

**Project 7094 - None**

**Department of Behavioral Health And Developmental Services**

**Ch115: Result of Periodic Review 2022**

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  
**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, as defined by § 37.2-100 of the Code of Virginia, 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, ~~intellectual disability~~ developmental disabilities, 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.~~

"Administrative hearing" means an administrative proceeding held pursuant to Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 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 where executed. ~~A WRAP or similar~~ The 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 shall be voluntary. To be voluntary, the authorization shall 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 this chapter 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 this chapter 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 State 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.

"Coercion" means the use of expressed or implied threats of violence or reprisal or other intimidating behavior that puts an individual in immediate fear of the consequences in order to compel that individual to take or not take a specific action, or subtle language or actions intended to persuade or otherwise influence an individual to do something that they might typically be unwilling to do.

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

"Community services board" or "CSB" means, as defined by § 37.2-100 of the Code of Virginia, the public body established pursuant to § 37.2-501 of the Code of Virginia that provides mental health, developmental, 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 this chapter or a provider's policies and procedures related to this chapter.

"Consent" means the voluntary agreement of an individual or that individual's authorized representative to specific services. Consent shall 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 this chapter, 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, the person, or to others.

"Exploitation" means the misuse or misappropriation of ~~the~~ an 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 and 12VAC35-115-130. 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~~ the individual's 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 legal authority to establish policy.

"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 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 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.

"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).

~~"Research review committee"~~ "Human research review committee," or "institutional review board" means a committee of professionals that provides complete and adequate review of human research activities pursuant to § 32.1-162.19 of the Code of Virginia. 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~~ comply with all requirements of 12VAC35-180. (~~See § 37.2-402 of the Code of Virginia and 12VAC35-180.~~)

"Human rights advocate" means a person employed by the ~~commissioner~~ department upon recommendation of the State Human Rights Director who is responsible for carrying out the functions prescribed for the position in 12VAC35-115-260 C to help individuals receiving services exercise their rights under this chapter. See 12VAC35-115-260 C.

"Independent review committee" means a committee appointed or accessed by a provider to review and approve the clinical efficacy of the provider's behavioral treatment plans and associated data collection procedures. An independent review committee shall be composed of professionals with training and experience in behavior analysis and interventions who are not involved in the development of the plan or directly providing services to the individual.

"Individual" or "individual receiving services" means, as defined by § 37.2-100 of the Code of Virginia, a current direct recipient of public or private mental health, developmental, or substance abuse treatment, rehabilitation, or habilitation services and 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.

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

"Investigation" means a detailed inquiry or systematic examination of the operations of a provider or its services regarding an alleged violation of this chapter or other applicable laws, regulations, or policies. An investigation may be undertaken as a result of a complaint, an incident report, or other information that comes to the attention of the provider or the department.

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

"Local human rights committee" or "LHRC" means a group of at least five people appointed by the State Human Rights Committee that is responsible for the duties prescribed in 12VAC35-115-270 A. See 12VAC35-115-270 A for membership and duties.

"Neglect" as defined by §37.2-100 of the Code of Virginia 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 an individual receiving care or treatment for mental illness, intellectual disability developmental disabilities, 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 this chapter.

"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~~ result from potential neglect.

~~"Person-centered"~~ "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 entity designated under the federal Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) and the Developmental Disabilities Assistance and Bill of Rights Act (DD). The protection and advocacy agency entity is the Disability Law Center of Virginia (dLCV), in accordance with § 51.5-39.13 of the Code of Virginia.

"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 the contents of conversation during a private counseling session with 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.

"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~~ post-procedure 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~~ geriatric chair, 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 including those imposed by a licensed professional. For purposes of this chapter, restrictions are separate and distinct from the privileging process used by the department for individuals receiving services who have a forensic status pursuant to Chapter 11.1 of Title 19.2 of the Code of Virginia.

"SCC" means a specially constituted committee serving an intermediate care facility for individuals with intellectual disabilities as described in the Centers for Medicare and Medicaid Services (CMS) Conditions of Participation (42 CFR 483.440(f)(3)).

"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, doctor of osteopathic medicine, physician assistant, or nurse practitioner.

"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.

"Sound therapeutic practice" means delivering appropriate, individually planned therapeutic interventions or services in a competent manner that conform to current acceptable professional practices and standards, and comply with applicable requirements and laws, including evidence-based practices when appropriate.

"State Human Rights Committee" or "SHRC" means a committee of nine members appointed by the board that is accountable for the duties prescribed in 12VAC35-115-270 C.

"State human rights director" means the person ~~employed by and~~ reporting to the commissioner who is responsible for carrying out the functions prescribed for the position in 12VAC35-115-260 D.

"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 shall conform to current acceptable professional practice.

### 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 this chapter, except as specifically limited in this chapter or otherwise by law. 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 ~~health~~ illness, developmental disability, or substance use disorder ~~or an intellectual disability~~ 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 Office of the State Inspector General (§ 2.2-308 of the Code of Virginia), 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 based on each individual's needs and service setting;
  - b. An adequate number of private, operating toilets, sinks, showers, and tubs that are designed to accommodate ~~individuals'~~ each individual's 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~~ year-round and compatible with health requirements.
4. Practice of a religion and ~~participate~~ participation 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 may be limited only if, in the judgment of a licensed professional, those services or practices 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 or pen, envelopes, 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 or pens, envelopes, 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 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 and promote diversity, equity, and inclusivity in the provision of services.

3. Providers shall obtain approval from the LHRC for any restriction imposed on an individual's rights under this subsection that lasts longer than seven consecutive calendar days or is imposed three or more times during a 30-calendar day time period. If the LHRC finds that the restriction is not being implemented in accordance with this chapter, the director shall be notified, and the LHRC shall provide recommendations.

4. Providers~~In addition to complying with the provision of 12VAC35-115-175 F, 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 this chapter shall immediately report this information directly to the director.

b. The director shall immediately initiate an investigation and take necessary steps to protect ~~the individual~~ all individuals receiving services until ~~an~~ the investigation is complete. The director shall maintain an investigation file that documents steps taken and the reasoning for any action or inaction. This may include the following actions:

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

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

(3) Temporarily suspend the involved employee ~~or employees, volunteer, consultant, or student involved~~, pending completion of ~~an~~ the investigation.

5. Providers shall immediately notify the appropriate social services or protective services agency about any individual who the provider reasonably believes to be a victim of abuse, neglect, or exploitation in accordance with § 63.2-1509 and § 63.2-1606 of the Code of Virginia and any other applicable law.

