

Part 710 to Title 14, NYCRR, is amended to read as follows:

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

Sec.

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Part 710.1 to Title 14, NYCRR, is amended to read as follows:

Part 710.1 Background and intent

(a) Article 80 of the Mental Hygiene Law (MHL) requires the [commission] 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 [of Mental Retardation and Developmental Disabilities (OMRDD)] 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 [OMRDD] 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 [OMRDD] OPWDD.

The surrogate decision-making committees established by law, whose members are selected by the [commission] 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 [commission] 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 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 [commission] 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, Schuylar, 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 [Commission] 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 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.

Part 710.2 to Title 14, NYCRR, is amended to read as follows:

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 or 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) [Commission] Justice Center means the New York State [Commission on Quality of Care and Advocacy for Persons with Disabilities (CQCAPD)] Justice Center for the Protection of People with Special Needs (Justice Center), a State agency created by [article 45 of the Mental Hygiene Law (MHL)] article 20 of the Executive Law.

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

(e) Committee chairperson means the person designated by and serving at the pleasure of the [commission] 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:

(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 [OMRDD] 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:

(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 [OMRDD] 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 [OMRDD] 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 [OMRDD] 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;

(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 [commission] 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 [OMRDD] 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, [OMRDD] OPWDD except in family care homes; hospitals as defined in article 28 of the Public Health Law; and, dentists and physicians.

Part 710.3 to Title 14, NYCRR, is amended to read as follows:

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 [committee] 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 [commission] 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 [commission] 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 health 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 [OMRDD] OPWDD; or

(c) has been approved by the commissioner of [OMRDD] 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;

(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 [commission] 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:

(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 [commission] 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 [Commission on Quality of Care and Advocacy for Persons with Disabilities at: 401 State Street, Schenectady, NY 12305-2397] 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 [commission] Justice Center for the receipt of such declarations.

(e) Assistance in the preparation of the declaration may be obtained by contacting the [commission] Justice Center at the above address or by telephoning (518) [388-2820] 549-3028. Collect telephone calls will be accepted by the [commission] Justice Center.

Part 710.4 to Title 14, NYCRR, is amended to read as follows:

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 [commission] 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 [commission] 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 [commission] 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 [commission] 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:

(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 [a] 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:

(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 [commission] 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 [commission] Justice Center and each member of the committee shall maintain the confidentiality of records as required by sections 33.13, [45.09(a)], and 80.07(c)(1) of the Mental Hygiene Law, [and] article 27-F of the Public Health Law and 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.

(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 [OMRDD] 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.

(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.

(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 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.

Part 710.6 to Title 14, NYCRR, is amended to read as follows:

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 [commission] 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.

Part 710.7 to Title 14, NYCRR, is amended to read as follows:

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 [commission] Justice Center determines that the absences should be excused. Notice of such absences shall be provided to the [commission] 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.

Part 710.8 to Title 14, NYCRR, is amended to read as follows:

Section 710.8. Quarterly report to the [commission] Justice Center

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