DISTRICT OF COLUMBIA
DEPARTMENT OF MENTAL HEALTH

NOTICE OF FINAL RULEMAKING

The Director of the Department of Mental Health, pursuant to the authority set forth in section 114 of the Mental Health Service Delivery Reform Act of 2001, effective December 18, 2001 (D.C. Law 14-56; D.C. Official Code § 7-1131.14) (Act), hereby gives notice of the adoption of the following new Chapter 1, of Title 22A, of the D.C. Code of Municipal Regulations, entitled Consent to Treatment. Chapter 1, Title 22A, DCMR sets forth the rules regarding the rights of consumers of mental health services and mental health supports with respect to informed consent to treatment, administration of medication in the absence of informed consent, and the use of advance directives.

Notice of Proposed Rulemaking was published on April 5, 2002 at 49 D.C. Reg. 3058. A second Notice of Proposed Rulemaking was published on September 20, 2002 at 49 D.C. Reg. 8768. These final rules will be effective upon publication in the D.C. Register.

Title 22A DCMR is amended by adding the following new Chapter 1:

100 PURPOSE AND APPLICATION

100.1 The purpose of these rules is to protect and enhance the rights and protections of consumers by establishing:

(a) The specific procedures for obtaining informed consent to treatment from consumers, including treatment with medication;

(b) The specific procedures for obtaining informed consent to treatment when a consumer lacks capacity to make a treatment decision; and

(c) The specific procedures for obtaining a valid declaration of advance instructions regarding psychiatric care and treatment from a consumer.

100.2 The rules in this Chapter are applicable to each MH provider and the DMH.

100.3 For purposes of this Chapter, a MH provider includes all privately and publicly operated providers of mental health services and supports, including the public core services agency and St. Elizabeths Hospital. References to DMH refer to DMH when it is acting in its capacity as the mental health authority for the District.

100.4 For purposes of this Chapter, each consumer 18 years of age or older who is receiving mental health services and supports is presumed to have the legal capacity to make treatment decisions unless:

(a) A court has declared the consumer incompetent to make treatment or health care decisions and has appointed a guardian to make such decisions;

(b) It has been determined that the consumer lacks the capacity to make a health care decision under § 5 of the Health-Care Decisions Act (HCDA), effective March 16, 1989 (D.C. Law 7-189; D.C. Official Code § 21-2204); or

(c) A court has explicitly ordered a consumer to participate in a specific form of treatment or to take medication.

100.5 A person who is under 18 years old and seeks or receives mental health services or mental health supports may lawfully consent to treatment or make treatment decisions consistent with Section 214 of the Mental Health Services Delivery Reform Act of 2001(Act), effective date December 18, 2001(D.C. Law 14-56; D.C. Official Code §§ 7-1231.01 *et seq.*).

100.6 Each consumer has the rights and protections set forth in the Mental Health Service Delivery Reform Act of 2001. In addition each consumer has the following rights and protections related to informed consent for treatment. The right to:

(a) Be treated with consideration and respect for dignity, autonomy, and privacy;

(b) Service in a humane setting that is the least restrictive feasible as defined in the consumer's service plan;

(c) Be informed of the consumer's own condition, of proposed or current services, treatment or therapies, and of the alternatives;

(d) Consent to or refuse any service, treatment, or therapy upon full explanation of the expected consequences of such consent or refusal, except as provided in § 100.4 of this chapter;

(e) Active and informed participation in the establishment, periodic review and reassessment of the consumer's service plan;

(f) Freedom from unnecessary or excessive medication;

(g) Freedom from unnecessary restraint or seclusion;

(h) Be informed of and refuse any unusual or hazardous treatment procedures, and to refuse to participate in research projects of experimental programs; and

(i) Be advised of and refuse observation by techniques such as one-way vision mirrors, tape recorders, televisions, movies or photographs.

100.7 Each MH provider shall adhere to the requirements regarding posting and distributing the Consumer Rights Statement set forth in 22A DCMR, Chapter 3.

