

**RULES  
OF  
TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES  
DIVISION OF MENTAL RETARDATION SERVICES**

**CHAPTER 0940-4-4  
SURROGATE DECISION MAKING FOR INDIVIDUALS WITH MENTAL RETARDATION  
OR MENTAL IMPAIRMENT RELATED TO DEVELOPMENTAL DISABILITIES**

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**0940-4-04-.01 PURPOSE.**

- (1) This chapter establishes a way to get timely and appropriate delivery of routine medical, dental, or mental health treatment for service recipients with mental retardation or mental impairment related to a developmental disability who lack capacity to make informed decisions and do not have a:
  - (a) Parent or guardian for individuals under age 18 or care giver of a minor child under Title 34, Chapter 6, Part 3, Tennessee Code Annotated;
  - (b) Parent or guardian for individuals under age 16 for mental health treatment;
  - (c) Conservator, guardian or legal custodian who has court authorization to give consent for such services;
  - (d) Declaration for mental health treatment which addresses the service to be provided; or
  - (e) Attorney-in-fact under a durable power of attorney (DPOA) for health care for the services to be provided.

**Authority:** T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.

**0940-4-04-.02 SCOPE.**

- (1) These rules apply to:
  - (a) An adult:
    1. With mental retardation or mental impairment related to a developmental disability;
    2. Who is in need of a single routine medical, dental, or mental health treatment or course of treatment; and
    3. Lacks capacity to make an informed decision based on an evaluation under Rule 0940-1-6.
  - (b) An unemancipated child:
    1. With mental retardation or mental impairment related to a developmental disability;

(Rule 0940-4-4-.02, continued)

2. Who does not have a parent, legal guardian, legal custodian or caregiver under Part 3, Chapter 6, Title 34, T.C.A.; and
  3. Is in need of a single routine medical, dental, or mental health treatment or course of treatment.
- (c) An unemancipated child between sixteen (16) and eighteen (18) years old:
1. With mental retardation or mental impairment related to a developmental disability and who has a serious emotional disturbance or mental illness and:
  2. Who is in need of a single routine medical, dental, or mental health treatment or course of treatment; and
  3. Lacks capacity to make an informed decision based on an evaluation under Rule 0940-1-6.
- (2) These rules do not apply to:
- (a) An individual with mental illness or serious emotional disturbance who does not have mental retardation or a mental illness due to a developmental disability;
  - (b) An adult who has:
    1. The capacity to make an informed decision about routine medical, dental or mental health treatment;
    2. A court-appointed conservator or an attorney in-fact under a durable power of attorney with authority to make decisions; or
    3. A declaration for mental health treatment that addresses the service to be provided.
  - (c) An individual under eighteen (18) years of age who has a parent, legal guardian, or legal custodian; or an individual under sixteen (16) years of age who has a mental illness or serious emotional disturbance and has a parent, legal guardian, legal custodian or an attorney-in-fact under a durable power of attorney for health care.
  - (d) An emergency as used in the Good Samaritan Law, T.C.A. §63-6-218.

**Authority:** T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.

**0940-4-04.03 DEFINITIONS.**

- (1) “Actively involved” means involvement with the individual based on the following:
  - (a) Observed interactions of the person with the individual;
  - (b) Advocacy for the best interests of the individual;
  - (c) Knowledge of and sensitivity to the individual’s preferences, values and beliefs;
  - (d) Ability to communicate with the individual; and

(Rule 0940-4-4-.03, continued)

