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| Chapter: Rules for State-Operated Programs and Facilities                | <b>Effective Date: 5/19/23</b>  |
| Subchapter: Behavior Management and Youth Discipline                     | Page: 1 of 6                    |
| Division: Due Process Hearings Procedures                                | Replaces: GAP.380.9555, 10/1/15 |
| <b>Rule: Level II Hearing Procedure</b>                                  |                                 |
| References: <i>Morales v. Turman</i> Settlement Agreement Section (V)(H) |                                 |

## **RULE**

(a) **Purpose.**

This rule establishes the procedure to be followed to ensure youth are afforded appropriate due process before certain actions are taken.

(b) **Definitions.**

Definitions pertaining to this rule are under [§380.9550 of this title](#) unless otherwise defined within this rule.

(c) **Applicability.**

A Level II hearing is appropriate due process in the following instances:

- (1) imposing a disciplinary consequence designated as a major consequence in accordance with [§380.9503 of this title](#);
- (2) placing a youth in the moderate or intensive level of the intervention program in accordance with [§380.9510 of this title](#);
- (3) transferring a parole-status youth from a home or home substitute to a medium-restriction facility for non-disciplinary reasons;
- (4) transferring an institutional-status youth who was initially assigned to a medium-restriction facility in accordance with [§380.8521 of this title](#) to a high-restriction facility for non-disciplinary reasons;
- (5) transferring a conditionally placed youth to a higher-restriction facility pursuant to [§380.8545 of this title](#);
- (6) with a few exceptions in procedure as identified in [§380.9571 of this title](#):
  - (A) admitting a youth to a Texas Juvenile Justice Department (TJJD)-operated crisis stabilization unit; and
  - (B) extending the time to treat a psychiatric disorder in connection with a crisis stabilization unit placement (as appropriate); or
- (7) depositing into the student benefit fund money possessed by a youth in a residential program in violation of §380.9503 of this title.

(d) **Criteria.**

- (1) In order for a youth to receive a major consequence, in accordance with §380.9503 of this title, or have contraband money seized and placed in the student benefit fund, the hearing manager shall find:
  - (A) the youth committed an eligible rule violation; and
  - (B) there are no extenuating circumstances, as defined by §380.9550 of this title.
- (2) In order for the youth to be placed in the moderate or intensive level of the intervention program, the hearing manager must find the youth committed an eligible rule violation.

- (3) In order for a youth to be transferred to a higher-restriction placement for non-disciplinary reasons, the hearing manager must find that there are no less restrictive placements appropriate and available for the youth.
- (4) In order for a conditionally placed youth to be transferred to a higher-restriction placement, the hearing manager must find one or more of the criteria required in [§380.8545 of this title](#).
- (5) For criteria for admission to or extension in a crisis stabilization unit, see [§380.8767 of this title](#).

(e) **Requesting the Hearing.**

- (1) The appropriate staff person, as specified by TJJJ procedural manuals, must request permission to schedule a hearing from the facility administrator, parole supervisor, contract case management supervisor, or their designees. The hearing must be requested and scheduled as soon as practical but no later than seven days, excluding weekends and holidays, after the alleged violation or discovery of the alleged violation.
- (2) For hearings involving a non-disciplinary transfer or transfer from a conditional placement, the youth may waive the hearing and agree to the transfer. The waiver must be in writing. If the youth does not waive the hearing, the hearing must be held before the transfer. However, if good cause compels a pre-hearing transfer, the hearing must be held no later than three calendar days after the transfer.
- (3) Failure to meet any timeline in this subsection must be justified with documentation of circumstances that made it impossible, impractical, or inappropriate to meet the deadline. Failure to document these justifications may result in a dismissal of the allegations or a reversal of the decision(s) of the hearing manager.

(f) **Hearing Manager.**

- (1) The hearing manager must be a TJJJ employee trained to function as a hearing manager. The hearing manager must be impartial and may not be a person who:
  - (A) witnessed any part of the alleged violation(s);
  - (B) made any prior decisions regarding the youth based on the alleged violation; or
  - (C) is directly responsible for supervising the youth.
- (2) If the youth is currently assigned to a halfway house, the hearing manager may not be a member of the halfway house staff.
- (3) If the youth is currently assigned to a contract program, the hearing manager may not be the TJJJ case management specialist assigned to that youth.
- (4) If the youth is currently assigned to his/her home, the hearing manager may not be the parole officer or parole supervisor assigned to the youth's case.

(g) **Staff Representative.**

- (1) The staff representative shall be a TJJJ employee trained to function as a staff representative.
- (2) The staff representative is responsible for assembling all evidence, giving all required notices, and presenting evidence at the hearing.

