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Justice Center for the Protection of People with Special Needs

Surrogate Decision-Making Committee Program

Volunteer Panel Member Handbook

October 2018

Surrogate Decision-Making Committee

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Introduction

In order for the Surrogate Decision-Making Committee (SDMC) Program panels to operate effectively, panel members must develop an understanding of the key elements critical to the SDMC process. This handbook provides panel members with updated information, guidance, and a framework for SDMC operations. The issues discussed in this handbook have been selected based on almost thirty years of program history.

When considering the complexity and unique nature of each case, it is easy to see why it can be challenging for panel members to adjudicate these cases and to reach decisions on behalf of the individuals served. It takes time and experience for panel members to effectively discharge their duties. Until panel members get this experience, this handbook provides them with the legal and conceptual framework for panel operations. Given the complexity of this information, panel members are strongly encouraged to bring this manual with them to hearings should any of the issues addressed herein arise.

The main objectives of this handbook are to:

1. Provide panel members with guidance about issues that have manifested themselves at SDMC hearings such as:
    - SDMC Memo 1 SDMC Panel Members
    - SDMC Memo 2 Authorized Surrogates
    - SDMC Memo 3 Panel Votes and Legal Standards
    - SDMC Memo 4 Presence of Medical Professionals at Panel Hearings
    - SDMC Memo 5 Treatment of MHLS Objections
    - SDMC Memo 6 Determination of Capacity
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    - SDMC Memo 11 Amendment of Declarations and Informed Consent
    - SDMC Memo 12 Consideration of Anesthesia
    - SDMC Memo 13 Treatment Planning, Testimony, and Bias
    - SDMC Memo 14 Decisions Regarding Withholding and/or Withdrawing Life Sustaining Treatment

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2. Provide panel members with helpful resources and contact information for SDMC Program staff should issues arise at hearings for which assistance is requested.
3. Provide panel members with the statutory and regulatory framework applicable to the SDMC Program and panel operations including:

Mental Hygiene Law Article 80
Surrogate's Court Procedure Act § 1750-b
Public Officers Law § 74

14 NYCRR Part 710
14 NYCRR § 633.10
14 NYCRR § 633.11
14 NYCRR § 27.9

While this manual is comprehensive, it is not intended to be all-inclusive. Panel members must complete the training session before they can be appointed to serve on SDMC panels by the Executive Director of the Justice Center for the Protection of People with Special Needs. The SDMC Training staff also offer several other training sessions for volunteers that have their own curriculum and training materials.

Questions regarding any of the information or guidance offered in this SDMC Handbook for Volunteer Panel Members may be addressed to SDMC Program staff at 518-549-0328, by email at SDMCVolunteers@justicecenter.ny.gov or by mailing your questions to:

NYS Justice Center for the Protection of People with Special Needs
SDMC Program
401 State Street
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Appendix 1 Panel Member Resources

Appendix 2 Laws and Regulations

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: SDMC Panel Members and the Public Officers Law **SDMC Memo 1**

Pursuant to Mental Hygiene Law (MHL) § 80.05 (d), members of Surrogate Decision-Making Committee panels are considered "public officers" in Public Officers Law (POL) §§ 17, 19 and 74. As public officers, panel members must sign an Oath of Office stating that they will abide by the NY and US constitutions, as well as adhere to the ethical standards provided for in the POL.

Prohibited Activities:

POL § 74 describes the code of ethics governing all public officers, including conflicts of interest and standards of conduct, which collectively provide that no SDMC panel member should:

- Have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his/her duties in the public interest;
- Accept other employment which will impair a panel member's independence of judgment;
- Disclose confidential information acquired while serving as a panel member or using such information for personal benefit; and
- Use one's official position as a panel member to secure unwarranted privileges or exemptions.

In addition to these standards, the Justice Center regulations for this program have further defined a "conflict of interest" to include those situations where a panel member is:

- a relative of the individual;
- a relative of another panel member (*proposed*);
- a board member, officer, employee, or otherwise affiliated with the patient's residential facility or provider of health services. However, absent any close affiliation, a member of the Board of Visitors of a psychiatric center or developmental disabilities service office may serve on a panel for an individual served by such facility's Developmental Disability Services Office; or
- a recipient of a gift of significant value from the residential facility where the individual resides.

In general, panel members should not have any interest or engage in any business or professional activity which would substantially conflict with the proper discharge of their duties as a panel members. In this regard, the Justice Center recognizes that many panel members do have employment or personal circumstances which may cause a potential conflict.

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These circumstances are, however, the same circumstances which qualify these members to serve. Therefore, to avoid a substantial conflict in a particular case, the panel member should excuse himself or herself from any case where there is an actual conflict because he/she has a connection to the particular individual, facility, or health services provider.

In the event that panel members receive a case assignment concerning an individual with whom they have a relationship or a facility or health services provider with which they are affiliated, SDMC Program staff should be notified as soon as possible so that another member can be assigned.

Confidentiality of Records:

MHL § 80.07 (c)(1), as well as the POL § 74, provides that panel members shall maintain the confidentiality of the relevant medical records. The Health Insurance Portability and Accountability Act regulations allow for use or disclosure of otherwise confidential or restricted information or records where "required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." 45 CFR 164.512 (a)(1).

MHL § 80.07(c) authorizes the Justice Center to receive any information relevant to surrogate decision-making or for the proposed treatment.

Thus, although both state and federal laws authorize release of confidential information to panel members, they also require members to maintain such information as a confidential record, except for disclosures to hearing participants who will assist the panel in making its determinations or who have a right to attend.

Indemnification of SDMC Panel Members:

SDMC members are entitled to be represented by the NYS Attorney General in a civil judicial proceeding. However, the panel member shall be entitled to representation by private counsel of his/her choice in any civil judicial proceeding whenever the Attorney General determines, based upon investigation and review of the facts and circumstances of the case, that representation by the Attorney General would be inappropriate, or whenever a court of competent jurisdiction determines that a conflict of interest exists and that the member is entitled to be represented by private counsel of his/her choice (POL § 17 [2][b]).

In addition, the State will indemnify and hold harmless any SDMC members for the amount of any judgment obtained against such member in any state or federal court, or in the amount of any settlement of a claim, or shall pay such judgment or settlement, provided that the act or omission from which such judgment or settlement arose occurred while the member was acting within the scope of his/her duties.

In the event that an SDMC member is served with legal papers in his/her capacity as a SDMC panel member, the Director of the SDMC Program should be notified as soon as possible at 518-549-0328, or via email at SDMCVolunteers@justicecenter.ny.gov.

To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: Authorized Surrogates **SDMC Memo 2**

The SDMC process is available only when the individual in need of major medical treatment or end of life care decision does not have the capacity to make the decision and does not have a legally authorized surrogate available and willing to make a decision on behalf of the individual.

When a parent, adult child, spouse, or other authorized surrogate is available and willing to act on behalf of the individual, the SDMC process is to stop and to defer to that preferred relative or surrogate. If there is such a legal surrogate who is unavailable or unwilling to act, the factual basis of his or her unavailability and the efforts made to contact such person or the person's willingness to allow the panel to proceed must be set forth upon the declaration filed with the SDMC. However, if such individual were to unexpectedly become available or object to SDMC proceeding, SDMC would defer to such individual as authorized by law and regulations.

A listing of authorized surrogates is included at the end of this memorandum.

Surrogate Decision Makers Authorized to Object to the SDMC Panel's Proceedings:

An available, willing, and authorized surrogate is authorized to object to a SDMC panel's proceedings.

OMH regulations authorize the parent, adult child, spouse, or a court of competent jurisdiction to provide consent or object on behalf of a resident of a mental hygiene facility. OPWDD regulations authorize an "actively involved" parent, spouse, adult child, adult sibling, adult family member, or a Consumer Advisory Board or a court of competent jurisdiction to provide consent or object on behalf of a person over the age of 18 who lacks capacity.

"Actively involved" is defined as an individual having a significant and ongoing involvement in a person's life so as to have sufficient knowledge of the person's needs.

If a provider has concerns that the authorized surrogate is not acting in the individual's best interests, the provider can ask a court to review the decision made by the surrogate.

Should the authorized surrogate's existence or objection not be known until an SDMC panel has convened, the hearing must be stopped and the objection of the surrogate noted on the record.

In instances where the authorized surrogate has signed a waiver relinquishing his/her right to make an objection or fails to respond to the Notice of the Panel Hearing and Declaration, the panel may proceed to review the declaration.

Minors with Parents:

The law and regulations exclude minors with parents from the jurisdiction of the SDMC process unless the parent(s) indicate their willingness to allow the SDMC panel to proceed by signing a waiver (Form 260); or the parental rights have been legally terminated.

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Guardians of the Property/Person (Surrogate's Court Procedure Act, Articles 17 and 17-A):

A **guardian** may be appointed for the benefit of a person with developmental disabilities or a minor when a court of law determines that such appointment is in the best interests of the individual. In the case of a person with developmental disabilities, the court must determine that the individual is unable to manage him or herself and/or affairs.

There are two types of guardianship:

1) a **guardian of the property** may be appointed to control the individual's financial and property affairs; and

2) a **guardian of the person** may be appointed to care for the individual's personal well-being. A guardianship order may provide for guardianship of the property or guardianship of the person or both.

Only a guardian of the person has the authority to provide medical decision-making on behalf off the the individual, unless a court limits such authority.

A guardian of the person may object to a SDMC panel proceeding, unless a court order limits the guardian of the person's ability to make medical decisions on behalf of the individual.

Guardian for Personal Needs (Mental Hygiene Law [MHL] Article 81):

A **guardian for personal needs** is a court-appointed surrogate for an individual who has voluntarily agreed to an appointment of a guardian to act on his/her behalf; or for an individual determined by a court to be incapacitated.

A guardian for personal needs has the authority to make major medical decisions only if a court has granted such guardian the specific authority to make major medical decisions. Such guardians for personal needs appointed pursuant to MHL Article 81 may object to the proceedings of the SDMC panel.

Health Care Agent (Public Health Law [PHL] Article 29-C):

Subject to any express limitations in the health care proxy, a health care agent shall have the authority to make any and all health care decisions on the individual's behalf. The exception is if the individual's wishes regarding administration of artificial nutrition and hydration are not reasonably known and cannot, with reasonable diligence, be ascertained, the health care agent shall not have the authority to make decisions regarding these measures.

There should be no need for the SDMC process if there is a valid health care agent willing and available to make a major medical treatment decision on behalf of the individual. PHL § 2992 authorizes a court of law to review whether or not an execution of a proxy by an individual was voluntary or if the agent is acting in accordance with the individual's wishes or best interests.

SDMC may act on a "declaration" in those cases in which:

- The healthcare agent waives the right to make a decision or is unwilling or unable to act;
- The healthcare agent has not responded to phone calls/correspondence from provider;
- The individual's wishes regarding administration of artificial nutrition and hydration are not reasonably known and cannot without reasonable diligence, be ascertained. In this case, the health care agent shall not have the authority to make decisions regarding such measures;
- If the document is not properly executed, or, if the individual has revoked the proxy.

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Conservator (MHL Article 77 - now repealed):

A **conservator** is a court-appointed surrogate for an individual who has suffered a substantial impairment of his/her ability to care for his/her property, or has become unable to provide for him/herself, or another person dependent on him/her for support.

A conservator is authorized to provide medical decision-making on behalf of the individual only in those instances where a court order or a court-approved plan of personal well-being provides for such authority.

If a conservator has been given medical decision-making authority, such conservator can object to the SDMC proceedings.

Committee of the Person (MHL Article 78 - now repealed):

A **committee of the person** is a court-appointed surrogate for an individual who has been determined to be incompetent to manage him/herself or his/her affairs. A committee of the person may also be appointed for a service recipient in a mental hygiene facility that is unable to adequately conduct his/her personal or business affairs.

A committee of the person may be appointed of the person or of the property or both.
A committee of the person has the authority to provide medical decision-making for the individual, and may object to the SDMC panel proceedings.

To recap:
An available, willing, and authorized **surrogate** is authorized to object to a SDMC panel's proceedings.

A **guardian of the person** may object to a SDMC panel proceeding only if a court has granted the guardian of the person the specific authority to make medical decisions on behalf of the individual.

A **guardian for personal needs** has the authority to object to a SDMC panel's proceedings only if a court has granted the guardian the specific authority to make major medical decisions. If a **conservator** has been given medical decision-making authority, he or she can object to the SDMC proceedings.

A **committee of the person** has the authority to provide medical decision-making for the individual, and may object to the SDMC panel proceedings.

Questions regarding protocol and the authority of surrogates should be directed to SDMC Program staff at 518 549-0328.

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Surrogate Decision-Making Committee Program:

Authorized Surrogates

SDMC Criteria for Surrogates

- Parents
- Spouse
- Adult Child
- Article 17-A Guardian of the Person
- Court-Appointed Committee of the Person or Conservator
- Health Care Agent

MHL Article 80

These relatives and court-appointed surrogates, whether or not they are actively involved, receive notice of the date, time, and location of the hearing and an SDMC form to waive their right to make the decision; the potential surrogate retains the authority to object to an SDMC proceeding.

Who may be a Medical Decision Maker for an Individual Qualified through OPWDD?

OPWDD Decision Maker Hierarchy*

1. Guardian/Health Care Proxy
2. Actively involved Spouse**
3. Actively involved Parent***
4. Actively involved Adult Child
5. Actively involved Adult Sibling
6. Consumer Advisory Board for Willowbrook Class individuals
7. Surrogate Decision-Making Committee Program or a court of competent jurisdiction

***See*: 14 NYCRR § 633.11**

*If the first qualified family member is not available and willing to make the decision, and a timely decision is necessary given the patient's medical circumstances, the decision may be made by the next qualified family member in order of priority.

If more than one qualified family member exists within a category on this list, the family member with the higher level of active involvement shall have the opportunity to make the decision first.

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If the qualified family members within a category are equally actively involved, any of such qualified family members shall have equal opportunity to make a decision.

** "Actively involved" is defined by regulations as significant and ongoing involvement in an individual's life so as to have sufficient knowledge of the person's needs. 14 NYCRR §633.99

*** There is not an "actively involved" requirement for parents if the individual is under 18 years old.

Who may be a Medical Decision Maker for an Individual Qualified through OMH or OASAS? In addition to a court of competent jurisdiction, a:

- Legal Guardian
- Spouse
- Parent
- Adult Child

See: 14 NYCRR § 27.9

There is no requirement for active involvement and no hierarchy for OMH and OASAS family members.

What is the Difference Between a Correspondent and a Surrogate?

A **correspondent** is a person who has demonstrated a genuine interest in promoting the best interests of an individual by having a personal relationship, participating in their care and treatment, and by regularly visiting or communicating with the person. A correspondent could be a friend in the community, a former staff person, a family care provider, a community advocate, or even a family member who does not wish to be the decision maker, but wishes to be involved.

Both a surrogate and a correspondent receive notice of the hearing, however the correspondent does not have the legal authority to make the medical decision. A correspondent may provide testimony at the hearing as to the individual's history, information concerning any potential surrogates, and any previously articulated preferences concerning the proposed treatment.

The surrogate receives an SDMC waiver form along with Notice of the Hearing and retains the ability to consent to or refuse the proposed treatment on the individual's behalf. If the surrogate fails to respond to the letter, the surrogate is deemed to be willing to allow the panel to proceed.

All interested parties receive a copy of the SDMC decision.

To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: SDMC Panel Votes and Legal Standards **SDMC Memo 3**

Background:

A frequent issue in the administration of the SDMC Program is the three separate determinations an SDMC panel may make. This memorandum is intended to explain the effect of the panel's particular votes pursuant to Mental Hygiene Law (MHL) Article 80.

The three determinations which the SDMC panels may make in any given case are:

(1) Whether the individual in need of treatment has the capacity to consent to or refuse the proposed major medical treatment; and if not,

(2) Whether the individual in need of treatment has an authorized surrogate who is willing and available to act on his or her behalf; and if not,

(3) Whether the proposed major medical treatment or end of life care decision is in the best interests of the individual.

If the SDMC panel determines that the individual has capacity, the proceeding and deliberations end as the individual has capacity to make the decision. Similarly, if the SDMC panel determines that the individual lacks capacity but that there is an authorized surrogate willing to act on the individual's behalf, the SDMC panel deliberations end, and the authorized surrogate will make the decision whether or not to consent to the proposed major medical treatment or end of life decision.

SDMC panels are authorized to make determinations in accordance with MHL Article 80. A full SDMC panel exists when all four panel members are present. However, when one panel member is absent, unavailable, or recuses him or herself due to a conflict of interest, MHL Article 80 permits a three-person panel quorum to make a determination.

Discussion of the Three Separate Determinations:

1. Whether the Individual is in Need for Surrogate Decision-Making

a. Panel Votes

MHL Article 80 provides that SDMC panels must decide "whether the patient is in need of surrogate decision-making." This entails two determinations: 1) does the individual have the capacity to consent or refuse the proposed major medical treatment or end of life care decision; and 2) is there a legally authorized surrogate, available and willing, to make such a decision.

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A SDMC panel must have 3 votes in agreement that the individual lacks capacity and lacks an authorized surrogate in order to move forward with the determination regarding whether the medical treatment is in the best interest of the individual. Therefore a quorum (three persons rather than four) panel must unanimously agree in order to determine the individual's capacity and whether an authorized surrogate is available and willing to act on behalf of the individual. Although quorum panels may act under the law, they should be avoided whenever possible. Panel members are urged to attend the scheduled meetings which they accepted to serve upon.

b. Standards Regarding Whether Patient Lacks Capacity and an Authorized Surrogate

MHL Article 80 provides that the SDMC panel is to consider the individual's capacity, or lack thereof, only for the treatment described in the SDMC declaration. In making the determination of whether the individual lacks capacity to make the proposed treatment decision, the panel shall consider whether the individual is unable to adequately understand and appreciate the nature and consequences of the proposed treatment. The individual's stated preference regarding the proposed treatment, if any, by itself should not be determinative of the individual's capacity. The panel is obliged to explore the individual's understanding and assessment of considerations such as those set forth above, by asking questions of the individual and persons concerned with the individual's well-being. Keep in mind that if the individual has the capacity to make the decision, he/she is free to change his or her decision at any time, as anyone is, and that the panel should not inappropriately impose its views or the doctor's views upon the individual.

The panel must decide after hearing from the individual and others concerned with the individual's well-being, whether there is clear and convincing evidence that the individual is in need of surrogate decision-making (MHL § 80.07 [e]). "**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. In other words, the evidence must be clear enough such that each panel member must be convinced that the person lacks capacity prior to voting "no" as to his or her capacity; and second, each panel member must be convinced that the person has no authorized surrogate prior to voting "no" to availability of an authorized surrogate.

If the panel determines that the individual is in need of surrogate decision-making, that is, he or she lacks capacity to make this decision and has no available surrogate, the panel then considers whether the proposed major medical treatment or end of life decision is in the best interest of the individual based on fair preponderance of the evidence.

(2) Whether Major Medical Treatment is in an Individual's Best Interests

a. Panel votes

MHL Article 80 requires at least three panel members to consent to or refuse the proposed medical treatment (MHL § 80.07 [f]). Thus, in a four-person panel, three or four votes in favor of the medical treatment will permit the panel to consent. Similarly, three or four votes against the medical treatment will permit the panel to refuse to give consent.

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A split vote, however, two against and two in favor of the treatment, results in no decision by the panel. In such a case, the panel may decide to seek more information and reconvene at a later date. The SDMC regulations provide for a conference call proceeding in an appropriate case, such as when there is a need for additional information.

A quorum panel of three, on the other hand, requires a unanimous decision either in favor of or against the proposed treatment. If two panel members favor treatment and one is against treatment, there is no decision by the panel; similarly, if one member favors treatment and two oppose it, there is no decision by the panel. Under this circumstance, the panel may decide to seek more information and reconvene at a later date, or the proponent of treatment may choose to go to court.

b. Standards Regarding Whether the Proposed Treatment is in the Individual's Best Interest

To consent to the proposed treatment, the panel must decide by a preponderance of the evidence that the proposed treatment is in the individual's best interests (MHL § 80.07 [f]).

A "**preponderance of the evidence**" means that the evidence, when weighed for its quality, rather than its quantity, tips the scale in favor of treatment. Additionally, preponderance of the evidence is the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact, or quantity of documents, but by evidence that has the most convincing force. In making its decision, the panel must give full consideration to any evidence of a previously articulated preference by the individual and shall consider the same standards detailed above that were considered in the capacity issue. (MHL § 80.07 [f]).

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: Role of Medical Professionals at Panel Hearings SDMC Memo 4

Background:

As part of the SDMC process, licensed medical professionals are required to attest to an individual's capacity and need for the proposed medical treatment. Declaration forms are required to be completed and submitted to the SDMC Program before a hearing can be scheduled. There is no separate requirement in law or regulation that such medical professionals testify at the hearings.

In the past, Mental Hygiene Legal Services (MHLS) attorneys have objected to the absence of a medical doctor's testimony during a panel hearing. MHLS has also objected when nurses and other medical professionals testify as medical expert witnesses, and when the panel relies in making its determination on unsworn documents contained in the declaration.

Legal Discussion:

(1) Whether a licensed medical professional's presence at SDMC hearings is necessary was left to the panel's discretion by the Legislature. In fact, it is within the panel's discretion to determine whether information from a physician, an independent assessment of the patient, or additional consultation with any other person, "may be necessary to assist the panel in determining whether the patient's best interests will be served by consenting to or refusing major medical treatment on the patient's behalf" (MHL § 80.07 [c]). In this way, the panels are able to make an effective decision, without the need for the formalities of a judicial determination, while retaining sufficient procedures to afford due process. Since the creation of the SDMC, staff and panel members have found that the presence of a licensed physician is not generally necessary to make an informed decision. The panels have a signed certification of a physician attesting to the individual's condition and need for medical treatment and at most hearings, the declarant who testifies has significant knowledge of the individual's background and understanding of his or her circumstances.

In sum, the Legislature has left to the SDMC panel's discretion whether a doctor must appear at the hearing. Proceeding without a doctor does not violate any rights of the individual because administrative hearings are not required to comply with the formal rules of evidence and procedure that may be applied in courts. If such an objection is raised or a motion is made to obtain a physician's testimony, the panel should note it in the record and proceed with the hearing.

