12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

PART I.

GENERAL PROVISIONS.

12VAC35-115-10. Authority and applicability.

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

B. Providers subject to these regulations include:

1. Facilities operated by the department under ~~Article 1 ('37.1-1 et seq.) of Chapter 1 of Title 37.1~~ Chapters 3 and 7 of Title 37.2 of the Code of Virginia;

2. Sexually violent predator programs ~~created~~ established under '~~37.1-70.10~~ § 37.2-909 of the Code of Virginia;

3. Community services boards that provide services under ~~Chapter 10 ('37.1-194 et seq.) of Title 37.1~~ Chapter 5 of Title 37.2 of the Code of Virginia;

4. Behavioral health authorities that provide services under ~~Chapter 15 ('37.1-242 et seq.) of Title 37.1~~ Chapter 6 of Title 37.2 of the Code of Virginia;

5. ~~Providers, public~~ Public or private providers~~,~~ that operate programs or facilities licensed by the department under ~~Chapter 8 ('37.1-179 et seq.) of Title 37.1~~ Article 2 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 ~~or through~~ the department.

C. Unless another law takes ~~priority, and to the extent that they are not preempted by the Health Insurance Portability and Accountability Act of 1996 and the regulations promulgated thereto~~ precedence, these regulations apply to all individuals who are receiving services from a public or private provider of services operated, licensed, or funded by the Department of Mental Health, Mental Retardation and Substance Abuse Services, except those operated by the Department of Corrections.

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

exemptions ~~Thereafter, the~~ commissioner shall ~~submit~~ and provide the written exemption to the ~~State Human Rights Committee (SHRC)~~ SHRC for its information. ~~The commissioner shall give the SHRC chairperson prior notice regarding all exemptions.~~ ~~Such~~ These exemptions shall be time limited and services shall not be compromised.

12VAC35-115-20. Policy.

A. Each individual who receives services shall be assured:

1. Protection to exercise his legal, civil, and human rights related to the receipt of those services;

2. Respect for basic human dignity; and

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

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

1. Acquire, retain, and dispose of property;

2. Sign legal documents;

3. Buy or sell;

4. Enter into contracts;

5. Register and vote;

6. Get married, separated, divorced, or have a marriage annulled;

7. Hold a professional, occupational, or vehicle operator's license;

8. Make a will and execute an advance directive; and

9. Have access to lawyers and the courts.

12VAC35-115-30. Definitions.

The following words and terms, when used in this chapter, 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 ~~an individual receiving services~~ a person receiving care or treatment for mental illness, mental retardation, or substance abuse. Examples of abuse include ~~but are not limited to the following~~ 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 ~~on a person~~ 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 ~~'37.1-1~~ § 37.2-100 of the Code of Virginia.

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

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

"Authorized representative" means a person permitted by law or these regulations to authorize the disclosure of information, to consent to treatment and services, or participation in human research. The decision-making authority of an authorized representative recognized or designated under these regulations is specific to the designating provider. Legal guardians, attorneys-in-fact, or health care agents appointed pursuant to §54.1-2983, may have decision-making authority beyond any specific provider.

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

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

1. Improved behavioral functioning and effectiveness;

2. Alleviation of symptoms of psychopathology; or

3. Reduction of serious behaviors.

~~A behavioral treatment program can also be referred to as a behavioral treatment plan or behavioral support plan.~~

"Board" means the State Mental Health, Mental Retardation and Substance Abuse Services Board.

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

"Commissioner" means the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services.

"Community services board (CSB)" means ~~a citizens' board~~ the public body established pursuant to ~~'37.1-195~~ § 37.2-501 of the Code of Virginia that provides ~~or arranges for the provision of~~ mental health, mental retardation, and substance abuse ~~programs and~~ services to consumers within ~~the political subdivision or subdivisions establishing~~ each city and county that established it. For the purpose of these regulations, community services board also includes a behavioral health authority established pursuant to § 37.2-602.

"Complaint" ~~is~~ means an ~~expression of dissatisfaction, grievance, or concern by, or on behalf of, an individual receiving services that has been brought to the attention of the provider, an employee of the provider, a human rights advocate, or the protection and advocacy agency, and alleges a violation or potential~~ allegation of a violation of these regulations or ~~program~~ a provider's policies and procedures related to these regulations. ~~A complaint is "informal" when a resolution is pursued prior to contact with the human rights advocate. See 12VAC35-115-160.~~

"Consent" means the voluntary ~~and expressed~~ agreement of an individual~~,~~ or that individual's ~~legally~~ authorized representative ~~if the individual has one~~ to specific services. ~~Informed consent is needed to disclose information that identifies an individual receiving services. Informed consent is also needed before a provider may provide treatment to an individual which poses risk of harm greater than that ordinarily encountered in daily life or during the performance of routine physical or psychological examinations, tests, or~~

~~treatments, or before an individual participates in human research. Informed consent is required for surgery, aversive treatment, electroconvulsive treatment, and use of psychoactive medications. Consent to any action for which consent is required under these regulations must be voluntary. To be voluntary, the consent must be given by the individual receiving services, or his legally authorized representative, so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress, or any form of constraint or coercion. To be informed, consent must be based on disclosure and understanding by the individual or legally authorized representative, as applicable, of the following kinds of information:~~

~~1. A fair and reasonable explanation of the proposed action to be taken by the provider and the purpose of the action. If the action involves research, the provider shall describe the research and its purpose, and shall explain how the results of the research will be disseminated and how the identity of the individual will be protected;~~

~~2. A description of any adverse consequences and risks to be expected and, particularly where research is involved, an indication whether there may be other significant risks not yet identified;~~

~~3. A description of any benefits that may reasonably be expected;~~

~~4. Disclosure of any alternative procedures that might be equally advantageous for the individual together with their side effects, risks, and benefits;~~

~~5. An offer to answer any inquiries by the individual, or his legally authorized representative;~~

~~6. Notification that the individual is free to refuse or withdraw his consent and to discontinue participation in any prospective service requiring his consent at any time without fear of reprisal against or prejudice to him;~~

~~7. A description of the ways in which the resident or his legally authorized representative can raise concerns and ask questions about the service to which consent is given;~~

~~8. When the provider proposes human research, an explanation of any compensation or medical care that is available if an injury occurs;~~

~~9. Where the provider action involves disclosure of records, documentation must include:~~

~~a. The name of the organization and the name and title of the person to whom the 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 consent extends to information placed in the individual's record after the consent was given but before it expires;~~

~~c. A statement of when the consent will expire, specifying a date, event, or condition upon which it will expire; and~~

~~d. An indication of the effective date of the consent.~~

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

"Department" means the Department of Mental Health, Mental Retardation and Substance Abuse Services ~~(DMHMRSAS)~~.

"Director" means the chief executive officer of any ~~program~~ provider delivering services.

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

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

"Emergency" means a situation that requires a person to take immediate action to avoid harm, injury, or death to an individual ~~receiving services~~ or to others~~, or to avoid substantial property damage~~.

"Exploitation" means the misuse or misappropriation of the individual's assets, goods, or property. Exploitation is a type of abuse. (See ~~'37.1-1~~ § 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 ~~receiving services~~. Exploitation includes ~~but is not limited to~~ violations of 12VAC35-115-120 (Work) and 12VAC35-115-130 (Research). Exploitation does not include the billing of an individual's third party payer for services. Exploitation also does not include instances of use or appropriation of an individual's assets, goods, or property when permission is given by the individual or his ~~legally~~ authorized representative:

1. With full knowledge of the consequences;

2. With no inducements; ~~or~~ 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 ~~who have~~ with final authority to set policy and hire and fire directors.

"Habilitation" ~~refers to~~ means the provision of services that enhance the strengths of, teach functional skills to, or reduce or eliminate problematic behaviors of an individual ~~receiving services~~. These services occur in an environment that suits the individual's needs, responds to his preferences, and promotes social interaction and adaptive

behaviors. In order to be considered sound and therapeutic, habilitation must conform to current acceptable professional practice.

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

1. Conducting quality assessment and improvement activities, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives, and related functions that do not include treatment;

2. Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, and training, licensing or credentialing activities;

3. Conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs; and

4. Other activities contained within the definition of health care operations in the Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. § 164.501.

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

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

"Human research" means any systematic investigation ~~that uses human participants who may be exposed to potential physical or psychological injury if they participate and which departs from established and accepted therapeutic methods appropriate to meet the participants' needs~~ ,including research development, testing, and evaluation, utilizing human subjects, that is designed to develop or contribute to generalized knowledge. Human research shall not be ~~conducted in compliance with §§ 32.1-162.16 through 32.1-162-20 and 37.1-24.01 of the Code of Virginia, and 12VAC35-180-10 et seq., or any applicable federal policies and regulations~~ deemed to include research exempt from federal research regulations pursuant to 45 C.F.R. § 46.101(b).

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

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

"Individualized services plan (ISP)" means a comprehensive and regularly updated written plan of action to meet the needs and preferences of an individual. An ISP

describes measurable goals and objectives and expected outcomes of services and is designed to meet the needs of a specific individual. The term ISP includes, treatment plan, functional plan, habilitation plan, or plan of care.

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

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

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

~~"Legally authorized representative" means a person permitted by law or these regulations to give informed consent for disclosure of information and give informed consent to treatment, including medical treatment, and participation in human research for an individual who lacks the mental capacity to make these decisions.~~

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

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

"Mechanical restraint" means the use of any mechanical device that restricts the freedom of movement or voluntary functioning of an individual's limb or a portion of his body when the individual does not have the option to remove the device.

"Neglect" means ~~the~~ failure by ~~an individual~~ 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 ~~provide~~ do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse. See ~~'37.1-1~~ § 37.2-100 of the Code of Virginia.

Next friend" means a person ~~whom a provider may appoint~~ designated by a director in accordance with ~~12VAC35-115-70 B 9 c~~ 12VAC35-115-146 to serve as the ~~legally~~ authorized representative of an individual who has been determined to lack capacity to

~~give~~ consent or authorize the disclosure of identifying information, when required under these regulations.

"Peer on peer harm" means a physical act or verbal expression by an individual against or to another individual that results in harm to the individual. Harm includes hitting and threatening behavior with the means to carry out the threat. Incidents of harm shall be investigated as potential neglect pursuant to 12VAC35-115-50 D3.

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

"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 that 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.

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

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

"Research review committee" or "institutional review board" means a committee of professionals to provide complete and adequate review of research activities. The committee shall be sufficiently qualified through maturity, experience, and diversity of its members, including consideration of race, gender, and cultural background, to promote respect for its advice and counsel in safeguarding the rights and welfare of participants in human research. (See ~~'37.1-24.01~~ § 37.2-402 of the Code of Virginia and 12VAC35-180-110 et seq.)

~~"Residential setting" means a place where an individual lives and services are available from a provider on a 24-hour basis. This includes hospital settings.~~

"Restraint" means the use of an approved mechanical device, medication, physical intervention or hands-on hold~~, or pharmacological agent~~ to ~~involuntarily~~ prevent an individual ~~receiving services~~ from moving his body to engage in a behavior that places

him or others at risk. ~~The term includes restraints used for behavioral, medical, or protective purposes.~~ There are three kinds of restraints:

1. Mechanical restraint means the use of an approved mechanical device that cannot be removed by the individual to restrict the freedom of movement or functioning of a limb or a portion of an individual's body.