101 INFORMED CONSENT TO TREATMENT

101.1 For purposes of this Chapter, the term "informed consent" means that a consumer grants, refuses or withdraws consent to treatment after the MH provider presents the consumer with information about the proposed mental health services, mental health supports, or treatment, in language and a manner that the consumer can understand. As part of informed consent, the consumer must be capable of making and communicating a decision about the proposed mental health service, mental health support, or treatment. The information provided to the consumer shall include an explanation of:

(a) The consumer's mental illness or mental health related problem, including diagnosis;

(b) The purpose of the proposed mental health service, mental health support, or treatment;

(c) The name and dosage of medication prescribed, if that is a proposed treatment;

(d) The known and potential common side effects or risks of the proposed mental health service, mental health support, or treatment;

(e) The potential benefits of the proposed mental health services, mental health supports, or treatment; and

(f) Any feasible alternatives to the proposed mental health services, mental health supports, or treatment.

101.2 Each MH provider shall obtain informed consent to treatment from each consumer receiving mental health services or mental health supports from

the MH provider prior to implementing the consumer's service plan. Informed consent to treatment shall be written. If the consumer is unwilling or unable to sign a consent to treatment form, then the MH provider shall document the reason in the consumer's clinical records.

101.3 Each consumer shall also be given an opportunity to ask questions about the proposed mental health services, mental health supports, or treatment, and shall be given an opportunity to give informed consent to each component of the individual recovery plan or service plan. The written consent to treatment form shall identify each mental health support, mental health service, or treatment, including the name and dosage of the medication prescribed, if any, for which the consumer has given his or her informed consent. The written consent to treatment form is not the same as the form signed by a consumer consenting generally to receive services from or enrolling with a MH provider.

101.4 Each MH provider's discussion with a consumer about the information described in § 101.1 shall be documented in the consumer's clinical record. The consumer shall acknowledge, in writing, that the MH provider has provided the consumer with the information necessary for the consumer to give informed consent to the proposed mental health services, mental health supports and course of treatment. If the consumer is unable or unwilling to make this acknowledgement in writing, then the MH provider shall document the reason in the consumer's clinical record.

101.5 Each MH provider shall document in the consumer's clinical record whether the consumer has consented to the mental health services, mental health supports or course of treatment recommended by the provider. Each MH provider shall document in the consumer's clinical record whether the consumer has declined to consent to the proposed treatment, mental health service or mental health support.

101.6 If a consumer who has given informed consent to a mental health service, mental health support, or treatment decides he or she no longer consents to the treatment, then the MH provider must document the decision in the consumer's clinical record. A MH provider may not continue providing a specific mental health service, mental health support, or treatment to a consumer who withdraws his or her consent to that particular form of treatment.

101.7 No MH provider shall administer electroconvulsive treatment to a consumer without the written informed consent of the consumer or a court order issued in compliance with D.C. Official Code § 21-2047(c)(2) and § 21-2211(b).

101.8 No MH provider shall condition the receipt of any individual mental health service, mental health support or treatment upon the consumer's agreement to accept another mental health service, mental health support or treatment.

102 **INFORMED CONSENT FROM SUBSTITUTE DECISION-MAKER**

102.1 If, while or after presenting the information required by § 101.1 to a consumer, the consumer's treating psychiatrist or psychologist believe that the consumer is incapable of making or communicating a decision regarding the provision of a mental health service, mental health support or treatment, the psychiatrist or psychologist may seek certification of the consumer's incapacitation in accordance with D.C. Official Code § 21-2204.

(a) Certification of incapacity to make a treatment decision requires a determination by two physicians, one of whom shall be the consumer's treating psychiatrist, that the consumer lacks the capacity to understand the decision to be made, or to make or communicate a decision about the proposed treatment.

(b) A consumer shall not be deemed incapacitated if the consumer is capable of understanding the decision to be made, making the decision, and communicating the decision, but refuses to consent to a proposed treatment or makes a decision different than the MH provider would prefer.

102.2 If a consumer has been certified as incapacitated in accordance with D.C. Official Code § 21-2204, the MH provider shall seek informed consent to the proposed mental health service, mental health support or course of treatment as follows:

(a) From the consumer's designated attorney-in-fact, if the consumer has executed a valid durable power of attorney for health care; or

(b) From a substitute health care decision-maker in accordance with D.C. Official Code § 21-2210.