On the other hand, in certain cases, panel members may believe that the testimony of a doctor will be necessary in order to make an informed decision. This is often the situation for cases involving end of life decision-making. In such a case, the panel may alert the SDMC Program staff of its concerns before or during the hearing. SDMC Program staff is available to discuss these concerns and, if necessary, contact the facility to produce a physician at the hearing or obtain the needed information.

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If, at the hearing the panel members decide that the testimony of a physician is necessary, the panel may adjourn the hearing and reconvene, either in person or by conference call, with the physician present while its authorization is held pending this conference.

(2) MHLS has raised an objection that nurses and other medical professionals who testify are not medical experts. However, no expert is required to be present at the panel hearing. Moreover, even assuming that a medical expert is required, under the liberal rules of evidence and principles of administrative law that apply to the SDMC process, a nurse may be a qualified expert witness.

An expert witness should be possessed of requisite skill, training, education; knowledge or experience from which it can be assumed that the information imparted or opinion rendered is reliable. *See*: Matott v. Ward, 48 N.Y.2d 455, 459 (1979). The determination of whether a witness is qualified to render an opinion as an expert is for the administrative agency to decide. Evans v. Great Eastern Lumber Co., 141 A.D.2d 937, 938 (3d Dept 1988); Morales v. Brown, 664 F. Supp. 75, 78 (S.D.N.Y. 1987) (where there is a genuine conflict between expert opinion and other substantial evidence, the administrative agency, as fact-finder, as opposed to the court, is to resolve conflict); Matter of Charles A. Field Delivery Serv., Inc., 66 N.Y.2d 516, 519 (1985) (administrative agencies are free to determine how disputed facts are to be decided, judging credibility and drawing such inferences as they find reasonable to resolve contested questions of fact). Thus, the SDMC panel is empowered to decide whether nurses or other medical consultants who testify at the hearings have the requisite knowledge, training, and experience, to testify as experts. If the panel finds that the medical professional is a qualified expert witness, the panel may rely on the witness' testimony in making its determination.

(3) The panels' reliance on unsworn documents that have been signed by examining psychologists and physicians has been challenged by MHLS, on the grounds that the documents constitute "hearsay." Hearsay is defined as any statement that has been made outside of the hearing that is being offered to prove the truth of the matter asserted therein. However, in an administrative hearing, hearsay is permitted and can be the basis of a panel's ultimate decision if it is probative and reliable. *See:* Gray v. Adducci, 73 N.Y.2d 741 (1988); Scaccia v. Martinez, 779 N.Y.S.2d 680 (4th Dept., 2004); Blake v. Mann, 145 A.D.2d 699, 701 (3d Dept., 1988), aff'd 75 N.Y.2d 742 (1989); Rudner v. Board of Regents, 105 A.D.2d 555, 556 (3d Dept., 1984); D'Souza v. NYS Dept. of Health, 68 A.D.3d 1562 (3d Dept., 2009).

Conclusion:

(1) Are SDMC panels required to have a medical doctor testify in order to satisfy the due process rights of the indivdual?

No. The decision of whether to call a doctor or other medical professional to testify at the hearing is within the panel's discretion because the law does not require testimony of a licensed physician/medical professional. Nevertheless, if the panel members believe the testimony of a licensed physician/medical professional will be necessary to make an informed decision, the panel may require the facility to produce a licensed physician/medical professional. This may be accomplished by having the physician/medical professional appear in person or by telephone

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conference call at the hearing or after the initial hearing. Another alternative to having the licensed physician/medical professional testify is for the panel to obtain other evidence, such as medical test results that could meet the need for supplementary clinical information.

(2) Should nurses and other medical professionals be permitted to testify as expert witnesses at SDMC hearings?

Yes. Nurses and other medical professionals may testify as experts, if the panel is satisfied that the witness has adequate knowledge, training, and experience to qualify as an expert medical witness.

(3) Are SDMC panels permitted to rely on unsworn documents in making their determination?

Yes. Unsworn documents are admissible in an SDMC hearing and may be relied on by the panel in making its determination.

To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: Treatment of MHLS Objections at Panel Hearings SDMC Memo 5

Mental Hygiene Legal Service (MHLS) may object to testimony or evidence at a SDMC hearing. MHLS is the legal representative of the patient and has the authority to be present and heard and to protect the interests of the patient during the SDMC process (MHL § 80.07 [b] & [d]). MHLS may assert any legal rights of his/her client, make any motion (i.e. suggestion for the panel to take an action), and object to testimony or other evidence on behalf of the patient. Nevertheless, the SDMC panel, not MHLS, is the decision-maker in the proceeding. The panel members have sole discretion as to the weight to be accorded to the evidence, the protocol of the hearing, and the final decision that is made in a case. MHLS can appeal any result to a court of law (MHL § 80.09).

The formal rules of evidence do not apply to administrative proceedings such as the SDMC panel hearings. This means that although courts rule on objections when they are raised in a judicial proceeding, the same standard is not applied in administrative or quasi-judicial proceedings, since evidence need not conform to the rules of evidence to be considered. For example, in administrative hearings that are governed by the New York State Administrative Procedure Act, "agencies need not observe the rules of evidence observed by the courts… Objections to evidentiary offers may be made and shall be noted in the record." Similarly, MHL Article 80, governing the SDMC process does not require conformity with the formal rules of evidence (MHL § 80.07[d]).

Panel members should be aware that they are the sole decision-makers in the SDMC hearing. SDMC panel members are encouraged to accept all appropriate and relevant evidence presented at the hearing. If MHLS raises objections to the testimony of certain witnesses or to other evidence at an SDMC hearings, the panel is not required to rule on objections, but should note them in the record. The panel should give due consideration to the objections during the deliberation.

If questions of protocol arise, the panel members are advised to seek assistance from SDMC Program staff at 518-549-0328.

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: Determination of Capacity **SDMC Memo 6**

The essential determination that the SDMC panel makes in every case is whether the indivdual has or lacks capacity to consent to or refuse treatment. If the panel determines that the individual has the capacity to make medical decisions, then no further decision-making by the panel is required or authorized. If the panel determines that the individual lacks capacity, then the panel can move forward with other determinations regarding whether there are available and willing surrogates and if the proposed treatment is in the individual's best interest.

All adults, including those residing in mental hygiene facilities, are presumed to have capacity (MHL § 33.01). To reach an informed decision, the individual must be provided with all relevant information by his or her medical professionals and/or others and demonstrate an appreciation of the benefits and risks associated with the proposed medical treatment or procedure. In addition, the decision to consent or refuse major medical treatment by the individual or other decision-maker must be made freely and voluntarily without coercion or undue influence. The fact that a particular individual's decision may seem unwise is not, in and of itself, determinative of the lack of capacity.

An individual's lack of capacity to consent to or refuse major medical treatment means that he or she cannot adequately understand and appreciate the nature and consequences of the proposed treatment, including the benefits, risks and alternatives to such treatment, and cannot thereby reach an informed decision to consent to or refuse such treatment in a knowing and voluntary manner that promotes his or her well-being" (MHL § 80.03[c]).

For an individual to be the subject of an SDMC declaration, the declarant must indicate the reasons the individual is believed to lack capacity. In addition, a capacity evaluation is completed by a psychiatrist or a licensed psychologist regarding the individual's capacity to make the proposed treatment decision.

When determining whether the individual lacks the capacity to make the proposed treatment decision, the panel shall consider whether the individual is able to adequately understand and appreciate the nature and consequences of the proposed treatment, including:

- the burdens of the treatment in terms of pain and suffering outweighing the benefits, or whether the proposed treatment would merely prolong the suffering and not provide any net benefit;

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- 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;
- the likely prognosis, expectant level of functioning, degree of humiliation and dependency with or without the proposed treatment; and
- evaluation of treatment options, including non-treatment, and their benefits and risks compared to those of the proposed treatment.

Legal considerations for an individual's capacity to give informed consent are:

- **Knowledge**:
  The decision-maker must be given all basic information by the expert or others about the decision which he or she must make.
- **Intelligence**:
  The decision-maker must demonstrate that he or she can rationally manipulate the information and realize a range of benefits and disadvantages, or future possibilities. This rational process should show that the individual has an appreciation of these benefits and risks and an intelligent process by which the decision-maker assesses them. Application of personal religious morals or beliefs or even their rejection is considered a sign of intelligent decision-making.
- **Voluntariness**:
  There must be a complete absence of any significant or meaningful coercion or coercive circumstances. The decision must be clearly that of the decision-maker's own free will.

Legal Standard for Capacity Determination:

MHL § 80.07(e) requires that the panel decision concerning capacity meet the legal standard of **clear and convincing evidence** which is evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

Additional Capacity Considerations for End of Life Care Declarations:

In cases involving the withdrawal or withholding of life sustaining treatment, the declarant must offer his/her opinion regarding the ability of the individual to give informed consent in the "Declaration for End of Life Care." In addition, the attending physician as well as another consulting physician or psychologist, one of whom must meet the qualifications set forth in Surrogate's Court Procedure Act § 1750-b(4)(a)(i-iii), must confirm to a reasonable degree of certainty that the individual lacks capacity to make health care decisions. Both must document the intellectual disability as well as the extent and probable duration of the disability or incapacity.

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: Panel Requests for Conference Calls **SDMC Memo 7**

The Justice Center for the Protection of People with Special Needs is authorized to administer the Surrogate Decision Making Committee (SDMC) Program. This authority includes the promulgation of regulations to carry out the purposes of the SDMC Program. The SDMC regulations promulgated by the Justice Center at 14 NYCRR Part 710 authorize the SDMC panels to conduct their proceedings via telephone conference calls in appropriate cases.

This memorandum sets forth the authority of the SDMC panels to hold conference call proceedings and to set forth the regulatory and general guidelines for determining when a conference call is appropriate. The SDMC Program was established because the exclusive use of judicial proceedings had, in some cases, jeopardized care by undue delay in the court process. The conference call proceeding is one of the ways that the SDMC process is more flexible than the courts and is able to provide more timely decision-making.

Pursuant to the regulations, a conference call proceeding is appropriate where:

- it will provide the panel with timely additional information concerning an application for additional surrogate decision-making which is related to the treatment that was the subject of an initial hearing and determination;
- it will enable the panel to review an SDMC consent which has expired and for which there is a request to renew and extend the effective date of the consent determination;
- it will afford the opportunity for a consultation with a person who may assist in the panel's determination;
- it will provide information concerning any changed circumstances, new conditions, or information; and/or
- it appears to be more appropriate to meet the needs of the individual for timely decision-making as determined by the circumstances.

The above list is not intended to be exclusive and the panel may decide that there are other circumstances in which a conference call proceeding is appropriate.

The conference call is one way the panel may obtain updated information to assure the individual's well-being, as conditions or the need for medical care change. The conference call proceedings often allows the same panel members who gave consent for an initial procedure to review the related information and procedures, thereby providing continuity of care with the benefit of their existing knowledge of the individual's treatment history.

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: Panel Authority to Modify the Consent SDMC Memo 8

There are only three circumstances when SDMC panels are able to modify the consent for major medical treatment:

1) when the proposed major medical treatment decision consists of more than one medical, surgical or diagnostic intervention or procedure;
2) when the need exists to modify the time period covered in the consent time frame; and
3) when the panel seeks to limit the use of anesthesia to "local anesthesia only “or "general anesthesia only."

Please contact the SDMC Program staff at 518 549-0328 if there are modifications requested to the consent and/or voting sheets. A clean copy of the revised form is preferred by medical providers rather than a hand-edited revision. However, this memo outlines the process a panel chairperson should follow to make hard copy edits if SDMC Program staff are unavailable to make the requested modifications.

Modification Type 1 Requests for Multiple Procedures:

When the proposed major medical treatment consists of more than one medical, surgical, or diagnostic intervention, the panel may give or withhold consent for each medical, surgical or diagnostic intervention or procedure separately. If, after considering the information presented at a hearing, the panel determines that one or more, but not all of the proposed treatment requests are in the individual's best interest, the panel's record of its determination will indicate consent or refusal of each intervention or procedure separately, and the panel chairperson must make the appropriate modifications to the SDMC Forms.

Please contact the SDMC Program staff to request that the procedures be separated on the revised forms and to have new voting sheets issued along with the revised forms. In the event the chairperson is unable to reach the SDMC Program staff, the following procedure should be followed:

a. The chairperson will modify the SDMC Form 280-A (which grants consent for the approved procedure) by crossing out the denied procedure and leaving the approved procedure on this consent. The change must be initialed by the panel chairperson; and

b. The chairperson will also modify the 280-D form (which indicates the procedure which was denied) by crossing out the approved procedure and leaving the denied procedure. The change must be initialed by the panel chairperson.

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c. In addition, the SDMC representative will make four additional copies of the voting sheet, striking the procedure from each set as appropriate, so that the panel votes denying and approving the specified procedures can be recorded separately.

Please see the attached example of Modification 1: Requests for Multiple Procedures

Modification Type 2 Modifying Time Frames of the Consent:

There are two instances in which the SDMC panel may modify the time frame on the consent:

1. The consent may be extended beyond the usual 60-day time frame for medical reasons (i.e. repeated procedures are likely over several months or due to the medical provider's limited schedule.)
2. The panel may delay the effective date of its major medical treatment decision for up to five days when there is an indication that the case will be appealed. Please note that effective dates for end of life care decisions may not be delayed by the panel.

If a determination is made to extend the length of the consent period, or delay the effective date of the consent, contact the SDMC Program staff to request the appropriate modification of the time frame so that a clean copy of the consent be prepared with the revised effective and expiration dates on the forms for the declarant and all interested parties.

In the event the SDMC representative at the hearing is unable to contact the SDMC Program staff, the panel chairperson should proceed as follows:

a) Extension of Length of Consent: The panel chairperson will cross out the 60 days on the SDMC 280-A consent, replace it with the length of time requested (90, 120, 180, 365 days), and modify the expiration date to reflect the appropriate changes. The changes must be initialed by the panel chairperson.
b) Delay of Effective Date of Consent: The panel chairperson will cross out the effective date of the consent and add five days to the effective date and the expiration date on the consent. All changes must be initialed by the panel chairperson.

Please see the attached examples of Modification 2: Modifying Time Frames of the Consent

Modification Type 3 Modifying the Type of Anesthesia:

Under exceptional circumstances the panel may be persuaded by the medical evidence that providing the proposed major medical treatment under general anesthesia is not in the best interests of the individual.

- In such cases, it may be appropriate to limit the consent to local anesthesia only. Alternatively, the panel may determine under exceptional circumstances that a particular major medical procedure should be provided only when a general anesthesia is used.
- The standard SDMC consent is conditioned upon a current pre-operative screening in accordance with sound medical practice to determine the suitability of the individual to withstand the major medical procedure and the recommended form of anesthesia. It is consistent with the SDMC panel's responsibilities to assess the benefits and risks presented to the individual, and to limit the application of general anesthesia or local anesthesia only in exceptional cases based upon the medical evidence presented.

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The consent form is a legal document and it is important to follow these protocols when the panel determines to limit the type of anesthesia or modify dates at the hearing. The preferred protocol is to contact the SDMC Program staff to request the revisions on a clean copy.

- SDMC panel members are reminded that anesthesiologists, as well as other attending health care professionals, are required to follow accepted professional standards, rules and practices when providing care.
- Preoperative protocol usually includes laboratory work, an electrocardiogram, an assessment that the chest is clear, a cessation of unnecessary medications so that there is no interaction with the anesthesia, a cessation of food and water for twelve hours and a cleansing of the bowel for related procedures. The cancellation of a medical procedure because it was originally authorized under local anesthesia, but is found to be more appropriate for general anesthesia, will cause the delay of treatment and personal hardship while new surgical anesthesiology authorization is sought. For these reasons, it is important to ensure not only the most appropriate anesthesia is approved, but where appropriate, an alternative is authorized as well to give the surgeon flexibility to properly address the medical needs.
- Almost any medical situation is dynamic in that the anesthesiologist and treating professionals may have to make alterations to accommodate unforeseen circumstances for the good of the patient in conformance with professional standards and the exercise of good judgment. The SDMC consent forms permit such medical judgments to be made with the proper authority given by the SDMC panel, i.e. when the panel does not set forth a limitation of local only or general only on the consent form.
- It is impossible for a physician to foresee when a situation might arise which would necessitate the use of general anesthesia, even in cases where the use of local anesthetic may have been anticipated.
- Absent exceptional circumstances, the restriction of local anesthesia only in the SDMC panel consents would be contrary to standard medical practice and would delay quality medical treatment to individuals with disabilities. The final decision regarding anesthesia rests with the anesthesiologist and the surgeon based upon a pre-operative examination of the patient. The standard medical practice is to explain the risks and benefits of the proposed anesthesia as well as to explain that no guarantee can be given regarding specific procedures or anesthesia for reasons such as those set forth above.

Please see the attached example of Modification 3: Modifying the Type of Anesthesia

Any questions should be directed to SDMC Program staff at 518-549-0328.

Modification Type 1: Multiple Procedure Revision (Chairperson Modifications to Separate the Procedures)
Example: Panel approves colonoscopy but not the EGD
This 280-A provides consent for the Colonoscopy
(Modifications to SDMC 280-A, SDMC 280-D, and Voting Sheets)

SDMC Form No. 280-A (Rev. 02/16)

Surrogate Decision-Making Committee

Determination Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

- -

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for

Surrogate Decision-Making on Behalf of

Patient's Name

(Patient)

- -

INFORMED CONSENT FOR

MAJOR MEDICAL TREATMENT

16120000

Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by

Declarant's Name

(Declarant)

Dated the 1st day of December 2016 on behalf of

Patient's Name

(Patient)

seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment Colonoscopy with possible biopsy and/or Polypectomy **[Step 1]** ~~and EGD with Possible Biopsy and/or Polypectomy~~ supported by the certifications of (Panel Chairperson crosses out the procedure which was denied and initials & dates the change)

Psychologist or Psychiatrist's Name

(Psychiatrist)

regarding the lack of capacity of said patient to provide informed consent, and of

Physician, Dentist, or Podiatrist's Name

(Physician)

regarding the need for the proposed major medical treatment and the use of anesthesia has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment and the need for the proposed medical treatment taking into account the risks of, benefits of, and alternatives to the treatment including the use of anesthesia, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that

Patient's Name

(Patient)

(1) does not have sufficient capacity to provide his/her own informed consent for this procedure;

(2) no legally-authorized person is available and willing to provide substitute informed consent; and

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Patient Name *Patient's Name*

Declaration No. 16120000

(3) the proposed major medical procedure is [X] in the best interests of the patient.

(4) This Committee hereby does [X] provide informed consent on behalf of *Patient's Name*
(Patient)
for the

Colonoscopy with possible biopsy and/or Polypectomy **[Step 2]** ~~and EGD with Possible Biopsy and/or Polypectomy~~
(Panel Chairperson crosses out the procedure which was denied and initials & dates the change)
[Go to SDMC Form No. 280-D for the Procedure Denied]
(Major Medical Treatment)

and the administration of anesthesia as well as related diagnostic, medical or dental procedures that are normal and customary in accordance with sound medical practice. The Committee, based on the medical evidence presented, may limit anesthesia to local only or general only by so specifying above. Such major medical procedure shall be performed by or under the supervision of a licensed Physician in private practice or at a facility licensed, certified or registered with the New York State Department of Health [XX], or at any facility duly licensed by a State of the United States, or in private practice by such a physician or dentist [XX]. Any tissues or parts surgically removed may be disposed or preserved in accordance with accustomed practice.

This consent is conditioned upon a current pre-operative screening in accordance with sound medical practice to determine the suitability of the patient to withstand the major medical procedure and the recommended form of anesthesia.

This consent shall constitute legally valid informed consent and no further consents for the proposed major medical treatment, administration of anesthesia and such related or continuing diagnostic, medical or dental procedures necessitated by the original treatment shall be required.

This determination is effective as of the 15th day of December 2016, and will expire in 60 days (sixty) days of this date or as of the 13th day of February 2017.

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

_____
(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Questions: Contact SDMC Program Director. (518) 549-0328

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Multiple Procedure Revision (Chairperson Modifications to Separate the Procedures)
Example: Panel approves colonoscopy but not the EGD
This 280-D is modified to indicate that the EGD consent was denied by the Panel

SDMC Form No. 280-D (Rev. 02/16)

Surrogate Decision-Making Committee Determination

Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

INFORMED CONSENT FOR MAJOR MEDICAL TREATMENT

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for Surrogate Decision-Making on Behalf of

Patient's Name **(Patient)**

16120000
Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by

Declarant's Name

(Declarant)

dated the 1st day of December 2016 on behalf of

Patient's Name

(Patient)

seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment **[Step 3]**~~Colonoscopy with Possible Biopsy/Polypectomy and~~ (Panel Chairperson crosses out the procedure which was approved on the 280-A and initials & dates this change) EGD with Possible Biopsy and/or Polypectomy supported by the certifications of

Psychologist or Psychiatrist's Name

(Psychiatrist)

regarding the lack of capacity of said patient to provide informed consent, and of

Physician, Dentist, or Podiatrist's Name

(Physician)

regarding the need for the proposed major medical treatment and the use of anesthesia has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment and the need for the proposed medical treatment taking into account the risks of, benefits of, and alternatives to the treatment including the use of anesthesia, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that

Patient's Name

(Patient)

(1) does not have sufficient capacity to provide his/her own informed consent for this procedure;
(2) no legally-authorized person is available and willing to provide substitute informed consent; and

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(3) the proposed major medical procedure is not [X] in the best interests of the patient.

(4) This Committee hereby does not [X] provide informed consent on behalf of *Patient's Name*

(Patient)

for the

[Step 4]~~Colonoscopy with Possible Biopsy/Polypectomy and~~ EGD with Possible Biopsy and/or Polypectomy (Panel Chairperson crosses out the procedure which was approved on the 280-A and initials & dates this change)

(Major Medical Treatment)

This determination is effective as of the 15th day of December 2016.

The case may be reopened whenever new information or a changed circumstance is available for the panel to consider. The provider also has the option of appealing this case to the Supreme Court in accordance with Mental Hygiene Law Section 80.09

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

_____

(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Questions: Contact SDMC Program Director. (518) 549-0328

[Step 5] Separate the procedures on the voting sheets:

- Each Panel member will receive two voting sheets; one with the first procedure crossed out, and another with the second procedure crossed out.