- (e) Availability to the individual for assistance or support when needed.
- (2) “Caregiver” means a person designated by a parent to care for a minor child under Title 34, Chapter 6, Part 3, T.C.A.
- (3) “Conservator” means a person appointed by a court under the conservatorship law in Title 34, Chapter 3 or the Veterans Administration Guardianship law in Title 34, Chapter 5, T.C.A., with authority to make decisions for an adult who lacks capacity to make informed decisions.
- (4) “Declaration for mental health treatment” means a document authorized by Part 10, Chapter 6, Title 33, T.C.A., that allows a competent adult or emancipated minor to indicate how he/she wants to be treated or not be treated when he/she is unable to make informed decisions about mental health treatment.
- (5) “Developmental disability” means a condition based on having either a severe, chronic disability under T.C.A. §33-1-101(10) or mental retardation under T.C.A. §33-1-101(17).
- (6) “Durable power of attorney” (DPOA) means a legal document authorized by Title 34, Chapter 6, Part 2, T.C.A., that allows the attorney-in-fact to make health care decisions for the individual.
- (7) “Guardian” means a person appointed by a court under the guardianship law in Title 34, Chapter 1, T.C.A., with authority to make decisions for an unemancipated individual under eighteen (18) years of age.
- (8) “Legal custodian” means a person appointed by a court under Title 37, Tennessee Code Annotated with authority to make decisions for a child who lacks capacity to make decisions.
- (9) “Mental retardation” means substantial limitations in functioning 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 that are manifested before eighteen (18) years of age. [T.C.A. §33-1-101(17)]
- (10) “Qualified examiner” means:
  - (a) A licensed physician to determine capacity to make an informed decision about routine medical or mental health treatment;
  - (b) A licensed psychologist to determine capacity to make an informed decision about routine mental health treatment;
  - (c) A licensed dentist to determine capacity to make an informed decision about routine dental care.
- (11) “Routine treatment” means commonplace, everyday medical, dental or mental health treatment but excludes psychosurgery, convulsive therapy, and elective surgery, or services solely for behavior control of an individual.
- (12) “Service provider” means an individual who provides routine medical, dental, or mental health treatment for individuals with a diagnosis of mental retardation or mental impairment related to a developmental disability.
- (13) “Service recipient” means a person who is receiving service, has applied for service, or for whom someone has applied for or proposed service because the person has a mental illness, serious emotional disturbance, or a developmental disability. [T.C.A. §33-1-101(21)]

(Rule 0940-4-4-.03, continued)

- (14) “Severe, chronic disability” in a person:
- (a) Over five (5) years of age means a condition that:
    - 1. Is attributable to a mental or physical impairment or combination of mental and physical impairments;
    - 2. Is manifested before twenty-two (22) years of age;
    - 3. Is likely to continue indefinitely;
    - 4. Results in substantial functional limitations in three (3) or more of the following major life activities:
      - (i) Self-care;
      - (ii) Receptive and expressive language;
      - (iii) Learning;
      - (iv) Mobility;
      - (v) Self-direction;
      - (vi) Capacity for independent living; and
      - (vii) Economic self-sufficiency; and
    - 5. 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.
  - (b) 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, 33-1-101, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.

**0940-4-04.04 ASSESSMENT OF CAPACITY TO MAKE AN INFORMED DECISION.**

- (1) Capacity to make informed decisions must be presumed for each adult unless the adult has a conservator. An unemancipated child does not have the capacity to make informed decisions. An emancipated child has the same rights and responsibilities as an adult within the scope of the court order.
- (2) When a service provider has reasonable cause to believe that an adult service recipient lacks capacity to make informed decisions, he/she must arrange for a qualified examiner to assess capacity under Department of Mental Health and Developmental Disabilities Rule 0940-1-6. When a service provider has reasonable cause to believe a service recipient sixteen (16) years of age or older lacks capacity to make informed mental health treatment decisions, s/he must arrange for a qualified examiner to assess capacity under Department of Mental Health and Developmental Disabilities Rule 0940-1-6.
- (3) If the results of the assessment of capacity indicate that the individual:

(Rule 0940-4-4-.04, continued)

- (a) Has the capacity to make an informed decision, only the individual can make the decision regarding the specific treatment recommended;
  - (b) Lacks the capacity to make an informed decision regarding the routine medical, dental or mental health treatment, then a surrogate decision-maker may be designated.
- (4) The results of the assessment and resultant action must be documented and maintained in the individual's record. The documentation must at least contain a description of the evidence obtained which supports either that the individual can make an informed decision or that there is a designated surrogate decision-maker.

**Authority:** T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-2-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.

