

# Virginia Administrative Code

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## CHAPTER 115

### REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS LICENSED, FUNDED, OR OPERATED BY THE DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

#### Part I

#### General Provisions

#### **12VAC35-115-10. Authority and applicability.**

A. The Code of Virginia authorizes these regulations to further define and protect the rights of individuals receiving services from providers of mental health, mental retardation, or substance abuse services in Virginia. The regulations require providers of services to take specific actions to protect the rights of each individual. The regulations establish remedies when rights are violated or in dispute, and provide a structure for support of these rights.

B. Providers subject to these regulations include:

1. Facilities operated by the department under Chapters 3 (§ 37.2-300 et seq.) and 7 (§ 37.2-700 et seq.) of Title 37.2 of the Code of Virginia;
2. Sexually violent predator programs established under § 37.2-909 of the Code of Virginia;
3. Community services boards that provide services under Chapter 5 (§ 37.2-500 et seq.) of Title 37.2 of the Code of Virginia;
4. Behavioral health authorities that provide services under Chapter 6 (§ 37.2-600 et seq.) of Title 37.2 of the Code of Virginia;
5. Public or private providers that operate programs or facilities licensed by the department under Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2 of the Code of Virginia except those

operated by the Department of Corrections; and

6. Any other providers receiving funding from the department. Providers of services under Part C of the Individuals with Disabilities Education Act (IDEA), 20 USC §§ 1431-1444, that are subject to these regulations solely by receipt of Part C funds from or through the department shall comply with all applicable IDEA regulations found in 34 CFR Part 303 in lieu of these regulations.

C. Unless another law takes precedence, these regulations apply to all individuals who are receiving services from a public or private provider of services operated, licensed or funded by the Department of Behavioral Health and Developmental Services, except those operated by the Department of Corrections.

D. These regulations apply to individuals under forensic status and individuals committed to the custody of the department as sexually violent predators, except to the extent that the commissioner may determine these regulations are not applicable to them. The exemption must be in writing and based solely on the need to protect individuals receiving services, employees, or the general public. The commissioner shall give the State Human Rights Committee (SHRC) chairperson prior notice of all exemptions and provide the written exemption to the SHRC for its information. These exemptions shall be time limited and services shall not be compromised.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007; Errata, 24:2 VA.R. 255 October 1, 2007; amended, Virginia Register Volume 29, Issue 4, eff. November 21, 2012.

#### **12VAC35-115-20. Policy.**

A. Each individual who receives services shall be assured:

1. Protection to exercise his legal, civil, and human rights related to the receipt of those services;
2. Respect for basic human dignity; and

3. Services that are provided consistent with sound therapeutic practice.

B. Providers shall not deny any individual his legal rights solely because he has been voluntarily or involuntarily admitted, certified for admission or committed to services. These legal rights include the right to:

1. Acquire, retain, and dispose of property;
2. Sign legal documents;
3. Buy or sell;
4. Enter into contracts;
5. Register and vote;
6. Get married, separated, divorced, or have a marriage annulled;
7. Hold a professional, occupational, or vehicle operator's license;
8. Make a will and execute an advance directive; and
9. Have access to lawyers and the courts.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

**12VAC35-115-30. Definitions.**

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

"Abuse" means any act or failure to act by an employee or other person responsible for the care of an individual in a facility or program operated, licensed, or funded by the department, excluding those operated by the Department of Corrections, that was performed or was failed to be performed knowingly,

recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury, or death to a person receiving care or treatment for mental illness, mental retardation, or substance abuse. Examples of abuse include acts such as:

1. Rape, sexual assault, or other criminal sexual behavior;
2. Assault or battery;
3. Use of language that demeans, threatens, intimidates or humiliates the person;
4. Misuse or misappropriation of the person's assets, goods or property;
5. Use of excessive force when placing a person in physical or mechanical restraint;
6. Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice, or the person's individualized services plan; and
7. Use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan. See § 37.2-100 of the Code of Virginia.

"Advance directive" means a document voluntarily executed in accordance with § 54.1-2983 of the Code of Virginia or the laws of another state where executed (§ 54.1-2993 of the Code of Virginia). This may include a wellness recovery action plan (WRAP) or similar document as long as it is executed in accordance with § 54.1-2983 of the Code of Virginia or the laws of another state. A WRAP or similar document may identify the health care agent who is authorized to act as the individual's substitute decision maker.

"Authorization" means a document signed by the individual receiving services or that individual's authorized representative that authorizes the provider to disclose identifying information about the individual. An authorization must be voluntary. To be voluntary, the authorization must be given by the individual receiving services or his authorized representative freely and without undue inducement, any element of force, fraud, deceit, or duress, or any form of constraint or coercion.

"Authorized representative" means a person permitted by law or these regulations to authorize the

disclosure of information or to consent to treatment and services or participation in human research. The decision-making authority of an authorized representative recognized or designated under these regulations is limited to decisions pertaining to the designating provider. Legal guardians, attorneys-in-fact, or health care agents appointed pursuant to § 54.1-2983 of the Code of Virginia may have decision-making authority beyond such provider.

"Behavior intervention" means those principles and methods employed by a provider to help an individual to achieve a positive outcome and to address challenging behavior in a constructive and safe manner. Behavior management principles and methods must be employed in accordance with the individualized services plan and written policies and procedures governing service expectations, treatment goals, safety, and security.

"Behavioral treatment plan, functional plan, or behavioral support plan" means any set of documented procedures that are an integral part of the individualized services plan and are developed on the basis of a systematic data collection, such as a functional assessment, for the purpose of assisting an individual to achieve the following:

1. Improved behavioral functioning and effectiveness;
2. Alleviation of symptoms of psychopathology; or
3. Reduction of challenging behaviors.

"Board" means the Board of Behavioral Health and Developmental Services.

"Caregiver" means an employee or contractor who provides care and support services; medical services; or other treatment, rehabilitation, or habilitation services.

"Commissioner" means the Commissioner of the Department of Behavioral Health and Developmental Services.

"Community services board" or "CSB" means the public body established pursuant to § 37.2-501 of the Code of Virginia that provides mental health, mental retardation, and substance abuse services to individuals within each city and county that established it. For the purpose of these regulations,

community services board also includes a behavioral health authority established pursuant to § 37.2-602 of the Code of Virginia.

"Complaint" means an allegation of a violation of these regulations or a provider's policies and procedures related to these regulations.

"Consent" means the voluntary agreement of an individual or that individual's authorized representative to specific services.

Consent must be given freely and without undue inducement, any element of force, fraud, deceit, or duress, or any form of constraint or coercion. Consent may be expressed through any means appropriate for the individual, including verbally, through physical gestures or behaviors, in Braille or American Sign Language, in writing, or through other methods.

"Department" means the Department of Behavioral Health and Developmental Services.

"Director" means the chief executive officer of any provider delivering services. In organizations that also include services not covered by these regulations, the director is the chief executive officer of the services or services licensed, funded, or operated by the department.

"Discharge plan" means the written plan that establishes the criteria for an individual's discharge from a service and identifies and coordinates delivery of any services needed after discharge.

"Disclosure" means the release by a provider of information identifying an individual.

"Emergency" means a situation that requires a person to take immediate action to avoid harm, injury, or death to an individual or to others.

"Exploitation" means the misuse or misappropriation of the individual's assets, goods, or property. Exploitation is a type of abuse. (See § 37.2-100 of the Code of Virginia.) Exploitation also includes the use of a position of authority to extract personal gain from an individual. Exploitation includes violations of 12VAC35-115-120 (Work) and 12VAC35-115-130 (Research). Exploitation does not include the billing of an individual's third party payer for services. Exploitation also does not include instances of use or appropriation of an individual's assets, goods or property when permission is given by the individual or his

authorized representative:

1. With full knowledge of the consequences;
2. With no inducements; and
3. Without force, misrepresentation, fraud, deceit, duress of any form, constraint, or coercion.

"Governing body of the provider" means the person or group of persons with final authority to establish policy. For the purpose of these regulations, the governing body of a CSB means the public body established according to Chapter 5 (§ 37.2-500 et seq.) or Chapter 6 (§ 37.2-600 et seq.) of Title 37.2 of the Code of Virginia, and shall include administrative policy community services boards, operating community services boards, local government departments with policy-advisory boards, and the board of a behavioral health authority.

"Habilitation" means the provision of individualized services conforming to current acceptable professional practice that enhance the strengths of, teach functional skills to, or reduce or eliminate challenging behaviors of an individual. These services occur in an environment that suits the individual's needs, responds to his preferences, and promotes social interaction and adaptive behaviors.

"Health care operations" means any activities of the provider to the extent that the activities are related to its provision of health care services. Examples include:

1. Conducting quality assessment and improvement activities, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives, and related functions that do not include treatment;
2. Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, and training, licensing or credentialing activities;
3. Conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs; and
4. Other activities contained within the definition of health care operations in the Standards for Privacy of Individually Identifiable Health Information, 45 CFR 164.501.

"Health plan" means an individual or group plan that provides or pays the cost of medical care, including any entity that meets the definition of "health plan" in the Standards for Privacy of Individually Identifiable Health Information, 45 CFR 160.103.

"Historical research" means the review of information that identifies individuals receiving services for the purpose of evaluating or otherwise collecting data of general historical significance. See 12VAC35-115-80 B (Confidentiality).

"Human research" means any systematic investigation, including research development, testing, and evaluation, utilizing human subjects, that is designed to develop or contribute to generalized knowledge. Human research shall not include research exempt from federal research regulations pursuant to 45 CFR 46.101(b).

"Human rights advocate" means a person employed by the commissioner upon recommendation of the State Human Rights Director to help individuals receiving services exercise their rights under this chapter. See 12VAC35-115-250 C.

"Individual" means a person who is receiving services. This term includes the terms "consumer," "patient," "resident," "recipient," and "client."

"Individualized services plan" or "ISP" means a comprehensive and regularly updated written plan that describes the individual's needs, the measurable goals and objectives to address those needs, and strategies to reach the individual's goals. An ISP is person-centered, empowers the individual, and is designed to meet the needs and preferences of the individual. The ISP is developed through a partnership between the individual and the provider and includes an individual's treatment plan, habilitation plan, person-centered plan, or plan of care.

"Informed consent" means the voluntary written agreement of an individual, or that individual's authorized representative to surgery, electroconvulsive treatment, use of psychotropic medications, or any other treatment or service that poses a risk of harm greater than that ordinarily encountered in daily life or for participation in human research. To be voluntary, informed consent must be given freely and without undue inducement, any element of force, fraud, deceit, or duress, or any form of constraint or



coercion.

"Inspector general" means a person appointed by the Governor to provide oversight by inspecting, monitoring, and reviewing the quality of services that providers deliver.

"Investigating authority" means any person or entity that is approved by the provider to conduct investigations of abuse and neglect.

"Licensed professional" means a physician, licensed clinical psychologist, licensed professional counselor, licensed clinical social worker, licensed or certified substance abuse treatment practitioner, or certified psychiatric nurse specialist.

"Local Human Rights Committee" or "LHRC" means a group of at least five people appointed by the State Human Rights Committee. See 12VAC35-115-250 D for membership and duties.

"Neglect" means failure by a person, program, or facility operated, licensed, or funded by the department, excluding those operated by the Department of Corrections, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse. See § 37.2-100 of the Code of Virginia.

"Next friend" means a person designated in accordance with 12VAC35-115-146 B to serve as the authorized representative of an individual who has been determined to lack capacity to consent or authorize the disclosure of identifying information, when required under these regulations.

"Peer-on-peer aggression" means a physical act, verbal threat or demeaning expression by an individual against or to another individual that causes physical or emotional harm to that individual. Examples include hitting, kicking, scratching, and other threatening behavior. Such instances may constitute potential neglect.

"Person centered" means focusing on the needs and preferences of the individual, empowering and supporting the individual in defining the direction for his life, and promoting self-determination, community involvement, and recovery.

"Program rules" means the operational rules and expectations that providers establish to promote the general safety and well-being of all individuals in the program and to set standards for how individuals will interact with one another in the program. Program rules include any expectation that produces a consequence for the individual within the program. Program rules may be included in a handbook or policies and shall be available to the individual.

"Protection and advocacy agency" means the state agency designated under the federal Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act and the Developmental Disabilities (DD) Act. The protection and advocacy agency is the Virginia Office for Protection and Advocacy.

"Provider" means any person, entity, or organization offering services that is licensed, funded, or operated by the department.

"Psychotherapy notes" means comments recorded in any medium by a health care provider who is a mental health professional documenting and analyzing an individual or a group, joint, or family counseling session that are separated from the rest of the individual's health record. Psychotherapy notes shall not include annotations relating to medication and prescription monitoring, counseling session start and stop times, treatment modalities and frequencies, clinical test results, or any summary of any symptoms, diagnosis, prognosis, functional status, treatment plan, or the individual's progress to date.

"Research review committee" or "institutional review board" means a committee of professionals that provides complete and adequate review of research activities. The committee shall be sufficiently qualified through maturity, experience, and diversity of its members, including consideration of race, gender, and cultural background, to promote respect for its advice and counsel in safeguarding the rights and welfare of participants in human research. (See § 37.2-402 of the Code of Virginia and 12VAC35-180.)

"Restraint" means the use of a mechanical device, medication, physical intervention, or hands-on hold to prevent an individual from moving his body to engage in a behavior that places him or others at imminent risk. There are three kinds of restraints:

1. Mechanical restraint means the use of a mechanical device that cannot be removed by the

individual to restrict the freedom of movement or functioning of a limb or a portion of an individual's body when that behavior places him or others at imminent risk.

2. Pharmacological restraint means the use of a medication that is administered involuntarily for the emergency control of an individual's behavior when that individual's behavior places him or others at imminent risk and the administered medication is not a standard treatment for the individual's medical or psychiatric condition.

3. Physical restraint, also referred to as manual hold, means the use of a physical intervention or hands-on hold to prevent an individual from moving his body when that individual's behavior places him or others at imminent risk.

"Restraints for behavioral purposes" means using a physical hold, medication, or a mechanical device to control behavior or involuntarily restrict the freedom of movement of an individual in an instance when all of the following conditions are met: (i) there is an emergency, (ii) nonphysical interventions are not viable, and (iii) safety issues require an immediate response.

"Restraints for medical purposes" means using a physical hold, medication, or mechanical device to limit the mobility of an individual for medical, diagnostic, or surgical purposes, such as routine dental care or radiological procedures and related postprocedure care processes, when use of the restraint is not the accepted clinical practice for treating the individual's condition.