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

3. Physical restraint, (also referred to as manual hold), means the use of a physical intervention or hands-on hold to prevent an individual from moving his body.

Restraints may be used for the following behavioral, medical, or protective purposes:

1. ~~A restraint used for "behavioral"~~ Behavioral purposes means ~~the use of~~ using ~~an approved~~ a physical hold, ~~a psychotropic~~ psychotropic medication, or ~~a~~ mechanical device ~~that is used for the purpose of controlling~~ to control behavior or involuntarily ~~restricting~~ restrict the freedom of movement of ~~the~~ an individual in an instance when all of the following conditions are met: (i) ~~in which there is an imminent risk of an individual harming himself or others, including staff~~ there is an emergency; (ii) ~~when~~

nonphysical interventions are not viable; and (iii) ~~when~~ safety issues require an immediate response.

2. ~~A restraint used for "medical"~~ Medical purposes means ~~the use of~~ ~~an~~ using a physical hold, medication, or mechanical device ~~approved mechanical or physical hold~~ to limit the mobility of the individual for medical, diagnostic, or surgical purposes, such as routine dental care or radiological procedures and related post-procedure care processes, when ~~the~~ use of ~~such device~~ the restraint is not ~~a standard~~ the accepted clinical practice for the individual's condition.

3. ~~A restraint used for "protective"~~ Protective purposes means ~~the use of~~ using a mechanical device to compensate for a physical or cognitive deficit ~~when the individual does not have the option to remove the device~~. The device may limit an individual's movement, for example, bed rails or a gerichair, and prevent possible harm to the individual ~~(e.g., bed rail or gerichair)~~ or it may create a passive barrier, such as a helmet, to protect the individual ~~(e.g., helmet)~~.

~~4. A "mechanical restraint" means the use of an approved mechanical device that involuntarily restricts the freedom of movement or voluntary functioning of a limb or a portion of a person's body as a means to control his physical activities when the individual receiving services does not have the ability to remove the device.~~

~~5. A "pharmacological restraint" means a drug that is given involuntarily for the emergency control of behavior when it is not a standard treatment for the individual's medical or psychiatric condition.~~

~~6. A "physical restraint" (also referred to "manual hold") means the use of approved physical interventions or "hands-on" holds to prevent an individual from moving his body to engage in a behavior that places him or others at risk of physical harm. Physical restraint does not include the use of "hands-on" approaches that occur for extremely brief periods of time and never exceed more that a few seconds duration and are used for the following purposes:~~

~~a. To intervene in or redirect a potentially dangerous encounter in which the individual may voluntarily move away from the situation or hands-on approach; or~~

~~b. To quickly de-escalate a dangerous situation that could cause harm to the individual or others.~~

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

"Seclusion" means the involuntary placement of an individual ~~receiving services~~ alone~~,~~ in ~~a locked room or secured~~ an area ~~from which he is physically prevented from leaving~~ secured by a door that is locked or held shut by a staff person, by physically blocking the door, or by any other physical or verbal means, so that the individual cannot leave it.

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

"Services" means mental health, mental retardation and substance abuse care~~;~~, treatment~~;~~, training~~;~~, habilitation~~;~~, or other supports, including medical care, delivered by a provider.

~~"Services plan" means a plan that defines and describes measurable goals and objectives and expected outcomes of service and is designed to meet the needs of a specific individual. The term ""services plan" also includes, but is not limited to, individualized services plan, treatment plan, habilitation plan or plan of care.~~

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

"State Human Rights Committee (SHRC)" means a committee of nine members appointed by the board that is accountable for the duties prescribed in 12VAC35-115-230 E. See 12VAC35-115-250 E for membership and duties.

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

"Time out" means ~~assisting an individual to regain emotional control by removing the individual from his immediate environment to a different, open location until he is calm~~

~~or the problem behavior has subsided~~ 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~~ in those areas that show impairment as the result of mental ~~disability, substance addiction~~ illness, mental retardation, substance use (alcohol or other drug dependence or abuse) disorders, or physical impairment. In order to be considered sound and therapeutic, the treatment must conform to current acceptable professional practice.

PART II.

ASSURANCE OF RIGHTS.

12VAC35-115-40. Assurance of rights.

A. These regulations protect the rights established in ~~'37.1-84.1~~ § 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.

2. Notify each individual and his authorized representative~~, as applicable,~~ about these rights and how to file a complaint. The notice shall be in writing and in any other form most easily understood by the individual. The notice shall tell an individual how he can contact the human rights advocate and give a short description of the human rights advocate's role. The provider shall give this notice at the time an individual begins services and every year thereafter.

3. Ask the individual or ~~legally~~ his authorized representative ~~as applicable~~ to sign the notice of rights. File the signed notice in the individual's services record. If the individual or legally authorized representative cannot or will not sign the notice, the person who gave the notice shall document that fact in the individual's services record.

4. Give a complete copy of these regulations to anyone who asks for one.

5. Display and provide information as requested by the protection and advocacy agency director that informs individuals of their right to contact the protection and advocacy agency.

6. Display and provide written notice of rights in the most frequently used languages.

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

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

PART III.

EXPLANATION OF INDIVIDUAL RIGHTS AND PROVIDER DUTIES.

12VAC35-115-50. Dignity.

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

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

1. Use his preferred or legal name.

The use of an individual's preferred name may be limited when a licensed professional makes the determination that the use of the name will result in demonstrable harm or have significant negative impact on the program itself or the individual's treatment, progress, and recovery. The director shall inform the individual and 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 treatment 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 ~~but are not limited to~~ 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, ~~legally~~ authorized representatives, advocates, the

~~Inspector General~~ inspector general, and employees of the protection and advocacy agency.

5. Be provided with general information about program services and policies in a manner easily understood by the individual.

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 a nutritionally adequate, varied, and appetizing diet prepared and served under sanitary conditions and served at appropriate times and temperatures.

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

a. Reasonable privacy and private storage space;

b. An adequate number and design of private, operating toilets, sinks, showers, and tubs;

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

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

e. Clean air, free of bad odors; and

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

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

a. Religious services or practices that present a danger of bodily injury to any individual or interfere with another individual's religious beliefs or practices may be limited.

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

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

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

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

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

c. The director shall inform the individual and 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 treatment team every month and documented in the services record.

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

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

b. The director shall inform the individual and 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 treatment team every month and documented in the individual's services record.

c. Residential substance abuse services providers 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 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 shall inform the individual and 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 treatment team every month and documented in the individual's services record.

c. Residential substance abuse service providers 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 of conduct to the LHRC and the human rights advocate for review and approval.

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

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

D. The provider's duties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) In all cases, the director shall provide his written ~~notice~~ decision, including actions taken as a result of the investigation, within seven working days following completion of

the investigation ~~of the decision and all actions taken~~ to the individual or individual's ~~legally~~ authorized representative, the human rights advocate, investigating authority and the involved employee or employees.

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

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

g. If at any time the director has reason to suspect that an individual may have been abused or neglected, the director shall immediately report this information to the appropriate local Department of Social Services (see ~~"63.1-55.3 and 63.1-248.3~~ §§ 63.2-1509 and 63.2-1606 of the Code of Virginia) and cooperate fully with any investigation that results.

h. If at any time the director has reason to suspect that the abusive, neglectful, or exploitive act is a crime, the director shall immediately contact the appropriate law-enforcement authorities and cooperate fully with any investigation that results.

~~E. Exceptions and conditions to the provider's duties.~~

~~1. If an individual has funds for clothing and to buy paper, pencils, and stamps to send a letter every day, the provider does not have to pay for them.~~

~~2. The provider may prohibit any religious services or practices that present a danger of bodily injury to any individual or interfere with another individual's religious beliefs or practices. Participation in religious services or practices may be reasonably limited by the provider in accordance with other general rules limiting privileges or times or places of activities.~~

~~3. If a provider has reasonable cause to believe that an individual's mail contains illegal material or anything dangerous, the director may open the mail, but not read it, in the presence of the individual. The director shall inform the individual of the reasons for the concern. An individual's ability to communicate by mail may also be limited if, in the judgment of a licensed physician or doctoral level psychologist (in the exercise of sound therapeutic practice), the individual's communication with another person or persons will result in demonstrable harm to the individual's mental health. The reasons for the restriction shall be documented in the individual's service record, the human rights advocate shall be notified prior to implementation.~~

~~4. Providers may limit the use of a telephone in the following ways:~~

~~a. Providers may limit use to certain times and places to make sure that other individuals have equal access to the telephone and that they can eat, sleep, or participate in an activity without being disturbed.~~

~~b. Providers may limit use by individuals receiving services for substance abuse, but only if sound therapeutic practice requires the restriction and the human rights advocate is notified.~~

~~c. Providers may limit an individual's access to the telephone if communication with another person or persons will result in demonstrable harm to the individual and is significantly impacting treatment in the judgment of a licensed physician or doctoral level psychologist. The reasons for the restriction shall be documented in the individual's service record and the human rights advocate shall be notified prior to implementation.~~

~~5. Providers may limit or supervise an individual's visitors when, in the judgment of a licensed physician or doctoral level psychologist, the visits result in demonstrable harm to the individual and significantly impact the individual's treatment; or when the visitors are suspected of bringing contraband or in any other way are threatening harm to the individual. The reasons for the restriction shall be documented in the individual's service record, and the human rights advocate shall be notified prior to implementation.~~

~~6. Providers may stop, report or intervene to prevent any criminal act.~~

12VAC35-115-60. Services.

12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

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

B. The provider's duties.

1. Providers shall develop, carry out, and regularly monitor policies and procedures governing discrimination in the provision of services. Providers shall comply with all state and federal laws, including any applicable provisions of the Americans with Disabilities Act (42 USC §2101 et seq.), that prohibit discrimination on the basis of race, color, religion, ethnicity, age, sex, disability, or ability to pay. These policies and procedures shall require, at a minimum, the following:

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

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

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

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

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

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

a. Identify what caregivers may do to respond to an emergency~~.~~ ,

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

c. Require that the director immediately notify the individual's ~~legally~~ authorized representative~~, if there is one,~~ and the advocate if an emergency results in harm or injury to any individual~~.~~ , and

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

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

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

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

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

d. Approval of seclusion and restraint.

5. Providers shall not ~~prepare or~~ deliver any service ~~for any~~ to an individual without a services plan that is tailored specifically to the needs and expressed preferences of the individual ~~receiving services~~ and, in the case of a minor, the minor and the minor’s parent or guardian. Services provided in response to emergencies or crises shall be deemed part of the services plan and thereafter documented in the individual's services plan.

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

7. When preparing ~~and~~ or changing an individual's services or discharge plan, providers shall ensure that all services received by the individual are integrated. With the

individual or the individual's authorized representative's consent, 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) shall be involved in 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.