SDMC Form No. 12 (Rev. 02/16)

Patient Name *Patient's Name*

Declaration No. *16120000*

Date of Hearing *December 15, 2016*

Procedure *Colonoscopy with Possible Biopsy/Polypectomy* ~~*and EGD with Possible Biopsy and/or Polypectomy*~~
(Panel Chairperson crosses out the second procedure and initials & dates this change)

Check marks and signature **only.** No opinions, contingencies or extraneous comments of any kind are to be written on the voting sheet.

	Vote Yes	Vote No	Vote More Info
1. Does the patient have capacity?	_____	_____	_____
2. Does the patient have any authorized surrogate available and willing?	_____	_____	_____
3. Is the major medical procedure in the best interest of patient?	_____	_____	_____

_____

Signature

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SDMC Form No. 12 (Rev. 02/16)

Patient Name *Patient's Name*

Declaration No. *16120000*

Date of Hearing *December 15, 2016*

Procedure ~~*Colonoscopy with Possible Biopsy/Polypectomy and*~~ *EGD with Possible Biopsy and/or Polypectomy*
(Panel Chairperson crosses out the first procedure and initials & dates this change)

Check marks and signature **only.** No opinions, contingencies or extraneous comments of any kind are to be written on the voting sheet.

	Vote Yes	Vote No	Vote More Info
3. Does the patient have capacity?	_____	_____	_____
4. Does the patient have any authorized surrogate available and willing?	_____	_____	_____
3. Is the major medical procedure in the best interest of patient?	_____	_____	_____

_____

Signature

401 State St. Schenectady NY 12305 | 518 549-0328 | SDMCVolunteers@justicecenter.ny.gov

Modification Type 2: Modifying Time Frame of the Consent (Chairperson extends length of time)
Example A.: Panel approves an extension of time on the consent
(Modifications are made to the SDMC 280-A)

SDMC Form No. 280-A (Rev. 02/16)

Surrogate Decision Making-Committee Determination

Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for

Surrogate Decision-Making on Behalf of

Patient's Name

(Patient)

INFORMED CONSENT FOR

MAJOR MEDICAL TREATMENT

16120000

Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by

Declarant's Name

(Declarant)

Dated the 1st day of December 2016 on behalf of

Patient's Name

(Patient)

seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment Colonoscopy with possible biopsy and/or Polypectomy supported by the certifications of

Psychologist or Psychiatrist's Name

(Psychiatrist)

regarding the lack of capacity of said patient to provide informed consent, and of

Physician, Dentist, or Podiatrist's Name

(Physician)

regarding the need for the proposed major medical treatment and the use of anesthesia has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment and the need for the proposed medical treatment taking into account the risks of, benefits of, and alternatives to the treatment including the use of anesthesia, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that

Patient's Name

(Patient)

(1) does not have sufficient capacity to provide his/her own informed consent for this procedure;

(2) no legally-authorized person is available and willing to provide substitute informed consent; and

(3) the proposed major medical procedure is [X] in the best interests of the patient.

(4) This Committee hereby does [X] provide informed consent on behalf of *Patient's Name*

(Patient)

for the Colonoscopy with possible biopsy and/or Polypectomy

(Major Medical Treatment)

and the administration of anesthesia as well as related diagnostic, medical or dental procedures that are normal and customary in accordance with sound medical practice. The Committee, based on the medical evidence presented, may limit anesthesia to local only or general only by so specifying above. Such major medical procedure shall be performed by or under the supervision of a licensed Physician in private practice or at a facility licensed, certified or registered with the New York State Department of Health [XX], or at any facility duly licensed by a State of the United States, or in private practice by such a physician or dentist [XX]. Any tissues or parts surgically removed may be disposed or preserved in accordance with accustomed practice.

This consent is conditioned upon a current pre-operative screening in accordance with sound medical practice to determine the suitability of the patient to withstand the major medical procedure and the recommended form of anesthesia.

This consent shall constitute legally valid informed consent and no further consents for the proposed major medical treatment, administration of anesthesia and such related or continuing diagnostic, medical or dental procedures necessitated by the original treatment shall be required.

This determination is effective as of the 15th day of December 2016, and will expire in ~~60 days (sixty) days~~ 180 days (One Hundred Eighty days) (Panel Chair crosses out the time on the consent and replaces it with the new length of time- initial and date) of this date or as of the ~~13th day of February 2017~~ 12th day of June 2017. (Panel Chair crosses out the former expiration date and enters the revised expiration date-initial and date)

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

_____

(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Questions: Contact SDMC Program Director. (518) 549-0328

Modifying Time Frame of the Consent (Chairperson delays the effective date on the consent)
Example B.: An appeal is likely, the panel grants a delay of five days for the effective date of the consent
(Modifications are made to the SDMC 280-A)

SDMC Form No. 280-A (Rev. 02/16)

Surrogate Decision-Making Committee Determination

Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for
Surrogate Decision-Making on Behalf of
Patient's Name
(Patient)

INFORMED CONSENT FOR MAJOR MEDICAL TREATMENT

16120000
Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by
Declarant's Name
(Declarant)
Dated the 1st day of December 2016 on behalf of
Patient's Name
(Patient)
seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment Colonoscopy with possible biopsy and/or Polypectomy supported by the certifications of
Psychologist or Psychiatrist's Name
(Psychiatrist)
regarding the lack of capacity of said patient to provide informed consent, and of
Physician, Dentist, or Podiatrist's Name
(Physician)
regarding the need for the proposed major medical treatment and the use of anesthesia has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment and the need for the proposed medical treatment taking into account the risks of, benefits of, and alternatives to the treatment including the use of anesthesia, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that
Patient's Name
(Patient)

(1) does not have sufficient capacity to provide his/her own informed consent for this procedure;

(2) no legally-authorized person is available and willing to provide substitute informed consent; and

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Patient Name *Patient's Name*

Declaration No. 16120000

(3) the proposed major medical procedure is [X] in the best interests of the patient.

(4) This Committee hereby does [X] provide informed consent on behalf of *Patient's Name*

(Patient)

for the Colonoscopy with possible biopsy and/or Polypectomy

(Major Medical Treatment)

and the administration of anesthesia as well as related diagnostic, medical or dental procedures that are normal and customary in accordance with sound medical practice. The Committee, based on the medical evidence presented, may limit anesthesia to local only or general only by so specifying above. Such major medical procedure shall be performed by or under the supervision of a licensed Physician in private practice or at a facility licensed, certified or registered with the New York State Department of Health [XX], or at any facility duly licensed by a State of the United States, or in private practice by such a physician or dentist [XX]. Any tissues or parts surgically removed may be disposed or preserved in accordance with accustomed practice.

This consent is conditioned upon a current pre-operative screening in accordance with sound medical practice to determine the suitability of the patient to withstand the major medical procedure and the recommended form of anesthesia.

This consent shall constitute legally valid informed consent and no further consents for the proposed major medical treatment, administration of anesthesia and such related or continuing diagnostic, medical or dental procedures necessitated by the original treatment shall be required.

This determination is effective as of the ~~15th day of December 2016~~ (panel chair crosses out the effective and expiration dates and adds five days to both; initials & dates), 20th day of December and will expire in 60 days (sixty) days of this date or as of the ~~13th day of February 2017~~ 18th day of February 2017.

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

_____

(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Questions: Contact SDMC Program Director. (518) 549-0328

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Modification of Anesthesia Type 3 Revision (Chairperson Modifications to limit the form of anesthesia)
Example: Panel determines based upon exceptional medical evidence presented that the general anesthesia will present a significant risk to this individual.
(This 280-A is modified to provide consent for the procedure under local anesthesia)

SDMC Form No. 280-A (Rev. 02/16)

Surrogate Decision-Making Committee Determination

Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for Surrogate Decision-Making on Behalf of

Patient's Name

(Patient)

INFORMED CONSENT FOR MAJOR MEDICAL TREATMENT

16120000

Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by

Declarant's Name

(Declarant)

Dated the 1st day of December 2016 on behalf of

Patient's Name **(Patient)**

seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment **Arteriovenous (AVF) Fistula Repair under ~~General Anesthesia~~ local anesthesia** (Panel Chair crosses out the former type of anesthesia approved and writes in the type approved by the panel- ALWAYS based upon exceptional medical criteria- initial and date the change) **for Dialysis Care and Treatment** supported by the certifications of

Psychologist or Psychiatrist's Name

(Psychiatrist)

regarding the lack of capacity of said patient to provide informed consent, and of

Physician, Dentist, or Podiatrist's Name

(Physician)

regarding the need for the proposed major medical treatment and the use of anesthesia has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment and the need for the proposed medical treatment taking into account the risks of, benefits of, and alternatives to the treatment including the use of anesthesia, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that

Patient's Name

(Patient)

(1) does not have sufficient capacity to provide his/her own informed consent for this procedure;
(2) no legally-authorized person is available and willing to provide substitute informed consent; and

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(3) the proposed major medical procedure is [X] in the best interests of the patient.

(4) This Committee hereby does [X] provide informed consent on behalf of *Patient's Name*

(Patient)

for the

Arteriovenous (AVF) Fistula Repair under ~~General Anesthesia~~ local anesthesia (Panel Chair crosses out the former type of anesthesia approved and writes in the type approved by the panel- - initial and date the change) **for Dialysis Care and Treatment**

(Major Medical Treatment)

and the administration of anesthesia as well as related diagnostic, medical or dental procedures that are normal and customary in accordance with sound medical practice. The Committee, based on the medical evidence presented, may limit anesthesia to local only or general only by so specifying above. Such major medical procedure shall be performed by or under the supervision of a licensed Physician in private practice or at a facility licensed, certified or registered with the New York State Department of Health [XX], or at any facility duly licensed by a State of the United States, or in private practice by such a physician or dentist [XX]. Any tissues or parts surgically removed may be disposed or preserved in accordance with accustomed practice.

This consent is conditioned upon a current pre-operative screening in accordance with sound medical practice to determine the suitability of the patient to withstand the major medical procedure and the recommended form of anesthesia.

This consent shall constitute legally valid informed consent and no further consents for the proposed major medical treatment, administration of anesthesia and such related or continuing diagnostic, medical or dental procedures necessitated by the original treatment shall be required.

This determination is effective as of the 15th day of December 2016, and will expire in 365 (one year) days of this date or as of the 15th day of December 2017.

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

_____

(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Voting Sheets are Modified to Reflect the Change of Anesthesia

SDMC Form No. 12 (Rev. 02/16)

Patient Name *Patient's Name*

Declaration No. *16120000*

Date of Hearing *December 15, 2016*

Procedure **Arteriovenous (AVF) Fistula Repair under ~~General Anesthesia~~ local anesthesia for Dialysis Care and Treatment** (Panel Chair crosses out the former type of anesthesia approved and writes in the type approved by the panel- - initial and date the change)

Check marks and signature **only.** No opinions, contingencies or extraneous comments of any kind are to be written on the voting sheet.

	Vote Yes	Vote No	Vote More Info
1. Does the patient have capacity?	_____	_____	_____
2. Does the patient have any authorized surrogate available and willing?	_____	_____	_____
3. Is the major medical procedure in the best interest of patient?	_____	_____	_____

_____

Signature

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: SDMC Program Change HIV Testing **SDMC Memo 9**

Effective June 1, 2017, the Surrogate Decision-Making Committee (SDMC) Program will no longer review declarations for HIV testing.

Amendments to Public Health Law (PHL) § 2781 and Title 10 NYCRR Part 63, now classify HIV testing as routine medical care. This shift in policy is part of a larger effort to encourage HIV testing for all individuals to promote early detection and care for HIV. The modifications to the PHL and regulations also bring NYS law in line with the Center of Disease Control and Prevention recommendations for routine HIV screening in all health care settings. Pursuant to Mental Hygiene Law Article 80, SDMC is empowered to make decisions regarding major medical treatment. Now that HIV testing is considered routine testing, it will no longer fall under the definition of major medical treatment.

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: Ex Parte Communication with MHLS or other Interested Parties

SDMC Memo 10

SDMC panel members often ask whether communication with Mental Hygiene Legal Service (MHLS) representatives or other interested parties, such as providers or potential surrogates outside of the confines of the actual hearing proceeding, is authorized. These are considered examples of ex parte communications, i.e. without all of the parties being present. Such communication occurs when a party to a case communicates or otherwise shares information about issues in the case outside the presence of other parties and/or their legal representative. SDMC panel hearings are quasi-judicial in nature, and some of the rules of conduct that apply in court proceedings apply to SDMC hearings. The panel members act together as a judge through their shared decision-making during the hearing. Communication between decision-makers and interested parties is prohibited in judicial and quasi-judicial proceedings unless all parties are on notice and have an opportunity to appear.

For SDMC panel members, the rules of conduct that should be followed are:

- Panelists should avoid impropriety or the appearance of impropriety, by declining to discuss any aspect of a case outside the hearing room. This avoids improper influence by any party. Additionally, if any one panel member makes statements, it might appear that he or she is speaking for the whole or majority of the panel. Panel decisions are collective in nature, and such comments by individual panel members would not only undermine the panel as a whole, but might also be used against the panel if the case is subsequently appealed to court.

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- In addition to declining contact initiated by others regarding a case, panel members are required to refrain from contacting any provider, physician, correspondent, or potential surrogate identified in the hearing case packet. Any exchange of information outside the hearing, even if the intent is to clarify or gather more information, would be considered ex parte communication and may result in the panel member's disqualification from serving on that panel. For general questions regarding a case, panel members may contact the SDMC Program nurse review specialist assigned to the case.

- Panel members may rely on the documentary evidence in the case hearing packet and testimonial evidence presented at the hearing to make their decision. The SDMC process requires that all parties have access to the same information which must be entered into the record and available for all parties.

- If a panel member receives a telephone call from the individual's facility, the MHLS attorney, or any other party, he or she should courteously decline to speak about the case and refer the call to the SDMC Program staff as they are not a party to the proceeding and can communicate with all parties involved in the proceeding. If the panel would like to receive more information from any party, the panel should advise the SDMC Program staff, who will arrange for the information to be presented at the hearing or via telephone conference call.

Any questions regarding panel member conduct or communication during or outside of a hearing should be direct to the SDMC Program staff at 518-549-0328.

To: **SDMC Volunteer Panel Members**

From: **SDMC Program Administration**

Subject: **Amendment of the Declarations and Informed Consent SDMC Memo 11**

Occasionally, questions arise regarding the SDMC panel's authority to authorize that differs from the proposed treatment request submitted by the medical professional and the declarant. Both the laws and regulations governing the SDMC clearly articulate that the panel makes a determination as to whether the proposed treatment is or is not in the best interest of the individual. Accordingly, SDMC panels may only consent to the proposed treatment request and do not have the authority to amend the treatment request.

However, in rare situations, the panel, declarant, and medical professional may agree to authorize treatment that is different from the one originally proposed based on information that is presented at the hearing.

It is important to consider that the physician, dentist, or podiatrist who completed and signed the "Certification on Need for Major Medical Treatment", is the person who is most familiar with the individual's condition. Consequently, any amendments should be made in consultation with the certifying or qualified medical professional. In addition, the "declarant" outlines the proposed treatment request on the "Declaration for Major Medical Treatment," and he or she should also be required to approve or disapprove any modification to ensure consistency regarding the treatment request. Accordingly, it is the declarant in consultation with the medical professional, and not the SDMC panel, who has the authority to modify the proposed treatment request.

When it is determined that the proposed treatment request should be modified, the following steps should be taken:

1. The Declaration shall be amended by SDMC Program staff to reflect the modified proposed treatment request only upon the approval of the declarant and certifying physician or a medical professional;
2. The amendment shall be recorded by SDMC Program staff on the Declaration for Surrogate Decision Making for Major Medical Treatment and the Certification on Need for Major Medical Treatment, which both identify the proposed major medical treatment;
3. The amendment must be revealed to the individual, to the extent practicable, in order to ascertain any preference of the individual;
4. The SDMC Informed Consent shall also be amended by the SDMC Program staff to conform to the modifications made to the Declaration and Certification on Need for Medical Treatment forms.

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration **SDMC Memo 12**

Subject: Consideration of Anesthesia for Routine or Diagnostic Procedures

Mental Hygiene Law (MHL) Article 80 and 14 NYCRR Part 710 provide for SDMC jurisdiction over diagnostic tests, procedures, and treatments for which the use of general anesthesia is proposed. SDMC regulations also grant jurisdiction over any diagnostic test, procedure, or treatment to which informed consent is required by law.

The proposed use of IV sedation and Monitored Anesthesia Care can be reviewed by SDMC panels under this provision. This allows SDMC panels to consider cases for routine examinations or treatment when the use of IV sedation or general anesthesia is part of the request. There are numerous reasons that a dentist, doctor, or podiatrist might propose that a particular procedure be performed under general anesthesia or another form of anesthesia for which informed consent is required by law. Dental procedures performed under a local anesthetic are specifically excluded from SDMC jurisdiction and are not considered to be major medical treatment. Therefore, these routine dental procedures would fall outside the authority of SDMC.

Panel members should not assume that the proposed anesthesia is the riskier option for any given individual. In addition, the most common risks of general anesthesia are listed on the SDMC Certification on Need for Major Medical Treatment (SDMC Form 220-A), and the use of general anesthesia is contemplated for each case even if it is not part of the original treatment request.

Panel members are also reminded that SDMC panels may grant consent for a medical procedure days or weeks prior to the anticipated procedure. While anesthesia plans are anticipated whenever possible, anesthesia plans can change. Consent is conditioned upon the sound practice of medicine and on the presumption of appropriate medical screening. The physician can move forward with a different anesthesia plan without having to return to the SDMC.

Although amending the form of anesthesia for a proposed test, procedure, or treatment is within the scope of the panel's authority, such amendment requires consultation with SDMC Program staff as this would prevent SDMC panel from providing consent and could potentially delay necessary care. Therefore, panels should refrain from placing restrictions on the recommended anesthesia unless this has been discussed with SDMC Program staff. If a case raises serious issues regarding the use of general anesthesia or other anesthetic for which informed consent is required by law, the panel has the authority, as in any case, to seek whatever information necessary to resolve such issues.

For additional information or questions, panel members are encouraged to contact SDMC Program staff at 518-549-0328.

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To: SDMC Volunteer Panel Members

From: SDMC Program Administration

Subject: Testimony, Treatment Planning, and Bias

SDMC Memo 13

Testimony:

Although the panel members bring knowledge and information from their own personal or professional backgrounds to the hearing and this information may be used to help the panel during deliberations, it is not expert testimony that should be relied upon in making the panel's final decisions.

Panel members are advised to avoid providing testimony or offering information or opinions about the risks, benefits, or alternatives to any particular treatment or procedure. This is the responsibility of the declarant and provider to answer questions and support their request for the proposed treatment.

Treatment Planning:

MHL Article 80 provides that a plan of care is proposed to the panel.

- The panel is to consider the specific plan of treatment before them in the declaration.
- No limitations or conditions may be placed on the consent, such as requiring additional testing or alternative procedures/treatments which were not proposed by the physician certifying the medical need.
- The discussion during the hearing regarding best interest should not include questions about the specific health care provider or the facility where the person will be treated.
- The panel may decide to contact the physician during the hearing, or they may request a second opinion and/or additional information if there are concerns with the proposed treatment plan.
- Aftercare cannot be ordered, but may impact the Best Interest decision.
- Anesthesia will be dictated by pre-operative screening. This is generally a decision that is made on the date of the procedure by the anesthesiologist as to what is most appropriate for that particular individual.

When an SDMC panel provides informed consent, it is typically for a procedure or treatment which may be scheduled more than ten days in the future. Panel members are reminded that consent is conditioned upon the sound practice of medicine and that the type of anesthesia may change on the date of the procedure.

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Bias

Panel members are encouraged to be aware of their own biases regarding treatment and procedures and to recuse themselves in situations in which they may not be impartial in the discharge of their duties as a panel member. Panel members are asked to identify procedures, treatments, agencies, and/or providers they may hold a bias against or an unfavorable opinion of so that SDMC coordinators will not place them on these panels.

If any case raises serious issues regarding the proposed treatment plan, or if a conflict or bias is identified, the panel member should contact SDMC Program staff at 518-549-0328.

To: SDMC Volunteer Panel Members

From: SDMC Program Administration **SDMC Memo 14**

Subject: Decisions Regarding Withholding or Withdrawing Life Sustaining Treatment

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In 2003, the Surrogate's Court Procedure Act, Article 17-A, was amended to add § 1750-b which is also known as the Health Care Decisions Act (HCDA). This amendment was enacted to clarify the decision-making authority of Article 17-A guardians to make all health care decisions for persons with intellectual disabilities, including decisions regarding the withdrawal and/or withholding of life sustaining treatment (LST). Subsequent amendments expanded this authority to other guardians and family members. In 2008, the list of available decision-makers was again expanded to include the Surrogate Decision Making Committee (SDMC).

A specialized training for panel members who are interested in serving on end of life care decision panels is offered by the SDMC Program. This training provides information concerning the HCDA process and the additional considerations required to make a decision for end of life care. Panel members interested in learning more about this training are encouraged to call the SDMC Program staff. Panel members are able to select the cases on which they are willing to serve, and these end of life care decision cases are no exception. If a panel member cannot accept a case of this nature for any reason, they may decline the case when contacted by the SDMC Coordinator.

Background:

The issue of withholding or withdrawing LST often stirs ethical and moral discussions among people. The case becomes more challenging when the issue involves an individual who is not able to provide their own input regarding the action that is being proposed. In the past, some decisions to withhold or withdraw LST by guardians and family had been challenged in the courts by care providers. The courts often ruled against the guardian's decision to withhold or withdraw the LST, citing as a basis the lack of information from the individual themselves as to what his/her preferences would be.

Unfortunately, for many people who have intellectual disabilities, communicating their wishes or preferences in these cases was never within their ability. So despite whether withholding or withdrawing life sustaining treatment would serve their best interest by relieving them of their suffering or preserving their dignity, the treatment was continued. This approach fundamentally denied those people the basic human right of being able to refuse medical treatment which is overly burdensome or provides no net benefit when evaluating the quality of life. In other words, in situations where the burdens of the treatment outweigh any benefit and/or the treatment will continue to cause pain and/or suffering.

