



# Overview of Changes to the Human Rights Regulations

Karen A. Taylor  
Office of the Attorney General

March 2017

# Authority

The Rules and Regulations that Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded or Operated by the Department of Behavioral Health and Developmental Services

- Promulgated by the State Board
- Pursuant to the authority found at Va. Code §37.2-400
- Last underwent major revisions in 2007
- These changes became effective February 9, 2017

# Policy

**Each individual receiving services shall be assured:**

- Protection to exercise legal, civil, and human rights related to receipt of those services.
- Respect for basic human dignity.
- Services that are provided consistent with sound therapeutic practice.

# Common Language

**Individual...** a person who is receiving services:  
*consumer, patient, resident, recipient, client*

**Provider...** any person, provider, facility or organization offering services that is licensed, funded, or operated by the department.

**Services...** treatment, training, habilitation, interventions or other supports, including medical care, delivered by a Provider.

# Assurance of Rights

Every individual has a right to make a human rights complaint, seek resolution and receive help making a complaint.

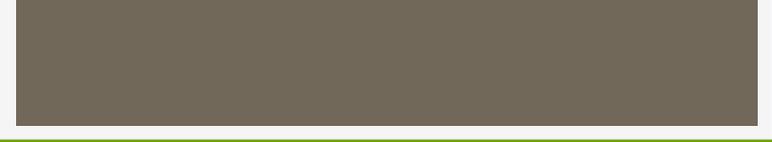
The Human Rights Regulations shall not prevent Individuals from pursuing any other legal right or remedy to which they may be entitled.

## Provider Duties:

- Prominently display Human Rights notice & Advocate contact details.
- Provide rights notices in frequently used languages.
- Notify individuals, their authorized representative (AR) or their legal guardian in writing about their rights & how to file a complaint.
- Ask individuals, their AR or legal guardian to sign a notice of rights that is filed in the medical record.
- Give a copy of the regulations to anyone who asks.
- Provide contact information for the disAbility Law Center of Virginia

# Rights

- Dignity
- Services
- Participation in Decision Making and Consent
- Confidentiality
- Access to and Amendment of records
- Restrictions on Freedoms of Everyday Life
- Behavioral Treatment Plans
- Use of Seclusion, Restraint or Time Out
- Work
- Research
- Determination of Capacity and Authorized Reps
- Complaint and Fair Hearing



# Changes by Section

# Section 30-Definitions

- “Administrative Hearing” means a proceeding under the APA; added to tie in with -150(A), which states they aren’t subject to review under the HRR process
- Simplified “governing body of provider”
- “Independent Review Committee” definition pulled out of previous -110 and put into Definitions section, but not substantively changed
- “Specially Constituted Committee” definition from the federal regulations applicable to ICF/IIDs

# Section 50-Dignity

- Language on the Provider's duties regarding abuse, neglect, and exploitation was pulled out of -50 and moved into new section on Complaints at -175(F)
- None of the Dignity rights were changed or deleted

# Section 60-Services

- -60(B): Specific list of possible bases of discrimination deleted so it will instead comply with ever-expanding other laws
- -60(B)(1)(a)-(d) regarding the handling of complaints of discrimination were pulled out and moved to the general section on Complaints
- -60(B)(5): Added language clarifying that in certain circumstances, others standing in loco parentis can give consent for minors (e.g., DSS)

# Section 90-Access to Records

- Clarified that a minor must have the permission of a parent, guardian, or other person in loco parentis before accessing his services record except in certain circumstances, incl. outpatient care for SA or MH, or inpatient psychiatric hospitalization when a minor 14 or older has consented to admission
- Clarified that the federal substance abuse regulations may prohibit a parent's access to his minor child's records in some instances

# Section 100-Restrictions on Freedom of Everyday Life

- Added language in -100(B)(3) to clarify that a provider may impose a restriction that is “otherwise required by law” without violating these regulations
- Added language in -100(B)(3)(d) requiring written notice to the individual of the reason for a restriction, criteria for removal, and the right to a fair review

## Section 100-Restrictions on Freedoms of Everyday Life, con't.

- -100(B)(5): **New requirement** that Providers obtain the approval of the LHRC for any restriction imposed under -100 or -50 that lasts longer than seven days or is imposed three or more times during a 30-day period. If the LHRC finds that the restriction is not being implemented in accordance with the HRR, the director shall be notified and the LHRC shall provide “recommendations”