~~C. Exceptions and conditions to the provider's duties.~~

~~1. Providers may deny or limit an individual's access to a service or services if sound therapeutic practice requires limiting the service to individuals of the same sex, or similar age, disability, or legal status.~~

~~2. With the individual's or legally authorized representative's consent, providers may involve family members in services and discharge planning. When the individual or the legally authorized representative requests such involvement, the provider shall take all reasonable steps to do so.~~

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

12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

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

~~1. Participate meaningfully in the preparation, implementation and any changes to the individual's services and discharge plans.~~

~~2. Express his preferences and have them incorporated into the services and discharge plans consistent with his condition and need for services and the provider's ability to provide.~~

~~3. Object to any part of a proposed services or discharge plan.~~

~~4. Give or not give consent for treatment, including medical treatment. See Consent 12VAC35-115-30.~~

~~5. Give or not give written informed consent for electroconvulsive treatment prior to the treatments or series of treatments.~~

~~a. Informed consent shall be documented on a form that shall become part of the individual's services record. In addition to containing the elements of informed consent as set forth in the definition of "consent" in 12VAC35-115-30, this form shall:~~

~~(1) Specify the maximum number of treatments to be administered during the series;~~

~~(2) Indicate that the individual has been given the opportunity to view an instructional video presentation about the treatment procedures and their potential side effects;~~

~~(3) Be signed by the individual receiving the treatment, or the individual's legally authorized representative, where applicable; and~~

~~(4) 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 the potential side effects of the procedures.~~

~~b. Separate consent, documented on a separate consent form, shall be obtained for any treatments exceeding the maximum number of treatments indicated on the initial consent form.~~

~~c. Providers shall inform the individual receiving services or the legally authorized representative, as applicable, that the individual may obtain a second opinion before receiving electroconvulsive treatment and shall document such notification in the individual's services record.~~

~~d. 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 and 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.~~

~~6. Give or not give informed consent for participation in human research.~~

~~7. Give or not give consent to the disclosure of information the provider keeps about him. See 12VAC35-115-80.~~

~~8. Have a legally authorized representative make decisions for him in cases where the individual lacks capacity to give informed consent.~~

~~9. Object to any decision that allows a legally authorized representative to make decisions for him. This includes having a professional assessment of capacity to consent and, at the individual's own expense, an independent assessment of capacity.~~

~~10. Be accompanied by someone the individual trusts as his representative when participating in services planning.~~

~~11. Indicate by signature in the service record, the individual's participation in and agreement to services plan, discharge plan, changes to these plans, and all other significant aspects of treatment and services he receives.~~

~~12. Request admission to or discharge from any service any time.~~

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

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

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

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

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

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

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

(2) When proposing human research, the provider shall describe the research and its purpose, explain how the results of the research will be disseminated and how the identity

of the individual will be protected, and explain any compensation or medical care that is available if an injury occurs;

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

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

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

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

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

(8) When the provider proposes human research, an explanation of any compensation or medical care that is available if an injury occurs.

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 separate 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 receiving services 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 lacks 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 shall immediately notify the human rights advocate and authorized representative. A petition for LHRC review of the objection may be filed under 12 VAC 35-115-200.

b. If the authorized representative objects or refuses to consent to a specific proposed treatment or service for which consent is necessary, the provider shall not institute the proposed treatment, except in an emergency in accordance with 12 VAC 35-115-70.

4. Be accompanied, except during forensic evaluations, by someone whom the individual trusts as his representative when he participates in services planning, assessments, and evaluations, including discussions and evaluations of the individual's capacity to consent, and discharge planning.

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

B. The provider's duties.

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

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

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

~~4. Providers shall obtain and document in the individual's services record the individual's consent prior to disclosing any information about him. See 12VAC35-115-80 for the rights, duties, exceptions, and conditions relating to disclosure.~~

~~5~~ 4. Providers shall obtain and document in the individual's services record the individual's or his authorized representative's consent for any treatment~~, including medical treatment,~~ before ~~the treatment~~ it begins. If the individual is a minor in the legal custody of a natural or adoptive parent, the provider shall obtain this consent from at least one parent. The consent of a parent is not needed if a court has ordered or consented to treatment or services pursuant to §§16.1-241 D, 16.1-275, or 54.1-2969 B of the Code of Virginia, or a local department of social services with custody of the minor has provided consent. Reasonable efforts must be made, however, to notify the parent or legal custodian promptly following the treatment or services. Additionally, a competent minor may independently consent to treatment ~~of~~ for sexually transmitted or contagious diseases, family planning or pregnancy, or outpatient services or treatment for mental illness, emotional disturbance, or ~~addictions~~ substance use disorders pursuant to §54.1-2969 E of the Code of Virginia.

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

emergency shall be documented in the individual's services record within 24 hours of the treatment or services.

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

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

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

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

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

~~7. If the capacity of an individual to give consent is in doubt, the provider shall make sure that a professional qualified by expertise, training, education, or credentials and not~~

~~directly involved with the individual conducts an evaluation and makes a determination of the individual's capacity.~~

~~8. If the individual or his family objects to the results of the qualified professional's determination, the provider shall immediately inform the human rights advocate.~~

~~a. If the individual or family member wishes to obtain an independent evaluation of the individual's capacity, he may do so at his own expense and within reasonable timeframes consistent with his circumstances. The provider shall take no action for which consent is required, except in an emergency, pending the results of the independent evaluation. The provider shall take no steps to designate a legally authorized representative until the independent evaluation is complete.~~

~~b. If the independent evaluation is consistent with the provider's evaluation, the 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 Part IV (12VAC35-115-150 et seq.) of this chapter.~~

~~9. When it is determined that an individual lacks the capacity to give consent, the provider shall designate a legally authorized representative. The director shall have the primary responsibility for determining the availability of and designating a legally authorized representative in the following order of priority:~~

~~a. An attorney-in-fact currently authorized to give consent under the terms of a durable power of attorney, a health care agent appointed by an individual under an advance directive pursuant to '54.1-2983 of the Code of Virginia, a legal guardian of the individual not employed by the provider and currently authorized to give consent, or, if the individual is a minor, a parent having legal custody of the individual.~~

~~b. The individual's next of kin. In designating the next of kin, the director shall select the best qualified person, if available, according to the following order of priority unless, from all information available to the director, another person in a lower priority is clearly better qualified: spouse, an adult child, a parent, an adult brother or sister, any other relative of the individual. If the individual expresses a preference for one family member over another in the same category, the director shall appoint that family member.~~

~~c. If no other person specified in subdivisions a and b is available and willing to serve, a provider may appoint a next friend of the individual, after a review and finding by the LHRC that the proposed next friend has shared a residence with or provided support and assistance to the individual for a period of at least six months prior to the designation, the proposed next friend has appeared before the LHRC and agreed to accept these responsibilities, and the individual has no objection to this proposed next friend being appointed authorized representative.~~

~~10. No provider, director, or employee of a provider or director may serve as legally authorized representative for any individual receiving services delivered by that provider or director unless the employee is a relative or legal guardian.~~

~~11. If a provider documents that the individual lacks capacity and no person is available or willing to act as a legally authorized representative, the provider shall:~~

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

~~b. Ask a court to authorize treatment. See '37.1-134.21 of the Code of Virginia.~~

~~12. If the individual who has a legally authorized representative objects to the disclosure of specific information or a specific proposed treatment, the director shall immediately notify the human rights advocate and the legally authorized representative, as applicable. A petition for a LHRC review may be filed under 12VAC35-115-180.~~

~~13. Providers shall make sure that an individual's capacity to consent is reviewed at least every six months or as the individual's condition warrants according to sound therapeutic practice to assess the continued need for a surrogate decision-maker. Such reviews, or decisions not to review, shall be documented in the individual's services record and communicated in writing to the surrogate decision-maker. Providers shall also consider an individual's request for review in a timely manner.~~

~~14. Providers shall respond to an individual's request for discharge according to requirements 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 '37.1-65 of the Code of Virginia to mental health facilities operated by the department who notify the director of their intent to leave shall be released when appropriate, but no later than eight hours after notification, unless another law authorizes the director to detain the individual for a longer period.~~

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

~~b. Involuntary commitment.~~

~~(1) When a minor involuntarily committed 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 committed under '37.1-67.3 of the Code of Virginia has been receiving services for more than 30 days and makes a written request for discharge, the director shall determine whether the individual continues to meet the criteria for involuntary commitment. If the director denies the request for discharge, he shall notify the individual in writing of the reasons for denial and of the individual's right to seek relief in the courts. The request and reasons for denial shall be included in the individual's services record. Anytime an individual meets any of the criteria for discharge set out in '37.1-98 A of the Code of Virginia, the director shall take all necessary steps to arrange the individual's discharge.~~

~~(3) If at any time it is determined that an individual involuntarily admitted under Chapter 11 ('19.2-167 et seq.) or Chapter 11.1 ('19.2-182.2 et seq.) of Title 19.2 of the Code of Virginia no longer meets the criteria upon which the individual was admitted and retained, the director shall notify the commissioner who shall seek judicial authorization to discharge or transfer the individual. Further, pursuant to '19.2-182.6 of the Code of Virginia, the commissioner shall petition the committing court for conditional or unconditional release at any time he believes the acquittee no longer needs hospitalization.~~

~~c. Certified admissions. If an individual certified for admission under '37.1-65.1 or 37.1-65.3 of the Code of Virginia requests discharge, the director will determine whether the individual continues to meet the criteria for certification. If the director denies the request~~

~~for discharge, the individual and the individual's legally authorized representative shall be notified in writing of the reasons for denial and of the individual's right to seek relief in the courts. The request and the reasons for denial will be included in the individual's services record.~~

~~C. Exceptions and conditions to the provider's duties.~~

~~1. Providers, in an emergency, may initiate, administer, or undertake a proposed treatment without the consent of the individual or the individual's legally authorized representative. All emergency treatment shall be documented in the individual's services record within 24 hours.~~

~~a. Providers shall immediately notify the legally authorized representative, as applicable, of the provision of treatment without consent during an emergency.~~

~~b. Providers shall continue emergency treatment without consent beyond 24 hours only following a review of the individual's condition and if a new order is issued by a professional who is authorized by law and the provider to order the 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 to address and prevent future such emergencies to the extent possible, into the individual's services plan, following the provision of emergency treatment without consent.~~

~~2. Providers may provide treatment without consent in accordance with a court order or in accordance with other provisions of law that authorize such treatment including the Health Care Decisions Act ('54.1-2981 et seq.). The provisions of these regulations are not intended to be exclusive of other provisions of law but are cumulative (e.g., see '54.1-2970 of the Code of Virginia).~~

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

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

a. Voluntary admissions.

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

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

b. Involuntary admissions.

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

(2) When an individual, involuntarily admitted under § 37.2-817 of the Code of Virginia has been receiving services for more than 30 days and makes a written request for discharge, the director shall determine whether the individual continues to meet the criteria for involuntary admission. If the director denies the request for discharge, he shall notify the individual in writing of the reasons for denial and of the individual's right

to seek relief in the courts. The request and the reasons for denial shall be included in the individual's services record. Anytime the individual meets any of the criteria for discharge set out in §§37.2-837 or 37.2-838 of the Code of Virginia, the director shall take all necessary steps to arrange the individual's discharge.

(3) If at any time it is determined that an individual involuntarily admitted under Chapter 11 (§ 19.2-167 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2 of the Code of Virginia no longer meets the criteria under which the individual was admitted and retained, the director or commissioner, as appropriate, shall seek judicial authorization to discharge or transfer the individual. Further, pursuant to § 19.2-182.6 of the Code of Virginia, the commissioner shall petition the committing court for conditional or unconditional release at any time he believes the acquittee no longer needs hospitalization.

c. Certified admissions. If an individual certified for admission under § 37.2-806 of the Code of Virginia requests discharge, the director shall determine whether the individual continues to meet the criteria for admission. If the director denies the request for discharge, the individual and the individual's authorized representative shall be notified in writing of the reasons for the denial and of the individual's right to seek relief in the courts. The request and the reasons for denial shall be included in the individual's services record.

