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CHAPTER 309
OREGON HEALTH AUTHORITY
HEALTH SYSTEMS DIVISION: BEHAVIORAL HEALTH SERVICES

FILING CAPTION: INFORMED CONSENT TO TREATMENT AND TRAINING BY PATIENTS IN STATE INSTITUTIONS

EFFECTIVE DATE: 08/13/2018

AGENCY APPROVED DATE: 08/01/2018

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RULES:
309-114-0005, 309-114-0010, 309-114-0020

AMEND: 309-114-0005

RULE TITLE: Definitions

NOTICE FILED DATE: 06/18/2018

RULE SUMMARY: Removing the Medication Educator requirement

RULE TEXT:
As used in these rules:
(1) "Authorized Representative" or "representative" means an individual who represents a party in a contested case hearing; the representative must be supervised by an attorney that is licensed by the Oregon State Bar.
(2) "Chief Medical Officer" means the physician designated by the superintendent of each state institution pursuant to ORS 426.020(2) who is responsible for the administration of medical treatment at each state institution.
(3) "Committed" or "Commitment" means an individual is admitted under ORS 161.327, 161.328, 161.370, 426.701, 426.130, 427.215 or 426.220 when the individual's guardian or health care representative is unavailable or unable to consent
(4) "Dangerousness" means either:
(a) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats, including verbal threats or attempts to commit suicide or inflict physical harm on him or herself. Evidence of substantial risk may include information about historical patterns of behavior that resulted in serious harm being inflicted by an individual upon him or herself as those patterns relate to the current risk of harm;
(b) A substantial risk that physical harm will be inflicted by an individual upon another individual, as evidenced by recent acts, behavior or threats, including verbal threats, which have caused such harm or which would place a reasonable person in reasonable fear of sustaining such harm. Evidence of substantial risk may include information about historical patterns of behavior
(5) "Division" means the State Hospitals Division of the Oregon Health Authority.
(6) "Guardian" means a legal guardian who is an individual appointed by a court of law to act as guardian of a minor or a

legally incapacitated person.
(7) "Health Care Representative" means a person who has authority to make health care decisions for a patient.
(8) "Legally Incapacitated" means having been found by a court of law under ORS 426.295 to be unable, without assistance, to properly manage or take care of one's personal affairs, or who is a person under guardianship.
(9) "Material Risk." A risk is material if it may have a substantial adverse effect on the patient's psychological or physical health, or both. Tardive dyskinesia is a material risk of neuroleptic medication. Other risks include, but are not limited to raised blood pressure, onset of diabetes and metabolic changes.
(10) "Patient" means an individual who is receiving care and treatment in a state institution for the mentally ill.
(11) Patient with a "grave disability" means a patient who:
(a) Is in danger of serious physical harm to his or her health or safety absent the proposed significant procedures; or
(b) Manifests severe deterioration in routine functioning evidenced by loss of cognitive or volitional control over his or her actions which is likely to result in serious harm absent the proposed significant procedures.
(12) "Person Committed to the Division" or "Person" means an individual committed under ORS 161.327, 161.328, 426.701, 426.220, 161.370, 426.130, or 427.215.
(13) "Psychiatric Nurse Practitioner," means a registered nurse with prescription authority who independently provides health care to clients with mental and emotional needs or disorders.
(14) "Routine Medical Procedure" means a procedure customarily administered by facility medical staff under circumstances involving little or no risk of causing injury to a patient including, but not limited to physical examinations, blood draws, influenza vaccinations, tuberculosis (TB) testing, human immunodeficiency virus (HIV) testing and hygiene.

(15) "Significant Procedure" means a diagnostic or treatment modality and all significant procedures of a similar class that pose a material risk of substantial pain or harm to the patient such as, but not limited to psychotropic medication and electro-convulsive therapy. Significant procedures do not include routine medical procedures.
(16) "Significant Procedures of a Similar Class" means a diagnostic or treatment modality that presents substantially similar material risks as the significant procedure listed on the treating physician's or psychiatric nurse practitioner's informed consent form and is generally considered in current clinical practice to be a substitute treatment or belong to the same class of medications as the listed significant procedure.
(a) For purposes of these rules, medications listed in subsections 16 (a)(A) through 16(a)(F) of this rule will be considered the same or similar class of medication as other medications in the same subsection:
(A) All medications used under current clinical practice as antipsychotic medications including typical and atypical antipsychotic medications;
(B) All medications used under current clinical practice as mood stabilizing medications;
(C) All medications used under current clinical practice as antidepressants;
(D) All medications used under current clinical practice as anxiolytics;
(E) All medications used under current clinical practice as psychostimulants; and
(F) All medications used under current clinical practice as dementia cognitive enhancers.
(b) Significant procedures of the same or similar class do not need to be specifically listed on the treating physician's or psychiatric nurse practitioner's form.
(17) "State Institution" or "Institution" means all Oregon State Hospital campuses. [DBL*D1] (18) "Superintendent" means the executive head of the state institution listed in section 17 (18) of this rule, or the superintendent's designee.

STATUTORY/OTHER AUTHORITY: ORS 179.040, 413.042

STATUTES/OTHER IMPLEMENTED: ORS 179.321, 183.458, 426.070, 426.385

OREGON HEALTH AUTHORITY, HEALTH SYSTEMS DIVISION: MENTAL HEALTH SERVICES

DIVISION 114

INFORMED CONSENT TO TREATMENT AND TRAINING BY PATIENTS IN STATE INSTITUTIONS

309-114-0000

Purpose

Purpose. These rules prescribe standards and procedures to be observed by personnel of state institutions operated by Division in obtaining informed consent to significant procedures, as defined by these rules, from patients of such state institutions. These rules do not apply to routine medical procedures. Administration of significant procedures without informed consent is permitted as described in OAR 309-114-0010(1)(b). The purpose of these rules is to assure that the rights of patients are protected with respect to significant procedures.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 5-2015, f. & cert. ef. 8-28-15; MHS 5-2016, f. & cert. ef. 5-25-16

309-114-0005

Definitions

As used in these rules:

(1) "Authorized Representative" or "representative" means an individual who represents a party in a contested case hearing; the representative must be supervised by an attorney that is licensed by the Oregon State Bar.

(2) "Chief Medical Officer" means the physician designated by the superintendent of each state institution pursuant to ORS 426.020(2)~~179.360(1)(f)~~ who is responsible for the administration of medical treatment at each state institution.

(3) “Committed” or “Commitment” means an individual is admitted under ORS 161.327, 161.328, 161.370, 426.701, 426.130, 427.215 or 426.220 when the individual's guardian or health care representative is unavailable or unable to consent

(4) “Dangerousness” means either:

(a) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats, including verbal threats or attempts to commit suicide or inflict physical harm on him or herself. Evidence of substantial risk may include information about historical patterns of behavior that resulted in serious harm being inflicted by an individual upon him or herself as those patterns relate to the current risk of harm;

(b) A substantial risk that physical harm will be inflicted by an individual upon another individual, as evidenced by recent acts, behavior or threats, including verbal threats, which have caused such harm or which would place a reasonable person in reasonable fear of sustaining such harm. Evidence of substantial risk may include information about historical patterns of behavior

(5) "Division" means the State Hospitals Division of the Oregon Health Authority.

(6) "Guardian" means a legal guardian who is an individual appointed by a court of law to act as guardian of a minor or a legally incapacitated person.

(7) “Health Care Representative” means a person who has authority to make health care decisions for a patient.

(8) "Legally Incapacitated" means having been found by a court of law under ORS 426.295 to be unable, without assistance, to properly manage or take care of one's personal affairs, or who is a person under guardianship.

(9) "Material Risk." A risk is material if it may have a substantial adverse effect on the patient's psychological or physical health, or both. Tardive dyskinesia is a material risk of neuroleptic medication. Other risks include, but are not limited to raised blood pressure, onset of diabetes and metabolic changes.

~~(10) “Medication Educator” means a Qualified Mental Health Professional (QMHP) who provides information about the proposed significant procedures to patients.~~

~~(11)~~ (10)"Patient" means an individual who is receiving care and treatment in a state institution for the mentally ill.

~~(12)~~ (11)Patient with a “grave disability” means a patient who:

(a) Is in danger of serious physical harm to his or her health or safety absent the proposed significant procedures; or

(b) Manifests severe deterioration in routine functioning evidenced by loss of cognitive or volitional control over his or her actions which is likely to result in serious harm absent the proposed significant procedures.

~~(13)~~(12) "Person Committed to the Division" or "Person" means an individual committed under ORS 161.327, 161.328, 426.701, 426.220, 161.370, 426.130, or 427.215.

~~(14)~~(13) "Psychiatric Nurse Practitioner," means a registered nurse with prescription authority who independently provides health care to clients with mental and emotional needs or disorders.

~~(15) "Qualified Mental Health Professional" (QMHP) means any individual meeting the following minimum qualifications as documented by the state institution:~~

~~(a) Graduate degree in psychology;~~

~~(b) Bachelor's or graduate degree in nursing and licensed by the State of Oregon;~~

~~(c) Graduate degree in social work or counseling;~~

~~(d) Graduate degree in a behavioral science field;~~

~~(e) Graduate degree in recreational art, or music therapy;~~

~~(f) Bachelor's degree in occupational therapy and licensed by the State of Oregon; or~~

~~(g) Bachelor's or graduate degree in a relevant area.~~

~~(16)~~(14) "Routine Medical Procedure" means a procedure customarily administered by facility medical staff under circumstances involving little or no risk of causing injury to a patient including, but not limited to physical examinations, blood draws, influenza vaccinations, tuberculosis (TB) testing, human immunodeficiency virus (HIV) testing and hygiene.

~~(17)~~(15) "Significant Procedure" means a diagnostic or treatment modality and all significant procedures of a similar class that pose a material risk of substantial pain or harm to the patient such as, but not limited to psychotropic medication and electro-convulsive therapy. Significant procedures do not include routine medical procedures.

~~(18)~~(16) "Significant Procedures of a Similar Class" means a diagnostic or treatment modality that presents substantially similar material risks as the significant procedure listed on the treating physician's or psychiatric nurse practitioner's informed consent form and is generally considered in current clinical practice to be a substitute treatment or belong to the same class of medications as the listed significant procedure.

(a) For purposes of these rules, medications listed in subsections 16 ~~14~~(a)(A) through 16~~14~~(a)(F) of this rule will be considered the same or similar class of medication as other medications in the same subsection:

(A) All medications used under current clinical practice as antipsychotic medications including typical and atypical antipsychotic medications;

(B) All medications used under current clinical practice as mood stabilizing medications;

(C) All medications used under current clinical practice as antidepressants;

(D) All medications used under current clinical practice as anxiolytics;

(E) All medications used under current clinical practice as psychostimulants; and

(F) All medications used under current clinical practice as dementia cognitive enhancers.

(b) Significant procedures of the same or similar class do not need to be specifically listed on the treating physician's or psychiatric nurse practitioner's form.

~~(19)~~(17) "State Institution" or "Institution" means all Oregon State Hospital campuses~~, and the Blue Mountain Recovery Center.~~

Commented [DBL*D1]: Removed BMRC

~~(20)~~(18) "Superintendent" means the executive head of the state institution listed in section 17 (18) of this rule, or the superintendent's designee.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 183.458, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 2-2009(Temp), f. & cert. ef. 4-2-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 6-2009, f. & cert. ef. 12-28-09; MHS 5-2010(Temp), f. & cert. ef. 3-12-10 thru 9-8-10; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; MHS 4-2011, f. & cert. ef. 5-19-11; MHS 15-2014(Temp), f. & cert. ef. 12-1-14 thru 5-29-15; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15; MHS 8-2015(Temp), f. & cert. ef. 11-24-15 thru 5-20-16; MHS 5-2016, f. & cert. ef. 5-25-16

309-114-0010

General Policy on Obtaining Informed Consent to Treatment and Training

(1)(a) Basic Rule. Patients, or parents or guardians of minors, or guardians on behalf of legally incapacitated patients, may refuse any significant procedure and may withdraw at any time

consent previously given to a significant procedure. Any refusal or withdrawal or withholding of consent shall be documented in the patient's record.

(b) Personnel of a state institution shall not administer a significant procedure to a patient unless written informed consent is obtained from or on behalf of the patient in the manner prescribed in these rules, except as follows:

(A) Administration of significant procedures to legally incapacitated patients as provided in section (6) of this rule;

(B) Administration of significant procedures without informed consent in emergencies under OAR 309-114-0015;

(C) Involuntary administration of significant procedures with good cause to persons committed to the Division under OAR 309-114-0020; or

(D) Involuntary administration of significant procedures pursuant to a valid court order.

