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MEMORANDUM

TO: DDSO Directors
Voluntary Provider Agency Executive Directors

FROM: Eileen Zibell
Associate Attorney

DATE: May 14, 2010

SUBJECT: Impact of the Family Health Care Decisions Act (FHCDA)

The Family Health Care Decisions Act (FHCDA), which provides a process for a surrogate to make an end-of-life decision on behalf of someone who lacks capacity, was signed into law on March 16, 2010. Most of the provisions will be effective on June 1, 2010.

Due to the fact that we already had the Health Care Decisions Act for Persons With Mental Retardation (HCDA), which applies to most of the individuals we serve and contains some special protections which are not included in the FHCDA, we requested that the HCDA remain intact for those individuals whose lack of capacity to make medical decisions is due to mental retardation or other developmental disability. The bill requires that the Task Force on Life and the Law conduct a study and make recommendations regarding merging the HCDA into the FHCDA.

In addition, this legislation made several significant amendments to the HCDA. The most important change for the individuals we serve is with respect to the issuance of Do Not Resuscitate (DNR) orders. Previously, the issuance of DNR orders was separate and distinct from other medical decisions involving the withdrawing or withholding of life-sustaining treatment (LST). This is no longer the case. As of June 1, 2010, the HCDA process must be followed for **all** decisions involving the withholding or withdrawal of LST, including DNR orders. As a result of this change, there will now be one set of medical criteria and one surrogate list for **all** such decisions. Although the HCDA medical criteria are similar to the DNR medical criteria, they are not identical. Most significantly, medical futility of CPR is not specifically included in the HCDA. However, the HCDA criteria are broad enough to encompass medical futility as a justification. Secondly, the HCDA requires a showing that the LST would impose an **extraordinary burden** on the individual, in addition to meeting one of the three specified medical criteria. DNR orders issued prior to June 1, 2010, remain effective.

A second significant amendment to the HCDA is the addition of the Willowbrook Consumer Advisory Board (CAB) to the list of authorized surrogates for those members of the Willowbrook

class who are fully represented by the CAB and who do not have a 17-A guardian or actively involved family member to make such a decision on their behalf.

Unlike the former DNR surrogate list, the HCDA surrogate list does not include a “close friend.” However, the HCDA surrogate list does include the Surrogate Decision Making Committee (SDMC) for individuals who do not have a 17-A guardian, actively involved family member or CAB to make such a decision on their behalf.

Please refer to the HCDA section of the Health Care Choices booklet at pages 18-22 www.omr.state.ny.us/hp_healthcare.jsp for a summary of the law and the steps required. Please note that the recent amendments to the HCDA are not yet included in the Health Care Choices booklet. These amendments include: the addition of DNR orders to the HCDA process, and the addition of the Willowbrook CAB and the SDMC as authorized surrogates for purposes of making decisions to withhold or withdraw life-sustaining treatment for individuals who do not have a 17-A guardian or actively involved family member. An updated Health Care Choices booklet will be available in the near future.

Please address any questions regarding these matters to Eileen Zibell in Counsel’s Office, Eileen.Zibell@omr.state.ny.us.