IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RASHAD MATTHEW RIDDICK,
Plaintiff

V. **Civil Action no. 3:19-cv-71**

JACK BARBER
HUGHES MELTON
REBECCA A. VAUTER,
Defendant.

I. JURISDICTION

1. This is a civil action under 42 U.S.C. §1983 to redress the deprivation, under color of state law, of the rights secured by the constitution of the United States for violations of Plaintiff Rashad Matthew Riddick's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

II. VENUE

2. Venue is proper in this court pursuant to 42 U.S.C §1391 (b) because during the relevant time period, Plaintiff was hospitalized in one of Virginia's state mental hospitals (Central State Hospital in Petersburg, Virginia) and a substantial part of the events giving rise to the claims occurred in this district.

II. PLAINTIFF'S

3. Plaintiff Rashad Matthew Riddick (Plaintiff) is and was at all times mentioned herein, a patient under the care and custody of the Virginia Department of Behavioral Health and

Developmental Services. Plaintiff is currently housed at Central State Hospital in Petersburg, Virginia where the incidents in said complaint took place.

4. At all times relevant to this case, Plaintiff Riddick was housed at Central State Hospital in Petersburg, Virginia and under the care and custody of the Commissioner per valid court order.

III. DEFENDANTS

5. Defendant Jack Barber was, from February 2018, until June of 2018, the interim Commissioner of the Virginia Department of Behavioral Heath and Developmental Services (DBHDS). He was legally responsible for the overall operation of the DBHDS including Central State Hospital.

6. Defendant Hughes Melton was, from June 2018, until June 2019 the acting commissioner of the VDBHDS. He was legally responsible for the overall operation of the DBHDS including Central State Hospital.

7. Defendant Rebecca Vauter was, at all times mentioned herein the acting Director of Central State Hospital. She is legally responsible for the daily operations of Central State Hospital.

8. Each Defendant is being sued individually in his or her individual capacity. At all times mentioned in this complaint each Defendant acted under color of state law.

IV. FACTS

COUNT I

9. On January 30, 2018 at approximately 9:55 a.m. in Central State Hospitals Building 39, Ward 6, Plaintiff was approached by Central State Hospital's Response Team and advised that per Commissioner Jack Barber (Former Interim Commissioner of the Virginia Department of Behavioral Health and Developmental Services) and Rebecca A. Vauter (Central State Hospital's acting Director) he was to be placed into 4-point restraints indefinitely. Plaintiff remained in said restraints for a full 2 weeks.

10. For 2 weeks Plaintiff was not permitted to go the Treatment Mall where all other patients were permitted to attend groups. Plaintiff was not permitted to use the law library or use any of the legal materials provided to all other patients.

11. Plaintiff was unable to attend religious services that are afforded to all other patients. When Plaintiff showered, Plaintiff remained in 4-point restraints and was only permitted to take out one arm at a time which prevented him from properly washing his body. Hygiene became a major issue. Plaintiff was unable to go to the gym for exercise. In sum, Plaintiff had been made to endure a permanent stress position for over 2 weeks per the directive of Defendant Barber and Defendant Vauter.

COUNT II

12. On February 15th 2018 at around 2:00 p.m., Plaintiff was escorted to an empty psychiatric ward in Building 39's Forensic Unit. Upon entering the area described above, Defendant Vauter

exited the nurses' station area from a side entrance only to announce that plaintiff was to remain on this ward by himself until further notice. No further instructions were given.

13. Plaintiff remained on said ward by himself in total isolation for 577 days with absolutely no physical human contact. Throughout this entire 19 month period when Plaintiff was fed, Plaintiff was fed through a slot cut into the nurses' station window. Plaintiff was not permitted outside recreation for the first full year. Plaintiff was not permitted to attend church services. Plaintiff was not permitted to go to groups for treatment. No staff or nursing were allowed to be on the ward around Plaintiff. Additionally, the wards nurses' station window had been taken down and converted into a one-way mirror so that not only was Plaintiff not permitted to *be* around anyone, the ward was set up to where Plaintiff could not even *see* anyone.