(2) Capacity of the patient: In order to consent to, or refuse, withhold, or withdraw consent to significant procedures, the patient must have the capacity to make a decision concerning acceptance or rejection of a significant procedure, as follows:

(a) Unless adjudicated legally incapacitated for all purposes or for the specific purpose of making treatment decisions, a patient shall be presumed competent to consent to, or refuse, withhold, or withdraw consent to significant procedures. A person committed to the Division may be deemed unable to consent to or refuse, withhold, or withdraw consent to a significant procedure only if the person currently demonstrates an inability to reasonably comprehend and weigh the risks and benefits of the proposed procedure, alternative procedures, or no treatment at all including, but not limited to, all applicable factors listed in (3)(a) of this rule. The patient’s current inability to provide informed consent is to be documented in the patient's record and supported by the patient’s statements or behavior; and may be evidenced in the treating physician’s or psychiatric nurse practitioner's informed consent form, the evaluation form by the independent examining physician and forms approving or disapproving the procedure by the superintendent or chief medical officer;

(b) A person committed to the Division shall not be deemed unable to consent to or refuse, withhold, or withdraw consent to a significant procedure merely by reason of one or more of the following facts:

(A) The person has been involuntarily committed to the Division;

(B) The person has been diagnosed as mentally ill;

(C) The person has disagreed or now disagrees with the treating physician's or psychiatric nurse practitioner’s diagnosis; or

(D) The person has disagreed or now disagrees with the treating physician's or psychiatric nurse practitioner's recommendation regarding treatment.

(c) If a court has determined that a patient is legally incapacitated, then consent shall be sought from the legal guardian.

(3) Procedures for Obtaining Informed Consent and Information to be Given: The person from whom informed consent to a significant procedure is sought shall be given information, orally and in writing, the substance of which is to be found on the treating physician's or psychiatric nurse practitioner's informed consent form. In the case of medication, there shall be attached a preprinted information sheet on the risks and benefits of the medication listed on the treating physician's or psychiatric nurse practitioner's form. All written materials under this rule will be provided in English. However, if the institution has reason to believe a patient has limited English language proficiency or the patient requests it, then the institution will make reasonable accommodations to provide the patient with meaningful access to the information, such as providing the patient with copies of the materials in the patient's native language if the materials are readily available in that language or providing the opportunity to have an interpreter orally translate written materials into the patient's native language. Specific information about significant procedures of a similar class will not be provided to or discussed with the patient.

(a) The information shall describe:

(A) The nature and seriousness of the patient's mental illness or condition;

(B) The purpose of the significant procedures listed on the treating physician's or psychiatric nurse practitioner's form, the intended outcome and the risks and benefits of the procedures;

(C) Any alternatives, particularly alternatives offering less material risks to the proposed significant procedure that are reasonably available and reasonably comparable in effectiveness;

(D) If the proposed significant procedure is medication, facility medical staff shall give the name, dosage range, and frequency of administration of the medication listed on the treating physician's or psychiatric nurse practitioner's form, and shall explain the material risks of the medication at that dosage range.

(E) The side effects of the intended medication or electro-convulsive therapy;

(F) The predicted medical, psychiatric, social, or legal consequences of not accepting the significant procedure or any comparable procedure, including any potential risk the patient represents to the health and safety of the patient, or others, which may include, but is not limited to, a consideration of the patient's history of violence and its relationship to mental health treatment if he or she does not receive the significant procedure;

(G) That consent may be refused, withheld or withdrawn at any time; and

(H) Any additional information concerning the proposed significant procedure requested by the patient.

~~(b) A medication educator shall assist by providing information to the patient that explains the proposed significant procedure, as described in subsection (3)(a)(B) and (E) of this rule;~~

~~(c)~~(b) The treating physician or psychiatric nurse practitioner intending to administer a significant procedure shall document in the patient's chart that the information required in subsection (3)(a) of this rule was explained and that the patient, parent or guardian of a minor or guardian of a legally incapacitated patient explicitly consented, refused, withheld or withdrew consent. The treating physician or psychiatric nurse practitioner may document this by completing the informed consent form and make it part of the patient's record.

(4) When discussing the significant procedure with the treating physician or psychiatric nurse practitioner ~~and the medication educator~~, the patient may request additional information about the significant procedure pursuant to OAR 309-114-0010(3)(a)(H) and present additional information relevant to making his or her decision.

(5) Voluntary Consent: Consent to a proposed significant procedure must be given voluntarily, free of any duress or coercion. Subject to the provisions of OAR 309-114-0020, the decision to refuse, withhold or withdraw consent previously given shall not result in the denial of any other benefit, privilege, or service solely on the basis of refusing, withholding or withdrawing consent. A voluntary patient may be discharged from the institution if offered procedures are refused.

(6) Obtaining Consent with Respect to Legally Incapacitated Patients: A state institution may not administer a significant procedure to a legally incapacitated patient without the consent of the guardian, or, in the case of a minor, the parent or guardian, except in the case of an emergency under OAR 309-114-0015, where the institution has good cause to involuntarily administer a significant procedure under 309-114-0020, or pursuant to a valid court order. In order to prove good cause, the institution must prove 309-114-0020(1)(a) and (1)(d) in reference to the guardian and 309-114-0020(1)(b) and (1)(c) in reference to the patient.

(7) Reports of Progress: A patient, the parents or guardian of a minor patient, or the guardian of a legally incapacitated patient shall, upon request, be informed of the progress of the patient during administration of the significant procedure.

~~(8) These rules will be effective as of December 1, 2007 on all new orders for administration of significant procedures without informed consent. This includes new orders written after expiration of the previous order. This rule will be effective for existing, unexpired orders as of January 1, 2008, on a phased-in schedule that will accommodate as many new hearings as is practicable to schedule each week.~~

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-

2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0015

Administration of Significant Procedures Without Informed Consent in Emergencies

(1) An emergency exists if in the opinion of the chief medical officer or designee:

(a) Immediate action is required to preserve the life or physical health of the patient and it is impracticable to obtain informed consent as provided in OAR 309-114-0010; or

(b) Immediate action is required because the behavior of the patient creates a substantial likelihood of immediate physical harm to the patient or others in the institution and it is impracticable to obtain informed consent as provided in OAR 309-114-0010.

(2) If an emergency exists, the chief medical officer or designee may administer a significant procedure to a patient without obtaining prior informed consent in the manner otherwise required by these rules provided:

(a) The specific nature of each emergency and the procedure which was used to deal with the emergency are adequately documented in the patient's record and a form provided for emergency procedure is completed and placed in the patient's record;

(b) Reasonable effort shall be made to contact the parent or legal guardian prior to the administration of the significant procedure. If contact is not possible, notice shall be given to the parent or legal guardian as soon as possible;

(c) Within a reasonable period of time after an emergency procedure is administered, the treatment team shall review the treatment or training program and, if practicable, implement a treatment or training program designed to correct the behavior creating the emergency; and

(d) The administration of a significant procedure in an emergency situation does not allow the institution to administer these procedures, once the emergency has subsided, without obtaining informed consent.

Stat. Auth.: ORS 179.040, 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0020

Involuntary Administration of Significant Procedures to Persons Committed to the Division with Good Cause

(1) Good cause: Good cause exists to administer a significant procedure to a person committed to the Division without informed consent if in the opinion of the treating physician or psychiatric nurse practitioner after consultation with the treatment team, the following factors are satisfied:

(a) Pursuant to OAR 309-114-0010(2), the person is deemed unable to consent to, refuse, withhold or withdraw consent to the significant procedure. This determination must be documented on the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form. It must include the specific questions asked and answers given regarding the patient's ability to weigh the risks and benefits of the proposed treatment, alternative treatment and no treatment including, but not limited to all relevant factors listed in 309-114-0010(3)(a).

(b) The proposed significant procedure will likely restore or prevent deterioration of the person's mental or physical health, alleviate extreme suffering or save or extend the person's life. This factor is established conclusively for purposes of a hearing under OAR 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form, unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing.

(c) The proposed significant procedure is the most appropriate treatment for the person's condition according to current clinical practice all other less intrusive procedures have been considered and all criteria and information set forth in OAR 309-114-0010(3)(a) were considered. This factor is established conclusively for purposes of a hearing under 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form, unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing.

(d) The institution made a conscientious effort to obtain informed consent from the patient. This factor is established conclusively for purposes of a hearing under OAR 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form ~~and the medication educator's form or progress note,~~ unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing. If the institution has reason to believe a patient has limited English language proficiency or the patient requests it, the institution will make reasonable accommodations to provide the patient with meaningful access to the informed consent process, such as providing the patient with the opportunity to have an interpreter orally translate written materials into the patient's native language and provide translation during the treating physician's or psychiatric nurse practitioner's attempts to obtain informed consent ~~and the medication educator's attempt to provide information about the significant procedure~~. A "conscientious effort" to obtain informed consent means the following:

(A) The patient's treating physician or psychiatric nurse practitioner made at least two good faith attempts to obtain informed consent by attempting to explain the procedure to the patient and documenting those efforts in the patient's record.~~; and~~

~~(B) The medication educator made at least one good faith attempt to provide the information required in OAR 309-114-0010(3)(a)(B) and (E) and explain and discuss the proposed procedure with the patient.~~

(e) Because of the preliminary nature of their commitment, the following additional findings must be made for patients under ORS 161.370 jurisdiction in order to show good cause under this rule:

(A) Medication is not requested for the sole purpose of restoring trial competency; and

(B) The patient is being medicated because of the patient's dangerousness or to treat the patient's grave disability.

(2) Independent Review: Prior to granting approval for the administration of a significant procedure for good cause to a person committed to the Division, the superintendent or chief medical officer of a state institution for the mentally ill shall obtain consultation and approval from an independent examining physician, or if a patient refuses to be examined, the superintendent or chief medical officer shall document that an independent examining physician made at least two good faith attempts to examine the patient. The superintendent or chief medical officer shall maintain a list of independent examining physicians and shall seek consultation and approval from independent examining physicians selected on a rotating basis from the list. The independent examining physician shall not be an employee of the Division, shall be a board-eligible psychiatrist, shall have been subjected to review by the medical staff executive committee as to qualifications to make such an examination, shall have been provided with a copy of administration rules OAR 309-114-0000 through 309-114-0030 and shall have participated in a training program regarding these rules, their meaning and application.

(3) The superintendent or chief medical officer shall provide to a patient to whom a significant procedure is proposed to be administered written advance notice of the intent to seek consultation and approval of an independent examining physician for the purpose of administering the procedure without the patient's consent.

(4) The physician selected to conduct the independent consultation shall:

(a) Review the person's medical chart including the records of efforts made to obtain the person's informed consent and

(A) Personally examine the person at least one time; or

(B) If the patient refuses to be examined, the physician shall make two good faith attempts to examine the patient. If the patient refuses to be examined during these two good faith attempts,

the independent consultation and approval requirement outlined in subsection (4)(a)(A) and (4)(b) of this rule shall be deemed to be fulfilled.

(b) Discuss the matter with the person to determine the extent of the need for the procedure and the nature of the person's refusal, withholding or withdrawal or inability to consent to the significant procedure. This determination as well as the supporting evidence in the form of the specific questions asked and answers given regarding the patient's ability to weigh the risks and benefits of the proposed treatment, alternative treatment and no treatment must be documented in the patient's record;

(c) Consider additional information, if any, presented prior to or at the time of examination or interview as may be requested by the person or anyone on behalf of the person; and

(d) Make a determination whether the factors required under these rules exist for the particular person or that one or more factors are not present and complete a report of his or her findings which provides their approval or disapproval of the proposed significant procedure. The written report must be provided to:

(A) The superintendent or chief medical officer; and

(B) The person to whom a significant procedure is proposed to be administered with a copy being made part of the person's record.

(5) Superintendent's Determination:

(a) The superintendent or chief medical officer shall approve or disapprove of the administration of the significant procedure to a person committed to the Division based on good cause provided that if the examining physician or psychiatric nurse practitioner found that one or more of the factors required by section (1) of this rule were not present or otherwise disapproved of the procedure; the superintendent or chief medical officer shall not approve the significant procedure and it shall not be performed;

(b) Approval of the significant procedure shall be only for as long as no substantial increase in risk is encountered in administering the significant procedure or significant procedure of a similar class during the term of a person's commitment, but in no case longer than 180 days. Disapproval shall be only for as long as no substantial change occurs in the person's condition during the term of commitment, but in no case longer than 180 days;

(c) Written notice of the superintendent's or chief medical officer's determination shall be provided to the patient and made part of the individual's record. This notice must be delivered to the patient and fully explained by facility medical staff. This notice must include a clear statement of the decision to treat without informed consent, specific basis for the decision, what evidence was relied on to make the decision and include a clear notice of the opportunity to ask for a contested case hearing with an administrative law judge if the patient disagrees with the decision. Attached must be a form with a simple procedure to request a hearing. The patient indicating in writing or verbally to any staff member a desire to challenge the institution's

decision will be sufficient to request a contested case hearing pursuant to OAR 309 114 0025. The patient shall have 48 hours to request a contested case hearing after receiving this notice. If the patient does not request a hearing within the 48 hour period or the patient subsequently withdraws his initial hearing request and is not already receiving the significant procedure, the institution may involuntarily administer the significant procedure. A patient retains the right to request an initial hearing on the decision to administer a significant procedure without informed consent at any time.