102.3 If a consumer has been certified as incapacitated in accordance with D.C. Official Code § 21-2204 and the MH provider is not able to obtain informed consent from either a designated attorney-in-fact or a substitute health care decision-maker, the MH provider shall petition the court for appointment of a guardian and seek informed consent from the guardian appointed by the court pursuant to D.C. Official Code § 21-2041, except as provided in § 103 and § 104 of this chapter.

102.4 A MH provider shall seek appointment of a guardian for a consumer in accordance with subchapter V of Chapter 20 of Title 21 of the District of Columbia Official Code, if:

(a) A consumer remains incapacitated for purposes of making a particular health care decision for more than thirty (30) days following certification of incapacitation as described in § 102.1 of this chapter; and

(b) The consumer does not have an attorney-in-fact designated in a durable power of attorney document available to make a decision about the delivery of mental health services, mental health supports or treatment to the consumer.

102.5 A substitute decision-maker shall act in accordance with the consumer's treatment preferences as expressed in an advance directive or a declaration of advance instructions. A substitute decision-maker's decision regarding mental health treatment which is based on the consumer's expressed treatment preferences shall be followed by DMH or the MH provider, except for good cause as documented in the consumer's clinical records, and shall never be overridden for the convenience of DMH or the MH provider.

102.6 In the absence of an advance directive or declaration of advance instructions, a substitute decision-maker shall grant, refuse or withdraw consent to mental health treatment based on the known wishes of the consumer or, if the wishes of the consumer are unknown and cannot be ascertained, on a good faith belief as to the best interests of the consumer. D.C. Official Code § 21-2210(b). A substitute decision-maker may consent to the administration of medication for the consumer only in accordance with the consumer's treatment preferences as expressed in a durable power of attorney document or in a declaration of advance instructions for mental health treatment.

102.7 A MH provider shall document whether the substitute decision-maker grants, refuses or withdraws consent to mental health treatment on behalf of a consumer in the consumer's clinical record. At least one (1) witness shall be present whenever a substitute decision-maker grants, refuses or withdraws consent to treatment on behalf of a consumer.

103 INFORMED CONSENT NOT REQUIRED IN EMERGENCY

103.1 An emergency means a situation in which a consumer is experiencing a mental health crisis and in which the immediate provision of mental health treatment is necessary to prevent serious injury to the consumer or others.

103.2 If an emergency exists, the MH provider shall obtain a written opinion from either the consumer's attending physician or treating physician stating that delay in obtaining informed consent to the mental health service, mental health support or treatment is likely to result in serious injury to the consumer (Emergency Opinion). If the MH provider has information that the consumer would not consent to emergency treatment based on the consumer's religious beliefs, the MH provider must obtain a court order prior to administering treatment that would terminate the emergency.

103.3 After receipt of the Emergency Opinion, the MH provider shall provide mental health services, mental health supports or treatment to the extent necessary to terminate the emergency.

104 ADMINISTRATION OF MEDICATION

104.1 Each MH provider shall obtain informed consent from each consumer prior to administering medication for the purposes of mental health treatment, except as described in § 104.4 through §104.17 of this chapter.

104.2 Prior to administering any medication for purposes of mental health treatment, a MH provider shall present the consumer with information about the proposed medication, including, but not limited to:

(a) The name and dose of the medication being prescribed;

(b) The purpose of administering the medication;

(c) Potential common side effects of the medication;

(d) Potential risks and benefits of taking the medication;

(e) Information about feasible alternative treatments; and

(f) An opportunity to ask questions about the proposed medication and to discuss the decision with family or others.

104.3 Each MH provider shall obtain the consumer's written informed consent to administration of medication, prior to prescribing and administering such medication. Such informed consent shall be documented in the consumer's clinical record. If the consumer consents to treatment with medication but is not willing or able to give consent in writing, the MH provider shall document this in the consumer's clinical records prior to beginning treatment with medication and document the reason the consumer has not given written consent.