"Restraints for protective purposes" means using a mechanical device to compensate for a physical or cognitive deficit when the individual does not have the option to remove the device. The device may limit an individual's movement, for example, bed rails or a gerichair, and prevent possible harm to the individual or it may create a passive barrier, such as a helmet to protect the individual.

"Restriction" means anything that limits or prevents an individual from freely exercising his rights and privileges.

"Seclusion" means the involuntary placement of an individual alone in an area secured by a door that is locked or held shut by a staff person, by physically blocking the door, or by any other physical or verbal

means, so that the individual cannot leave it.

"Serious injury" means any injury resulting in bodily hurt, damage, harm, or loss that requires medical attention by a licensed physician.

"Services" means care, treatment, training, habilitation, interventions, or other supports, including medical care, delivered by a provider licensed, operated or funded by the department.

"Services record" means all written and electronic information that a provider keeps about an individual who receives services.

"State Human Rights Committee" or "SHRC" means a committee of nine members appointed by the board that is accountable for the duties prescribed in 12VAC35-115-250 E. See 12VAC35-115-250 E for membership and duties.

"State Human Rights Director" means the person employed by and reporting to the commissioner who is responsible for carrying out the functions prescribed in 12VAC35-115-250 F.

"Time out" means the involuntary removal of an individual by a staff person from a source of reinforcement to a different, open location for a specified period of time or until the problem behavior has subsided to discontinue or reduce the frequency of problematic behavior.

"Treatment" means the individually planned, sound, and therapeutic interventions that are intended to improve or maintain functioning of an individual receiving services delivered by providers licensed, funded, or operated by the department. In order to be considered sound and therapeutic, the treatment must conform to current acceptable professional practice.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007; Volume 29, Issue 4, eff. November 21, 2012.

## Assurance of Rights

### **12VAC35-115-40. Assurance of rights.**

A. These regulations protect the rights established in § 37.2-400 of the Code of Virginia.

B. Individuals are entitled to know what their rights are under these regulations; therefore, providers shall take the following actions:

1. Display, in areas most likely to be noticed by the individual, a document listing the rights of individuals under these regulations and how individuals can contact a human rights advocate. The document shall be presented in the manner, format, and languages most frequently understood by the individual receiving services.
2. Notify each individual and his authorized representative about these rights and how to file a complaint. The notice shall be in writing and in any other form most easily understood by the individual. The notice shall provide the name and phone number of the human rights advocate and give a short description of the human rights advocate's role. The provider shall give this notice to and discuss it with the individual at the time services begin and every year thereafter.
3. Ask the individual or his authorized representative to sign the notice of rights. File the signed notice in the individual's services record. If the individual or his authorized representative cannot or will not sign the notice, the person who gave the notice shall document that fact in the individual's services record.
4. Give a complete copy of these regulations to anyone who asks for one.
5. Display and provide information as requested by the protection and advocacy agency director that informs individuals of their right to contact the protection and advocacy agency.

C. Every individual has a right to seek resolution of his complaint and make a human rights complaint. Any individual or anyone acting on his behalf who thinks that a provider has violated any of his rights under these regulations may make a complaint and get help in making the complaint in accordance with Part V (12VAC35-115-150 et seq.) of this chapter.

D. Other rights and remedies may be available. These regulations shall not prevent any individual from pursuing any other legal right or remedy to which he may be entitled under federal or state law.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

### Part III

#### Explanation of Individual Rights and Provider Duties

#### **12VAC35-115-50. Dignity.**

A. Each individual has a right to exercise his legal, civil, and human rights, including constitutional rights, statutory rights, and the rights contained in these regulations, except as specifically limited herein. Each individual has a right to have services that he receives respond to his needs and preferences and be person-centered. Each individual also has the right to be protected, respected, and supported in exercising these rights. Providers shall not partially or totally take away or limit these rights solely because an individual has a mental illness, mental retardation, or substance use disorder and is receiving services for these conditions or has any physical or sensory condition that may pose a barrier to communication or mobility.

B. In receiving all services, each individual has the right to:

1. Use his preferred or legal name. The use of an individual's preferred name may be limited when a licensed professional makes the determination that the use of the name will result in demonstrable harm or have significant negative impact on the program itself or the individual's treatment, progress, and recovery. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation and the reasons for the restriction shall be documented in the individual's services

record. The need for the restriction shall be reviewed by the team every month and documented in the services record.

2. Be protected from harm including abuse, neglect, and exploitation.

3. Have help in learning about, applying for, and fully using any public service or benefit to which he may be entitled. These services and benefits include educational or vocational services, housing assistance, services or benefits under Titles II, XVI, XVIII, and XIX of the Social Security Act, United States Veterans Benefits, and services from legal and advocacy agencies.

4. Have opportunities to communicate in private with lawyers, judges, legislators, clergy, licensed health care practitioners, authorized representatives, advocates, the inspector general, and employees of the protection and advocacy agency.

5. Be provided with general information about program services, policies, and rules in writing and in the manner, format and language easily understood by the individual.

6. Be afforded the opportunity to have an individual of his choice notified of his general condition, location, and transfer to another facility.

C. In services provided in residential and inpatient settings, each individual has the right to:

1. Have sufficient and suitable clothing for his exclusive use.

2. Receive nutritionally adequate, varied, and appetizing meals that are prepared and served under sanitary conditions, are served at appropriate times and temperatures, and are consistent with any individualized diet program.

3. Live in a humane, safe, sanitary environment that gives each individual, at a minimum:

a. Reasonable privacy and private storage space;

b. An adequate number of private, operating toilets, sinks, showers, and tubs that are designed to accommodate individuals' physical needs;

c. Direct outside air provided by a window that opens or by an air conditioner;

d. Windows or skylights in all major areas used by individuals;

e. Clean air, free of bad odors; and

f. Room temperatures that are comfortable year round and compatible with health requirements.

4. Practice a religion and participate in religious services subject to their availability, provided that such services are not dangerous to the individual or others and do not infringe on the freedom of others.

a. Religious services or practices that present a danger of bodily injury to any individual or interfere with another individual's religious beliefs or practices may be limited. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation. The reasons for the restriction shall be documented in the individual's services record.

b. Participation in religious services or practices may be reasonably limited by the provider in accordance with other general rules limiting privileges or times or places of activities.

5. Have paper, pencil and stamps provided free of charge for at least one letter every day upon request. However, if an individual has funds to buy paper, pencils, and stamps to send a letter every day, the provider does not have to pay for them.

6. Communicate privately with any person by mail and have help in writing or reading mail as needed.

a. An individual's access to mail may be limited only if the provider has reasonable cause to believe that the mail contains illegal material or anything dangerous. If so, the director or his designee may open the mail, but not read it, in the presence of the individual.

b. An individual's ability to communicate by mail may be limited if, in the judgment of a licensed professional, the individual's communication with another person or persons will result in demonstrable harm to the individual's mental health.

c. The director or his designee shall discuss the issue with the individual and inform the human



rights advocate of the reasons for any restriction prior to implementation and the reasons for the restriction shall be documented in the individual's services record. The need for the restriction shall be reviewed by the team every month and documented in the services record.

7. Communicate privately with any person by telephone and have help in doing so. Use of the telephone may be limited to certain times and places to make sure that other individuals have equal access to the telephone and that they can eat, sleep, or participate in an activity without being disturbed.

a. An individual's access to the telephone may be limited only if, in the judgment of a licensed professional, communication with another person or persons will result in demonstrable harm to the individual or significantly affect his treatment.

b. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation and the reasons for the restriction shall be documented in the individual's services record. The need for the restriction shall be reviewed by the team every month and documented in the individual's services record.

c. Residential substance abuse services providers that are not inpatient hospital settings or crisis stabilization programs may develop policies and procedures that limit the use of the telephone during the initial phase of treatment when sound therapeutic practice requires restriction, subject to the following conditions:

(1) Prior to implementation and when it proposes any changes or revisions, the provider shall submit policies and procedures, program handbooks, or program rules to the LHRC and the human rights advocate for review and approval.

(2) When an individual applies for admission, the provider shall notify him of these restrictions.

8. Have or refuse visitors.

a. An individual's access to visitors may be limited or supervised only when, in the judgment of

a licensed professional, the visits result in demonstrable harm to the individual or significantly affect the individual's treatment or when the visitors are suspected of bringing contraband or threatening harm to the individual in any other way.

b. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation and the restriction shall be documented in the individual's services record. The need for the restriction shall be reviewed by the team every month and documented in the individual's services record.

c. Residential substance abuse service providers that are not inpatient hospital settings or crisis stabilization programs may develop policies and procedures that limit visitors during the initial phase of treatment when sound therapeutic practice requires the restriction, subject to the following conditions:

(1) Prior to implementation and when proposing any changes or revisions, the provider shall submit policies and procedures, program handbooks, or program rules to the LHRC and the human rights advocate for review and approval.

(2) The provider shall notify individuals who apply for admission of these restrictions.

9. Nothing in these provisions shall prohibit a provider from stopping, reporting, or intervening to prevent any criminal act.

#### D. The provider's duties.

1. Providers shall recognize, respect, support, and protect the dignity rights of each individual at all times. In the case of a minor, providers shall take into consideration the expressed preferences of the minor and the parent or guardian.

2. Providers shall develop, carry out, and regularly monitor policies and procedures that assure the protection of each individual's rights.

3. Providers shall assure the following relative to abuse, neglect, and exploitation:

a. Policies and procedures governing harm, abuse, neglect, and exploitation of individuals

receiving their services shall require that, as a condition of employment or volunteering, any employee, volunteer, consultant, or student who knows of or has reason to believe that an individual may have been abused, neglected, or exploited at any location covered by these regulations, shall immediately report this information directly to the director.

b. The director shall immediately take necessary steps to protect the individual until an investigation is complete. This may include the following actions:

(1) Direct the employee or employees involved to have no further contact with the individual. In the case of incidents of peer-on-peer aggression, protect the individuals from the aggressor in accordance with sound therapeutic practice and these regulations.

(2) Temporarily reassign or transfer the employee or employees involved to a position that has no direct contact with individuals receiving services.

(3) Temporarily suspend the involved employee or employees pending completion of an investigation.

c. The director shall immediately notify the human rights advocate and the individual's authorized representative. In no case shall notification be later than 24 hours after the receipt of the initial allegation of abuse, neglect, or exploitation.

d. In no case shall the director punish or retaliate against an employee, volunteer, consultant, or student for reporting an allegation of abuse, neglect, or exploitation to an outside entity.

e. The director shall initiate an impartial investigation within 24 hours of receiving a report of potential abuse or neglect. The investigation shall be conducted by a person trained to do investigations and who is not involved in the issues under investigation.

(1) The investigator shall make a final report to the director or the investigating authority and to the human rights advocate within 10 working days of appointment. Exceptions to this timeframe may be requested and approved by the department if submitted prior to the close of the sixth day.

(2) The director or investigating authority shall, based on the investigator's report and any other available information, decide whether the abuse, neglect or exploitation occurred. Unless otherwise provided by law, the standard for deciding whether abuse, neglect, or exploitation has occurred is preponderance of the evidence.

(3) If abuse, neglect or exploitation occurred, the director shall take any action required to protect the individual and other individuals. All actions must be documented and reported as required by 12VAC35-115-230.

(4) In all cases, the director shall provide his written decision, including actions taken as a result of the investigation, within seven working days following the completion of the investigation to the individual or the individual's authorized representative, the human rights advocate, the investigating authority, and the involved employee or employees. The decision shall be in writing and in the manner, format, and language that is most easily understood by the individual.

(5) If the individual affected by the alleged abuse, neglect, or exploitation or his authorized representative is not satisfied with the director's actions, he or his authorized representative, or anyone acting on his behalf, may file a petition for an LHRC hearing under 12VAC35-115-180.

f. The director shall cooperate with any external investigation, including those conducted by the inspector general, the protection and advocacy agency, or other regulatory or enforcement agencies.

g. If at any time the director has reason to suspect that an individual may have been abused or neglected, the director shall immediately report this information to the appropriate local Department of Social Services (see §§ 63.2-1509 and 63.2-1606 of the Code of Virginia) and cooperate fully with any investigation that results.

h. If at any time the director has reason to suspect that the abusive, neglectful or exploitive act is a crime, the director or his designee shall immediately contact the appropriate law-

enforcement authorities and cooperate fully with any investigation that results.

4. Providers shall afford the individual the opportunity to have an individual of his choice notified of his general condition, location, and transfer to another facility.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007; Volume 29, Issue 4, eff. November 21, 2012.

#### **12VAC35-115-60. Services.**

A. Each individual receiving services shall receive those services according to law and sound therapeutic practice.

B. The provider's duties.

1. Providers shall develop, carry out, and regularly monitor policies and procedures prohibiting discrimination in the provision of services. Providers shall comply with all state and federal laws, including any applicable provisions of the Americans with Disabilities Act (42 USC § 12101 et seq.), that prohibit discrimination on the basis of race, color, religion, ethnicity, age, sex, disability, or ability to pay. These policies and procedures shall require, at a minimum, the following:

a. An individual or anyone acting on his behalf may complain to the director if he believes that his services have been limited or denied due to discrimination.

b. If an individual complains of discrimination, the director shall assure that an appropriate investigation is conducted immediately. The director shall make a decision, take action, and document the action within 10 working days of receipt of the complaint.

c. A written copy of the decision and the director's action shall be forwarded to the individual and his authorized representative, the human rights advocate, and any employee or employees involved.

d. If the individual or his authorized representative is not satisfied with the director's decision or action, he may file a petition for an LHRC hearing under 12VAC35-115-180.

2. Providers shall ensure that all services, including medical services and treatment, are at all times delivered in accordance with sound therapeutic practice. Providers may deny or limit an individual's access to services if sound therapeutic practice requires limiting the service to individuals of the same sex or similar age, disability, or legal status.

3. Providers shall develop and implement policies and procedures that address emergencies.

These policies and procedures shall:

a. Identify what caregivers may do to respond to an emergency;

b. Identify qualified clinical staff who are accountable for assessing emergency conditions and determining the appropriate intervention;

c. Require that the director immediately notify the individual's authorized representative and the advocate if an emergency results in harm or injury to any individual; and

d. Require documentation in the individual's services record of all facts and circumstances surrounding the emergency.