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Procedure:

The HCDA was enacted to clarify that decisions regarding LST are part of the natural continuum of all health care decisions, and to allow decisions by surrogates to end LST only where the need is clearest (i.e. where individuals are profoundly ill and never had the ability to make such decisions for themselves), to utilize existing legal standards wherever possible, and to maintain judicial oversight of close decisions, with a statutory structure incorporating a workable standard for the court.

In order for a decision to withhold or withdraw LST to be made by a surrogate or by the SMDC panel in these cases, the individual's record must include certain certifications by physicians. The law requires that the attending physician and a consulting psychiatrist or licensed psychologist attest that the individual lacks the capacity to make the decision for him/herself. In addition, one of the two must meet additional eligibility criteria to make that determination, as established by the law to ensure that the physician or psychologist has specialized training or experience in the provision of care to persons with developmental disabilities.

The other certifications that are required are from two physicians - the attending physician and a concurring physician - that the individual has one or more of three specific medical conditions: 1) permanent unconsciousness; 2) a terminal condition; or 3) a medical condition that requires LST. Both physicians must also further certify that the LST poses an extraordinary burden to the patient in light of either the person's medical condition, other than the person's mental retardation, or the expected outcome of the LST not withstanding such person's mental retardation. A further certification is necessary when the proposal includes a request to withhold or withdraw artificial nutrition and/or hydration. The physician must state that either there is no reasonable hope of maintaining life, or that the artificial nutrition and/or hydration itself poses the extraordinary burden to the individual.

A decision by an SDMC panel for the withholding or withdrawing of LST follows the same protocols as for other decisions that are presented to them. The case will be presented by a declarant, who will complete a Declaration for End of Life Care form, which states that the individual cannot make the decision and has no legally authorized willing and available surrogate to make the decision, and that the decision to withhold and/or withdraw LST is in the individual's best interest. Included with that declaration will be the aforementioned required certifications by the attending physician, a consulting psychiatrist or psychologist and a concurring physician. These certifications and any relevant medical information will be presented on SDMC forms that the panel will review prior to making its decision.

The SDMC regulations provide guidance to the panel in assessing the individual's capacity to make the decision by assessing if he/she can adequately understand and appreciate:

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1. The burdens of treatment in terms of pain and suffering outweighing the benefits, or whether the proposed treatment would merely prolong the suffering and not provide any health benefit.
2. 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.
3. The likely prognosis, expectant level of functioning, degree of humiliation, and dependency with or without the proposed medical treatment.
4. An evaluation of treatment option, including non-treatment, and the benefits and risks of those options as compared to those of the proposed medical treatment.

When the panel is considering the best interest question regarding the request to withhold or withdraw LST there are additional criteria outlined by the HCDA that must be considered:

- the panel must make these decisions solely and exclusively on the best interest of the individual; and
- when reasonably known or ascertainable, the individual's wishes, and/or moral or religious beliefs.

The panel should also consider the following when determining the best interest of the individual:

1. the dignity and uniqueness the individual;
2. the preservation, improvement, or restoration of the individual's health;
3. the relief of suffering by means of palliative care or pain management;
4. the unique nature of artificial nutrition and hydration and the effect if may have on the individual; and
5. the individual's entire medical condition.

In addition to these considerations, the law is clear that the financial considerations of the guardian are not to be considered when making a best interest determination, and that there is a presumption that individuals with mental retardation and/or developmental disabilities are entitled to the full an equal rights, equal protection, respect, and dignity afforded to persons without such disabilities.

Given these strong protections within the law and the need to ensure that these decisions are made in only the most compelling cases, the State is warranted in establishing rigorous standards and procedures for making a decision to withhold or withdraw LST from a person who is incapacitated. The guardian has an affirmative obligation to advocate for the full and efficacious provision of health care, including LST.

For additional information or guidance on these cases, panel members are encouraged to contact the SDMC Program staff at 518-549-0328.

Appendix 1:

SDMC Panel Member Hearing Resources

SDMC Program Contact Information

- Program Staff
- Regional Contract Offices

SDMC Sample Panel Questions for Major Medical Treatment

Voting Guide Matrix

SDMC Panel Chairperson Responsibilities

Sample Waiver of Objection to Hearing and Cover Letter

- Consents:
  - 280-A Consent Provided
  - 280-B Surrogate decision-maker identified at hearing
  - 280-C Individual is found to have capacity
  - 280-D Consent is denied

Medical Abbreviations & Acronyms

Opening Encrypted Electronic Mail

SDMC Mandated Reporter Memo

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SDMC Program Staff Contact Information

Surrogate Decision-Making Program

Phone: 518-549-0328

email: SDMCVolunteers@justicecenter.ny.gov

Fax: 518-549-0460

Contract Agencies by Region

Agency	Region
Empowered Pathways Christine Boxall 315 724-1718 x203	Broome/Central
Capital District Center for Independence, Inc. George Kleinmeier 518 459-6422 x227	Capital/ Taconic
Center for Dispute Settlement Ida Clark 607 776-6976	Finger Lakes
Center for Dispute Settlement Ida Clark 607 776-6976	Western
Education and Assistance Corporation Yvonne Buffa 516 489-7733 x169	Hudson Valley, Bronx County, NY County & Richmond County
Education and Assistance Corporation Fransesca Chaplin 631-265-0490 x202	Kings County, Long Island and Queens County
SDMC SDMC Program Staff 518 549-0328	Sunmount

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Sample Panel Questions for Capacity, Surrogacy and Best Interest

Non-Emergency Major Medical Treatment

October 2018

Surrogate Decision-Making Committee (SDMC)
401 State Street, Schenectady, NY 12305
518.549.0328 | SDMCvolunteers@justicecenter.ny.gov
www.justicecenter.ny.gov

Capacity: Clear and Convincing Standard

Capacity is something that is presumed; an individual lacks the ability to consent or refuse major medical treatment if he or she cannot understand the proposed medical treatment, understand the risks, benefits and alternatives of the treatment, or make an informed decision about the proposed treatment in a knowing and voluntary manner.

Clear and Convincing standard refers to evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

Capacity has already been evaluated by a professional, please refer to the Capacity Certification (SDMC Form 210) for additional information as you formulate your questions.

Capacity Considerations

- Has the procedure or treatment been explained?
- Can this individual understand the proposed medical treatment?
- Can this individual understand the risks, benefits and alternatives of the treatment/procedure?
- Can this individual understand the burden of treatment?
- Can this individual make an informed decision about the proposed treatment in a knowing and voluntary manner?
- Can this individual appreciate that there may be pain with and possibly without the treatment?
- Does this individual understand the prognosis?
- Has this individual evaluated the treatment options? Can he/she articulate the reasoning behind his/her decision?

Sample Questions for the Individual

Please ensure questions are initially addressed directly to the individual, regardless of his/her apparent ability to participate or interact.

Good morning John Smith, how are you today? Do you know why we are here today? Have you been to the doctor recently?

- What did the doctor say about your medical condition? Has the medical procedure been explained to you?
- What is the treatment and what is it likely to do for you?
- Have the risks and benefits been explained to you? What are the risks? The benefits?
- Please tell me in your own words what the doctor wants to do.
- Have you been sick before? Did you see the doctor then?
- Have you been to a hospital before? Do you remember what happened there?
- Have you ever had an operation?
- What sickness or injury did you have then?

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Sample Questions for the Individual (cont'd)

- How did the doctors help you? Did the doctors do anything that hurt you?
- Do you remember if you were asleep during the procedure?
- Did you feel better or worse after the procedure?
- Have you decided whether to have the procedure or not? How did you decide to accept or reject that treatment? Why do you think the doctor wants you to have the treatment?
- What makes your choice better than the doctor's recommendation? Do you believe you need some kind of treatment?
- Has the doctor explained that sometimes, but not very often, the treatment can make some people feel some pain afterward?
- Are you in any pain now? Do you understand you will be asleep during the procedure and that you will wake up afterwards? Why do you want to have the procedure done (or not done)?
- What has the doctor told you could happen if you have the procedure or decide not to have the procedure? What is the treatment likely to do for you?
- Is there an alternative procedure that the doctor decided not to do?

Sample Questions for the Declarant, Providers, and Staff

For individuals who lack expressive skills, information about their capacity may be evaluated through questions addressed to the declarant, providers, and correspondents.

- Please describe this individual's overall functional level with regard to baseline communication, social, and adaptive skills. How does this individual make his/her needs known? How does he/she respond to new situations? What types of support does this individual need with daily living skills such as dressing, hygiene, and routine tasks?
- Please describe a typical day for this individual. What decisions does this person make on a regular basis? Does he/she choose their own clothing?
- Does this individual manage his/her own money?
- What kind of supervision does this individual require?
- When the procedure was explained to the individual, what was his/her reaction?
- Does this individual understand what the doctors are going to do and how the treatment might help?
- Does this individual understand or comprehend the degree of pain and suffering that he/she will experience with or without treatment?
- Does this individual understand how the treatment will help him/her? Does this individual understand the nature and consequences of the treatment options, including non-treatment?

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Surrogacy: Clear and Convincing Standard

A surrogate is someone who is available and willing to make the medical treatment decision. This can include a parent, spouse, health care agent, legal guardian, adult child, adult sibling or family member, court-appointed guardian, or health care proxy.

Clear and Convincing standard refers to evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

A correspondent is a person that has a genuine interest in promoting this individual's best interests, but isn't legally authorized to provide consent.

Information about the individual's possible surrogates is found in the Declaration for Major Medical Treatment, SDMC form 200. Please review this information as you formulate your questions.

Surrogacy Considerations

Does this individual have a legally authorized, willing and available surrogate to make this decision?

Sample Questions Addressed to Providers and Staff

- Does this individual have a parent who is available, authorized and willing to make the medical decision? Has this individual ever been married or have any children?
- Is there a legal guardian with authority to make medical decisions?
- Has this individual ever executed a health care proxy?
- If this is the first time the individual has been before SDMC, who previously provided consent for medical procedures?
- Does this individual have regular visitors? If so, who are they and when did they last visit?
- What efforts have been made to contact such people?
- What were the results of those efforts?
- Does this individual have any ongoing and supportive contact with anyone on a regular basis?
- Were the Notice of Hearing and Declaration sent to all known authorized persons and correspondents? Was there any response?

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Best Interest: Fair Preponderance of the Evidence Standard

Panel members make a best interest decision for the individual by considering all the factors and unique needs associated with the individual. The individual's opinion regarding the proposed major medical treatment is to be given full consideration by the panel and balanced against the best interest needs of the individual, as well as his/her ability to understand and appreciate the consequences of his/her preferences.

Fair Preponderance of the Evidence standard refers to the evidence that when weighed for its quality rather than quantity, tips the scale to provide or withhold consent for the proposed procedure/treatment; the evidence just has to tip the scale in one direction.

Best Interest Considerations

Is the proposed medical treatment/procedure in the best interest of this individual?

The panel will assess the risks, benefits, and alternatives to the proposed treatment of:

- The relief of suffering
- Preservation or restoration of functioning
- Improved quality of life and the potential quality of life with and without the treatment
- Whether this individual has any opinion or personal beliefs about the proposed treatment
- The burdens of treatment; with the benefits outweighing the risks
- The appreciation of pain with and without treatment; the possibility that the pain could be mitigated
- The prognosis with and without the procedure
- Evaluation or treatment options and alternatives

Sample Questions to ask the Nurse or Medical Providers

Please describe the individual's medical condition and the treatment being requested and why it is necessary.

- What are the risks to the individual?
- What are the burdens of treatment in terms of pain and suffering?
- What are the benefits of the treatment?
- Will the proposed treatment merely prolong the individual's suffering and not provide any benefit?
- What is the expected degree, duration and constancy of pain with and without treatment?
- What is the likely prognosis with and without treatment?

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Sample Questions to Ask the Nurse or Medical Providers (cont'd)

- What is the expectant level of functioning with or without the proposed treatment?
- What is the expectant degree of humiliation with or without the proposed treatment?
- Is there a less invasive alternative? If so, why is the doctor requesting this procedure instead?
- What are the other treatment options, including non-treatment? What are the benefits and risks of those options compared to the proposed treatment?
- How is the individual's overall health?
- Any cardiac or pulmonary issues or concerns?
- Does this individual take any medications that will be affected by or that will potentially affect the treatment?
- Does this individual have any medical issues that could impact the procedure and/or outcome?
- How will the individual handle any pre-operative or pretreatment preparations?
- Will someone familiar to the individual be able to accompany him/her to the procedure and stay at the hospital, if required? What type of after-care plan will be required? Will the facility be able to provide the required aftercare?
- Will this individual be able to tolerate or comply with after care requirements?
- Has the individual expressed any concerns and/or preferences with regard to the treatment?
- Are there any individualized risks to the individual if local or general anesthesia are used?

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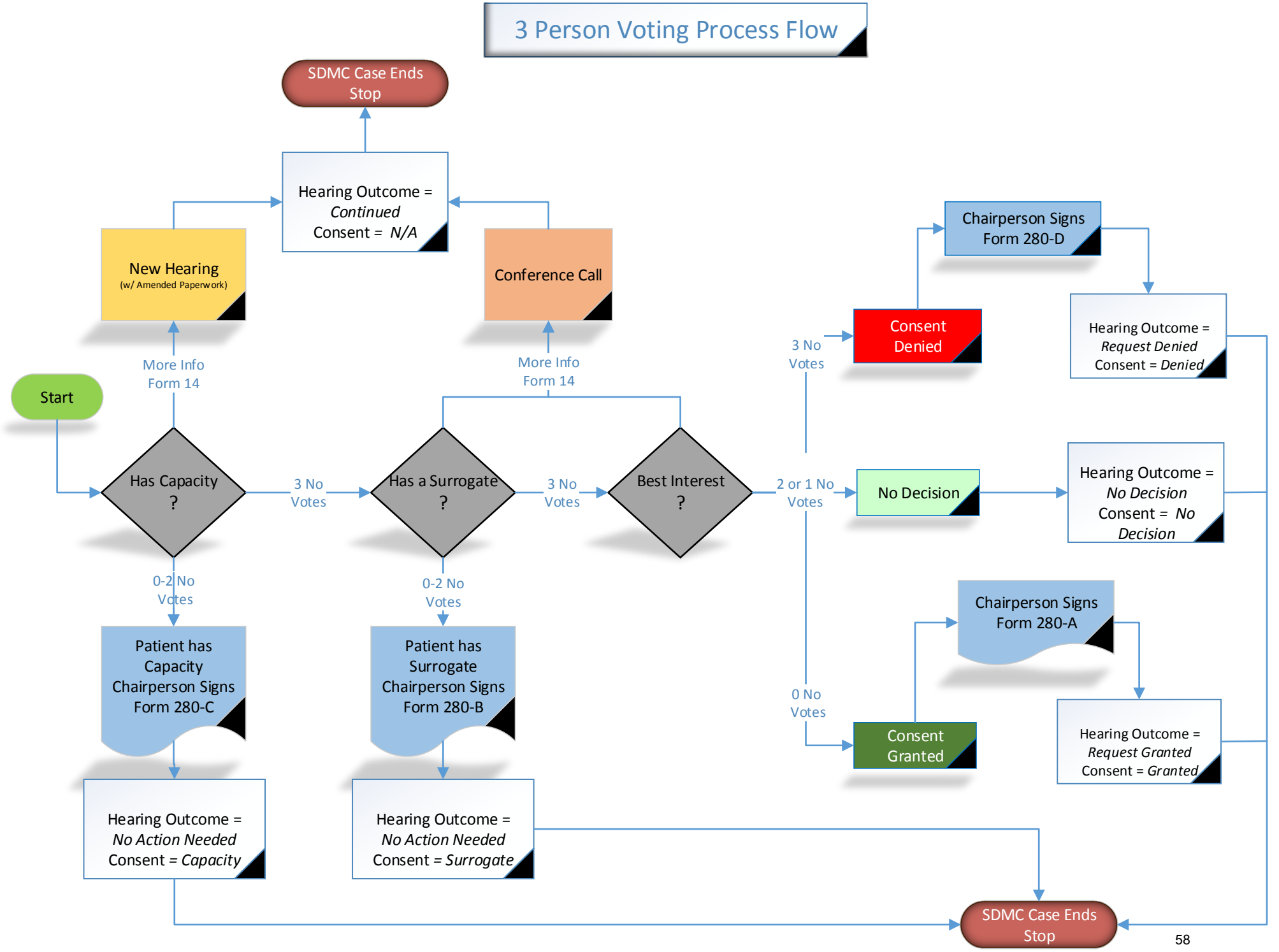
3 Person Voting Process Flow



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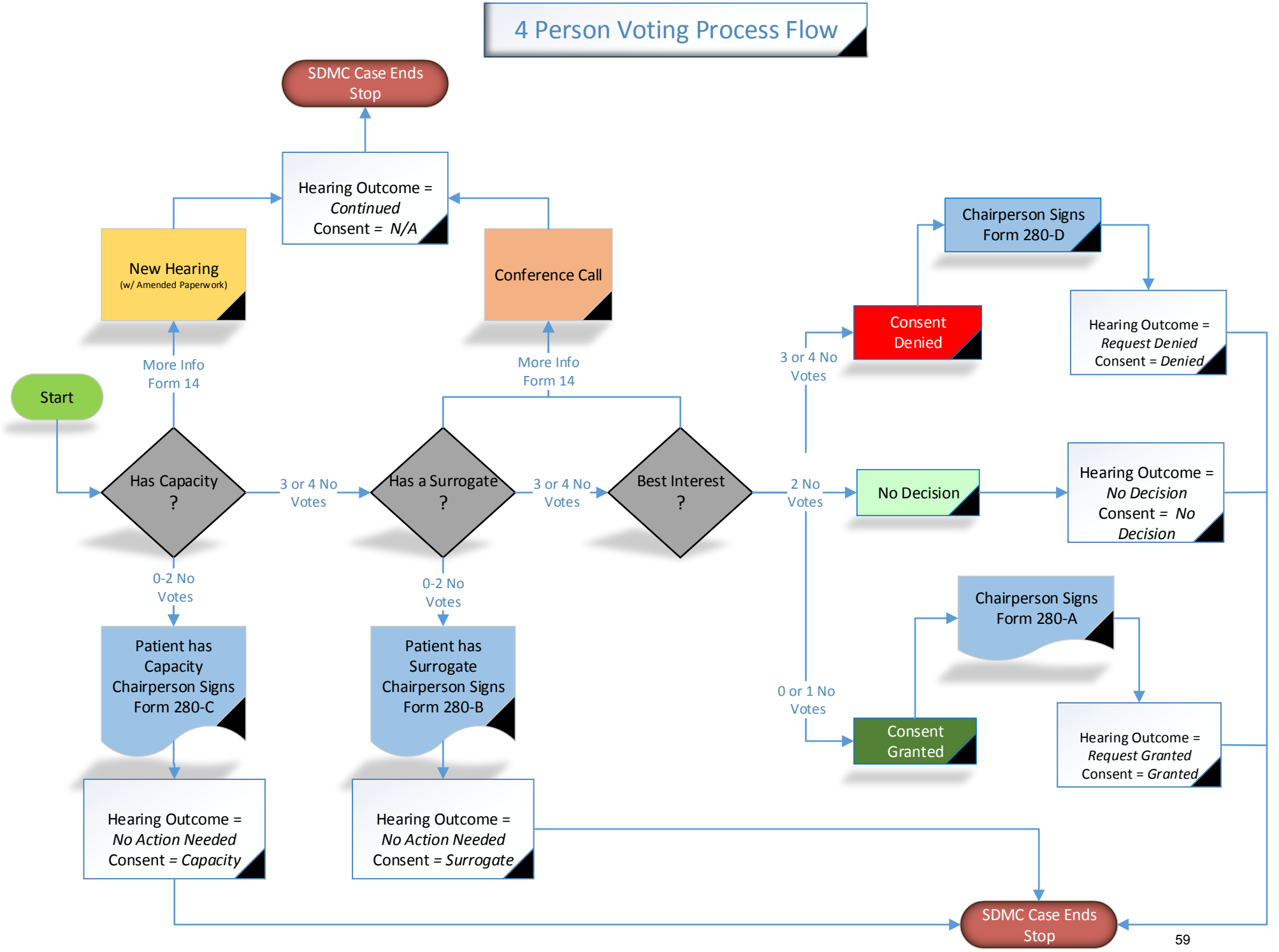
4 Person Voting Process Flow



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SDMC PANEL CHAIRPERSON RESPONSIBILITIES

Prior to the hearing:

1. Review case(s)
2. Questions, concerns or requests for additional information, should be directed to the SDMC Program staff nurse who prepared the case. Each case has a cover sheet containing this information.
3. Review the SMDC Volunteer Panel Member Handbook prior to the hearing. The SDMC representative at the hearing should either have a copy of the handbook or digital access to the handbook.

Hearing Activities:

1. Monitor attendance of interested parties:

   a. A panel of three persons is a quorum panel and the chairperson may open the hearing.

   b. A representative from Mental Hygiene Legal Service (MHLS) may be present.

   c. The individual in need of services must be present at the hearing or visited by the panel or a designated panel member prior to the hearing.

   d. Members of the treatment team should be present to provide testimony.

   e. Listed surrogates and/or correspondents may also be present, but it is not mandatory that they attend.

   Note 1:

   If a fourth panel member listed on the opening statement and/or the MHLS representative are not present at the scheduled time, the chairperson needs to call to see if they plan to attend the hearing. Based on that phone call, the chairperson may wait and delay the start of the hearing for a reasonable period of time to allow others to arrive. The chairperson has the discretion to determine when to start the hearing.

   Note 2:

   If the fourth member and/or MHLS representative are not present and cannot be reached, it should be verified and stated on the record that they were notified, but are not present.

2. Request that all parties print their name and position on the attendance sheet.
3. Ask the SDMC representative to turn on the tape recorder.
4. Read the Opening Statement into the record.

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Note: If MHLS objections arise during the opening statement, refer to SDMC Memo #5 (Treatment of MHLS Objections) in the SDMC Volunteer Panel Member Handbook. The chairperson may also consult with the SDMC representative or call SDMC Program staff to obtain guidance on how to proceed.

