14 NYCRR PART 710

PROCEDURES OF THE SURROGATE DECISION-MAKING COMMITTEE OF THE NEW YORK STATE JUSTICE CENTER FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS

(Statutory authority: Executive Law, section 553(15); Mental Hygiene Law, art 80; Surrogate's Court Procedure Act, section 1750)

Sec.

Section 710.1 Background and intent.

(a) The purpose of this Part is to set forth uniform procedures for the surrogate decision-making committee established by article 80 of the Mental Hygiene Law (MHL).

(b) Article 80 of the MHL requires the Justice Center to administer a statewide quasi-judicial process for patients in need of surrogate decision-making as defined in section 80.03(b) of the MHL to assess:

(1) a patient's capacity to consent to or refuse major medical treatment; and

(2) whether there is an available and willing surrogate to make the decisions; and

(3) whether the proposed treatment promotes the patient's best interests.

Article 80 of the MHL authorizes panels organized by the surrogate decision-making committee to consider proposed major medical treatments on behalf of qualifying patients.

(c) Article 17-A of the SCPA authorizes panels organized by the surrogate decision-making committee to consider proposed end-of-life decisions on behalf of qualifying patients. Section 1750-b of the SCPA requires the Justice Center to establish procedures to assess:

(1) a patient's capacity to consent to or refuse the withholding or withdrawing of life-sustaining treatment; and

(2) whether the proposed decision promotes the patient's best interests.

(d) The surrogate decision-making committee provides another means to obtain informed consent when a qualifying patient lacks decision-making capacity and has no surrogate decision maker willing or able to make the decision. This program is intended to serve as an alternative means to

the court system for obtaining medical consent and will not prevent applications to a court to obtain consent in the absence of, or prior to a review of the case, by a surrogate decision-making committee or panel. The program is available in all sixty-two counties of New York State.

(e) The surrogate decision-making committee organizes volunteer panels to make determinations regarding proposed major medical treatments for qualifying patients, including the capacity of the qualifying patient to make such a decision, the availability and willingness of an alternative surrogate decision maker, and the best interests of the qualifying patient. The Justice Center determines the staff and assistance available to the SDMC program. In providing such staff and assistance, the Justice Center may enter into agreements with not-for-profit organizations including but not limited to community dispute resolution centers, as defined by article 21-A of the Judiciary Law. Staff of such organizations shall be considered public officers for the purposes of sections 17, 19 and 74 of the Public Officers Law (POL).

710.2 Legal authority.

(a) Article 80 of the MHL requires the Justice Center to administer a statewide quasi-judicial process with panels organized by the surrogate decision-making committee to consider proposed major medical treatments on behalf of qualifying patients.

(b) Article 17-A of the Surrogate's Court Procedures Act (SCPA) authorizes panels organized by the surrogate decision-making committee to consider proposed end-of-life decisions on behalf of qualifying patients as defined in article 17-A of the SCPA.

(c) Section 1750-b of the SCPA requires the Justice Center to establish committee procedures to assess a patient's capacity to consent to or refuse the withholding or withdrawing of life-sustaining treatment, and to assess whether the proposed decision promotes the patient's best interests.

(d) Subdivision (15) of section 553 of the Executive Law authorizes the Justice Center to administer the surrogate decision-making committee program, as authorized pursuant to article 80 of the MHL.

710.3 Definitions.

(a) Attending physician means the physician, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient. Where more than one physician shares such responsibility, or where a physician is acting on the attending physician's behalf, any such physician may act as the attending physician.

(b) Best interest means promoting the patient's well-being by considering the risks, benefits and alternatives to the patient of a proposed medical decision. (1) For the purposes of making a major medical treatment decision pursuant to article 80 of the MHL, such a determination takes into account the following: the relief of suffering; the preservation or restoration of functioning; the improvement in the quality of the patient's life with and without the proposed major medical treatment; and consistency with the personal beliefs and values known to be held by the patient.

