

**RULES
OF
DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES
OFFICE OF THE COMMISSIONER**

**CHAPTER 0940-1-6
CAPACITY TO MAKE DECISIONS**

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0940-1-6-.01 PURPOSE.

- (1) The purpose of this chapter is to prescribe a uniform assessment process as required by T.C.A. §33-3-217, to determine whether a service recipient lacks capacity to make informed decisions on issues within the meaning of T.C.A. §33-3-218.

Authority: T.C.A. §§4-4-103, 4-5-202, 4-5-204, 33-1-101, 33-1-302, 33-1-305, 33-1-309, 33-2-301, 33-2-302, 33-3-217, and 33-3-218. *Administrative History:* Original rule filed December 29, 2005; effective March 14, 2006.

0940-1-6-.02 SCOPE.

- (1) This chapter covers the determination of whether a service recipient with mental retardation, mental impairment related to a developmental disability, mental illness, or serious emotional disturbance has capacity to make an informed decision on the issues within the meaning of T.C.A. §§33-3-217 and 218. For persons with a mental illness or serious emotional disturbance, this chapter does not cover outpatient services and does not cover services in an emergency room in a medical or surgical facility except for psychiatric admission to the facility. This chapter does not apply to any emergency that endangers a service recipient's health or life.

Authority: T.C.A. §§4-4-103, 4-5-202, 4-5-204, 33-1-101, 33-1-302, 33-1-305, 33-1-309, 33-2-301, 33-2-302, 33-3-217, and 33-3-218. *Administrative History:* Original rule filed December 29, 2005; effective March 14, 2006.

0940-1-6-.03 APPLICABILITY.

- (1) For an adult service recipient with mental retardation or mental impairment related to a developmental disability under T.C.A. §33-1-101, this chapter applies to:
 - (a) admission to a developmental center under T.C.A. §33-5-301,
 - (b) discharge from a developmental center under T.C.A. §33-5-303, or
 - (c) routine medical, dental, or mental health treatment.
- (2) For a service recipient, 16 years old or older, with a mental illness or serious emotional disturbance, this chapter applies to:
 - (a) application for voluntary admission to or discharge from a hospital or inpatient treatment resource;
 - (b) after voluntary or involuntary admission to a hospital or inpatient treatment resource, determination of the service recipient's capacity to make an informed decision regarding:

(Rule 0940-1-6-.03, continued)

1. inpatient mental health treatment,
2. release of information, or
3. request for information.

Authority: T.C.A. §§4-4-103, 4-5-202, 4-5-204, 33-1-101, 33-1-302, 33-1-305, 33-1-309, 33-2-301, 33-2-302, 33-3-217, and 33-3-218. **Administrative History:** Original rule filed December 29, 2005; effective March 14, 2006.

0940-1-6-.04 DEFINITIONS.

- (1) “Developmental disability” means a condition based on having either a severe chronic disability or mental retardation as defined in T.C.A. §33-1-101.
- (2) “Examiner” means:
 - (a) For a service recipient with mental illness or serious emotional disturbance, a physician or “qualified mental health professional”, or
 - (b) For a service recipient with mental retardation or mental impairment related to a developmental disability: (1) a licensed dentist for routine dental treatment; (2) a licensed physician for routine medical or mental health treatment; (3) a licensed psychologist with health service provider designation, for routine mental health treatment.
- (3) “Lacks capacity” means that the person is:
 - (a) Unable to understand a proposed procedure or treatment; or
 - (b) Unable to understand the risks and benefits of such procedure or treatment; or
 - (c) Unable to understand the risks and benefits of an available alternative to the procedure or treatment.
- (4) “Licensed physician” means a graduate of an accredited medical school authorized to confer upon graduates the degree of doctor of medicine (M.D.) who is duly licensed in the state, or an osteopathic physician who is a graduate of a recognized osteopathic college authorized to confer the degree of doctor of osteopathy (D.O.) and who is licensed to practice osteopathic medicine in the state.
- (5) “Mental illness” as defined in T.C.A. §33-1-101(16), means a psychiatric disorder, alcohol dependence, or drug dependence, but does not include mental retardation or other developmental disabilities.
- (6) “Mental retardation” as defined in T.C.A. §33-1-101(17), means substantial limitations in functioning:
 - (a) As shown by significantly sub-average intellectual functioning that exists concurrently with related limitations in two (2) or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and
 - (b) That are manifested before age eighteen.
- (7) “Qualified mental health professional” means a person who is licensed in the state, if required for the profession, and who is a psychiatrist; physician with expertise in psychiatry as determined by training,

(Rule 0940-1-6-.04, continued)

education, or experience; psychologist with health service provider designation; psychological examiner, or senior psychological examiner; social worker who is certified with two (2) years of mental health experience or licensed; marital and family therapist; nurse who has a master's degree in nursing who functions as a psychiatric nurse; professional counselor; or if the person is providing service to service recipients who are children, any of the above educational credentials plus mental health experience with children.