~~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.~~

### **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.

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 human rights 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, developmental, and behavioral screenings and assessments, as applicable, upon admission and during the provision of services;

b. Preparation, implementation, and modifications to an ISP based on 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 an ISP 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 or other person authorized to consent to treatment pursuant to § 54.1-2969 A of the Code of Virginia. Services provided in response to emergencies or crises shall be deemed part of the ISP and thereafter documented in the ISP.

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

7. When preparing or changing an ISP 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.

#### **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 of the individual has participated~~ individual's participation 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, including significant changes in any service setting; 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 § 32.1-162.17 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, and 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 of 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 statement of disagreement and request 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 C or D, 16.1-275, or 54.1-2969 A 1 or 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 § 54.1-2970 of the Code of Virginia and 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.

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 § 16.1-340.1 or 16.1-341 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 calendar 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 (§ 19.2-167 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.

## **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 including ~~(see 42 CFR Part 2, Confidentiality of Alcohol and Drug Abuse~~ Substance Use Disorder 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 person's 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~~ from the circumstances, based ~~on~~ 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 Substance Use Disorder 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-time 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~~ Reviews, appeals, or investigations under these regulations;
- (3) Evaluation of provider performance and individual outcomes (~~see per §§ 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 pursuant to § 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~~ In accordance with § 2.2-308 of the Code of Virginia, providers may disclose to the Office of the State Inspector General (~~§ 2.2-308 of the Code of Virginia~~) 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 per 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, if applicable;

(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 § 32.1-127.1:03 of the Code of Virginia and any other state or federal 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.

**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. With respect to the services records of minors:

1. A minor must have the permission of a parent, guardian, or other person standing in loco parentis before he can access his services record. He may access his services record without this permission only if the records pertain to treatment for sexually transmitted or reportable 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 prohibited by 42 CFR Part 2, parental rights have been terminated, a court order provides otherwise, or the minor's treating physician, ~~or~~ clinical psychologist, licensed clinical social worker, or licensed professional counselor has determined, in the exercise of professional judgment, that disclosure to the parent would be reasonably likely to cause substantial harm to the minor or another person. Any denial of a parental request shall comply with the provisions of subsection F of § 32.1-127.1:03 of the Code of Virginia, including a right to have the denial reviewed.

C. The provider's duties ~~are to:~~ are to:

1. ~~Providers shall tell~~ Tell each individual and his authorized representative how he can access and request amendment of his own services record.

2. ~~Providers shall permit~~ Permit each individual to see, read, and receive a copy of 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, licensed clinical social worker, or licensed professional counselor 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. This provision does not authorize a physician, clinical psychologist, licensed clinical social worker, or licensed professional counselor to withhold a record in its entirety on the grounds that some portion of the record would cause harm. The physician, ~~or~~ clinical psychologist, licensed clinical social worker, or licensed professional counselor shall also ~~provide~~ provide the individual access to as much about his services record as he ~~can~~ possible without risking harm to the individual or others.

b. If access is denied in whole or in part in accordance with subdivision 2 a of this subsection, 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 U.S. Department of Health and Human Services, if applicable. If restrictions are placed on access, the individual shall be notified of the restrictions and conditions for their removal. These restrictions 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, licensed clinical social worker, or licensed professional counselor who was not directly involved in the denial to review the decision to deny access. The physician, ~~or~~ clinical psychologist, licensed clinical social worker, or licensed professional counselor shall determine within a reasonable period of time, not to exceed 10 calendar days, whether or not to deny the access requested in accordance with the standard in subdivision 2 a of this subsection. The provider shall promptly ~~provide~~ notify the individual ~~notice~~ of the physician's, ~~or~~ psychologist's, licensed clinical social worker's, or counselor'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, licensed clinical social worker, or licensed professional counselor 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, licensed clinical social worker, or licensed professional counselor to review the decision.

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

**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, or use television, radio or other devices that access media, books, and newspapers, or other publication and web-based resources, whether privately owned or in a library or public area of the service setting available to individuals receiving services;
- 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 this chapter or otherwise required by law. If a provider imposes a restriction pursuant to this chapter, 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 and provided written notice 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.

4. 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.

5. Providers shall obtain approval of the LHRC of any restriction imposed on an individual's rights under this subsection or ~~12VAC35-115-50~~ that lasts longer than seven days or is imposed three or more times during a ~~30-day~~ 30-calendar day ~~time~~ period. If the LHRC finds that the restriction is not being implemented in accordance with this chapter, the director shall be notified, and the LHRC shall provide recommendations.

6. Providers may develop and enforce written program rules, but only if the rules do not conflict with this chapter or any ISP and are needed to maintain a safe and orderly environment.

7. 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~~ At the time of admission, and any time the rules are changed, 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 human rights advocate or LHRC and provide the rules to the human rights advocate any time the rules are changed; 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.

#### **12VAC35-115-105. Behavioral treatment plans.**

A. A behavioral treatment plan is used to assist an individual to improve participation in normal activities and conditions of everyday living, reduce challenging behaviors, alleviate symptoms of psychopathology, and maintain a safe and orderly environment.

B. Providers may use individualized restrictions ~~such as restraint or time-out~~ in a behavioral treatment plan to address challenging behaviors that present an immediate danger to the individual or others, but only after a licensed professional or licensed behavior analyst has conducted a detailed and systematic assessment of the behavior and the situations in which the behavior occurs. Providers shall document in the individual's services record that the lack of success or probable success of less restrictive procedures attempted or considered, and the risks associated with not treating the behavior, are greater than any risks associated with the use of the proposed restrictions.

C. Providers shall develop any behavioral treatment plan according to their policies and procedures, which shall 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; and

3. Behavioral treatment plans involving the use of restraint or timeout are submitted to an independent review committee, prior to implementation, for review and approval of the technical adequacy of the plan and data collection procedures.

D. In addition to any other requirements of 42 CFR 483.440(f)(3), providers that are intermediate care facilities for individuals with intellectual disabilities shall submit any behavioral

treatment plan that involves the use of restraint or time out, and its independent review committee approval, to the SCC under 42 CFR 483.440(f)(3) for the SCC's approval prior to implementation.

E. Providers other than intermediate care facilities for individuals with intellectual disabilities shall submit any behavioral treatment plan that involves the use of restraint or time out, and its independent review committee approval, to the LHRC, which shall determine whether the plan is in accordance with this chapter prior to implementation.

F. If either the LHRC or SCC finds that the behavioral treatment plan violates the rights of the individual or is not being implemented in accordance with this chapter, the LHRC or SCC shall notify the director and provide recommendations regarding the proposed plan.

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

H. Providers shall not use seclusion in a behavioral treatment plan.

### **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 by the individual 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 the individual's 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. Seclusion may be used only in an emergency and only in facilities operated by the department; residential facilities for children that are licensed under the Regulations for Children's Residential Facilities (12VAC35-46); inpatient hospitals; and crisis receiving centers or crisis stabilization units that are licensed under Part VIII (12VAC35-105-1830 et seq.) of 12VAC35-105.