(2) For the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to article 17-A of the SCPA, such a determination takes into account the following: the dignity and uniqueness of every person; relief of suffering by means of palliative care and management; the unique nature of artificially provided nutrition or hydration, and the effect it may have on the patient; and the entire medical condition of the patient.

(c) Conflict of interest means an association, including a financial or personal association, which precludes the participation of a panel member in the proceedings with regard to a patient. In general, any member who has any interest, financial or otherwise, direct or indirect, or engages in any business or transaction or professional activity or incurs any obligation or receives any benefit of any nature which is in

conflict with the impartial discharge of his or her duties as a panel member shall neither be assigned to the panel considering the case nor vote upon its disposition. A panel member will be precluded whenever the panel member:

(1) is a relative of the patient;

(2) has served as a board member, officer, employee, or otherwise has been affiliated with the facility where the patient resides or receives services; provided, however, that a member of a Board of Visitors may serve on a panel for a patient served by the psychiatric center or developmental disabilities services office to which the Board of Visitors member is assigned, absent any close affiliation or affinity;

(3) has provided health services or has been an officer, board member or employee of any provider of health services to the patient; provided, however, that health care professionals are not precluded from serving on a panel wherein the patient is known to be served by another provider within the same health care network or parent corporation or entity, absent any close affiliation or affinity;

(4) has engaged in any business or has been an officer, board member or employee of any corporation, association, partnership or joint venture which has transacted business with the facility where the patient resides; or has recently received a gift of significant value from the facility where the patient resides; or

(5) is a relative of another panel member.

(d) Correspondent means a person who has demonstrated a genuine interest in promoting the well-being of a patient by having a personal relationship with the patient, by participating in the planning of a patient's services, by regularly visiting the patient, or by regularly communicating with the patient. Regular communication includes communi-

cation more than once a year on the topic of the patient's well-being or planning of the patient's services, and does not include communication such as holiday or birthday greetings.

(e) Declarant means a person who submits a declaration seeking a major medical treatment decision on behalf of a patient, or seeking a decision to withhold or withdraw life-sustaining treatment on behalf of a patient. Such persons may include the director of the patient's residential facility or his or her designee or staff member, the patient's service coordinator, physicians, dentists, staff of hospitals as defined in article 28 of the Public Health Law (PHL), or a relative or correspondent of the patient.

(f) Developmental disability means a disability, as defined in section 1.03 of the MHL.

(g) Justice Center means the New York State Justice Center for the Protection of People with Special Needs (Justice Center), a State agency created by article 20 of the Executive Law.

(h) Legal guardian means an individual or agency appointed by the court to serve as a guardian of the person of an infant pursuant to article 17 of the SCPA, or a guardian of the person of an individual with a developmental disability pursuant to article 17-A of the SCPA, or a guardian authorized to make health care decisions for a person pursuant to article 81 of the MHL. For the purposes of this Part, legal guardian also includes a committee of the person appointed by the courts pursuant to article 78 of the MHL, now repealed, and a conservator appointed by the courts pursuant to article 77 of the MHL, now repealed.

(i) Life-sustaining treatment means medical treatment, including cardiopulmonary resuscitation and nutrition and hydration provided by means of medical treatment, which is sustaining life functions and with-

out which, according to reasonable medical judgment, the patient will die within a relatively short period of time. Cardiopulmonary resuscitation is presumed to be life-sustaining treatment without the necessity of a medical judgment by an attending physician.

(j) Major medical treatment means a medical, surgical, or diagnostic intervention or procedure as defined in section 80.03(a) of the MHL, including any such intervention or procedure that involves hospice admission pursuant to article 40 of the PHL. Major medical treatment includes any professional diagnosis or treatment in which informed consent is required by law.

(k) Mental Hygiene Legal Services (MHLS) means a program under the jurisdiction of the judicial branch of government and which provides legal assistance to patients pursuant to article 47 of the MHL.