14. Plaintiff remained on said ward by himself housed in an empty dayroom area with absolutely no human contact for 19 months. During this period of extreme isolation Plaintiff experienced gross hallucinations, Plaintiff talked to himself a lot, and experienced long periods of depression where Plaintiff stopped eating. Such conditions posed an atypical and significant hardship on Plaintiff in relation to the ordinary incidents of hospital life.

V. EXHAUSTION OF LEGAL REMEDIES

15. I have exhausted all institutional remedies in accordance with hospital policy and addressed all of the issues alleged above in full. (See Exhibit A)

(See all attached complaints and responses to complaints)

VI. LEGAL CLAIMS

16. Plaintiff realleges and incorporates by reference paragraphs 1-21 .

17. The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty or property without due process of law". To establish a procedural due process violation, a plaintiff must satisfy a two-part test. First, he must demonstrate that he had a protected liberty interest in avoiding solitary confinement. Second, he must prove that Defendants failed to afford him minimally adequate process to protect that liberty interest. Additionally, the *Youngberg* court held that the Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crimes, was not an appropriate source for determining the rights of the involuntary committed. Rather, the Fourteenth Amendment and the liberty interest protected by that Amendment provided for proper constitutional basis for these rights.

18. Per Title 12 of the Virginia Administrative Code's *Regulations* section 12VAC35-115-110 *Use of Seclusion, Restraint and Time Out* (see Exhibit B pages 32-34) clearly outlines specific criteria with mandatory language involving the duration of 4 point restraints. "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." Here, Defendants Barber, Vauter, and Melton failed to adhere to the above regulations which clearly identified a protected liberty interest in avoiding being placed in 4 point restraints for nearly 2 weeks.

19. Additionally, Title 12 of the Virginia Administrative Code's *Regulations* section 12VAC35-115-110 *Use of Seclusion, Restraint and Time Out* Section 12VAC35-115-110 (c) (14) states "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." Here, Defendants Barber, Vauter, and Melton failed to adhere to the above regulations which clearly identified a protected liberty interest in avoiding being placed in solitary confinement for 577 days.

20. Further, section 12VAC35-115-110 (c) (15) of Virginia Administrative Code's *Regulations* states "Providers shall not issue standing orders for the use of seclusion or restraint for behavioral purposes," therein giving plaintiff a protected liberty interest in assuring that no standing order imposed per this section. Upon information and belief, Plaintiff remained in solitary confinement per written standing order sought by Defendant Vauter and approved by both Defendant's Barber and Melton in direct violation of section 12VAC35-115-110 (c) (15).

21. Additionally, 577 days meets the criteria of punitive punishment and violation of plaintiff's due process rights. (see Covino v. Dep't of Corr., 933 F.2d 128, 130 2d Cir 1991) (remanding to assess whether nine-month administrative detention violated due process and observing that such duration "smacks of punishment").

22. Defendants Jack Barber, Rebecca Vauter, and Hughes Melton knowingly and willingly disregarded the policies and procedures set forth in 12VAC35-115-110 *Use of Seclusion,*

Restraint and Time Out (See Exhibit 1). As such, Plaintiff was made to endure 577 days of solitary confinement by himself on an entire ward.

23. Throughout this period of total isolation plaintiff suffered gross hallucinations, lost a large amount of weight, and has been in a state of chronic hyper-vigilance since his release from seclusion.

24. Plaintiffs stay in isolation posed an atypical and significant hardship on him in relation to the ordinary incidents of prison life. Plaintiff was not able to attend Treatment Groups as other patients committed to the state. Plaintiff was not able go outside for outside recreation as other patients committed to the state. Plaintiff was not able to attend any of the many activities provided to all other patients at CSH such as basketball, arts and crafts and other leisure activities provided daily in violation of plaintiffs Due Process Rights.

VII. PRAYER FOR RELIEF

25. I understand that in a Section 1983 action the Court cannot change my sentence, release me from custody or restore good time. I understand I should file a petition for a writ of habeas corpus if desire this type of relief. RR (Please initial)

26. The plaintiff wants the court to: Award money damages in the amount of $2.7 million

COUNT I: Plaintiff is seeking $500,000 in punitive damages

COUNT II: Plaintiff is seeking $2.2 Million in punitive damages

27. Places of incarceration within the last 6 months: Central State Hospital

CONSENT

28. CONSENT TO TRIAL BY A MAGISTRATE JUDGE: The parties are advised of their right, pursuant to 28 U.S.C §636 (c), to have a U.S. magistrate Judge preside over a trial, with appeal to the U.S. Court of Appeals for the Fourth Circuit.