12VAC35-115-80. Confidentiality.

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

B. The provider's duties.

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

2. Providers shall obtain and document in the individual's services record the individual's authorization 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 the 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.

~~2~~ 3. Providers shall tell each individual~~,~~ and his ~~legally~~ authorized representative ~~if he has one,~~ 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 ~~consent~~ authorization. If a disclosure is not required by law, the providers shall give strong consideration to any objections from the individual or his authorized representative in making the decision to disclose information (see Virginia Government Data Collection and Dissemination Practices Act, § 2.2-3800 et seq. of the Code of Virginia).

~~3~~ 4. Providers shall prevent unauthorized disclosures of information from services records and shall ~~convey~~ maintain and disclose the information in a secure manner.

~~4~~ 5. ~~If consent to disclosure is required, providers shall get the written consent of the individual or the legally authorized representative, as applicable, before disclosing information.~~ In the case of a minor, the ~~consent~~ 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 ~~release~~ disclosure of ~~records~~ information related to medical or health services for a sexually transmitted or contagious disease ~~or~~, family planning or pregnancy, ~~but requires parental consent for release of records related to~~ and outpatient care, treatment, or rehabilitation for substance use disorders, mental illness,or emotional disturbance.

b. ~~A minor may authorize the release of outpatient substance abuse records without parental consent in programs governed by 42 CFR Part 2~~ The concurrent authorization of the minor and parent is required to disclose inpatient substance abuse records.

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

~~5~~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 ~~consents~~ authorizes the disclosure or unless ~~the~~ state law or regulation allows or requires further disclosure without ~~consent~~ authorization.

~~6. Upon request, providers shall tell individuals the sources of information contained in their services records and the names of anyone, other than employees of the provider, who has received information about them from the provider. Individuals receiving services should be informed that the department may have access to their records.~~

~~C. Exceptions and conditions to the provider's duties.~~

~~1.~~ 7. Providers may encourage individuals to name family members, friends, and others who may be told of their presence in the program and general condition or well-being. ~~Consent must be obtained and documented in the services record for the provider to contact family members, friends, or others. Nothing in this provision shall prohibit providers from taking steps necessary to secure a legally authorized representative~~ Except for information governed by 42 C.F.R. Part 2, providers may disclose to a family member, other relative, a close personal friend, or any other person identified by the individual, information that is directly relevant to that person's involvement with the individual's care or payment for his health care, if the provider (i) obtains the individual's agreement, (ii) provides the individual with the opportunity to object to the disclosure, and (iii) the individual does not object or the provider reasonably infers from the circumstances, based on the exercise of professional judgment, that the individual does not object to the disclosure. If the opportunity to agree or object cannot be provided because of the individual's incapacity or an emergency circumstance, the provider may, in the exercise of professional judgment, determine whether the disclosure is in the best interest of the individual and, if so, disclose only the information that is directly relevant to the person's involvement with the individual's health care.

~~2.~~ 8. Providers may disclose the following identifying information without ~~consent~~ authorization or violation of the individual's confidentiality, but only under the conditions

specified in ~~this subdivision and in subdivision 3 of this subsection~~ the following subdivisions of this subsection. Providers should always consult ~~42 CFR Part 2~~ 42 C.F.R. Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records, if applicable, because these federal regulations may prohibit some of the disclosures addressed in this section. See also §32.1-127.1:03 of the Code of Virginia for a list of circumstances under which records may be disclosed without ~~consent~~ authorization.

a. Emergencies: Providers may disclose information in an emergency to any person who needs that particular information for the purpose of preventing injury~~,~~ or death ~~or substantial property destruction in an emergency~~. The provider shall not disclose any information that is not needed for these specific purposes.

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

~~c. Insurance companies and other third party payers: Disclosure may be made to insurance companies and other third party payers according to Chapter 12 ('37.1-225 et seq.) of Title 37.1 of the Code of Virginia.~~

~~d~~ c. Court proceedings: If the individual~~,~~ or someone acting for him~~,~~ introduces any aspect of his mental condition or services as an issue before a court, administrative

agency, or medical malpractice review panel, the provider may disclose any information relevant to that issue. The provider may also disclose any records if they are properly subpoenaed, if a court orders them to be produced, or if involuntary ~~commitment~~ admission or certification for admission is being proposed ~~or conducted~~.

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

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

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

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

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

(3) Evaluation of provider performance and individual outcomes (see ~~'37.1-98.2~~ §§ 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.

~~h~~ g. Preadmission screening, services, and discharge planning: Providers may disclose to the department, the CSB, or to other providers information necessary to prescreen individuals or to prepare and carry out a comprehensive individualized services or discharge plan (see ~~'37.1-98.2~~ § 37.2-505 of the Code of Virginia).

~~i~~ h. Protection and advocacy agency: Providers may disclose information to the protection and advocacy agency ~~any information that may establish probable cause to believe that an individual receiving services has been abused or neglected and any information concerning the death or serious injury of any individual while receiving services, whatever the suspected cause of the death~~ in accordance with that agency's legal authority under federal and state law.

~~j~~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.

~~(1)~~ (2) The commissioner, CSB executive director, or private program director has ~~authorizes~~ authorized the research;

~~(2)~~ (3) The individual or individuals who are the subject of the disclosure are deceased;

~~(3)~~ (4) There are no known living persons ~~authorized~~ permitted by law to ~~consent to~~ authorize the disclosure; and

~~(4)~~ (5) The disclosure would in no way reveal the identity of any person who is not the subject of the historical research.

~~k. A request for historical research shall include, at a minimum:~~

~~(1) A summary of the scope and purpose of the research;~~

~~(2) A description of the product to result from the research and its expected date of completion;~~

~~(3) A rationale explaining the need to access otherwise confidential records; and~~

~~(4) Specific identification of the type and location of the records sought.~~

~~l~~ j. Protection of ~~the~~ public safety: ~~If a provider reasonably believes an individual receiving services is a present threat to a specifically identifiable person or the public, the provider may communicate only those facts necessary to alleviate the potential threat~~ 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.

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

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

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

(1) For the provider's own training programs in which students, trainees, or practitioners in mental health are being taught under supervision to practice or improve their skills in group, joint, family, or individual counseling;

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

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

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

(5) When otherwise required by law.

~~o~~ n. Other statutes or regulations: Providers may disclose information to the extent required or permitted by any other state ~~or federal statute~~ law or ~~regulations~~ regulation.

~~3. If information is disclosed without consent to anyone other than employees of the department, CSB or other provider, providers shall take the following steps before the disclosure (or, in an emergency, promptly afterward):~~

~~a. Put a written notation of the information disclosed, the name of the person who received the information, the purpose of disclosure, and the date of disclosure permanently in the individual's services record.~~

~~b. Give the individual or his legally authorized representative written notice of the disclosure, including the name of each person who received the information and the nature of the information.~~

~~4. If the disclosure is not required by law, give strong consideration to any objections from the individual or his legally authorized representative in making the decision to release information (see Virginia Government Data Collection and Dissemination Practices Act, '2.2-3800 et seq. of the Code of Virginia).~~

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; or

g. To correctional institutions or law enforcement officials.

10. The provider shall include the following information in the listing of disclosures of information provided to the individual or his authorized representative under paragraph 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 for 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 paragraph 10 of this subsection for the first disclosure made during the requested period;

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

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

12. The provider need not inform an individual whom it believes to be a victim of abuse or neglect:

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

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

12VAC35-115-90. Access to and ~~correction~~ amendment of services records.

A. ~~Each individual has a right to see, read, and get a copy of his own services record. Minors must have their parent or guardian's permission first. If this right is restricted according to law, the individual has a right to let certain other people see his record. Each individual has a right to challenge, correct or explain anything in his record. Whether or not corrections are made as a result, each individual has a right to let anyone who sees his record know that he tried to correct or explain his position and what happened as a result. An individual's legally authorized representative has the same rights as the individual himself has (see '2.2-3806 of the Code of Virginia).~~

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

1. See, read, and get a copy of his own services record, except psychotherapy notes, information that is privileged pursuant to § 8.01-581.17 of the Code of Virginia, and information compiled by the provider in reasonable anticipation of or for use in a civil, criminal, or administrative action or proceeding.

2. Let certain other people see, read, or get a copy of his own services record if the individual is restricted by law from seeing, reading, or receiving a copy.

3. Challenge, amend, or receive an explanation of anything in his services record; and

4. Let anyone who sees his record, regardless of whether amendments to the record have been made, know that the individual has tried to amend the record or explain his position and what happened as a result.

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

1. A minor may access his services record without the permission of a parent only if the records pertain to treatment for sexually transmitted or contagious diseases, family planning or pregnancy, outpatient care, treatment or rehabilitation for substance use disorders, mental illness or emotional disturbance, or inpatient psychiatric hospitalization when a minor is 14 years of age or older and has consented to the admission.

2. A parent may access his minor child's services record unless parental rights have been terminated, a court order provides otherwise, or the minor's treating physician or clinical psychologist has determined, in the exercise of professional judgment, that the disclosure to the parent would be reasonably likely to cause substantial harm to the minor or another person.

~~B~~ C. The provider's duties.

1. Providers shall tell each individual~~,~~ and his ~~legally~~ authorized representative ~~if he has one,~~ how he can access and ~~provide corrections to~~ request amendment of his own services ~~records~~ record.

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

a. Access to all or a part of an individual's services record may be denied or limited only if a physician or a clinical psychologist involved in providing services to the individual talks to the individual, examines the services record as a result of the individual's request for access, and signs and puts in the services record permanently a written statement that he thinks access to the services record by the individual at this time would be reasonably likely to endanger the life or physical safety of the individual or another person or that the services record makes reference to a person other than a health care provider and the access requested would be reasonably likely to cause substantial harm to the referenced

person. The physician or clinical psychologist must also tell the individual as much about his services record as he can without risking harm to the individual.

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

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

(2) At the individual's option, the individual may designate at his own expense a reviewing physician or clinical psychologist who was not directly involved in the denial to review the decision to deny access in accordance with the standard in subdivision 2.a,

above. If the individual chooses this option, the provider is not required to designate a physician or clinical psychologist to review the decision.

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

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

~~4. If the provider limits or refuses to let an individual see his services records, the provider shall notify the advocate and tell the individual that he can ask to have a lawyer, physician, or psychologist of his choice see his records. If the individual makes this request, the provider shall disclose the record to that lawyer, physician, or psychologist ("2.2-3705, 32.1-127.1:03 and 8.01-413 of the Code of Virginia).~~

~~5. The provider shall document in the record the decision and reasons for the decision to limit or refuse access to the individual's medical record. The individual shall be notified of time limits and conditions for removal of the restriction. These time limits and conditions shall also be specified in the record.~~

~~6~~ 4. If an individual asks to challenge, ~~correct~~ amend, or explain any information contained in his services record, the provider shall investigate and file in the services record a written report concerning the individual's request.

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

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

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

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

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

b. If ~~the report does not result in action satisfactory to the individual, the provider shall, upon~~ a request to amend the services record is denied, the provider shall give the individual a written statement containing the basis for the denial and notify the individual

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

(1) Give all persons who have copies of the record a copy of the individual's statement.

(2) Clearly note in any later disclosure of the record that it is disputed and include a copy of the statement with the disputed record.