# Section 105-Behavioral Treatment Plans (BTP)

- Although this section itself is new, the language in it comes largely from language pulled from -110 and -250 (LHRC duties)
- BTP is used to assist an individual to improve participation in normal activities and conditions of everyday living, reduce challenging behaviors, alleviate symptoms of psychopathology, and maintain a safe and orderly environment

## Section 105-Behavioral Treatment Plans (BTP), con't.

- Providers may use restrictions such as restraint or time out in a BTP to address challenging behaviors **that present an immediate danger to the individual or others**, but only after a **licensed professional\*** has conducted a detailed and systematic assessment of the behavior and the situations in which it occurs.
  - \*Previously, this was “qualified professional”

## Section 105-Behavioral Treatment Plans (BTP), con't.

- **All** BTPs must be submitted to an “independent review committee” prior to implementation for review and approval of the technical adequacy of the plan and data collection procedures
- **In addition**, for BTPs that involve the **use of restraint or time out...**

## Section 105-Behavioral Treatment Plans (BTP), con't.

- Providers that **are ICF/IID facilities** must submit any BTP involving **restraint or time out**, along with its IRC approval, **to the specially constituted committee** (SCC) under 42 CFR 483.440(f)(3) for the SCC's approval prior to implementation
- All other providers (**not ICF/IID**) must submit any BTP involving **restraint or time out**, along with its IRC approval, **to the LHRC**, which shall determine whether the plan is in accordance with the HRR prior to implementation

## Section 105-Behavioral Treatment Plans (BTP), con't.

- If either the LHRC or the SCC finds that the BTP violates the rights of the individual or is not being implemented in accordance with the HRR, the LHRC or SCC must notify the director and provide recommendations about the proposed BTP
- BTPs involving restraint or time out also must be reviewed quarterly by the IRC **and** the LHRC or SCC to determine if it has resulted in improvements in functioning

# Section 110-Seclusion, Restraint, and Time Out

- Added -110(C)(6) to reiterate that Providers shall not use a restraint that places an Individual's body in a prone (face down) position
- Removed -110(C)(8) that required Providers to submit all proposed seclusion, restraint, and time out policies to the LHRC for review and comment before implementation or upon changes

# Section 145-Determination of Capacity

- Capacity evaluations were previously required to be done by “a professional who is qualified by experience, training, education, or credentials,” but now they must be “conducted by or under the supervision of a **licensed** professional....”

# Complaint Process

- Section -140 which had general, brief guidance about complaints was deleted
- Language was added to -150(A) to clarify that court orders or orders or decisions entered after an administrative hearing are not subject to review under the HRR complaint process
- Section -170, “Complaint Resolution Process” was repealed and replaced with new -175, “Human Rights Complaint Process”
  - Goal was to do away with informal/formal and simplify

# Section 175-Complaints

- Each **individual has the right to:**
  - Make a complaint that provider has violated any of the rights **assured by the HRR**
  - Have a timely and fair review of complaint
  - Have someone file complaint on his behalf
  - Use these and other complaint procedures
  - Make a complaint under any other applicable law, including to dLCV

## Section 175-Complaints, con't.

- The **individual shall:**
  - Be contacted by director within 24 hours
  - Have access to an advocate for assistance
  - Be protected from retaliation and harm
  - Have the complaint reviewed, investigated, and resolved “as soon as possible”
  - Receive a report with director’s decision and action plan within 10 working days
  - Be notified in writing of his right to, and process for, appealing to the LHRC

# Section 175-Complaints, con't.

- Upon receipt of complaint, **providers shall:**
  - Notify DBHDS “asap, but no later than next business day”
  - Ensure director contacts the individual about the complaint within 24 hours
  - Initiate an impartial investigation, or resolution, “asap, but no later than next business day”
  - Take all steps necessary to ensure individual is protected from retaliation or harm
  - Assist the individual in understanding the HR complaint process, the provider’s policies, and the confidentiality of involved information
  - Ensure communications in manner, format, and language most easily understood by individual
  - Adhere to reporting requirements
  - Report director’s decision within 10 working days to individual, AR, if applicable, and the advocate

## Section 175-Complaints, con't.

- Sections -175(C) and (E) specify the requirements for complaint resolution policies and procedures required of all providers
- These policies and procedures need to be in writing and “approved by the Department prior to implementation”
- Section -175(F) contains additional requirements for complaints involving abuse, neglect, or exploitation
  - Changed to more closely parallel complaints generally

# Section 175(F)-Abuse/Neglect

- 1. The program director shall take immediate steps to protect the individual until the investigation is complete, including appropriate personnel actions.
- 2. Any instance of seclusion or restraint that does not comply with this chapter or an approved variance, or that results in injury to an individual, shall be reported to the authorized representative, as applicable, and the department in accordance with the requirements for reporting allegations of abuse.
- 3. The program director shall notify the department and authorized representative, if applicable, of an allegation of abuse or neglect within 24 hours of the receipt of the allegation.
- 4. The program director shall ensure that the investigation is conducted by a person trained to do investigations and who is not involved in the issues under investigation.