(l) Minor means a person who has not attained the age of 18 years, unless each of the minor's parents satisfy one of the following conditions: the parent's parental rights have been legally terminated; the parent is deceased; the parent has indicated his or her willingness to allow the panel to proceed.

(m) Panel means a group of four members; however, nothing in this Part shall preclude the panel from operating with less than four members in accordance with section 80.05(g) of the MHL and section 710.5 (a)(6) of this Part. A panel shall include members from each of the following groups:

(1) physicians, nurses, psychologists, or other health care professionals licensed by New York State;

(2) former patients as defined in section 80.03(b) of the MHL, parents, spouses, adult children, siblings or advocates of persons with developmental disabilities;

(3) attorneys admitted to the practice of law in New York State; and

(4) other persons with recognized expertise or demonstrated interest in the care and treatment of persons with developmental disabilities.

(n) Panel chairperson means the person designated by the surrogate decision-making committee program or its designee. The panel chairperson serves at the pleasure of the surrogate decision-making committee program.

(o) Patient means a patient in need of surrogate decision-making as that term is defined in section 80.03(b) of the MHL.

(p) Providers of health services means: individuals, associations, corporations, or public or private agencies other than State agencies, providing services to persons with developmental disabilities; facilities operated by OASAS, OMH, or OPWDD, except in family care homes; hospitals as defined in article 28 of the PHL; and dentists and physicians.

(q) Program staff means employees of the Justice Center who administer the surrogate decision-making committee, or a designee.

(r) Service coordination provider means an employee of any agency, or an independent contractor or other party so designated, who provides active assistance to patients as they access and negotiate the various service systems in pursuit of the necessary and desired services and supports to achieve and maintain their personal goals.

710.4 Applications to the surrogate decision-making committee.

(a) Applications to the surrogate decision-making committee must include a declaration setting forth the declarant's reasons for the beliefs that:

(1) the patient lacks the capacity to consent to a proposed treatment;

(2) there is no available and willing surrogate to make the decision; and

(3) the proposed treatment serves the patient's best interests; and supporting documents, if necessary, as set forth in this Part.

(b) Declaration in support of surrogate decision-making. (1) A declarant may file the declaration on behalf of any qualifying patient, as defined in article 80 of the MHL and article 17-A of the SCPA.

(2) For declarations regarding major medical treatment decisions pursuant to article 80 of the MHL, the declaration must be made in writing and include, inter alia, the following:

(i) a brief description of the proposed major medical treatment;

(ii) a statement that the patient does not have a parent, spouse, adult child, legal guardian or other surrogate who is legally authorized, available and willing to make the major medical treatment decision; the factual basis for such a statement; and the efforts made to contact such persons;

(iii) a description of the patient's opinion or reaction, if any, when the proposed major medical treatment decision was explained;

(iv) the reasons for believing that the patient lacks the capacity to make the major medical treatment decision; and

(v) a statement of the declarant's opinion of whether the best interests of the patient would be promoted by such treatment decision and the basis for the opinion.

(3) For declarations regarding decisions to withhold or withdraw life-sustaining treatment, pursuant to article 17-A of the SCPA, the declaration must be made in writing and include, inter alia, the following:

(i) a statement that the patient does not have a parent, spouse, adult child, legal guardian or other surrogate who is legally authorized, available and willing to make the decision to withhold or withdraw life-sustaining treatment; the factual basis for such a statement; and the efforts made to contact such persons;

(ii) a description of the proposed life-sustaining treatment to be withheld or withdrawn;

(iii) a description of the efforts to determine the moral and religious beliefs of the patient, and such beliefs, if known;

(iv) a description of the patient's opinion or reaction, if any, when the proposed withholding or withdrawing of life-sustaining treatment was explained;

(v) the reasons for believing that the patient lacks capacity to provide informed consent; and

(vi) a statement of the declarant's opinion whether the best interests of the patient would be promoted by such decision and the basis for that opinion.