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 a restraint that places the individual's body in a prone (face down) position.

7. 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 safety plan, the crisis ISP, or the ISP 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.



8. 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, shall be reported to the department as provided in 12VAC35-115-230 C.

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 this chapter 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 documents 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 nine 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.

D. For purposes of this section, "safety plan," "crisis individualized services plan," or "crisis ISP" shall have the same meaning as those terms are described in 12VAC35-105-1860 and 12VAC35-105-1870.

#### Part IV

##### Substitute Decision Making

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

A. Every individual shall be presumed to be capable of consenting to treatment, services, or research or authorizing the disclosure of information unless he is determined to lack capacity in accordance with this section and § 54.1-2983.2 of the Code of Virginia.

B. Except as provided by § 54.1-2983.2 of the Code of Virginia, if the capacity of an individual to consent to treatment, services, or research or to authorize the disclosure of information is in doubt, the attending physician shall: i) conduct a personal examination of the individual, ii) make a capacity assessment of the individual based upon the examination, iii) certify in writing the individual is incapable of making an informed decision regarding consent to treatment, services, or research or authorization for disclosure of information, and iv) obtain written certification from a capacity reviewer that, based upon a personal examination of the individual, the individual is incapable of making an informed decision. The capacity reviewer shall: ~~provider shall obtain an evaluation conducted by or under the supervision of a licensed professional, who is not directly involved with the individual to determine whether the individual has capacity to consent or to authorize the disclosure of information.~~

1. Be a licensed physician or clinical psychologist who is qualified by training or experience to assess whether an individual is capable or incapable of making an informed decision.

2. Not be otherwise currently involved in the treatment of the individual assessed, unless an independent capacity reviewer is not reasonably available.

3. Not be required if the individual is unconscious or experiencing a profound impairment of consciousness due to trauma, stroke or other acute physiological condition.

4C. 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.

~~2D.~~ In conducting this a capacity evaluation under subsection B, the professional attending physician or capacity reviewer may seek comments from other people who are directly involved with the individual and the individual's care from representatives accompanying the individual pursuant to 12VAC35-115-70 A 4 about the individual's capacity to consent or to authorize disclosure.

~~3E.~~ Providers shall determine the need for an evaluation of an individual's capacity to consent or authorize disclosure of information ~~and~~ or 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.

1a. 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.

2b. 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.

~~4F.~~ 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. No individual shall be deemed to lack capacity to consent to treatment, services, or research or to authorize the disclosure of information based solely on a particular clinical diagnosis.~~

G. Capacity evaluations pursuant to this section are solely for purposes of decision-making under these regulations.

H. Capacity evaluations shall indicate the specific type of decision for which the individual's capacity is being evaluated 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.~~ 1. If the individual or his family objects to the results of the ~~licensed professional's determination~~ capacity evaluation, the provider shall immediately inform the human rights advocate.

A1. 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 new 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.

B2. If the independent evaluation is consistent with the provider's evaluation, the provider's evaluation is binding, and the provider shall implement it accordingly.

~~3.~~ 3. If the independent evaluation is not consistent with the provider's evaluation, the matter shall be referred ~~to~~ within 10 business days to the Office of Human Rights for the LHRC for review and decision by the LHRC under 12VAC35-115-200.

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

A. ~~When~~ For decisions that do not require consent, the provider shall consider the expressed preferences of the individual and encourage the individual to make choices on his own behalf.

B. If 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 to treatment, services, or research or to 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~~ § 54.1-2983 of the Code 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. C.~~ If a decision maker recognized under subsection B 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 provided information about how to request LHRG review by the Office of Human Rights 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 except where a divorce action has been filed and the divorce is not final;

(2) An adult child;

(3) A parent;

(4) An adult brother or sister; or

(5) Any other relative of the individual in the descending order of blood relationship.

2. Next friend of the individual. ~~If no other person specified above~~ family member described in subdivision C 1 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.

c. The person designated as next friend also shall personally appear before the LHRC, unless the LHRC has waived the personal appearance and instead allowed 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.

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

E. 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 as required by subdivision C 1.

~~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 the 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.~~

F. An authorized representative shall (i) be available to participation in services as a substitute decision maker on behalf of the individual; (ii) agree to accept these responsibilities; and (iii) make a good faith effort to ascertain the religious values, basic values, and previously expressed preferences of the individual, and to the extent possible, base his decisions on the beliefs, values, and preferences of the individual, or if they are unknown, on the individual's best interests.

~~G. G.~~ 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 legal guardian, the provider shall assure that the individual's preferences are included in the services plan in accordance with § 64.2-2019 E of the Code of Virginia and that the individual can make complaints about any aspect of the services he receives.

~~D. H.~~ The provider shall document the recognition of an attorney-in-fact, health care agent, or legal guardian in accordance with subsection B, or the designation of an authorized representative pursuant to subsection C, in the individual's services record, including evidence of consultation with the individual about his preference. The following shall be included in the services record:

1. Consultation with the individual about his preferences;

~~2. copies~~ Copies of applicable legal documents such as the durable power of attorney, advance directive, or guardianship order; ~~;~~

~~3. names~~ Names and contact information for family members; ~~;~~ and;

~~4. when~~ 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 selected as the authorized representative.

~~E. I.~~ The provider shall explain the role of the authorized representative to the individual and the authorized representative prior to the time of designation, including that the individual has

the right to a review in accordance with 12VAC35-115-200. The provider shall communicate this information to the individual in a way most easily understood by the individual and document evidence of this communication in the individual's services record.

J. 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 pursuant to § 37.2-1101 of the Code of Virginia).~~

F. K. Court orders authorizing treatment shall not be viewed as substituting or eliminating the need for the provider to continue to seek an authorized representative. In situations where there is a judicial authorization for treatment, providers shall:

1. ~~Providers shall review~~ 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 Document~~ all such reviews ~~shall be documented~~ in the individual's services record and ~~communicated~~ communicate the results to the individual.
3. When the provider recognizes or designates an authorized representative or the individual regains capacity, the provider shall:
  - a. ~~notify~~ Notify the court that its order is may no longer be needed; and ~~shall~~
  - b. ~~immediately~~ Immediately suspend its use of the court order unless directed otherwise by the court.