4. Providers shall assign a specific person or group of persons to carry out each of the following activities:

a. Medical, mental health, and behavioral screenings and assessments, as applicable, upon admission and during the provision of services;

b. Preparation, implementation, and appropriate changes to an individual's services plan based on the ongoing review of the medical, mental, and behavioral needs of the individual;

c. Preparation and implementation of an individual's discharge plan; and

d. Review of every use of seclusion or restraint by a qualified professional who is involved in providing services to the individual.

5. Providers shall not deliver any service to an individual without a services plan that is tailored

specifically to the needs and expressed preferences of the individual and, in the case of a minor, the minor and the minor's parent or guardian. Services provided in response to emergencies or crises shall be deemed part of the services plan and thereafter documented in the individual's services plan.

6. Providers shall write the services plan and discharge plan in clear, understandable language.

7. When preparing or changing an individual's services or discharge plan, providers shall ensure that all services received by the individual are integrated. With the individual's or the individual's authorized representative's authorization, providers may involve family members in services and discharge planning. When the individual or his authorized representative requests such involvement, the provider shall take all reasonable steps to do so. In the case of services to minors, the parent or guardian or other person authorized to consent to treatment pursuant to § 54.1-2969 A of the Code of Virginia shall be involved in service and discharge planning.

8. Providers shall ensure that the entries in an individual's services record are at all times authentic, accurate, complete, timely, and pertinent.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

### **12VAC35-115-70. Participation in decision making and consent.**

A. Each individual has a right to participate meaningfully in decisions regarding all aspects of services affecting him. This includes the right to:

1. Consent or not consent to receive or participate in services.

a. The ISP and discharge plan shall incorporate the individual's preferences consistent with his condition and need for service and the provider's ability to address them;

b. The individual's services record shall include evidence that the individual has participated in the development of his ISP and discharge plan, in changes to these plans, and in all other significant aspects of his treatment and services; and

c. The individual's services record shall include the signature or other indication of the individual's or his authorized representative's consent.

2. Give or not give informed consent to receive or participate in treatment or services that pose a risk of harm greater than ordinarily encountered in daily life and to participate in human research except research that is exempt under § 37.2-162.17 of the Code of Virginia. Informed consent is always required for surgical procedures, electroconvulsive treatment, or use of psychotropic medications.

a. To be informed, consent for any treatment or service must be based on disclosure of and understanding by the individual or his authorized representative of the following information:

(1) An explanation of the treatment, service, or research and its purpose;

(2) When proposing human research, the provider shall describe the research and its purpose, explain how the results of the research will be disseminated and how the identity of the individual will be protected, and explain any compensation or medical care that is available if an injury occurs;

(3) A description of any adverse consequences and risks associated with the research, treatment, or service;

(4) A description of any benefits that may be expected from the research, treatment, or service;

(5) A description of any alternative procedures that might be considered, along with their side effects, risks, and benefits;

(6) Notification that the individual is free to refuse or withdraw his consent and to discontinue participation in any treatment, service, or research requiring his consent at any time without fear or reprisal against or prejudice to him; and



(7) A description of the ways in which the individual or his authorized representative can raise concerns and ask questions about the research, treatment, or service to which consent is given.

b. Evidence of informed consent shall be documented in an individual's services record and indicated by the signature of the individual or his authorized representative on a form or the ISP.

c. Informed consent for electroconvulsive treatment requires the following additional components:

(1) Informed consent shall be in writing, documented on a form that shall become part of the individual's services record. This form shall:

(a) Specify the maximum number of treatments to be administered during the series;

(b) Indicate that the individual has been given the opportunity to view an instructional video presentation about the treatment procedures and their potential side effects; and

(c) Be witnessed in writing by a person not involved in the individual's treatment who attests that the individual has been counseled and informed about the treatment procedures and potential side effects of the procedures.

(2) Separate consent, documented on a new consent form, shall be obtained for any treatments exceeding the maximum number of treatments indicated on the initial consent form.

(3) Providers shall inform the individual or his authorized representative that the individual may obtain a second opinion before receiving electroconvulsive treatment and the individual is free to refuse or withdraw his consent and to discontinue participation at any time without fear of reprisal against or prejudice to him. The provider shall document such notification in the individual's services record.

(4) Before initiating electroconvulsive treatment for any individual under age 18 years, two qualified child psychiatrists must concur with the treatment. The psychiatrists must be trained or

experienced in treating children or adolescents and not directly involved in treating the individual. Both must examine the individual, consult with the prescribing psychiatrist, and document their concurrence with the treatment in the individual's services record.

3. Have an authorized representative make decisions for him in cases where the individual has been determined to lack the capacity to consent or authorize the disclosure of information.

a. If an individual who has an authorized representative who is not his legal guardian objects to the disclosure of specific information or a specific proposed treatment or service, the director or his designee shall immediately notify the human rights advocate and authorized representative. A petition for LHRC review of the objection may be filed under 12VAC35-115-200.

b. If the authorized representative objects or refuses to consent to a specific proposed treatment or service for which consent is necessary, the provider shall not institute the proposed treatment, except in an emergency in accordance with this section or as otherwise permitted by law.

4. Be accompanied, except during forensic evaluations, by a person or persons whom the individual trusts to support and represent him when he participates in services planning, assessments, evaluations, including discussions and evaluations of the individual's capacity to consent, and discharge planning.

5. Request admission to or discharge from any service at any time.

**B. The provider's duties.**

1. Providers shall respect, protect, and help develop each individual's ability to participate meaningfully in decisions regarding all aspects of services affecting him. This shall be done by involving the individual, to the extent permitted by his capacity, in decision making regarding all aspects of services.

2. Providers shall ask the individual to express his preferences about decisions regarding all aspects of services that affect him and shall honor these preferences to the extent possible.

3. Providers shall give each individual the opportunity and any help he needs to participate meaningfully in the preparation of his services plan, discharge plan, and changes to these plans, and all other aspects of services he receives. Providers shall document these opportunities in the individual's services record.

4. Providers shall obtain and document in the individual's services record the individual's or his authorized representative's consent for any treatment before it begins. If the individual is a minor in the legal custody of a natural or adoptive parent, the provider shall obtain this consent from at least one parent. The consent of a parent is not needed if a court has ordered or consented to treatment or services pursuant to § 16.1-241 D, 16.1-275, or 54.1-2969 B of the Code of Virginia, or a local department of social services with custody of the minor has provided consent. Reasonable efforts must be made, however, to notify the parent or legal custodian promptly following the treatment or services. Additionally, a competent minor may independently consent to treatment for sexually transmitted or contagious diseases, family planning or pregnancy, or outpatient services or treatment for mental illness, emotional disturbance, or substance use disorders pursuant to § 54.1-2969 E of the Code of Virginia.

5. Providers may initiate, administer, or undertake a proposed treatment without the consent of the individual or the individual's authorized representative in an emergency. All emergency treatment or services and the facts and circumstances justifying the emergency shall be documented in the individual's services record within 24 hours of the treatment or services.

a. Providers shall immediately notify the authorized representative of the provision of treatment without consent during an emergency.

b. Providers shall continue emergency treatment without consent beyond 24 hours only following a review of the individual's condition and if a new order is issued by a professional who is authorized by law and the provider to order treatment.

c. Providers shall notify the human rights advocate if emergency treatment without consent continues beyond 24 hours.

d. Providers shall develop and integrate treatment strategies into the ISP to address and prevent future emergencies to the extent possible following provision of emergency treatment without consent.

6. Providers shall obtain and document in the individual's services record the consent of the individual or his authorized representative to continue any treatment initiated in an emergency that lasts longer than 24 hours after the emergency began.

7. Providers may provide treatment in accordance with a court order or in accordance with other provisions of law that authorize such treatment or services including the Health Care Decisions Act (§ 54.1-2981 et seq. of the Code of Virginia). The provisions of these regulations are not intended to be exclusive of other provisions of law but are cumulative (§ 54.1-2970 of the Code of Virginia).

8. Providers shall respond to an individual's request for discharge set forth in statute and shall make sure that the individual is not subject to punishment, reprisal, or reduction in services because he makes a request. However, if an individual leaves a service against medical advice, any subsequent billing of the individual by his private third party payer shall not constitute punishment or reprisal on the part of the provider.

a. Voluntary admissions.

(1) Individuals admitted under § 37.2-805 of the Code of Virginia to state hospitals operated by the department who notify the director of their intent to leave shall be discharged when appropriate, but no later than eight hours after notification, unless another provision of law authorizes the director to retain the individual for a longer period.

(2) Minors admitted under § 16.1-338 or 16.1-339 of the Code of Virginia shall be released to the parent's or legal guardian's custody within 48 hours of the consenting parent's or legal guardian's notification of withdrawal of consent, unless a petition for continued hospitalization pursuant to § 16.1-340 or 16.1-345 of the Code of Virginia is filed.

b. Involuntary admissions.

(1) When a minor involuntarily admitted under § 16.1-345 of the Code of Virginia no longer meets the commitment criteria, the director shall take appropriate steps to arrange the minor's discharge.

(2) When an individual involuntarily admitted under § 37.2-817 of the Code of Virginia has been receiving services for more than 30 days and makes a written request for discharge, the director shall determine whether the individual continues to meet the criteria for involuntary admission. If the director denies the request for discharge, he shall notify the individual in writing of the reasons for denial and of the individual's right to seek relief in the courts. The request and the reasons for denial shall be included in the individual's services record. Anytime the individual meets any of the criteria for discharge set out in § 37.2-837 or 37.2-838 of the Code of Virginia, the director shall take all necessary steps to arrange the individual's discharge.

(3) If at any time it is determined that an individual involuntarily admitted under Chapter 11 (§ 19.2-67 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2 of the Code of Virginia no longer meets the criteria under which the individual was admitted and retained, the director or commissioner, as appropriate, shall seek judicial authorization to discharge or transfer the individual. Further, pursuant to § 19.2-182.6 of the Code of Virginia, the commissioner shall petition the committing court for conditional or unconditional release at any time he believes the acquittee no longer needs hospitalization.

c. Certified admissions. If an individual certified for admission to a state training center or his authorized representative requests discharge, the director or his designee shall contact the individual's community services board to finalize and implement the discharge plan.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

**12VAC35-115-80. Confidentiality.**

A. Each individual is entitled to have all identifying information that a provider maintains or knows about him remain confidential. Each individual has a right to give his authorization before the provider shares identifying information about him or his care unless another state law or regulation, or these regulations specifically require or permit the provider to disclose certain specific information.

B. The provider's duties.

1. Providers shall maintain the confidentiality of any information that identifies an individual. If an individual's services record pertains in whole or in part to referral, diagnosis or treatment of substance use disorders, providers shall disclose information only according to applicable federal regulations (see 42 CFR Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records).

2. Providers shall obtain and document in the individual's services record the individual's authorization or that of the authorized representative prior to disclosing any identifying information about him. The authorization must contain the following elements:

a. The name of the organization and the name or other specific identification of the person or persons or class of persons to whom disclosure is made;

b. A description of the nature of the information to be disclosed, the purpose of the disclosure, and an indication whether the authorization extends to the information placed in the individual's record after the authorization was given but before it expires;

c. An indication of the effective date of the authorization and the date the authorization will expire, or the event or condition upon which it will expire; and

d. The signature of the individual and the date. If the authorization is signed by an authorized representative, a description of the authorized representative's authority to act.

3. Providers shall tell each individual and his authorized representative about the individual's

confidentiality rights. This shall include how information can be disclosed and how others might get information about the individual without his authorization. If a disclosure is not required by law, the provider shall give strong consideration to any objections from the individual or his authorized representative in making the decision to disclose information.

4. Providers shall prevent unauthorized disclosures of information from services records and shall maintain and disclose information in a secure manner.

5. In the case of a minor, the authorization of the custodial parent or other person authorized to consent to the minor's treatment under § 54.1-2969 is required, except as provided below:

a. Section 54.1-2969 E of the Code of Virginia permits a minor to authorize the disclosure of information related to medical or health services for a sexually transmitted or contagious disease, family planning or pregnancy, and outpatient care, treatment or rehabilitation for substance use disorders, mental illness, or emotional disturbance.

b. The concurrent authorization of the minor and custodial parent is required to disclose inpatient substance abuse records.

c. The minor and the custodial parent shall authorize the disclosure of identifying information related to the minor's inpatient psychiatric hospitalization when the minor is 14 years of age or older and has consented to the admission.

6. When providers disclose identifying information, they shall attach a statement that informs the person receiving the information that it must not be disclosed to anyone else unless the individual authorizes the disclosure or unless state law or regulation allows or requires further disclosure without authorization.

7. Providers may encourage individuals to name family members, friends, and others who may be told of their presence in the program and general condition or well-being. Except for information governed by 42 CFR Part 2, providers may disclose to a family member, other relative, a close personal friend, or any other person identified by the individual, information that is directly relevant

to that persons involvement with the individual's care or payment for his health care, if (i) the provider obtains the individual's agreement, (ii) the provider provides the individual with the opportunity to object to the disclosure, and (iii) the individual does not object or the provider reasonably infers for the circumstances, based on the exercise of professional judgment, that the individual does not object to the disclosure. If the opportunity to agree or object cannot be provided because of the individual's incapacity or an emergency circumstance, the provider may, in the exercise of professional judgment, determine whether the disclosure is in the best interest of the individual and, if so, disclose only the information that is directly relevant to the person's involvement with the individual's health care.