(4) The declaration shall be signed and dated by the declarant, stating that the information on the declaration is true to the best of the declarant's knowledge.

(5) A declaration regarding a minor patient must indicate whether the patient's parents are deceased, or have had their parental rights terminated, or have waived their right to make the decision.

(c) Supporting documents. (1) For applications regarding major medical treatment decisions, the following documents must be submitted

along with the declaration:

(i) A statement completed, signed and dated by a psychiatrist or psychologist duly licensed by the State of New York, providing the factual basis and professional opinion that the patient lacks the capacity to make the major medical treatment decision.

(ii) A statement completed, signed and dated by a physician, podiatrist, or dentist including:

(A) a description of the proposed major medical treatment decision and the patient's medical, podiatric, or dental condition which requires such treatment decision indicating the date of diagnosis;

(B) the risks and benefits to the patient of the proposed treatment decision and any alternative treatments including consideration of non-treatment;

(C) a statement whether the patient has any medical, podiatric, or dental condition which would prevent his or her travel to or presence at the panel hearing and a description of such condition; and

(D) a statement whether there is a need for an expedited review including the factual and medical justification for such a review.

(iii) A statement completed, signed and dated by someone responsible for the patient's medical chart providing supplemental medical information including:

(A) a description of the current medications of the patient, any known allergies, the dates of the last physical examination, EKG, chest X-ray, and laboratory workup;

(B) a history of any cardiac or pulmonary disease and any other major illness or surgery within the previous year; and

(C) a statement of any known primary or secondary physical conditions.

(iv) Any other information that may be necessary to determine the need

for such treatment decision, including a copy of any pertinent evaluation or data regarding the patient.

(2) For applications regarding decisions to withhold or withdraw life-sustaining treatment, the following documents must be submitted with the declaration:

(i) A certification on capacity, as required by section 1750-b of the SCPA, including:

(A) A statement completed, signed and dated by the attending physician, certifying that to a reasonable degree of medical certainty the patient lacks capacity to make health care decisions, and stating the attending physician's opinion as to the cause and nature of the incapacity and its extent and probable duration;

(B) A statement completed, signed and dated by a consulting physician or psychologist, providing the factual basis and professional opinion that such patient lacks the capacity to make the end-of-life decision;

(C) A statement that either the attending physician or consulting physician or psychologist:

(I) is employed by a developmental disabilities services office named in section 13.17 of the MHL or employed by OPWDD to provide treatment and care to people with developmental disabilities;

(II) has been employed for a minimum of two years to render care and service in a facility or program operated, certified or authorized by OPWDD;

(III) has been approved by the commissioner of OPWDD; or

(IV) otherwise satisfies the statutory requirements of section 1750-b of the SCPA.

(ii) A certification on the appropriateness of withdrawal or withholding of life-sustaining treatment, completed, signed and dated by the

attending physician and including:

(A) The risks and benefits of withholding or withdrawing life-sustaining treatment, taking into consideration the extraordinary burdens to the patient of providing life-sustaining treatment in light of the patient's:

(I) medical condition, other than such patient's developmental disability; and

(II) the expected outcome of providing life-sustaining treatment, notwithstanding the patient's developmental disability, and whether there are any alternative treatments available to the patient; and

(III) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration, a certification that there is no reasonable hope of maintaining life, or a certification that the artificially provided nutrition or hydration poses an extraordinary burden.

(B) A statement that to a reasonable degree of medical certainty the patient has a medical condition that is:

(I) a terminal condition in that the patient has an illness or injury from which there is no recovery and which reasonably can be expected to cause death within one year;

(II) permanent unconsciousness; or

(III) a medical condition other than the patient's developmental disability, which requires life-sustaining treatment, is irreversible and which will continue indefinitely.