(d) If the patient withdraws his or her initial request for hearing or refuses to attend the initial hearing without good cause, the administrative law judge will issue a dismissal order pursuant to OAR 137-003-0672(3). A dismissal order will allow the institution to immediately administer the significant procedure without informed consent as if the patient had never requested a hearing. If a dismissal order is issued, the patient may request a second hearing. If the patient withdraws his second request for hearing or refuses to attend the second hearing without good cause, the hearing will occur as scheduled with the institution presenting a prima facie case pursuant to ORS 183.417(4) and the administrative law judge will issue a proposed order by default. The institution will then issue a final order by default.

(e) Records of all reports by independent examining physicians of the determinations of the superintendent or chief medical officer under this rule shall be maintained by the superintendent or chief medical officer in a separate file and shall be summarized each year. Such summaries shall show:

(A) Each type of proposed significant procedure for which consultation with an independent examining physician was sought;

(B) The number of times consultation was sought from a particular independent examining physician for each type of proposed significant procedure;

(C) The number of times each independent examining physician approved and disapproved each type of proposed significant procedure; and

(D) The number of times the superintendent or chief medical officer approved and disapproved each type of proposed significant procedure.

(f) The summaries referred to in subsection (5)(e) of this rule shall be public records and shall be made available to the public during reasonable business hours in accordance with ORS Chapter 192.

(6) When treatment is being administered without informed consent, the ward physician or psychiatric nurse practitioner will write a progress note addressing any changes in patient's capacity to give informed consent every 60 days.

(7) At any time that a patient's condition changes so that there appears to his or her treating physician or psychiatric nurse practitioner to be a substantial improvement in the patient's capacity to consent to or refuse treatment, a formal re assessment of the patient's capacity to

consent shall occur as described in OAR 309-114-0010 and 309-114-0020. No order to administer treatment without informed consent in non-emergency situations shall be valid for longer than 180 days or the duration of the commitment, whichever is shorter, without re establishing the need for the order by following the procedures described in 309-114-0010 and 309-114-0020.

(8) When an individual is transferred to a state institution from a community hospital or another state institution where he or she was already being treated with a significant procedure without informed consent, the receiving institution must apply OAR 309-114-0000 through 309-114-0030 no later than 7 days after the date of admission to the new institution. A state institution can honor an existing order for involuntary administration of a significant procedure without informed consent if procedures such as those outlined in 309-114-0010 through 309-114-0030 have already been applied and all necessary documentation is in the patient's file.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-880, cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 6-2010(Temp), f. & cert. ef. 3-24-10 thru 9-20-10; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; MHS 4-2011, f. & cert. ef. 5-19-11; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0025

Contested Case Hearing

(1) Patient’s Rights: A patient has the right to contest the hospital’s determination that it has good cause to involuntarily administer a significant procedure without informed consent pursuant to OAR 309-114-0020(5)(c). If the patient is a minor or legally incapacitated, the parents or guardian has the right to contest the hospital’s determination that it has good cause to involuntarily administer a significant procedure without informed consent pursuant to 309-114-0020(5)(c).

(a) Instructions and a simple method of requesting such a hearing shall be provided to every patient when he or she receives notice that the institution intends to administer a significant procedure without informed consent. The patient indicating in writing or verbally to any staff member a desire to challenge the institution’s decision will be sufficient to request a contested case hearing.

(b) A patient’s verbal or written request for a hearing implies consent to the release of his or her records and protected health information to his or her representative, the institution’s representative, and the Office of Administrative Hearings for the purpose of preparing for and conducting the contested case hearing.

(c) After filing a request for an administrative hearing, an attorney or certified law student will be appointed by the Division to represent any patient who requests one. The patient has the right to be represented at the hearing by a representative appointed and paid by the state. The patient also has the right to be represented at the hearing by an attorney or certified law student of his or her choice and at his or her own expense.

(d) If a patient requests a contested case hearing and is not already receiving the significant procedure pursuant to a valid physician's or psychiatric nurse practitioner's order the patient has the right to not receive the significant procedure prior to and during the hearing. If the patient is already receiving the significant procedure pursuant to a valid physician's or psychiatric nurse practitioner's order, the institution may continue to administer the significant procedure to the patient until the final order is issued.

(2) Contested Case Hearing: The administrative hearing will conform to the requirements set forth in ORS 183.413 through 183.500, and the Attorney General's Model Rules at OAR 137-003-0501 and the following:

(a) The hearing must be held within 14 days of the date of the patient's request, unless the patient or his or her representative or the state institution's representative requests a delay for good cause or the patient or his or her representative and the state institution's representative agree to a postponement. Good cause includes, but is not limited to, the following circumstances: the patient's ward is quarantined at the time of the hearing, additional time is required to access necessary and relevant records not in the possession of the state institution, or titration of the patient's medication is necessary to allow minimally adequate communication by the patient with his or her representative for purposes of the hearing.

(b) These hearings are closed to all non-participants, except personnel from the institution or the Attorney General's Office, personnel from Disability Rights Oregon, personnel from the Office of Administrative Hearings, or members of the patient's family. Any exceptions to this policy must be agreed to in advance by the institution's representative and the patient or their representative. The institution may exclude non-participants, otherwise allowed to attend these hearings, who are disruptive or represent a safety concern.

(c) In lieu of discovery, the patient or his or her representative will be provided with the treating physician's or psychiatric nurse practitioner's form, independent examining physician's evaluation form, the superintendent's or chief medical officer's form approving or disapproving of the administration of the significant procedure, and the preprinted information regarding the risks and benefits of the proposed significant procedures. The patient or his or her representative may also review the patient's chart and consult with the patient's treating physician or psychiatric nurse practitioner.

(d) The following procedures are not available in these contested case hearings: summary determination procedures as defined in OAR 137-003-580, pre-hearing motions as defined in 137-003-0630, and pre-determination review procedures in 137-003-0640.

(e) A final order must be issued by the administrative law judge within two days, excluding weekends and holidays, after the hearing, except when the administrative law judge determines that there is good cause to delay the final order. All final orders must be issued within 3 days of the close of the hearing or the record, whichever is later, excluding weekends and holidays. A final order is effective immediately upon being signed or as otherwise provided in the order.

(f) If after the hearing, the administrative law judge determines that there is an issue not raised by a party or the agency that impacts the outcome of the case, the administrative law judge must grant a continuance for good cause and inform the institution's representative and the patient or his or her representative so that they may present additional arguments and evidence on that issue.

(g) The administrative law judge must determine whether to affirm or reverse the state institution's decision that it has good cause to involuntarily administer a significant procedure without informed consent from the patient as defined by the factors in OAR 309-114-0020(1) with regards to the significant procedures listed on the treating physician's or psychiatric nurse practitioner's informed consent form.

(h) A final order affirming or reversing the institution's decision to involuntarily administer a significant procedure to the patient without informed consent includes all significant procedures listed on the treating physician's or psychiatric nurse practitioner's informed consent form and all unlisted significant procedures of a similar class.

(i) A final order approving the involuntary administration of the significant procedure without informed consent shall be reexamined if the treating physician or psychiatric nurse practitioner determines that there is a substantial increase in the risk to the patient in administering the significant procedure during the term of a person's commitment, but in no case longer than 180 days. Approval of the significant procedure may also be reexamined pursuant to OAR 309-114-0020(8) if the treating physician or psychiatric nurse practitioner determines that there is substantial improvement in the patient's capacity.

(j) A final order disapproving the involuntary administration of the significant procedure without informed consent lasts for no longer than 180 days. If a substantial change in the patient's condition occurs during this time, the institution may re-evaluate the patient using the entire OAR 309-114-0020 process, and must additionally document and explain what substantial change in the person's capacity has occurred since the administrative law judge decision was issued.

(k) If the final order reverses the institution's decision to involuntarily administer a significant procedure and the patient is already receiving the significant procedure, then the hospital may continue to administer the significant procedure to the extent it is necessary to develop and implement a titration plan to safely discontinue the significant procedure according to current clinical practice.

(l) If the patient withdraws his initial request for hearing or refuses to attend the initial hearing without good cause, the administrative law judge will issue a dismissal order pursuant to OAR

137-003-0672(3). A dismissal order will allow the institution to immediately administer the significant procedure without informed consent as if the patient had never requested a hearing. If a dismissal order is issued, the patient may request a second hearing. If the patient withdraws his second request for hearing or refuses to attend the second hearing without good cause, the hearing will occur as scheduled with the institution presenting a prima facie case pursuant to ORS 183.417(4) and the administrative law judge will issue a final order by default. The final order by default will be issued in a manner consistent with the time frames and process outlined in OAR 309-114-0025(2).

(m) Any administrative law judge who will preside over a hearing regarding involuntary administration of a significant procedure without informed consent must complete agency approved training unique to administration of psychiatric treatment without consent. This training shall be developed by the Division in consultation with Disability Rights Oregon.

(n) Subject to the approval of the Attorney General, an agency officer or employee is authorized to appear, but not make legal argument, on behalf of the agency in contested case hearings involving the involuntary administration of a significant procedure to a patient.

(A) For purposes of this rule, the term “legal argument” is used as defined in ORS 183.452 and OAR 137-003-0545.

(B) When an agency officer or employee represents the agency, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. Where such objections involve legal argument, the presiding officer shall provide reasonable opportunity for the agency officer or employee to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after the conclusion of the hearing.

Stat. Auth.: ORS 179.040
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 15-2014(Temp), f. & cert. ef. 12-1-14 thru 5-29-15; Administrative correction, 6-23-15

309-114-0030

Notice to Patients and Employees

(1) Upon a patient's admission, the state institutions shall inform the patient, orally and in writing, of the rights, policies, and procedures set forth in these rules. In addition, a clear and simple summary of the contents, including the title, number, and purpose of these rules, and instructions on how to obtain a copy of the rules and advice about their content shall be prominently displayed in areas frequented by patients in all state institutions.

(2) All employees of state institutions involved in patient care shall be notified in writing at the commencement of his or her employment, or, for present employees, within a reasonable time after the effective date of these rules, of the rights, policies, and procedures set forth in these rules. These employees shall participate in a training program regarding the rules, their meaning and application.

Stat. Auth.: ORS 179.040
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; Administrative correction, 6-28-11

AMEND: 309-114-0010

RULE TITLE: General Policy on Obtaining Informed Consent to Treatment and Training

NOTICE FILED DATE: 06/18/2018

RULE SUMMARY: Removing the Medication Educator requirement

RULE TEXT:

(1)(a) Basic Rule. Patients, or parents or guardians of minors, or guardians on behalf of legally incapacitated patients, may refuse any significant procedure and may withdraw at any time consent previously given to a significant procedure. Any refusal or withdrawal or withholding of consent shall be documented in the patient's record.

(b) Personnel of a state institution shall not administer a significant procedure to a patient unless written informed consent is obtained from or on behalf of the patient in the manner prescribed in these rules, except as follows:

(A) Administration of significant procedures to legally incapacitated patients as provided in section (6) of this rule;

(B) Administration of significant procedures without informed consent in emergencies under OAR 309-114-0015;

(C) Involuntary administration of significant procedures with good cause to persons committed to the Division under OAR 309-114-0020; or

(D) Involuntary administration of significant procedures pursuant to a valid court order.

(2) Capacity of the patient: In order to consent to, or refuse, withhold, or withdraw consent to significant procedures, the patient must have the capacity to make a decision concerning acceptance or rejection of a significant procedure, as follows:

(a) Unless adjudicated legally incapacitated for all purposes or for the specific purpose of making treatment decisions, a patient shall be presumed competent to consent to, or refuse, withhold, or withdraw consent to significant procedures. A person committed to the Division may be deemed unable to consent to or refuse, withhold, or withdraw consent to a significant procedure only if the person currently demonstrates an inability to reasonably comprehend and weigh the risks and benefits of the proposed procedure, alternative procedures, or no treatment at all including, but not limited to, all applicable factors listed in (3)(a) of this rule. The patient's current inability to provide informed consent is to be documented in the patient's record and supported by the patient's statements or behavior; and may be evidenced in the treating physician's or psychiatric nurse practitioner's informed consent form, the evaluation form by the independent examining physician and forms approving or disapproving the procedure by the superintendent or chief medical officer;

(b) A person committed to the Division shall not be deemed unable to consent to or refuse, withhold, or withdraw consent to a significant procedure merely by reason of one or more of the following facts:

(A) The person has been involuntarily committed to the Division;

(B) The person has been diagnosed as mentally ill;

(C) The person has disagreed or now disagrees with the treating physician's or psychiatric nurse practitioner's diagnosis; or

(D) The person has disagreed or now disagrees with the treating physician's or psychiatric nurse practitioner's recommendation regarding treatment.