8. Providers may disclose the following identifying information without authorization or violation of the individual's confidentiality, but only under the conditions specified in the following subdivisions of this subsection. Providers should always consult 42 CFR Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records, if applicable, because these federal regulations may prohibit some of the disclosures addressed in this section.

a. Emergencies: Providers may disclose information in an emergency to any person who needs that particular information for the purpose of preventing injury to or death of an individual or other person. The provider shall not disclose any information that is not needed for this specific purpose.

b. Providers or health plans: Providers may permit any full- or part-time employee, consultant, agent, or contractor of the provider to use identifying information or disclose to another provider, a health plan, the department, or a CSB, information required to give services to the individual or to get payment for the services.

c. Court proceedings: If the individual or someone acting for him introduces any aspect of his mental condition or services as an issue before a court, administrative agency, or medical malpractice review panel, the provider may disclose any information relevant to that issue. The provider may also disclose any records if they are properly subpoenaed, if a court orders them



to be produced, or if involuntary admission or certification for admission is being proposed.

d. Legal counsel: Providers may disclose information to their own legal counsel or to anyone working on behalf of their legal counsel in providing representation to the provider. Providers of state-operated services may disclose information to the Office of the Attorney General or to anyone appointed by or working on behalf of that office in providing representation to the Commonwealth of Virginia.

e. Human rights committees: Providers may disclose to the LHRC and the SHRC any information necessary for the conduct of their responsibilities under these regulations.

f. Others authorized or required by the commissioner, CSB, or private program director: Providers may disclose information to other persons if authorized or required for the following activities:

(1) Licensing, human rights, or certification or accreditation reviews;

(2) Hearings, reviews, appeals, or investigations under these regulations;

(3) Evaluation of provider performance and individual outcomes (see §§ 37.2-508 and 37.2-608 of the Code of Virginia);

(4) Statistical reporting;

(5) Preauthorization, utilization reviews, financial and related administrative services reviews, and audits; or

(6) Similar oversight and review activities.

g. Preadmission screening, services, and discharge planning: Providers may disclose to the department, the CSB, or to other providers information necessary to screen individuals for admission or to prepare and carry out a comprehensive individualized services or discharge plan (see § 37.2-505 of the Code of Virginia).

h. Protection and advocacy agency: Providers may disclose information to the protection and advocacy agency in accordance with that agency's legal authority under federal and state law.

i. Historical research: Providers may disclose information to persons engaging in bona fide historical research if all of the following conditions are met:

(1) The request for historical research shall include, at a minimum, a summary of the scope and purpose of the research, a description of the product to result from the research and its expected date of completion, a rationale explaining the need to access otherwise private information, and the specific identification of the type and location of the records sought.

(2) The commissioner, CSB executive director, or private program director has authorized the research;

(3) The individual or individuals who are the subject of the disclosure are deceased;

(4) There are no known living persons permitted by law to authorize the disclosure; and

(5) The disclosure would in no way reveal the identity of any person who is not the subject of the historical research.

j. Protection of public safety: If an individual receiving services makes a specific threat to cause serious bodily injury or death to an identified or readily identifiable person and the provider reasonably believes that the individual has the intent and the ability to carry out the threat immediately or imminently, the provider may disclose those facts necessary to alleviate the potential threat.

k. Inspector General: Providers may disclose to the Inspector General any individual services records and other information relevant to the provider's delivery of services.

l. Virginia Patient Level Data System: Providers may disclose financial and services information to Virginia Health Information as required by law (see Chapter 7.2 (§ 32.1-276.2 et seq.) of Title 32.1 of the Code of Virginia).

m. Psychotherapy notes: Providers shall obtain an individual's authorization for any disclosure of psychotherapy notes, except when disclosure is made:

(1) For the provider's own training programs in which students, trainees, or practitioners in

mental health are being taught under supervision to practice or improve their skills in group, joint, family or individual counseling;

(2) To defend the provider or its employees or staff against any accusation or wrongful conduct;

(3) In discharge of the provider's duty, in accordance with § 54.1-2400.1 B of the Code of Virginia, to take precautions to protect third parties from violent behavior or other serious harm;

(4) As required in the course of an investigation, audit, review, or proceeding regarding a provider's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity; or

(5) When otherwise required by law.

n. A law-enforcement official:

(1) Pursuant to a search warrant or grand jury subpoena;

(2) In response to their request, for the purpose of identifying or locating a suspect, fugitive, an individual required to register pursuant to § 9.1-901 of the Sex Offender and Crimes Against Minors Registry Act, material witness, or missing person, provided that only the following information is disclosed:

(a) Name and address of the individual;

(b) Date and place of birth of the individual;

(c) Social Security number of the individual;

(d) Blood type of the individual;

(e) Date and time of treatment received by the individual;

(f) Date and time of death of the individual;

(g) Description of distinguishing physical characteristics of the individual; and

(h) Type of injury sustained by the individual.

(3) Regarding the death of an individual for the purpose of alerting law enforcement of the

death if the health care entity has a suspicion that such death may have resulted from criminal conduct; or

(4) If the health care entity believes in good faith that the information disclosed constitutes evidence of a crime that occurred on its premises.

o. Other statutes or regulations: Providers may disclose information to the extent required or permitted by any other state or law or regulation. See also § 32.1-127.1:03 of the Code of Virginia for a list of circumstances in which records may be disclosed without authorization.

9. Upon request, the provider shall tell the individual or his authorized representative the sources of information contained in his services records and provide a written listing of disclosures of information made without authorization, except for disclosures:

- a. To employees of the department, CSB, the provider, or other providers;
- b. To carry out treatment, payment, or health care operations;
- c. That are incidental or unintentional disclosures that occur as a by-product of engaging in health care communications and practices that are already permitted or required;
- d. To an individual or his authorized representative;
- e. Pursuant to an authorization;
- f. For national security or intelligence purposes;
- g. To correctional institutions or law enforcement officials; or
- h. That were made more than six years prior to the request.

10. The provider shall include the following information in the listing of disclosures of information provided to the individual or his authorized representative under subdivision 9 of this subsection:

- a. The name of the person or organization that received the information and the address if known;
- b. A brief description of the information disclosed; and

c. A brief statement of the purpose of the disclosure or, in lieu of such a statement, a copy of the written request for disclosure.

11. If the provider makes multiple disclosures of information to the same person or entity for a single purpose, the provider shall include the following:

a. The information required in subdivision 10 of this subsection for the first disclosure made during the requested period;

b. The frequency, periodicity, or number of disclosures made during the period for which the individual is requesting information; and

c. The date of the last disclosure during the time period.

12. If the provider makes a disclosure to a social service or protective services agency about an individual who the provider reasonably believes to be a victim of abuse or neglect, the provider is not required to inform the individual or his authorized representative of the disclosure if:

a. The provider, in the exercise of professional judgment, believes that informing the individual would place the individual at risk of serious harm; or

b. The provider would be informing the authorized representative, and the provider reasonably believes that the authorized representative is responsible for the abuse or neglect, and that informing such person would not be in the best interests of the individual.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007; Volume 29, Issue 4, eff. November 21, 2012.

#### **12VAC35-115-90. Access to and amendment of services records.**

A. With respect to his own services record, each individual and his authorized representative has the right to:

1. See, read, and get a copy of his own services record, except information that is privileged pursuant to § 8.01-581.17 of the Code of Virginia, and information compiled by the provider in reasonable anticipation of or for use in a civil, criminal, or administrative action or proceeding;
2. Let certain other people see, read, or get a copy of his own services record if the individual is restricted by law from seeing, reading, or receiving a copy;
3. Challenge, request to amend, or receive an explanation of anything in his services record; and
4. Let anyone who sees his record, regardless of whether amendments to the record have been made, know that the individual has tried to amend the record or explain his position and what happened as a result.

B. Except in the following circumstances, minors must have their parent's or guardian's permission before they can access their services record:

1. A minor may access his services record without the permission of a parent only if the records pertain to treatment for sexually transmitted or contagious diseases, family planning or pregnancy, outpatient care, treatment or rehabilitation for substance use disorders, mental illness or emotional disturbance, or inpatient psychiatric hospitalization when a minor is 14 years of age or older and has consented to the admission.
2. A parent may access his minor child's services record unless parental rights have been terminated, a court order provides otherwise, or the minor's treating physician or clinical psychologist has determined, in the exercise of professional judgment, that the disclosure to the parent would be reasonably likely to cause substantial harm to the minor or another person.

C. The provider's duties.

1. Providers shall tell each individual and his authorized representative how he can access and request amendment of his own services record.
2. Providers shall permit each individual to see his services record when he requests it and to request amendments if necessary.

a. Access to all or a part of an individual's services record may be denied or limited only if a physician or a clinical psychologist involved in providing services to the individual talks to the individual, examines the services record as a result of the individual's request for access, and signs and puts in the services record permanently a written statement that he thinks access to the services record by the individual at this time would be reasonably likely to endanger the life or physical safety of the individual or another person or that the services record makes reference to a person other than a health care provider and the access requested would be reasonably likely to cause substantial harm to the referenced person. The physician or clinical psychologist must also tell the individual as much about his services record as he can without risking harm to the individual.

b. If access is denied in whole or in part, the provider shall give the individual or his authorized representative a written statement that explains the basis for the denial, the individual's review rights, as set forth in the following subdivisions, how he may exercise them, and how the individual may file a complaint with the provider or the United States Department of Health and Human Services, if applicable. If restrictions or time limits are placed on access, the individual shall be notified of the restrictions and time limits and conditions for their removal. These time limits and conditions also shall be specified in the services record.

(1) If the individual requests a review of denial of access, the provider shall designate a physician or clinical psychologist who was not directly involved in the denial to review the decision to deny access. The physician or clinical psychologist must determine within a reasonable period of time whether or not to deny the access requested in accordance with the standard in subdivision 2 a of this subsection. The provider must promptly provide the individual notice of the physician's or psychologist's determination and provide or deny access in accordance with that determination.

(2) At the individual's option, the individual may designate at his own expense a reviewing physician or clinical psychologist who was not directly involved in the denial to review the

decision to deny access in accordance with the standard in subdivision 2 a of this subsection. If the individual chooses this option, the provider is not required to designate a physician or clinical psychologist to review the decision.

c. If the provider limits or refuses to let an individual see his services record, the provider shall also notify the advocate and tell the individual that he can ask to have a lawyer of his choice see his record. If the individual makes this request, the provider shall disclose the record to that lawyer (§ 8.01-413 of the Code of Virginia).

3. Providers shall, without charge, give individuals any help they may need to read and understand their services record and request amendments to it.

4. If an individual asks to challenge, amend, or explain any information contained in his services record, the provider shall investigate and file in the services record a written report concerning the individual's request.

a. If the report finds that the services record is incomplete, inaccurate, not pertinent, not timely, or not necessary, the provider shall:

(1) Either mark that part of the services record clearly to say so, or else remove that part of the services record and file it separately with an appropriate cross reference to indicate that the information was removed;

(2) Not disclose the original services record without separate specific authorization or legal authority (e.g., if compelled by subpoena or other court order);

(3) Obtain the individual's identification of and agreement to have the provider notify the relevant persons of the amendment; and

(4) Promptly notify in writing all persons who have received the incorrect information and all persons identified by the individual that the services record has been corrected.

b. If a request to amend the services record is denied, the provider shall give the individual a written statement containing the basis for the denial and notify the individual of his right to



submit a statement of disagreement and how to submit such a statement. The provider shall also give the individual (i) a statement that if a statement of disagreement is not submitted that the individual may request the provider to disclose the request for amendment and the denial with future disclosures of information and (ii) a description of how the individual may complain to the provider or the Secretary of Health and Human Services, if applicable. Upon request, the provider shall file in the services record the individual's statement explaining his position. If needed, the provider shall help the individual to write this statement. If a statement is filed, the provider shall:

- (1) Give all persons who have copies of the record a copy of the individual's statement.
- (2) Clearly note in any later disclosure of the record that it is disputed and include a copy of the statement with the disputed record.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007; Errata, 24:6 VA.R. 889 November 26, 2007.

#### **12VAC35-115-100. Restrictions on freedoms of everyday life.**

A. From admission until discharge from a service, each individual is entitled to:

1. Enjoy all the freedoms of everyday life that are consistent with his need for services, his protection, and the protection of others, and that do not interfere with his services or the services of others. These freedoms include:

- a. Freedom to move within the service setting, its grounds, and the community;
- b. Freedom to communicate, associate, and meet privately with anyone the individual chooses;
- c. Freedom to have and spend personal money;
- d. Freedom to see, hear, or receive television, radio, books, and newspapers, whether privately

owned or in a library or public area of the service setting;

e. Freedom to keep and use personal clothing and other personal items;

f. Freedom to use recreational facilities and enjoy the outdoors; and

g. Freedom to make purchases in canteens, vending machines, or stores selling a basic selection of food and clothing.

2. Receive services in that setting and under those conditions that are least restrictive of his freedom.

B. The provider's duties.

1. Providers shall encourage each individual's participation in normal activities and conditions of everyday living and support each individual's freedoms.

2. Providers shall not limit or restrict any individual's freedom more than is needed to achieve a therapeutic benefit, maintain a safe and orderly environment, or intervene in an emergency.

3. Providers shall not impose any restriction on an individual unless the restriction is justified and carried out according to these regulations. If a provider imposes a restriction, except as provided in 12VAC35-115-50, the following conditions shall be met:

a. A qualified professional involved in providing services has, in advance, assessed and documented all possible alternatives to the proposed restriction, taking into account the individual's medical and mental condition, behavior, preferences, nursing and medication needs, and ability to function independently.

b. A qualified professional involved in providing services has, in advance, determined that the proposed restriction is necessary for effective treatment of the individual or to protect him or others from personal harm, injury, or death.

c. A qualified professional involved in providing services has, in advance, documented in the individual's services record the specific reason for the restriction.

d. A qualified professional involved in providing services has explained, so that the individual

can understand, the reason for the restriction, the criteria for removal, and the individual's right to a fair review of whether the restriction is permissible.

e. A qualified professional regularly reviews the restriction and that the restriction is discontinued when the individual has met the criteria for removal.

f. If a court has ordered the provider to impose the restriction or if the provider is otherwise required by law to impose the restriction, the restriction shall be documented in the individual's services record.

4. Providers may develop and enforce written program rules, but only if the rules do not conflict with these regulations or any individual's services plan and are needed to maintain a safe and orderly environment.

5. Providers shall, in the development of these program rules:

a. Get as many suggestions as possible from all individuals who are expected to obey the rules;

b. Apply these rules in the same way to each individual;

c. Give the rules to and review them with each individual and his authorized representative in a way that the individual can understand them, including explaining possible consequences for violating them;

d. Post the rules in summary form in all areas to which individuals and their families have regular access;

e. Submit the rules to the LHRC for review and approval upon request of the advocate or LHRC; and

f. Prohibit individuals from disciplining other individuals, except as part of an organized self-government program conducted according to a written policy approved in advance by the LHRC.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

## Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

### **12VAC35-115-110. Use of seclusion, restraint, and time out.**

A. Each individual is entitled to be completely free from any unnecessary use of seclusion, restraint, or time out.

B. The voluntary use of mechanical supports to achieve proper body position, balance, or alignment so as to allow greater freedom of movement or to improve normal body functioning in a way that would not be possible without the use of such a mechanical support, and the voluntary use of protective equipment are not considered restraints.

C. The provider's duties.

1. Providers shall meet with the individual or his authorized representative upon admission to the service to discuss and document in the individual's services record, his preferred interventions in the event his behaviors or symptoms become a danger to himself or others and under what circumstances, if any, the intervention may include seclusion, restraint, or time out.