(C) A statement whether there is a need for an expedited review including the factual and medical justification for such a review; and

(iii) A statement completed, signed and dated by someone responsible for the patient's medical chart, providing supplemental medical information including:

(A) a description of the current medications of the patient, any known allergies, the dates of the last physical examination, EKG, chest X-ray, and laboratory workup; and

(B) a history of any cardiac or pulmonary disease and any other major illness or surgery within the previous year; and

(C) a statement of any known primary or secondary physical conditions.

(iv) A certification on the appropriateness of withdrawal or withholding of life-sustaining treatment, completed, signed and dated by the consulting physician or psychologist, and including all the required information as defined above for the attending physician's certification on the appropriateness of withdrawal or withholding of life-sustaining treatment.

(3) In the event that confidential information regarding acquired immune deficiency syndrome (AIDS), an infection with HIV, or related virus or illness is relevant to the panel's review, such information will be submitted to the committee as a supplemental statement or statements as authorized by PHL section 2782(1)(a).

(d) The declaration and supporting documents must be filed with the surrogate decision-making committee program staff to initiate the review of the request on behalf of a patient.

710.5 Procedures of the surrogate decision-making committee program and panels.

(a) Upon receipt of the declaration, the procedures of the program staff are as follows:

(1) The program staff or its designee shall send a copy of the declaration to the following interested parties as set forth in the declaration: the patient, the patient's parent, spouse, adult child, legal guardian, other authorized surrogate, correspondent, if known; the director of the patient's residential facility or such director's designee; and the Mental Hygiene Legal Services (MHLS) departmental office that serves the same region as the patient's county of residence.

(2) Copies of the declaration shall be sent along with a notice of hearing which shall inform recipients of the procedures of the panel, including the opportunity for the recipient to be present and to be heard.

(3) A patient's parent, spouse, adult child, legal guardian, other authorized surrogate, or correspondent who does not respond to the notice or who submits a signed waiver for the proceeding shall be deemed to be willing to allow the panel to proceed; provided, however, that parents of minors who have not had their parental rights terminated must submit a waiver to indicate their willingness to allow the panel to consider the declaration.

(4) The hearing shall be scheduled no earlier than five days after the notice of hearing is sent by the program staff to the interested parties set forth in (a)(1) of this section, except where medical or dental circumstances require a more immediate hearing, or where consent to conduct a more immediate hearing has been obtained from all of the interested parties. When the interested parties have consented to a

more immediate hearing, a hearing shall be scheduled at the earliest convenience.

(5) The program staff shall assign the declaration to one of the committee's panels and shall send a copy of the declaration and any supporting documents to the members of the designated panel. Confidential information regarding AIDS, HIV infection or related virus or illness shall be sent to the panel and to MHLS on behalf of the patient. Such confidential information shall also be sent to any other person only if necessary to provide for appropriate review by the committee; provided, however, that any such disclosure shall include a notice of the confidential nature of the information and the penalties for unauthorized disclosure as provided for by PHL article 27-F.

(6) The panel proceedings may be conducted with only three persons. Provided, however, if a program staff receives reasonable notice at least 48 hours prior to the hearing that a panel member will not be able to attend a panel hearing, program staff shall take reasonable steps to secure an appropriate replacement panel member.

(7) Prior to the date of the hearing, the declaration shall be preliminarily reviewed by program staff to ascertain whether additional information may be necessary to assist the panel in determining the patient's need for surrogate decision-making and in determining whether the patient's best interests will be served by the proposed major medical treatment or end-of-life decision on the patient's behalf. The program staff may request and shall, notwithstanding any other law to the contrary, be entitled to receive from any physician, mental hygiene facility, health care facility or person licensed to render health care, any information which is relevant to the patient's need for surrogate decision-making or the proposed decision. Such information may include,

among other things: facts regarding the patient's parents, spouse, adult child, legal guardians, or other authorized surrogates; facts and professional opinions regarding the patient's capacity to make the proposed decision; and facts and professional opinions regarding whether the proposed major medical treatment decision is in the patient's best interests.

