

CHAPTER 25-01.2 DEVELOPMENTAL DISABILITY

25-01.2-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Applicant" means an entity that has requested licensure from the department.
2. "Department" means the department of health and human services.
3. "Developmental disability" means a severe, chronic disability of an individual which:
 - a. Is attributable to a mental or physical impairment or combination of mental and physical impairments, including Down syndrome and fetal alcohol spectrum disorders, including fetal alcohol syndrome, partial fetal alcohol syndrome, and alcohol-related neurodevelopmental disorder;
 - b. Is manifested before the individual attains age twenty-two;
 - c. Is likely to continue indefinitely;
 - d. Results in substantial functional limitations in three or more of the following areas of major life activity:
 - (1) Self-care;
 - (2) Receptive and expressive language;
 - (3) Learning;
 - (4) Mobility;
 - (5) Self-direction;
 - (6) Capacity for independent living; and
 - (7) Economic sufficiency; and
 - e. Reflects the individual's needs for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.
4. "Individualized setting" means a setting where an individual owns or rents the individual's residence and a public or private agency or organization provides services to an individual with a developmental disability.
5. "Institution or facility" means any school, hospital, residence center, group home, or any other setting operated by any public or private agency or organization, that provides services to an individual with a developmental disability.
6. "Least restrictive appropriate setting" means that setting that allows an individual with a developmental disability to develop and realize the individual's fullest potential and enhances the individual's ability to cope with the individual's environment without unnecessarily curtailing fundamental personal liberties.
7. "License" means authorization by the department to provide services to individuals with developmental disabilities, pursuant to chapter 25-16.
8. "Service or services to an individual with a developmental disability" means services provided by any public or private agency or organization, directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability.

25-01.2-02. Appropriate treatment, services, and habilitation - Treatment in least restrictive appropriate setting.

All individuals with developmental disabilities have a right to appropriate treatment, services, and habilitation for those disabilities. Treatment, services, and habilitation for individuals with a developmental disability must be provided in the least restrictive appropriate setting.

25-01.2-03. Presumption of incompetence prohibited - Discrimination prohibited - Deprivation of constitutional, civil, or legal rights prohibited.

An individual with a developmental disability may not be presumed to be incompetent and may not be deprived of any constitutional, civil, or legal right solely because of admission to or residence at an institution, facility, or individualized setting or solely because of receipt of

services to individuals with developmental disabilities. However, nothing in this section may be construed to limit or modify section 16.1-01-04. The constitutional, civil, or legal rights which may not be varied or modified under the provisions of this section include:

1. The right to vote at elections;
2. The free exercise of religion;
3. The right of reasonable opportunities to interact with members of the opposite sex; and
4. The right to confidential handling of personal and medical records.

25-01.2-04. Communication rights.

1. Except as provided in this section, every individual with a developmental disability who resides in an institution, facility, or individualized setting has the right of private, unimpeded, and uncensored communication, including visitation, with persons of the individual's choice.
2. A public or private agency or organization licensed by the department to provide services to an individual with a developmental disability shall document any restrictions of these rights in the individual's person-centered service plan.
3. A public or private agency or organization not licensed by the department may establish in writing reasonable times and places for use of telephones and for visits, provided that an individual's ability to contact an attorney, guardian, or custodian, may not be restricted and provided that any rules or restrictions must be posted in each institution, facility, or individualized setting.
4. A copy of any rules or restrictions must be given to all individuals over eighteen years of age, to the parents or custodians of all individuals under eighteen years of age, or guardian, upon admission.

25-01.2-05. Personal property.

1. Except as provided in this subsection, every individual with a developmental disability who resides in an institution, facility, or individualized setting must be permitted to receive, possess, and use lawful personal property and must be provided with a secure, convenient, and reasonable amount of storage space for that property.
2. A public or private agency or organization providing services to an individual with a developmental disability may restrict the possession and use of certain classes of property which may be dangerous or may harm an individual.
3. Notice of any restrictions must be immediately given in writing to all individuals over eighteen years of age, to the parents or custodian of all individuals under eighteen years of age, or guardian.
4. A restriction of the rights of an individual with a developmental disability which is imposed by a public or private agency or organization that provides services to the individual must be reviewed at least annually as part of the individual's individualized habilitation, person-centered service, or individual education plan team meeting.
5. Unless a restriction applies universally, the restricting agency or organization shall remove the restriction placed on an individual with a developmental disability at the earliest point at which the individual demonstrates the ability to mitigate the need for the restriction.
6. When an individual is discharged from services provided from a public or private agency or organization, all of the individual's lawful personal property that is in the custody of the public or private agency or organization must be returned to the individual.
7. A public or private agency or organization licensed by the department to provide services to an individual with a developmental disability shall document any restrictions of these rights in the individual's person-centered service plan.