2. Providers shall document in the individual's services record all known contraindications to the use of seclusion, time out, or any form of physical or mechanical restraint, including medical contraindications and a history of trauma and shall flag the record to alert and communicate this information to staff.

3. Only residential facilities for children that are licensed under the Regulations for Providers of Mental Health, Mental Retardation, and Substance Abuse Residential Services for Children (12VAC35-45) and inpatient hospitals may use seclusion and only in an emergency.

4. Providers shall not use seclusion, restraint, or time out as a punishment or reprisal or for the convenience of staff.

5. Providers shall not use seclusion or restraint solely because criminal charges are pending

against the individual.

6. Providers shall not use seclusion or restraint for any behavioral, medical, or protective purpose unless other less restrictive techniques have been considered and documentation is placed in the individual's services plan that these less restrictive techniques did not or would not succeed in reducing or eliminating behaviors that are self-injurious or dangerous to other people or that no less restrictive measure was possible in the event of a sudden emergency.

7. Providers that use seclusion, restraint, or time out shall develop written policies and procedures that comply with applicable federal and state laws and regulations, accreditation, and certification standards, third party payer requirements, and sound therapeutic practice. These policies and procedures shall include at least the following requirements:

a. Individuals shall be given the opportunity for motion and exercise, to eat at normal meal times and take fluids, to use the restroom, and to bathe as needed.

b. Trained, qualified staff shall monitor the individual's medical and mental condition continuously while the restriction is being used.

c. Each use of seclusion, restraint, or time out shall end immediately when criteria for removal are met.

d. Incidents of seclusion and restraint, including the rationale for and the type and duration of the restraint, are reported to the department as provided in 12VAC35-115-230 C.

8. Providers shall submit all proposed seclusion, restraint, and time out policies and procedures to the LHRC for review and comment before implementing them, when proposing changes, or upon request of the human rights advocate, the LHRC, or the SHRC.

9. Providers shall comply with all applicable state and federal laws and regulations, certification and accreditation standards, and third party requirements as they relate to seclusion and restraint.

a. Whenever an inconsistency exists between these regulations and federal laws or regulations, accreditation or certification standards, or the requirements of third party payers, the provider

shall comply with the higher standard.

b. Providers shall notify the department whenever a regulatory, accreditation, or certification agency or third party payer identifies problems in the provider's compliance with any applicable seclusion and restraint standard.

10. Providers shall ensure that only staff who have been trained in the proper and safe use of seclusion, restraint, and time out techniques may initiate, monitor, and discontinue their use.

11. Providers shall ensure that a qualified professional who is involved in providing services to the individual reviews every use of physical restraint as soon as possible after it is carried out and document the results of his review in the individual's services record.

12. Providers shall ensure that review and approval by a qualified professional for the use or continuation of restraint for medical or protective purposes is documented in the individual's services record. Documentation includes:

a. Justification for any restraint;

b. Time-limited approval for the use or continuation of restraint; and

c. Any physical or psychological conditions that would place the individual at greater risk during restraint.

13. Providers may use seclusion or mechanical restraint for behavioral purposes in an emergency only if a qualified professional involved in providing services to the individual has, within one hour of the initiation of the procedure:

a. Conducted a face-to-face assessment of the individual placed in seclusion or mechanical restraint and documented that alternatives to the proposed use of seclusion or mechanical restraint have not been successful in changing the behavior or were not attempted, taking into account the individual's medical and mental condition, behavior, preferences, nursing and medication needs, and ability to function independently;

b. Determined that the proposed seclusion or mechanical restraint is necessary to protect the

individual or others from harm, injury, or death;

c. Documented in the individual's services record the specific reason for the seclusion or mechanical restraint;

d. Documented in the individual's services record the behavioral criteria that the individual must meet for release from seclusion or mechanical restraint; and

e. Explained to the individual, in a way that he can understand, the reason for using mechanical restraint or seclusion, the criteria for its removal, and the individual's right to a fair review of whether the mechanical restraint or seclusion was permissible.

14. Providers shall limit each approval for restraint for behavioral purposes or seclusion to four hours for individuals age 18 and older, two hours for children and adolescents ages 9 through 17, and one hour for children under age nine.

15. Providers shall not issue standing orders for the use of seclusion or restraint for behavioral purposes.

16. Providers shall ensure that no individual is in time out for more than 30 minutes per episode.

17. Providers shall monitor the use of restraint for behavioral purposes or seclusion through continuous face-to-face observation, rather than by an electronic surveillance device.

18. Providers may use restraint or time out in a behavioral treatment plan to address behaviors that present an immediate danger to the individual or others, but only after a qualified professional has conducted a detailed and systematic assessment of the behavior and the situations in which the behavior occurs.

a. Providers shall develop any behavioral treatment plan involving the use of restraint or time out for behavioral purposes according to its policies and procedures, which ensure that:

(1) Behavioral treatment plans are initiated, developed, carried out, and monitored by professionals who are qualified by expertise, training, education, or credentials to do so.

(2) Behavioral treatment plans include nonrestrictive procedures and environmental

modifications that address the targeted behavior.

(3) Behavioral treatment plans are submitted to and approved by an independent review committee comprised of professionals with training and experience in applied behavior analysis who have assessed the technical adequacy of the plan and data collection procedures.

b. Providers shall document in the individual's services record that the lack of success, or probable success, of less restrictive procedures attempted and the risks associated with not treating the behavior are greater than any risks associated with the use of restraint.

c. Prior to the implementation of any behavioral treatment plan involving the use of restraint or time out, the provider shall obtain approval of the LHRC. If the LHRC finds that the plan violates or has the potential to violate the rights of the individual, the LHRC shall notify and make recommendations to the director.

d. Behavioral treatment plans involving the use of restraint or time out shall be reviewed quarterly by the independent review committee and by the LHRC to determine if the use of restraint has resulted in improvements in functioning of the individual.

19. Providers may not use seclusion in a behavioral treatment plan.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

#### **12VAC35-115-120. Work.**

A. Individuals have a right to engage or not engage in work or work-related activities consistent with their service needs while receiving services. Personal maintenance and personal housekeeping by individuals receiving services in residential settings are not subject to this provision.

B. The provider's duties.



1. Providers shall not require, entice, persuade, or permit any individual or his family member to perform labor for the provider as a condition of receiving services. If an individual voluntarily chooses to perform labor for the provider, the labor must be consistent with his individualized services plan. All policies and procedures, including pay, must be consistent with the Fair Labor Standards Act (29 USC § 201 et seq.).
2. Providers shall consider individuals who are receiving services for employment opportunities on an equal basis with all other job applicants and employees according to the Americans with Disabilities Act (42 USC § 12101 et seq.).
3. Providers shall give individuals and employers information, training, and copies of policies affecting the employment of individuals receiving services upon request.
4. If vocational training, extended employment services, or supported employment services are offered, providers shall establish procedures for documenting the decision on employment and training and the methodology for establishing wages. Providers shall give a copy of the procedures and information about possible consequences for violating the procedures to all individuals and their authorized representatives.
5. Providers who employ individuals receiving services shall not deduct the cost of services from an individual's wages unless ordered to do so by a court.
6. Providers shall not sell to or purchase goods or services from an individual receiving services except through established governing body policy that is consistent with U.S. Department of Labor standards.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

### **12VAC35-115-130. Research.**

A. Each individual has a right to choose to participate or not participate in human research.

B. The provider's duties.

1. Providers shall obtain prior, written, informed consent of the individual or his authorized representative before any individual begins to participate in human research unless the research is exempt under § 32.1-162.17 of the Code of Virginia.

2. Providers shall comply with all other applicable state and federal laws and regulations regarding human research, including the provisions under Chapter 5.1 (§ 32.1-162.16 et seq.) of Title 32.1 of the Code of Virginia and the regulations adopted under § 37.2-402 of the Code of Virginia.

3. Providers shall obtain review and approval from an institutional review board or research review committee prior to performing or participating in a human research protocol. Documentation of this review and approval shall be maintained and made available on request by the individual or his authorized representative.

4. Prior to participation by individuals in any human research project, the provider shall inform and provide a copy of the institutional review board or research review committee approval to the LHRC. Once the research has been initiated, the provider shall update the LHRC periodically on the status of the individual's participation.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

### **12VAC35-115-140. Complaint and fair hearing.**

A. Each individual has a right to:

1. Complain that the provider has violated any of the rights assured under these regulations;

2. Have a timely and fair review of any complaint according to the procedures in Part V (12VAC35-115-150 et seq.) of this chapter;
3. Have someone file a complaint on his behalf;
4. Use these and other complaint procedures; and
5. Complain under any other applicable law, including complain to the protection and advocacy agency.

B. The provider's duties.

1. If an individual makes a complaint, the provider shall make every attempt to resolve the complaint at the earliest possible step.
2. Providers shall not take, threaten to take, permit, or condone any action to retaliate against anyone filing a complaint or prevent anyone from filing a complaint or helping an individual to file a complaint.
3. Providers shall assist the complainant in understanding the full complaint process, the options for resolution including the formal and informal processes, and the confidentiality elements involved.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

Part IV

Substitute Decision Making

**12VAC35-115-145. Determination of capacity to give consent or authorization.**

If the capacity of an individual to consent to treatment, services, or research, or authorize the disclosure of information is in doubt, the provider shall obtain an evaluation from a professional who is

qualified by expertise, training, education, or credentials and not directly involved with the individual to determine whether the individual has capacity to consent or to authorize the disclosure of information.

1. Capacity evaluations shall be obtained for all individuals who may lack capacity, even if they request that an authorized representative be designated or agree to submit to a recommended course of treatment.

2. In conducting this evaluation, the professional may seek comments from representatives accompanying the individual pursuant to 12VAC35-115-70 A 4 about the individual's capacity to consent or to authorize disclosure.

3. Providers shall determine the need for an evaluation of an individual's capacity to consent or authorize disclosure of information and the need for a substitute decision maker whenever the individual's condition warrants, the individual requests such a review, at least every six months, and at discharge, except for individuals receiving acute inpatient services.

a. If the individual's record indicates that the individual is not expected to obtain or regain capacity, the provider shall document annually that it has reviewed the individual's capacity to make decisions and whether there has been any change in that capacity.

b. Providers of acute inpatient services shall determine the need for an evaluation of an individual's capacity to consent or authorize disclosure of information whenever the individual's condition warrants or at least at every treatment team meeting. Results of such reviews shall be documented in the treatment team notes and communicated to the individual and his authorized representative.

4. Capacity evaluations shall be conducted in accordance with accepted standards of professional practice and shall indicate the specific type of decision for which the individual's capacity is being evaluated (e.g., medical) and shall indicate what specific type of decision the individual has or does not have the capacity to make. Capacity evaluations shall address the type of supports that might be used to increase the individual's decision-making capabilities.

5. If the individual or his family objects to the results of the qualified professional's determination, the provider shall immediately inform the human rights advocate.

a. If the individual or family member wishes to obtain an independent evaluation of the individual's capacity, he may do so at his own expense and within reasonable timeframes consistent with his circumstances. If the individual or family member cannot pay for an independent evaluation, the individual may request that the LHRC consider the need for an independent evaluation pursuant to 12VAC35-115-200 B. The provider shall take no action for which consent or authorization is required, except in an emergency, pending the results of the independent evaluation. The provider shall take no steps to designate an authorized representative until the independent evaluation is complete.

b. If the independent evaluation is consistent with the provider's evaluation, the provider's evaluation is binding, and the provider shall implement it accordingly.

c. If the independent evaluation is not consistent with the provider's evaluation, the matter shall be referred to the LHRC for review and decision under 12VAC35-115-200 through 12VAC35-115-250.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

#### **12VAC35-115-146. Authorized representatives.**

A. When it is determined in accordance with 12VAC35-115-145 that an individual lacks the capacity to consent or authorize the disclosure of information, the provider shall recognize and obtain consent or authorization for those decisions for which the individual lacks capacity from the following if available:

1. An attorney-in-fact who is currently empowered to consent or authorize the disclosure under the terms of a durable power of attorney;

2. A health care agent appointed by the individual under an advance directive or power of attorney in accordance with the laws of Virginia; or
3. A legal guardian of the individual, or if the individual is a minor, a parent with legal custody of the minor or other person authorized to consent to treatment pursuant to § 54.1-2969 A of the Code of Virginia.

B. If an attorney-in-fact, health care agent or legal guardian is not available, the director shall designate a substitute decision maker as authorized representative in the following order of priority:

1. The individual's family member. In designating a family member, the director shall honor the individual's preference unless doing so is clinically contraindicated.

- a. If the director does not appoint the family member chosen by the individual, the individual shall be told of the reasons for the decision and information about how to request LHRC review according to 12VAC35-115-200.

- b. If the individual does not have a preference or if the director does not honor the individual's preference in accordance with these regulations, the director shall select the best qualified person, if available, according to the following order of priority unless, from all information available to the director, another person in a lower priority is clearly better qualified.

- (1) A spouse;

- (2) An adult child;

- (3) A parent;

- (4) An adult brother or sister; or

- (5) Any other relative of the individual.

2. Next friend of the individual. If no other person specified above is available and willing to serve as authorized representative, a provider may designate a next friend of the individual, after a review and finding by the LHRC that the proposed next friend has, for a period of six months within two years prior to the designation either:

a. Shared a residence with the individual; or

b. Had regular contact or communication with the individual and provided significant emotional, personal, financial, spiritual, psychological, or other support and assistance to the individual.

3. In addition to the conditions set forth in subdivision 2 of this subsection, the individual must have no objection to the proposed next friend being designated as the authorized representative.

4. The person designated as next friend also shall:

a. Personally appear before the LHRC, unless the LHRC has waived the personal appearance; and

b. Agree to accept these responsibilities and act in the individual's best interest and in accordance with the individual's preferences, if known.

5. The LHRC shall have the discretion to waive a personal appearance by the proposed next friend and to allow that person to appear before it by telephone, video, or other electronic means of communication as the LHRC may deem appropriate under the circumstances. Waiving the personal appearance of the proposed next friend should be done in very limited circumstances.

6. If, after designation of a next friend, an appropriate family member becomes available to serve as authorized representative, the director shall replace the next friend with the family member.

C. No director, employee, or agent of a provider may serve as an authorized representative for any individual receiving services delivered by that provider unless the authorized representative is a relative or the legal guardian. When a provider, or the director, an employee, or agent of the provider is also the individual's guardian, the provider shall assure that the individual's preferences are included in the services plan and that the individual can make complaints about any aspect of the services he receives.