(c) If a court has determined that a patient is legally incapacitated, then consent shall be sought from the legal guardian.

(3) Procedures for Obtaining Informed Consent and Information to be Given: The person from whom informed consent to a significant procedure is sought shall be given information, orally and in writing, the substance of which is to be found on the treating physician's or psychiatric nurse practitioner's informed consent form. In the case of medication, there shall be attached a preprinted information sheet on the risks and benefits of the medication listed on the treating physician's or psychiatric nurse practitioner's form. All written materials under this rule will be provided in English. However, if the institution has reason to believe a patient has limited English language proficiency or the patient requests it, then the institution will make reasonable accommodations to provide the patient with meaningful access to the information, such as providing the patient with copies of the materials in the patient's native language if the materials are readily available in that language or providing the opportunity to have an interpreter orally translate written materials into the patient's native language. Specific information about significant procedures of a similar class

will not be provided to or discussed with the patient.
(a) The information shall describe:
(A) The nature and seriousness of the patient's mental illness or condition;
(B) The purpose of the significant procedures listed on the treating physician's or psychiatric nurse practitioner's form, the intended outcome and the risks and benefits of the procedures;
(C) Any alternatives, particularly alternatives offering less material risks to the proposed significant procedure that are reasonably available and reasonably comparable in effectiveness;
(D) If the proposed significant procedure is medication, facility medical staff shall give the name, dosage range, and frequency of administration of the medication listed on the treating physician's or psychiatric nurse practitioner's form, and shall explain the material risks of the medication at that dosage range.
(E) The side effects of the intended medication or electro-convulsive therapy;
(F) The predicted medical, psychiatric, social, or legal consequences of not accepting the significant procedure or any comparable procedure, including any potential risk the patient represents to the health and safety of the patient, or others, which may include, but is not limited to, a consideration of the patient's history of violence and its relationship to mental health treatment if he or she does not receive the significant procedure;
(G) That consent may be refused, withheld or withdrawn at any time; and
(H) Any additional information concerning the proposed significant procedure requested by the patient.
(b) The treating physician or psychiatric nurse practitioner intending to administer a significant procedure shall document in the patient's chart that the information required in subsection (3)(a) of this rule was explained and that the patient, parent or guardian of a minor or guardian of a legally incapacitated patient explicitly consented, refused, withheld or withdrew consent. The treating physician or psychiatric nurse practitioner may document this by completing the informed consent form and make it part of the patient's record.
(4) When discussing the significant procedure with the treating physician or psychiatric nurse practitioner, the patient may request additional information about the significant procedure pursuant to OAR 309-114-0010(3)(a)(H) and present additional information relevant to making his or her decision.
(5) Voluntary Consent: Consent to a proposed significant procedure must be given voluntarily, free of any duress or coercion. Subject to the provisions of OAR 309-114-0020, the decision to refuse, withhold or withdraw consent previously given shall not result in the denial of any other benefit, privilege, or service solely on the basis of refusing, withholding or withdrawing consent. A voluntary patient may be discharged from the institution if offered procedures are refused.
(6) Obtaining Consent with Respect to Legally Incapacitated Patients: A state institution may not administer a significant procedure to a legally incapacitated patient without the consent of the guardian, or, in the case of a minor, the parent or guardian, except in the case of an emergency under OAR 309-114-0015, where the institution has good cause to involuntarily administer a significant procedure under 309-114-0020, or pursuant to a valid court order. In order to prove good cause, the institution must prove 309-114-0020(1)(a) and (1)(d) in reference to the guardian and 309-114-0020(1)(b) and (1)(c) in reference to the patient.
(7) Reports of Progress: A patient, the parents or guardian of a minor patient, or the guardian of a legally incapacitated patient shall, upon request, be informed of the progress of the patient during administration of the significant procedure.

STATUTORY/OTHER AUTHORITY: ORS 179.040, 413.042

STATUTES/OTHER IMPLEMENTED: ORS 179.321, 426.070, 426.385

OREGON HEALTH AUTHORITY, HEALTH SYSTEMS DIVISION: MENTAL HEALTH SERVICES

DIVISION 114

INFORMED CONSENT TO TREATMENT AND TRAINING BY PATIENTS IN STATE INSTITUTIONS

309-114-0000

Purpose

Purpose. These rules prescribe standards and procedures to be observed by personnel of state institutions operated by Division in obtaining informed consent to significant procedures, as defined by these rules, from patients of such state institutions. These rules do not apply to routine medical procedures. Administration of significant procedures without informed consent is permitted as described in OAR 309-114-0010(1)(b). The purpose of these rules is to assure that the rights of patients are protected with respect to significant procedures.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 5-2015, f. & cert. ef. 8-28-15; MHS 5-2016, f. & cert. ef. 5-25-16

309-114-0005

Definitions

As used in these rules:

(1) "Authorized Representative" or "representative" means an individual who represents a party in a contested case hearing; the representative must be supervised by an attorney that is licensed by the Oregon State Bar.

(2) "Chief Medical Officer" means the physician designated by the superintendent of each state institution pursuant to ORS 426.020(2)~~179.360(1)(f)~~ who is responsible for the administration of medical treatment at each state institution.

(3) “Committed” or “Commitment” means an individual is admitted under ORS 161.327, 161.328, 161.370, 426.701, 426.130, 427.215 or 426.220 when the individual's guardian or health care representative is unavailable or unable to consent

(4) “Dangerousness” means either:

(a) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats, including verbal threats or attempts to commit suicide or inflict physical harm on him or herself. Evidence of substantial risk may include information about historical patterns of behavior that resulted in serious harm being inflicted by an individual upon him or herself as those patterns relate to the current risk of harm;

(b) A substantial risk that physical harm will be inflicted by an individual upon another individual, as evidenced by recent acts, behavior or threats, including verbal threats, which have caused such harm or which would place a reasonable person in reasonable fear of sustaining such harm. Evidence of substantial risk may include information about historical patterns of behavior

(5) "Division" means the State Hospitals Division of the Oregon Health Authority.

(6) "Guardian" means a legal guardian who is an individual appointed by a court of law to act as guardian of a minor or a legally incapacitated person.

(7) “Health Care Representative” means a person who has authority to make health care decisions for a patient.

(8) "Legally Incapacitated" means having been found by a court of law under ORS 426.295 to be unable, without assistance, to properly manage or take care of one's personal affairs, or who is a person under guardianship.

(9) "Material Risk." A risk is material if it may have a substantial adverse effect on the patient's psychological or physical health, or both. Tardive dyskinesia is a material risk of neuroleptic medication. Other risks include, but are not limited to raised blood pressure, onset of diabetes and metabolic changes.

~~(10) “Medication Educator” means a Qualified Mental Health Professional (QMHP) who provides information about the proposed significant procedures to patients.~~

~~(11)~~ (10)"Patient" means an individual who is receiving care and treatment in a state institution for the mentally ill.

~~(12)~~ (11)Patient with a “grave disability” means a patient who:

(a) Is in danger of serious physical harm to his or her health or safety absent the proposed significant procedures; or

(b) Manifests severe deterioration in routine functioning evidenced by loss of cognitive or volitional control over his or her actions which is likely to result in serious harm absent the proposed significant procedures.

~~(13)~~(12) "Person Committed to the Division" or "Person" means an individual committed under ORS 161.327, 161.328, 426.701, 426.220, 161.370, 426.130, or 427.215.

~~(14)~~(13) "Psychiatric Nurse Practitioner," means a registered nurse with prescription authority who independently provides health care to clients with mental and emotional needs or disorders.

~~(15) "Qualified Mental Health Professional" (QMHP) means any individual meeting the following minimum qualifications as documented by the state institution:~~

~~(a) Graduate degree in psychology;~~

~~(b) Bachelor's or graduate degree in nursing and licensed by the State of Oregon;~~

~~(c) Graduate degree in social work or counseling;~~

~~(d) Graduate degree in a behavioral science field;~~

~~(e) Graduate degree in recreational art, or music therapy;~~

~~(f) Bachelor's degree in occupational therapy and licensed by the State of Oregon; or~~

~~(g) Bachelor's or graduate degree in a relevant area.~~

~~(16)~~(14) "Routine Medical Procedure" means a procedure customarily administered by facility medical staff under circumstances involving little or no risk of causing injury to a patient including, but not limited to physical examinations, blood draws, influenza vaccinations, tuberculosis (TB) testing, human immunodeficiency virus (HIV) testing and hygiene.

~~(17)~~(15) "Significant Procedure" means a diagnostic or treatment modality and all significant procedures of a similar class that pose a material risk of substantial pain or harm to the patient such as, but not limited to psychotropic medication and electro-convulsive therapy. Significant procedures do not include routine medical procedures.

~~(18)~~(16) "Significant Procedures of a Similar Class" means a diagnostic or treatment modality that presents substantially similar material risks as the significant procedure listed on the treating physician's or psychiatric nurse practitioner's informed consent form and is generally considered in current clinical practice to be a substitute treatment or belong to the same class of medications as the listed significant procedure.

(a) For purposes of these rules, medications listed in subsections 16 ~~14~~(a)(A) through 16~~14~~(a)(F) of this rule will be considered the same or similar class of medication as other medications in the same subsection:

(A) All medications used under current clinical practice as antipsychotic medications including typical and atypical antipsychotic medications;

(B) All medications used under current clinical practice as mood stabilizing medications;

(C) All medications used under current clinical practice as antidepressants;

(D) All medications used under current clinical practice as anxiolytics;

(E) All medications used under current clinical practice as psychostimulants; and

(F) All medications used under current clinical practice as dementia cognitive enhancers.

(b) Significant procedures of the same or similar class do not need to be specifically listed on the treating physician's or psychiatric nurse practitioner's form.

~~(19)~~(17) "State Institution" or "Institution" means all Oregon State Hospital campuses~~, and the Blue Mountain Recovery Center.~~

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~~(20)~~(18) "Superintendent" means the executive head of the state institution listed in section 17 (18) of this rule, or the superintendent's designee.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 183.458, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 2-2009(Temp), f. & cert. ef. 4-2-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 6-2009, f. & cert. ef. 12-28-09; MHS 5-2010(Temp), f. & cert. ef. 3-12-10 thru 9-8-10; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; MHS 4-2011, f. & cert. ef. 5-19-11; MHS 15-2014(Temp), f. & cert. ef. 12-1-14 thru 5-29-15; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15; MHS 8-2015(Temp), f. & cert. ef. 11-24-15 thru 5-20-16; MHS 5-2016, f. & cert. ef. 5-25-16

309-114-0010

General Policy on Obtaining Informed Consent to Treatment and Training

(1)(a) Basic Rule. Patients, or parents or guardians of minors, or guardians on behalf of legally incapacitated patients, may refuse any significant procedure and may withdraw at any time

consent previously given to a significant procedure. Any refusal or withdrawal or withholding of consent shall be documented in the patient's record.

(b) Personnel of a state institution shall not administer a significant procedure to a patient unless written informed consent is obtained from or on behalf of the patient in the manner prescribed in these rules, except as follows:

(A) Administration of significant procedures to legally incapacitated patients as provided in section (6) of this rule;

(B) Administration of significant procedures without informed consent in emergencies under OAR 309-114-0015;

(C) Involuntary administration of significant procedures with good cause to persons committed to the Division under OAR 309-114-0020; or

(D) Involuntary administration of significant procedures pursuant to a valid court order.

(2) Capacity of the patient: In order to consent to, or refuse, withhold, or withdraw consent to significant procedures, the patient must have the capacity to make a decision concerning acceptance or rejection of a significant procedure, as follows:

(a) Unless adjudicated legally incapacitated for all purposes or for the specific purpose of making treatment decisions, a patient shall be presumed competent to consent to, or refuse, withhold, or withdraw consent to significant procedures. A person committed to the Division may be deemed unable to consent to or refuse, withhold, or withdraw consent to a significant procedure only if the person currently demonstrates an inability to reasonably comprehend and weigh the risks and benefits of the proposed procedure, alternative procedures, or no treatment at all including, but not limited to, all applicable factors listed in (3)(a) of this rule. The patient’s current inability to provide informed consent is to be documented in the patient's record and supported by the patient’s statements or behavior; and may be evidenced in the treating physician’s or psychiatric nurse practitioner's informed consent form, the evaluation form by the independent examining physician and forms approving or disapproving the procedure by the superintendent or chief medical officer;

(b) A person committed to the Division shall not be deemed unable to consent to or refuse, withhold, or withdraw consent to a significant procedure merely by reason of one or more of the following facts:

(A) The person has been involuntarily committed to the Division;

(B) The person has been diagnosed as mentally ill;

(C) The person has disagreed or now disagrees with the treating physician's or psychiatric nurse practitioner’s diagnosis; or

(D) The person has disagreed or now disagrees with the treating physician's or psychiatric nurse practitioner's recommendation regarding treatment.