# Section 175(F)-Abuse/Neglect, con't.

- 5. The investigator shall provide a written report of the results of the investigation of abuse or neglect to the director and to the human rights advocate within 10 working days from the date the investigation began unless an extension has been granted.
- 6. The program director shall decide, based on the investigator's report and any other available information, whether the abuse, neglect, or exploitation occurred. Unless otherwise provided by law, the standard for deciding whether abuse, neglect, or exploitation has occurred is preponderance of the evidence.
- 7. The program director shall submit the final decision and action plan, if applicable, to the individual, authorized representative, if applicable, and human rights advocate within 10 working days of its completion.

## Section 175-Complaints, con't.

- Section -175(G) provides that if the advocate concludes there's a "substantial risk that serious or irreparable harm will result if the complaint is not resolved immediately," the advocate shall inform the director, provider's governing body, and the LHRC. The LHRC shall then conduct an emergency hearing in accordance with -190.

# Section 180-LHRC Hearings

- Section -180(A) was simplified: “Any individual or his AR who disagrees with a director’s final decision or action plan resulting from any complaint resolution process under [the HRR] may request an LHRC hearing by following the process described in this section.”
- Clarification added that petition must be filed within 10 working days **from receipt** of the director’s action plan/final decision

# Section 180-LHRC Hearings, con't.

- Clarification added that:
  - The hearing is an informal process and the rules of evidence are **not** applicable;
  - The hearing shall be conducted in a nonadversarial manner;
  - Each party shall be provided a chance to present its facts;
  - Questions shall be directed to the LHRC and not the other party; and
  - The LHRC shall ask questions to each party.

# Section 210-SHRC Appeals

- Minor edits made for clarification
  - Changed “not satisfied” to “disagreed”
  - Changed the SHRC’s “report” to “decision”
  - Changed the “governing body’s action plan” to the “director’s action plan”

# Section 230-Reporting Requirements

- Language added in -230(A) regarding reporting information concerning abuse, neglect, or exploitation, and to -230(C) (4) regarding reporting S/R that doesn't comply with the HRR or results in injury, to clarify that reporting is to be done "via the department's web-based reporting application," which is currently CHRIS
- Section -230(D) changed to state that providers now only need to report to the LHRC "when requested" information on complaints, and report on implementation of variances in accordance with the LHRC meeting schedule

# Responsibilities and Duties

- Section -250, “Responsibilities and Duties,” was repealed in its entirety
- New -260 sets out “Provider and Department Responsibilities,” including the duties of providers, their employees, human rights advocates, and the Department
- New -270 sets out “SHRC and LHRC Responsibilities”

# Section 260-Provider and Department Duties

- Section -260(A) Providers, through their directors, shall:
  - 1. Designate a person or persons responsible for helping individuals exercise their rights and resolve complaints regarding services;
  - 2. Take all steps necessary to perform duties required by, and ensure compliance with, the HRR in all services provided;
  - 3. Post information in program locations about the existence and purpose of the human rights program;
  - 4. Communicate information about the availability of a human rights advocate to individuals and authorized representatives, in accordance with [12VAC35-115-40](#) B 1 and B 2;
  - 5. Ensure access, as needed, to the LHRC for all individuals receiving services;
  - 6. Provide the human rights advocate unrestricted access to an individual and his services records whenever the advocate deems access is necessary to carry out rights protection, complaint resolution, and advocacy on behalf of the individual;