25-01.2-06. Labor - Wages - Money.

1. An individual with a developmental disability who is receiving services from a public or private agency or organization must be permitted to seek employment and work in integrated settings if this is a desire of the individual.
2. An individual with a developmental disability who performs labor that is of any consequential economic benefit to a public or private agency or organization shall receive wages that are commensurate with the value of the work performed, in accordance with applicable federal and state laws and regulations. An individual of an institution, facility, or individualized setting may be required to perform tasks of a personal housekeeping nature in the individual's living quarters without compensation.
3. An individual with a developmental disability may use the individual's money as the individual chooses, unless the individual is a minor or is prohibited from doing so under a court guardianship or conservatorship order.
4. An individual with a developmental disability may deposit money, or cause money to be deposited, in the individual's name with a financial institution of the individual's choice, or the individual may deposit the money with a public or private agency or organization. The public or private agency or organization may not retain any money deposited with the public or private agency or organization under this subsection, but shall hold all such funds in an account in the individual's name. All earnings attributable to an individual's money must accrue to the individual.
5. No public or private agency or organization, nor any of the public or private agency or organization's employees may be made representative payee for an individual without the individual's informed consent.
6. When an individual is discharged, all of the individual's money, including earnings, must be returned to the individual.
7. A public or private agency or organization licensed by the department to provide services to an individual with a developmental disability shall document any restrictions of these rights in the individual's person-centered service plan.

25-01.2-07. Medical and dental services - Application to residential institution or facility.

All residents of an institution or facility are entitled to appropriate and adequate medical and dental services, which must be provided by qualified professionals who are licensed to practice or are otherwise authorized to provide medical and dental services pursuant to state and federal law and regulations. This section applies only with respect to an institution or facility that provides residential care.

25-01.2-08. Medication - Chemical restraints.

An individual with a developmental disability receiving services at any institution, facility, or individualized setting from a public or private agency or organization may not be administered at any time any drug or medication, or be chemically restrained or tranquilized in any manner, except upon the written authorization of a licensed physician, physician assistant, or advanced practice registered nurse when necessary and appropriate as an element of the service being received or as a treatment of any medical or physical condition in conformity with accepted standards for that treatment. The nature, amount of, and reasons for the administration of any drug or medication must be promptly recorded in the individual's medical record. A public or private agency or organization licensed by the department to provide services to an individual with a developmental disability shall document any restrictions of these rights in the individual's person-centered service plan.

25-01.2-09. Punishment - Seclusion - Restraints - Psychosurgery - Sterilization - Shock treatment.

An individual with a developmental disability receiving services at any institution, facility, or individualized setting from a public or private agency or organization may not at any time:

1. Be subjected to any corporal punishment or shock treatment.

2. Be secluded, except to ensure immediate physical safety of the individual or others.
3. Be restrained, except to ensure immediate physical safety of the individual or others.
4. Be subjected to psychosurgery, sterilization, medical behavioral research, or pharmacological research, except in conformity with an order of a court of competent jurisdiction. Under no circumstances may an individual receiving treatment be subjected to hazardous or intrusive experimental research that is not directly related to the specific goals of that individual's treatment program.
5. Be subjected to electroconvulsive therapy without that individual's or guardian's written and informed consent. If the recipient of services is a minor, the recipient's parent, custodian, or guardian may provide informed consent for that treatment, which the parent, custodian, or guardian believes to be in the recipient's best interests.

25-01.2-10. Seclusion or physical restraint - Administrator to be notified.

1. Whenever an individual with a developmental disability receiving services from a public or private agency or organization not licensed by the department, is placed in seclusion or is physically restrained, the public or private agency or organization administrator or the administrator's representative must be notified and shall determine if the isolation or restraint is necessary. The isolation or restraint may be continued only upon written order of the administrator or the administrator's representative and for a period of not more than twenty-four hours. Any individual who is in seclusion or who is physically restrained must be checked by an attendant at least once every thirty minutes.
2. A public or private agency or organization licensed by the department to provide services to an individual with a developmental disability may not place an individual in seclusion. In order to use physical restraints, the restraint must be in compliance with the individual's person-centered service plan or done in accordance with the public or private agency's or organization's emergency restraint policy.