(c) If a court has determined that a patient is legally incapacitated, then consent shall be sought from the legal guardian.

(3) Procedures for Obtaining Informed Consent and Information to be Given: The person from whom informed consent to a significant procedure is sought shall be given information, orally and in writing, the substance of which is to be found on the treating physician's or psychiatric nurse practitioner's informed consent form. In the case of medication, there shall be attached a preprinted information sheet on the risks and benefits of the medication listed on the treating physician's or psychiatric nurse practitioner's form. All written materials under this rule will be provided in English. However, if the institution has reason to believe a patient has limited English language proficiency or the patient requests it, then the institution will make reasonable accommodations to provide the patient with meaningful access to the information, such as providing the patient with copies of the materials in the patient's native language if the materials are readily available in that language or providing the opportunity to have an interpreter orally translate written materials into the patient's native language. Specific information about significant procedures of a similar class will not be provided to or discussed with the patient.

(a) The information shall describe:

(A) The nature and seriousness of the patient's mental illness or condition;

(B) The purpose of the significant procedures listed on the treating physician's or psychiatric nurse practitioner's form, the intended outcome and the risks and benefits of the procedures;

(C) Any alternatives, particularly alternatives offering less material risks to the proposed significant procedure that are reasonably available and reasonably comparable in effectiveness;

(D) If the proposed significant procedure is medication, facility medical staff shall give the name, dosage range, and frequency of administration of the medication listed on the treating physician's or psychiatric nurse practitioner's form, and shall explain the material risks of the medication at that dosage range.

(E) The side effects of the intended medication or electro-convulsive therapy;

(F) The predicted medical, psychiatric, social, or legal consequences of not accepting the significant procedure or any comparable procedure, including any potential risk the patient represents to the health and safety of the patient, or others, which may include, but is not limited to, a consideration of the patient's history of violence and its relationship to mental health treatment if he or she does not receive the significant procedure;

(G) That consent may be refused, withheld or withdrawn at any time; and

(H) Any additional information concerning the proposed significant procedure requested by the patient.

~~(b) A medication educator shall assist by providing information to the patient that explains the proposed significant procedure, as described in subsection (3)(a)(B) and (E) of this rule;~~

~~(c)~~(b) The treating physician or psychiatric nurse practitioner intending to administer a significant procedure shall document in the patient's chart that the information required in subsection (3)(a) of this rule was explained and that the patient, parent or guardian of a minor or guardian of a legally incapacitated patient explicitly consented, refused, withheld or withdrew consent. The treating physician or psychiatric nurse practitioner may document this by completing the informed consent form and make it part of the patient's record.

(4) When discussing the significant procedure with the treating physician or psychiatric nurse practitioner ~~and the medication educator~~, the patient may request additional information about the significant procedure pursuant to OAR 309-114-0010(3)(a)(H) and present additional information relevant to making his or her decision.

(5) Voluntary Consent: Consent to a proposed significant procedure must be given voluntarily, free of any duress or coercion. Subject to the provisions of OAR 309-114-0020, the decision to refuse, withhold or withdraw consent previously given shall not result in the denial of any other benefit, privilege, or service solely on the basis of refusing, withholding or withdrawing consent. A voluntary patient may be discharged from the institution if offered procedures are refused.

(6) Obtaining Consent with Respect to Legally Incapacitated Patients: A state institution may not administer a significant procedure to a legally incapacitated patient without the consent of the guardian, or, in the case of a minor, the parent or guardian, except in the case of an emergency under OAR 309-114-0015, where the institution has good cause to involuntarily administer a significant procedure under 309-114-0020, or pursuant to a valid court order. In order to prove good cause, the institution must prove 309-114-0020(1)(a) and (1)(d) in reference to the guardian and 309-114-0020(1)(b) and (1)(c) in reference to the patient.

(7) Reports of Progress: A patient, the parents or guardian of a minor patient, or the guardian of a legally incapacitated patient shall, upon request, be informed of the progress of the patient during administration of the significant procedure.

~~(8) These rules will be effective as of December 1, 2007 on all new orders for administration of significant procedures without informed consent. This includes new orders written after expiration of the previous order. This rule will be effective for existing, unexpired orders as of January 1, 2008, on a phased-in schedule that will accommodate as many new hearings as is practicable to schedule each week.~~

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-

2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0015

Administration of Significant Procedures Without Informed Consent in Emergencies

(1) An emergency exists if in the opinion of the chief medical officer or designee:

(a) Immediate action is required to preserve the life or physical health of the patient and it is impracticable to obtain informed consent as provided in OAR 309-114-0010; or

(b) Immediate action is required because the behavior of the patient creates a substantial likelihood of immediate physical harm to the patient or others in the institution and it is impracticable to obtain informed consent as provided in OAR 309-114-0010.

(2) If an emergency exists, the chief medical officer or designee may administer a significant procedure to a patient without obtaining prior informed consent in the manner otherwise required by these rules provided:

(a) The specific nature of each emergency and the procedure which was used to deal with the emergency are adequately documented in the patient's record and a form provided for emergency procedure is completed and placed in the patient's record;

(b) Reasonable effort shall be made to contact the parent or legal guardian prior to the administration of the significant procedure. If contact is not possible, notice shall be given to the parent or legal guardian as soon as possible;

(c) Within a reasonable period of time after an emergency procedure is administered, the treatment team shall review the treatment or training program and, if practicable, implement a treatment or training program designed to correct the behavior creating the emergency; and

(d) The administration of a significant procedure in an emergency situation does not allow the institution to administer these procedures, once the emergency has subsided, without obtaining informed consent.

Stat. Auth.: ORS 179.040, 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0020

Involuntary Administration of Significant Procedures to Persons Committed to the Division with Good Cause

(1) Good cause: Good cause exists to administer a significant procedure to a person committed to the Division without informed consent if in the opinion of the treating physician or psychiatric nurse practitioner after consultation with the treatment team, the following factors are satisfied:

(a) Pursuant to OAR 309-114-0010(2), the person is deemed unable to consent to, refuse, withhold or withdraw consent to the significant procedure. This determination must be documented on the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form. It must include the specific questions asked and answers given regarding the patient's ability to weigh the risks and benefits of the proposed treatment, alternative treatment and no treatment including, but not limited to all relevant factors listed in 309-114-0010(3)(a).

(b) The proposed significant procedure will likely restore or prevent deterioration of the person's mental or physical health, alleviate extreme suffering or save or extend the person's life. This factor is established conclusively for purposes of a hearing under OAR 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form, unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing.

(c) The proposed significant procedure is the most appropriate treatment for the person's condition according to current clinical practice all other less intrusive procedures have been considered and all criteria and information set forth in OAR 309-114-0010(3)(a) were considered. This factor is established conclusively for purposes of a hearing under 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form, unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing.

(d) The institution made a conscientious effort to obtain informed consent from the patient. This factor is established conclusively for purposes of a hearing under OAR 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form ~~and the medication educator's form or progress note,~~ unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing. If the institution has reason to believe a patient has limited English language proficiency or the patient requests it, the institution will make reasonable accommodations to provide the patient with meaningful access to the informed consent process, such as providing the patient with the opportunity to have an interpreter orally translate written materials into the patient's native language and provide translation during the treating physician's or psychiatric nurse practitioner's attempts to obtain informed consent ~~and the medication educator's attempt to provide information about the significant procedure~~. A "conscientious effort" to obtain informed consent means the following:

(A) The patient's treating physician or psychiatric nurse practitioner made at least two good faith attempts to obtain informed consent by attempting to explain the procedure to the patient and documenting those efforts in the patient's record.~~; and~~

~~(B) The medication educator made at least one good faith attempt to provide the information required in OAR 309-114-0010(3)(a)(B) and (E) and explain and discuss the proposed procedure with the patient.~~

(e) Because of the preliminary nature of their commitment, the following additional findings must be made for patients under ORS 161.370 jurisdiction in order to show good cause under this rule:

(A) Medication is not requested for the sole purpose of restoring trial competency; and

(B) The patient is being medicated because of the patient's dangerousness or to treat the patient's grave disability.

(2) Independent Review: Prior to granting approval for the administration of a significant procedure for good cause to a person committed to the Division, the superintendent or chief medical officer of a state institution for the mentally ill shall obtain consultation and approval from an independent examining physician, or if a patient refuses to be examined, the superintendent or chief medical officer shall document that an independent examining physician made at least two good faith attempts to examine the patient. The superintendent or chief medical officer shall maintain a list of independent examining physicians and shall seek consultation and approval from independent examining physicians selected on a rotating basis from the list. The independent examining physician shall not be an employee of the Division, shall be a board-eligible psychiatrist, shall have been subjected to review by the medical staff executive committee as to qualifications to make such an examination, shall have been provided with a copy of administration rules OAR 309-114-0000 through 309-114-0030 and shall have participated in a training program regarding these rules, their meaning and application.

(3) The superintendent or chief medical officer shall provide to a patient to whom a significant procedure is proposed to be administered written advance notice of the intent to seek consultation and approval of an independent examining physician for the purpose of administering the procedure without the patient's consent.

(4) The physician selected to conduct the independent consultation shall:

(a) Review the person's medical chart including the records of efforts made to obtain the person's informed consent and

(A) Personally examine the person at least one time; or

(B) If the patient refuses to be examined, the physician shall make two good faith attempts to examine the patient. If the patient refuses to be examined during these two good faith attempts,

the independent consultation and approval requirement outlined in subsection (4)(a)(A) and (4)(b) of this rule shall be deemed to be fulfilled.

(b) Discuss the matter with the person to determine the extent of the need for the procedure and the nature of the person's refusal, withholding or withdrawal or inability to consent to the significant procedure. This determination as well as the supporting evidence in the form of the specific questions asked and answers given regarding the patient's ability to weigh the risks and benefits of the proposed treatment, alternative treatment and no treatment must be documented in the patient's record;

(c) Consider additional information, if any, presented prior to or at the time of examination or interview as may be requested by the person or anyone on behalf of the person; and

(d) Make a determination whether the factors required under these rules exist for the particular person or that one or more factors are not present and complete a report of his or her findings which provides their approval or disapproval of the proposed significant procedure. The written report must be provided to:

(A) The superintendent or chief medical officer; and

(B) The person to whom a significant procedure is proposed to be administered with a copy being made part of the person's record.

(5) Superintendent's Determination:

(a) The superintendent or chief medical officer shall approve or disapprove of the administration of the significant procedure to a person committed to the Division based on good cause provided that if the examining physician or psychiatric nurse practitioner found that one or more of the factors required by section (1) of this rule were not present or otherwise disapproved of the procedure; the superintendent or chief medical officer shall not approve the significant procedure and it shall not be performed;

(b) Approval of the significant procedure shall be only for as long as no substantial increase in risk is encountered in administering the significant procedure or significant procedure of a similar class during the term of a person's commitment, but in no case longer than 180 days. Disapproval shall be only for as long as no substantial change occurs in the person's condition during the term of commitment, but in no case longer than 180 days;

(c) Written notice of the superintendent's or chief medical officer's determination shall be provided to the patient and made part of the individual's record. This notice must be delivered to the patient and fully explained by facility medical staff. This notice must include a clear statement of the decision to treat without informed consent, specific basis for the decision, what evidence was relied on to make the decision and include a clear notice of the opportunity to ask for a contested case hearing with an administrative law judge if the patient disagrees with the decision. Attached must be a form with a simple procedure to request a hearing. The patient indicating in writing or verbally to any staff member a desire to challenge the institution's

decision will be sufficient to request a contested case hearing pursuant to OAR 309 114 0025. The patient shall have 48 hours to request a contested case hearing after receiving this notice. If the patient does not request a hearing within the 48 hour period or the patient subsequently withdraws his initial hearing request and is not already receiving the significant procedure, the institution may involuntarily administer the significant procedure. A patient retains the right to request an initial hearing on the decision to administer a significant procedure without informed consent at any time.

