department agreed to pursue obtaining successor surrogates when the Department acts as the surrogate in three Department long-term care facilities. Further, in an August 20, 2001, letter to David G. Sudbeck, the Hartley Court Monitor, the Department acknowledged its obligation to designate persons or entities to serve as surrogates when no family member or close friend is able or willing to serve, and that there is an apparent conflict of interest when a Department employee acts as surrogate for a Hartley-protected person in a Department health care facility. This emergency rule will aid the Department in complying with Judge Bloom's Order, will hasten the termination of the Hartley proceedings, and will thus prevent substantial harm to the public interest.

**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.

**FISCAL NOTE FOR PROPOSED RULES**

**Rule Title:** Health Care Surrogate Rule, 64csr86

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

**Agency:** Department of Health and Human Resources  
Bureau for Public Health

**Address:** Building 3, Room 201, Capitol Complex  
Charleston, WV 25305

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

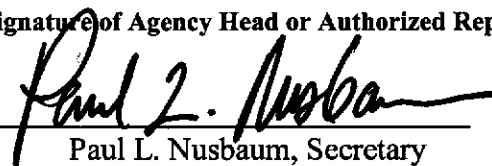
There will be no economic impact resulting from this rule.

**C. Economic Impact on Citizens/Public at Large.**

There will be no economic impact resulting from this rule.

Date: 11/19/01

Signature of Agency Head or Authorized Representative:



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



**EMERGENCY RULE QUESTIONNAIRE**

DATE: November 19, 2001

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* DHHR - Bureau for Behavioral Health & Health Facilities  
350 Capitol Street - Room 350; Charleston, WV 25301 - 3702  
Attention: Steve Small Tel: 558-5386

EMERGENCY RULE TITLE: Surrogates for Incapacitated Persons in Health Care Facilities

1. Date of filing November 19, 2001

2. Statutory authority for promulgating emergency rule:  
W. Va. Code §16-30-8(a)(7)

3. Date of filing of proposed legislative rule: \_\_\_\_\_

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? It is a new rule.

5. Has the same or similar emergency rule previously been filed and expired?  
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.

See attached statement of circumstances which require the emergency rule.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

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8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

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## **Statement of Circumstances Which Require the Emergency Rule**

Currently, there exists no person or entity designated under W. Va. Code § 16-30-8(a)(7) by the Department of Health and Human Resources to act as a surrogate for incapacitated persons in health care facilities operated by the Department. As a result, a person's physician selects the Department or an employee of the Department to act as a surrogate if no relative or close friend is willing or able to serve as a surrogate. As described below, this situation justifies an emergency rule under two of the criteria in W. Va. Code §29A-3-15(f).

First, the rule is necessary for the immediate preservation of the public peace, health, safety and welfare, because by designating additional persons and entities who may serve as surrogates, the rule will increase the choices of surrogates for incapacitated persons in health care facilities operated by the Department, and by prohibiting Department health care facility employees from acting as surrogates for patients in their facilities, the rule will avoid a current apparent conflict of interest.

Second, this rule will prevent substantial harm to the public interest. In the case of E. H. et al. v. Matin, et al., Number 81-MISC-585, Kanawha County Circuit Court ("Hartley"), the Court determined that the Department was not providing behavioral health services in accordance with the Code. As a result, the Court has been monitoring the Department's behavioral health program for over 20 years. Recent Court orders have held that this proceeding will be terminated, and the Department will be able to administer its behavioral health program, without Court oversight, by the end of 2001, if certain conditions are met.

One of these conditions involves Department employees acting as surrogates for patients in Department health care facilities. In a recent Hartley Consent Order, signed by Judge Bloom on July 3, 2001, the Department agreed to pursue obtaining successor surrogates when the Department acts as the surrogate in three Department long-term care facilities. Further, in an August 20, 2001, letter to David G. Sudbeck, the Hartley Court Monitor, the Department acknowledged its obligation to designate persons or entities to serve as surrogates when no family member or close friend is able or willing to serve, and that there is an apparent conflict of interest when a Department employee acts as surrogate for a Hartley-protected person in a Department health care facility. This emergency rule will aid the Department in complying with Judge Bloom's Order, will hasten the termination of the Hartley proceedings, and will thus prevent substantial harm to the public interest.