5. Ask all persons present to identify themselves for the record by name and relationship to the individual receiving services.

6. Swear in all witnesses who will be providing testimony.

7. Create a record by asking sufficient questions regarding capacity, surrogacy and best interest - in that order.

   Note 1: It is the chairperson's responsibility:

   - to ensure that the hearing is conducted in a professional manner;
   - to ensure that the hearing remains on track and focused on the proposed treatment/procedure;
   - to close one issue before moving on to the next; and
   - to ensure sufficient questions and responses are contained in the record to support the panel's decision.

   The chairperson may receive or request assistance at the hearing from the SDMC representative in performing this function.

   Note 2:
   The panel may elect to deliberate at any time during the hearing. For example, a panel may feel there is sufficient evidence that the individual has the capacity to make his or her own decision. If so, they may deliberate and vote on the capacity issue. The panel can also go back on the record if they decide that they want more information about capacity or if they decide to move on to the other two questions (available surrogate & best interest).

8. The chairperson will close the hearing when panel members have no additional questions. and announce that the panel is ready to deliberate.
   The chairperson will ask the SDMC representative to turn off the tape recorder, and ask all parties present to leave the room so the panel may deliberate in private.

   Note:

   As with the example above, the panel may re-open the hearing, if, during deliberations, there are unresolved questions or there is a need for additional information.

9. The panel chairperson will lead discussions during deliberations and direct other panel members to record their vote on the voting sheets provided.

10. Once a vote has been taken and the panel has reached a decision, the others will return to the room. The chairperson will ask the SDMC representative to turn on the tape recorder and announce the decision for the record.

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Note 1:

An interpretation of panel member votes is contained in SDMC Memo #3 and the Voting Guide Matrix is in SDMC Volunteer Panel Member Handbook. The SDMC representative or SDMC Program staff may also be consulted.

Note 2:

When the panel vote is not unanimous, the chairperson will not announce the breakdown of panel voting. However, a chairperson may tell interested parties when a vote is unanimous.

Completing the Paperwork:

1. The chairperson will sign a sufficient number of copies of the consent form, as directed by the SDMC representative at the hearing. It is the chairperson's responsibility, with the assistance of the SDMC representative, to be sure that the correct consent form which accurately reflects the panel's determination, is signed and issued.

   Notes:

   - The 280-A form is issued when the individual is found to lack capacity, does not have a surrogate willing and able to make the decision, and the panel has granted consent for the major medical procedure.
   - The 280-B form is issued when the panel finds that an individual lacks capacity, but has a legally authorized surrogate, willing and able to make the decision.
   - The 280-C form is issued when the panel finds that the individual has the capacity to make his or her own decision.
   - The 280-D form is issued when the individual is found to lack capacity, does not have a surrogate willing and able to make the decision, and the panel has denied consent for the major medical procedure.

2. If modifications to the consent form are deemed necessary (e.g. granting a longer consent period at the request of the provider, consideration of the procedures separately), the SDMC representative is available to assist by contacting the SDMC Program staff to request a clean copy of the consent and voting sheet revisions. In the event the SDMC Program staff are unavailable, the panel chairperson will make such modifications as instructed in the SDMC Volunteer Panel Member Handbook Memo #8.

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3. With the assistance of the SDMC representative, the chairperson will distribute copies of consent forms to applicable parties, (three copies to the provider, one copy to MHLS, one copy to SDMC, and as many additional copies as are needed for all listed correspondents).

   Note: When the panel consents to the proposed major medical treatment, a copy of the Outcome of Medical Procedure (SDMC Form 272) should also be given to the provider.

SAMPLE Waiver of Objection to Hearing
SDMC Form 260
Sent with Waiver Letter

SDMC Form No. 260

SURROGATE DECISION-MAKING COMMITTEE
Proceeding for the Review of the
Need for Surrogate Decision-Making
on Behalf of

Jane Doe
(Patient)

WAIVER OF OBJECTION TO HEARING

18100200
Declaration No.
(SDMC Use Only)

John Doe
1010 Main Street
Adirondack, NY 10055
(315) 555-6000

I, John Doe, as the father of Jane Doe, who resides at, acknowledge receipt of the declaration for major medical treatment.

I am aware of my right to be present and be heard at the Committee hearing, and the availability of the Justice Center for the Protection of People with Special Needs to answer any questions I may have regarding this proceeding. Having reviewed the declaration, I do hereby consent to the consideration by the Surrogate Decision-Making Committee of the need for surrogate consent for the proposed major medical treatment.

_____
Signature

_____
Date

NOTE: Return to the Surrogate Decision-Making Committee via mailing, fax or e-mail.

Justice Center for the Protection of People with Special Needs
SDMC
401 State Street, Schenectady, NY 12305
Fax: 518-549-0460
Email: SDMC@justicecenter.ny.gov

NEW YORK STATE OF OPPORTUNITY.

Justice Center for the Protection of People with Special Needs

SAMPLE WAIVER LETTER-
Sent with Form 260

September 27, 2018

John Doe
1010 Main St.
Adirondack, NY 10055

RE: Jane Doe
DECLARATION NO. 18100200

Dear John Doe:

CAPITAL DISTRICT DDSO has submitted a declaration on behalf of Jane Doe requesting consent for the following procedure(s):

Colonoscopy with biopsy/polypectomy

If you choose to give or withhold consent regarding this procedure(s), you should contact our office. If you choose not to make this decision, please sign the enclosed Waiver of Objection to Hearing to allow the Surrogate Decision-Making Committee to either give or withhold consent.

If you have any questions regarding this matter, please call our office collect at 518-549-0328.

Sincerely,

(Name of SDMC Nurse Review Specialist)

Nurse Review Specialist

Enclosures:
Waiver Form
Return Envelope
Notice of Hearing packet

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SDMC Form No. 280-A (Rev. 02/16)

Surrogate Decision-Making Committee Determination

Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

When Consent is granted by the Panel, the 280-A is completed and signed.

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for Surrogate Decision-Making on Behalf of

Patient's Name

(Patient)

INFORMED CONSENT FOR MAJOR MEDICAL TREATMENT

16120000

Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by

Declarant's Name

(Declarant)

Dated the 1st day of December 2016 on behalf of

Patient's Name

(Patient)

seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment Arteriovenous (AVF) Fistula Placement under General Anesthesia for Dialysis Care and Treatment supported by the certifications of

Psychologist or Psychiatrist's Name

(Psychiatrist)

regarding the lack of capacity of said patient to provide informed consent, and of

Physician, Dentist, or Podiatrist's Name

(Physician)

regarding the need for the proposed major medical treatment and the use of anesthesia has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment and the need for the proposed medical treatment taking into account the risks of, benefits of, and alternatives to the treatment including the use of anesthesia, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that

Patient's Name

(Patient)

(1) does not have sufficient capacity to provide his/her own informed consent for this procedure;

(2) no legally-authorized person is available and willing to provide substitute informed consent; and

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(3) the proposed major medical procedure is [x] in the best interests of the patient.

(4) This Committee hereby does [x] provide informed consent on behalf of *Patient's Name*

(Patient)

for the

Arteriovenous (AVF) Fistula Placement under General Anesthesia for Dialysis Care and Treatment

(Major Medical Treatment)

and the administration of anesthesia as well as related diagnostic, medical or dental procedures that are normal and customary in accordance with sound medical practice. The Committee, based on the medical evidence presented, may limit anesthesia to local only or general only by so specifying above. Such major medical procedure shall be performed by or under the supervision of a licensed Physician in private practice or at a facility licensed, certified or registered with the New York State Department of Health [XX], or at any facility duly licensed by a State of the United States, or in private practice by such a physician or dentist [XX]. Any tissues or parts surgically removed may be disposed or preserved in accordance with accustomed practice.

This consent is conditioned upon a current pre-operative screening in accordance with sound medical practice to determine the suitability of the patient to withstand the major medical procedure and the recommended form of anesthesia.

This consent shall constitute legally valid informed consent and no further consents for the proposed major medical treatment, administration of anesthesia and such related or continuing diagnostic, medical or dental procedures necessitated by the original treatment shall be required.

This determination is effective as of the 15th day of December 2016, and will expire in 365 (one year) days of this date or as of the 15th day of December 2017.

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

_____

(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Questions: Contact SDMC Program Director. (518) 549-0328

SDMC Form No. 280-B (Rev. 02/16)

Surrogate Decision-Making Committee Determination

Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

When a Surrogate comes forward to make the decision, the 280-B is completed and signed.

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for

Surrogate Decision-Making on Behalf of

Patient's Name

(Patient)

AVAILABILITY OF

ALTERNATE SURROGATE

16120000

Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by

Declarant's Name

(Declarant)

dated the 1st day of December 2016 on behalf of

Patient's Name

(Patient)

seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment Arteriovenous (AVF) Fistula Placement under General Anesthesia for Dialysis Care and Treatment supported by the certifications of

Psychologist or Psychiatrist's Name

(Psychiatrist)

regarding the lack of capacity of said patient to provide informed consent, and of

Physician, Dentist, or Podiatrist's Name

(Physician)

regarding the need for the proposed major medical treatment and type of anesthesia recommended, has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that

Patient's Name

(Patient)

(1) does not have sufficient capacity to provide his/her own informed consent for this procedure; and

(2) has a surrogate who is available, willing and with legal authority to provide substitute consent for this procedure.

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Patient Name *Patient's Name*

Declaration No. 16120000

This Committee hereby finds that _____[Name of Surrogate]_____

(Print Name of Surrogate)

has properly represented him or herself as a surrogate with legal authority to provide substitute decision-making on behalf of

Patient's Name

(Patient)

and that the Committee will defer to this surrogate based upon his or her stated availability and willingness to provide substitute decision-making for this procedure.

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

This determination is effective as of the 15th day of December 2016.

_____

(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Questions: Contact SDMC Program Director. (518) 549-0328

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SDMC Form No. 280-C (Rev. 02/16)

Surrogate Decision-Making Committee Determination

Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

When the Panel determines that the person has capacity, the 280-C is completed and signed.

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for

Surrogate Decision-Making on Behalf of

Patient's Name

(Patient)

CAPACITY TO PROVIDE

INFORMED CONSENT

16120000

Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by

Declarant's Name

(Declarant)

dated the 1st day of December 2016 on behalf of

Patient's Name

(Patient)

seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment Arteriovenous (AVF) Fistula Placement under General Anesthesia for Dialysis Care and Treatment supported by the certifications of

Psychologist or Psychiatrist's Name

(Psychiatrist)

regarding the lack of capacity of said patient to provide informed consent, and of

Physician, Dentist, or Podiatrist's Name

(Physician)

regarding the need for the proposed major medical treatment and type of anesthesia recommended, has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that

Patient's Name

(Patient)

does have sufficient capacity to provide his/her own informed consent for said major medical procedure.

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Patient Name *Patient's Name*

Declaration No. 16120000

This Committee has determined that

Patient's Name

(Patient)

has sufficient capacity to provide his or her own informed consent and that any consent to or refusal to undergo the

Arteriovenous (AVF) Fistula Placement under General Anesthesia for Dialysis Care and Treatment

(Major Medical Procedure)

shall constitute legally valid informed consent, and no further consent shall be required.

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

This determination is effective as of the 15th day of December 2016

_____

(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Questions: Contact SDMC Program Director. (518) 549-0328.

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SDMC Form No. 280-D (Rev. 02/16)

Surrogate Decision-Making Committee Determination

Mental Hygiene Law Article 80

SDMC Program Director

NYS Justice Center

When Consent is denied by the Panel, the 280-D is completed and signed.

SURROGATE DECISION-MAKING COMMITTEE

Proceeding for the Review of the Need for Surrogate Decision-Making on Behalf of

Patient's Name

(Patient)

INFORMED CONSENT FOR MAJOR MEDICAL TREATMENT

16120000
Declaration No.

An application having been made to this Committee pursuant to Article 80 of the New York State Mental Hygiene Law by

Declarant's Name

(Declarant)

dated the 1st day of December 2016 on behalf of

Patient's Name

(Patient)

seeking a determination of the need for surrogate decision-making for this patient for the following major medical treatment Arteriovenous (AVF) Fistula Placement under General Anesthesia for Dialysis Care and Treatment supported by the certifications of

Psychologist or Psychiatrist's Name

(Psychiatrist)

regarding the lack of capacity of said patient to provide informed consent, and of

Physician, Dentist, or Podiatrist's Name

(Physician)

regarding the need for the proposed major medical treatment and the use of anesthesia has been reviewed by this Committee. The Committee having duly inquired into the need for surrogate decision-making for this major medical treatment and the need for the proposed medical treatment taking into account the risks of, benefits of, and alternatives to the treatment including the use of anesthesia, and having been satisfied from the oral and documentary evidence provided at the hearing on the 15th day of December 2016 finds that

Patient's Name

(Patient)

(1) does not have sufficient capacity to provide his/her own informed consent for this procedure;

(2) no legally-authorized person is available and willing to provide substitute informed consent; and

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(3) the proposed major medical procedure is not [X] in the best interests of the patient.

(4) This Committee hereby does not [X] provide informed consent on behalf of *Patient's Name*

(Patient)

for the

Arteriovenous (AVF) Fistula Placement under General Anesthesia for Dialysis Care and Treatment

(Major Medical Treatment)

This determination is effective as of the 15th day of December 2016.

The case may be reopened whenever new information or a changed circumstance is available for the panel to consider. The provider also has the option of appealing this case to the Supreme Court in accordance with Mental Hygiene Law Section 80.09

This determination has been made in accordance with the provisions of Article 80 of the New York State Mental Hygiene Law and Title 14 of the New York Codes, Rules and Regulations Part 710 promulgated by the Commission on Quality of Care and Advocacy for Persons with Disabilities governing the operations of this Committee. Pursuant to Chapter 501 of the Laws of 2012 regulations, rules, and functions of the Surrogate Decision-Making Committee (SDMC) Program set out in Part 710 are wholly assumed by and continue in full force under the Justice Center for the Protection of People with Special Needs.

_____

(Chairperson)

NOTICE OF RIGHT TO APPEAL: As the patient, declarant, director, MHLS, all authorized surrogates and all known correspondents, you have the right to appeal this determination by applying to the New York State Supreme Court for a review and temporary restraining order of this decision.

The Surrogate Decision-Making Committee (SDMC) Program is administered by the NYS Justice Center for the Protection of People with Special Needs to provide informed consent or refusal of the treatment decision.

Questions: Contact SDMC Program Director. (518) 549-0328

Medical Abbreviations & Acronyms

2^0	secondary to, 2 hours	gm	gram	PE	physical exam
ac	before eating	GT	gastric tube	PEG Tube	percutaneous endo-scopic gastrostomy tube
abd	abdominal	GU	genitourinary	per	through or by
ad lib	as desired	HA	headache	pc	after meals
ALS	advanced life support	HAL	hyperalimentation	po	by mouth
AMA	against medical advice	hct	hematocrit	post op	after surgery
A&O	alert and oriented	hgb	hemoglobin	pre op	before surgery
bid	twice daily	h/o	history of	pr	via the rectum
Bld	blood	h&p	history and physical	prn	as needed
BM	bowel movement	hs	Hour of sleep	PT	physical therapy
BP	blood pressure	Hx	history	qd	every day
BRP	bathroom privileges	ICP	Intracranial pressure	qod	every other day
c	with	ID	Infectious disease	qh	each hour
CA	Cancer	IM	Intramuscular	q4h	every 4 hours
CBC	complete blood count	inj	injection	qid	Four times daily
cc	cubic centimeter	I&O	intake and output	qns	quantity not sufficient
c/o	complains of	int	Internal	R	Right
CPR	Cardiopulmonary Resuscitation	IU	international unit	Rx	prescription
CSF	cerebrospinal fluid	IUGR	intrauterine growth retardation	s	without
CT Scan	computed tomography scan	IV	intravenous	sc	subcutaneously
CV	cardiovascular	IVP	Intravenous bolus	sl	slight
Cx	cultures	J-Tube	jejunostomy feeding tube	stat	at once
d	day	kg	Kilogram	SOB	short of breath
d/c	Discontinue or discharge	l	liter	Sx	symptoms
DNI	do not intubate	L	Left	tid	three times daily
DNR	do not resuscitate	LQ	Lower quadrant	TPN	total parenteral nutrition
dos	date of surgery	LST	Life Sustaining Treatment	TPR	temperature, pulse & respirations
Dx	diagnosis	m	meter	tx	treatment
ED	emergency department	mEq	milliequivalent	UA	urinalysis
EGD	Esophagastroduodenoscopy	ml	milliliter	UQ	upper quadrant
EEG	Electroencephalogram	MRI	Magnetic Resonance Imaging	WBC	white blood count
EMG	electromyogram	mva	motor vehicle accident	WNL	Within normal limits
ENT	Ear, nose & throat	neg	negative		
ETOH	alcohol	NKA	no known allergies		
ETT	endotracheal tube	NPO	nothing by mouth		
ext	external	NGT	Nasogastric		
Foley	indwelling urinary catheter	O_2	oxygen		
FOOB	fell out of bed	OD	right eye		
Fx	fracture	OOB	out of bed		
GI	gastrointestinal	OS	left eye		

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To: SDMC Program Staff and Volunteer Panel Members

From: SDMC Program Administration

Re: Mandated Reporter Laws and SDMC Staff and Volunteer Panel Members

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A "mandated reporter" is a "custodian" or a "human services professional" as defined below. Whenever a mandated reporter has a reasonable cause to suspect abuse or neglect has occurred involving a vulnerable person, he or she is required to make a report to the Vulnerable Persons' Central Register (VPCR) immediately upon discovery.

Surrogate Decision-Making Committee (SDMC) Program staff and volunteer panel members who are mandated reporters should report instances of abuse, neglect and significant incidents to the Vulnerable Persons' Central Register (VPCR).

While not every member of the SDMC Program staff and volunteer panel member may be considered a mandated reporter by law, there is nothing preventing them from filing a report with the VPCR by calling the hotline when they have a reasonable cause to suspect abuse or neglect has occurred. SDMC Program staff should notify his/her supervisor after making a report.

"**Custodian**" means *a director, operator, employee or volunteer of a facility or provider agency; or a consultant or an employee or volunteer of a corporation, partnership, organization or governmental entity which provides goods or services to a facility or provider agency pursuant to contract or other arrangement that permits such person to have regular and substantial contact with individuals who are cared for by the facility or provider agency*.

"**Human services professional**" means *any: physician; registered physician assistant; surgeon; medical examiner; coroner; dentist; dental hygienist; osteopath; optometrist; chiropractor; podiatrist; resident; intern; psychologist; registered nurse; licensed practical nurse; nurse practitioner; social worker; emergency medical technician; licensed creative arts therapist; licensed marriage and family therapist; licensed mental health counselor; licensed psychoanalyst; licensed behavior analyst; certified behavior analyst assistant; licensed speech/ language pathologist or audiologist; licensed physical therapist; licensed occupational therapist; hospital personnel engaged in the admission, examination, care or treatment of persons; Christian Science practitioner; school official, which includes but is not limited to school teacher, school guidance counselor, school psychologist, school social worker, school nurse, school administrator or other school personnel required to hold a teaching or administrative license or certificate; full or part-time compensated school employee required to hold a temporary coaching license or professional coaching certificate; social services worker; any other child care or foster care worker; mental health professional; person credentialed by the office of alcoholism and substance abuse services; peace officer; police officer; district attorney or assistant district attorney; investigator employed in the office of a district attorney; or other law enforcement official.*

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Appendix 2:

Laws and regulations governing the operation of the SDMC

- Mental Hygiene Law Article 80 Surrogate Decision-Making for Medical Care and Treatment
- Surrogate's Court Procedure Act, Article 17A, § 1750-(b) the Health Care Decisions Act
- Public Officers Law § 74 Code of Ethics
- 14 NYCRR Part 710 Procedures of the Surrogate Decision-Making Committee 14 NYCRR § 633.10 Care and Treatment (OPWDD)
  14 NYCRR § 633.11 Medical Treatment (OPWDD)
  14 NYCRR § 27.9 Surgery and Certain Other Treatments (OMH)

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NYS Mental Hygiene Law

ARTICLE 80 SURROGATE DECISION-MAKING FOR MEDICAL CARE AND TREATMENT

§ 80.01 Legislative findings and purpose.

The legislature hereby finds and declares that timely access to health care for people who are mentally disabled is an important objective for New York state; that the autonomy of persons with decision-making capacity to make health care decisions for themselves must be respected; and that, in cases involving persons with impaired decision-making capacity, efforts should be made to ensure that health care decisions are based on the best interests of the patient and reflect, to the extent possible, the patient's own personal beliefs and values. The legislature further finds that the exclusive utilization of judicial authorization to obtain consent for medical care for the mentally disabled has in some cases resulted in undue delay in the provision of necessary care, needlessly jeopardizing the health of the mentally disabled. The legislature further finds and declares that the public interest will be served by the establishment of a statewide quasi-judicial surrogate decision-making process, which would determine patient capacity to consent to or refuse medical treatment and assess whether the proposed treatment promotes the patient's best interests, consistent with the patient's values and preferences. The process will strengthen the surrogate decision-making role of parents and other family members, while assuring that those individuals without available family members have access to medical care.

§ 80.03 Definitions.When used in this article:

(a) **"Major medical treatment"** means a medical, surgical or diagnostic intervention or procedures where a general anesthetic is used or which involves any signficant risk of any signficant invasion of bodily intergerity requiring an incision or producing

substantial pain, discomfort, debilitation or having a significant recovery period. Such term does not include: any routine diagnosis or treatment such as the administration of medications other than chemotherapy for non-psychiatric conditions or nutrition or the extraction of bodily fluids for analysis; electroconvulsive therapy; dental care performed with a local anesthetic; any procedures which are provided under emergency circumstances, pursuant to section twenty-five hundred four of the public health law; the withdrawal or discontinuance of medical treatment which is sustaining life functions; or sterilization or the termination of a pregnancy.