(d) If the patient withdraws his or her initial request for hearing or refuses to attend the initial hearing without good cause, the administrative law judge will issue a dismissal order pursuant to OAR 137-003-0672(3). A dismissal order will allow the institution to immediately administer the significant procedure without informed consent as if the patient had never requested a hearing. If a dismissal order is issued, the patient may request a second hearing. If the patient withdraws his second request for hearing or refuses to attend the second hearing without good cause, the hearing will occur as scheduled with the institution presenting a prima facie case pursuant to ORS 183.417(4) and the administrative law judge will issue a proposed order by default. The institution will then issue a final order by default.

(e) Records of all reports by independent examining physicians of the determinations of the superintendent or chief medical officer under this rule shall be maintained by the superintendent or chief medical officer in a separate file and shall be summarized each year. Such summaries shall show:

(A) Each type of proposed significant procedure for which consultation with an independent examining physician was sought;

(B) The number of times consultation was sought from a particular independent examining physician for each type of proposed significant procedure;

(C) The number of times each independent examining physician approved and disapproved each type of proposed significant procedure; and

(D) The number of times the superintendent or chief medical officer approved and disapproved each type of proposed significant procedure.

(f) The summaries referred to in subsection (5)(e) of this rule shall be public records and shall be made available to the public during reasonable business hours in accordance with ORS Chapter 192.

(6) When treatment is being administered without informed consent, the ward physician or psychiatric nurse practitioner will write a progress note addressing any changes in patient's capacity to give informed consent every 60 days.

(7) At any time that a patient's condition changes so that there appears to his or her treating physician or psychiatric nurse practitioner to be a substantial improvement in the patient's capacity to consent to or refuse treatment, a formal re assessment of the patient's capacity to

consent shall occur as described in OAR 309-114-0010 and 309-114-0020. No order to administer treatment without informed consent in non-emergency situations shall be valid for longer than 180 days or the duration of the commitment, whichever is shorter, without re establishing the need for the order by following the procedures described in 309-114-0010 and 309-114-0020.

(8) When an individual is transferred to a state institution from a community hospital or another state institution where he or she was already being treated with a significant procedure without informed consent, the receiving institution must apply OAR 309-114-0000 through 309-114-0030 no later than 7 days after the date of admission to the new institution. A state institution can honor an existing order for involuntary administration of a significant procedure without informed consent if procedures such as those outlined in 309-114-0010 through 309-114-0030 have already been applied and all necessary documentation is in the patient's file.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-880, cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 6-2010(Temp), f. & cert. ef. 3-24-10 thru 9-20-10; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; MHS 4-2011, f. & cert. ef. 5-19-11; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0025

Contested Case Hearing

(1) Patient’s Rights: A patient has the right to contest the hospital’s determination that it has good cause to involuntarily administer a significant procedure without informed consent pursuant to OAR 309-114-0020(5)(c). If the patient is a minor or legally incapacitated, the parents or guardian has the right to contest the hospital’s determination that it has good cause to involuntarily administer a significant procedure without informed consent pursuant to 309-114-0020(5)(c).

(a) Instructions and a simple method of requesting such a hearing shall be provided to every patient when he or she receives notice that the institution intends to administer a significant procedure without informed consent. The patient indicating in writing or verbally to any staff member a desire to challenge the institution’s decision will be sufficient to request a contested case hearing.

(b) A patient’s verbal or written request for a hearing implies consent to the release of his or her records and protected health information to his or her representative, the institution’s representative, and the Office of Administrative Hearings for the purpose of preparing for and conducting the contested case hearing.

(c) After filing a request for an administrative hearing, an attorney or certified law student will be appointed by the Division to represent any patient who requests one. The patient has the right to be represented at the hearing by a representative appointed and paid by the state. The patient also has the right to be represented at the hearing by an attorney or certified law student of his or her choice and at his or her own expense.

(d) If a patient requests a contested case hearing and is not already receiving the significant procedure pursuant to a valid physician's or psychiatric nurse practitioner's order the patient has the right to not receive the significant procedure prior to and during the hearing. If the patient is already receiving the significant procedure pursuant to a valid physician's or psychiatric nurse practitioner's order, the institution may continue to administer the significant procedure to the patient until the final order is issued.

(2) Contested Case Hearing: The administrative hearing will conform to the requirements set forth in ORS 183.413 through 183.500, and the Attorney General's Model Rules at OAR 137-003-0501 and the following:

(a) The hearing must be held within 14 days of the date of the patient's request, unless the patient or his or her representative or the state institution's representative requests a delay for good cause or the patient or his or her representative and the state institution's representative agree to a postponement. Good cause includes, but is not limited to, the following circumstances: the patient's ward is quarantined at the time of the hearing, additional time is required to access necessary and relevant records not in the possession of the state institution, or titration of the patient's medication is necessary to allow minimally adequate communication by the patient with his or her representative for purposes of the hearing.

(b) These hearings are closed to all non-participants, except personnel from the institution or the Attorney General's Office, personnel from Disability Rights Oregon, personnel from the Office of Administrative Hearings, or members of the patient's family. Any exceptions to this policy must be agreed to in advance by the institution's representative and the patient or their representative. The institution may exclude non-participants, otherwise allowed to attend these hearings, who are disruptive or represent a safety concern.

(c) In lieu of discovery, the patient or his or her representative will be provided with the treating physician's or psychiatric nurse practitioner's form, independent examining physician's evaluation form, the superintendent's or chief medical officer's form approving or disapproving of the administration of the significant procedure, and the preprinted information regarding the risks and benefits of the proposed significant procedures. The patient or his or her representative may also review the patient's chart and consult with the patient's treating physician or psychiatric nurse practitioner.

(d) The following procedures are not available in these contested case hearings: summary determination procedures as defined in OAR 137-003-580, pre-hearing motions as defined in 137-003-0630, and pre-determination review procedures in 137-003-0640.

(e) A final order must be issued by the administrative law judge within two days, excluding weekends and holidays, after the hearing, except when the administrative law judge determines that there is good cause to delay the final order. All final orders must be issued within 3 days of the close of the hearing or the record, whichever is later, excluding weekends and holidays. A final order is effective immediately upon being signed or as otherwise provided in the order.

(f) If after the hearing, the administrative law judge determines that there is an issue not raised by a party or the agency that impacts the outcome of the case, the administrative law judge must grant a continuance for good cause and inform the institution's representative and the patient or his or her representative so that they may present additional arguments and evidence on that issue.

(g) The administrative law judge must determine whether to affirm or reverse the state institution's decision that it has good cause to involuntarily administer a significant procedure without informed consent from the patient as defined by the factors in OAR 309-114-0020(1) with regards to the significant procedures listed on the treating physician's or psychiatric nurse practitioner's informed consent form.

(h) A final order affirming or reversing the institution's decision to involuntarily administer a significant procedure to the patient without informed consent includes all significant procedures listed on the treating physician's or psychiatric nurse practitioner's informed consent form and all unlisted significant procedures of a similar class.

(i) A final order approving the involuntary administration of the significant procedure without informed consent shall be reexamined if the treating physician or psychiatric nurse practitioner determines that there is a substantial increase in the risk to the patient in administering the significant procedure during the term of a person's commitment, but in no case longer than 180 days. Approval of the significant procedure may also be reexamined pursuant to OAR 309-114-0020(8) if the treating physician or psychiatric nurse practitioner determines that there is substantial improvement in the patient's capacity.

(j) A final order disapproving the involuntary administration of the significant procedure without informed consent lasts for no longer than 180 days. If a substantial change in the patient's condition occurs during this time, the institution may re-evaluate the patient using the entire OAR 309-114-0020 process, and must additionally document and explain what substantial change in the person's capacity has occurred since the administrative law judge decision was issued.

(k) If the final order reverses the institution's decision to involuntarily administer a significant procedure and the patient is already receiving the significant procedure, then the hospital may continue to administer the significant procedure to the extent it is necessary to develop and implement a titration plan to safely discontinue the significant procedure according to current clinical practice.

(l) If the patient withdraws his initial request for hearing or refuses to attend the initial hearing without good cause, the administrative law judge will issue a dismissal order pursuant to OAR

137-003-0672(3). A dismissal order will allow the institution to immediately administer the significant procedure without informed consent as if the patient had never requested a hearing. If a dismissal order is issued, the patient may request a second hearing. If the patient withdraws his second request for hearing or refuses to attend the second hearing without good cause, the hearing will occur as scheduled with the institution presenting a prima facie case pursuant to ORS 183.417(4) and the administrative law judge will issue a final order by default. The final order by default will be issued in a manner consistent with the time frames and process outlined in OAR 309-114-0025(2).

(m) Any administrative law judge who will preside over a hearing regarding involuntary administration of a significant procedure without informed consent must complete agency approved training unique to administration of psychiatric treatment without consent. This training shall be developed by the Division in consultation with Disability Rights Oregon.

(n) Subject to the approval of the Attorney General, an agency officer or employee is authorized to appear, but not make legal argument, on behalf of the agency in contested case hearings involving the involuntary administration of a significant procedure to a patient.

(A) For purposes of this rule, the term “legal argument” is used as defined in ORS 183.452 and OAR 137-003-0545.

(B) When an agency officer or employee represents the agency, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. Where such objections involve legal argument, the presiding officer shall provide reasonable opportunity for the agency officer or employee to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after the conclusion of the hearing.

Stat. Auth.: ORS 179.040
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 15-2014(Temp), f. & cert. ef. 12-1-14 thru 5-29-15; Administrative correction, 6-23-15

309-114-0030

Notice to Patients and Employees

(1) Upon a patient's admission, the state institutions shall inform the patient, orally and in writing, of the rights, policies, and procedures set forth in these rules. In addition, a clear and simple summary of the contents, including the title, number, and purpose of these rules, and instructions on how to obtain a copy of the rules and advice about their content shall be prominently displayed in areas frequented by patients in all state institutions.

(2) All employees of state institutions involved in patient care shall be notified in writing at the commencement of his or her employment, or, for present employees, within a reasonable time after the effective date of these rules, of the rights, policies, and procedures set forth in these rules. These employees shall participate in a training program regarding the rules, their meaning and application.

Stat. Auth.: ORS 179.040
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; Administrative correction, 6-28-11

AMEND: 309-114-0020

RULE TITLE: Involuntary Administration of Significant Procedures to Persons Committed to the Division with Good Cause

NOTICE FILED DATE: 06/18/2018

RULE SUMMARY: Removing the Medication Educator requirement

RULE TEXT:

(1) Good cause: Good cause exists to administer a significant procedure to a person committed to the Division without informed consent if in the opinion of the treating physician or psychiatric nurse practitioner after consultation with the treatment team, the following factors are satisfied:

(a) Pursuant to OAR 309-114-0010(2), the person is deemed unable to consent to, refuse, withhold or withdraw consent to the significant procedure. This determination must be documented on the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form. It must include the specific questions asked and answers given regarding the patient's ability to weigh the risks and benefits of the proposed treatment, alternative treatment and no treatment including, but not limited to all relevant factors listed in 309-114-0010(3)(a).

(b) The proposed significant procedure will likely restore or prevent deterioration of the person's mental or physical health, alleviate extreme suffering or save or extend the person's life. This factor is established conclusively for purposes of a hearing under OAR 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form, unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing.

(c) The proposed significant procedure is the most appropriate treatment for the person's condition according to current clinical practice all other less intrusive procedures have been considered and all criteria and information set forth in OAR 309-114-0010(3)(a) were considered. This factor is established conclusively for purposes of a hearing under 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form, unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing.

(d) The institution made a conscientious effort to obtain informed consent from the patient. This factor is established conclusively for purposes of a hearing under OAR 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing. If the institution has reason to believe a patient has limited English language proficiency or the patient requests it, the institution will make reasonable accommodations to provide the patient with meaningful access to the informed consent process, such as providing the patient with the opportunity to have an interpreter orally translate written materials into the patient's native language and provide translation during the treating physician's or psychiatric nurse practitioner's attempts to obtain informed consent. A "conscientious effort" to obtain informed consent means the following:

(A) The patient's treating physician or psychiatric nurse practitioner made at least two good faith attempts to obtain informed consent by attempting to explain the procedure to the patient and documenting those efforts in the patient's record.

(e) Because of the preliminary nature of their commitment, the following additional findings must be made for patients under ORS 161.370 jurisdiction in order to show good cause under this rule:

(A) Medication is not requested for the sole purpose of restoring trial competency; and

(B) The patient is being medicated because of the patient’s dangerousness or to treat the patient’s grave disability.

