

**PURPOSE**

The purpose of this policy is to establish consistent procedures across the Michigan Department of Health and Human Services (MDHHS) state operated facilities, hospitals and centers in:

1. Obtaining informed consent to treatment and services
2. Evaluating comprehension
3. Assuring disclosure of relevant information
4. Insuring voluntariness before obtaining consent, and
5. Insuring the least restrictive form of alternative decision-making is determined by the informed consent committee.

**REVISION HISTORY**

This policy has not been updated since original publication effective date of May 16, 2010.

**DEFINITIONS**

**Comprehension** means the ability of the individual to understand what the personal implications of providing consent will be based upon the relevant information available.

**Conservator** means a person appointed by a court to manage a protected individual's estate. (MCL 700.1103[h])

**Guardian** means a person who has qualified as a guardian of a minor or a legally incapacitated individual under a parental or spousal nomination or a court appointment and includes a limited guardian. (MCL 700.5205, 700.5206 and 700.5306)

**Informed consent** means a written agreement or written documentation of a verbal agreement executed by a recipient or his/her legal representative for treatment, medication, services or supports that is based on a full disclosure of facts needed to make a decision which evidence the elements of knowledge, comprehension and voluntariness.

**Knowledge** means basic information about the procedure or treatment, risks, other related consequences and other relevant information. The standard governing required disclosure by a person obtaining informed consent is what a reasonable patient needs to know in order to make an informed decision. Other relevant information includes all of the following:

- a. The purpose of the procedures or treatment

- b. A description of the attendant discomforts, risks and benefits that can reasonably be expected
- c. A disclosure of appropriate alternatives advantageous to the recipient, and
- d. An offer to answer further inquiries.

**Legal competence** means the recipient has the capability and authority by law to take an action.

**Legal representative** means a guardian, parent with legal custody of a minor recipient, personal representative of the estate of a deceased recipient, or a patient advocate designated by a recipient under a valid advance directive.

**Person in loco parentis** means a person who is not the parent or guardian of a minor, but who has either legal custody of a minor or physical custody of a minor and is providing support and care for the minor.

**Voluntariness** means the free power of choice without the intervention of an element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion, including promises or assurances of privilege or freedom.

## POLICY

It is the policy of the MDHHS that, subject to applicable court orders, informed consent shall be obtained from the recipient or their legal representative and documented in writing prior to receipt of mental health services and that the least restrictive form of alternative decision-making will be pursued if the recipient does not have a legal representative and is determined as unable to give an informed consent.

## STANDARDS

1. Informed consent must include the elements of legal competency, knowledge, comprehension and voluntariness.
2. A recipient shall be presumed to be legally competent. This presumption may be rebutted only by a court appointment of a guardian or exercise by a court of guardianship powers and only to the extent of the scope and duration of the guardianship. An individual shall be presumed legally

competent regarding matters that are not within the scope and authority of the guardianship.

3. A MDHHS operated hospital or center shall establish written protocols for evaluating comprehension and for assuring disclosure of relevant information and measures to insure voluntariness before obtaining consent. The protocols shall indicate for specific circumstances, the types of information that shall be disclosed and the steps that may be taken to protect voluntariness. The protocol shall include a mechanism for determining whether an alternative decision-maker should be considered.
4. If a person responsible for obtaining an informed consent or implementing a treatment or procedure requiring informed consent has reasonable cause to believe that a recipient is not capable of giving or refusing to give an informed consent, that person shall notify the person in charge of implementing the recipient's individualized plan of service of the reasons for his/her conclusion that the recipient is not capable of giving or refusing an informed consent.
5. A MDHHS operated hospital or center shall establish an appropriate mechanism to accomplish an expeditious preliminary review of the reasons and conclusions that a recipient lacks the capacity to give or refuse an informed consent.
6. If the preliminary review mechanism finds that there is substantial credence to the reasons and conclusion that a recipient is not capable of giving or refusing an informed consent, the hospital or center shall establish a committee to evaluate the capability of the recipient to give or refuse informed consent according to the standard in subsection 1. above and the definitions. The committee shall conduct this evaluation by reviewing available clinical records, assessments, other relevant information and obtaining additional evaluations as necessary.
7. At a minimum, a committee established pursuant to 6. above shall include mental health professionals with appropriate clinical experience or training who are knowledgeable regarding the requirements for informed consent and who are not involved in either the action or application for which consent is needed or the decision to evaluate the need for guardianship proceedings.