**0940-4-04-.05 QUALIFICATIONS OF A SURROGATE DECISION-MAKER.**

- (1) A surrogate decision-maker must be an adult whom the individual does not reject and must be one of the following adults in descending order of preference:
- (a) The individual's spouse;
  - (b) The individual's adult child;
  - (c) The individual's parent or stepparent;
  - (d) The individual's adult sibling;
  - (e) Any other adult relative of the individual; or
  - (f) Any other adult.
- (2) The surrogate decision-maker must:
- (a) Know about the individual's developmental disability and condition as it relates to the recommended service;
  - (b) Be actively involved in the individual's life;
  - (c) Be willing to make a decision for the individual on the routine medical, dental or mental health treatment;
  - (d) Appear to be reasonably capable of making such a decision and likely to make it objectively in the individual's best interest; and
  - (e) Appear to have no conflict of interest with the individual.

**Authority:** T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.

**0940-4-04-.06 DUTIES OF A SURROGATE DECISION-MAKER.**

- (1) Obtain information on the following:

(Rule 0940-4-4-.05, continued)

- (a) The nature of the proposed treatment or procedure;
  - (b) The possible risks, including side effects and potential benefits of the proposed treatment, procedure or course of action;
  - (c) The alternative treatments or courses of action and their attendant risks and potential benefits; and
  - (d) The period of time involved such as the immediacy of the need for treatment and the length of time the consent will remain valid.
- (2) Make treatment decisions for an emancipated individual who lacks capacity and does not have a conservator, court appointed custodian, attorney-in-fact under a durable power of attorney or declaration for mental health treatment, which addresses the routine treatment recommended. The surrogate decision-maker may give or withhold consent for treatment.
  - (3) If a surrogate decision-maker wishes to discontinue acting as a surrogate, notify the service provider.

**Authority:** T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.

**0940-4-04-.07 RIGHTS OF A SURROGATE DECISION-MAKER.**

- (1) A surrogate decision-maker who acts in good faith, reasonably and without malice in connection with the decision is free from all liability, civil or criminal, by reason of the surrogate's decision.

**Authority:** T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.

**0940-4-04-.08 DUTIES OF A SERVICE PROVIDER.**

- (1) Follow the decision of an individual who has the authority or capacity to make an informed decision.
- (2) If there is no individual who has the authority or capacity to make an informed decision, and a service provider has reasonable cause to believe that a service recipient lacks capacity to make an informed decision, the service provider must:
  - (a) determine if there is a declaration for mental health treatment which addresses the routine treatment recommended and follow the declaration, or
  - (b) arrange for a qualified examiner to assess capacity under Rule 0940-1-6-. 03(5)(b) or if the service provider is a qualified examiner, perform the assessment.
    1. If the qualified examiner determines that the individual lacks capacity and needs a surrogate decision-maker, the service provider must:
      - (i) Select a surrogate decision-maker in conformity with 0940-4-04-.05, document the identity of the surrogate decision-maker and obtain consent from the surrogate decision-maker.
- (3) Arrange for reassessment of the individual's capacity to make informed decisions when the individual or the service provider, conservator, guardian, court-appointed custodian, or attorney-in-fact under a DPOA believes the individual has capacity. Only a qualified examiner may perform a capacity reassessment.

(Rule 0940-4-4-.08, continued)

- (4) Inform the surrogate decision-maker of:
  - (a) The nature of the proposed treatment or procedure and any immediate need;
  - (b) The possible risks, including side effects and potential benefits of the proposed treatment, procedure or course of action;
  - (c) The alternative treatments or courses of action and their attendant risks and potential benefits;
  - (d) The right to additional information; and
  - (e) The right to give or withdraw consent.
- (5) Document a surrogate decision-maker's decision in the service provider's file.
- (6) If a surrogate decision-maker withdraws from decision-making, document the decision and the justification in the service provider's file.
- (7) When a surrogate decision-maker withdraws, identify a new surrogate decision-maker if further routine treatment or course of treatment is needed.
- (8) When there is no person willing or qualified to serve in the capacity of surrogate decision-maker, the service provider shall document his/her efforts to obtain a surrogate decision-maker. The service provider shall inform the individual that the required service cannot be provided without the consent of a surrogate decision-maker, conservator, guardian, court-appointed custodian, attorney-in-fact under a DPOA or a declaration for mental health treatment.
- (9) Act in reliance on the surrogate decision-maker's decision.
- (10) If there is a disagreement about the right of a person to act as a surrogate decision-maker, notify the parties that the service may be provided when the disagreement has been resolved.

**Authority:** T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.