(2) Independent Review: Prior to granting approval for the administration of a significant procedure for good cause to a person committed to the Division, the superintendent or chief medical officer of a state institution for the mentally ill shall obtain consultation and approval from an independent examining physician, or if a patient refuses to be examined, the superintendent or chief medical officer shall document that an independent examining physician made at least two

good faith attempts to examine the patient. The superintendent or chief medical officer shall maintain a list of independent examining physicians and shall seek consultation and approval from independent examining physicians selected on a rotating basis from the list. The independent examining physician shall not be an employee of the Division, shall be a board-eligible psychiatrist, shall have been subjected to review by the medical staff executive committee as to qualifications to make such an examination, shall have been provided with a copy of administration rules OAR 309-114-0000 through 309-114-0030 and shall have participated in a training program regarding these rules, their meaning and application.

(3) The superintendent or chief medical officer shall provide to a patient to whom a significant procedure is proposed to be administered written advance notice of the intent to seek consultation and approval of an independent examining physician for the purpose of administering the procedure without the patient's consent.

(4) The physician selected to conduct the independent consultation shall:

(a) Review the person's medical chart including the records of efforts made to obtain the person's informed consent and

(A) Personally examine the person at least one time; or

(B) If the patient refuses to be examined, the physician shall make two good faith attempts to examine the patient. If the patient refuses to be examined during these two good faith attempts, the independent consultation and approval requirement outlined in subsection (4)(a)(A) and (4)(b) of this rule shall be deemed to be fulfilled.

(b) Discuss the matter with the person to determine the extent of the need for the procedure and the nature of the person's refusal, withholding or withdrawal or inability to consent to the significant procedure. This determination as well as the supporting evidence in the form of the specific questions asked and answers given regarding the patient’s ability to weigh the risks and benefits of the proposed treatment, alternative treatment and no treatment must be documented in the patient's record;

(c) Consider additional information, if any, presented prior to or at the time of examination or interview as may be requested by the person or anyone on behalf of the person; and

(d) Make a determination whether the factors required under these rules exist for the particular person or that one or more factors are not present and complete a report of his or her findings which provides their approval or disapproval of the proposed significant procedure. The written report must be provided to:

(A) The superintendent or chief medical officer; and

(B) The person to whom a significant procedure is proposed to be administered with a copy being made part of the person's record.

(5) Superintendent's Determination:

(a) The superintendent or chief medical officer shall approve or disapprove of the administration of the significant procedure to a person committed to the Division based on good cause provided that if the examining physician or psychiatric nurse practitioner found that one or more of the factors required by section (1) of this rule were not present or otherwise disapproved of the procedure; the superintendent or chief medical officer shall not approve the significant procedure and it shall not be performed;

(b) Approval of the significant procedure shall be only for as long as no substantial increase in risk is encountered in administering the significant procedure or significant procedure of a similar class during the term of a person's commitment, but in no case longer than 180 days. Disapproval shall be only for as long as no substantial change occurs in the person's condition during the term of commitment, but in no case longer than 180 days;

(c) Written notice of the superintendent's or chief medical officer's determination shall be provided to the patient and made part of the individual's record. This notice must be delivered to the patient and fully explained by facility medical staff. This notice must include a clear statement of the decision to treat without informed consent, specific basis for the decision, what evidence was relied on to make the decision and include a clear notice of the opportunity to ask for a contested case hearing with an administrative law judge if the patient disagrees with the decision. Attached must be a form with a simple procedure to request a hearing. The patient indicating in writing or verbally to any staff member a desire to challenge the institution's decision will be sufficient to request a contested case hearing pursuant to OAR 309 114 0025. The patient shall have 48 hours to request a contested case hearing after receiving this notice. If the patient

does not request a hearing within the 48 hour period or the patient subsequently withdraws his initial hearing request and is not already receiving the significant procedure, the institution may involuntarily administer the significant procedure. A patient retains the right to request an initial hearing on the decision to administer a significant procedure without informed consent at any time.
(d) If the patient withdraws his or her initial request for hearing or refuses to attend the initial hearing without good cause, the administrative law judge will issue a dismissal order pursuant to OAR 137-003-0672(3). A dismissal order will allow the institution to immediately administer the significant procedure without informed consent as if the patient had never requested a hearing. If a dismissal order is issued, the patient may request a second hearing. If the patient withdraws his second request for hearing or refuses to attend the second hearing without good cause, the hearing will occur as scheduled with the institution presenting a prima facie case pursuant to ORS 183.417(4) and the administrative law judge will issue a proposed order by default. The institution will then issue a final order by default.
(e) Records of all reports by independent examining physicians of the determinations of the superintendent or chief medical officer under this rule shall be maintained by the superintendent or chief medical officer in a separate file and shall be summarized each year. Such summaries shall show:
(A) Each type of proposed significant procedure for which consultation with an independent examining physician was sought;
(B) The number of times consultation was sought from a particular independent examining physician for each type of proposed significant procedure;
(C) The number of times each independent examining physician approved and disapproved each type of proposed significant procedure; and
(D) The number of times the superintendent or chief medical officer approved and disapproved each type of proposed significant procedure.
(f) The summaries referred to in subsection (5)(e) of this rule shall be public records and shall be made available to the public during reasonable business hours in accordance with ORS Chapter 192.
(6) When treatment is being administered without informed consent, the ward physician or psychiatric nurse practitioner will write a progress note addressing any changes in patient's capacity to give informed consent every 60 days.
(7) At any time that a patient's condition changes so that there appears to his or her treating physician or psychiatric nurse practitioner to be a substantial improvement in the patient's capacity to consent to or refuse treatment, a formal re assessment of the patient's capacity to consent shall occur as described in OAR 309-114-0010 and 309-114-0020. No order to administer treatment without informed consent in non-emergency situations shall be valid for longer than 180 days or the duration of the commitment, whichever is shorter, without re establishing the need for the order by following the procedures described in 309-114-0010 and 309-114-0020.
(8) When an individual is transferred to a state institution from a community hospital or another state institution where he or she was already being treated with a significant procedure without informed consent, the receiving institution must apply OAR 309-114-0000 through 309-114-0030 no later than 7 days after the date of admission to the new institution. A state institution can honor an existing order for involuntary administration of a significant procedure without informed consent if procedures such as those outlined in 309-114-0010 through 309-114-0030 have already been applied and all necessary documentation is in the patient's file.

STATUTORY/OTHER AUTHORITY: ORS 179.040, 413.042

STATUTES/OTHER IMPLEMENTED: ORS 179.321, 426.070, 426.385

OREGON HEALTH AUTHORITY, HEALTH SYSTEMS DIVISION: MENTAL HEALTH SERVICES

DIVISION 114

INFORMED CONSENT TO TREATMENT AND TRAINING BY PATIENTS IN STATE INSTITUTIONS

309-114-0000

Purpose

Purpose. These rules prescribe standards and procedures to be observed by personnel of state institutions operated by Division in obtaining informed consent to significant procedures, as defined by these rules, from patients of such state institutions. These rules do not apply to routine medical procedures. Administration of significant procedures without informed consent is permitted as described in OAR 309-114-0010(1)(b). The purpose of these rules is to assure that the rights of patients are protected with respect to significant procedures.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 5-2015, f. & cert. ef. 8-28-15; MHS 5-2016, f. & cert. ef. 5-25-16

309-114-0005

Definitions

As used in these rules:

(1) "Authorized Representative" or "representative" means an individual who represents a party in a contested case hearing; the representative must be supervised by an attorney that is licensed by the Oregon State Bar.

(2) "Chief Medical Officer" means the physician designated by the superintendent of each state institution pursuant to ORS 426.020(2)~~179.360(1)(f)~~ who is responsible for the administration of medical treatment at each state institution.

(3) “Committed” or “Commitment” means an individual is admitted under ORS 161.327, 161.328, 161.370, 426.701, 426.130, 427.215 or 426.220 when the individual's guardian or health care representative is unavailable or unable to consent

(4) “Dangerousness” means either:

(a) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats, including verbal threats or attempts to commit suicide or inflict physical harm on him or herself. Evidence of substantial risk may include information about historical patterns of behavior that resulted in serious harm being inflicted by an individual upon him or herself as those patterns relate to the current risk of harm;

(b) A substantial risk that physical harm will be inflicted by an individual upon another individual, as evidenced by recent acts, behavior or threats, including verbal threats, which have caused such harm or which would place a reasonable person in reasonable fear of sustaining such harm. Evidence of substantial risk may include information about historical patterns of behavior

(5) "Division" means the State Hospitals Division of the Oregon Health Authority.

(6) "Guardian" means a legal guardian who is an individual appointed by a court of law to act as guardian of a minor or a legally incapacitated person.

(7) “Health Care Representative” means a person who has authority to make health care decisions for a patient.

(8) "Legally Incapacitated" means having been found by a court of law under ORS 426.295 to be unable, without assistance, to properly manage or take care of one's personal affairs, or who is a person under guardianship.

(9) "Material Risk." A risk is material if it may have a substantial adverse effect on the patient's psychological or physical health, or both. Tardive dyskinesia is a material risk of neuroleptic medication. Other risks include, but are not limited to raised blood pressure, onset of diabetes and metabolic changes.

~~(10) “Medication Educator” means a Qualified Mental Health Professional (QMHP) who provides information about the proposed significant procedures to patients.~~

~~(11)~~ (10)"Patient" means an individual who is receiving care and treatment in a state institution for the mentally ill.

~~(12)~~ (11)Patient with a “grave disability” means a patient who:

(a) Is in danger of serious physical harm to his or her health or safety absent the proposed significant procedures; or

(b) Manifests severe deterioration in routine functioning evidenced by loss of cognitive or volitional control over his or her actions which is likely to result in serious harm absent the proposed significant procedures.

~~(13)~~(12) "Person Committed to the Division" or "Person" means an individual committed under ORS 161.327, 161.328, 426.701, 426.220, 161.370, 426.130, or 427.215.

~~(14)~~(13) "Psychiatric Nurse Practitioner," means a registered nurse with prescription authority who independently provides health care to clients with mental and emotional needs or disorders.

~~(15) "Qualified Mental Health Professional" (QMHP) means any individual meeting the following minimum qualifications as documented by the state institution:~~

~~(a) Graduate degree in psychology;~~

~~(b) Bachelor's or graduate degree in nursing and licensed by the State of Oregon;~~

~~(c) Graduate degree in social work or counseling;~~

~~(d) Graduate degree in a behavioral science field;~~

~~(e) Graduate degree in recreational art, or music therapy;~~

~~(f) Bachelor's degree in occupational therapy and licensed by the State of Oregon; or~~

~~(g) Bachelor's or graduate degree in a relevant area.~~

~~(16)~~(14) "Routine Medical Procedure" means a procedure customarily administered by facility medical staff under circumstances involving little or no risk of causing injury to a patient including, but not limited to physical examinations, blood draws, influenza vaccinations, tuberculosis (TB) testing, human immunodeficiency virus (HIV) testing and hygiene.

~~(17)~~(15) "Significant Procedure" means a diagnostic or treatment modality and all significant procedures of a similar class that pose a material risk of substantial pain or harm to the patient such as, but not limited to psychotropic medication and electro-convulsive therapy. Significant procedures do not include routine medical procedures.

~~(18)~~(16) "Significant Procedures of a Similar Class" means a diagnostic or treatment modality that presents substantially similar material risks as the significant procedure listed on the treating physician's or psychiatric nurse practitioner's informed consent form and is generally considered in current clinical practice to be a substitute treatment or belong to the same class of medications as the listed significant procedure.

(a) For purposes of these rules, medications listed in subsections 16 ~~14~~(a)(A) through 16~~14~~(a)(F) of this rule will be considered the same or similar class of medication as other medications in the same subsection:

(A) All medications used under current clinical practice as antipsychotic medications including typical and atypical antipsychotic medications;

(B) All medications used under current clinical practice as mood stabilizing medications;

(C) All medications used under current clinical practice as antidepressants;

(D) All medications used under current clinical practice as anxiolytics;

(E) All medications used under current clinical practice as psychostimulants; and

(F) All medications used under current clinical practice as dementia cognitive enhancers.

(b) Significant procedures of the same or similar class do not need to be specifically listed on the treating physician's or psychiatric nurse practitioner's form.

~~(19)~~(17) "State Institution" or "Institution" means all Oregon State Hospital campuses~~, and the Blue Mountain Recovery Center.~~

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~~(20)~~(18) "Superintendent" means the executive head of the state institution listed in section 17 (18) of this rule, or the superintendent's designee.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 183.458, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 2-2009(Temp), f. & cert. ef. 4-2-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 6-2009, f. & cert. ef. 12-28-09; MHS 5-2010(Temp), f. & cert. ef. 3-12-10 thru 9-8-10; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; MHS 4-2011, f. & cert. ef. 5-19-11; MHS 15-2014(Temp), f. & cert. ef. 12-1-14 thru 5-29-15; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15; MHS 8-2015(Temp), f. & cert. ef. 11-24-15 thru 5-20-16; MHS 5-2016, f. & cert. ef. 5-25-16

309-114-0010

General Policy on Obtaining Informed Consent to Treatment and Training

(1)(a) Basic Rule. Patients, or parents or guardians of minors, or guardians on behalf of legally incapacitated patients, may refuse any significant procedure and may withdraw at any time

consent previously given to a significant procedure. Any refusal or withdrawal or withholding of consent shall be documented in the patient's record.

