

This rule was filed as 7 NMAC 26.3.

TITLE 7 HEALTH
CHAPTER 26 DEVELOPMENTAL DISABILITIES
PART 3 RIGHTS OF INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES LIVING IN THE
COMMUNITY

7.26.3.1 ISSUING AGENCY: Department of Health, Developmental Disabilities Division, 1190 Saint Francis Drive, Post Office Box 26110, Santa Fe, New Mexico 87502-6110, Telephone No. (505)827-2574
[09/07/94; 01/15/97; Recompiled 10/31/01]

7.26.3.2 SCOPE:

A. This regulation applies only to clients and service providers as defined below.
B. This regulation is not available to resolve disputes concerning the content of or the substantial failure to implement a community individual service plan. Any dispute concerning the content of a plan or any claim alleging substantial failure to implement a plan must be raised in the dispute resolution process, if available. This regulation is not available to review any action by a service provider or the department to suspend, terminate or reduce medicaid covered services if a fair hearing procedure is available pursuant to federal law.

C. Nothing in this regulation alters or modifies the duty of any person having reason to believe that a person is being abused, neglected, or exploited to report that information as required by the Adult Protective Services Act, Section 27-7-30 NMSA 1978 (1992 Repl.) and the Abuse and Neglect Act, Section 32A-4-3 NMSA 1978 (1993 Repl.).

[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.3 STATUTORY AUTHORITY: NMSA 1978, Section 9-7-6.

[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.4 DURATION: Permanent.

[01/15/97; Recompiled 10/31/01]

7.26.3.5 EFFECTIVE DATE: January 15, 1997, unless a later date is cited at the end of a Section or Paragraph.

[09/12/94; 01/15/97; Recompiled 10/31/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

7.26.3.6 OBJECTIVE:

A. These regulations set out rights that the department expects all providers of services to individuals with developmental disabilities to respect. These regulations are intended to complement the department's Client Complaint Procedures (7 NMAC 26.4) [now 7.26.4 NMAC].

B. These regulations are promulgated, in part, to satisfy requirements arising from the implementation of the decision in the Jackson v. Fort Stanton, N.M. Dist. Ct. No. Civ. 87-839, including agreements reached by the parties. These regulations are promulgated to further the goals of the Developmental Disabilities Act, Sections 28-16A-1 through 28-16A-18 NMSA 1978.

C. Notice of public hearing on the proposed regulations was given in accordance with Section 9-7-6 NMSA 1978. On June 23, 1994, a public hearing was held in Santa Fe, New Mexico. Both written and oral testimony was accepted from all persons who desired to testify. The department's hearing officer submitted his recommendations on August 25, 1994.

D. These regulations do not incorporate all the recommendations made by the hearing officer. I have today prepared a decision which is part of the record that explains the reasons for the department's deviation from recommendations made by the hearing officer.

E. The purpose of this regulation is to promote the health, safety and welfare of individuals who are receiving supports and services for persons with developmental disabilities from service providers certified by, or funded in whole or in part with state funds administered by the department through contracts or agreements. This regulation defines rights of persons with developmental disabilities so that these rights can be readily identified,

exercised and protected and provides that the department will enforce remedies for substantiated complaints of violation of the client's right as provided in the client complaint procedure.
[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.7 DEFINITIONS:

A. "Aversive procedures" means those prohibited procedures, including, but not limited to, taste and odor aversives, excessive deprivation or stimulation of basic sensory experiences, any device or intervention intended to cause pain or unpleasant sensations, electric shock, isolation, mechanical restraint, forced exercise, withholding of food, water or sleep, inappropriate clothing, humiliation and water mist, as defined in the division's behavioral support policy.

B. "Client" means a person with developmental disabilities who is receiving supports and services for individuals with developmental disabilities by a service provider certified by, or funded in whole or in part with state funds administered by the department through contracts or agreements.

C. "Complainant" means a client or his or her legal guardian who files a complaint pursuant to this regulation.

D. "Chemical restraint" means the use of medication, including psychoactive medication, as punishment, as a substitute for a habilitation or in quantities that interfere with services or habilitation, for the convenience of staff, or for unreasonable [sic] restricting a client's freedom of movement, other than in an emergency where there is a substantial and imminent risk of serious physical harm to the client or others.

E. "Days" means calendar days.

F. "Department" means the department of health.

G. "Developmental disabilities" means a severe chronic disability of a person that:

(1) is attributable to a mental or physical impairment, including the result from trauma to the brain, or a combination of mental and physical impairments;

(2) is manifest before the person reaches the age twenty-two years;

(3) is expected to continue indefinitely;

(4) results in substantial functional limitations in three or more of the following areas of major life activity:

(a) self-care;

(b) receptive and expressive language;

(c) learning;

(d) mobility;

(e) self-direction;

(f) capacity for independent living; and

(g) economic self-sufficiency; and

(5) reflects the person's need for a combination and sequence of special, interdisciplinary or generic care, treatment or other services that are of life-long or extended duration and are individually planned and coordinated.