Do you consent to proceed before a U.S Magistrate Judge: Yes

VERIFICATION:

I, Rashad Matthew Riddick, state that I am the plaintiff in this action and I know the content of the above complaint; that it is true of my own knowledge, except as to those matters that are stated to be based on information and belief, and as to those matters, I believe them to be true. I further state that I believe the factual assertions are sufficient to support a claim of violation of constitutional rights. Further, I verify I am aware of the provisions set forth in 28 USC 1915 that prohibit an inmate from filing a civil action if the prisoner has, three or more occasions while incarcerated, brought an action or appeal in federal court that are dismissed on the grounds that it was frivolous, malicious or failed to state a claim upon which relief may be granted, unless the prisoner is in imminent danger of serious physical injury. I understand that if this complaint is dismissed on any of the above grounds, I may be prohibited from filing any future actions without the pre-payment of filing fees.

Commonwealth of Virginia

Department of Behavioral Health and Developmental Services

Central State Hospital

Rebecca A. Vauter, Psy.D., ABPP
Director/CEO

February 2, 2018

Mr. Rashad Riddick
Central State Hospital
Building 39 Ward 6
Petersburg VA 23803

Dear Mr. Riddick:

The purpose of this letter is to respond to your complaint received by Ms. Barker on February 2, 2018. Ms. Barker stated your complaint is that the hospital is violating 12 VAC 35-115-110, Use of Seclusion, Restraints and timeout policies as outlined in the Human Rights Regulations. You stated, "I did not physically assault anyone, harm myself or others, without this criteria the hospital cannot have me placed in restraints". You further contend that range of motion has not been completed; you are not afforded the opportunity to go outside, to the gym, library or exercise. You stated that yesterday evening you requested to be placed in seclusion so that you could stretch and do exercises however you were denied this opportunity. You further commented that you would like to see the policy that would allow for administrative restraints, you commented no policy for regulation would allow for such actions. Lastly Ms. Barker stated that you complained that she had not reached out to you in light of your contended human rights violations. Ms. Barker stated that you questioned her role at the Hospital.

With regard to your contention that the hospital is violating section 12 VAC35-115-110 of the Human Rights Regulations, as explained during our face to face meeting on Wednesday, January 31, 208, the hospital has sought an exemption to 12 VAC35-115-110 in accordance with 12 VAC35-115-10, Authority and Applicability, D. of the Human Rights Regulations. This section states, "This chapter applies to individuals under forensic status and individuals committed to the custody of the department as sexually violent predators, except to the extent that the commissioner may determine this chapter is not applicable to them. The exemption shall be in writing and based solely on the need to protect individuals receiving services, employees, or the general public. The commissioner shall give the State Human Rights Committee (SHRC) chairperson prior notice of all exemptions and provide the written exemption to the SHRC for its information. These exemptions shall be time limited and services shall not be compromised." Based on the exemption you could be placed in seclusion or restraint any time there is concern a concern that you could become aggressive without needing to meet criteria as outlined in policy.

You further contend that opportunities for range of motion have not been completed. Based on discussion with the Director of Nursing, staff have been offering you opportunities for range of motion, but you declined opportunities for range of motion unless you could be permitted to have more than one limb at a time released.

With regard to your requests to go outside, as well as the gym and library, at this time you are restricted to the ward. The ward porch is available to provide you with direct outside air. I will consult with clinicians to determine if your request for library and gym access can be safely managed.

I have received notification of your request to exercise, and in consultation with nursing and security we have arranged a protocol that will allow you the opportunity to exercise. That should have been afforded to you by the time you receive this letter.

With regard to Ms. Barker's role here at the hospital, she is the designated individual at the hospital responsible for helping individuals exercise their rights and resolve complaints. If Ms. Barker identifies a concern she contacts my office to advise me of the concern and may provide my office with additional information based on her informal inquires. Ms. Barker did question you being placed in restraints and was advised of the exemption to the Human Rights Regulations. Ms. Flowers is the Human Rights Advocate assigned to the hospital by the DBHDS Office of Human Rights, she can be reached at 524-4463.