(b) **"A patient in need of surrogate decision-making"** means a patient as defined in subdivision twenty-three of section 1.03 of this chapter who is: a resident of a mental hygiene facility including a resident of housing programs funded by an office of the department or whose federal funding application was approved by an office of the department or for whom such facility maintains legal admission status therefor; or, receiving home and community-based services for persons with mental disabilities provided pursuant to section 1915 of the federal social security act; or receiving individualized support services; or, case management or service coordination funded, approved, or provided by the office for people with developmental disabilities; and, for whom major medical treatment is proposed, and who is determined by the surrogate decision-making committee to lack the ability to consent to or refuse such treatment, but shall not include minors with parents or persons with legal guardians, committees or conservators who are legally authorized, available and willing to make such health care decisions. Once a person is eligible for surrogate decision-making, such person may continue to receive surrogate decision-making as authorized by this section regardless of a change in residential status.

(c**) "Lack of ability to consent to or refuse major medical treatment"** means the patient cannot adequately understand and appreciate the nature and consequences of a proposed major medical treatment, including the benefits and risks of and alternatives to such treatment, and cannot thereby reach an informed decision to consent to or to refuse such treatment in a knowing and voluntary manner that promotes the patient's well-being.

(d**) "Best interests"** means promoting personal well-being by the assessment of the risks, benefits and alternatives to the patient of a proposed major medical treatment, taking into account factors including the relief of suffering, the preservation or restoration of functioning, 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.

(e) **"Surrogate decision-making committee"** means a committee of at least twelve persons established pursuant to section 80.05 of this article.

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(f) **"Panel"** means a subcommittee of four members of the surrogate decision-making committee.

(g) **"Commission"** means the commission on quality of care and advocacy for persons with disabilities.

(h) **"Providers of health services"** means, for the purposes of this article, those defined in subdivisions five and six of section 1.03 of this chapter; hospitals, as defined pursuant to article twenty-eight of the public health law; physicians and dentists.

(i) **"Declarant"** means a person who submits a declaration pursuant to the provisions of this article and may include any provider of health services, the director of the patient's residential facility or a relative or correspondent of the patient.

(j) **"Declaration"** means a written statement submitted in accordance with section 80.07 of this article.

(k) **"Correspondent"** means a person who has demonstrated a genuine interest in promoting the best interests of the patient by having a personal relationship with the patient, by participating in the patient's care and treatment, by regularly visiting the patient, or by regularly communicating with the patient.

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§ 80.05 Surrogate decision-making committees and panels; organization.

(a) Surrogate decision-making committees of at least twelve persons shall be established by the commission in geographic areas of the state, as may be designated by the commission. A committee designated after April first, nineteen hundred eighty-eight shall not accept applications for review pursuant to this article until April first, nineteen hundred eighty-nine and within appropriations made therefor.

(b) The members shall be appointed by the commission. The commission shall designate one member of each of the committees to serve as chairperson, who shall serve at the pleasure of the commission. Members appointed as of July thirty-first, nineteen hundred ninety shall serve for terms expiring on July thirty-first, nineteen hundred ninety-one. Upon expiration of such terms, such members may be appointed for terms of two years commencing on August first, nineteen hundred ninety-one. Any additional members and members appointed due to vacancies shall be appointed for terms of two years commencing on the date of completion of training by the commission. Members may be reappointed for additional two year terms of office but the provisions of section five of the public officers law shall not apply to such members. The commission may assign a committee member to serve on an additional committee or committees as deemed necessary or appropriate by the commission.

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(c) Members of the committee and panel shall include members from each of the following groups:

(i) physicians, nurses, psychologists, or other health care professionals licensed by the state of New York;

(ii) former patients or parents, spouses, adult children, siblings or advocates of mentally disabled persons; (iii) attorneys admitted to the practice of law in New York state; and (iv) other persons with recognized expertise or demonstrated interest in care and treatment of mentally disabled persons.

(d) A member who has failed to attend three consecutive meetings of the committee or panel to which the member has been appointed shall be considered to have vacated his or her office unless the commission determines that the absences should be excused. The members shall be reimbursed for their actual and necessary expenses and shall be considered public officers for the purpose of sections seventeen, nineteen and seventy-four of the public officers law.

(e) The committees shall have available to them such staff and assistance as may be deemed necessary by the commission. In providing for such staff and assistance, the commission may enter into agreements with nonprofit organizations, including but not limited to community dispute resolution centers authorized under article twenty-one-A of the judiciary law, and the staff of such organizations in carrying out such functions shall be considered public officers for the purpose of sections seventeen, nineteen and seventy-four of the public officers law. Provided, however, the commission may not delegate pursuant to such agreements responsibility for the appointment of members to serve on surrogate decision-making committees, the training of any such members, the review of declarations, maintenance of the record of the hearing and original file, and general oversight of panel activities. Any information, books, records, or data which are confidential as provided for by law, received by such an organization pursuant to an agreement with the commission, shall be kept confidential by the organization, and any limitations on the further release thereof, imposed by law upon the party furnishing the information, books, records or data, shall apply to the organization.

(f) Each surrogate decision-making committee shall undertake its responsibilities through panels composed of four of its members. The chairman of each committee or his or her designee shall designate the chairman of the panel who shall serve at the pleasure of the committee chairman or his or her designee.

(g) A panel shall be convened as often as deemed necessary by the chairman of the committee or his or her designee to assure timely review of pending declarations; provided, however, that neither article six nor article seven of the public officers law shall apply to the

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conduct of such committee or panel. The proceedings of the panel may be conducted with only three persons. Provided, however, if a panel chairperson receives reasonable notice that a panel member will not be able to attend a panel hearing, such chairperson or his or her designee shall undertake efforts to identify another appropriate member of the committee to serve on such panel.

(h) No member who is a provider of health services or an officer or employee of any provider of health services to a patient whose case is under consideration by a panel may serve with respect to such patient.

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§ 80.07 Procedures of the committees and panels.

(a) The committee shall receive declarations filed on behalf of patients, as follows:

1. A declaration may be filed by a declarant on behalf of any patient, residing within the geographic area served by the committee, who is believed to be in need of major medical treatment and to lack the capacity to consent to or refuse major medical treatment. Jurisdiction by the surrogate decision-making committee may continue throughout all subsequent proceedings related to the major medical treatment proposed in the initial declaration notwithstanding the patient's transfer outside of the geographic region or discharge from the facility.

2. A declaration shall be signed by the declarant and shall state the following:

(i) the patient does not have a parent, spouse, adult child, committee of the person, conservator or legal guardian, or other available surrogate authorized by regulation in accordance with section 33.03 of this chapter; or that the patient's parent, spouse, adult child, committee of the person, conservator, legal guardian, or other available surrogate authorized by regulation in accordance with section 33.03 of this chapter is willing to allow the panel to act upon the declaration;

(ii) the reasons for believing that the patient lacks the capacity to consent to or refuse major medical treatment and the factual and professional basis for this belief, which may include an independent evaluation by a person qualified to assess the patient's capacity to make such medical decisions;

(iii) a description of the proposed major medical treatment and of the patient's medical condition which requires such treatment; the risks, alternatives and benefits to the patient of such treatment; a statement of declarant's opinion of whether the best interests of the patient would be promoted by such treatment and the basis for the opinion; the patient's view of the

proposed treatment, if known; and such other information as may be necessary to establish the need for such treatment.

(b) Upon receipt of the declaration, the committee shall send a copy of the declaration forthwith to the patient and to the patient's parent, spouse, adult child, or other available surrogate authorized by regulation in accordance with section 33.03 of this chapter, committee of the person, conservator, legal guardian or correspondent, if known, the director of the patient's residential mental hygiene facility, if any, or such director's designee and the mental hygiene legal service which serves the same region as the committee. The chairperson of the committee or his or her designee shall assign the declaration to one of its panels, whose members will also receive a copy of the declaration. The declaration shall be accompanied by a notice of the time, place and date of the panel hearing on the declaration. The hearing shall be scheduled no earlier than five days after such declaration is sent, except where medical circumstances require a more immediate hearing or where the consent of the patient's parent, spouse, adult child, committee of the person, conservator, legal guardian or correspondent, if known, the director of the patient's mental hygiene residential facility, if any, or such director's designee and the mental hygiene legal service has been obtained for conducting a more immediate hearing. The notice shall inform recipients of the procedures of the panels, including the opportunity for the recipient to be present and to be heard.

(c) The declaration shall, prior to the date of the panel hearing, be reviewed by the panel chairman or his designee 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 consenting to or refusing major medical treatment on the patient's behalf. The panel chairman or his designee may:

1. Request and shall, notwithstanding any other law to the contrary, be entitled to receive from any physician, mental hygiene facility or 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 for the proposed major medical treatment. Information, books, records or data which are confidential as provided for by law shall be kept confidential by the panel and any limitations on the further release thereof imposed by law upon the party furnishing the information, books, records or data shall apply to the panel.

2. Order an independent assessment of the patient, or of information concerning the patient, to be undertaken, including obtaining an independent opinion, where such independent assessment or opinion is determined by the panel chairman to be necessary.

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3. 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.

(d) The panel shall conduct a hearing, at which the patient, any other person requested by the patient to appear on his or her behalf, and the mental hygiene legal service have the right to be present and to be heard. Where practicable, the panel members shall personally interview and observe the patient prior to making their decision. 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. Such hearing shall be recorded and any information, record, assessment or consultation submitted to or considered by the panel shall be maintained as part of the record of the deliberations of the panel. Formal rules of evidence shall not apply to the proceedings of the panel.

(e) The panel shall make a determination, based on clear and convincing evidence, as to whether the patient is in need of surrogate decision-making; provided, however, that minor patients shall be deemed to lack such capacity, to the extent that minors generally are deemed to lack such capacity. 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. In such event, a record of such determination shall be made and the patient's consent to such treatment, if given, shall constitute legally valid consent.

(f) For any patient determined to be in need of surrogate decision-making, the panel shall make a further determination as to whether the proposed major medical treatment is or is not in the best interests of the patient based on a fair preponderance of the evidence; provided, however, that evidence of a previously articulated preference by the patient concerning the proposed treatment shall be given full consideration by the panel. The panel shall provide a record of its determination which consents to or refuses major medical treatment on the patient’s behalf, which shall reflect the opinion of at least three of the panel members. If the panel determination consents to such treatment, such consent shall constitute legally valid consent to such treatment in the same manner and to the same extent as if the patient were able to consent to or refuse such treatment on his or her own behalf.

(g) If at any time during the pendency of a proceeding, a parent, spouse or adult child, or other available surrogate authorized by regulation in accordance with section 33.03 of this chapter objects to the panel acting upon the declaration or a committee of the person, conservator or legal guardian 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. A record of such person's objection shall be included as part of the record as provided for by this section.

(h) A copy of any determination made pursuant to this section shall contain a statement describing the right to appeal set forth herein and shall promptly be sent or provided to the patient; other persons requested by the patient to appear on his or her behalf; declarant; parent, spouse, adult child, legal guardian, committee of the person, or other available surrogate authorized by regulation in accordance with section 33.03 of this chapter or, in the absence of such persons, known correspondents of the patient; the director of the patient's mental hygiene residential facility, if any; and the mental hygiene legal service. Where practicable, the panel shall reach its determination or determinations at the time of the hearing and provide notice to the above persons forthwith. The terms of such determinations and the giving of such notice shall be made a part of the record. The decision shall state when the consent shall become effective after such determination has been provided or mailed to the parties specified in this section. The panel may delay the effective date of its decision for up to five days in order to enable an objecting party to exercise the right of appeal, pursuant to section 80.09 of this article.

§ 80.09 Right of appeal; temporary restraining order.

The patient, declarant, a parent, spouse, adult child, conservator, legal guardian, committee of the person, or other available surrogate authorized by regulation in accordance with section 33.03 of this chapter or correspondent of the patient, the mental hygiene legal service, or the director of the patient's residential facility may apply to the supreme court for review, pursuant to article seventy-eight of the civil practice law and rules, 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 rule thirty-four hundred three of the civil practice law and rules. 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.

§ 80.11 Effect of determination that a person is in need of surrogate decision-making.

The determination by a panel that a patient is in need of surrogate decision-making under this article shall not be construed or deemed to be a determination that such person is impaired or incompetent pursuant to article seventy-seven or seventy-eight of this chapter, nor shall it be valid for any other purpose or any other future medical treatment, unless the determination explicitly applies to related or continuing treatment necessitated by the original treatment. Nothing in this article shall be construed to limit the availability of other lawful means to obtain substitute consent for medical treatment, without utilizing the procedures set forth in this article. No person shall be deemed to have failed to exhaust administrative remedies by

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commencing a legal action to obtain consent to or refusal of medical treatment in the absence of or prior to a review of the case by a surrogate decision-making committee or panel.

§ 80.13 Committee reports.

The chairman of each committee shall provide a quarterly report on the activities of the committee and its panels to the commission on quality of care for the mentally disabled. Such report shall provide all information in the manner and form requested by the commission.

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SURROGATE'S COURT PROCEDURE ACT, Article 17-A

Section 1750-b Health care decisions for intellectually disabled persons

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§ 1750-b. Health care decisions for intellectually disabled persons

1. Scope of authority. Unless specifically prohibited by the court after consideration of the determination, if any, regarding an intellectually disabled person's capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law, on behalf of the intellectually disabled person that such person could make if such person had capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment. For purposes of this section, "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 without which, according to reasonable medical judgment, the patient will die within a relatively short time period.

Cardiopulmonary resuscitation is presumed to be life-sustaining treatment without the necessity of a medical judgment by an attending physician. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the intellectually disabled person could not consent if such person had capacity.

(a) For the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to this section, in the case of a person for whom no guardian has been appointed pursuant to section seventeen hundred fifty or seventeen hundred fifty-a of this article, a "guardian" shall also mean a family member of a person who

(i) has an intellectual disability, or

(ii) has a developmental disability, as defined in section 1.03 of the mental hygiene law, which (A) includes intellectual disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability. Qualified family members shall be included in a prioritized list of said family members pursuant to regulations established by the commissioner of mental retardation and developmental disabilities. Such family members must have a significant and ongoing involvement in a person's life so as to have sufficient

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knowledge of their needs and, when reasonably known or ascertainable, the person's wishes, including moral and religious beliefs. In the case of a person who was a resident of the former Willowbrook state school on March seventeenth, nineteen hundred seventy-two and those individuals who were in community care status on that date and subsequently returned to Willowbrook or a related facility, who are fully represented by the consumer advisory board and who have no guardians appointed pursuant to this article or have no qualified family members to make such a decision, then a "guardian" shall also mean the Willowbrook consumer advisory board. A decision of such family member or the Willowbrook consumer advisory board to withhold or withdraw life-sustaining treatment shall be subject to all of the protections, procedures and safeguards which apply to the decision of a guardian to withhold or withdraw life-sustaining treatment pursuant to this section. In the case of a person for whom no guardian has been appointed pursuant to this article or for whom there is no qualified family member or the Willowbrook consumer advisory board available to make such a decision, a "guardian" shall also mean, notwithstanding the definitions in section 80.03 of the mental hygiene law, a surrogate decision-making committee, as defined in article eighty of the mental hygiene law. All declarations and procedures, including expedited procedures, to comply with this section shall be established by regulations promulgated by the commission on quality of care and advocacy for persons with disabilities.

(b) Regulations establishing the prioritized list of qualified family members required by paragraph (a) of this subdivision shall be developed by the commissioner of mental retardation and developmental disabilities in conjunction with parents, advocates and family members of persons who are mentally retarded. Regulations to implement the authority of the Willowbrook consumer advisory board pursuant to paragraph (a) of this subdivision may be promulgated by the commissioner of the office of mental retardation and developmental disabilities with advice from the Willowbrook consumer advisory board.

(c) Notwithstanding any provision of law to the contrary, the formal determinations required pursuant to section seventeen hundred fifty of this article shall only apply to guardians appointed pursuant to section seventeen hundred fifty or seventeen hundred fifty-a of this article.

2. Decision-making standard.

(a) The guardian shall base all advocacy and health care decision-making solely and exclusively on the best interests of the intellectually disabled person and, when reasonably known or ascertainable with reasonable diligence, on the intellectually disabled person's wishes, including moral and religious beliefs.

(b) An assessment of the intellectually disabled person's best interests shall include consideration of:

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(i) the dignity and uniqueness of every person;

(ii) the preservation, improvement or restoration of the intellectually disabled person's health;

(iii) the relief of the intellectually disabled person's suffering by means of palliative care and pain management;

(iv) the unique nature of artificially provided nutrition or hydration, and the effect it may have on the intellectually disabled person; and

(v) the entire medical condition of the person.

(c) No health care decision shall be influenced in any way by:

(i) a presumption that persons with mental retardation are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without intellectual disabilities or developmental disabilities; or

(ii) financial considerations of the guardian, as such considerations affect the guardian, a health care provider or any other party.

3. Right to receive information. Subject to the provisions of sections 33.13 and 33.16 of the mental hygiene law, the guardian shall have the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the intellectually disabled person's health care.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from a intellectually disabled person:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a reasonable degree of medical certainty that the intellectually disabled person lacks capacity to make health care decisions. The determination thereof shall be included in the intellectually disabled person's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the intellectually disabled person's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a licensed psychologist, to further confirm the intellectually disabled person's lack of capacity. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or (ii) have been employed for a minimum of

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two years to render care and service in a facility or program operated, licensed or authorized by the office of mental retardation and developmental disabilities, or (iii) have been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years' experience in treating intellectual disabilities. A record of such consultation shall be included in the intellectually disabled person's medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the intellectually disabled person's chart that:

(i) the intellectually disabled person has a medical condition as follows:

A. a terminal condition, as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law; or

B. permanent unconsciousness; or

C. a medical condition other than such person's intellectual disability which requires life-sustaining treatment, is irreversible and which will continue indefinitely; *and*

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's intellectual disability; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's intellectual disability; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment *either:*

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and

presented to the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(ii) orally, to two persons eighteen years of age or older, at least

one of whom is the intellectually disabled person's attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the intellectually disabled person's medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the mentally retarded person, and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the intellectually disabled person, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office of Persons with developmental disabilities, or

C. have been approved by the commissioner of OPWDD in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years' experience in treating mental retardation. A record of such consultation shall be included in the intellectually disabled person's medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office of Persons with Developmental Disabilities, the chief executive officer

of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of OPWDD, or his or her designee.

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5. Objection to health care decision.

(a) Suspension. A health care decision made pursuant to subdivision four of this section shall be suspended, pending judicial review, except if the suspension would in reasonable medical judgment be likely to result in the death of the intellectually disabled person, in the event of an objection to that decision at any time by:

(i) the intellectually disabled person on whose behalf such decision was made; or

(ii) a parent or adult sibling who either resides with or has maintained substantial and continuous contact with the intellectually disabled person; or

(iii) the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(iv) any other health care practitioner providing services to the intellectually disabled person, who is licensed pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-six, one hundred thirty-nine, one hundred forty-one, one hundred forty-three, one hundred forty-four, one hundred fifty-three, one hundred fifty-four, one hundred fifty-six, one hundred fifty-nine or one hundred sixty-four of the education law; or

(v) the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section; or

(vi) if the person is in or was transferred from a residential facility or program operated, approved or licensed by the Office of Persons with Developmental Disabilities (OPWDD), the mental hygiene legal service; or

(vii) if the person is not in and was not transferred from such a facility or program, the commissioner of the Office of Persons with Developmental Disabilities (OPWDD), or his or her designee.

(b) Form of objection. Such objection shall occur orally or in writing.

(c) Notification. In the event of the suspension of a health care decision pursuant to this subdivision, the objecting party shall promptly notify the guardian and the other parties identified in paragraph (a) of this subdivision, and the attending physician shall record such suspension in the intellectually disabled person's medical chart.

(d) Dispute mediation. In the event of an objection pursuant to this subdivision, at the request of the objecting party or person or entity authorized to act as a guardian under this section, except a surrogate decision making committee established pursuant to article eighty of the mental hygiene law, such shall be referred to a dispute mediation system, established pursuant to section two thousand nine hundred seventy-two of the public health law or similar entity for mediating disputes in a hospice, such as a patient's advocate's office, hospital chaplain's office or ethics

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committee, as described in writing and adopted by the governing authority of such hospice, for non-binding mediation. In the event that such dispute cannot be resolved within seventy-two hours or no such mediation entity exists or is reasonably available for mediation of a dispute, the objection shall proceed to judicial review pursuant to this subdivision. The party requesting mediation shall provide notification to those parties entitled to notice pursuant to paragraph (a) of this subdivision.

6. Special proceeding authorized. The guardian, the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section, the mental hygiene legal service *(if the person is in or was transferred from a residential facility or program operated, approved or licensed by the Office for People with Developmental Disabilities)* or the commissioner OPWDD or his or her designee (if the person is not in and was not transferred from such a facility or program) may commence a special proceeding in a court of competent jurisdiction with respect to any dispute arising under this section, including objecting to the withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section.

7. Provider's obligations.

(a) A health care provider shall comply with the health care decisions made by a guardian in good faith pursuant to this section, to the same extent as if such decisions had been made by the intellectually disabled person, if such person had capacity.

(b) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require a private hospital to honor a guardian's health care decision that the hospital would not honor if the decision had been made by the intellectually disabled person, if such person had capacity, because the decision is contrary to a formally adopted written policy of the hospital expressly based on religious beliefs or sincerely held moral convictions central to the hospital's operating principles, and the hospital would be permitted by law to refuse to honor the decision if made by such person, provided:

(i) the hospital has informed the guardian of such policy prior to or upon admission, if reasonably possible; and

(ii) the intellectually disabled person is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the guardian's decision. If the guardian is unable or unwilling to arrange such a transfer, the hospital’s refusal to honor the decision of the guardian shall constitute an objection pursuant to subdivision five of this section.

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(c) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require an individual health care provider to honor a guardian's health care decision that the individual would not honor if the decision had been made by the intellectually disabled person, if such person had capacity, because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the guardian and the facility, if any, of his or her refusal to honor the guardian's decision. In such event, the facility shall promptly transfer responsibility for the intellectually disabled person to another individual health care provider willing to honor the guardian's decision. The individual's health care provider shall cooperate in facilitating such transfer of the patient. (d) Notwithstanding the provisions of any other paragraph of this subdivision, if a guardian directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the intellectually disabled person, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the guardian's decision pending either transfer of the intellectually disabled person to a willing hospital or individual health care provider, or judicial review.