H. "Director" means the director, developmental disabilities division or his or her designate.

I. "Division" means the developmental disabilities division of the department.

J. "Emergency" means a circumstance in which the health or safety of the client or another person is in imminent risk of harm and immediate action is necessary to prevent the harm.

K. "Emotional or psychological abuse" means use of verbal or other communication to threaten a client with physical harm or to ridicule, curse, humiliate, degrade or antagonize a client, or any similar action

L. "Exploitation of a client's personal property" means intentionally, knowingly or recklessly using a client's person or property for another person's profit, advantage, or benefit without legal right or authority. Exploitation includes failure to compensate a client for services or work for which he or she is entitled to compensation.

M. "Facilities" means institutions operated by the department.

N. "Guardian" means the parent of an individual with developmental disabilities if the client is a minor or a legal guardian appointed or recognized pursuant to the Uniform Probate Code, Section 45-5-101, et seq. NMSA 1978 (1993 Repl.).

O. "Mechanical restraint" means any apparatus that restricts a client's movement excluding mechanical supports designed by a physical therapist and approved by a physician or designed by an occupational therapist that is used to achieve proper body position and excluding protective devices.

P. "Medical restraint" means any apparatus prescribed by a physician, dentist or medical practitioner acting within the scope of his or her license, as health-related protection that restricts a client's movement during the conduct of a specific medical or surgical procedure.

Q. "Neglect" means, subject to the client's right to refuse treatment and subject to medical personnel's right to exercise sound medical discretion:

(1) the failure to provide any treatment, services, care, medication or item that is necessary to maintain the health and safety of a client;

(2) the failure to take reasonable precaution that is necessary to prevent damage to the health and safety of a client; or

(3) the failure to carry out a duty to supervise properly or control the provision of any treatment, care, goods, services, or medication necessary to maintain the health or safety of a client.

R. "Office" means the office of quality assurance or a regional office within the developmental disabilities division.

S. "Plan" means the individual service plan for services, treatment or habilitation developed by the interdisciplinary team.

T. "Physical abuse" means any act, or failure to act, performed knowingly, intentionally or recklessly that causes or is likely to cause harm. Physical abuse includes, but is not limited to, physically striking or assaulting a client, hitting, slapping, pinching, kicking, pushing, dragging, shaking, squeezing, choking and shoving. Physical contact which endangers the safety of a client as well as handling the client with more force than is necessary also constitute physical abuse.

U. "Physical restraint" means the use of manual methods to restrict the movement or normal functioning of a portion of an individual's body other than physical guidance and prompting techniques of brief duration.

V. "Protective devices" means helmets, safety goggles or glasses, guards, mitts, gloves, pads and other common safety devices that are normally used or recommended for use by persons without disabilities while engaged in a sport, occupation, or during transportation.

W. "Service provider" means a private entity that has entered into a contract or provider agreement with the department or that is certified by the department for the purpose of providing supports and services to individuals with developmental disabilities. When the context requires, the service provider means the executive director or administrator having authority to bind the service provider. Service provider does not include facilities operated by the department.

X. "Sexual abuse" means sexual activity between a client and staff, nonconsensual sexual activity or contact with others without regard to injury, and sexual exploitation. Sexual activity includes, but is not limited to kissing, hugging, stroking or fondling with sexual intent; oral sex or sexual intercourse; and request or suggestion or encouragement by staff for performance of sex with the employee or another. Sexual intent is to be determined by an examination of all the circumstances related to the incident. Sexual exploitation includes sexual exploitation as defined in the Abuse and Neglect Act, Section 32A-4-2(F) and allowing, permitting or encouraging obscene or pornographic filming or photographing of an adult client without his or her consent for commercial or noncommercial purposes.

[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.8 REGULATION DOES NOT CREATE AN ENTITLEMENT TO SERVICES: Nothing in this regulation shall provide an entitlement to programs, supports, services or benefits that does not otherwise exist pursuant to other law or regulation.

[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.9 REGULATION DOES NOT CREATE A CAUSE OF ACTION: Any rights or remedies provided pursuant to this regulation that do not otherwise exist pursuant to other law or regulation are enforceable only through the client complaint procedure and are not enforceable in court. Nothing in this regulation shall create a right of judicial review of the administrative decision of the director or the secretary or his or her designee made pursuant to the client complaint procedure.

[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.10 CLIENT RIGHTS: Unless expressly modified by court order or specifically granted to a guardian or conservator, all clients have:

- A. the same legal rights guaranteed to all other individuals under the United States Constitution, New Mexico State Constitution, and federal and state laws;
- B. the right to be free from unlawful discrimination on the basis of race, age, religion, color, national origin, ancestry, sex, sexual preference, physical or mental handicap or medical condition;
- C. the right to be free from emotional or psychological abuse, physical abuse, sexual abuse, neglect and exploitation of his or her personal property;
- D. the right to practice the religion of his or her choice or to abstain from the practice of religion;
- E. the right to safe working conditions, hours of labor and wages for labor consistent with the Fair Labor Standards Act and other applicable federal and state laws, and worker's compensation, except that clients receiving residential services may be required to do normal housekeeping and home maintenance chores. Clients shall not be required to perform labor involving the essential operation of the service provider, including the care and treatment of other clients. Clients may volunteer to do labor, consistent with federal and state labor laws. If a client volunteers to do work for which the program would otherwise be required to pay non-clients, the client shall be paid a commensurate wage;
- F. the right to consent to or refuse medical treatment, medical services, and other forms of habilitation services or supports, consistent with the ISP regulations and the duties of a parent, guardian or treatment guardian pursuant to the requirements of the Children's Mental Health and Developmental Disabilities Act, Section 32A-6-14 NMSA 1978 (1993 Repl.) or the Mental Health and Developmental Disabilities Act, Section 43-1-15 NMSA 1978 (1993 Repl.);
- G. the right to have privacy, including both periods of privacy and places of privacy;
- H. the right to communicate freely with persons of his or her choice in any reasonable manner and at any reasonable time he or she chooses;
- I. the right to own, use and control real property and personal possessions;
- J. the right to engage in social interaction with members of either sex;
- K. the right to enter into contract, including the contract to marry;
- L. the right to engage in consensual sexual activity, except sexual activity defined as sexual abuse;
- M. the right to procreate and to parent or not to procreate;
- N. the right to manage his or her financial affairs, unless the client has a court appointed guardian or conservator or access to his or her funds is restricted by the individual service plan. A service provider who manages the funds of a client pursuant to the client's individual service plan shall comply with applicable federal standards or regulations and the following requirements:
 - (1) the service provider shall have obtained informed consent and written authorization from the client or the guardian or conservator, which shall state the service provider's responsibilities;
 - (2) the service provider shall maintain a written record of all financial transactions involving the funds of the client and shall make the record available to the client and the guardian or conservator upon request;
 - (3) the service provider shall provide for the safekeeping of the funds, shall keep the funds separate from all other funds and shall be held strictly accountable for the funds and any interest;;
 - (4) the service provider shall return the funds to the client or guardian or conservator, including interest, upon request. Upon the death of a client, the service provider shall provide the executor or personal representative a complete accounting of all funds and property;
- O. the right to participate in the political process, including the right to vote;
- P. the right to have access to his or her records, except as expressly limited by statute, and to have confidential treatment of all information in his or her records, including personal and medical records. Confidentiality does not preclude access to an individual's records by an individual or organization otherwise entitled under federal or state law to review records;
- Q. the right to voice grievances and complaints and to recommend changes in service provider policies and services without restraint, interference, coercion, discrimination or reprisal;
- R. the right to have access to available advocacy services, including consultation and assistance on the individual's concerns and training on legal rights;
- S. the right to refuse to participate in medical or psychological research experimentation;
- T. the right to be free from excessive use of medical restraint;
- U. the right to be free from the use of chemical restraint;
- V. the right to be free from the use of physical restraint except in an emergency;
- W. the right to be free from limitations on freedom of movement except in an emergency;
- X. the right to be free from the use of mechanical restraint; and

Y the right to be free from the use of aversive procedures.
[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.11 RESTRICTIONS OR LIMITATION OF CLIENT'S RIGHTS:

- A. A service provider shall not restrict or limit a client's rights except:
- (1) where the restriction or limitation is allowed in an emergency and is necessary to prevent imminent risk of physical harm to the client or another person; or
 - (2) where the interdisciplinary team has determined that the client's limited capacity to exercise the right threatens his or her physical safety; or
 - (3) as provided for in Section 10.1.14 [now Subsection N of 7.26.3.10 NMAC].
- B. Any emergency intervention to prevent physical harm shall be reasonable to prevent harm, shall be the least restrictive intervention necessary to meet the emergency, shall be allowed no longer than necessary and shall be subject to interdisciplinary team (IDT) review. The IDT upon completion of its review may refer its findings to the office of quality assurance. The emergency intervention may be subject to review by the service provider's behavioral support committee or human rights committee in accordance with the behavioral support policies or other department regulation or policy.
- C. The service provider may adopt reasonable program policies of general applicability to clients served by that service provider that do not violate client rights.
[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.12 RETALIATION FOR INITIATION OF COMPLAINT PROCEDURE PROHIBITED: A client has the right to present or make known a complaint without restraint, interference or coercion. A service provider shall not retaliate or discriminate against a client, staff person or other person who complains to the service provider or initiates a complaint procedure.
[09/12/94; 01/15/97; Recompiled 10/31/01]

7.26.3.13 CLIENT COMPLAINT PROCEDURE AVAILABLE: A complainant may initiate a complaint as provided in the client complaint procedure to resolve complaints alleging that a service provider has violated a client's rights as described in Section 10 [now 7.26.3.10 NMAC]. The department will enforce remedies for substantiated complaints of violation of a client's rights as provided in client complaint procedure.
[09/12/94; 01/15/97; Recompiled 10/31/01]

HISTORY OF 7.26.3 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: DOH 94-05 (DDD), Regulations Governing Client Rights For Individuals With Developmental Disabilities Living In The Community, 9/12/94.

History of Repealed Material: [RESERVED]