In accordance with the Hospital's variance to the Human Rights Rules and Regulations, if you disagree with this decision you may appeal it to the CSH Maximum Security Appeals Committee within ten working days. Your appeal shall be mailed to the Directors Office in building 113 or directly to the Human Rights Advocate, Ms. Flowers in building 111. The CSH Maximum Security Appeals Committee will consist of the Chairperson and Vice Chair of the State Human Rights Committee and the Department of Behavior Health and Developmental Services (DBHDS) State Human Rights Director.

The CSH Maximum Security Appeals Committee shall review the appeal and provide a written response within 21 days. If the complaint is determined by the Appeals Committee to be a founded complaint, the response, which includes recommendations outlining how the complaint should be resolved, shall be forwarded to the Director for resolution. A copy shall be sent to the Human Rights Advocate. This is the final level of appeal. Decisions of the CSH Maximum Security Appeals Committee may not be appealed.

Respectfully,

Rebecca Vauter

CC: Carrie Flowers Advocate
Jennifer Barker, Director, Patient Relations & Recovery Initiatives

Rashad M. Rahman
[illegible]
P.O. Box [illegible]
Petersburg VA 23804

Rebecca A. Vautier,

On February 6th, 2018, I received a letter from your office in regards to a number of issues including, but not limited to, a violation of my constitutional right to be free from cruel and unusual punishment, systematic torture, violations of the Department of Behavioral Health and Developmental Services Policy 12VAC35-115-110 Use of Seclusion, Restraint and Time Out, and Retaliation.

First and foremost, I want to point out that no policy, directive or variance that is written and concocted by your office or the Commissioner's office can circumvent the Constitution or any state or federal law passed by Congress.

12VAC35-115-10 Authority and Applicability Part I (A) States "The Code of Virginia authorizes these regulations to further define and protect the rights of individuals receiving services from providers of mental health, developmental, or substance abuse services in Virginia. This chapter requires providers of services to take specific actions to protect the rights of each individual. This chapter establishes remedies when rights are violated or are in dispute and provides a structure for support of these rights."

Ms. Vautier, you however quoted 12VAC35-115-10 (D) but you appear to be wholly ignorant of its intent and purpose. The second sentence of 12VAC35-115-10 (D) specifically states "The exemption shall

BE IN WRITING AND BASED SOLELY ON THE NEED TO PROTECT INDIVIDUALS RECEIVING SERVICES, EMPLOYEES OR THE GENERAL PUBLIC." THIS IS MANDATORY LANGUAGE. HOW IS ANY PERSON IN A POST RESTRAINTS BASED SOLELY ON THE NEED TO PROTECT INDIVIDUALS RECEIVING SERVICES, EMPLOYEES OR THE GENERAL PUBLIC WHEN I HAVE NOT BECOME PHYSICALLY AGGRESSIVE, NOR HARMED MYSELF OR ENDANGERED ANY PATIENT, STAFF OR THE PUBLIC? WHO AND WHAT ARE HOW PROTECTING? HOW DOES THE COMMISSIONER CAN REASONABLY DEMONSTRATE THIS.

IT ALSO STATES IN SECTION 5 OF THE SAME SECTION "THOSE EXCEPTIONS SHALL BE TIME LIMITED AND SERVICES SHALL NOT BE COMPROMISED." HERE, SERVICES HAVE WITHOUT DOUBT BEEN COMPROMISED. HERE, I HAVE NOT BEEN PERMITTED TO ATTEND THE TREATMENT MALL FOR TREATMENT. HERE, I HAVE BEEN DENIED ACCESS TO RELIGIOUS SERVICES. HERE, I HAVE BEEN UNABLE TO UTILIZE THE LAW LIBRARY OR LAW MATERIALS PROVIDED IN THE LIBRARY AREA WHICH IS EFFECTIVELY PREVENTING ME FROM ACCESSING THE COURTS. HERE, I AM UNABLE TO ACCESS DOCUMENTS ON MY USB DRIVE THAT I NEED FOR A PENDING LEGAL MATTER. HERE, I NOW SUFFER FROM IMPROPER HYGIENE AS ONLY ONE HAND IS PERMITTED TO BE RELEASED WHILE SHOWERING ... SHALL I CONTINUE?