(b) The general procedures of the hearing are as follows:

(1) The hearing shall be conducted by the panel. Recipients of the declaration, as well as any other person requested by the patient to appear on his or her behalf, shall have the right to be present and be heard.

(2) The facility where the patient resides shall, to the extent possible, ensure the presence of the patient at the hearing unless the declaration contains a certification by a physician, podiatrist, or dentist that the patient is unable for medical reasons to attend the hearing or unless it is a declaration regarding the withdrawal or withholding of life-sustaining treatment. To the extent practicable, the patient should be accompanied by a person who is personally familiar with the patient, his or her condition and his or her history. If the patient is unable to attend the hearing or if it is a declaration regarding the withdrawal or withholding of life-sustaining treatment, the panel members shall either personally observe and interview the patient, or the program staff or a designee shall designate at least one panel member to observe and interview the patient prior to the commencement of the hearing.

(3) The panel shall be empowered to administer oaths to and to take testimony from any person who might assist the panel in making its decision.

(4) The panel shall be empowered to conduct its proceeding via tele-

phone conference calls in appropriate cases, including but not limited to cases in which:

(i) the conference call proceeding appears to be more appropriate to meet the needs of the patient for timely decision-making as determined by the circumstances.

(ii) the conference call proceeding may afford the opportunity to consult with a person who may assist in the panel's determinations;

(iii) the panel determination that a patient is in need of surrogate decision-making for the proposed major medical treatment decision has expired, and a request is made to renew and extend the effective date of the determination;

(iv) the conference call proceeding may provide timely receipt and consideration of information concerning any changed circumstances, new conditions, or information and application for additional surrogate decision-making related to the major medical treatment decision which was the subject of an initial hearing and surrogate decision-making determination; provided however a conference call or additional hearing shall not be required for procedures which are related diagnostic, medical, or dental procedures that are normal and customary in accordance with sound medical practice and thereby included within an original determination that has not expired;

(5) Confidential information regarding AIDS, HIV infection or related virus or illness may be disclosed as determined by the panel during the hearing if relevant to the determination of capacity or determination of need for major medical treatment; provided, however, that participants shall be provided with a notice of the confidential nature of the information and the penalties for unauthorized disclosure as provided for by article 27F of the PHL.

(6) Formal rules of evidence shall not apply to the panel proceedings.

(7) If at any time during the pendency of a proceeding, a patient, parent, spouse, adult child, legal guardian, or other surrogate who is legally authorized to consent to or refuse such treatment on the patient's behalf, objects to the panel acting upon the declaration, the proceedings regarding such patient shall cease. Any such person's objection shall be made part of the record.

(8) When the proposed major medical treatment decision consists of more than one medical, surgical or diagnostic intervention or procedure, the panel shall be empowered to consider and give or refuse consent for each proposed intervention or procedure separately. If the panel gives consent for one or more, but not all, of the proposed interventions or procedures, the panel's record of its determination shall indicate consent or refusal for each intervention or procedure separately.

(9) When the proposed end-of-life decision consists of more than one medical, surgical or diagnostic intervention or procedure, the panel shall be empowered to consider and give or refuse consent for each proposed intervention or procedure separately. If the panel gives consent for one or more, but not all, of the proposed interventions or procedures, the panel's record of its determination shall indicate consent or refusal for each intervention or procedure separately.

(10) Where practicable, the panel shall reach its determination immediately and provide a copy of the determination to the interested parties immediately after the hearing. Notice of this determination may be given by any means that will provide timely or reliable notice. The giving of such notice shall be made part of the record.

(11) At the hearing, the panel shall be empowered to:

(i) order an independent assessment of the patient, or order informa-

tion concerning the patient, including obtaining an independent opinion, where such independent assessment or opinion is determined to be necessary by the panel chairperson; or

(ii) consult with any other person who might assist in such a determination of the best interests of the patient, including ascertainment of the personal beliefs and values of the patient.