- (8) "Routine medical, dental, or mental health treatment" means commonplace, everyday medical, dental or mental health treatment but does not include psychosurgery, convulsive therapy, and elective surgery.
- (9) "Serious emotional disturbance" means a condition in a child who currently or at any time during the past year has had a diagnosable mental, behavioral, or emotional disorder of sufficient duration to meet psychiatric diagnostic criteria that results in functional impairment which substantially interferes with or limits the child's role or functioning in family, school, or community activities and includes any mental disorder, regardless of whether it is of biological etiology.
- (10) "Severe, chronic disability" in a person over five (5) years of age means a condition that:
- (a) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
 - (b) Is manifested before age twenty-two (22);
 - (c) Is likely to continue indefinitely;
 - (d) Results in substantial functional limitations in three or more of the following major life activities:
 - 1. Self-care;
 - 2. Receptive and expressive language;
 - 3. Learning;
 - 4. Mobility;
 - 5. Self-direction;
 - 6. Capacity for independent living; and
 - 7. Economic self-sufficiency; and
 - (e) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic services, supports, or other assistance that is likely to continue indefinitely and to need to be individually planned and coordinated.
- (11) "Severe, chronic disability" in a person up to five (5) years of age means a condition of substantial developmental delay or specific congenital or acquired conditions with a high probability of resulting in developmental disability as defined for persons over five (5) years of age if services and supports are not provided.

Authority: T.C.A. §§4-4-103, 4-5-202, 4-5-204, 33-1-101, 33-1-302, 33-1-305, 33-1-309, 33-2-301, 33-2-302, 33-3-217, and 33-3-218. **Administrative History:** Original rule filed December 29, 2005; effective March 14, 2006.

0940-1-6-.05 ASSESSMENT.

- (1) Validity of the assessment. If an examiner concludes that a service recipient is unable to make an informed decision about a subject to which these rules apply, then the service recipient lacks capacity for a decision about the subject matter at that time.
- (2) Performing the assessment.
 - (a) The examiner must approach the evaluation of a service recipient's capacity to make an informed decision on the presumption that the service recipient has capacity.
 - (b) The examiner must take every reasonably practicable step to conduct the assessment in a way that enables the service recipient to show capacity to make informed decisions about the procedure or treatment. The examiner must, at the minimum, perform steps 1 and 2 below, as well as those stated in subdivision (2)(c) of this rule.
 1. The examiner must:
 - (i) Determine the service recipient's most effective method of taking in and processing information and convey information in that way;
 - (ii) Adjust the examiner's communication to allow for physical, educational, socio-economic, cultural and linguistic differences between the service recipient and examiner; and
 - (iii) Minimize the impact of anything that may cause stress on the service recipient.
 2. The examiner must provide all information that is necessary for the service recipient to show capacity to make decisions on:
 - (i) The issue to be decided;
 - (ii) The reason a decision is needed;
 - (iii) The proposed procedure or treatment and the risks and benefits of the proposed procedure or treatment;
 - (iv) The risks and benefits of any available alternatives;
 - (v) The service recipient's right to refuse or later withdraw from participation in the procedure or treatment and the risks and benefits of refusal or withdrawal; and
 - (vi) Any consequences of accepting or refusing the procedure or treatment.
 - (c) The examiner must seek responses from the service recipient on the following points, at least, before deciding whether the person lacks capacity:
 1. The person's understanding of the proposed procedure or treatment;
 2. The person's understanding of the issue the person is to decide;
 3. The person's understanding of what could happen if the procedure or treatment is carried out;

(Rule 0940-1-6-.05, continued)

4. The person's understanding of what could happen if the procedure or treatment is not carried out;
 5. The person's understanding of the procedure's or treatment's side effects;
 6. The person's understanding of other ways the issue could be addressed;
 7. The person's understanding of the risks and benefits of any available alternative procedure or treatment;
 8. The person's understanding that the procedure or treatment can be refused and what will happen if the procedure or treatment is refused;
 9. The person's understanding of whether the procedure or treatment can be stopped after it begins;
 10. The person's understanding of the result of any of the other ways of addressing the issue, refusing to address the issue, or stopping the procedure or treatment after it has begun;
 11. The person's ability to communicate the person's own wishes with respect to the proposed procedure or treatment; and
 12. The person's ability to maintain a choice by continuing to express the same decision about the issue at various times during the assessment process.
- (3) Recording the assessment. The examiner must record the form and method of the assessment, including:
- (a) The issue which required an informed decision;
 - (b) Specific actions, statements, or behaviors of the service recipient that initially gave reason to question the service recipient's lack of capacity;
 - (c) How information was provided in the service recipient's most effective method of taking in information;
 - (d) Communication adjustments that the examiner made to allow for physical, educational, socio-economic, cultural, and linguistic differences between the service recipient and examiner;
 - (e) Measures that the examiner or others took to minimize the impact of anything, which may have caused stress on the service recipient;
 - (f) Specific actions taken by the examiner to assist the service recipient in demonstrating understanding of the risks and benefits of the proposed procedure or treatment and any alternative procedure or treatment, including actions taken to assist the service recipient's communication of the person's own decision on the issue;
 - (g) Specific service recipient statements or behaviors that support the examiner's conclusion about the service recipient's capacity to make an informed decision;
 - (h) The examiner's conclusion on the service recipient's capacity to make an informed decision; and
 - (i) The examiner's signature, credentials, and the date of the assessment.

(Rule 0940-1-6-.05, continued)

Authority: T.C.A. §§4-4-103, 4-5-202, 4-5-204, 33-1-101, 33-1-302, 33-1-305, 33-1-309, 33-2-301, 33-2-302, 33-3-217, and 33-3-218. **Administrative History:** Original rule filed December 29, 2005; effective March 14, 2006.

0940-1-6-.06 DUTY OF DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES.

- (1) The department must maintain a list of procedures and tools that are acceptable to assess whether a person has capacity. Examiners may use these procedures and tools or develop their own, consistent with the requirements of this chapter.

Authority: T.C.A. §§4-4-103; 4-5-202, 4-5-204, 33-1-101, 33-1-302, 33-1-305, 33-1-309, 33-2-301, 33-2-302, 33-3-217, and 33-3-218. **Administrative History:** Original rule filed December 29, 2005; effective March 14, 2006.