AND IF I MUST SET OUT WHAT "SERVICES" ARE, 12VAC35-115-20 POLICY CLEARLY SETS THIS OUT, AGAIN, IN MANDATORY LANGUAGE "A) EACH INDIVIDUAL WHO RECEIVES SERVICES SHALL BE ASSURED: 1) PROTECTION TO EXERCISE HIS LEGAL, CIVIL, AND HUMAN RIGHTS RELATED TO THE RECEIPT OF THOSE SERVICES; (2) RESPECT FOR BASIC HUMAN DIGNITY; AND (3) SERVICES THAT ARE PROVIDED CONSISTENT WITH SOUND THERAPEUTIC PRACTICE.

YOU HAVE NOT DEMONSTRATED THAT THIS EXEMPTION IS IN WRITING NOR HAVE YOU SET A TIME LIMIT AS PROVIDED BY POLICY.

IN SUMMARY, IT IS CLEAR THAT THESE RESTRAINTS ARE NOT FOR THE PROTECTION OF OTHERS, OR THE PUBLIC, BUT RATHER, TO HINDER MY ACCESS TO LEGAL REMEDIES. I THEREFORE APPEAL THIS ARBITRARY ACTION, WHICH AS A PRACTICAL MATTER IN ITSELF VIOLATES EVERY ETHICAL, CONSTITUTIONAL AND HUMAN RIGHT CONCEIVABLE.

MOST RESPECTFULLY SUBMITTED,

2-14-18

Sworn before me on this 14th day
of February 2018
City of Petersburg State of VA
Methonda L. Rice (7753739)
Notary Public
My Commision expires 5/31/2021

RECEIVED
FEB 21 2018
OFFICE OF THE STATE INSPECTOR GENERAL
COMMONWEALTH OF VIRGINIA

Methonda L. Rice

March 22, 2018

Good Morning Mr. Riddick,

This is to inform you that your appeal to CSH Maximum Security Appeals Committee, dated Feb. 27th will not be addressed. The initial complaint is your rights were allegedly violated under 12VAC35-115-110, Use of Seclusion, Restraints and timeout policies as outlined in the Regulations. The hospital responded, informing you that the hospital acquired an exemption to 12VAC35-115-110, Use of Seclusion, Restraints and Timeout policies through 12VAC35-115-10.D. Your response to the hospital primarily alleged a violation of procedure under section 12VAC35-115-10.D. This appeal will not be forwarded to the Committee in regards to 12VAC35-115-10.D because this was not the initial complaint. In keeping within the protocol of the CSH RTS-01C Patient and Family Complaint Resolution, you may submit a complaint under 12VAC35-115-10.D procedure, if you choose to do so.

Carrie Flowers, HRA

Office of Human Rights

804-524-4463

Commonwealth of Virginia
Department of Behavioral Health and Developmental Services

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

Effective Date: February 9, 2017

Virginia Administrative Code
Title 12. Health
Agency 35. Department of Behavioral Health and Developmental Services
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

12VAC35-115-10. Authority and Applicability.

Part I. General Provisions

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

B. Providers subject to this chapter include:

1. Facilities operated by the department under Chapters 3 (§ 37.2-300 et seq.) and 7 (§ 37.2-700 et seq.) of Title 37.2 of the Code of Virginia;

2. Sexually violent predator programs established under § 37.2-909 of the Code of Virginia;

3. Community services boards that provide services under Chapter 5 (§ 37.2-500 et seq.) of Title 37.2 of the Code of Virginia;

4. Behavioral health authorities that provide services under Chapter 6 (§ 37.2-600 et seq.) of Title 37.2 of the Code of Virginia;

5. Public or private providers that operate programs or facilities licensed by the department under Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2 of the Code of Virginia except those operated by the Department of Corrections; and

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

C. Unless otherwise provided by law, this chapter applies to all individuals who are receiving services from a public or private provider of services operated, licensed, or funded by the Department of Behavioral Health and Developmental Services, except those operated by the Department of Corrections.

D. This chapter applies to individuals under forensic status and individuals committed to the custody of the department as sexually violent predators, except to the extent that the commissioner may determine this chapter is not applicable to them. The exemption shall be in writing and based solely on the need to protect individuals receiving services, employees,

12VAC35-115-30. Definitions.