(h) **Advocate.**

- (1) A TJJJ employee, contract employee, or volunteer who has been trained to serve as an advocate shall assist the youth. If a youth hires his or her own counsel, then no advocate will be appointed.

- (2) The youth is given the opportunity to choose an advocate from among those trained. The youth's choice shall be honored unless there is a showing of unavailability of the requested advocate. If the youth does not choose an advocate or the requested advocate is unavailable, an advocate will be appointed.
- (3) The advocate may not be a person who was a witness to the alleged violation.
- (4) If the youth is not proficient in the English language, the advocate must be proficient in English and in the youth's primary language or an interpreter shall be used.

(i) **Notice.**

- (1) Not later than 24 hours before the hearing, the youth and the youth's advocate shall be given:
  - (A) written notice of the reasons for calling the hearing;
  - (B) written notice of the proposed action to be taken;
  - (C) written notice and copies of the evidence to be relied upon; and
  - (D) written notice of the following rights of the youth:
    - (i) the right to remain silent;
    - (ii) the right to be assisted by an advocate in the hearing process;
    - (iii) the right to confront and cross-examine adverse witnesses who testify at the hearing;
    - (iv) the right to contest adverse evidence admitted at the hearing;
    - (v) the right to call readily available witnesses and present readily available evidence on his/her own behalf at the hearing; and
    - (vi) the right to appeal the results of the hearing. The right to appeal cannot be waived.
- (2) Staff currently employed at and youth currently residing at the location of the hearing are considered to be "readily available" and shall be called to testify at the youth's request. If there are unusual circumstances that would prevent the witness from attending in person or by phone or videoconference, the hearing may be postponed or continued to allow a witness's testimony. If the witness's testimony cannot be secured within a reasonable time, the hearing may proceed without the witness. The reasons for proceeding without requested witnesses shall be documented and placed in the hearing record.
- (3) Evidence is considered "readily available" if it is within the control of any TJJD staff member at the location of the hearing or is otherwise easily attainable. Video created by TJJD, such as body-worn-camera video and surveillance video, is generally considered "readily available" and shall be shown to the youth if used as evidence during the hearing. The reasons for excluding requested evidence must be documented and placed in the hearing record.
- (4) All youth in TJJD facilities and contract placements shall be given the hearing packet (all written materials relied upon and a list of witnesses) at least 24 hours before the hearing. The paperwork may be taken away from the youth if the youth is misusing the papers in any way.
- (5) After receipt of the written notice and consultation with the advocate, the youth may waive the 24-hour-notice period by agreeing, in writing, to an earlier hearing time.
- (6) If the youth is younger than 18 years of age, reasonable efforts shall be made to inform the youth's parent/guardian of the time and place of the hearing at least 24 hours before the hearing. If the youth is 18 years of age or older, such notice may be provided only with the youth's authorization to release the information.

**(j) Location of Hearing, Youth's Presence at Hearing, and Official Record of Hearing.**

- (1) The hearing shall be held where the youth resides unless the hearing manager determines another site is more appropriate.
- (2) The hearing shall be recorded. The recording is the official record of the hearing. The recording and the hearing packet shall be preserved for six months after the hearing.
- (3) The youth shall be present during the hearing unless the youth waives his/her presence, his/her behavior prevents the hearing from proceeding in an orderly and expeditious fashion, or his/her temporary removal from the hearing room is necessary to secure the testimony of a witness.
  - (A) A voluntary waiver of the youth's presence must be in writing and signed by the youth and his/her advocate. If the youth does not sign the waiver for any reason, his/her presence is not waived.
  - (B) If a youth is excluded from the hearing for behavioral reasons or to secure the testimony of a witness, the reason(s) for the exclusion shall be documented in the hearing record. The advocate shall be present during the testimony and must have the opportunity to question the witness.
  - (C) A true plea cannot be entered on behalf of a youth who has waived his/her presence at the hearing.
- (4) A victim who appears as a witness shall be provided a waiting area where he/she is not likely to come in contact with the youth or the youth's parent/guardian except during the hearing.
- (5) To protect the confidential nature of the hearing, persons other than the youth, the youth's advocate, the staff representative, and the youth's parent/guardian may be excluded from the hearing room at the discretion of the hearing manager; however, any person except the staff representative or the youth's advocate may be excluded from the hearing room if his/her presence causes undue disruption or delay of the hearing. The reason(s) for the exclusion(s) shall be stated on the record.
- (6) The hearing may be held by conference call or videoconference. If the hearing is held by conference call or videoconference, all required participants must be able to simultaneously hear one another.