104.4 If, after presenting the information described in § 104.2, the MH provider and the consumer's attending or treating physician believe that the consumer is incapable of making a decision about treatment with medication, the MH provider and consumer's attending or treating physician shall seek certification of incapacitation in accordance with § 102.1. If a consumer has been certified as incapacitated for purposes of making a health care decision, the MH provider shall seek informed consent to the proposed treatment in accordance with § 11 of the HCDA (D.C. Official Code § 21-2210).

104.5 Any consent to the administration of medication by a consumer's attorney-in-fact or substitute health care decision-maker must be consistent with the consumer's treatment preferences, as expressed in a validly executed durable power of attorney for health care or declaration of advance instructions for mental health treatment.

104.6 A MH provider may administer medication for mental health treatment to an incapacitated consumer without the consumer's written informed consent, pursuant to the MH provider's policy that shall be approved by DMH and shall be consistent with these rules and other relevant Federal and local laws and regulations, in:

(a) An emergency, as defined in § 103.1; or

(b) The absence of an attorney-in-fact or substitute health care decision-maker available and willing to make a decision about the administration of medication, after affording the consumer the right to procedures guaranteed by § 208 of the Mental Health Consumers' Rights Protection Act of 2001(Title II), effective December 18, 2001(D.C. Law 14-56; D.C. Official Code § 7-1231.08).

104.7 A consumer's refusal to consent to the administration of medication on the basis of a valid religious objection shall not be overridden, in either an emergency or non-emergency, without a valid court order.

104.8 The Director or his/her designee shall designate a neutral person within DMH or the MH provider to serve as the internal reviewer of the necessity for involuntary administration of medication (Medication Review Officer).

104.9 A MH provider seeking approval of involuntary administration of medication to an incapacitated consumer shall:

(a) Provide the consumer with written and oral information about available advocacy services;

(b) Notify the Director or the Chief Clinical Officer of a consumer's request for a meeting with the designated Medication Review Officer;

(c) Notify the consumer at least 48 hours prior to the meeting with the Medication Review Officer; and

(d) Notify the consumer of his or her right to be present and have a personal representative present during the meeting with the Medication Review Officer.

104.10 The Medication Review Officer shall schedule a meeting with the MH provider, the consumer and the consumer's representative, and the psychiatrist seeking to administer the medication. The consumer, the MH provider and the psychiatrist shall have the opportunity to present information about the proposed treatment with medication, the necessity for administering the medication, the consumer's capacity to make a decision about the proposed medication, and the consumer's reasons for not consenting to medication. In addition, the Medication Review Officer shall review the consumer's advance directive or declaration of advance instructions, if one exists.

104.11 The Medication Review Officer shall document the outcome of the review of the need for involuntary administration of medication in a written report to be included in the consumer's clinical record. In addition, a copy of the report shall be submitted to the Director or the Chief Clinical Officer, the consumer, the MH provider and the consumer's treating psychiatrist within three (3) business days after the meeting. The Medication Review Officer's report shall state whether the medication may be administered over the consumer's objection. If the Medication Review Officer's report authorizes the administration of medication, it shall be valid for a maximum of thirty (30) days from the date of issuance. The written report shall include the following:

(a) A list of the facts and circumstances considered during the review;

(b) Findings of Fact;

(c) Conclusion; and

(d) Recommendations.

104.12 If the Medication Review Officer concurs in the conclusion that the consumer lacks the capacity to make a decision regarding treatment with medication and determines that the consumer should be treated with medication without informed consent, then the Medication Review Officer

shall notify the consumer and the consumer's representative, if one is involved, that the consumer may seek a review of the decision with the DMH Medication Review Panel.

104.13 The consumer shall have the right to appeal the Medication Review Officer's decision to the DMH Medication Review Panel. Within one (1) day of the date of the Medication Review Officer's decision, the consumer or the consumer's personal representative must inform the Medication Review Officer or the Chief Clinical Officer if the consumer would like to appeal the Medical Review Officer's decision. If the consumer would like his or her representative to participate in the Medication Review Panel process, then the consumer or the representative must inform the Medication Review Officer or the Chief Clinical Officer whether there are any times in the next 72 hours when the representative would not be available.