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

"Abuse" means any act or failure to act by an employee or other person responsible for the care of an individual in a facility or program operated, licensed, or funded by the department, excluding those operated by the Department of Corrections, that was performed or was failed to be performed knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury, or death to a person receiving care or treatment for mental illness, intellectual disability, 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. A WRAP or similar document may identify the health care agent who is authorized to act as the individual's substitute decision maker.

"Authorization" means a document signed by the individual receiving services or that individual's authorized representative that authorizes the provider to disclose identifying information about the individual. An authorization 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

executive officer of the services or services licensed, funded, or operated by the department.

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

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

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

"Exploitation" means the misuse or misappropriation of the individual's assets, goods, or property. Exploitation is a type of abuse. (See § 37.2-100 of the Code of Virginia.) Exploitation also includes the use of a position of authority to extract personal gain from an individual. Exploitation includes violations of 12VAC35-115-120 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 authorized representative:

1. With full knowledge of the consequences;

2. With no inducements; and

3. Without force, misrepresentation, fraud, deceit, duress of any form, constraint, or coercion.

"Governing body of the provider" means the person or group of persons with final authority to establish policy.

"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.

"Neglect" means failure by a person, program, or facility operated, licensed, or funded by the department, excluding those operated by the Department of Corrections, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of an individual receiving care or treatment for mental illness, intellectual disability, 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 potential neglect.

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

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

"Protection and advocacy agency" means the state agency designated under the federal Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) and the Developmental Disabilities Assistance and Bill of Rights Act (DD). The protection and advocacy agency is the disAbility Law Center of Virginia (dLCV).

"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.

"Research review committee" or "institutional review board" means a committee of professionals that provides complete and adequate review of research activities. The committee shall be sufficiently qualified through maturity, experience, and diversity of its

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

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

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

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

Statutory Authority

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

Historical Notes

Derived from Volume 18, Issue 03 , eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25 , eff. September 19, 2007; Volume 29, Issue 04 , eff. November 21, 2012; Volume 33, Issue 10 , eff. February 9, 2017.

12VAC35-115-40. Assurance of Rights.

Part II. Assurance of Rights

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

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

1. Display, in areas most likely to be noticed by the individual, a document listing the rights of individuals under these regulations and how individuals can contact a human rights advocate. The document shall be presented in the manner, format, and languages most frequently understood by the individual receiving services.

2. Notify each individual and his authorized representative about these rights and how to file a complaint. The notice shall be in writing and in any other form most easily

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;

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

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

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

e. Clean air, free of bad odors; and

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

4. Practice a religion and participate in religious services subject to their availability,

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

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

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

8. Have or refuse visitors.

a. An individual's access to visitors may be limited or supervised only when, in the judgment of a licensed professional, the visits result in demonstrable harm to the individual or significantly affect the individual's treatment or when the visitors are suspected of bringing contraband or threatening harm to the individual in any other way.

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

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

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

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

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

D. The provider's duties.

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

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

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

emergencies. These policies and procedures shall:

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

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

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

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

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

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

b. Preparation, implementation, and 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.

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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 for LHRC review of the objection may be filed

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

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

following activities:

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

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

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

(4) Statistical reporting;

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

(6) Similar oversight and review activities.

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

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

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

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

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

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

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

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

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

k. Inspector General: Providers may disclose to the Office of the State Inspector General (§ 2.2-308 of the Code of Virginia) any individual services records and other information

from criminal conduct; or

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

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

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

a. To employees of the department, CSB, the provider, or other providers;

b. To carry out treatment, payment, or health care operations;

c. That are incidental or unintentional disclosures that occur as a by-product of engaging in health care communications and practices that are already permitted or required;

d. To an individual or his authorized representative;

e. Pursuant to an authorization;

f. For national security or intelligence purposes;

g. To correctional institutions or law-enforcement officials; or

h. That were made more than six years prior to the request.

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

a. The name of the person or organization that received the information and the address if known;

b. A brief description of the information disclosed; and

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

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

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

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

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 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.

C. The provider's duties.

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

2. Providers shall permit each individual to see his services record when he requests it and to request amendments if necessary.