**(k) Hearing Process.**

- (1) Except as provided by paragraphs (2) and (3) of this subsection, hearings consist of two parts: fact finding and disposition. During the fact-finding portion of the hearing, only evidence concerning the alleged violation(s) may be considered. The youth's prior behavior may not be discussed or considered unless disposition is reached. In the disposition phase, the youth will be given the opportunity to present evidence of extenuating circumstances.
- (2) The following types of hearings consist only of fact finding to determine if the criteria for transfer are met:
  - (A) non-disciplinary transfer hearings; and
  - (B) conditional placement transfer hearings requested because the conditional placement is no longer a viable option.
- (3) A mental health status review hearing consists only of fact finding to determine if the criteria for admission or extension in a crisis stabilization unit are met.
- (4) The youth shall be given the opportunity to plead "true" or "not true" to each allegation. If the youth pleads "true," the hearing manager shall ask questions of the youth to ensure he/she did so voluntarily and that he/she did commit the violation.

- (5) If the youth pleads “not true,” the staff representative has the burden of proving by a preponderance of evidence that the youth did commit the alleged violation(s).
- (6) Witnesses shall take an oath before testifying. Witnesses may testify by phone or videoconference if in-person testimony is impractical or unfeasible. If testimony is provided by phone, persons required to be present at the hearing must be able to simultaneously hear the testimony.
- (7) The hearing manager, staff representative, and advocate may question each witness in turn.
- (8) With the exception of the youth or staff representative, any person designated as a witness may be excluded from the hearing room during the testimony of other witnesses and may be instructed to refrain from discussing his/her testimony with anyone until all the witnesses have been dismissed.
- (9) The hearing manager may permit a witness to testify outside the presence of the youth if doing so appears reasonable and necessary to secure the testimony of the witness. If the youth is excluded from the hearing room during testimony, the advocate for the youth must be present during the testimony and must have the opportunity to review the testimony with the youth before questioning the witness.
- (10) The youth may not be called as a witness unless, after consulting with the advocate, he/she waives on the record his/her right to remain silent. Neither the hearing manager nor the staff representative may question the youth unless he/she waives the right to remain silent.
  - (A) The youth’s failure to testify shall not create a presumption or inference against him/her.
  - (B) A youth who waives the right to remain silent may be questioned concerning only those issues addressed by his/her testimony.
- (11) All credible evidence may be considered, irrespective of its form.
- (12) The standard of proof for all disputed issues is a preponderance of evidence.
- (13) The hearing manager may recess or continue the hearing for such period(s) of time as may be necessary to ensure an informed and accurate fact finding or to secure evidence the hearing manager determines may be relevant.
- (14) After all evidence has been presented, the staff representative and advocate may offer summation statements.
- (15) The hearing manager shall announce his/her findings of fact.
- (16) If there is a finding of true, the hearing manager shall proceed to disposition, unless the hearing consists only of fact finding as described in paragraphs (2) and (3) of this subsection. During disposition, the hearing manager shall provide the youth an opportunity to present evidence of extenuating circumstances. If no extenuating circumstances are found, the hearing manager shall make the disposition finding of which the youth was given notice.
- (17) If the hearing manager finds extenuating circumstances incident to the rule violation(s) proved at the hearing, the youth may not be assigned any consequence designated as a major consequence in accordance with [§380.9503 of this title](#). However, the true finding will remain in the youth’s disciplinary record and may be considered by the youth’s treatment team or parole officer in determining appropriate actions to address the youth’s behavior. If extenuating circumstances are found incident to a youth’s possession of prohibited money, the hearing manager determines the appropriate way to dispose of the money. A finding of extenuating circumstances does not prohibit placement of a youth in the intervention program under [§380.9510 of this title](#), but the admission review shall take the finding into account.

- (18) A hearing manager's decision to impose a disciplinary consequence is final, subject to appeal. However, the youth's treatment team may reduce or suspend the imposition of the consequence if warranted.
  - (19) The hearing manager shall prepare a report of his/her findings, which includes the grounds for the hearing, the evidence relied upon, and the decision.
  - (20) After the hearing manager announces his/her decision, he/she shall inform the youth of the youth's right to appeal to the executive director or designee. The hearing manager's decision is implemented even if the youth appeals and the response is pending.
  - (21) A copy of the hearing report shall be given to the youth immediately after the hearing is closed.
  - (22) The hearing manager's report shall be reviewed by the appropriate supervisor, institutional superintendent, halfway house superintendent, or parole supervisor, as are all disciplinary reports, to ensure consistency in the application of policy.
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