~~G. L.~~ L. Conditions for removal of an authorized representative:;

1. Whenever an individual has regained capacity to consent as indicated by a capacity evaluation ~~or clinical determination pursuant to 12VAC35-115-145~~, the director shall:
  - a. ~~immediately~~ Immediately remove any authorized representative designated pursuant to subdivision ~~B~~ C 1 or 2 of this section;;
  - b. ~~notify~~ Notify the individual and the authorized representative; and
  - c. ~~ensure~~ Ensure that the services record reflects that the individual is capable of making his own decisions.
2. Whenever an individual with an authorized representative who is his a legal guardian has may have regained his capacity to give informed consent, the director ~~may~~ shall use the applicable statutory provisions of § 64.2-2012 to ~~remove~~ petition the court for restoration of the individual's legal capacity ~~the authorized representative. (See § 64.2-2012 of the Code of Virginia.)~~
3. 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.

4. M. The director shall remove ~~the~~ an authorized representative designated pursuant to subdivision B ~~4~~ or 2 or C 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. 1. 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. 2. 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.~~

N. The individual or the human rights advocate may request the LHRC to review the director's decision to remove an authorized representative under the procedures set out in 12VAC35-115-200, and the LHRC may reinstate the authorized representative if it determines that the director's action was unjustified.

## Part V

### Complaint Resolution, Hearing Review , and Appeal Procedures

#### **12VAC35-115-149. Applicable definitions for complain resolution, review, and appeal procedures.**

For the purposes of Part V of this chapter, "individual" shall also include those persons who are no longer receiving services and were discharged if their complaint arises from the services provided and the violation is alleged to have occurred or ended within one year o the date of the complaint.

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

A. Court orders or orders or decisions entered after an administrative hearing are not subject to review under the human rights complaint resolution process.

B. 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.

C. The timeframe for filing a complaint is within one year of the date the alleged violation occurred or ended. ~~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). 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).~~

~~D. 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 if the director thinks such action is correct and justified.~~

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

F. 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.

G. In no event shall a pending administrative hearing, fact-finding 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 if the director thinks such action is correct and justified.

~~G~~H. In making 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 this chapter.

~~H~~I. 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.

~~I~~J. 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~~conditions, if any, that prevent ~~efforts to fully remedy the violation~~implementation of the recommendations.

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

### **12VAC35-115-175. Human rights complaint process.**

A. Each individual has a right to:

1. Make a complaint that the provider has violated any of the rights assured under this chapter regarding the individual's receipt of services, including a complaint made after discharge ;
2. Have a timely and fair review of any complaint in accordance with this chapter and the program's human rights complaint resolution policies and procedures;
3. Have someone file a complaint on his behalf;
4. Use these and other complaint procedures; ~~and~~
5. Make a complaint under any other applicable law, including to the protection and advocacy agency- ; and
6. Have access to a human rights advocate for assistance with the complaint.

B. ~~The individual shall:~~

1. ~~Be contacted by the director or the director's designee regarding the complaint within 24 hours;~~
2. ~~Have access to a human rights advocate for assistance with the complaint;~~
3. ~~Be protected from retaliation and harm;~~
4. ~~Have the complaint reviewed, investigated, and resolved as soon as possible;~~
5. ~~Receive a report with the director's decision and action plan within 10 working days; and~~



~~6. Be notified in writing of his right to and the process for appealing the director's decision and action plan to the LHRC. The timeframe for filing a complaint is within one year of the date the alleged violation occurred or ended.~~

C. Upon receipt of a complaint, providers shall:

- ~~1. Notify the department of the complaint as soon as possible, but no later than the next business day as required in Section 230 ; .~~
- ~~2. Ensure that the director or the director's designee contacts the individual regarding the complaint within 24 hours ; .~~
- ~~3. Initiate an impartial thorough investigation into, ~~or resolution of,~~ the complaint as soon as possible, but no later than the next business day ; . The program director shall ensure that the investigation is conducted by a person trained to do investigations of complaints under this chapter and who is not involved in the issues under investigation.~~
- ~~4. Take all steps necessary to ensure that individuals involved in the complaint are protected from retaliation and harm ; .~~
- ~~5. Assist the individual making a complaint in understanding the human rights complaint process, the provider's complaint resolution policies and procedures, and the confidentiality of involved information ; .~~
- ~~6. Ensure that all communications to the individual are in the manner, format, and language most easily understood by the individual;~~
- ~~7. Adhere to the reporting requirements in 12VAC35-115-230; and~~
- ~~8. Report Provide the director's decision and action plan to the individual, authorized representative, if applicable, and human rights advocate within 10 working business days from receipt of the complaint to the individual, authorized representative, if applicable, and human rights advocate unless an extension has been granted. The director's decision shall be in writing and shall include a description of the alleged violation, the findings of fact, a determination of whether the violation occurred, and notification to the individual of his right to appeal and the process for appealing the director's decision or action plan to the LHRC.~~

~~D. The human rights advocate may, at the request of the provider, extend the time period for an investigation to be completed before or after the expiration for good cause. No director may extend any time periods for any actions he is required to take under this section.~~

~~D. All providers shall have complaint resolution policies and procedures that address all of the requirements of subsections C and E of this section.~~

~~E. Provider complaint resolution policies and procedures shall be in writing and approved by the department prior to implementation. The policies and procedures shall:~~

- ~~1. Ensure that anyone who believes that a provider has violated an individual's rights under this chapter can report it to the director or the human rights advocate for resolution;~~
- ~~2. Ensure that employees shall not take, threaten to take, permit, or condone any action (i) to punish or retaliate against anyone filing a complaint or (ii) to prevent anyone from filing or helping an individual file a complaint either under this chapter or with an outside entity;~~
- ~~3. Ensure that every attempt is made to resolve an individual's complaint as quickly as possible;~~
- ~~4. Provide opportunities for timely negotiation and resolution for all complaints, including the additional requirements related to abuse, neglect, or exploitation in subsection F of this section;~~

- ~~5. Establish a process for designating the director's responsibilities to ensure timely complaint reporting and resolution;~~
- ~~6. Detail the program's complaint review or investigation process, including (i) specific actions the program will take to protect the individual and gather and document relevant information and (ii) how and when the individual and his authorized representative, if applicable, will receive updates on the progress of the review;~~
- ~~7. Detail notification requirements and deadlines including procedures for providing:
  - ~~a. The program's complaint policies and procedures to all individuals and authorized representatives at admission to service; and~~
  - ~~b. Written notification to the individual regarding his right to and the process to appeal the director's decision and action plan to the LHRC; and~~~~
- ~~8. Detail staff training requirements regarding the program's complaint resolution process and requirements.~~