~~C. Exceptions and conditions to the provider's duties. A provider may deny access to all or a part of an individual's services record only if a physician or a licensed psychologist involved in providing services to the individual talks to the individual, looks over the services record as a result of the individual's request for access, signs and puts in the services record permanently a written statement that he thinks access to the services records by the individual at this time would be physically or mentally harmful to the individual. The physician or licensed psychologist must also tell the individual as much about his services record as he can without risking harm to the individual.~~

12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

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 ~~the following~~:

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

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

c. Freedom to have and spend personal money~~.~~ ;

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

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

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

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

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

B. The provider's duties.

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

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

3. Providers shall not impose any restriction on an individual unless the restriction is justified and carried out according to these regulations. If a provider imposes a restriction, except as provided in 12 VAC 35-115-50, the following conditions shall be met:

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

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

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

d. A qualified professional involved in providing services has explained, so that the individual can understand, the reason for the restriction, the criteria for removal, and the individual's right to a fair review of whether the restriction is permissible.

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

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

~~4. Providers shall make sure that a qualified professional regularly reviews every restriction and that the restriction is discontinued when the individual has met the criteria for removal.~~

~~5. Providers shall not place any restriction on the physical or personal freedom of any individual solely because criminal or delinquency charges are pending against that~~

~~individual, except in the situation where the individual is transferred directly from jail or detention for the purpose of receiving an evaluation or treatment.~~

~~C. Exceptions and conditions on the provider's duties.~~

~~1. Except as provided in 12VAC 35-115-50 E, providers may impose restrictions if a qualified professional involved in providing services to the individual has, in advance:~~

~~a. Assessed and documented all possible alternatives to the proposed restriction, taking into account the individual's medical and mental condition, behavior, preferences, nursing and medication needs, and the ability to function independently;~~

~~b. Determined that the proposed restriction is necessary for effective treatment of the individual or to protect him or others from personal harm, injury or death;~~

~~c. Documented in the individual's services record the specific reason for the restriction; and~~

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

~~2. Providers may impose a restriction if a court has ordered the provider to impose the restriction or if the provider is otherwise required by law to impose such restriction. Such restriction shall be documented in the individual's services record.~~

~~3~~ 4. Providers may develop and enforce written program rules ~~of conduct~~, but only if the rules do not conflict with these regulations or any individual's services plan~~,~~ and ~~the rules~~ are needed to maintain a safe and orderly environment.

~~4~~ 5. Providers shall, in the development of these program rules ~~of conduct~~:

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

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

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

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

e. Submit the rules to the LHRC for review and approval ~~before putting them into effect, before any changes are made to the rules, and~~ upon request of the advocate or LHRC~~.~~;

and

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

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

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

B. The provider's duties.

~~1. Providers shall not use seclusion or restraint as punishment, reprisal, or for the convenience of staff.~~

~~2. Providers shall limit each authorization for seclusion or behavioral restraint to four hours for individuals 18 and older, two hours for children and adolescents ages 9 to 17, and one hour for children under age 9.~~

~~3. Providers shall monitor the combined use of seclusion and restraint by a continuous face-to-face observation, not solely by an electronic surveillance device.~~

~~4. Providers shall ensure that seclusion and restraint may only be implemented, monitored, and discontinued by staff who have been trained in the proper and safe use of seclusion and restraint techniques.~~

~~5. Providers shall not utilize seclusion or restraint unless it is justified and carried out according to these regulations.~~

~~a. The justification for any seclusion or restraint procedure must be documented in the individual's services plan.~~

~~b. The authorization for the use of seclusion or restraint must be documented in the individual's services plan and include behavioral criteria the individual must meet for release.~~

~~c. The authorization for the use of seclusion or restraint must be time-limited. Authorizations for the use of seclusion or restraint procedures may not be given on an as needed basis.~~

~~d. The authorizing professional must document that he has taken into account any physical or psychological conditions that would place the individual at greater risk during restraint or seclusion.~~

~~6. Providers shall make sure that a qualified professional regularly reviews every use of seclusion or restraint and that the procedure is discontinued when the individual has met the criteria for removal.~~

~~7. Providers shall not use seclusion or restraint solely because criminal or delinquency charges are pending against the individual.~~

~~8. Providers who use seclusion or restraint shall develop written seclusion and restraint policies and procedures that comply with applicable federal and state statutes and regulations, accreditation standards, third party payer requirements, and sound therapeutic practice. These policies and procedures shall include the following requirements at a minimum:~~

~~a. Providers shall submit all proposed seclusion and restraint policies and procedures to the LHRC for review and comment before they are implemented, when changes are proposed, and upon request by the human rights advocate or the LHRC. The SHRC may request these policies and procedures be transmitted to the SHRC for review.~~

~~b. Providers shall make sure that each individual who requires seclusion or restraint is given the opportunity for motion and exercise, to eat at normal meal times and take fluids, to use the restroom, and bathe as needed.~~

~~c. Providers shall make sure that the medical and mental condition of each individual in seclusion or restraint is continuously monitored by trained, qualified staff for the duration of the restriction.~~

~~d. Each use of seclusion or restraint shall end immediately when criteria for removal is met.~~

~~e. Incidents of seclusion and restraint, including the rationale, type and duration of the restraint, shall be reported to the department as provided in 12VAC35-115-230.~~

~~9. Providers shall not consider the use of seclusion or restraint unless other less restrictive techniques have been considered and documented in the individual's services plan to demonstrate 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.~~

~~10. Only inpatient hospital settings and residential facilities for children or adolescents licensed under the Mandatory Certification/Licensure Standards for Treatment Programs for Residential Facilities for Children (12VAC35-40-10 et seq.) of the Standards for Interdepartmental Regulation of Children's Residential Facilities (22VAC42-10-10 et seq.) may use seclusion.~~

~~11. Providers shall comply with all applicable state and federal laws and regulations, accreditation standards, and third party payer requirements as they relate to seclusion and restraint. Whenever an inconsistency exists between these regulations and federal regulations, accreditation standards, or the requirements of third party payers, the provider will be held to the higher standard.~~

~~12. Providers shall notify the department whenever a regulatory or accreditation agency or third party payer identifies problems in the provider's compliance with any applicable seclusion or restraint standard.~~

~~13. Providers shall ensure that no individual is in time out for more than 30 minutes per episode and that the instruction to the individual to move or remain in the alternative location may not take the form of a threat.~~

~~14. Providers shall ensure that isolated time out as defined by the U.S. Health Care Financing Administration (HCFA) may be used only in compliance with HCFA requirements. Isolated time out may only be used as part of a behavioral treatment program that has been approved by the LHRC and incidents of isolated time out shall be limited to one hour.~~

~~C. Exceptions and conditions on the provider's duties.~~

~~1. Providers who use seclusion and restraint may impose seclusion or restraint in an emergency, but only to the extent necessary to stop the emergency and only if:~~

~~a. Less restrictive measures have been exhausted; or~~

~~b. The emergency is so sudden that no less restrictive measure is possible.~~

~~2. Providers who use seclusion and restraint may use seclusion or restraint if a qualified professional involved in providing services to the individual has, in advance:~~

~~a. Assessed and documented why alternatives to the proposed use of seclusion or restraint have not been successful in changing the behavior or not attempted, taking into account~~

~~the individual's medical and mental condition, behavior, preferences, nursing and medication needs, and ability to function independently;~~

~~b. Determined that the proposed seclusion or restraint is necessary for effective treatment of the individual or to protect him or others from personal harm, injury, or death;~~

~~c. Documented in the individual's service record the specific reasons for the seclusion or restraint; and~~

~~d. Explained, so that the individual can understand, the reason for using restraint or seclusion, the criteria for its removal, the individual's right to a fair review of whether the restriction is permissible.~~

~~3. Providers who use seclusion and restraint may use restraint or seclusion in a behavioral treatment plan, but only if the plan has been developed according to policies and procedures. All plans involving the use of restraints for behavioral purposes and all plans involving the use of seclusion shall be reviewed in advance by the LHRC. Such procedures shall ensure that:~~

~~a. Plans are initiated, developed, carried out, and monitored by professionals who are qualified by expertise, training, education or credentials.~~

~~b. Individual plans are submitted to and approved by an independent review committee, comprised of professionals with training and experience in applied behavior analysis,~~

~~which shall assess the technical adequacy of the plan and data collection procedures; and the LHRC, which shall review the plans to ensure that the rights of the individuals are protected. All approvals shall be documented in the individual's services record before implementation.~~

~~c. Information about the individual plans or aggregate data about all plans is available anytime:~~

~~(1) Upon request by the human rights advocate, the LHRC, the SHRC, the Inspector General, and the department; and~~

~~(2) According to relevant reporting requirements.~~

~~d. Seclusion and restraint shall only be included in plans:~~

~~(1) To address behaviors that present an immediate danger to the individual or others, but only after it has been demonstrated by a detailed and systematic analysis of the behavior itself and the situations in which the behavior occurs. Providers shall document the lack of success or of probable success of less restrictive procedures attempted and that the risks associated with not treating the behavior are greater than any risks associated with the use of restraint or seclusion.~~

~~(2) After review by the LHRC. If the LHRC finds that a behavioral treatment plan that utilizes seclusion or restraint violates or has the potential to violate the rights of the individual, the LHRC will notify and make recommendations to the director.~~

~~(3) If the plans include nonrestrictive procedures and environmental modifications that address the targeted behavior.~~

~~e. Plans that include the use of seclusion and restraint shall also be reviewed quarterly by the independent review committee and by the LHRC to assess if the use of restrictions has resulted in improvements in functioning.~~

~~4. Providers may use time out, but only according to policies and procedures that comply with sound therapeutic practice. These policies and procedures shall be documented in the individual's services plan with the justification and purpose for using time out instead of other less restrictive techniques.~~

1. Providers shall meet with the individual or his authorized representative upon admission to discuss the individual’s preferred interventions should it become necessary to use seclusion, restraint, or time out.

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

3. Only residential facilities for children that are licensed under the Regulations for Providers for Mental Health, Mental Retardation and Substance Abuse Residential Services for Children (12 VAC 35-45-10 et seq.) and inpatient hospitals may use seclusion and only in an emergency.

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

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

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

7. Providers that use seclusion, restraint, or time out shall develop written policies and procedures that comply with applicable federal and state statutes, regulation, accreditation, or 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 monitors the individual's medical and mental condition continuously for the duration of the restriction.

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

d. Incidents of seclusion and restraint, including the rationale for and the type and duration of the restraint are reported to the department as provided in 12 VAC 35-115-220.

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

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

a. Whenever an inconsistency exists between these regulations and federal 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 any restraint as soon as possible after it is carried out.

12. Providers shall ensure that review and approval by a qualified professional for the use or continuation of restraint is documented in the individual's services record. Approval for the use of restraint may not be given on an as needed basis. Documentation includes:

a. Justification for any restraint;

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

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

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

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

b. Determined that the proposed seclusion or mechanical restraint is necessary to protect the individual or others from harm, injury, or death;

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

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

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

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

15. Providers shall limit each approval for time-out to no more than 30 minutes.

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

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

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

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

(2) Behavioral treatment plans include nonrestrictive procedures and environmental modifications that address the targeted behavior.

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

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

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

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

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

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 ~~supportive~~ supported employment services are offered, providers shall establish procedures for documenting the decision on employment and training and the methodology for establishing consumer wages. Providers shall give a copy of the procedures and information about possible consequences for violating the procedures to all individuals and their ~~legally~~ 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.