104.14 The Director shall appoint a Medication Review Panel to review decisions of the Medication Review Officer, if the consumer has requested an appeal. The members of the Medication Review Panel shall:

(a) Not be affiliated with the consumer, the MH provider or psychiatrist seeking to administer the medication; and

(b) Include a board-certified psychiatrist, a licensed mental health practitioner and a consumer or if unavailable, a consumer advocate.

104.15 The DMH Medication Review Panel shall convene within seventy-two (72) hours of receipt of the appeal and shall review the Medication Review Officer's decision. Notice of the time for the DMH Medication Review Panel meeting shall be provided to the consumer and the consumer's representative, if one has been involved. The Medication Review Panel shall convene at the MH provider facility where the consumer receives services.

104.16 The Medication Review Officer's decision shall be stayed pending review by the DMH Medication Review Panel.

104.17 The DMH Medication Review Panel shall issue a decision upholding or overturning the Medication Review Officer's decision within one (1) day of its meeting.

105 ADVANCE DIRECTIVES AND INSTRUCTIONS

105.1 Each consumer has the right to make health care decisions for himself or herself, including the right to accept or refuse life-sustaining medical

treatment if such treatment becomes necessary, unless certified as incapacitated pursuant to D.C. Code § 21-2204. In addition, each mental health consumer has the right to execute advance directives to be used if a determination is made that the consumer lacks the capacity to make a health care decision.

105.2 An advance directive is a written document signed by a consumer that indicates the consumer's preferences regarding medical treatment decisions, including mental health treatment, and may be in the form of:

(a) A validly executed and current living will prepared in accordance with the requirements of § 3 of the Natural Death Act of 1981, effective February 25, 1982 (D.C. Law 4-69; D.C. Official Code § 7-622);

(b) A validly executed and current durable power of attorney for health care prepared in accordance with the requirements of § 6 of the HCDA (D.C. Official Code § 21-2205), which may include an advance directive for health or mental health treatment; or

(c) A validly executed declaration of advance instructions for mental health treatment prepared in accordance with the requirements of § 105.7 of this chapter.

105.3 The existence of a living will, durable power of attorney for health care, advance directive or declaration of advance instructions for mental health treatment shall not affect a consumer's right to make decisions about the receipt of particular mental health services or mental health supports when the consumer is capable of making such decisions.

105.4 Each MH provider shall establish a system to verify whether each consumer receiving mental health services from the MH provider has prepared a living will, a durable power of attorney for health care or a declaration of advance instructions (Advance Directive Verification System). The Advance Directive Verification System shall include the following elements:

(a) An explanation of advance directives and advance instructions in language the consumer can understand;

(b) An opportunity for the consumer to give the MH provider a copy of the consumer's current living will, durable power of attorney for health care or declaration of advance instructions; and

(c) An opportunity for the consumer to execute a living will, durable power of attorney for health care or declaration of advance instructions.

105.5 Each MH provider shall ensure that the living will, durable power of attorney for health care or declaration of advance instructions executed by each consumer receiving mental health services from the MH provider becomes part of the consumer's clinical record.

105.6 Each MH provider shall establish a system to ensure that the clinical record for each consumer receiving mental health services from the MH provider is updated to reflect any changes to the consumer's living will, durable power of attorney for health care, or declaration of advance instructions.

105.7 A valid declaration of advance instructions shall:

(a) Be written;

(b) Include the signature of at least one adult witness who is not related to the consumer by blood or marriage, who is not employed by DMH or the MH provider, and who is not the consumer's attending physician;

(c) Include acknowledgment that the witness believes the consumer is able to express the preferences set forth in the declaration of advance instructions; and

(d) Be signed and dated by the consumer.

105.8 A consumer may be capable of executing a durable power of attorney for health care even though a determination has been made, pursuant to the HCDA, that the consumer lacks the capacity to make a treatment decision. In the absence of a durable power of attorney for health care, the MH provider will rely on a substitute decision maker as identified in § 11 of the HCDA (D.C. Official Code § 21-2210).