F. Additional requirements for complaints involving abuse, neglect, or exploitation:

1. The program director shall take immediate steps to protect the individual until the investigation is complete, including those listed in 50 D 3 b of this chapter and any other appropriate personnel actions.
2. Any instance of seclusion or restraint that does not comply with this chapter or an approved variance, or that results in injury to an individual, shall be reported to the authorized representative, as applicable, and the department in accordance with the requirements for reporting allegations of abuse.
3. The program director shall notify the department and authorized representative, if applicable, of an allegation of any complaint involving abuse, or neglect, or exploitation, and the steps taken to protect the individual until an investigation is complete, within 24 hours of the receipt of the allegation complaint, and comply with all other reporting requirements in Section 230 .
4. The program director shall ensure that the investigation is conducted by a person trained to do carry out investigations of abuse, neglect, or exploitation under this chapter and who is not involved in the issues under investigation.
5. The program director shall ensure that the investigation begins as soon as possible but within 24 hours.
6. Within 10 business days from the date the investigation begins:
  - a. The investigator shall provide a written report of the results of the investigation of abuse, or neglect, or exploitation to the director and to the human rights advocate within 10 working days from the date the investigation began unless an extension has been granted.
  - b. The program director shall decide, make a final decision based on the investigator's report and any other available information, 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.
  - c. The program director shall develop an action plan, if applicable.
  - d. The program director shall submit the final decision and action plan, if applicable, to the individual, authorized representative, if applicable, and human rights advocate within 10 working days of its completion.

F. All providers shall have complaint resolution policies and procedures that address all of the requirements of this Section 50 D 3 a of this chapter. Provider complaint resolution policies and

procedures shall be in writing and approved by the department prior to implementation. The policies and procedures shall:

1. Ensure that anyone who believes that a provider has violated an individual's rights under this chapter can report it to the director or the human rights advocate for resolution;
2. Ensure that employees shall not take, threaten to take, permit, or condone any action to (i) punish or retaliate against anyone filing a complaint; or (ii) prevent anyone from filing or helping an individual file a complaint either under this chapter or with an outside entity;
3. Ensure that every attempt is made to resolve an individual's complaint as quickly as possible;
4. Provide opportunities for timely negotiation and resolution for all complaints, including the additional requirements related to abuse, neglect, or exploitation in section 50 D 4;
5. Establish a process for when the director is the subject of the complaint, including designating the director's responsibilities and final decision making authority regarding whether a violation occurred to another person to ensure impartiality, separation from the investigation, and timely reporting and resolution.
6. Detail the program's complaint review or investigation process, including (i) specific actions the program will take to protect the individual and gather and document relevant information and (ii) how and when the individual and his authorized representative, if applicable, will receive updates on the progress of the review;
7. Detail notification requirements and deadlines including procedures for providing:
  - a. The program's complaint policies and procedures to all individuals and authorized representatives at admission to service; and
  - b. Written notification to the individual regarding his right to and the process to appeal the director's decision and action plan to the LHRC; and
8. Detail staff training requirements regarding the program's complaint resolution process and requirements.

G. If 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's governing body, and the LHRC. The LHRC shall conduct a hearing fact-finding review according to the special procedures for emergency ~~hearings~~ fact-finding reviews in 12VAC35-115-190.

~~H. The director shall cooperate fully with any abuse or neglect complaint investigation conducted by a local department of social services.~~

~~I. If at any time the director has reason to suspect that the abusive, neglectful, or exploitive act is a crime and that it occurred on the program premises, the director or designee shall immediately contact the appropriate law enforcement authorities and cooperate fully with any investigation that may result~~ comply with all reporting requirements in Section 230 of this chapter.

I. In no event shall a pending administrative hearing, fact-finding review, or appeal prevent a director from taking corrective action related to the complaint if such action is required by law or if the director thinks such action is necessary to protect the health and safety of individuals receiving services.

**12VAC35-115-180. Local human rights committee ~~hearing~~ and fact-finding review procedures.**

A. Any individual or his authorized representative who disagrees with a director's final decision or action plan resulting from any complaint resolution process under this chapter may request an LHRC ~~hearing~~ fact-finding review by following the process described in this section. This fact-

finding review is not subject to the provisions of the Administrative Process Act Section 2.2-4000. et. seq.

B. Within 10 business days from receipt of the director's action plan or final decision on the complaint, the individual or his authorized representative shall file the petition submit to the human rights advocate a statement of disagreement with a request for a hearing fact-finding review. The human rights advocate shall transmit the statement of disagreement with the chairperson of the LHRC and forward a copy to the provider director within 10 working days from receipt of the director's action plan or final decision on the complaint.

1. The petition statement of disagreement and request for hearing a fact-finding review shall be in writing. It shall contain all facts and arguments surrounding the complaint and reference any section of this chapter that the individual believes the provider violated.

2. The human rights advocate or any person the individual chooses may help the individual in submitting filing the petition statement of disagreement. 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 writing the statement of disagreement .

C. The LHRC chair provider's director shall forward a copy of the petition statement of disagreement to the provider's governing body, 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. Within five working business days, the director shall submit to the LHRC the human rights advocate who shall forward the materials on the LHRC and the individual::

1. A written response to everything contained in the petition statement of disagreement ; and

2. A copy of the entire written record of the complaint including copies of relevant reports submitted via the department's web-based reporting application.

E. LHRC hearing fact-finding review procedures:

1. The fact-finding review shall be canceled if resolution is reached prior to commencement of the fact-finding review.

2. Reviews will generally be closed to third parties 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. The LHRC may conduct a closed fact-finding review 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 or other provision of law.

3. 3. The LHRC shall hold a hearing fact-finding review within 20 working business days of receiving the petition statement of disagreement .

4. 4. The parties shall have at least five working business days' notice of the hearing fact-finding review date.

5. 5. The director or his designee shall attend the hearing fact-finding review.

6. 6. The individual or his authorized representative making the complaint shall attend the hearing fact-finding review, unless the individual designates a chosen representative per B 2 of this section to attend on his behalf.

7. 7. The hearing fact-finding review is an informal process and, as such, the rules of evidence are not applicable.

8. 8. At the hearing fact-finding review, the parties and chosen representatives and designees have the right to present witnesses and other evidence and the opportunity to be heard, but there shall be no cross examination.

~~7. 9.~~ The hearing fact-finding review shall be conducted in a nonadversarial manner.

a. Each party shall be provided the opportunity to present its facts.

b. ~~Each party shall direct questions to the LHRC rather than to the other party.~~

~~c.~~ The LHRC shall ask questions, as appropriate, to each party.

F. Within 10 working business days after the hearing fact-finding review is completed, ~~ends,~~ the LHRC shall give its written findings of fact, determination of violations, and recommendations to the parties and their representatives through the Office of Human Rights. 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. In making recommendations regarding complaint resolution, the LHRC shall identify any regulations the provider violated and any policies, practices, or conditions that contributed to the violations. It shall also recommend appropriate corrective actions, including changes in policies, practices, or conditions to prevent further violations of the rights assured under this chapter.