D. The provider shall document the recognition or designation of an authorized representative in the individual's services record, including evidence of consultation with the individual about his preference, copies of applicable legal documents such as the durable power of attorney, advance directive, or guardianship order, names and contact information for family members, and, when there is more than one

potential family member available for designation as authorized representative, the rationale for the designation of the particular family member as the authorized representative.

E. If a provider documents that the individual lacks capacity to consent and no person is available or willing to act as an authorized representative, the provider shall:

1. Attempt to identify a suitable person who would be willing to serve as guardian and ask the court to appoint that person to provide consent or authorization; or
2. Ask a court to authorize treatment (See § 37.2-1101 of the Code of Virginia).

F. Court orders authorizing treatment shall not be viewed as substituting or eliminating the need for an authorized representative.

1. Providers shall review the need for court-ordered treatment and determine the availability of and seek an authorized representative whenever the individual's condition warrants, the individual requests such a review, or at least every six months except for individuals receiving acute inpatient treatment.
2. Providers of acute inpatient services shall review the need for court-ordered treatment and determine the availability of and seek an authorized representative whenever the individual's condition warrants or at least at every treatment team meeting. All such reviews shall be documented in the individual's services record and communicated to the individual.
3. When the provider recognizes or designates an authorized representative, the provider shall notify the court that its order is no longer needed and shall immediately suspend its use of the court order.

G. Conditions for removal of an authorized representative. Whenever an individual has regained capacity to consent as indicated by a capacity evaluation or clinical determination, the director shall immediately remove any authorized representative designated pursuant to subdivision B 1 or 2 of this section, notify the individual and the authorized representative, and ensure that the services record reflects that the individual is capable of making his own decisions. Whenever an individual with an



authorized representative who is his legal guardian has regained his capacity to give informed consent, the director may use the applicable statutory provisions to remove the authorized representative. (See § 37.2-1012 of the Code of Virginia.) If powers of attorney and health care agents' powers do not cease of their own accord when a clinician has determined that the individual is no longer incapacitated, the director shall seek the consent of the individual and remove the person as authorized representative.

1. The director shall remove the authorized representative designated pursuant to subdivision B 1 or 2 of this section if the authorized representative becomes unavailable, unwilling, or unqualified to serve. The individual or the advocate may request the LHRC to review the director's decision to remove an authorized representative under the procedures set out at 12VAC35-115-180, and the LHRC may reinstate the authorized representative if it determines that the director's action was unjustified.

2. Prior to any removal under this authority, the director shall notify the individual of the decision to remove the authorized representative, of his right to request that the LHRC review the decision, and of the reasons for the removal decision. This information shall be placed in the individual's services record. If the individual requests, the director shall provide him with a written statement of the facts and circumstances upon which the director relied in deciding to remove the authorized representative.

The LHRC may recommend the removal of a next friend pursuant to 12VAC35-115-200 when the next friend is not acting in accordance with the individual's best interest.

3. The director may otherwise seek to replace an authorized representative recognized pursuant to this section who is an attorney-in-fact currently authorized to consent under the terms of a durable power of attorney, a health care agent appointed by an individual under an advance directive, a legal guardian of the individual, or, if the individual is a minor, a parent with legal custody of the individual, only by a court order under applicable statutory authority.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

## Part V

### Complaint Resolution, Hearing, and Appeal Procedures

#### **12VAC35-115-150. General provisions.**

A. The parties to any complaint are the individual and the director. Each party can also have anyone else represent him during resolution of the complaint. The director shall make every effort to resolve the complaint at the earliest possible stage.

B. Meetings, reviews, and hearings will generally be closed to other people unless the individual making the complaint requests that other people attend or if an open meeting is required by the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

1. The LHRC and SHRC may conduct a closed hearing to protect the confidentiality of persons who are not a party to the complaint, but only if a closed meeting is otherwise allowed under the Virginia Freedom of Information Act (see § 2.2-3711 of the Code of Virginia).

2. If any person alleges that implementation of an LHRC recommendation would violate the individual's rights or those of other individuals, the person may file a petition for a hearing with the SHRC, according to 12VAC35-115-210.

C. In no event shall a pending hearing, review, or appeal prevent a director from taking corrective action based on the advice of the provider's legal counsel that such action is required by law or he otherwise thinks such action is correct and justified.

D. The LHRC or SHRC, on the motion of any party or on its own motion, may, for good cause, extend any time periods before or after the expiration of that time period. No director may extend any time periods for any actions he is required to take under these procedures without prior approval of the LHRC or SHRC.

E. Except in the case of emergency proceedings, if a time period in which action must be taken under this part is not extended by the LHRC or SHRC, the failure of a party to act within that time period shall waive that party's further rights under these procedures.

F. In making their recommendations regarding complaint resolution, the LHRC and the SHRC shall identify any rights or regulations that the provider violated and any policies, practices, or conditions that contributed to the violations. They shall also recommend appropriate corrective actions, including changes in policies, practices, or conditions, to prevent further violations of the rights assured under these regulations.

G. If it is impossible to carry out the recommendations of the LHRC or the SHRC within a specified time, the LHRC or the SHRC, as appropriate, shall recommend any necessary interim action that gives appropriate and possible immediate remedies.

H. Any action plan submitted by the director or commissioner in the course of these proceedings shall fully address final and interim recommendations made by the LHRC or the SHRC and identify financial or other constraints, if any, that prevent efforts to fully remedy the violation.

I. All communication with the individual during the complaint resolution process shall be in the manner, format, and language most easily understood by the individual.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

#### **12VAC35-115-160. (Repealed.)**

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; repealed, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

## **12VAC35-115-170. Complaint resolution process.**

A. Anyone who believes that a provider has violated an individual's rights under these regulations may report it to the director or the human rights advocate for resolution.

1. If the report is made only to the director, the director or his designee shall immediately notify the human rights advocate. If the report is made on a weekend or holiday, then the director or his designee shall notify the human rights advocate on the next business day.

2. If the report is made only to the human rights advocate, the human rights advocate shall immediately notify the director. If the report is made on a weekend or holiday, then the human rights advocate shall notify the director on the next business day.

3. The human rights advocate or the director or his designee shall discuss the report with the individual and notify the individual of his right to pursue a complaint through the process established in these regulations. The steps in the informal and formal complaint process established in these regulations shall be thoroughly explained to the individual. The human rights advocate or the director or his designee shall ask the individual if he understands the complaint process and the choice that he has before asking the individual how he wishes to pursue the complaint. The individual shall then be given the choice of pursuing the complaint through the informal or formal complaint process. If the individual does not make a choice, the complaint shall be managed through the informal process.

4. The following steps apply if the complaint is pursued through the informal process:

Step 1: The director or his designee shall attempt to resolve the complaint immediately. If the complaint is resolved, no further action is required.

Step 2: If the complaint is not resolved within five working days, the director or his designee shall refer it for resolution under the formal process. The individual may extend the informal process five-day time frame for good cause. All such extensions shall be reported to the human rights advocate by the director or his designee.

5. The following steps apply if the complaint is pursued through the formal process:

Step 1: The director or his designee shall try to resolve the complaint by meeting with the individual, any representative the individual chooses, the human rights advocate, and others as appropriate within 24 hours of receipt of the complaint or the next business day if that day is a weekend or holiday. The director or his designee shall conduct an investigation of the complaint, if necessary.

Step 2: The director or his designee shall give the individual and his chosen representative a written preliminary decision and, where appropriate, an action plan for resolving the complaint within 10 working days of receiving the complaint. Along with the action plan, the director shall provide written notice to the individual about the time frame for the individual's response pursuant to Step 3 of this subdivision, information on how to contact the human rights advocate for assistance with the process, and a statement the complaint will be closed if the individual does not respond.

Step 3: If the individual disagrees with the director's preliminary decision or action plan, he can respond to the director in writing within five working days after receiving the preliminary decision and action plan. If the individual has not responded within five working days, the complaint will be closed.

Step 4: If the individual disagrees with the preliminary decision or action plan and reports his disagreement to the director in writing within five working days after receiving the decision or action plan, the director shall investigate further as appropriate and shall make a final decision regarding the complaint. The director shall forward a written copy of his final decision and action plan to the individual, his chosen representative, and the human rights advocate within five working days after the director receives the individual's written response. Along with the action plan, the director shall provide written notice to the individual about the time frame for the individual's response pursuant to Step 5 of this subdivision, information about how to contact the human rights advocate for assistance with the process, and a statement that if the individual

does not respond that the complaint will be closed.

Step 5: If the individual disagrees with the director's final decision or action plan, he may file a petition for a hearing by the LHRC using the procedures prescribed in 12VAC35-115-180. If the individual has accepted the relief offered by the director, the matter is not subject to further review.

B. If at any time during the formal complaint process the human rights advocate concludes that there is substantial risk that serious or irreparable harm will result if the complaint is not resolved immediately, the human rights advocate shall inform the director, the provider, the provider's governing body, and the LHRC. Steps 1 through 5 of subdivision A 5 of this section shall not be followed. Instead, the LHRC shall conduct a hearing according to the special procedures for emergency hearings in 12VAC35-115-180.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

### **12VAC35-115-180. Local Human Rights Committee hearing and review procedures.**

A. Any individual or his authorized representative who does not accept the relief offered by the director or disagrees with (i) a director's final decision and action plan resulting from the complaint resolution; (ii) a director's final action following a report of abuse, neglect, or exploitation; or (iii) a director's final decision following a complaint of discrimination in the provision of services may request an LHRC hearing by following the steps provided in subsections B through I of this section.

B. Step 1: The individual or his authorized representative must file the petition for a hearing with the chairperson of the LHRC within 10 working days of the director's action or final decision on the complaint.

1. The petition for hearing must be in writing. It should contain all facts and arguments surrounding the complaint and reference any section of the regulations that the individual believes the provider

violated.

2. The human rights advocate or any person the individual chooses may help the individual in filing the petition. If the individual chooses a person other than the human rights advocate to help him, he and his chosen representative may request the human rights advocate's assistance in filing the petition.

C. Step 2: The LHRC chair shall forward a copy of the petition to the director and the human rights advocate as soon as he receives it. A copy of the petition shall also be forwarded to the provider's governing body.

D. Step 3: Within five working days, the director shall submit to the LHRC:

1. A written response to everything contained in the petition; and
2. A copy of the entire written record of the complaint.

E. Step 4: The LHRC shall hold a hearing within 20 working days of receiving the petition.

1. The parties shall have at least five working days' notice of the hearing.
2. The director or his designee shall attend the hearing.
3. The individual or his authorized representative making the complaint shall attend the hearing.
4. At the hearing, the parties and chosen representatives and designees have the right to present witnesses and other evidence and the opportunity to be heard.

F. Step 5: Within 10 working days after the hearing ends, the LHRC shall give its written findings of fact and recommendations to the parties and their representatives. Whenever appropriate, the LHRC shall identify information that it believes the director shall take into account in making decisions concerning discipline or termination of personnel.

G. Step 6: Within five working days of receiving the LHRC's findings and recommendations, the director shall give the individual, the individual's chosen representative, the human rights advocate, the governing body, and the LHRC a written action plan he intends to take to respond to the LHRC's findings and recommendations. Along with the action plan, the director shall provide written notice to the individual

about the time frame for the individual's response pursuant to Step 7 (subsection H of this section) and a statement that if the individual does not respond that the complaint will be closed. The plan shall not be implemented for five working days after it is submitted, unless the individual agrees to its implementation sooner.

H. Step 7: The individual, his chosen representative, the human rights advocate, or the LHRC may object to the action plan within five working days by stating the objection and what the director can do to resolve the objection.

1. If an objection is made, the director may not implement the action plan, or may implement only that portion of the plan that the individual making the complaint agrees to, until he resolves the objection as requested or appeals to the SHRC for a decision under 12VAC35-115-210.

2. If no one objects to the action plan, the director shall begin to implement the plan on the sixth working day after he submitted it.

I. Step 8: If an objection to the action plan is made and the director does not resolve the objection to the action plan to the individual's satisfaction within two working days following its receipt by the director, the individual may appeal to the SHRC under 12VAC35-115-210.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

#### **12VAC35-115-190. Special procedures for emergency hearings by the LHRC.**

A. If the human rights advocate informs the LHRC of a substantial risk that serious and irreparable harm will result if a complaint is not resolved immediately, the LHRC shall hold and conclude a preliminary hearing within 72 hours of receiving this information.

1. The director or his designee and the human rights advocate shall attend the hearing. The



individual and his authorized representative may attend the hearing.

2. The hearing shall be conducted according to the procedures in 12VAC35-115-180, but it shall be concluded on an expedited basis.

B. At the end of the hearing, the LHRC shall make preliminary findings and, if a violation is found, shall make preliminary recommendations to the director, the provider, and the provider's governing body.

C. The director shall formulate and carry out an action plan within 24 hours of receiving the LHRC's preliminary recommendations. A copy of the plan shall be sent to the human rights advocate, the individual, his authorized representative, and the governing body.

D. If the individual or the human rights advocate objects within 24 hours to the LHRC findings or recommendations or to the director's action plan, the LHRC shall conduct a full hearing within five working days of the objection, following the procedures outlined in 12VAC35-115-180. This objection shall be in writing to the LHRC chairperson, with a copy sent to the director.

E. Either party may appeal the LHRC's decision to the SHRC under 12VAC35-115-210.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

#### **12VAC35-115-200. Special procedures for LHRC reviews involving consent and authorization.**

A. The individual, his authorized representative, or anyone acting on the individual's behalf may request in writing that the LHRC review the following situations and issue a decision:

1. If an individual his authorized representative objects at any time to the appointment of a specific person as authorized representative or any decision for which consent or authorization is required and has been given by his authorized representative, other than a legal guardian, he may ask the LHRC to decide whether his capacity was properly evaluated, the authorized representative was

properly appointed, or his authorized representative's decision was made based on the individual's basic values and any preferences previously expressed by the individual to the extent that they are known, and if unknown or unclear in the individual's best interests.

a. The provider shall take no action for which consent or authorization is required if the individual objects, except in an emergency or as otherwise permitted by law, pending the LHRC review.

b. If the LHRC determines that the individual's capacity was properly evaluated, the authorized representative is properly designated, or the authorized representative's decision was made based on the individual's basic values and any preferences previously expressed by the individual to the extent that they are known, or if unknown or unclear in the individual's best interests, then the provider may proceed according to the decision of the authorized representative.

c. If the LHRC determines that the individual's capacity was not properly evaluated or the authorized representative was not properly designated, then the provider shall take no action for which consent is required except in an emergency or as otherwise required or permitted by law, until the capacity review and authorized representative designation is properly done.

d. If the LHRC determines that the authorized representative's decision was not made based on the individual's basic values and any preferences previously expressed by the individual to the extent known, and if unknown or unclear, in the individual's best interests, then the provider shall take steps to remove the authorized representative pursuant to 12VAC35-115-146.