199 DEFINITIONS

199.1 The following terms have the meaning ascribed in this section:

"Advanced directives" – a written statement or document signed by a consumer indicating what decision the consumer would make regarding health care or mental health care, which may be relied on by a substitute decision-maker in the event that the consumer is deemed incapacitated under the Health-Care Decisions Act. This statement or document may be

incorporated into another document, such as a durable power of attorney designation, but could be freestanding.

"Attending physician" – the physician, who may be a psychiatrist, on duty or on call at the MH provider who becomes involved in the care of a consumer.

"Attorney-in-fact" - a person who has been appointed by a consumer to make health care decisions on the consumer's behalf, in the consumer's durable power of attorney for health care, in accordance with D.C. Official Code § 21-2205(a).

"Capacity" - the ability to understand and appreciate the nature and consequences of the proposed mental health treatment, including the benefits and risks of, and alternatives to, the proposed mental health treatment and to make and communicate a decision regarding the proposed mental health treatment.

"Chief Clinical Officer" – the person appointed by the Director to be the Chief Clinical Officer of the Department, pursuant to § 107 of the Act (D.C. Official Code § 7-1131.07).

"Consumer" - a person 18 years of age or older eligible to receive mental health services and mental health supports as defined in § 102 of the Act (D.C. Official Code § 7-1131.02(18) and (19)).

"Consumer Rights Statement" - a document prepared and distributed by DMH to all MH providers which describes all the consumer rights and protections available under federal and District laws and regulations.

"Court" - means the Superior Court of the District of Columbia

"Declaration of advance instructions" - a written statement of a consumer's mental health treatment preferences, including the consumer's informed choice to accept or forego particular mental health services and mental health supports.

"Director" - the Director of DMH.

"DMH" - the Department of Mental Health

"DMH Medication Review Panel" - a panel of three persons appointed by the Director to review appeals from decisions by the Medication Review Officer.

"Durable power of attorney for health care" – a document prepared by a consumer in accordance with the requirements of the HCDA which

designates an attorney-in-fact to make various health care decisions on the consumer's behalf when the consumer is unable to make such decisions. A durable power of attorney for health care may include instructions for the attorney-in-fact about health care decisions, including mental health treatment preferences.

"Emergency" – a situation in which a consumer is experiencing a mental health crisis and in which the immediate provision of mental health treatment is, in the written opinion of the attending physician, necessary to prevent serious injury to the consumer or others.

"Grievance" – a description by any individual of his or her dissatisfaction with either DMH or a MH provider, including the denial or abuse of any consumer right or protection provided by applicable federal and District laws and regulations.

"Living will" – a document prepared by a consumer in accordance with the requirements of the Natural Death Act of 1981, which sets forth the consumers wishes regarding application or withdrawal of life sustaining procedures.

"Medication Review Officer" - a neutral person within DMH or a MH provider, appointed by the Director or her/his designee to review the necessity for involuntary administration of medication.

"Mental Illness" - a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life.

"Mental health services" - the services funded or regulated by DMH for the purpose of addressing mental illness or mental health problems.

"Mental health supports" - the supports funded or regulated by DMH for the purpose of addressing mental illness or mental health problems.

"MH provider" - any individual or entity, public or private, which is licensed or certified by the District to provide mental health services and mental health supports, or that has entered into an agreement with DMH to provide mental health services and supports.

"Policy" – a written statement developed by an MH provider that gives specific direction regarding how the MH provider shall operate administratively and programmatically.

"Procedure" – a written set of instructions describing the step-by-step actions to be taken by MH provider staff in implementing a policy of the MH provider.

"Service plan" - the individual recovery plan (IRP) for adults, the individual service plan (ISP) for children and youth, or the treatment plan for a consumer. The service plan identifies the mental health supports and mental health services that will be provided to a consumer.

"St. Elizabeths Hospital" – the inpatient psychiatric hospital operated by DMH.

"Substitute health care decision-maker" - means an individual authorized to make an incapacitated consumer's health care treatment pursuant to D.C. Official Code § 21-2210(a).

"Treating physician" – the physician, who may be a psychiatrist, responsible for regularly treating a particular consumer. In some instances the treating physician may also be the attending physician.