(e) Nothing in this section shall affect or diminish the authority of a surrogate decision-making panel to render decisions regarding major medical treatment pursuant to article eighty of the mental hygiene law.

8. Immunity.

(a) Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith a health care decision by a guardian, or for other actions taken reasonably and in good faith pursuant to this section.

(b) Guardian immunity. No guardian shall be subjected to criminal or civil liability for making a health care decision reasonably and in good faith pursuant to this section.

Section: Previous Article 17-A 1750 1750A 1750B 1751 1752 1753 1754 1755 1756 1757 1758 1759 1760 1761

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Public Officers Law Chapter 47 of the Consolidated Laws
Article 4. Powers and Duties of Public Officers

§ 74. Code of ethics

1. Definition. As used in this section: The term "state agency" shall mean any state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor.

The term "legislative employee" shall mean any officer or employee of the legislature but it shall not include members of the legislature.

2. Rule with respect to conflicts of interest. No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

3. Standards.

a. No officer or employee of a state agency, member of the legislature or legislative employee should accept other employment which will impair his independence of judgment in the exercise of his official duties.

b. No officer or employee of a state agency, member of the legislature or legislative employee should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

c. No officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

e. No officer or employee of a state agency, member of the legislature or legislative employee should engage in any transaction as representative or agent of the state with any business entity in which he

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has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

g. An officer or employee of a state agency should abstain from making personal investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create substantial conflict between his duty in the public interest and his private interest.

h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

i. No officer or employee of a state agency employed on a full-time basis nor any firm or association of which such an officer or employee is a member nor corporation a substantial portion of the stock of which is owned or controlled directly or indirectly by such officer or employee, should sell goods or services to any person, firm, corporation or association which is licensed or whose rates are fixed by the state agency in which such officer or employee serves or is employed.

j. *[Repealed]*

4. Violations. In addition to any penalty contained in any other provision of law any such officer, member or employee who shall knowingly and intentionally violate any of the provisions of this section may be fined, suspended or removed from office or employment in the manner provided by law.

CREDIT(S)

(Added L.1954, c. 696; amended L.1964, c. 941, § 6; L.1965, c. 1012, § 4; L.1983, c. 764, § 2.)

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14 NYCRR DEPARTMENT OF MENTAL HYGIENE

CHAPTER XX. JUSTICE CENTER FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS

PART 710. PROCEDURES OF THE SURROGATE DECISION-MAKING COMMITTEES OF THE NEW YORK STATE JUSTICE CENTER FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS

(Statutory authority: Mental Hygiene Law, § 45.0(j); L. 1985, ch. 354; L.2008, ch. 262)

Section 710.1. Background and intent.

(a) Article 80 of the Mental Hygiene Law (MHL) requires the Justice Center to administer a program to provide a quasi-judicial procedure to consent or to refuse the provision of nonemergency major medical treatment on behalf of persons with mental disabilities:

(1) living or formerly residing in residential mental hygiene programs operated, licensed or funded by the Office of Alcoholism and Substance Abuse Services (OASAS), the Office of Mental Health (OMH), or the Office for People with Developmental Disabilities (OPWDD); or

(2) living or formerly residing in housing programs whose Federal funding application was approved by OASAS, OMH, or OPWDD; or

(3) receiving or who have received home and community-based services for persons with mental disabilities pursuant to section 1915 of the Federal Social Security Act; or

(4) receiving or who have received individual support services, service coordination, or case management funded, approved, or provided by OPWDD.

The surrogate decision-making committees established by law, whose members are selected by the Justice Center, will act upon requests made on behalf of such individuals who are not capable of providing informed consent for themselves and who do not have a parent, spouse, adult child, or other authorized surrogate willing and available to do so, or when such individuals are willing to allow the committee to proceed. Each surrogate decision-making committee will consist of at least 12 persons in the regions designated by the Justice Center. If a patient has an available parent, spouse, adult child, or an available surrogate legally authorized and willing to provide the major medical treatment decision, the committee will not act on the case. This program is intended to serve as an alternative means to the court system for obtaining medical consents and will not

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one of whom is the intellectually disabled person's attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the intellectually disabled person's medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the mentally retarded person, and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the intellectually disabled person, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office of Persons with developmental disabilities, or

C. have been approved by the commissioner of OPWDD in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years' experience in treating mental retardation. A record of such consultation shall be included in the intellectually disabled person's medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office of Persons with Developmental Disabilities, the chief executive officer

of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of OPWDD, or his or her designee.

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prevent applications to a court to obtain consent for major medical treatment in the absence of or prior to a review of the case by a surrogate decision-making committee or panel. Geographic areas designated by the Justice Center for the purposes of the program are the region consisting of New York, Kings, Queens, Richmond, Bronx, Orange, Sullivan, Nassau, Suffolk, Westchester and Rockland Counties and the region consisting of Albany, Schenectady, Rensselaer, Schoharie, Columbia, Greene, Dutchess, Ulster, Putnam, Warren, Washington, Fulton, Montgomery, Saratoga, Clinton, Essex, Franklin, Hamilton, Jefferson, St. Lawrence, Broome, Chenango, Delaware, Otsego, Tioga, Tompkins, Cayuga, Cortland, Herkimer, Lewis, Madison, Oneida, Onondaga, Oswego, Monroe, Wayne, Ontario, Yates, Livingston, Wyoming, Seneca, Schuyler, Chemung, Steuben, Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Westchester and Rockland Counties. For administrative purposes, Westchester and Rockland Counties shall be treated as part of both geographic areas.

(b) Under current law, no nonemergency major medical treatment can be rendered to any person without his or her informed consent. This means that the patient has to demonstrate the intellect to understand what is being proposed, to realize and assess the risks and benefits, and to voluntarily consent to or refuse the proposed major medical treatment. For persons who are not capable of providing informed consent, certain surrogates such as close relatives (usually a parent, spouse or adult child), health care agent, or judicially appointed guardians have been recognized by law to have the authority to consent or refuse on behalf of the patient; or such decisions could be made by a court of competent jurisdiction upon application. The surrogate decision-making program added another means for obtaining informed consent on behalf of such persons who do not have other willing, authorized, and available surrogates or, whose surrogates are willing to allow a surrogate decision-making committee to provide substitute consent.

(c) Any major medical treatment involving bodily intrusion, a significant risk, or general anesthetic is included under the jurisdiction of these committees. The following medical procedures are excluded by law from the jurisdiction of the committees: routine diagnosis or treatment including the administration of medications other than chemotherapy for nonpsychiatric conditions, or the extraction of bodily fluids for analysis; emergency treatment pursuant to section 2504 of the Public Health Law; dental care performed with a local anesthetic; electroconvulsive therapy; the withdrawal or discontinuance of medical treatment which is sustaining life functions, except as provided in these regulations, Part 710, and section 1750-b of article 17-A of the Surrogate's Court Procedure Act (SCPA); sterilization; and termination of a pregnancy.

(d) Section 1750-b of article 17-A of the SCPA requires the Justice Center to establish procedures for the committees to review declarations regarding a proposed decision to withhold or withdraw life sustaining treatment for a person with mental retardation or developmental disabilities for

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whom no guardian has been appointed pursuant to article 17-A of the SCPA and for whom there is no qualified family member available to make such a decision.

Section 710.2. 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 personal well-being by the assessment of the risks, benefits and alternatives to the patient of a proposed major medical treatment decision, taking into account factors including the relief of suffering, the preservation of restoration of functioning, improvement in the quality of the patient's life with and without the proposed major medical treatment, if any, and consistency with the personal beliefs and values known to be held by the patient. In addition, for the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to section 1750-b of the SCPA, best interest shall include a consideration of:

(1) the dignity and uniqueness of every person;

(2) relief of suffering by means of palliative care and management;

(3) the unique nature of artificially provided nutrition or hydration, and the effect it may have on the patient; and

(4) the entire medical condition of the person.

(c) 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.

(d) Committee means a surrogate decision-making committee consisting of at least 12 persons appointed by the Justice Center to serve an area designated by the Justice Center pursuant to section 80.05 of the MHL.

(e) Committee chairperson means the person designated by and serving at the pleasure of the Justice Center as the chairperson of a committee.

(f) Committee of the person means an individual who was appointed by the courts pursuant to article 78 of the MHL, now repealed.

(g) Conflict of interest means a standard which precludes the participation of a panel member in the proceedings with regard to a patient whenever the panel member:

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(1) is a relative of the patient;

(2) serves as board member, officer, employee, or otherwise is affiliated with the facility where the patient resides or receives services, provided, however, 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 that the board of visitors member is assigned to absent any close affiliation or affinity;

(3) provides health services or is an officer, board member or employee of any provider of health services to the patient provided, however, 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) engages in any business or is 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.

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.

(h) Conservator means an individual who was appointed by the courts pursuant to article 77 of the MHL, now repealed.

(i) Correspondent means a person who has demonstrated a genuine interest in promoting the best interest 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, by serving as an advocate as defined in OPWDD regulations section 635.99 of this Title, or by regularly communicating with the patient.

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

(k) Developmental disability means a disability which includes mental retardation or results in a similar impairment of general intellectual functioning or adaptive behavior so that the person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability and, as defined in section 1.03 of the MHL:

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(1) (i) is attributable to mental retardation, cerebral palsy, epilepsy, neurological impairment, familial dysautonomia or autism; or

(ii) is attributable to any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such person; or

(iii) is attributable to dyslexia resulting from a disability described in paragraph (1) or (2) of this subdivision; and

(2) originates before such person attains age 22;

(3) has continued or can be expected to continue indefinitely; and

(4) constitutes a substantial handicap to such person's ability to function normally in society.

(l) Lack of ability to consent to or refuse major medical treatment means the patient is unable to adequately understand and appreciate the nature and consequences of a proposed major medical treatment decision, including the benefits and risks of the proposed major medical treatment and of alternatives to such treatment, and cannot thereby reach an informed decision to consent or refuse such treatment in a knowing and voluntary manner that promotes the patient's well-being.

(m) 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 mental retardation or developmental disabilities pursuant to article 17-A of the SCPA or a guardian authorized to decide about health care pursuant to article 81 of the MHL.

(n) Life-sustaining treatment means medical treatment which is sustaining life functions and without which, according to responsible medical judgment, the patient will die within a relatively short period.

(o) Major medical treatment means a medical, surgical or diagnostic intervention or procedure for which a general anesthetic is used or which involves any significant risk, hospice admission pursuant to article 40 of the Public Health Law or a human immunodeficiency virus (HIV) related test, or any significant invasion of bodily integrity requiring an incision or producing substantial pain, discomfort, debilitation or which has a significant recovery period or any professional diagnosis or treatment to which informed consent is required by law. Major medical treatment does not include:

(1) routine diagnosis or treatment such as the administration of medications other than chemotherapy for nonpsychiatric conditions or nutrition or the extraction of bodily fluids for analysis;

(2) electroconvulsive therapy;

(3) dental care performed with a local anesthetic;

(4) any procedures which are provided under emergency circumstances pursuant to section 2504 of the Public Health Law;

(5) discontinuance of medical treatment which is sustaining life functions, except as provided in these regulations, Part 710, and pursuant to SCPA section 1750-b;

(6) sterilization; or

(7) termination of a pregnancy.

(p) Mental hygiene facility means a facility as defined in section 1.03(6) of the MHL which is operated, licensed, funded, or whose Federal funding was approved by OASAS, OMH, or OPWDD and which provides services to persons with mental disabilities or service coordination to persons with mental retardation or developmental disabilities. Mental hygiene facilities shall include State psychiatric centers, State developmental centers, community based intermediate care facilities, community residences, family care homes, residential treatment facilities, psychiatric hospitals, psychiatric units of general hospitals, private schools for persons with mental retardation, home and community based waiver providers, individualized residential alternatives providers, housing programs whose Federal funding application was approved by, OASAS, OMH, or OPWDD and such facilities or programs which maintain legal admission status for an individual. For the purposes of this Part, the term facility is also considered to include service coordination, non-site based home and community based waiver providers, and individualized support services providers operated, certified, or funded by OPWDD.

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

(r) Minor means a person who has not attained the age of 18 years.

(s) Panel means a subcommittee of four members of the committee which shall include members from each of the following groups, however, nothing in this subdivision shall preclude the panel from operating with less than four members in accordance with section 710.4(a)(6) of this Part:

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

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(2) parents, spouses, adult children, siblings or advocates of persons with mental 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 mental disabilities.

(t) Panel chairperson means the person designated by the committee chairperson or his or her designee and serving at the pleasure of the committee chairperson or his or her designee.

(u) Patient means a resident of a mental hygiene facility but does not include a minor with a parent unless the parent's parental rights have been legally terminated or the parent has signed Justice Center form no. 260 indicating his or her willingness to allow the panel to proceed, or persons with legal guardians, committees or conservators who are legally authorized, available, and willing to make health care decisions. Patient also means a person receiving home and community-based services for persons with mental disabilities pursuant to section 1915 of the Federal Social Security Act; or receiving individualized services; or case management or service coordination funded, approved or provided by OPWDD; or any person previously eligible for surrogate decision-making pursuant to article 80 of the MHL.

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

Section 710.3. Preparation and filing the declaration.

(a) Except as noted herein, a declarant may file the declaration on behalf of any patient residing within the geographic area served by the Justice Center, who is believed to be in need of a major medical treatment decision/s, to lack the capacity to consent to or refuse major medical treatment, and to have no available and willing parent, spouse, adult child, health care agent, or other willing and available surrogate authorized by regulation in accordance with section 33.03 of MHL, legal guardian, committee of the person, or conservator who is legally authorized to provide consent. Jurisdiction by the surrogate decision-making committee program may continue throughout all subsequent declarations and proceedings notwithstanding the patient's transfer outside of the geographic region or discharge from the facility or discontinuation of services.

(b) The declaration must be made in writing, upon Surrogate Decision Making Committee (SDMC) form no. 200 or form 300, and include the following:

(1) a statement that the patient does not have a parent, spouse, adult child, committee of the person, conservator, or legal guardian of the person or other surrogate who is legally authorized, available and willing to make the major medical treatment decision. The declaration shall provide the factual basis for such a statement, including the efforts made to contact such persons;

(2) the reasons for believing that the person lacks the capacity to make the major medical treatment decision and the factual basis supported by an appropriate statement by a professional for this belief. The declaration shall be accompanied by a statement, completed and signed by a psychiatrist or psychologist duly licensed by the State of New York, providing the factual basis and professional opinion that such person lacks the capacity to make the major medical treatment decision on SDMC form no. 210 or form 310. **A copy of any pertinent evaluation or data and any evaluation of the patient shall also be attached to the declaration**.

(i) Form 310 for declarations regarding the withdrawal or withholding of life- sustaining treatment for a person with mental retardation or developmental disabilities shall include:

(a) an attending physician statement that to a reasonable degree of medical certainty the person lacks capacity to make heath care decisions; and

(b) the attending physician's opinion as to the cause and nature of the incapacity and its extent and probable duration.

(ii) Form 310 for declarations regarding the withdrawal or withholding of life-sustaining treatment for a person with mental retardation or developmental disabilities shall include a statement that the attending physician or consulting physician or licensed psychologist:

(a) is employed by a developmental disabilities services office (DDSO) named in section 13.17 of the MHL; or

(b) 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; or

(c) has been approved by the commissioner of OPWDD in accordance with section 633.10(a)(7)(i) of this Title.

(3) 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;

(4) the patient's opinion regarding the proposed treatment decision, if known, and if not known, the reasons for the patient's opinion being unknown;

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(5) any other information that may be necessary to determine the need for such treatment decision, including a copy of a second medical or dental opinion which would be required by a prudent physician, podiatrist or dentist based on the nature of the proposed major medical treatment decision; and

(6) a statement completed, signed and dated by a physician, podiatrist or dentist on SDMC form no. 220-A for declarations for major medical decisions or completed, signed and dated by two physicians, including the attending physician, on form no. 320-A and 320-B for declarations regarding the withdrawal or withholding of life-sustaining treatment for persons with mental retardation or developmental disabilities, including:

(i) 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;

(ii) the risks and benefits to the patient of the proposed treatment decision and any alternative treatments including consideration of nontreatment; for proposed treatment decisions to withhold or withdraw life sustaining treatment the risks and benefits of withholding or withdrawing life sustaining treatment will consider the extraordinary burdens to the patient of providing life sustaining treatment in light of the person's:

(a) medical condition, other than such person's mental retardation or developmental disabilities; and

(b) the expected outcome of providing life sustaining treatment notwithstanding the person's mental retardation and developmental disabilities and whether there are any alternative treatments available to the patient that would preserve, improve the health or provide for restoration of functioning; and

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

(iii) 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 including a description of such condition; and

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

(v) Forms 320-A and 320-B will include a statement that to a reasonable degree of medical certainty the patient has a medical condition that is:

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(a) 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; or

(b) Permanent unconsciousness; or

(c) a medical condition other than mental retardation or developmental disability which requires life-sustaining treatment, is irreversible and which will continue indefinitely;

(7) a statement completed, signed and dated by someone in charge of, or familiar with the patient's chart on SDMC form no. 220-B for declarations for major medical decisions or on form 330 for declarations regarding the withdrawal or withholding of life-sustaining treatment for persons with mental retardation or developmental disabilities, including: providing supplemental medical information including:

(i) 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;

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

(iii) a statement of any known primary or secondary physical conditions;

(8) 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 Public Health Law, section 2782(1)(a).

(c) 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, except for any portion signed and dated by another person who shall make a similar statement as to that portion.

(d) The declaration shall be filed with the committee by delivering it to the Surrogate Decision-Making Committee, c/o Justice Center for the Protection of People with Special Needs at: 161 Delaware Avenue, Delmar, NY 12054-1310, or at any office designated by the Justice Center for the receipt of such declarations.

(e) Assistance in the preparation of the declaration may be obtained by contacting the Justice Center at the above address or by telephoning (518) 549- 3028. Collect telephone calls will be accepted by the Justice Center.

Section 710.4. Procedures of the committee and panel in the review of the declaration and determination.

(a) The procedures of the committee are as follows:

(1) Upon receipt of the declaration, the surrogate decision-making committee program staff shall cause a copy of the declaration to be sent forthwith to the following persons as set forth in the declaration: the patient, the patient's parent, spouse, adult child, committee of the person, conservator, legal guardian, other authorized surrogate, or correspondent, if known; the director of the patient's residential facility or such director's designee; and the mental hygiene legal service which serves the same region as the committee. 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 SDMC form 240 which shall give notice of the confidential nature of the information and the penalties for unauthorized disclosure as provided for by Public Health Law, article 27-F. The declaration shall be sent by one of the following means:

(i) Certified mail, return receipt requested; or

(ii) by any other means wherein an admission of receipt is obtained in writing; or

(iii) by any other means wherein consent to receipt of the declaration by such means was obtained and the individual obtaining such consent documents the date and time of the consent, means of transmission or delivery and the consenting individual in the panel's record of the proceedings; or

(iv) Special mail service by express mail or use of any special delivery service wherein a receipt or record of deposit is prepared and maintained as part of the record; or

(v) First class mail when a record of deposit is prepared and maintained as part of the record.

(2) Copies of the declaration caused to be sent by the committee shall be accompanied along with SDMC form no. 250 or form no. 350, which shall give notice of the time, place and date of the panel hearing on the declaration. The notice 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, other authorized surrogate, committee of the person, conservator or guardian of the person who does not respond to the notice and declaration or who submits a signed waiver for the proceeding on SDMC form no. 260 shall be deemed to be willing to allow the panel to proceed; provided, however, that the declaration regarding a minor must indicate whether the parents are deceased or have had their parental rights terminated. Surviving parents of minors who have not had their parental rights terminated must submit a copy of SDMC

form no. 260 to indicate their willingness to allow the panel to consider the declaration. If, at any time during the pendency of a proceeding a parent, spouse, adult child, other authorized surrogate, committee of the person, conservator or legal guardian who is legally authorized to make such treatment decision on the patient's behalf objects to the panel acting upon the declaration, the panel proceedings regarding such patient shall cease. A record of any such person's objection shall be included as part of the record as provided for by these procedures.

(4) The hearing shall be scheduled no earlier than five days after the date the declaration is sent by the surrogate decision-making committee program staff to the requisite people, except where medical or dental circumstances require a more immediate hearing, or where the consent of the patient's parent, spouse, adult child, other authorized surrogate, committee of the person, conservator, guardian of the person or correspondent, if known, the director or his or her designee of the patient's residential facility and MHLS has been obtained for conducting a more immediate hearing.

(5) The committee chairperson, or his or her designee, shall assign the declaration to one of the committee's panels and shall cause a copy of the declaration and any supporting documents to be sent to the members of the designated panel.

(6) The proceedings of the panel may be conducted with only three persons. Provided, however, if a panel chairperson or his or her designee receives reasonable notice that a panel member will not be able to attend a panel hearing, such chairperson or his or her designee shall undertake efforts to identify another appropriate member of the committee to serve on such panel.

(i) Reasonable notice as it is used in this subdivision means at least 48 hours prior to the hearing.

(ii) Undertake efforts means that the chairperson or his or her designee shall take reasonable steps as determined by the circumstances to secure an appropriate replacement panel member.

(7) The chairperson of the committee may assign any case for reconsideration of the declaration for surrogate decision-making upon becoming aware of new information or changed circumstances.

(b) The procedures of the panel are as follows:

(1) Prior to the date of the hearing, the declaration shall be preliminarily reviewed 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 decision on the patient's behalf. The panel chairperson or his or her designee may:

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(i) request and shall, notwithstanding any other law to the contrary, be entitled to receive from any physician, mental hygiene facility or 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 for the proposed major medical treatment decision. Such information may include, among other things: facts regarding the patient's parent, spouse, adult child, committee, conservator or legal guardian, or other authorized surrogates; facts and professional opinions regarding the patient's inability to make a major medical treatment decision; and facts and professional opinions regarding whether the proposed major medical treatment decision is in the patient's best interests;

(ii) Order an independent assessment of the patient, or of information concerning the patient, to be undertaken, including obtaining an independent opinion, where such independent assessment or opinion is determined by the panel chairperson or his or her designee to be necessary; or

(iii) 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.

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

(1) The hearing shall be conducted by the panel. Recipients of the declaration including the patient and MHLS 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; provided, however, the panel chairperson may limit to three persons those individuals requested by the patient to appear on his or her behalf.