TITLE 64  
EMERGENCY RULES  
BUREAU FOR PUBLIC HEALTH

FILED

2001 NOV 19 P 2:12

SERIES 86  
SURROGATES FOR INCAPACITATED PERSONS IN WEST VIRGINIA  
HEALTH CARE FACILITIES SECRETARY OF STATE  
OPERATED BY  
THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES

**§64-86-1. General.**

1.1. Scope. – This emergency 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.

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**E. H., et al.,**

**Petitioners,**

**v.**

**Civil Action No. 81-MISC-585**

**MATIN, et al.,**

**Respondents.**

**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. **Adult Family Care, Residential Board and Care and Personal Care Home Provider Reimbursement**

(a) The Department of Health and Human Resources, ("DHHR"), shall ensure an adequate reimbursement schedule within State budgetary constraints for those individuals who are living in adult family care, residential board and care, and personal care settings, and shall place greater emphasis on securing home finders.

(b) The Secretary of the DHHR shall designate a qualified team of specialists from inside and outside the DHHR, with input from the Court Monitor and Petitioners' counsel, to review and recommend necessary reimbursement changes to ensure the provision of quality services. This process shall result in the establishment of reimbursement rates by December 1, 2001.

(c) This process will provide a reimbursement range approximating \$850-\$1,500 per month, in accordance with the needs of the individuals treatment plan, and employ a sufficient number of Home Finders, approximately 8-20, to ensure that clients are placed in the least restrictive setting.

(d) DHHR shall develop a strategy for moving individuals from institutional settings such as institutions to alternative community settings such as adult family care homes, residential board and care homes, and personal care homes.

2. Colin Anderson Center

Compliance clocks will be completed for the remaining seven (7) individuals who are a part of Sub-class I and who were discharged from Colin Anderson Center.

3. Community Placement

(a) Those individuals with behavioral health needs in the long-term care and behavioral health institutions, including Hopemont, Lakin, and Pinecrest, shall be given the opportunity for placement in the community under the direction of the Department's Long-Term Care Coordinator. This process shall be ongoing.

(b) The Court Monitor and counsel for the Petitioners, or their designees, shall review all residents of Hopemont, Lakin, and Pinecrest Hospitals who have behavioral health needs and who have DHHR as their guardian and/or surrogate, and shall pursue a successor guardian and/or surrogate for those residents.

(c) The Court Monitor shall attend discharge planning meetings for those residents of Hopemont, Lakin, and Pinecrest Hospitals who have behavioral health needs and who have been recommended for community placement.

4. Community Case Management

(a) The Department shall construct and implement, in consultation with the Monitor and counsel for the Petitioners', a system for the provision of case management services statewide, which system shall address the acuity scale, cycle of staff turnover, reimbursement of transportation costs, caseload size, and reimbursement levels by October 1, 2001.

(b) Minimum salary levels for case managers shall be included in provider contracts hereafter beginning with Fiscal Year 2003.

(c) All issues identified in the Monitors' September, 2000, Case Management Report shall be addressed.

5. Community Crisis Services

(a) The parties shall ensure that the crisis services system is adequate and evenly distributed across all regions in the state.

(b) This system shall deter the unnecessary admissions to State psychiatric facilities of persons with mental illness and developmental disabilities and shall provide agencies/organizations with the methods and instruments to respond appropriately to emergency crisis situations.

(c) Improvements to the system which shall be addressed shall include: (1) ten (10) new crisis residential beds; (2) staff improvements at each of the statutory behavioral health centers to assist in crisis intervention 24 hours per day; (3) crisis intervention services to include de-escalation and direct linkage to the client's case manager; (4) computerized tracking system to determine the best use of crisis beds and future needs. This will be completed by December 1, 2001.

6. Services for Non-Medicaid Eligible Individuals (Uncompensated Care)

The DHHR, in agreement with the Court Monitor and counsel for the Petitioners, shall establish a process for the provision and distribution of its uncompensated care funds to its contracted providers.

7. Forensic Services

The parties shall develop a plan to address the forensic needs of the State of West Virginia. Stakeholders who shall be involved in this planning process shall include, at a minimum, representatives from DHHR, Petitioners, the Court Monitor, Appalachian Legal Services, the Department of Corrections, Prosecuting Attorneys, the Public Defender Office and the Supreme Court. This will be completed by December 1, 2001.

8. Eastern Panhandle Training Center

The parties shall ensure that a comprehensive array of services are being provided at Eastern Panhandle Training Center and that those services are provided in accordance with the West Virginia Behavioral Health Care Delivery System Plan, as well as in accordance with applicable DHHR regulations.

9. The parties, in consultation with the Court Monitor, shall develop rules for the resolution of issues in the event of termination of the position of Court Monitor.