~~G.~~ H. Within five working business days of receiving the LHRC's findings of fact, determination of violations 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 ~~to the director~~ intends to implement 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 timeframe for the individual's response and a statement that if the individual does not respond, then the complaint will be closed. The plan shall not be implemented for five working business days after it is submitted, unless the individual agrees to its implementation sooner.

I. 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 including identifying conditions, if any, that may prevent full implementation of the recommendations.

~~H.~~ J. The individual, his chosen representative, the human rights advocate, or the LHRC may object to the action plan within five working business 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 until the objection is resolved. The provider may, however, implement any portion of the plan to which the individual making the complaint agrees.

2. If no one objects to the action plan, the director shall begin to implement the plan on the sixth working business day after ~~to the director~~ submitted it, or as otherwise provided in the plan.

~~I.~~ K. 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 business days following its receipt by the director, the individual may appeal to the SHRC under 12VAC35-115-210.

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

A. The individual, his authorized representative, or anyone acting on the individual's behalf may request in writing via communication to the human rights advocate ~~that the LHRC~~ a review of the following situations and issue a decision:

1. If an individual objects at any time to ~~the appointment of a specific person as his authorized representative or any decision for which consent or authorization is required that 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~~ the authorized representative's decision was made based on the individual's previously expressed beliefs, basic values, and any

preferences, ~~previously expressed by the individual to the extent that they are known, and/or~~ 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 are 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 preference previously expressed by the individual to the extent known, and if unknown or unclear, made 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, or to authorize the disclosure of information under 12VAC35-115-80, 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~~ decides the provider's original evaluation will control, the director may begin or continue treatment or research or disclose information, but only with 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 decides the independent evaluation indicating the individual has capacity will control ~~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~~ and 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 to 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 stop such 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.

~~Regardless of the individual's capacity to consent to treatment or services or to 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 stop such 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 to authorize disclosure of information. The LHRC shall notify all parties and the human rights advocate of the decision within 10 business days of the initial request.~~

C. If an individual objects at any time to the appointment of a specific person as his authorized representative, he may ask the Office of Human Rights for an administrative review of whether the individual's capacity evaluation and the designation of the authorized representative was conducted in accordance with this chapter:

1. The provider shall take no action for which new consent or authorization is required if the individual objects, except in an emergency or as otherwise permitted by law, pending the review by the Office of Human Rights.

2. If the Office of Human Rights determines that the individual's capacity was properly evaluated and the authorized representative was properly designated, then the provider may proceed according to the decision of the authorized representative.

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

4. All parties will be notified of the decision by the human rights advocate. Administrative reviews conducted under this chapter by the Office of Human Rights cannot be appealed to the LHRC or SHRC.

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

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

A. Any party may appeal to the SHRC if he disagrees with any of the following:

1. An LHRC's final findings of fact, ~~conclusions, determination regarding violations and/or~~ recommendations following a hearing fact-finding review;
2. A director's final action plan following an LHRC hearing fact-finding review;
3. An LHRC's final decision regarding the capacity of an individual to consent to treatment, services, or research or to 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, C, and D of this section.

B. Appeals shall be ~~filed submitted~~ in writing with the SHRC via communication to the human rights advocate by a party within 10 working days of receipt of the final decision or action plan.

1. The appeal shall explain the reasons for disagreement with the final decision or action plan.
2. The human rights advocate or any other person the individual chooses may help in ~~filing~~writing 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 shall give a copy of the appeal to the other party via communication to the human rights advocate. ~~the human rights advocate, and The human rights advocate will inform~~ 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. 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 via communication to the human rights advocate. 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 via communication to the human rights advocate.

D. Within five working days of noting or being notified of an appeal, the ~~director~~ Office of Human Rights shall forward a complete record of the LHRC ~~hearing~~ fact-finding review to the SHRC. The record shall include, at a minimum:

1. The original ~~petition~~ statement of disagreement 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, ~~conclusions~~ determinations regarding violations, and recommendations;
6. The director's action plan, if any; and
7. Any written objections to the action plan or its implementation.

E. 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~~ business days' notice of the ~~appeal hearing~~ appeal date.
2. The SHRC shall notify the Office of the State Inspector General (§ 2.2-308 of the Code of Virginia) of the appeal.
3. The following rules govern appeal ~~hearings~~ proceedings:
  - a. The SHRC shall not hear any new evidence.
  - b. The SHRC is bound by the LHRC's findings of fact unless it makes a determination that those findings of fact are clearly wrong or that the ~~hearing~~ fact-finding review procedures of the LHRC were inadequate.



- c. The SHRC shall limit its review to whether the facts, as found by the LHRC, establish a violation of this chapter 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.
4. If the SHRC decides that the LHRC's findings of fact are clearly wrong or that the hearing fact-finding review procedures employed by the LHRC were inadequate, the SHRC may:

- a. Send the case back to the LHRC for another hearing fact-finding review to be completed within a time period specified by the SHRC; or
- b. Conduct its own fact-finding hearing review . If the SHRC chooses to conduct its own fact-finding hearing review , it may appoint a subcommittee of at least three of its members as fact finders. The SHRC fact-finding hearing review shall be conducted within 30 workingbusiness days of the SHRC's initial hearing appeal review .

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

F. Within 20 workingbusiness days after the SHRC appeal hearing date, the SHRC shall submit a decision containing its findings of fact, if applicable, and its conclusions and recommendations to the commissioner and to the provider's governing body, with copies to the parties, the LHRC, and the human rights advocate. The decision shall identify any regulations the provider violated and any policies, practices, or conditions that contributed to the violations. The SHRC shall also recommend appropriate corrective actions, including changes in policies, practices, or conditions to prevent further violations of the rights assured under this chapter.

G. Within 10 workingbusiness days after receiving the SHRC's decision, in the case of appeals involving a state facility, the commissioner shall submit an outline of actions to the director to be taken in response to the SHRC's recommendations. In the case of appeals involving CSBs and private providers, the director shall outline in writing the action or actions that will be taken 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. If the SHRC objects in writing to the commissioner's or director's proposed actions, their actions shall be postponed. The commissioner or director shall meet with the SHRC at its next regularly scheduled meeting to attempt to arrange a mutually agreeable resolution.

I. Final determination regarding the action plan shall be as follows:

- 1. 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 this chapter, it shall notify the board, the protection and advocacy agency, and the Office of the State Inspector General (§ 2.2-308 of the Code of Virginia).
- 2. In the case of services delivered by all other providers, the action plan of the director 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. Upon completion of the process outlined in this section, the SHRC shall notify the parties and the human rights advocate of the final outcome of the complaint.