# Section 260-Provider and Department Duties, con't.

- 7. Require competency-based training of employees on the HRR upon employment and at least annually thereafter. Documentation of such competency shall be maintained in the employee's personnel file;
- 8. Comply with all state laws governing the reporting of abuse and neglect and all procedures set forth in the HRR for reporting allegations of abuse, neglect, or exploitation;
- 9. Submit to the human rights advocate for review and comment proposed policies, procedures, or practices that may affect individual human rights;
- 10. Ensure appointment of a designated liaison to, and appropriate staff participation with, the LHRC, as required;
- 11. Cooperate with the human rights advocate and the LHRC to investigate and correct conditions or practices interfering with the free exercise of individuals' human rights and make sure that all employees cooperate with the human rights advocate, the LHRC, and the SHRC in carrying out their duties under the HRR;
- 12. Comply with requests by the SHRC, LHRC, or human rights advocate for information, policies, procedures, and written reports regarding compliance with the HRR;
- 13. Ensure the availability of records and employee witnesses upon the request of the LHRC or SHRC;
- 14. Submit applications for variances to the HRR only as a last resort; and
- 15. Not influence or attempt to influence the appointment of any person to an LHRC affiliated with the provider or director.

# Section 260-Provider and Department Duties, con't.

- Section -260(C) Department human rights advocates shall:
  - 1. Represent any individual making a complaint or, upon request, consult with and help any other representative the individual chooses;
  - 2. Provide training to individuals, family members, and providers on the HRR;
  - 3. Investigate and try to prevent or correct any alleged rights violation by interviewing, mediating, negotiating, advising, or consulting with providers and their respective governing bodies, directors, and employees;
  - 4. Provide orientation, training, and technical assistance to the LHRCs for which he is responsible; and
  - 5. Investigate and examine all conditions or practices that may interfere with the free exercise of individuals' rights.

# Section 270(A)-LHRC Duties

- 1. Review any restriction on the rights of any individual imposed pursuant to [12VAC35-115-50](#) or [12VAC35-115-100](#) that lasts longer than seven days or is imposed three or more times during a 30-day period for providers within the LHRC's jurisdiction in accordance with [12VAC35-115-100](#) B 5;
- 2. Review next friend designations in accordance with [12VAC35-115-146](#) B 2;
- 3. Hold hearings according to the procedures set forth in Part V ([12VAC35-115-150](#) et seq.) of the HRR for any individual served by a provider under the LHRC's jurisdiction;
- 4. Review behavioral treatment plans in accordance with [12VAC35-115-105](#);
- 5. Receive, review, and act on applications for variances to the HRR in accordance with [12VAC35-115-220](#);

# Section 270(A)-LHRC Duties, con't.

- 6. Consist of five or more members appointed by the SHRC.
  - a. Membership shall be broadly representative of professional and consumer interests as required in § [37.2-204](#) of the Code of Virginia.
  - b. At least one member shall be a health care provider.
  - c. No current employee of the department or a provider shall serve as a member of any LHRC that serves an oversight function for the employing facility or provider.
  - d. Members shall recuse themselves from all cases in which they have a financial or other conflict of interest.
  - e. Initial appointments to an LHRC shall be staggered, with approximately one-third of the members appointed for terms of three years, approximately one-third for terms of two years, and the remainder for a term or terms of one year. After that, all appointments shall be for terms of three years.
  - f. A person may be appointed for no more than two consecutive three-year terms. A person appointed to fill a vacancy may serve out that term and then be eligible for two additional consecutive terms.
  - g. Nominations for membership to LHRCs shall be submitted directly to the SHRC through the state human rights director at the department's Office of Human Rights;

# Section 270(A)-LHRC Duties, con't.

- 7. Elect a chairperson from its own members who shall:
  - a. Coordinate the activities of the LHRC; and
  - b. Preside at regular meetings and hearings held pursuant to the HRR;
- 8. Meet every quarter or more frequently as necessary to adhere to all timelines as set forth in the HRR; and
- 9. Adopt written bylaws that address procedures for conducting business; electing the chairperson, secretary, and other officers; designating standing committees; and setting the frequency of meetings.
- B. Local human rights committees may delegate authority to a subcommittee when expedited decisions are required before the next scheduled LHRC meeting to avoid seriously compromising an individual's quality of care, habilitation, or quality of life. The decision of the subcommittee shall be reviewed by the full LHRC at its next meeting.

# Responsibilities and Duties

- In summary, providers' duties to provide clerical support to LHRCs and to "affiliate" with an LHRC were removed
- Significant refinement to advocates' responsibilities to focus more on representing individuals, providing training, and conducting investigations
- Significant changes to LHRCs' duties to highlight providing due process for individuals and acting on complaints, treatment plans, and variances instead of emphasis on gathering cumulative information or reviewing policies
- Removed providers' required attendance at LHRC meetings, unless particular due process issue