12VAC35-115-130. Research.

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

B. The provider's duties.

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

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

3. Providers shall ~~solicit~~ obtain ~~consultation and~~ review ~~by~~ and approval from an institutional review board or research review committee prior to ~~participation in human research~~ performing or participating in a human research protocol.

4. All providers shall inform the ~~Local Human Rights Committee~~ LHRC before an individual receiving services may participate in any human research project and provide periodic updates on the status of the individual's participation to the committee.

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

A. Each individual has a right to:

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

2. Have a timely and fair review of any complaint according to the procedures in ~~Part IV~~ Part V (12VAC35-115-150 et seq.) of this chapter~~.~~ ;

3. Have someone file a complaint on his behalf~~.~~ ;

4. Use these and other complaint procedures~~.~~ ; and

5. Complain under any other applicable law, including complain to the protection and advocacy agency.

B. The provider's duties.

1. If an individual makes a complaint, ~~his~~ the provider shall make every attempt to resolve the complaint ~~to the individual's satisfaction~~ at the earliest possible step.

2. Providers shall not take, threaten to take, permit, or condone any action to retaliate against anyone filing a complaint or prevent anyone from filing a complaint or helping an individual to file a complaint.

3. Providers shall assist the complainant in understanding the full complaint process ~~of complaint~~, the options for resolution including the formal and informal processes, and the confidentiality elements ~~of confidentiality~~ involved.

PART IV

SUBSTITUTE DECISION MAKING

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

A. If the capacity of an individual to consent to treatment, services, or research, or authorize the disclosure of information is in doubt, the provider shall obtain an evaluation

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

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

2. In conducting this evaluation, the professional may seek comments from a representative accompanying the individual pursuant to 12 VAC-35-115-70A4 about the individual's capacity to consent or 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 the authorized representative.

4. Capacity evaluations shall be conducted in accordance with accepted standards of professional practice and shall indicate the specific type or level of decision for which the individual's capacity is being evaluated (e.g. medical, treatment planning) and shall indicate what specific type of decision the individual has or does not have the capacity to make.

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

a. If the individual or family member wishes to obtain an independent evaluation of the individual's capacity, he may do so at his own expense and within reasonable timeframes consistent with his circumstances. If the individual or family member cannot pay for an independent evaluation, the individual may request that the LHRC consider the need for an independent evaluation pursuant to 12 VAC 35-115-200 (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 12 VAC 35-115-200 et seq. of this chapter.

12VAC35-115-146. Authorized representatives.

A. When it is determined in accordance with 12 VAC-35-115-145 that an individual lacks the capacity to consent or authorize the disclosure of information, the provider shall recognize and obtain consent or authorization for those decisions for which the individual lacks capacity from the following:

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

2. A health care agent appointed by the individual under an advance directive or power of attorney in accordance with the laws of Virginia; or

3. A legal guardian of the individual, or if the individual is a minor, a parent with legal custody of the minor or other person authorized to consent to treatment pursuant to § 54.1-2969 (A).

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

1. The individual's family member. In designating a family member, the director shall select the best qualified person, if available, according to the following order of priority

unless, from all information available to the director, another person in a lower priority is clearly better qualified. The director shall ask the individual and if the individual expresses a preference for one family member over another in the same category, the director shall designate that family member, unless there is a compelling clinical reason not to do so.

a. a spouse,

b. an adult child,

c. a parent,

d. an adult brother or sister,

e. any other relative of the individual.

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

a. Shared a residence with the individual; or

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

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

4. The person designated as next friend also shall:

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

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

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

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

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

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

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

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

2. Ask a court to authorize treatment (See § 37.2-1101of the Code of Virginia).

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

1. Providers shall review the need for court ordered treatment and determine the availability of and seek an authorized representative whenever the individual's condition warrants, the individual requests such a review, or at least every six months except for individuals receiving acute inpatient treatment.

2. Providers of acute inpatient services shall review the need for court ordered treatment and determine the availability of and seek an authorized representative whenever the

individual's condition warrants or at least at every treatment team meeting. All such reviews shall be documented in the individual's services record and communicated to the individual.

3. When the provider recognizes or designates an authorized representative, the provider shall notify the court that its order is no longer needed and shall immediately suspend its use of the court order.

G. Conditions for removal of an authorized representative.

Whenever an individual has regained capacity to consent as indicated by a capacity evaluation or clinical determination, the director shall immediately remove any authorized representative designated pursuant to 12 VAC-35-115-146 B1 or B2, notify the individual and the authorized representative, and ensure that the services record reflects that the individual is capable of making his own decisions. Whenever an individual with an authorized representative who is his legal guardian has regained his capacity to give informed consent, the director shall use the applicable statutory provisions to remove the authorized representative. (See § 37.2-1012 of the Code of Virginia.) Powers of attorney and health care agents' powers should cease of their own accord when a clinician has determined that the individual is no longer incapacitated.

1. The director shall remove the authorized representative designated pursuant to 12 VAC 35-115 146 B 1 or 2 if the authorized representative becomes unavailable, unwilling, or unqualified to serve. The individual or the advocate may appeal the director's decision to remove an authorized representative to the LHRC under the

procedures set out at 12 VAC-35-115-180, and the LHRC may reinstate the authorized representative if it determines that the director's action was unjustified.

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

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

3. The director may otherwise seek to replace an authorized representative recognized pursuant to 12VAC35-115-146 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.

~~PART IV~~ PART V

COMPLAINT RESOLUTION, HEARING, AND APPEAL PROCEDURES.

12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

12VAC35-115-150. General provisions.

A. The parties to any complaint are the individual and the director. Each party can also have anyone else ~~to~~ represent him during resolution of the complaint ~~resolution~~.

B. Meetings, reviews, and hearings will generally be closed to other people unless the individual making the complaint requests that other people attend or if an open meeting is required by the Virginia Freedom of Information Act.

1. The LHRC and SHRC may conduct a closed hearing to protect the confidentiality of persons who are not a party to the complaint, but only if a closed meeting is otherwise allowed under the Virginia Freedom of Information Act (~~'2.2-3700 et seq.~~ § 2.2-3711 of the Code of Virginia).

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

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

D. The LHRC or SHRC, on the motion of any party or on its own motion, may, for good cause, extend any time periods ~~either~~ before or after the expiration of that time period. No

director may extend any time periods for any actions he is required to take under these procedures without prior approval of the LHRC or SHRC.

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

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

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

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

~~12VAC35-115-160. Informal complaint process.~~

12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

~~A. Step 1. Anyone who believes that a provider has violated an individual's rights under these regulations may report the alleged violation to the director or the director's designee.~~

~~B. Step 2. The director or his designee shall attempt to resolve the complaint immediately. If the complaint is resolved to the individual's or legally authorized representative's satisfaction, no further action is required.~~

~~C. Step 3. The director or his designee shall refer any complaint that is not resolved to the individual's or legally authorized representative's satisfaction, within five working days, to the human rights advocate per 12VAC35-115-170.~~

~~D. Step 4. If the individual or his legally authorized representative, as applicable, is not satisfied with the resolution then the director or the director's designee shall immediately notify the human rights advocate per 12VAC35-115-170.~~

~~E. The individual or the legally authorized representative, as applicable, may contact the human rights advocate at any time to pursue a formal complaint per 12VAC35-115-170.~~

~~F. The human rights advocate shall have access to information regarding all informal complaints upon request.~~

~~G. Complaints made under this section will not be reported to the department under 12VAC35-115-230.~~

12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

12VAC35-115-170. ~~Formal complaint~~ Complaint resolution process.

A. ~~The following steps apply if:~~

~~1. The informal complaint process did not resolve the complaint to the individual's satisfaction within five working days; or~~

~~2. The individual chooses to not pursue the informal complaint process.~~

~~B. Step 1:~~ Anyone who believes that a provider has violated an individual's rights under these regulations may report it to the director ~~and~~ or the human rights advocate~~, or either of them,~~ for resolution.

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

2. If the report is made only to the human rights advocate, the human rights advocate shall immediately notify the director ~~or his designee~~. If the report is made on a weekend or holiday, then the human rights advocate shall notify the director ~~or his designee~~ on the next business day. ~~The human rights advocate or the director or his designee shall notify the individual of his right to pursue his complaint through all available means under this part.~~

3. ~~If the human rights advocate concludes, after an initial investigation, that there is substantial risk that serious and irreparable harm will result if the complaint is not resolved immediately, the human rights advocate shall inform the director, the provider, the provider's governing body, and the LHRC. Steps 2 through 6 below shall not be followed. Instead, the LHRC shall conduct a hearing according to the special procedures for emergency hearings in 12VAC35-115-190.~~

The human rights advocate or director or his designee shall discuss the report with the individual and notify the individual of his right to pursue a complaint through the process established in these regulations. The individual shall be given the choice of pursuing the complaint through the informal or formal complaint process. If the individual does not make a choice the complaint shall be managed through the informal process.

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

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

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

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

~~C. Step 2~~ Step 1: The director or his designee shall try to resolve the complaint by meeting ~~within 24 hours of receipt of the complaint~~ with the individual, any representative the individual chooses, the human rights advocate, and others as appropriate within 24 hours of receipt of the complaint or the next business day if that day is a weekend or holiday. ~~, and by conducting an investigation if necessary~~ The director or his designee shall conduct an investigation of the complaint, if necessary.

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

~~E. Step 4~~ Step 3: If the individual ~~is not satisfied at this step~~ disagrees with the director's preliminary decision or action plan, he can respond to the director in writing within ~~5~~ five working days after receiving the ~~director's or the designee's written~~ preliminary decision and action plan. If the individual has not responded within five working days the complaint will be closed.

~~F. Step 5~~ Step 4: ~~The~~ If the individual disagrees with the preliminary decision or action plan the director shall investigate further as appropriate and shall make a final decision regarding the complaint. The director shall forward a written copy of his final decision

and action plan to the individual, his chosen representative, and the human rights advocate within ~~10~~ five working days after the director ~~received~~ receives the individual's written response. Along with the action plan, the director shall provide written notice to the individual about the time frame for the individual's response pursuant to Step 5 of this subdivision and a statement that if the individual does not respond that the complaint will be closed.

~~G. Step 6~~ Step 5: If the individual ~~is not satisfied~~ disagrees with the director's final decision or action plan, he may file a petition for a hearing by the LHRC, using the procedures prescribed in 12VAC35-115-180. If the individual has accepted the relief offered by the director, the matter is not subject to further review.

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

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

12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

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

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

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

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

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

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

1. A written response to everything contained in the petition~~.~~ ; and

2. A copy of the entire written record of the complaint.

E. Step 4: The LHRC shall hold a hearing within ~~15~~ 20 working days of receiving the petition.

1. The parties shall have at least five working days' notice of the hearing.

2. The director or his ~~chosen representative~~ designee shall attend the hearing.

3. The individual or ~~legally~~ his authorized representative~~, as applicable,~~ making the complaint shall attend the hearing.

~~3~~ 4. At the hearing, the parties and ~~their~~ chosen representatives and designees have the right to present witnesses and other evidence and the opportunity to be heard.

F. Step 5: Within 10 working days after the hearing ends, the LHRC shall give~~, in writing,~~ its written findings of fact and recommendations to the parties and their

representatives. Whenever appropriate, the LHRC shall identify information that it believes the director shall take into account in making decisions concerning discipline or termination of personnel.