8. If a majority of an informed consent committee concludes that a person does not have the capability to make a decision or to understand a situation, as required for informed consent, the committee shall consider and make recommendations for alternative decision-making which include, from least restrictive to most restrictive:
  - a. Conservator
  - b. Limited guardian, indicating in what specific matters
  - c. Temporary guardian, indicating for how long and for what specific matter(s)
  - d. Emergency guardian, with explanation of emergency and scope of authority, and
  - e. Full guardian.
9. If a majority of the informed consent committee concludes that guardianship is the most appropriate form to promote and protect the well-being of the recipient and recommends a guardianship with a scope designed to encourage the development of maximum self-reliance and independence of the recipient, then a hospital/center director shall cause a proceeding for guardianship to be commenced in the probate court either directly or through a responsible CMHSP.
10. If a majority of the informed consent committee concludes that informed consent is absent either because a recipient has not been made sufficiently aware of the procedures, risks or ramifications, benefits or alternatives or because a decision is not voluntary, as required for an informed consent, the director shall cause the recipient to be provided necessary information or, when possible, an opportunity for voluntary choice.
11. If a majority of an informed consent committee concludes that a recipient can give or has given an informed consent or has the capacity to give an informed consent or has the capability to give an informed consent and has refused to consent, the director of the provider shall ensure that staff take actions accordingly.
12. Informed consent shall be re-obtained if changes in circumstances substantially change the risks, other consequences, or benefits that were previously expected.

13. A written or witnessed verbal agreement documenting an informed consent shall not include any exculpatory language through which the recipient, or a person consenting on the recipient's behalf, waives or appears to waive, a legal right, including a release of a provider or its agents from liability for negligence. The agreement shall embody the basic elements of informed consent in the particular context. The individual or legal representative consenting shall be given adequate opportunity to read the document before signing it. The requirement of a written consent shall not eliminate, where essential to the individual's understanding or otherwise deemed advisable, a reading of the document to the individual or an oral explanation in a language the individual understands. A note of the explanation and by whom made shall be placed in the record along with the written consent.
14. A consent is executed when it is in writing and signed by the appropriate individual or when a verbal agreement of a recipient is witnessed and documented by an individual other than the individual providing treatment.
15. A recipient or his/her legal representative shall be given notice that they are free to withdraw and discontinue participation in a treatment or procedure at any time, within the constraints of applicable court guardianship or treatment orders, without prejudice to the recipient.
16. Refusal to give informed consent for an essential component(s) of the treatment plan may in some circumstances constitute a refusal to give consent for all treatment.
17. A minor 14 years of age or older may request hospitalization pursuant to Section 498d(4) of the Mental Health Code. The determination of suitability for hospitalization shall occur pursuant to Section 498e. The parent or guardian of a minor shall be notified immediately of the admission of a minor to a hospital in any case where the parent or guardian did not execute the application for hospitalization. Notice shall comply with the requirements of Section 498i. The parent or guardian shall be requested by the hospital to give written consent to the treatment of the minor and for the release of information from agencies or individuals involved in treating the minor prior to the hospitalization as determined necessary by the hospital for treatment of the minor. If consent to treatment cannot be obtained, the hospital director may proceed under either the revised probate code (Act No. 642 of Public Acts of 1978,

sections 700.1 to 700.933 of the Michigan Compiled Laws), or chapter XIA of Act No. 288 of Public Acts of 1939 (sections 712A.1 to 712A.28 of the Michigan Compiled Laws) as warranted by the situation and the best interests of the minor.

## REFERENCES

- Michigan Mental Health Code, MCL 330.1600 – 1644
- MDHHS Administrative Rule 330.7003
- Michigan Estates and Protected Individuals Code, 1998 Public Act 368
  - Article I, Part 1 - Short Title and Definitions
  - Article V, Part 2 – Guardians of Minors
  - Part 3 – Guardians of Incapacitated persons
  - Part 4 – Protection of Property of an Individual Under Disability or of a Minor

## CONTACT

For additional information concerning this policy, contact the Director of the MDHHS Office of Recipient Rights at (517) 373-2319.