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

b. If access is denied in whole or in part, the provider shall give the individual or his authorized representative a written statement that explains the basis for the denial, the individual's review rights, as set forth in the following subdivisions, how he may exercise them, and how the individual may file a complaint with the provider or the 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 who was not directly involved in the denial to review the decision to deny access. The physician or clinical psychologist shall determine within a reasonable period of time whether or not to deny the access requested in accordance with the standard in subdivision 2 a of this subsection. The provider shall promptly provide the individual notice of the physician's or psychologist's determination and provide or deny access in accordance with that determination.

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

Statutory Authority

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

Historical Notes

Derived from Volume 18, Issue 03 , eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25 , eff. September 19, 2007; Errata, 24:6 VA.R. 889 November 26, 2007; amended, Virginia Register Volume 33, Issue 10 , eff. February 9, 2017.

12VAC35-115-100. Restrictions on Freedoms of Everyday Life.

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

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

a. Freedom to move within the service setting, its grounds, and the community;

b. Freedom to communicate, associate, and meet privately with anyone the individual chooses;

c. Freedom to have and spend personal money;

d. Freedom to see, hear, or receive television, radio, books, and newspapers, whether privately owned or in a library or public area of the service setting;

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

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

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

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

B. The provider's duties.

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

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

3. Providers shall not impose any restriction on an individual unless the restriction is justified and carried out according to 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

organized self-government program conducted according to a written policy approved in advance by the LHRC.

Statutory Authority

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

Historical Notes

Derived from Volume 18, Issue 03 , eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25 , eff. September 19, 2007; Volume 33, Issue 10 , eff. February 9, 2017.

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 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 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.

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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 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:

2017.

12VAC35-115-120. Work.

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

B. The provider's duties.

1. Providers shall not require, entice, persuade, or permit any individual or his family member to perform labor for the provider as a condition of receiving services. If an individual voluntarily chooses to perform labor for the provider, the labor must be consistent with his individualized services plan. All policies and procedures, including pay, must be consistent with the Fair Labor Standards Act (29 USC § 201 et seq.).

2. Providers shall consider individuals who are receiving services for employment opportunities on an equal basis with all other job applicants and employees according to the Americans with Disabilities Act (42 USC § 12101 et seq.).

3. Providers shall give individuals and employers information, training, and copies of policies affecting the employment of individuals receiving services upon request.

4. If vocational training, extended employment services, or supported employment services are offered, providers shall establish procedures for documenting the decision on employment and training and the methodology for establishing wages. Providers shall give a copy of the procedures and information about possible consequences for violating the procedures to all individuals and their authorized representatives.

5. Providers who employ individuals receiving services shall not deduct the cost of services from an individual's wages unless ordered to do so by a court.

6. Providers shall not sell to or purchase goods or services from an individual receiving services except through established governing body policy that is consistent with U.S. Department of Labor standards.

Statutory Authority

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

Historical Notes

Derived from Volume 18, Issue 03 , eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25 , eff. September 19, 2007.

12VAC35-115-130. Research.

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

B. The provider's duties.

capacity to consent or to authorize disclosure.

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

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

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

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

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

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

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

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

Statutory Authority

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

period of six months within two years prior to the designation either:

a. Shared a residence with the individual; or

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

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

4. The person designated as next friend also shall:

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

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

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

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

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

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

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

1. Attempt to identify a suitable person who would be willing to serve as guardian and ask the court to appoint that person to provide consent or authorization; or

when the next friend is not acting in accordance with the individual's best interest.

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

Statutory Authority

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

Historical Notes

Derived from Volume 23, Issue 25 , eff. September 19, 2007; amended, Virginia Register Volume 31, Issue 01 , eff. October 8, 2014.

12VAC35-115-150. General Provisions.

Part V. Complaint Resolution, Hearing, and Appeal Procedures

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. 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. 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.

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 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

5. Make a complaint under any other applicable law, including to the protection and advocacy agency.

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.

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;

2. Ensure that the director or the director's designee contacts the individual regarding the complaint within 24 hours;

3. Initiate an impartial investigation into, or resolution of, the complaint as soon as possible, but no later than the next business day;

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 the director's decision and action plan within 10 working days to the individual, authorized representative, if applicable, and human rights advocate.