G. Step 6: Within five working days of receiving the LHRC's findings and recommendations, the director shall give the individual, the individual's chosen representative, the human rights advocate, the governing body, and the LHRC a written action plan he intends to take to respond to the LHRC's findings and recommendations. Along with the action plan, the director shall provide written notice to the individual about the time frame for the individual's response pursuant to Step 7 (12VAC35-115-180 H) and a statement that if the individual does not respond that the complaint will be closed. The plan shall not be implemented for five working days after it is submitted, unless the individual ~~receiving services~~ agrees to its implementation sooner.

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

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

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

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

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

A. ~~Step 1:~~ 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 ~~the~~ his ~~legally~~ authorized representative may attend the hearing.

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

B. ~~Step 2:~~ 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. ~~Step 3:~~ 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. ~~Step 4:~~ If the individual or the human rights advocate objects within 24 hours to the LHRC findings or recommendations or to the director's action plan, the LHRC shall conduct a full hearing within five working days of the objection, following the procedures outlined in 12VAC35-115-180. This objection shall be in writing to the LHRC chairperson, with a copy sent to the director.

E. ~~Step 5:~~ Either party may appeal the LHRC's decision to the SHRC under 12VAC35-115-210.

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

A. ~~Step 1:~~ The ~~LHRC may be requested, in writing, to review whether an individual's personal consent is required in the following situations.~~ individual, his authorized representative, or anyone acting on the individual’s behalf may request in writing that the LHRC review the situations listed below and issue a decision.

1. If an individual objects at any time to ~~a specific treatment, participation in specific human research, or disclosure of specific confidential information,~~ any decision for

which consent or authorization is required and has been given by his ~~legally~~ authorized representative, other than a legal guardian, he may ask the LHRC to decide whether ~~his personal consent is required for that treatment, participation in research, or disclosure of information~~ his capacity was properly evaluated, the authorized representative was properly appointed, or his authorized representative's decision was made based on the individual's basic values and any preferences previously expressed by the individual to the extent that they are known, and if unknown or unclear, in the individual's best interests.

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

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

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

permitted by law, until the capacity review and authorized representative designation is properly done.

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

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

a. If the LHRC agrees that the individual lacks the capacity to consent to treatment or services, or authorize disclosure of information, the director may begin or continue treatment or research, or disclose information, but only 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, research, or disclose information with 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 ~~legally~~ authorized representative, he may object and ask the LHRC to decide whether consent or authorization is required.

~~NOTE: If the individual is a minor, the consent of the parent or legal guardian must be obtained, unless the treatment provided is for treatment referenced under '54.1-2969 E of the Code of Virginia, including outpatient medical or health services for substance abuse, or mental illness or emotional disturbance, in which case the minor alone may provide the consent as if an adult. If treatment involves admission to an inpatient treatment program, the consent of a minor 14 years of age and older, in addition to that of the parent, must also be obtained in accordance with '16.1-338 of the Code of Virginia.~~

Regardless of the individual's capacity to consent to treatment or services, or authorize disclosure of information, if the LHRC determines that a decision made by a director requires consent or authorization that was not obtained, the director shall immediately

rescind the action unless and until such consent or authorization is obtained. The director may appeal to the SHRC under 12VAC35-115-210 but not take any further action until the SHRC issues its opinion.

B. ~~Step 2: The LHRC may ask that a physician or licensed clinical psychologist not employed by the provider and at the provider's expense, evaluate the individual and give an opinion about his capacity to consent. The LHRC may not make a decision until it reviews the action proposed by the director, any determination of lack of capacity, the opinion of the independent evaluator if applicable, and the individual's reasons for objecting to that determination.~~ Before making such a decision, the LHRC shall review the action proposed by the director, any determination of lack of capacity, the opinion of the independent evaluator if applicable, and the individual's or his authorized representative's reasons for objecting to that determination. To facilitate its review, the LHRC may ask that a physician or licensed clinical psychologist not employed by the provider, evaluate the individual at the provider's expense, and give an opinion about his capacity to consent to treatment or authorize information.

~~C. Step 3:~~ The LHRC shall ~~issue its~~ notify all parties and the human rights advocate of the decision within 10 working days of the initial request.

~~1. If the LHRC agrees that the individual lacks the capacity to consent, the director may begin or continue treatment or research, or disclose the information, but only with the appropriate consent of the legally authorized representative. The LHRC shall advise the~~

~~individual of his right to appeal this determination to the SHRC under 12VAC35-115-210.~~

~~2. If the LHRC does not agree that the individual lacks the capacity to consent, the director shall not begin any treatment, research or information disclosure without the individual's consent, or shall take immediate steps to discontinue use of medication if it has already begun. 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, regardless of the individual's capacity to consent, the LHRC determines that a decision made by a director requires consent that was not obtained, the director shall immediately rescind the action unless and until such consent 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.~~

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

A. Any party may appeal to the ~~State Human Rights Committee~~ SHRC if he is not satisfied with any of the following:

1. An LHRC's final findings of fact and recommendations following a hearing~~.~~ ;

2. A director's final action plan following an LHRC hearing~~.~~ ;

3. An LHRC's final decision regarding the capacity of an individual to consent to treatment, services, or research~~,~~ or authorize disclosure of ~~confidential~~ information~~.~~ ; or

4. An LHRC's final decision concerning whether consent or authorization is needed for the director to take a certain action.

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

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

1. The appeal shall explain the reasons the final action is not satisfactory.

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

3. The party appealing must give a copy of the appeal to the other party, the human rights advocate, and the LHRC.

4. If the director is the party appealing, he shall first request and get written permission to appeal from the commissioner or governing body of the provider, as appropriate. If the director does not get this written permission and note the appeal within 10 working days, his right to appeal is waived.

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

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

1. The original petition or information filed with the LHRC and any statement filed by the director in response~~.~~ ;

2. Parts of the individual's services record that the LHRC considered and any other parts of the services record submitted to, but not considered by the LHRC that either party considers relevant~~.~~ ;

3. All written documents and materials presented to and considered by the LHRC, including any independent evaluations conducted~~.~~ ;

4. A tape or ~~word-for-word~~ transcript of the LHRC proceedings, if available~~.~~ ;

5. The LHRC's findings of fact and recommendations~~.~~ ;

6. The director's action plan, if any~~.~~ ; and

7. Any written objections to the action plan or its implementation.

E. Step 4: The SHRC shall hear the appeal ~~within 20 working days~~ at its next scheduled meeting after the ~~chair~~ chairperson receives the appeal.

1. The SHRC shall give the parties at least 10 working days' notice of the appeal hearing.

2. The following rules govern appeal hearings:

a. The SHRC shall not hear any new evidence.

b. The SHRC is bound by the LHRC's findings of fact subject to subdivision 3 of this subsection.

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

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

e. The SHRC ~~will~~ shall notify the ~~Inspector General~~ inspector general of the appeal.

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

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

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

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

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

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

any of the recommended actions. Copies of their responses shall be forwarded to the SHRC, the LHRC, the director, the human rights advocate, and the individual.

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

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

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

J. Step 9: Upon completion of the process outlined above, the SHRC shall notify the parties and the human rights advocate of the final outcome of the complaint.

~~PART VI~~ PART VI

12VAC35-115 RULES AND REGULATIONS TO ASSURE THE RIGHTS OF INDIVIDUALS RECEIVING SERVICES FROM PROVIDERS OF MENTAL HEALTH, MENTAL RETARDATION, ~~AND~~ OR SUBSTANCE ABUSE SERVICES

VARIANCES

12VAC35-115-220. Variances.

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

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

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

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

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

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

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

2. Notify the ~~Inspector General~~ inspector general of the request for variance~~.~~ ; and

3. After considering all available information, prepare a written decision deferring, disapproving, ~~or~~ 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, ~~where appropriate,~~ the ~~State Human Rights Director~~ 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. If an individual is in immediate danger due to a provider's implementation of these regulations, the provider may request a temporary variance pending approval pursuant to

the process described in this section. Such a request shall be submitted in writing to the commissioner, chairperson of the SHRC, and state human rights director. The commissioner, chairperson of the SHRC, and state human rights director shall issue a decision within 48 hours of the receipt of such a request.

~~PART VI~~ PART VII

REPORTING REQUIREMENTS

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

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

1. The director of a facility operated by the department shall report allegations of abuse and neglect in accordance with all applicable operating instructions issued by the commissioner or his designee.

2. The director of a service licensed or funded by the department shall report each allegation of abuse or neglect to the assigned human rights advocate within 24 hours from the receipt of the allegation (see 12VAC35-115-50).

3. The investigating authority shall provide a written report of the results of the investigation of abuse or neglect to the director and human rights advocate within 10 working days from the date the investigation began unless an exemption has been granted

by the department (see 12VAC35-115-50). This report shall include ~~but not be limited to the following~~:

a. Whether abuse, neglect, or exploitation occurred;

b. ~~Type~~ The type of abuse; and

c. Whether the act resulted in physical or psychological injury.

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

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

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

3. All reports of death and serious injuries shall include ~~but not be limited to~~ the following:

a. Date and place of ~~death/injury~~ the death or injury;

b. Nature of the injuries and treatment required; and

c. Circumstances of ~~death/serious~~ 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 but not be limited to the following:

a. Type(s) to include:

(1) Physical restraint (manual hold)~~.~~ ;

(2) Mechanical restraint~~.~~ ;

(3) Pharmacological ~~(chemical restraint).~~ restraint~~.~~ ; and

(4) Seclusion.

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

(1) Behavioral purpose~~.~~ ;

(2) Medical purpose~~.~~ ;or

(3) Protective purpose.

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

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

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

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

D. ~~Providers shall collect, maintain and report the following information concerning human rights activities:~~

~~1.~~ The director shall provide to the human rights advocate~~, at least monthly,~~ and the LHRC information on the type, resolution level, and findings of each complaint of a human rights violation~~; ,~~ ~~reports shall be made to the LHRC upon request~~ and implementation of variances in accordance with the LHRC meeting schedule or as requested by the advocate.

~~2. The director shall provide to the human rights advocate and the LHRC, at least monthly, reports regarding the implementation of any variances.~~

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

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

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

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

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

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

I. Providers shall report to the Department of Health Professions, Enforcement Division, violations of these regulations that constitute reportable conditions under ~~'54.1-2906~~ §§ 54.1-2400.4, 54.1-2909, and 54.1-2900.6 of the Code of Virginia.

~~PART VII~~ PART VIII.

ENFORCEMENT AND SANCTIONS.

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

A. The commissioner may invoke the sanctions enumerated in ~~'37.1-185.1~~ § 37.2-419 of the Code of Virginia upon receipt of information that a provider licensed or funded by the department is:

1. In violation of (i) the provisions of ~~'37.1-84.1~~ § 37.2-400 and ~~"37.1-179 through 37.1-189.2~~ §§ 37.2-403 through 37.2-422 of the Code of Virginia~~;~~, (ii) these regulations ~~;~~ ,and (iii) provisions of the licensing regulations promulgated pursuant to ~~"37.1-179.1 and 37.1-182~~ §§ 37.2-404 and 37.2-411 of the Code of Virginia; and

2. ~~Such~~ The violation adversely ~~impacts~~ affects the human rights of individuals receiving services or poses an imminent and substantial threat to the health, safety, or welfare of individuals receiving services.