## Part VII

### Reporting Requirements

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

A. Providers shall collect, maintain, and report the following information concerning complaints:

1. The director of a facility operated by the department shall report complaints that do not involve abuse, neglect, or exploitation via the department's web-based reporting application 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 complaints that do not involve abuse, neglect, or exploitation via the department's web-based reporting application by the end of the next business day after receipt of the complaint in accordance with 12VAC35-115-175.

3. The provider shall submit the director's findings to the human rights advocate via the department's web-based reporting application within 10 business days from the date the investigation began unless an extension was granted in accordance with 12VAC35-115-175. This report shall include:

a. Whether a violation occurred;

b. A description of the resolution offered; and

c. Whether the resolution was accepted by the individual.

B. Providers shall collect, maintain, and report the following information concerning complaints involving abuse, neglect, and or exploitation:

1. The director of a facility operated by the department shall report ~~allegations of complaints involving~~ abuse, and neglect, or exploitation via the department's web-based reporting application 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~~ complaint involving abuse, or neglect, or exploitation via the department's web-based reporting application within 24 hours of receipt of the ~~allegation~~ complaint (~~see 12VAC35-115-175~~).

3. Immediately notify the appropriate social services or protective services agency about any individual who the provider reasonably suspects to be a victim of abuse, neglect, or exploitation in accordance with § 63.2-1509 or § 63.2-1606 of the Code of Virginia and any other applicable law or regulation.

4. The investigating authority shall provide a written report of the results of the investigation of abuse, or neglect, or exploitation to the director and human rights advocate via the department's web-based reporting application within 10 ~~working~~ business days from the date the investigation began unless an extension has been granted (~~see in accordance with~~ 12VAC35-115-175). 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; and

d. Any actions taken by the provider to correct or remediate the abuse, neglect, or exploitation.

~~B. C.~~ 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. D.~~ Providers shall collect, maintain and report in the manner prescribed by the department 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 or types, to include:
    - (1) Physical restraint (manual hold);
    - (2) Mechanical restraint;
    - (3) Pharmacological restraint; or
    - (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 this chapter or approved variances, or that results in injury to an individual, shall be reported to the authorized representative, as applicable, and to the department via the department's web-based reporting application within 24 hours.

~~D. E.~~ Providers shall report to the human rights advocate and the LHRC when requested information on each complaint of a human rights violation, including a description and its conclusions, and report on implementation of variances, in accordance with the LHRC meeting schedule.

~~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 Office of the State Inspector General (§ 2.2-308 of the Code of Virginia) 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~~ disclosing 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 disclosed to the public, including encryption of data transferred by electronic means.

H. Nothing in this section is to be construed ~~as requiring to require~~ the reporting of proceedings, minutes, records, or reports of any entity that 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 this chapter that constitute reportable conditions under federal or state law laws and regulations . Such reports shall be documented in the department's web-based reporting application.

## Part VIII

### Enforcement and Sanctions

#### Part IX

### Responsibilities and Duties

#### **12VAC35-115-260. Provider and department responsibilities.**

A. Providers, through their directors, shall:

1. Designate a person or persons responsible for helping individuals exercise their rights and resolve complaints regarding services;

2. Take all steps necessary to perform duties required by, and ensure compliance with, this chapter in all services provided;

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

4. Communicate information about the availability of a human rights advocate to individuals and authorized representatives, in accordance with 12VAC35-115-40 B 1 and B 2;

5. Ensure access, as needed, to the LHRC for all individuals receiving services;

6. Provide the human rights advocate unrestricted access to an individual and his services records whenever the human rights advocate deems access is necessary to carry out rights protection, complaint resolution, and advocacy on behalf of the individual;

7. Communicate in writing to the individual, and the authorized representative, if applicable, information about any actions taken by the provider outside of the complaint resolution process to correct or remediate a violation of this chapter that directly involved the individual;

~~7.~~ 8. Require competency-based training of employees on this chapter upon employment and at least annually thereafter. Documentation of such ~~competency~~training shall be maintained in the employee's personnel file;

9. Require competency-based training of employees responsible for conducting investigations of complaints of alleged violations of this chapter upon designation, and at least annually thereafter, and maintain documentation of such training in each employee's personnel file;

~~8.~~ 10. Comply with all state laws governing the reporting of abuse and neglect and all procedures set forth in this chapter for reporting allegations of abuse, neglect, or exploitation and cooperate fully with any investigation that may result. This shall include immediately contacting the appropriate social services or protective services agency if at any time the director has reason to suspect that an abusive, neglectful, or exploitative act occurred, and that it occurred during provision of a service;

~~9.~~ 11. Submit to the human rights advocate for review and comment proposed policies, procedures, or practices that may affect individual human rights;

~~10.~~ 12. Ensure designation and participation—appointment of a designated of an appropriate staff as a liaison to, and appropriate staff participation with, the LHRC, as required Office of Human Rights. Notification of the change of a designated liaison shall be made to the Office of Human Rights.

~~11.~~ 13. 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, the LHRC, and the SHRC in carrying out their duties under this chapter;

~~12.~~ 14. Comply with all requests by the SHRC, LHRC, or human rights advocate for information regarding compliance with this chapter to include ; provider policies, procedures, service records, written reports, and provision of access to employee witnesses and electronic meetings, and written reports regarding compliance with this chapter;

~~13.~~ Ensure the availability of records and employee witnesses upon the request of the LHRC or SHRC;

~~14.~~ 15. Submit applications for variances to this chapter only as a last resort; and

~~15.~~ 16. Not influence or attempt to influence the appointment of any person to an LHRC affiliated with the provider or director.

B. Providers shall require their employees to:

1. Read and become~~Become~~ familiar with this chapter, comply with it in all respects, and help individuals understand and assert their rights;

2. Protect individuals from any form of abuse, neglect, or exploitation by:

a. Not abusing, neglecting, or exploiting any individual;

b. Using the minimum force necessary to restrain an individual;

c. Not permitting or condoning anyone else abusing, neglecting, or exploiting any individual; and

d. Immediately Reporting reporting all suspected abuse, neglect, or exploitation ~~to so~~ the director may fulfill the requirements of Section 230; and

3. Cooperate with any investigation, meeting, hearing fact-finding or other review, or appeal held under this chapter. Cooperation includes giving statements or sworn testimony.

