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OFFICIAL COMPILATION 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 OMRDD

Current through July 31, 2012

* Section 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 OMRDD 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 decisionmaking 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 decisionmaking 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 decisionmaking 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 that 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.

(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.

(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, OMRDD 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.

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