10. Items for Mediation

(a) In the absence of agreement by the parties on the issues of: (a) Usage of Potomac Center; (b) usage of Green Acres Training Center. (c) services to victims of traumatic brain

injury, and (d) whether the Valley Mental Health Center Hopemont Group Homes are the least restrictive environment for its residents, these four (4) issues are hereby ORDERED referred to mediation.

(b) The parties have agreed upon the selection of a Mediator, John H. Kozak. The reasonable and necessary expenses of the Mediator shall be compensated from the budget of the Court Monitor.

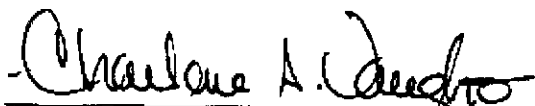
(c) The mediation shall be completed within forty-five days after the entry of this Order, unless extended by agreement of the parties or the mediator.

The Clerk is directed to transmit a certified copy of this Order to all counsel of record.

Entered this \_\_\_\_\_ day of June, 2001 .

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Louis H. Bloom, Judge



Charlene A. Vaughan (WV ID #1855)

Counsel for Respondents



Daniel F. Hedges (WV ID #1660)

Counsel for Petitioners

LTC Facilities  
Hartley Residents with DHHR Guardian/Surrogate  
August 9, 2001

Pinecrest

1. A. Mills

Lakin

1. R. Allen
2. T. Bowman
3. B. Jo VanPelt
4. J. Butler
5. C. English
6. R. Hawks
7. W. Hissey
8. B. Hanshaw
9. E. Potts

Hopemont

1. P. Brown
2. V. Cobbs
3. L. Hardway
4. F. Koch
5. G. Lanham
6. D. Matthews
7. W. McKinnley
8. D. Mitchell
9. R. Phillips
10. J. Sizemore
11. T. Stotler
12. E. Taulton
13. A. Tenney



DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL

HEALTH & HUMAN RESOURCES  
LEGAL DIVISION

(304) 558-2131  
FAX (304) 558-0947

E-mail: [cvaughan@wvdbhr.org](mailto:cvaughan@wvdbhr.org)

August 20, 2001

David G. Sudbeck  
3701 MacCorkle Avenue, SE  
Charleston, West Virginia 25304

RE: Monitors' Finalization Plan, Goal #3

Dear David:

As represented at the August 16, 2001 Parties Meeting, the following represents an analysis of the surrogate/guardianship issue by the Department:

- The Department has reviewed all records of individuals living at Pinecrest, Lakin, and Hopemont Long Term Care Facilities and determined that 22 individuals presently have the Department as either their guardian or surrogate. Attached is a listing of those individuals.

- The Department agrees that in spite of the statutory authority found at W.Va. Code § 44A-1-8(7)(g) for it to serve as guardian for individuals under its care or to whom it is providing services or financial assistance, there is an appearance of impropriety when such individuals are in one of the state operated long term care facilities and the Department is also charged with ensuring those individuals are in their least restrictive environment.

- The Department is aware of the practice by attending physicians in naming it as surrogate for protected persons under the Health Care Surrogate Act found at W.Va. Code § 16-30B-1 et seq.

- The Department is aware of the appearance of impropriety when such protected persons are in one of the state operated long term care facilities and the Department is also charged with ensuring those individuals are in their least restrictive environment.

- The Department is aware that under W.Va. Code § 16-30B-7(a)(7), it has an obligation to designate persons or entities to serve as a surrogate for a protected

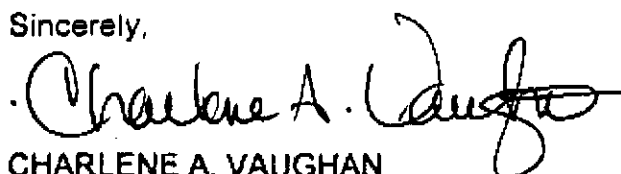
David G. Sudbeck  
August 20, 2001  
Page Two

person when no family member or close friend is able or willing to serve.

Based upon these observations, the Department shall:

1. Actively seek to have W.Va. Code § 44A-1-8(7)(g) amended, to reflect a provision that it shall not be named guardian over any individual under its care or to whom it is providing services or financial assistance who is residing in one of the state operated long term care facilities;
2. Actively seek legislative appropriations to fund the designation of a private entity or entities to serve as health care surrogate and/or guardian of last resort.

Sincerely,



CHARLENE A. VAUGHAN  
DEPUTY ATTORNEY GENERAL

CAV/

Enclosure, as noted

cc: Desmond Byrne  
Fred Booth  
Phil Lynch  
Steve Small  
Julie Shelton  
Daniel Hedges