C. Department human rights advocates shall:

1. ~~Represent~~ Support any individual making a complaint or, upon request, consult with and help any other representative the individual chooses;
2. Provide training to individuals, authorized representatives, family members, and providers on this chapter;
3. Investigate and ~~try to~~ make recommendations to facilitate the prevent prevention or correct correction of any alleged rights violation of this chapter or any conditions, policies, or practices that may interfere with the free exercise of individuals' rights by interviewing, mediating, negotiating, advising, or consulting with providers and their respective governing bodies, directors, and employees;
4. Issue notice to providers about violations of this chapter when a violation is determined to have occurred either through the providers investigation or the department's review; and
4. ~~5.~~ Provide orientation, training, and technical assistance to the LHRCs for which he the human rights advocate is responsible; and
5. ~~Investigate and examine all conditions or practices that may interfere with the free exercise of individuals' rights.~~

D. The department shall:

1. Employ the state human rights director to lead statewide implementation of the human rights program;
2. Determine, in consultation with the SHRC, the appropriate number and geographical boundaries of LHRCs;
3. Develop information, ~~assistance~~ guidance, training tools, and other resources on this chapter for individuals and constituents ~~on this chapter~~;
4. Provide for regular monitoring and enforcement of this chapter, including conducting unannounced compliance reviews at any time;
5. Cooperate with and provide support to the SHRC and LHRCs, including:
  - a. Training ~~SHRC and LHRC~~ members on their responsibilities, roles, and functions under this chapter;
  - b. Providing access to ~~topic area consultants~~ subject matter experts and to consultants as needed to support ~~their fulfilling~~ fulfillment of their the duties of the members under this chapter; and
  - c. Providing necessary support for SHRC and LHRC ~~investigations~~ reviews ; and meetings ; and hearings ; and
6. Maintain current and regularly updated data of incidences of abuse, neglect, and exploitation; seclusion and restraint; complaints, deaths and serious injuries; 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. Compile all data reported under this section and make this data available to the public and the Office of the State Inspector General upon request in writing or by electronic means after removing all provider-identifying information and all information that could be used to identify a person as an individual receiving services.

**12VAC35-115-270. State Human Rights Committee and local human rights committees responsibilities.**

A. Local human rights committees shall:

1. Review any restriction on the rights of any individual imposed pursuant to 12VAC35-115-50 or 12VAC35-115-100 that lasts longer than seven calendar days or is imposed three or more times during a ~~30-day~~ 30-calendar day period for providers within the LHRC's ~~jurisdiction~~ purview in accordance with 12VAC35-115-50 D 3 and 12VAC35-115-100 B 5;
2. Review next friend designations in accordance with 12VAC35-115-146 B 2;
3. Hold hearings fact-finding reviews according to the procedures set forth in Part V (12VAC35-115-150 et seq.) of this chapter for any individual served by a provider under the LHRC's ~~jurisdiction~~ purview;
4. Review behavioral treatment plans in accordance with 12VAC35-115-105;
5. Receive, review, and act on applications for variances to this chapter in accordance with 12VAC35-115-220;
6. Receive and review documentation regarding approval of and any individual's participation in research in accordance with 12VAC35-115-130;
7. Conduct reviews involving consent and authorization in accordance with 12VAC35-115-200.
8. Consist of five or more members appointed by the SHRC.
  - a. Membership shall be broadly representative of interests of ~~professional professionals and consumer interests~~ individuals who are receiving or who have received services as required in § 37.2-204 of the Code of Virginia.
  - b. One-third of the appointments made to the local human rights committees shall be individuals who are receiving or who have received services or family members of such individuals, with at least two individuals who are receiving or who have received public or private mental health, developmental, or substance abuse treatment or habilitation services within five years of the date of their initial appointment on each committee.
  - c. At least one member shall be a health care provider.
  - ~~e.~~ d. 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.~~ e. Members shall recuse themselves from all cases in which they have a financial or other conflict of interest.
  - ~~e.~~ f. Initial appointments to an LHRC shall be staggered, with approximately one-third of the members appointed for terms of three years, approximately one-third for terms of two years, and the remainder for a term or terms of one year. After that, all appointments shall be for terms of three years.
  - f. g. 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.
  - ~~g.~~ h. 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;
7. 9. Elect a chairperson from its own members who shall:
  - a. Coordinate the activities of the LHRC; and
  - b. Preside at regular meetings and hearings reviews held pursuant to this chapter;
8. 10. Meet ~~every quarter~~ quarterly or more frequently as necessary to adhere to all timelines as set forth in this chapter; and

9. ~~11.~~ Adopt written bylaws that address procedures for conducting business; electing the chairperson, ~~secretary~~ vice chairperson , and any other officers as specified ; designating standing committees; and setting the frequency of meetings.

B. Local human rights committees may delegate 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.

C. The State Human Rights Committee shall:

1. Perform the following responsibilities with respect to the operation of LHRCs:
  - a. Appoint LHRC members with the advice of the respective LHRC, human rights advocate, and the state human rights director;
  - b. Review and approve the bylaws of LHRCs; and
  - c. Provide oversight to and assist LHRCs in the performance of their duties under this chapter, including the development of ~~guidance documents~~ procedural protocols for the execution of LHRC duties ;
2. Review LHRC decisions when required by this chapter 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 this chapter;
3. 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 ensure that:
  - a. Its recommendations are communicated to providers, human rights advocates, and LHRCs as appropriate; and
  - b. The communication of its recommendations does not identify the name of individuals or employees in a particular case;
4. 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;
5. Submit to the board and publish an annual report of its activities and the status of human rights in services licensed, funded, or operated by the department and make recommendations for improvement;
6. Evaluate the implementation of this chapter and make necessary and appropriate recommendations to the board, the commissioner, and the state human rights director concerning its interpretation and enforcement;
7. Review and make recommendations to the department and board, as appropriate, concerning:
  - a. The scope and content of training programs designed by the department to promote responsible performance of the duties assigned under this chapter;
  - b. Existing or proposed policies, procedures, or practices that could jeopardize the rights of individuals receiving services from any provider;
  - c. Proposed revisions to this chapter; and
  - d. Revisions to existing or proposed laws, regulations, policies, procedures, and practices that are needed to ensure the protection of individuals' rights;
8. Consist of nine members appointed by the board.



- a. Members shall be broadly representative of interests of professional professionals and consumer interests individuals who are receiving or have received services as required in § 37.2-204 of the Code of Virginia;
  - b. Members shall recuse themselves from all cases in which they have a financial or other conflict of interest;
  - c. If there is a vacancy, interim appointments may be made by the board for the remainder of the unexpired term;
  - d. 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; and
  - e. No current member of an LHRC or current employee of the department, a CSB, or a behavioral health authority may serve as a member of the SHRC;
9. 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. b. Have direct access to the state human rights director, commissioner , and the board in carrying out these duties;~~
10. Conduct at least eight regular meetings per year; and
11. Adopt written bylaws that address procedures for conducting business; making membership recommendations to the board; electing a chairperson, vice chairperson, ~~secretary~~, and any other officers; appointing members of LHRCs; designating standing committees and their responsibilities; establishing ad hoc committees; and setting the frequency of meetings.