(12) Nothing in this section shall be interpreted to authorize ex parte communications during the hearing or consideration of materials, information, or opinions not presented formally at the hearing.

(c) The panel's determination of the patient's need for surrogate decision-making shall be made in accordance with the following provisions:

(1) In hearings regarding proposed major medical treatment decisions, the panel shall determine whether there is clear and convincing evidence that the patient: lacks the capacity to make the proposed major medical treatment decision; and does not have a parent, spouse, adult child, other authorized surrogate, or legal guardian, who is legally authorized, available and willing to make such a decision. Clear and convincing evidence is evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

(2) In determining whether the patient lacks the capacity to make the proposed major medical treatment decision, the panel shall consider whether the patient is unable to adequately understand and appreciate the nature and consequences of the proposed major medical treatment decision, including:

(i) the burdens of the treatment to the patient in terms of pain and suffering outweighing the benefits, or whether the proposed treatment

would merely prolong the patient's suffering and not provide any net benefit;

(ii) the degree, expected duration and constancy of pain with and without treatment, and the possibility that the pain could be mitigated by less intrusive forms of medical treatment including the administration of medications;

(iii) the likely prognosis, expectant level of functioning, degree of humiliation, and dependency with or without the proposed major medical treatment; and

(iv) the evaluation of treatment options, including non-treatment, and their benefits and risks compared to those of the proposed major medical treatment decision.

(3) In hearings regarding the proposed withholding or withdrawal of life-sustaining treatment, the panel shall determine whether there is clear and convincing evidence as defined in (c)(1) of this section that the patient is in need of surrogate decision-making by considering the certification by the attending physician and the consulting physician or licensed psychologist as set forth in Part 710.4(c)(2) and considering each of the factors set forth in the declaration.

(4) Unless three panel members concur in the determination that the patient is in need of surrogate decision-making, the patient shall be deemed not to need surrogate decision-making.

(5) In the event that the patient is deemed not to need surrogate decision-making because he or she has the capacity to consent on his or her own behalf, patient consent to or refusal of such treatment, if given, shall constitute legally valid consent or refusal therefor. No other consent shall be required by a provider of health services.

(d) The panel's determination regarding the appropriateness of the

proposed health care decision shall be made in accordance with the following provisions:

(1) In a hearing regarding proposed major medical treatment, if a patient has been determined by the panel to be in need of surrogate decision-making, the panel shall make a determination whether the proposed major medical treatment is in the best interests of the patient based upon a fair preponderance of the evidence. A fair preponderance of the evidence is evidence that an issue is more likely true than not.

(2) In a hearing regarding the proposed withholding or withdrawal of life-sustaining treatment, if a patient has been determined by the panel to be in need of surrogate decision-making, the panel shall make a determination whether the proposed end-of-life decision is in the best interests of the patient based upon a fair preponderance of the evidence as defined in (d)(1) of this section. Decisions to withhold or withdraw life-sustaining treatment pursuant to section 1750-b of the SCPA shall include consideration of the following additional factors:

(i) the panel decision is not intended to permit suicide, assisted suicide or euthanasia;

(ii) the panel decision shall be based on the patient's qualifying medical condition, other than developmental disability, with recognition that a person with developmental disability is entitled to full and equal rights, equal protection, respect, medical care and dignity afforded to persons without developmental disabilities and without any financial considerations as such may affect the health care provider or any other party.

(3) Any evidence of an articulated preference by the patient concerning the proposed treatment shall be given full consideration by the panel.

(4) The panel's consent to major medical treatment shall state that any tissues or parts surgically removed may be disposed of or preserved by the provider of health services in accordance with customary practice.

(e) Effect of the panel determination. (1) The panel determination shall include the effective date and the expiration date. The panel may delay the effective date for up to five days in order to enable an objecting party to exercise the right of appeal. For all determinations regarding a decision to withhold or withdraw life-sustaining treatment, the panel shall not delay the effective date of its decision.