(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 for a person with mental retardation or developmental disabilities. 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 for a person with mental retardation or developmental disabilities, the panel members shall either personally observe and interview the patient or the panel chairperson shall designate a 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. It shall also be empowered to conduct its proceeding via telephone conference calls in appropriate cases, including but not limited to cases in which:

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(i) a conference call proceeding will enable the receipt and consideration on a timely basis additional information concerning an 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;

(ii) the panel determination, made following a hearing, 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;

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

(iv) The conference call proceeding will provide information concerning any changed circumstances, new conditions or information; or

(v) 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.

Confidential information regarding AIDS, HIV infection or related virus or illness may be disclosed as determined by the panel during the proceeding of the panel if relevant to the capacity or need for major medical treatment determinations; provided, however, that participants shall be provided with SDMC form 240.

(4) 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 or consultation submitted to or considered by the panel.

(5) The Justice Center and each member of the committee shall maintain the confidentiality of records as required by sections 33.13 and 80.07(c)(1) of the Mental Hygiene Law, article 27-F of the Public Health Law and section 558 of the Executive Law.

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

(7) If at any time during the pendency of a proceeding, a parent, spouse, adult child, a committee of the person, conservator or guardian of the person, 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. A record of any such person's objection shall be included as part of the record as provided for by this section.

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(8) A declaration may be amended upon agreement of the declarant or declarant designee and the licensed physician, podiatrist or dentist who completed the form 220-A or a consulting physician. Form 300 regarding the withdrawal or withholding of life-sustaining treatment for persons with mental retardation or developmental disabilities may be amended upon agreement of the declarant or declarant designee, the attending physician, and the doctor who completed the form 320-B or a consulting physician.

(9) In the event that a panel refuses to consent to a major medical treatment that may be considered life-sustaining, any party may resubmit to the committee with additional certifications or information for review of the decision pursuant to section 1750-b of the SCPA and these regulations.

(10) In the event that a panel refuses to consent to withholding or withdrawal of major medical treatment any party may resubmit to the committee for consideration as a declaration for non-emergency surrogate decision-making for major medical treatment.

(11) The panel decision shall state when the consent or refusal, if any, shall become effective after such determination and shall be provided or mailed to the persons specified in paragraph (12) of this subdivision. The panel may delay the effective date of its decision for up to five days in order to enable an objecting party to exercise the right of appeal. For all determinations regarding a health care decision to withhold or withdraw life-sustaining treatment, the panel shall not delay the effective date of its decision.

(12) A copy of any panel determination shall contain a statement describing the right to appeal and shall promptly be sent by certified mail, return receipt requested, or otherwise provided by any other means that will provide more timely and/or reliable notice to the: patient; other persons requested by the patient to appear on his or her behalf; declarant; parent, spouse, adult child, legal guardian, committee of the person or conservator, other known authorized surrogates, or, in the absence of such persons to known correspondents of the patient; the director of the patient's residential facility, or service coordination provider operated, certified or funded by OPWDD; and MHLS.

(13) 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 decision and shall not be construed or deemed valid for any other purpose or for any other future major medical treatment decision unless the determination explicitly applies to related or continuing treatment necessitated by the original treatment. No panel determination shall be valid after two months from its effective date unless the determination explicitly states otherwise.

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(14) 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 person is impaired or incompetent or incapacitated pursuant to article 81 of the Mental Hygiene Law.

(15) All information, records, assessments or consultations 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.

(16) 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 committee or panel.

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

(1) The panel shall decide based upon clear and convincing evidence whether the patient is in need of surrogate decision-making by determining that the patient: (i) lacks the ability to make the proposed major medical treatment decision; and (ii) does not have a parent, spouse, adult child, other authorized surrogate, legal guardian, committee or conservator 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 making the determination of 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) evaluation of treatment options, including nontreatment and their benefits and risks compared to those of the proposed major medical treatment decision.

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(3) 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.

(4) 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.

(e) The panel's determination regarding proposed major medical treatment shall be made in accordance with the following provisions:

(1) 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 by considering the standards used in paragraph (d)(2) 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 standards:

(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 mental retardation or developmental disability, with recognition that a person with mental retardation or developmental disabilities is entitled to full and equal rights, equal protection, respect, medical care and dignity afforded to persons without mental retardation or developmental disabilities and without any financial considerations as such affect the health care provider or any other party.

(2) Evidence of a previously as well as currently articulated preference by the patient shall be given full consideration by the panel.

(3) Unless at least three panel members vote to make the determination regarding the major medical treatment decision, the panel's vote shall not constitute a legally valid determination regarding the major medical treatment decision on behalf of the patient.

(4) Where practicable, the panel shall reach its determination immediately after the hearing and provide a copy of the determination to the necessary persons immediately after the hearing. Notice of this determination may be given also by certified mail, return receipt requested, or by any other means that will provide more timely and/or reliable notice. The giving of such notice shall be made part of the record.

(5) The panel determination regarding the major medical treatment decision shall constitute legally valid consent or refusal to such treatment in the same manner and to the same extent as

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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) 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.

(7) 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.

Section 710.5. Right of appeal; temporary restraining order.

As set forth in section 80.09 of the Mental Hygiene Law:

(a) The patient, declarant, a parent, spouse, adult child, authorized surrogate, conservator, legal guardian, committee of the person or correspondent of the patient, the MHLS, or the director of the patient's residential facility may apply to the Supreme Court for review, pursuant to article 78 of the CPLR, 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 CPLR, section 3403.

(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.

Section 710.6. Notices concerning the schedule of panel hearing.

(a) Each panel shall be convened as often as deemed necessary by the committee chairperson or his or her designee to assure timely review of the pending declarations.

(b) The committee chairperson or his or her designee shall notify the Justice Center of the time and place of all hearings at least five days in advance or, in the event of medical necessity or where the consent to a more immediate hearing has been obtained pursuant to section 80.07(b) of the MHL, as soon as possible.

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

(a) A member who has failed to attend three consecutive meetings of the committee or 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 Justice Center by the surrogate decision-making committee program staff and vacancies shall be filled in accordance with article 80 of the MHL. The 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 Public Officers Law.

(b) 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.

Section 710.8. Quarterly report to the Justice Center.

(a) The chairperson of each committee shall provide a quarterly report on the activities of the committee and its panels to the Justice Center. The report shall provide all information requested by the Justice Center and any other information the Justice Center specifically requests of the committee chairperson.

14 NYCRR Part 710
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14 NYCRR 633.10

OFFICIAL COMPLIATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 14. DEPARTMENT OF MENTAL HYGIENE

CHAPTER XIV. OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES

PART 633. PROTECTION OF INDIVIDUALS RECEIVING SERVICES IN FACILITIES OPERATED AND/OR CERTIFIED BY OPWDD

633.10 Care and Treatment

(a) Principles of compliance.

(1) Section 33.03 of the Mental Hygiene Law requires that each person shall receive care and treatment that is suited to his or her needs and skillfully, safely and humanely administered with full respect to his or her dignity and personal integrity.

(2) In accordance with the regulations for the class of facility, there shall be a current record (see glossary, section 633.99 of this Part) that includes all information concerning or relating to the examination or treatment of the person for whom the record is kept, and which includes a plan of services (by whatever name known). On no less than an annual basis, the agency/facility or the sponsoring agency shall ensure the following requirements are met to ensure the protection of persons under their care and treatment:

(i) An assessment of functional capacity.

(ii) Review and evaluation of the person's written plan of services and his or her progress in relation to that plan done by at least that staff member designated as having the coordination responsibility for the person's plan of services, or by the person's program planning team (see glossary).

(iii) For persons in a residential facility, at least a medical/dental evaluation by a physician or registered physician's assistant addressing the person's need for an examination or specific medical/dental services; or by a dentist for dental services. The determination of the basis for such evaluation (*e.g.,* appraisal of the person through records and previous contacts) shall be that of the qualified professional.

(iv) Where applicable, requirements specified in Subpart 636-1 of this Title for a person-centered planning process and person-centered service plan.

(3) Treatment or therapies which, by law or regulation, require the written order of a professional (see glossary) shall be delivered in accordance with the order of someone operating within the scope of his or her professional license. The order shall be based on an appropriate examination.

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(4) Notification of health care problems.

(i) The person's parent, guardian, advocate or correspondent shall be notified if a person receiving services is suspected or diagnosed as having a health problem which results in the person being:

(a) served in an emergency room or urgent care center; or

(b) admitted to a hospital; or

(c) unable to participate in scheduled activities for seven or more days.

(ii) However, notification shall not be made if:

(a) the individual is a capable adult person (see section 633.99 of this Part) and objects to the notification; or

(b) there is a written advice from the guardian or parent that he or she does not want to be notified.

(5) The agency/facility shall develop a plan for addressing the life threatening emergency needs of the persons served. Such a plan shall be based on the needs of the persons in the facility, and shall address the availability of first aid, cardiopulmonary resuscitation (CPR) techniques and access to emergency medical services. Where staff training is part of the plan, there shall be provision to keep such training up to date. For family care homes, the relevant sponsoring agency shall be responsible for addressing this requirement.

(6) Facilities which have emergency medical equipment on hand shall ensure that such equipment is maintained in accordance with a written agency/facility plan. Such a plan shall incorporate maintenance requirements that are in accordance with manufacturer recommendations and which includes provisions for inspection/replenishment subsequent to each use. Facilities with such equipment shall ensure that there are staff appropriately qualified to use it.

(7) Provisions relevant to implementation of the Health Care Decisions Act for Persons with Mental Retardation.

(i) Parties involved in decisions to withdraw or withhold life-sustaining treatment.

(a) Pursuant to section 1750-b of the Surrogate's Court Procedure Act (SCPA), in addition to parties specified by the statute, parties may seek the approval of the commissioner to be authorized to perform the following duties:

(1) serve as the attending physician to confirm, with a reasonable degree of medical certainty, that the person with developmental disabilities lacks capacity to make health care decisions (if the consultant lacks specified additional qualifications); or

(see glossary, section 633.99 of this Part) designates the directors of each of the DDSOs (see glossary, section 633.99 of this Part) to receive such notification from an attending physician. In any such case, the DDSO director shall confirm that the person's condition meets all of the criteria set forth in SCPA section 1750-b(4)(a) and (b). In the event that the director is not convinced that all of the necessary criteria are met, he or she may object to the decision and/or initiate a special proceeding to resolve such dispute in accordance with SCPA section 1750-b(5) and (6).

(iv) Qualified family member.

(a) This subparagraph implements the provisions of subdivision (1) of SCPA section 1750-b, only for the purposes of a qualified family member making a decision to withhold or withdraw life-sustaining treatment pursuant to such section.

(b) In the case of a person for whom no guardian has been appointed pursuant to SCPA sections 1750 or 1750-a, a *guardian* as used in SCPA section 1750-b shall also mean a qualified family member.

(c) A decision to withhold or withdraw life-sustaining treatment may be made in accordance with SCPA section 1750-b by the following qualified family members in the order stated:

(1) an actively involved (see section 633.99 of this Part) spouse;

(2) an actively involved parent;

(3) an actively involved adult child;

(4) an actively involved adult sibling; and

(5) an actively involved adult family member (see section 633.99 of this Part).

(d) If the first qualified family member on the list in clause (*c*) of this subparagraph is not reasonably available and willing, and is not expected to become responsibly available and willing to make a timely decision given the person's medical circumstances, a decision may be made by the next qualified family member on the list, in the order of priority stated.

(e) If more than one qualified family member exists within a category on the list in clause (*c*) of this subparagraph, the qualified family member with the higher level of active involvement shall have the opportunity to make the decision first. If the qualified family members within a category are equally actively involved, any of such qualified family members shall have equal opportunity to make a decision.

(f) If the first reasonably available and willing qualified family member makes a decision not to withhold or withdraw life-sustaining treatment, other qualified family members would not be authorized to overturn such decision. However, nothing in this subparagraph limits the right of any such qualified family member to object to such decision pursuant to SCPA section 1750-b(5)(ii).

(b) Standards of certification.

(1) If a person was suspected or diagnosed as having a health problem which required emergency room services or admission to a hospital or infirmary, or was unable to participate in scheduled activities for seven or more days, there is documentation that his or her parent(s), guardian(s) or correspondent was notified, unless the person is a capable adult and objected to such notification to a parent or correspondent being made.

(2) There is a written plan specifying how the agency/facility will deal with life threatening emergencies. Such a plan shall address:

(i) First aid.

(ii) CPR.

(iii) Access to emergency medical services.

(3) OPWDD shall verify that staff have been made aware of their responsibilities in accordance with the agency/facility plan.

(4) OPWDD shall verify that where a facility has emergency medical equipment on hand, the recommended inspection and/or maintenance schedule has been maintained.

14 NYCRR 633.10

Current through June 20, 2018

14 NYCRR 633.11

OFFICIAL COMPLIATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 14. DEPARTMENT OF MENTAL HYGIENE

CHAPTER XIV. OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES

PART 633. PROTECTION OF INDIVIDUALS RECEIVING SERVICES IN FACILITIES OPERATED AND/OR CERTIFIED BY OPWDD

633.11 Medical Treatment

(a) Principles of compliance.

(1) Consent for professional medical treatment.

(i) In any case where professional medical treatment (see glossary, section 633.99 of this Part) is proposed to be rendered to a person for which informed consent (see glossary) would be required by applicable law, the chief executive officer shall ensure assistance in obtaining such informed consent by or on behalf of such person. In every case it shall be the duty of such chief executive officer to ensure that the person is personally afforded an appropriate explanation of any proposed professional medical treatment.

(ii) Medical, dental, health and hospital services may be rendered to a person of any age without seeking informed consent when, in the physician's judgment, an emergency exists creating an immediate need for medical attention. In such cases, the supplier of the proposed professional medical treatment may accept the authorization of the chief executive officer of the individual's residential facility to render such professional medical treatment.

(iii) Informed consent may be obtained for those persons who are residents of a facility operated or certified by OPWDD as follows:

(a) If a person is less than 18 years of age, consent shall be obtained from one of the surrogates listed, in the order stated:

(1) a guardian lawfully empowered to give such consent;

(2) an actively involved (see section 633.99 of this Part) spouse;

(3) a parent;

(4) an actively involved adult sibling (see section 633.99 of this Part);

(5) an actively involved adult family member (see section 633.99 of this Part);

(6) a local commissioner of social services with custody over the person pursuant to the Social Services Law or Family Court Act (if applicable); or

(7) a surrogate decision making committee (SDMC) (see section 633.99 of this Part) or a court of competent jurisdiction.

(b) If a person is 18 years of age or older, but lacks capacity to understand appropriate disclosures regarding proposed professional medical treatment or a determination of insufficient capacity has been made pursuant to clause (*g*) of this subparagraph, informed consent to such proposed professional medical treatment shall be obtained from one of the surrogates listed, in the order stated:

(1) a guardian lawfully empowered to give such consent or the person's duly appointed health care agent or alternative agent (see section 633.20 of this Part and article 29-C of the Public Health Law);

(2) an actively involved spouse;

(3) an actively involved parent;

(4) an actively involved adult child;

(5) an actively involved adult sibling;

(6) an actively involved adult family member;

(7) the Consumer Advisory Board (see section 633.99 of this Part) for the Willowbrook Class (only for class members it fully represents);

(8) a surrogate decision making committee (SDMC) or a court of competent jurisdiction.

(c) If the first surrogate on the list in clause (*a*) or (*b*) of this subparagraph is not reasonably available and willing, and is not expected to become reasonably available and willing to make a timely decision given the person's medical circumstances, application shall be made to the next surrogate on the list, in the order of priority stated.

(d) If more than one party exists within a category on the list in clause (*a*) or (*b*) of this subparagraph utilizing the standard of active involvement, consent shall be sought first from the party with a higher level of active involvement or, when the parties within a category are equally actively involved, consent shall be sought from any of such parties.

(e) If the first reasonably available and willing surrogate listed above objects to the proposed treatment, consent shall not be sought from other surrogates on the list.

If the agency considers the proposed treatment to be in the best interests of the person, application may be made to a court of competent jurisdiction or, if the surrogate does not object to an SDMC proceeding, to the SDMC. Notice of any such application shall be given to the objecting party.

(f) If a person is 18 years of age or older and has capacity to understand appropriate disclosures regarding proposed professional medical treatment, such treatment shall be initiated only upon the person's informed consent.

(g) If it is not clear whether a person has capacity to understand appropriate disclosures regarding proposed professional medical treatment, the chief executive officer of a facility shall, in each instance, either:

(1) Prepare and file a declaration with a surrogate decision making committee in accordance with article 80 of the Mental Hygiene Law and regulations promulgated thereunder; or

(2) Obtain an independent written opinion and analysis of the individual's capacity to understand appropriate disclosures regarding proposed professional medical treatment and to give or withhold informed consent thereto. Such consultant shall be either a New York State licensed psychologist, or a psychiatrist holding current and appropriate licensure, shall have experience in treating those with developmental disabilities, and shall not be an employee of the facility. After considering the opinion of such consultant, the chief executive officer shall determine whether the person possesses or lacks capacity to understand appropriate disclosures regarding proposed professional medical treatment and to give or withhold informed consent thereto, and whether to proceed in accordance with the other provisions of this section. Both the consultant's opinion and the chief executive officer's decision shall be documented in the person's record and communicated to the person and his or her parent, other nearest relative, guardian or correspondent.

(2) Consent for other medical treatment. In any case where medical treatment is proposed to be rendered to a person, for which informed consent is not necessary, and in addition to any other right or remedy provided for by law, any person or other party authorized to speak on behalf of that person who objects to the proposed medical treatment shall be specifically advised at the time of the objection of his or her right to a formal appeal pursuant to section 633.12 of this Part.

(3) Sterilization.

(i) Sterilization of a person in a facility shall be performed only in conformance with applicable Federal and State laws and regulations.

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(ii) Sterilization may be performed when medically required to save a person from danger of death or serious physical illness.

(iii) Sterilization of a person shall never be performed for the convenience of staff or to accommodate the operation or management of a facility.

(4) No person receiving services shall be tested for the human immunodeficiency virus (HIV) unless informed consent is first obtained in compliance with article 27-F of the Public Health Law.

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(5) Nasogastric feeding procedures.

(i) If nasogastric tube feeding is necessary, the tube used must be flexible and the smallest gauge possible.

(ii) The use of a nasogastric feeding tube with an outside diameter that exceeds 3.96 millimeters (#12 French) shall be prohibited unless the use of a larger diameter nasogastric tube is medically indicated and the use of such a larger tube is directed in writing by a licensed physician.

(b) Standards of certification.

(1) When a person has undergone professional medical treatment, other than emergency treatment, OPWDD can verify that informed consent was obtained prior to treatment.

(2) A facility providing day programming has notified an individual's residence when there was an emergency or sudden illness.

14 NYCRR 633.11

Current through June 20, 2018

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14 NYCRR 27.9

OFFICIAL COMPLIATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 14. DEPARTMENT OF MENTAL HYGIENE

CHAPTER II. ALL FACILITIES

SUBCHAPTER B. INSTITUTIONAL CARE AND TREATMENT

PART 27. QUALITY OF CARE AND TREATMENT

27.9 Surgery and Certain Other Treatments

Electro-convulsive therapy, surgery, major medical treatment or the use of experimental drugs or procedures may be administered to any patient only upon the informed consent of the patient or of a person authorized to act on his or her behalf after a full and comprehensive disclosure of potential benefits and the potential of harm. Aversive or noxious stimuli shall not be included as part of any patient's individual service plan unless all conditions for obtaining consent as otherwise set forth in this section are met. Before such stimuli may be included in any service plan, such procedures shall be evaluated by a suitable committee responsible for reviewing and approving the efficacy and humaneness of this element of the patient's service plan. Patients are presumed to have sufficient mental capacity to give consent unless there are facts and substantial reasons to the contrary. The following conditions shall apply:

(a) If a patient is under 18 years of age, consent shall be obtained from the parents or legal guardian. If no parent or legal guardian is available or if such a patient having mental capacity to understand the procedure objects or one of the parents objects to the proposed procedure, the director may not initiate the procedure without a court order authorizing it, except in the case where surgery is indicated by significant danger to life or limb of the patient if the procedure is delayed.

(b) If a patient is 18 years or older but in the opinion of the chief of the service does not have sufficient mental capacity to give consent, authorization for the procedure in question must be obtained from the spouse, a parent, an adult child, or a court of competent jurisdiction. Nothing in this section shall prevent the director from giving consent to surgical procedure under emergency conditions where there appears to be significant danger to life or limb of the patient if the procedure is delayed.

(c) If a patient is 18 years or older and has sufficient mental capacity to give consent, the procedures may be initiated only with the patient's consent. The patient shall have the right, upon his or her request, to have a person of her or his choice present when consent is sought. In cases where a patient withholds consent to a procedure necessary for protection of life or limb, the director shall notify the Mental Health Information Service and may apply for court authorization.

(d) If it is not clear that the patient has sufficient mental capacity to give consent, an independent opinion about the patient's mental capacity must be obtained from a qualified consultant who is not an employee of the facility. After considering the opinion of the consultant, the director will decide whether the patient does or does not have the capacity to give consent and the director may then proceed in accordance with the other provisions of this section. The director shall enter in the patient's clinical record the reasons for this decision.

(e) Each facility director shall develop standard procedures to evaluate the decisions made on the mental capacity of individual patients to give consent. A qualified consultant who is not an employee of the facility shall be a member of the review process.

(f) All patients who object shall have recourse to the procedures for objection and appeal stipulated in section 27.8 of this Part.

14 NYCRR 27.9

Current through June 30, 2018

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Additional Volunteer Panel Member Trainings

On behalf of the NYS Justice Center for the Protection of People with Special Needs and the Surrogate Decision-Making Committee Program, your volunteer service and commitment to the program is sincerely appreciated. Below is a list of additional panel member trainings:

- SDMC End of Life Care Decision Making
- SDMC Panel Chairperson Training
- Advanced Panel Member Forums
- Refresher Training

Resources and Contact Information

Surrogate Decision-Making Committee:	518-549-0328
Report Abuse or Neglect:	855-373-2122

For additional SDMC resources and information on the Justice Center, please visit our website at:

www.justicecenter.ny.gov

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