25-01.2-11. Psychosurgery, sterilization, or research - Court order required - Hearing - Right to attorney at public expense.

A court of competent jurisdiction may issue the orders required for the procedures or treatments in subsection 4 of section 25-01.2-09 upon application of the party alleging the necessity of the procedure, the individual who is receiving or is entitled to receive the treatment, the parents or custodian of the individual under eighteen years of age, or guardian, following a hearing on the application.

1. The individual receiving or entitled to treatment shall:
 - a. Receive prior notice of the hearing;
 - b. Have the right and the opportunity to present evidence; and
 - c. Have the right to be confronted with and to cross-examine witnesses.
2. If the individual with a developmental disability is indigent, counsel shall be provided at public expense not less than ten days before the hearing.
3. The burden of proof is on the party alleging the necessity of the procedure or treatment.
4. An order allowing the procedure or treatment may not be granted unless the party alleging the necessity of the procedure or treatment proves by clear and convincing evidence that the procedure is in the best interest of the recipient and that no less drastic measures are feasible.

25-01.2-12. Diet.

Every individual with a developmental disability receiving residential services in an institution, facility, or individualized setting, must be allowed access to food at any time and meal choices must be provided. Any public or private agency or organization licensed by the department to provide services to an individual with a developmental disability shall document in

the individual's person-centered service plan any restrictions on access to or choice of food because of health and safety concerns.

25-01.2-13. Education.

Every child with a developmental disability is entitled to a free and appropriate education in the least restrictive appropriate setting in accordance with chapter 15.1-32.

25-01.2-14. Individualized habilitation, person-centered service, or individual education plan - Contents.

Any public or private agency or organization that provides services to an individual with a developmental disability must have a written, individualized habilitation, person-centered service, or individual educational plan developed and put into effect for each individual for whom that public or private agency or organization is primarily responsible for the delivery, or coordinating the delivery, of services. A plan required under this section must:

1. Be developed and put into effect within thirty days following admission of the individual.
2. Be reviewed and updated from time to time, but no less than annually.
3. Include a statement of the long-term habilitation or education goals for the individual and the intermediate objectives relating to the attainment of those goals. The objectives must be stated specifically, in sequence, and in behavioral or other terms that provide measurable indices of progress.
4. State an objective criteria and an evaluation procedure and schedule for determining whether the objectives and goals are being achieved.
5. Describe the personnel necessary for the provision of the services described in the plan.
6. Specify the date of initiation and the anticipated duration of each service to be provided.
7. State whether the individual with a developmental disability appears to need a guardian and determine the type of protection needed by the individual based on the individual's actual mental and adaptive limitations and other conditions which may warrant the appointment of a guardian. Any member of the individual habilitation, person-centered service, or individual educational plan team may petition, or notify any interested person of the need to petition, for a finding of incapacity and appointment of a guardian.

25-01.2-15. Right to refuse services.

An adult recipient of services, parents or custodian if the recipient is a minor, or the recipient's guardian, must be given the opportunity to refuse generally accepted behavioral health or developmental disability services, including medication, unless those services are necessary to prevent the recipient from causing serious harm to the recipient or to others. If services are refused, the recipient, guardian, or parent or custodian of a minor must be informed of alternate services available, the risks of those alternate services, and the possible consequences to the recipient of the refusal of generally accepted services.

25-01.2-16. Notice of rights.

Any public or private agency or organization that provides services to an individual with a developmental disability in an institution or facility shall post conspicuously in public areas a summary of the rights that are set out in this chapter. In addition, upon commencement of services or as soon after commencement as the recipient's condition permits, every recipient who is eighteen years of age or older, the parents or custodian of all recipients under eighteen years of age, and the guardian must be given written notice of the rights guaranteed by this chapter.

25-01.2-17. Enforcement of rights.

Every individual with a developmental disability is entitled to enforce any of the rights guaranteed by this chapter by civil action or any other remedy available by common law or statute. In any proceeding to enforce these rights, the court may, in its discretion, award reasonable attorney's fees and costs to a successful plaintiff. An individual with a developmental disability who is successful in an administrative proceeding may also be awarded reasonable attorney's fees and costs. Any award of attorney's fees and costs must be in addition to any actual or punitive damages to which the individual may be entitled.

25-01.2-18. Authority to adopt rules.

The department of health and human services may adopt, in accordance with chapter 28-32, any rules necessary to implement this chapter. The superintendent of public instruction may adopt rules to implement this chapter in schools. The rules adopted may not restrict or limit the rights guaranteed by this chapter.