(2) A copy of any panel determination shall contain a statement describing the right to appeal and shall promptly be sent to the following parties: patient; other persons requested by the patient to appear on his or her behalf; declarant; patient's parent, spouse, adult child, legal guardian, other known authorized surrogates, and correspondents; the director of the patient's residential facility or designee; service coordination provider; and MHLS.

(3) In the event that a panel refuses to consent to a major medical treatment that may be considered life-sustaining, any party may submit a new declaration for consideration as a declaration for the withholding or withdrawal of life-sustaining treatment with the requisite certifications and supporting documents.

(4) In the event that a panel refuses to consent to the withholding or withdrawal of life-sustaining treatment, any party may submit a new declaration for consideration as a declaration for surrogate decision-making for major medical treatment, with the requisite supporting documents.

(5) The panel determination regarding the major medical treatment

decision or the end-of-life decision shall constitute legally valid consent or refusal to such treatment in the same manner and to the same extent as if the patient were able to consent or refuse on his or her own behalf. No other consent shall be required by a provider of health services.

(6) A panel determination that a patient is in need of surrogate decision-making for the proposed major medical treatment decision shall not be valid for any future major medical treatment and shall not be construed or deemed valid for any other purpose or for any other future major medical treatment unless the determination applies to related or continuing treatment necessitated by the original treatment. No panel determination shall be valid after the expiration date listed in the determination, except as provided for in section 701.5(b)(4)(iii).

(7) A panel determination that a patient is in need of surrogate decision-making shall not be construed or deemed to be a determination that such patient is impaired or incompetent or incapacitated pursuant to article 81 of the MHL.

(8) No person shall be deemed to have failed to exhaust administrative remedies for commencing a legal action to obtain a major medical treatment decision because of the pending review of the case by a panel.

(f) A record of the determinations and proceedings of the panel shall be made and retained for 10 years. Such record shall include any information, record, assessment, consultation, or amendment submitted to or considered by the panel. (1) The Justice Center, any designee, and each member of the panel shall maintain the confidentiality of records as required by sections 33.13 and 80.07(c)(1) of the MHL, article 27-F of the PHL.

(2) All information, records, assessments, consultations or amendments

submitted to or considered by the panel and the panel deliberations are not subject to the Freedom of Information Law or the Open Meetings Law.

710.6 Right of appeal; temporary restraining order.

(a) The patient, declarant, a parent, spouse, adult child, legal guardian, authorized surrogate, correspondent of the patient, the MHLS, or the director of the patient's residential facility may apply to the Supreme Court pursuant to article 78 of the CPLR for review of whether a determination by a panel is supported by substantial evidence. If a trial is required, it shall receive an immediate preference, as provided for in section 3403 of the CPLR.

(b) Within the discretion of the court, a temporary restraining order may be granted by the Supreme Court to facilitate appeal by a proper party, unless it is found by the court to be inconsistent with a need for more timely medical attention. In the event such an order is granted, the court shall conduct an expedited review of the panel's determination.

710.7 Panel members: status as public officers and removal for failure to attend meetings.

(a) Panel members shall be reimbursed for their actual and necessary expenses and shall be considered public officers for the purpose of sections 17, 19 and 74 of the POL.

(b) A member who has failed to attend three consecutive meetings of the panel to which the member has been appointed shall be considered to have vacated his or her office unless the Justice Center determines that the absences should be excused. Notice of such absences shall be provided to the program staff and vacancies shall be filled in accordance with article 80 of the MHL.

(c) A member who has a conflict of interest with any patient shall not serve on a panel regarding such patient.

(d) A member who was unable to serve because he or she has a conflict of interest shall not be deemed to have failed to attend the hearing regarding that declaration.

710.8 Report to the Justice Center.

Upon request of the Justice Center, the program staff shall provide a report on the activities of the committee and its panels containing all information requested by the Justice Center.