2. If an individual or his family member has obtained an independent evaluation of the individual's capacity to consent to treatment or services or to participate in human research under 12VAC35-115-70, or authorize the disclosure of information under 12VAC35-115-90, and the opinion of that evaluator conflicts with the opinion of the provider's evaluator, the LHRC may be requested to decide which evaluation will control.

a. If the LHRC agrees that the individual lacks the capacity to consent to treatment or services

or authorize disclosure of information, the director may begin or continue treatment or research or disclose information, but only the appropriate consent or authorization of the authorized representative. The LHRC shall advise the individual of his right to appeal this determination to the SHRC under 12VAC35-115-210.

b. If the LHRC does not agree that the individual lacks the capacity to consent to treatment or services or authorize disclosure of information, the director shall not begin any treatment or research, or disclose information without the individual's consent or authorization, or shall take immediate steps to discontinue any actions begun without the consent or authorization of the individual. The director may appeal to the SHRC under 12VAC35-115-210 but may not take any further action until the SHRC issues its opinion.

3. If a director makes a decision that affects an individual and the individual believes that the decision requires his personal consent or authorization or that of his authorized representative, he may object and ask the LHRC to decide whether consent or authorization is required.

Regardless of the individual's capacity to consent to treatment or services or authorize disclosure of information, if the LHRC determines that a decision made by a director requires consent or authorization that was not obtained, the director shall immediately rescind the action unless and until such consent or authorization is obtained. The director may appeal to the SHRC under 12VAC35-115-210 but may not take any further action until the SHRC issues its opinion.

B. Before making such a decision, the LHRC shall review the action proposed by the director, any determination of lack of capacity, the opinion of the independent evaluator if applicable, and the individual's or his authorized representative's reasons for objecting to that determination. To facilitate its review, the LHRC may ask that a physician or licensed clinical psychologist not employed by the provider evaluate the individual at the provider's expense and give an opinion about his capacity to consent to treatment or authorize information.

The LHRC shall notify all parties and the human rights advocate of the decision within 10 working days of the initial request.

## Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

## Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

### **12VAC35-115-210. State Human Rights Committee appeals procedures.**

A. Any party may appeal to the SHRC if he is not satisfied with any of the following:

1. An LHRC's final findings of fact and recommendations following a hearing;
2. A director's final action plan following an LHRC hearing;
3. An LHRC's final decision regarding the capacity of an individual to consent to treatment, services, or research or authorize disclosure of information; or
4. An LHRC's final decision concerning whether consent or authorization is needed for the director to take a certain action.

The steps for filing an appeal are provided in subsections B through I of this section.

B. Step 1: Appeals shall be filed in writing with the SHRC by a party within 10 working days of receipt of the final action.

1. The appeal shall explain the reasons the final action is not satisfactory.
2. The human rights advocate or any other person may help in filing the appeal. If the individual chooses a person other than the human rights advocate to help him, he and his chosen representative may request the human rights advocate's help in filing the appeal.
3. The party appealing must give a copy of the appeal to the other party, the human rights advocate, and the LHRC.
4. If the director is the party appealing, he shall first request and get written permission to appeal from the commissioner or governing body of the provider, as appropriate. If the director does not

get this written permission and note the appeal within 10 working days, his right to appeal is waived.

C. Step 2: If the director is appealing, the individual may file a written statement with the SHRC within five working days after receiving a copy of the appeal. If the individual is appealing, the director shall file a written statement with the SHRC within five working days after receiving a copy of the appeal.

D. Step 3: Within five working days of noting or being notified of an appeal, the director shall forward a complete record of the LHRC hearing to the SHRC. The record shall include, at a minimum:

1. The original petition or information filed with the LHRC and any statement filed by the director in response;
2. Parts of the individual's services record that the LHRC considered and any other parts of the services record submitted to, but not considered by the LHRC that either party considers relevant;
3. All written documents and materials presented to and considered by the LHRC, including any independent evaluations conducted;
4. A tape or transcript of the LHRC proceedings, if available;
5. The LHRC's findings of fact and recommendations;
6. The director's action plan, if any; and
7. Any written objections to the action plan or its implementation.

E. Step 4: The SHRC shall hear the appeal at its next scheduled meeting after the chairperson receives the appeal.

1. The SHRC shall give the parties at least 10 working days' notice of the appeal hearing.
2. The following rules govern appeal hearings:
  - a. The SHRC shall not hear any new evidence.
  - b. The SHRC is bound by the LHRC's findings of fact subject to subdivision 3 of this subsection.

c. The SHRC shall limit its review to whether the facts, as found by the LHRC, establish a violation of these regulations and a determination of whether the LHRC's recommendations or the action plan adequately address the alleged violation.

d. All parties and their representatives shall have the opportunity to appear before the SHRC to present their positions and answer questions the SHRC may have.

e. The SHRC shall notify the inspector general of the appeal.

3. If the SHRC decides that the LHRC's findings of fact are clearly wrong or that the hearing procedures employed by the LHRC were inadequate, the SHRC may:

a. Send the case back to the LHRC for another hearing to be completed within a time period specified by the SHRC; or

b. Conduct its own fact-finding hearing. If the SHRC chooses to conduct its own fact-finding hearing, it may appoint a subcommittee of at least three of its members as fact finders. The fact-finding hearing shall be conducted within 30 working days of the SHRC's initial hearing.

In either case, the parties shall have 15 working days' notice of the date of the hearing and the opportunity to be heard and to present witnesses and other evidence.

F. Step 5: Within 20 working days after the SHRC appeal hearing, the SHRC shall submit a report, its findings of fact, if applicable, and recommendations to the commissioner and to the provider's governing body, with copies to the parties, the LHRC, and the human rights advocate.

G. Step 6: Within 10 working days after receiving the SHRC's report, in the case of appeals involving a state facility, the commissioner shall submit an outline of actions to be taken in response to the SHRC's recommendations. In the case of appeals involving CSBs and private providers, the commissioner and the provider's governing body shall each outline in writing the action or actions they will take in response to the recommendations of the SHRC. They shall also explain any reasons for not carrying out any of the recommended actions. Copies of their responses shall be forwarded to the SHRC, the LHRC, the director, the human rights advocate, and the individual.

H. Step 7: If the SHRC objects in writing to the commissioner's or governing body's proposed actions, or both, their actions shall be postponed. The commissioner or governing body, or both, shall meet with the SHRC at its next regularly scheduled meeting to attempt to arrange a mutually agreeable resolution.

I. Step 8: In the case of services provided directly by the department, the commissioner's action plan shall be final and binding on all parties. However, when the SHRC believes the commissioner's action plan is incompatible with the purpose of these regulations, it shall notify the board, the protection and advocacy agency, and the inspector general.

In the case of services delivered by all other providers, the action plan of the provider's governing body shall be reviewed by the commissioner. If the commissioner determines that the provider has failed to develop and carry out an acceptable action plan, the commissioner shall notify the protection and advocacy agency and shall inform the SHRC of the sanctions the department will impose against the provider.

J. Step 9: Upon completion of the process outlined in subsections B through I of this section, the SHRC shall notify the parties and the human rights advocate of the final outcome of the complaint.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

## Part VI

### Variances

#### **12VAC35-115-220. Variances.**

A. Variances to these regulations shall be requested and approved only when the provider has tried to implement the relevant requirement without a variance and can provide objective, documented information that continued operation without a variance is not feasible or will prevent the delivery of

effective and appropriate services and supports to individuals.

B. Only directors may apply for variances, and they must first be approved by the provider, the governing body of the provider, or the commissioner, as appropriate, before consideration by an LHRC or the SHRC.

C. Upon receiving approval from the governing body or commissioner, and after notifying the human rights advocate and other interested persons, the director shall file a formal application for variance with the LHRC. This application shall reference the specific part of these regulations to which a variance is needed, the proposed wording of the substitute rule or procedure, and the justification for a variance. The application shall also describe time limits and other conditions for duration and the circumstances that will end the applicability of the variance.

1. When the LHRC receives the application, it shall invite, and provide ample time to receive, oral or written statements about the application from the human rights advocate, individuals affected by the variance, and other interested persons.
2. The LHRC shall review the application and prepare a written report of facts, which shall include its recommendation for approval, disapproval, or modification. The LHRC shall send its report, recommendations, and a copy of the original application to the State Human Rights Director, the SHRC, and the director making application for the variance.

D. When the SHRC receives the application and the LHRC's report, the SHRC shall do the following:

1. Invite oral or written statements about the application from the applicant director, LHRC, advocate, and other interested persons by publishing the request for variance in the next issue of the Virginia Register of Regulations;
2. Notify the inspector general of the request for variance; and
3. After considering all available information, prepare a written decision deferring, disapproving, modifying, or approving the application. All variances shall be approved for a specific time period and must be reviewed at least annually.



a. A copy of this decision including conditions, time frames, circumstances for removal, and the reasons for the decision shall be given to the applicant director, the commissioner or governing body, the state human rights director, the human rights advocate, any person commenting on the request at any stage, and the LHRC.

b. The decision and reasons shall also be published in the next issue of the Virginia Register of Regulations.

E. Directors shall implement any approved variance in strict compliance with the written application as amended, modified, or approved by the SHRC.

F. Providers shall develop policies and procedures for monitoring the implementation of any approved variances. These policies and procedures shall specify that at no time can a variance approved for one individual be extended to general applicability. These policies and procedures shall assure the ongoing collection of any data relevant to the variance and the presentation of any later report concerning the variance as requested by the commissioner, the state human rights director, the human rights advocate, the LHRC or the SHRC.

G. The decision of the SHRC granting or denying a variance shall be final.

H. Following the granting of a variance, the provider shall notify all individuals affected by the variance about the details of the variance.

I. If an individual is in immediate danger due to a provider's implementation of these regulations, the provider may request a temporary variance pending approval pursuant to the process described in this section. Such a request shall be submitted in writing to the commissioner, chairperson of the SHRC, and state human rights director. The commissioner, chairperson of the SHRC, and state human rights director shall issue a decision within 48 hours of the receipt of such a request.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

## Part VII

### Reporting Requirements

#### **12VAC35-115-230. Provider requirements for reporting to the department.**

A. Providers shall collect, maintain and report the following information concerning abuse, neglect, and exploitation:

1. The director of a facility operated by the department shall report allegations of abuse and neglect in accordance with all applicable operating instructions issued by the commissioner or his designee.
2. The director of a service licensed or funded by the department shall report each allegation of abuse or neglect to the assigned human rights advocate within 24 hours from the receipt of the allegation (see 12VAC35-115-50).
3. The investigating authority shall provide a written report of the results of the investigation of abuse or neglect to the director and human rights advocate within 10 working days from the date the investigation began unless an exemption has been granted by the department (see 12VAC35-115-50). This report shall include:
  - a. Whether abuse, neglect, or exploitation occurred;
  - b. The type of abuse; and
  - c. Whether the act resulted in physical or psychological injury.

B. Providers shall collect, maintain, and report the following information concerning deaths and serious injuries:

1. The director of a facility operated by the department shall report to the department deaths and serious injuries in accordance with all applicable operating instructions issued by the commissioner or his designee.

2. The director of a service licensed or funded by the department shall report deaths and serious injuries in writing to the department within 24 hours of discovery and by telephone to the authorized representative within 24 hours.

3. All reports of death and serious injuries shall include:

- a. Date and place of the death or serious injury;
- b. Nature of the injuries and treatment required; and
- c. Circumstances of the death or serious injury.

C. Providers shall collect, maintain and report the following information concerning seclusion and restraint:

1. The director of a facility operated by the department shall report each instance of seclusion or restraint or both in accordance with all applicable operating instructions issued by the commissioner or his designee.

2. The director of a service licensed or funded by the department shall submit an annual report of each instance of seclusion or restraint or both by the 15th of January each year, or more frequently if requested by the department.

3. Each instance of seclusion or restraint or both shall be compiled on a monthly basis and the report shall include:

a. Type(s) to include:

- (1) Physical restraint (manual hold);
- (2) Mechanical restraint;
- (3) Pharmacological restraint; and
- (4) Seclusion.

b. Rationale for the use of seclusion or restraint to include:

- (1) Behavioral purpose;

(2) Medical purpose; or

(3) Protective purpose.

c. Duration of the seclusion or restraint, as follows:

(1) The duration of seclusion and restraint used for behavioral purposes is defined as the actual time the individual is in seclusion or restraint from the time of initiation of seclusion or restraint until the individual is released.

(2) The duration of restraint for medical and protective purposes is defined as the length of the episode as indicated in the order.

4. Any instance of seclusion or restraint that does not comply with these regulations or approved variances, or that results in injury to an individual, shall be reported to the authorized representative, as applicable, and the assigned human rights advocate within 24 hours.

D. The director shall provide to the human rights advocate and the LHRC information on the type, resolution level, and findings of each complaint of a human rights violation and implementation of variances in accordance with the LHRC meeting schedule or as requested by the advocate.

E. Reports required under this section shall be submitted to the department on forms or in an automated format or both developed by the department.

F. The department shall compile all data reported under this section and make this data available to the public and the inspector general upon request.

1. The department shall provide the compiled data in writing or by electronic means.

2. The department shall remove all provider-identifying information and all information that could be used to identify a person as an individual receiving services.

G. In the reporting, compiling and releasing of information and statistical data provided under this section, the department and all providers shall take all measures necessary to ensure that any information identifying individuals is not released to the public, including encryption of data transferred by electronic means.

H. Nothing in this section is to be construed as requiring the reporting of proceedings, minutes, records, or reports of any committee or nonprofit entity providing a centralized credentialing service which are identified as privileged pursuant to § 8.01-581.17 of the Code of Virginia.

I. Providers shall report to the Department of Health Professions, Enforcement Division, violations of these regulations that constitute reportable conditions under §§ 54.1-2400.4, 54.1-2909, and 54.1-2900.6 of the Code of Virginia.

#### Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

### Part VIII

#### Enforcement and Sanctions

#### **12VAC35-115-240. Human rights enforcement and sanctions.**

A. The commissioner may invoke the sanctions enumerated in § 37.2-419 of the Code of Virginia upon receipt of information that a provider licensed or funded by the department is:

1. In violation of (i) the provisions of § 37.2-400 and §§ 37.2-403 through 37.2-422 of the Code of Virginia, (ii) these regulations, or (iii) provisions of the licensing regulations adopted pursuant to §§ 37.2-404 and 37.2-411 of the Code of Virginia; and
2. The violation adversely affects the human rights of individuals or poses an imminent and substantial threat to the health, safety, or welfare of individuals.

The commissioner shall notify the provider in writing of the specific violation or violations found and of his intention to convene an informal conference pursuant to § 2.2-4019 of the Code of Virginia at which the presiding officer will be asked to recommend issuance of a special order.

B. The sanctions contained in the special order shall remain in effect for the duration of any appeal of

the special order.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

## Part IX

### Responsibilities and Duties

#### **12VAC35-115-250. Offices, composition and duties.**

A. Providers and their directors shall:

1. Identify a person or persons accountable for helping individuals to exercise their rights and resolve complaints regarding services.
2. Comply with all state laws governing the reporting of abuse and neglect and all procedures set forth in these regulations for reporting allegations of abuse, neglect, or exploitation.
3. Require competency-based training on these regulations upon employment and at least annually thereafter. Documentation of such competency shall be maintained in the employee's personnel file.
4. Take all steps necessary to assure compliance with these regulations in all services provided.
5. Communicate information about the availability of a human rights advocate to individuals and authorized representatives.
6. Assure one LHRC affiliation within the region as defined by the SHRC. The SHRC may require multi-site providers to have more than one LHRC affiliation within a region if the SHRC determines that additional affiliations are necessary to protect individuals' human rights.
7. Assure that the appropriate staff attend LHRC meetings in accordance with the LHRC meeting schedule to report on human rights activities, to impart information to the LHRC at the request of

the human rights advocate or LHRC, and discuss specific concerns or issues with the LHRC.

8. Cooperate with the human rights advocate and the LHRC to investigate and correct conditions or practices interfering with the free exercise of individuals' human rights and make sure that all employees cooperate with the human rights advocate and the LHRC in carrying out their duties under these regulations. Notwithstanding the requirements for complaints pursuant to Part V (12VAC35-115-150 et seq.) of this chapter, the provider shall submit a written response indicating intended action to any written recommendation made by the human rights advocate or LHRC within 15 days of the receipt of such recommendation.

9. Provide the advocate unrestricted access to individuals and individual services records whenever the human rights advocate deems access necessary to carry out rights protection, complaint resolution, and advocacy.

10. Submit to the human rights advocate for review and comment any proposed policies, procedures, or practices that may affect individual human rights.

11. Comply with requests by the SHRC, LHRC, and human rights advocate for information, policies, procedures, and written reports regarding compliance with these regulations.

12. Name a liaison to the LHRC, who shall give the LHRC suitable meeting accommodations, clerical support and equipment, and assure the availability of records and employee witnesses upon the request of the LHRC. Oversight and assistance with the LHRC's substantive implementation of these regulations shall be provided by the SHRC. See subsection E of this section.

13. Submit applications for variances to these regulations only as a last resort.

14. Post in program locations information about the existence and purpose of the human rights program.

15. Not influence or attempt to influence the appointment of any person to an LHRC associated with the provider or director.

16. Perform any other duties required under these regulations.

B. Employees of the provider shall, as a condition of employment:

1. Become familiar with these regulations, comply with them in all respects, and help individuals understand and assert their rights.

2. Protect individuals from any form of abuse, neglect, or exploitation (i) by not abusing, neglecting or exploiting any individual; (ii) by not permitting or condoning anyone else abusing, neglecting, or exploiting any individual; and (iii) by reporting all suspected abuse, neglect, or exploitation to the director. Protecting individuals receiving services from abuse also includes using the minimum force necessary to restrain an individual.

3. Cooperate with any investigation, meeting, hearing, or appeal held under these regulations. Cooperation includes giving statements or sworn testimony.

4. Perform any other duties required under these regulations.

C. The human rights advocate shall:

1. Represent any individual making a complaint or, upon request, consult with and help any other representative the individual chooses.

2. Monitor the implementation of an advocacy system for individuals receiving services from the provider or providers to which the advocate is assigned.

3. Promote and monitor provider compliance with these and other applicable individual rights laws, regulations, and policies.

4. Investigate and try to prevent or correct, informally or formally, any alleged rights violations by interviewing, mediating, negotiating, advising, and consulting with providers and their respective governing bodies, directors, and employees.

5. Whenever necessary, file a written complaint with the LHRC for an individual or, where general conditions or practices interfere with individuals' rights, for a group of individuals.

6. Investigate and examine all conditions or practices that may interfere with the free exercise of



individuals' rights.

7. Help the individual or the individual's chosen representative during any meeting, hearing, appeal, or other proceeding under these regulations unless the individual or his chosen representative chooses not to involve the human rights advocate.

8. Provide orientation, training, and technical assistance to the LHRCs for which he is responsible.

9. Tell the LHRC about any recommendations made to the director, the provider, the provider's governing body, the state human rights director, or the department for changes in policies, procedures, or practices that have the potential to adversely affect the rights of individuals.

10. Make recommendations to the state human rights director concerning the employment and supervision of other advocates where appropriate.

11. Submit regular reports to the state human rights director, the LHRC, and the SHRC about provider implementation of and compliance with these regulations.

12. Provide consultation to individuals, providers and their governing bodies, directors, and employees regarding individuals' rights, providers' duties, and complaint resolution.

13. Perform any other duties required under these regulations.

D. The Local Human Rights Committee shall:

1. Consist of five or more members appointed by the SHRC.

a. Membership shall be broadly representative of professional and consumer interests. At least two members shall be individuals who are receiving or have received public or private mental health, mental retardation, or substance abuse treatment or habilitation services within five years of their initial appointment. At least one-third of the members shall be consumers or family members of consumers. Remaining appointments shall include persons with interest, knowledge, or training in the mental health, mental retardation, or substance abuse field.

b. At least one member shall be a health care provider.

c. No current employee of the department or a provider shall serve as a member of any LHRC

that serves an oversight function for the employing facility or provider.

d. Initial appointments to an LHRC shall be staggered, with approximately one-third of the members appointed for a term of three years, approximately one-third for a term of two years, and the remainder for a term of one year. After that, all appointments shall be for a term of three years.

e. A person may be appointed for no more than two consecutive three-year terms. A person appointed to fill a vacancy may serve out that term and then be eligible for two additional consecutive terms.

f. Nominations for membership to LHRCs shall be submitted directly to the SHRC through the state human rights director at the department's Office of Human Rights.

2. Permit affiliations of local providers in accordance with the recommendations from the human rights advocate. SHRC approval is required for the denial of an affiliation request.
3. Receive complaints of alleged rights violations filed by or for individuals receiving services from providers with which the LHRC is affiliated and hold hearings according to the procedures set forth in Part V (12VAC35-115-150 et seq.) of this chapter.
4. Conduct investigations as requested by the SHRC.
5. Upon the request of the human rights advocate, provider, director, or an individual or individuals, or on its own initiative, an LHRC may review any existing or proposed policies, procedures, practices, or behavioral treatment plans that could jeopardize the rights of individuals receiving services from the provider with which the LHRC is affiliated. In conducting this review, the LHRC may consult with any human rights advocate, employee of the provider, or anyone else. After this review, the LHRC shall make recommendations to the director concerning changes in these plans, policies, procedures, and practices.
6. Receive, review, and act on applications for variances to these regulations according to 12VAC35-115-220.

7. Receive, review and comment on all behavioral treatment plans involving the use of restraint or time out and seclusion, restraint, or time out policies for affiliated providers.
8. Adopt written bylaws that address procedures for conducting business, electing the chairperson, secretary, and other officers, designating standing committees, and setting the frequency of meetings.
9. Elect from its own members a chairperson to coordinate the activities of the LHRC and to preside at regular committee meetings and any hearings held pursuant to these regulations.
10. Conduct a meeting every quarter or more frequently as necessary to adhere to all time lines as set forth in these regulations.
11. Require members to recuse themselves from all cases wherein they have a financial or other conflict of interest.
12. The LHRC may delegate summary decision-making authority to a subcommittee when expedited decisions are required before the next scheduled LHRC meeting to avoid seriously compromising an individual's quality of care, habilitation, or quality of life. The decision of the subcommittee shall be reviewed by the full LHRC at its next meeting.
13. Perform any other duties required under these regulations.

E. The State Human Rights Committee shall:

1. Consist of nine members appointed by the board.
  - a. Members shall be broadly representative of professional and consumer interests and of geographic areas in the Commonwealth. At least two members shall be individuals who are receiving or have received public or private mental health, mental retardation, or substance abuse treatment or habilitation services within five years of their initial appointment. At least one-third of the members shall be consumers or family members of consumers. Remaining appointments shall include persons with interest, knowledge, or training in the mental health, mental retardation, or substance abuse field.

- b. At least one member shall be a health care professional.
  - c. No member can be an employee or board member of the department or a CSB.
  - d. If there is a vacancy, interim appointments may be made for the remainder of the unexpired term.
  - e. A person may be appointed for no more than two consecutive three-year terms. A person appointed to fill a vacancy may serve out that term, and then be eligible for two additional consecutive terms.
2. Elect a chairperson from its own members who shall:
- a. Coordinate the activities of the SHRC;
  - b. Preside at regular meetings, hearings, and appeals; and
  - c. Have direct access to the commissioner and the board in carrying out these duties.
3. Upon request of the commissioner, human rights advocate, provider, director, or an individual or individuals, or on its own initiative, a SHRC may review any existing or proposed policies, procedures, or practices that could jeopardize the rights of individuals receiving services from any provider. In conducting this review, the SHRC may consult with any human rights advocate, employee of the director, or anyone else. After this review, the SHRC shall make recommendations to the director or commissioner concerning changes in these policies, procedures, and practices.
4. Determine the appropriate number and geographical boundaries of LHRCs and consolidate LHRCs serving only one provider into regional LHRCs whenever consolidation would assure greater protection of rights under these regulations.
5. Appoint members of LHRCs with the advice of the respective LHRC, human rights advocate, and the state human rights director.
6. Advise the commissioner about the employment of the state human rights director and human rights advocates.

7. Conduct at least eight regular meetings per year.
8. Review decisions of LHRCs and, if appropriate, hold hearings and make recommendations to the commissioner, the board, and providers' governing bodies regarding alleged violations of individuals' rights according to the procedures specified in these regulations.
9. Provide oversight and assistance to LHRCs in the performance of their duties hereunder, including the development of guidance documents such as sample bylaws, affiliation agreements, and minutes to increase operational consistency among LHRCs.
10. Review denials of LHRC affiliations.
11. Notify the commissioner and the state human rights director whenever it determines that its recommendations in a particular case are of general interest and applicability to providers, human rights advocates, or LHRCs and assure the availability of the opinion or report to providers, human rights advocates, and LHRCs as appropriate. No document made available shall identify the name of individuals or employees in a particular case.
12. Grant or deny variances according to the procedures specified in Part VI (12VAC35-115-220) of this chapter and review approved variances at least once every year.
13. Make recommendations to the board concerning proposed revisions to these regulations.
14. Make recommendations to the commissioner concerning revisions to any existing or proposed laws, regulations, policies, procedures, and practices to ensure the protection of individuals' rights.
15. Review the scope and content of training programs designed by the department to promote responsible performance of the duties assigned under these regulations by providers, employees, human rights advocates, and LHRC members, and, where appropriate, make recommendations to the commissioner.
16. Evaluate the implementation of these regulations and make any necessary and appropriate recommendations to the board, the commissioner, and the state human rights director concerning interpretation and enforcement of the regulations.

17. Submit to the board and publish an annual report of its activities and the status of human rights in mental health, mental retardation, and substance abuse treatment and services in Virginia and make recommendations for improvement.

18. Adopt written bylaws that address procedures for conducting business; making membership recommendations to the board; electing a chairperson, vice chairperson, secretary, and other officers; appointing members of LHRCs; designating standing committees and their responsibilities; establishing ad hoc committees; and setting the frequency of meetings.

19. Review and approve the bylaws of LHRCs.

20. Require members to recuse themselves from all cases where they have a financial or other conflict of interest.

21. Perform any other duties required under these regulations.

F. The state human rights director shall:

1. Lead the implementation of the statewide human rights program and make ongoing recommendations to the commissioner, the SHRC, and LHRCs for continuous improvements in the program.

2. Advise the commissioner concerning the employment and retention of human rights advocates.

3. Advise providers, directors, advocates, LHRCs, the SHRC, and the commissioner concerning their responsibilities under these regulations and other applicable laws, regulations, policies, and departmental instructions that protect individuals' rights.

4. Organize, coordinate, and oversee training programs designed to promote responsible performance of the duties assigned under these regulations.

5. Periodically visit service settings to monitor the free exercise of rights enumerated in these regulations.

6. Supervise human rights advocates in the performance of their duties under these regulations.

7. Support the SHRC and LHRCs in carrying out their duties under these regulations.

8. Review LHRC decisions and recommendations for general applicability and provide suggestions for training to appropriate entities.
9. Monitor implementation of corrective action plans approved by the SHRC.
10. Perform any other duties required under these regulations.

G. The commissioner shall:

1. Employ the state human rights director after consultation with the SHRC.
2. Employ advocates following consultation with the state human rights director.
3. Provide or arrange for assistance and training necessary to carry out and enforce these regulations.
4. Cooperate with the SHRC and the state human rights director to investigate providers and correct conditions or practices that interfere with the free exercise of individuals' rights.
5. Advise and consult with the SHRC and the state human rights director concerning the appointment of members of LHRCs.
6. Maintain current and regularly updated data and perform regular trend analyses to identify the need for corrective action in the areas of abuse, neglect, and exploitation; seclusion and restraint; complaints; deaths and serious injuries; and variance applications.
7. Assure regular monitoring and enforcement of these regulations, including authorizing unannounced compliance reviews at any time.
8. Perform any other duties required under these regulations.

H. The board shall:

1. Adopt regulations that further define the rights of individuals receiving services from providers covered by these regulations.
2. Appoint members of the SHRC.
3. Review and approve the bylaws of the SHRC.

4. Perform any other duties required under these regulations.

Statutory Authority

§§ 37.2-203 and 37.2-400 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 18, Issue 3, eff. November 21, 2001; Errata, 18:6 VA.R. December 3, 2001; amended, Virginia Register Volume 23, Issue 25, eff. September 19, 2007.

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