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 ~~during the pendency~~ for the duration of any appeal of the special order.

~~PART VIII~~ PART IX .

RESPONSIBILITIES AND DUTIES.

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

A. Providers and their directors shall:

1. Identify a person or persons accountable for helping individuals to exercise their rights and resolve complaints regarding services.

2. Comply with all state laws governing the reporting of abuse and neglect and all procedures set forth in these regulations for reporting allegations of abuse, neglect, or exploitation.

3. Require competency-based training on these regulations upon employment and at least annually thereafter. Documentation of such competency shall be maintained in the employee's personnel file.

4. Take all steps necessary to assure compliance with these regulations in all services provided.

5. Communicate information about the availability of a human rights advocate ~~and assure an LHRC~~ to ~~all~~ individuals ~~receiving services~~ and authorized representatives.

6. Assure ~~that appropriate staff attend all LHRC meetings to report on human rights activities as directed by the human rights advocate or the LHRC bylaws~~ one LHRC affiliation within the region as defined by the SHRC. The SHRC may require multi-site providers to have more than one LHRC affiliation within a region if the SHRC determines that additional affiliations are necessary to protect individuals' human rights.

7. Assure that the appropriate staff attend LHRC meetings in accordance with the LHRC meeting schedule to report on human rights activities, to impart information to the LHRC at the request of the human rights advocate or LHRC, and discuss specific concerns or issues with the LHRC.

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

~~8~~ 9. Provide the advocate unrestricted access to individuals and individual services records whenever the human rights advocate deems access necessary to carry out rights protection, complaint resolution, and advocacy.

~~9~~ 10. Submit to the human rights advocate for review and comment any proposed policies, procedures, or practices that may affect individual human rights.

~~10~~ 11. Comply with requests by the SHRC, LHRC, and human rights advocate for information, policies, procedures, and written reports regarding compliance with these regulations.

~~11~~ 12. Name a liaison to the LHRC, who shall give the LHRC suitable meeting accommodations, clerical support and equipment, and assure the availability of records and employee witnesses upon the request of the LHRC. Oversight and assistance with the

LHRC's substantive implementation of these regulations shall be provided by the SHRC. See subsection E of this section.

~~12~~ 13. Submit applications for variances to these regulations only as a last resort.

~~13~~ 14. Post in program locations information about the existence and purpose of the human rights program.

~~14~~ 15. Not influence or attempt to influence the appointment of any person to an LHRC associated with the provider or director.

~~15~~ 16. Perform any other duties required under these regulations.

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

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

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

3. Cooperate with any investigation, meeting, hearing, or appeal held under these regulations. Cooperation includes~~, but is not limited to,~~ giving statements or sworn testimony.

4. Perform any other duties required under these regulations.

C. The human rights advocate shall:

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

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

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

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

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

6. Investigate and examine all conditions or practices ~~which~~ that may interfere with the free exercise of individuals' rights.

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

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

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

10. Make recommendations to the ~~State Human Rights Director~~ state human rights director concerning the employment and supervision of other advocates where appropriate.

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

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

13. Perform any other duties required under these regulations.

D. The Local Human Rights Committee shall:

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

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

b. ~~No member shall be an employee of the department or an employee or board member of the provider for which the LHRC provides oversight.~~ At least one member shall be a health care provider.

c. No current employee of the department or a provider shall serve as a member of any LHRC that serves an oversight function for the employing facility or provider.

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

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

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

2. Permit affiliations of local providers in accordance with the recommendations from the human rights advocate. SHRC approval is required for the denial of an affiliation request.

3. Receive complaints of alleged rights violations filed by or for individuals receiving services from providers with which the LHRC is ~~associated~~ affiliated and hold hearings according to the procedures set forth in Part IV (12VAC35-115-150 et seq.) of this chapter.

~~3~~ 4. Conduct investigations as requested by the SHRC.

~~4~~ 5. Upon the request of the human rights advocate, provider, director, or an individual or individuals receiving services, or on its own initiative, an LHRC may review any existing or proposed policies, procedures, ~~or~~ practices, or behavioral treatment plans that could jeopardize the rights of ~~one or more~~ individuals receiving services from the provider with which the LHRC is affiliated. In conducting this review, the LHRC may consult with any human rights advocate, employee of the director, or anyone else. After this review, the LHRC shall make recommendations to the director concerning changes in these plans, policies, procedures, and practices.

~~5~~ 6. Receive, review, and act on applications for variances to these regulations according to 12VAC35-115-220.

~~6~~ 7. Receive, review and comment on all ~~restrictive~~ behavioral treatment ~~programs~~ plans involving the use of ~~and seclusion and~~ restraint or time out and seclusion, restraint, or time out policies for affiliated providers.

~~7~~ 8. Adopt written bylaws that address procedures for conducting business, electing the ~~chair~~ chairperson, secretary, and other officers, designating standing committees, and setting the frequency of meetings.

~~8~~ 9. Elect from its own members a ~~chair~~ chairperson to coordinate the activities of the LHRC and to preside at regular committee meetings and any hearings held pursuant to these regulations.

~~9~~ 10. Conduct a meeting every quarter or more frequently as necessary to adhere to all time lines as set forth in these regulations.

~~10~~ 11. Require members to recuse themselves from all cases wherein they have a financial~~, family~~ or other conflict of interest.

12. The LHRC may delegate summary decision making authority to a subcommittee when expedited decisions are required before the next scheduled LHRC meeting to avoid seriously compromising an individual's quality of care, habilitation, or quality of life. The decision of the subcommittee shall be reviewed by the full LHRC at its next meeting.

~~11~~ 13. Perform any other duties required under these regulations.

E. The ~~State Human Rights Committee (SHRC)~~ SHRC shall:

1. Consist of nine members appointed by the board.

a. Members shall be broadly representative of professional and consumer interests and of geographic areas in the Commonwealth. At least two members shall be individuals who are receiving ~~services~~ or have received ~~within five years of their initial appointment~~ public or private mental health, mental retardation, or substance abuse treatment or habilitation services within five years of their initial appointment. At least one-third of the members shall be consumers or family members ~~of similar individuals~~ of consumers.

Remaining appointments shall include persons with interest, knowledge, or training in the mental health, mental retardation, or substance abuse field.

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

c. No member can be an employee or board member of the department or a CSB.

~~c. All appointments after November 21, 2001, shall be for a term of three years.~~

d. If there is a vacancy, interim appointments may be made for the remainder of the unexpired term.

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

2. Elect a ~~chair~~ chairperson from its own members who shall:

a. Coordinate the activities of the SHRC;

b. Preside at regular meetings, hearings and appeals; and

c. Have direct access to the commissioner and the board in carrying out these duties.

3. Upon request of the commissioner, human rights advocate, provider, director, or an individual ~~or individuals~~ receiving services~~,~~ or on its own initiative, a SHRC may review

any existing or proposed policies, procedures, or practices that could jeopardize the rights of ~~one or more~~ individuals receiving services from any provider. In conducting this review, the SHRC may consult with any human rights advocate, employee of the director, or anyone else. After this review, the SHRC shall make recommendations to the director or commissioner concerning changes in these policies, procedures, and practices.

4. Determine the appropriate number and geographical boundaries of LHRCs and consolidate LHRCs serving only one provider into regional LHRCs whenever consolidation would assure greater protection of rights under these regulations.

5. Appoint members of LHRCs with the advice of ~~and consultation with~~ the commissioner and the ~~State Human Rights Director~~ state human rights director.

6. Advise ~~and consult with~~ the commissioner ~~in~~ about the employment of the ~~State Human Rights Director~~ state human rights director and human rights advocates.

7. Conduct at least eight regular meetings per year.

8. Review decisions of LHRCs and, if appropriate, hold hearings and make recommendations to the commissioner, the board, and providers' governing bodies regarding alleged violations of individuals' rights according to the procedures specified in these regulations.

9. Provide oversight and assistance to LHRCs in the performance of their duties hereunder, including the development of guidance documents such as sample by-laws, affiliation agreements, and minutes, to increase operational consistency among LHRCs.

10. Review denials of LHRC affiliations.

11. Notify the commissioner and the State Human Rights Director whenever it determines that its recommendations in a particular case are of general interest and applicability to providers, human rights advocates, or LHRCs and assure the availability of the opinion or report to providers, human rights advocates, and LHRCs as appropriate. No document made available shall identify the name of individuals or employees in a particular case.

~~11~~12. Grant or deny variances according to the procedures specified in Part V (12VAC35-115-220) of this chapter and review approved variances at least once every year.

~~12~~13. Make recommendations to the board concerning proposed revisions to these regulations.

~~13~~14. Make recommendations to the commissioner concerning revisions to any existing or proposed laws, regulations, policies, procedures, and practices to ensure the protection of individuals' rights.

~~14~~15. Review the scope and content of training programs designed by the department to promote responsible performance of the duties assigned under these regulations by providers, employees, human rights advocates, and LHRC members, and, where appropriate, make recommendations to the commissioner.

~~15~~16. Evaluate the implementation of these regulations and make any necessary and appropriate recommendations to the board, the commissioner, and the ~~State Human Rights Director~~ state human rights director concerning interpretation and enforcement of the regulations.

~~16~~17. Submit ~~a report on its activities~~ to the board and publish ~~each year~~ an annual report of its activities and the status of human rights in ~~the~~ mental health, mental retardation, and substance abuse treatment and services in Virginia and make recommendations for improvement.

~~17~~18. Adopt written bylaws that address procedures for conducting business; making membership recommendations to the board; electing a ~~chair~~ chairperson, vice ~~chair~~ chairperson, secretary, and other officers; appointing members of LHRCs; designating standing committees and their responsibilities; establishing ad hoc committees; and setting the frequency of meetings.

~~18~~19. Review and approve the bylaws of LHRCs.

~~19. Publish an annual report of the status of human rights in the mental health, mental retardation, and substance abuse treatment and services in Virginia and make recommendations for improvement.~~

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

~~21~~ 22. Perform any other duties required under these regulations.

F. The ~~State Human Rights Director~~ state human rights director shall:

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

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

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

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

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

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

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

8. Review LHRC decisions and recommendations for general applicability and provide suggestions for training to appropriate entities.

9. Monitor implementation of corrective action plans approved by the SHRC.

10. Perform any other duties required under these regulations.

G. The commissioner shall:

1. Employ the ~~State Human Rights Director~~ state human rights director after ~~advice and~~ consultation with the SHRC.

2. Employ advocates following consultation with the ~~State Human Rights Director~~ state human rights director.

3. Provide or arrange for assistance and training necessary to carry out and enforce these regulations.

4. Cooperate with the SHRC and the ~~State Human Rights Director~~ state human rights director to investigate providers and correct conditions or practices that interfere with the free exercise of individuals' rights.

5. Advise and consult with the SHRC and the ~~State Human Rights Director~~ state human rights director concerning the appointment of members of LHRCs.

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

7. Assure regular monitoring and enforcement of these regulations, including authorizing unannounced compliance reviews at any time.

8. Perform any other duties required under these regulations.

H. The board shall:

1. ~~Promulgate~~ Adopt regulations defining the rights of individuals receiving services from providers covered by these regulations.

2. Appoint members of the SHRC.

3. Review and approve the bylaws of the SHRC.

4. Perform any other duties required under these regulations.