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;

6. The program director shall decide, 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.

7. 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.

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 according to the special procedures for emergency hearings 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.

Statutory Authority

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

Historical Notes

Derived from Volume 33, Issue 10 , eff. February 9, 2017.

12VAC35-115-180. Local Human Rights Committee Hearing and 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 by following the process described in this section.

B. The individual or his authorized representative shall file the petition for a hearing with the chairperson of the LHRC within 10 working days from receipt of the director's action plan or final decision on the complaint.

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

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 day after he submitted it, or as otherwise provided in the plan.

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

Statutory Authority

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

Historical Notes

Derived from Volume 18, Issue 03 , eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25 , eff. September 19, 2007; Volume 33, Issue 10 , eff. February 9, 2017.

12VAC35-115-190. Special Procedures for Emergency Hearings by the Lhrc.

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

1. The director or his designee and the human rights advocate shall attend the hearing. The individual and his authorized representative may attend the hearing.

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

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

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

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

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

Statutory Authority

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

Historical Notes

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

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

Regardless of the individual's capacity to consent to treatment or services or 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 working days of the initial request.

Statutory Authority

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

Historical Notes

Derived from Volume 18, Issue 03 , eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25 , eff. September 19, 2007; Volume 33, Issue 10 , eff. February 9, 2017.

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, and recommendations following a hearing;

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 days' notice of the appeal hearing.

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:

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 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 procedures employed by the LHRC were inadequate, the SHRC may:

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

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

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

F. Within 20 working days after the SHRC appeal hearing, 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.

G. Within 10 working 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 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.

of the variance.

1. When the LHRC receives the application, it shall invite, and provide ample time to receive, oral or written statements about the application from the human rights advocate, individuals affected by the variance, and other interested persons.

2. The LHRC shall review the application and prepare a written report of facts, which shall include its recommendation for approval, disapproval, or modification. The LHRC shall send its report, recommendations, and a copy of the original application to the State Human Rights Director, the SHRC, and the director making application for the variance.

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

1. Invite oral or written statements about the application from the applicant director, LHRC, advocate, and other interested persons by publishing the request for variance in the next issue of the Virginia Register of Regulations;

2. Notify the Office of the State Inspector General (§ 2.2-308 of the Code of Virginia) of the request for variance; and

3. After considering all available information, prepare a written decision deferring, disapproving, modifying, or approving the application. All variances shall be approved for a specific time period and must be reviewed at least annually.

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

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

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

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

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

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

I. If an individual is in immediate danger due to a provider's implementation of these regulations, the provider may request a temporary variance pending approval pursuant to the

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

a. Date and place of the death or serious injury;

b. Nature of the injuries and treatment required; and

c. Circumstances of the death or serious injury.

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

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

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

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

a. Type 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.

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

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

Statutory Authority

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

Historical Notes

Derived from Volume 18, Issue 03 , eff. November 21, 2001; amended, Virginia Register Volume 23, Issue 25 , eff. September 19, 2007.

12VAC35-115-250. (Repealed.)

Part IX. Responsibilities and Duties

Historical Notes

Derived from Volume 18, Issue 03 , eff. November 21, 2001; Errata, 18:6 VA.R. December 3, 2001; amended, Virginia Register Volume 23, Issue 25 , eff. September 19, 2007; repealed, Virginia Register Volume 33, Issue 10 , eff. February 9, 2017.

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 advocate deems access is necessary to carry out rights protection, complaint resolution, and advocacy on behalf of the individual;

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

mediating, negotiating, advising, or consulting with providers and their respective governing bodies, directors, and employees;

4. Provide orientation, training, and technical assistance to the LHRCs for which he 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, training tools, and other resources 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 as needed to support their fulfilling of their duties under this chapter; and

c. Providing necessary support for SHRC and LHRC investigations, meetings, and hearings; and

6. Maintain current and regularly updated data and perform regular trend analyses to identify the need for corrective action in the areas of abuse, neglect, and exploitation; seclusion and restraint; complaints; deaths and serious injuries; and variance applications.

Statutory Authority

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

Historical Notes

Derived from Volume 33, Issue 10 , eff. February 9, 2017.

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 days or is imposed three or more

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;

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

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