(b) Personnel of a state institution shall not administer a significant procedure to a patient unless written informed consent is obtained from or on behalf of the patient in the manner prescribed in these rules, except as follows:

(A) Administration of significant procedures to legally incapacitated patients as provided in section (6) of this rule;

(B) Administration of significant procedures without informed consent in emergencies under OAR 309-114-0015;

(C) Involuntary administration of significant procedures with good cause to persons committed to the Division under OAR 309-114-0020; or

(D) Involuntary administration of significant procedures pursuant to a valid court order.

(2) Capacity of the patient: In order to consent to, or refuse, withhold, or withdraw consent to significant procedures, the patient must have the capacity to make a decision concerning acceptance or rejection of a significant procedure, as follows:

(a) Unless adjudicated legally incapacitated for all purposes or for the specific purpose of making treatment decisions, a patient shall be presumed competent to consent to, or refuse, withhold, or withdraw consent to significant procedures. A person committed to the Division may be deemed unable to consent to or refuse, withhold, or withdraw consent to a significant procedure only if the person currently demonstrates an inability to reasonably comprehend and weigh the risks and benefits of the proposed procedure, alternative procedures, or no treatment at all including, but not limited to, all applicable factors listed in (3)(a) of this rule. The patient’s current inability to provide informed consent is to be documented in the patient's record and supported by the patient’s statements or behavior; and may be evidenced in the treating physician’s or psychiatric nurse practitioner's informed consent form, the evaluation form by the independent examining physician and forms approving or disapproving the procedure by the superintendent or chief medical officer;

(b) A person committed to the Division shall not be deemed unable to consent to or refuse, withhold, or withdraw consent to a significant procedure merely by reason of one or more of the following facts:

(A) The person has been involuntarily committed to the Division;

(B) The person has been diagnosed as mentally ill;

(C) The person has disagreed or now disagrees with the treating physician's or psychiatric nurse practitioner’s diagnosis; or

(D) The person has disagreed or now disagrees with the treating physician's or psychiatric nurse practitioner's recommendation regarding treatment.

(c) If a court has determined that a patient is legally incapacitated, then consent shall be sought from the legal guardian.

(3) Procedures for Obtaining Informed Consent and Information to be Given: The person from whom informed consent to a significant procedure is sought shall be given information, orally and in writing, the substance of which is to be found on the treating physician's or psychiatric nurse practitioner's informed consent form. In the case of medication, there shall be attached a preprinted information sheet on the risks and benefits of the medication listed on the treating physician's or psychiatric nurse practitioner's form. All written materials under this rule will be provided in English. However, if the institution has reason to believe a patient has limited English language proficiency or the patient requests it, then the institution will make reasonable accommodations to provide the patient with meaningful access to the information, such as providing the patient with copies of the materials in the patient's native language if the materials are readily available in that language or providing the opportunity to have an interpreter orally translate written materials into the patient's native language. Specific information about significant procedures of a similar class will not be provided to or discussed with the patient.

(a) The information shall describe:

(A) The nature and seriousness of the patient's mental illness or condition;

(B) The purpose of the significant procedures listed on the treating physician's or psychiatric nurse practitioner's form, the intended outcome and the risks and benefits of the procedures;

(C) Any alternatives, particularly alternatives offering less material risks to the proposed significant procedure that are reasonably available and reasonably comparable in effectiveness;

(D) If the proposed significant procedure is medication, facility medical staff shall give the name, dosage range, and frequency of administration of the medication listed on the treating physician's or psychiatric nurse practitioner's form, and shall explain the material risks of the medication at that dosage range.

(E) The side effects of the intended medication or electro-convulsive therapy;

(F) The predicted medical, psychiatric, social, or legal consequences of not accepting the significant procedure or any comparable procedure, including any potential risk the patient represents to the health and safety of the patient, or others, which may include, but is not limited to, a consideration of the patient's history of violence and its relationship to mental health treatment if he or she does not receive the significant procedure;

(G) That consent may be refused, withheld or withdrawn at any time; and

(H) Any additional information concerning the proposed significant procedure requested by the patient.

~~(b) A medication educator shall assist by providing information to the patient that explains the proposed significant procedure, as described in subsection (3)(a)(B) and (E) of this rule;~~

~~(c)~~(b) The treating physician or psychiatric nurse practitioner intending to administer a significant procedure shall document in the patient's chart that the information required in subsection (3)(a) of this rule was explained and that the patient, parent or guardian of a minor or guardian of a legally incapacitated patient explicitly consented, refused, withheld or withdrew consent. The treating physician or psychiatric nurse practitioner may document this by completing the informed consent form and make it part of the patient's record.

(4) When discussing the significant procedure with the treating physician or psychiatric nurse practitioner ~~and the medication educator~~, the patient may request additional information about the significant procedure pursuant to OAR 309-114-0010(3)(a)(H) and present additional information relevant to making his or her decision.

(5) Voluntary Consent: Consent to a proposed significant procedure must be given voluntarily, free of any duress or coercion. Subject to the provisions of OAR 309-114-0020, the decision to refuse, withhold or withdraw consent previously given shall not result in the denial of any other benefit, privilege, or service solely on the basis of refusing, withholding or withdrawing consent. A voluntary patient may be discharged from the institution if offered procedures are refused.

(6) Obtaining Consent with Respect to Legally Incapacitated Patients: A state institution may not administer a significant procedure to a legally incapacitated patient without the consent of the guardian, or, in the case of a minor, the parent or guardian, except in the case of an emergency under OAR 309-114-0015, where the institution has good cause to involuntarily administer a significant procedure under 309-114-0020, or pursuant to a valid court order. In order to prove good cause, the institution must prove 309-114-0020(1)(a) and (1)(d) in reference to the guardian and 309-114-0020(1)(b) and (1)(c) in reference to the patient.

(7) Reports of Progress: A patient, the parents or guardian of a minor patient, or the guardian of a legally incapacitated patient shall, upon request, be informed of the progress of the patient during administration of the significant procedure.

~~(8) These rules will be effective as of December 1, 2007 on all new orders for administration of significant procedures without informed consent. This includes new orders written after expiration of the previous order. This rule will be effective for existing, unexpired orders as of January 1, 2008, on a phased-in schedule that will accommodate as many new hearings as is practicable to schedule each week.~~

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-

2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0015

Administration of Significant Procedures Without Informed Consent in Emergencies

(1) An emergency exists if in the opinion of the chief medical officer or designee:

(a) Immediate action is required to preserve the life or physical health of the patient and it is impracticable to obtain informed consent as provided in OAR 309-114-0010; or

(b) Immediate action is required because the behavior of the patient creates a substantial likelihood of immediate physical harm to the patient or others in the institution and it is impracticable to obtain informed consent as provided in OAR 309-114-0010.

(2) If an emergency exists, the chief medical officer or designee may administer a significant procedure to a patient without obtaining prior informed consent in the manner otherwise required by these rules provided:

(a) The specific nature of each emergency and the procedure which was used to deal with the emergency are adequately documented in the patient's record and a form provided for emergency procedure is completed and placed in the patient's record;

(b) Reasonable effort shall be made to contact the parent or legal guardian prior to the administration of the significant procedure. If contact is not possible, notice shall be given to the parent or legal guardian as soon as possible;

(c) Within a reasonable period of time after an emergency procedure is administered, the treatment team shall review the treatment or training program and, if practicable, implement a treatment or training program designed to correct the behavior creating the emergency; and

(d) The administration of a significant procedure in an emergency situation does not allow the institution to administer these procedures, once the emergency has subsided, without obtaining informed consent.

Stat. Auth.: ORS 179.040, 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0020

Involuntary Administration of Significant Procedures to Persons Committed to the Division with Good Cause

(1) Good cause: Good cause exists to administer a significant procedure to a person committed to the Division without informed consent if in the opinion of the treating physician or psychiatric nurse practitioner after consultation with the treatment team, the following factors are satisfied:

(a) Pursuant to OAR 309-114-0010(2), the person is deemed unable to consent to, refuse, withhold or withdraw consent to the significant procedure. This determination must be documented on the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form. It must include the specific questions asked and answers given regarding the patient's ability to weigh the risks and benefits of the proposed treatment, alternative treatment and no treatment including, but not limited to all relevant factors listed in 309-114-0010(3)(a).

(b) The proposed significant procedure will likely restore or prevent deterioration of the person's mental or physical health, alleviate extreme suffering or save or extend the person's life. This factor is established conclusively for purposes of a hearing under OAR 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form, unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing.

(c) The proposed significant procedure is the most appropriate treatment for the person's condition according to current clinical practice all other less intrusive procedures have been considered and all criteria and information set forth in OAR 309-114-0010(3)(a) were considered. This factor is established conclusively for purposes of a hearing under 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form and the independent examining physician's evaluation form, unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing.

(d) The institution made a conscientious effort to obtain informed consent from the patient. This factor is established conclusively for purposes of a hearing under OAR 309-114-0025 by introducing into evidence the treating physician's or psychiatric nurse practitioner's informed consent form ~~and the medication educator's form or progress note,~~ unless this factor is affirmatively raised as an issue by the patient or his or her representative at the hearing. If the institution has reason to believe a patient has limited English language proficiency or the patient requests it, the institution will make reasonable accommodations to provide the patient with meaningful access to the informed consent process, such as providing the patient with the opportunity to have an interpreter orally translate written materials into the patient's native language and provide translation during the treating physician's or psychiatric nurse practitioner's attempts to obtain informed consent ~~and the medication educator's attempt to provide information about the significant procedure~~. A "conscientious effort" to obtain informed consent means the following:

(A) The patient's treating physician or psychiatric nurse practitioner made at least two good faith attempts to obtain informed consent by attempting to explain the procedure to the patient and documenting those efforts in the patient's record.~~; and~~

~~(B) The medication educator made at least one good faith attempt to provide the information required in OAR 309-114-0010(3)(a)(B) and (E) and explain and discuss the proposed procedure with the patient.~~

(e) Because of the preliminary nature of their commitment, the following additional findings must be made for patients under ORS 161.370 jurisdiction in order to show good cause under this rule:

(A) Medication is not requested for the sole purpose of restoring trial competency; and

(B) The patient is being medicated because of the patient's dangerousness or to treat the patient's grave disability.

(2) Independent Review: Prior to granting approval for the administration of a significant procedure for good cause to a person committed to the Division, the superintendent or chief medical officer of a state institution for the mentally ill shall obtain consultation and approval from an independent examining physician, or if a patient refuses to be examined, the superintendent or chief medical officer shall document that an independent examining physician made at least two good faith attempts to examine the patient. The superintendent or chief medical officer shall maintain a list of independent examining physicians and shall seek consultation and approval from independent examining physicians selected on a rotating basis from the list. The independent examining physician shall not be an employee of the Division, shall be a board-eligible psychiatrist, shall have been subjected to review by the medical staff executive committee as to qualifications to make such an examination, shall have been provided with a copy of administration rules OAR 309-114-0000 through 309-114-0030 and shall have participated in a training program regarding these rules, their meaning and application.

(3) The superintendent or chief medical officer shall provide to a patient to whom a significant procedure is proposed to be administered written advance notice of the intent to seek consultation and approval of an independent examining physician for the purpose of administering the procedure without the patient's consent.

(4) The physician selected to conduct the independent consultation shall:

(a) Review the person's medical chart including the records of efforts made to obtain the person's informed consent and

(A) Personally examine the person at least one time; or

(B) If the patient refuses to be examined, the physician shall make two good faith attempts to examine the patient. If the patient refuses to be examined during these two good faith attempts,

the independent consultation and approval requirement outlined in subsection (4)(a)(A) and (4)(b) of this rule shall be deemed to be fulfilled.

(b) Discuss the matter with the person to determine the extent of the need for the procedure and the nature of the person's refusal, withholding or withdrawal or inability to consent to the significant procedure. This determination as well as the supporting evidence in the form of the specific questions asked and answers given regarding the patient's ability to weigh the risks and benefits of the proposed treatment, alternative treatment and no treatment must be documented in the patient's record;

(c) Consider additional information, if any, presented prior to or at the time of examination or interview as may be requested by the person or anyone on behalf of the person; and

(d) Make a determination whether the factors required under these rules exist for the particular person or that one or more factors are not present and complete a report of his or her findings which provides their approval or disapproval of the proposed significant procedure. The written report must be provided to:

(A) The superintendent or chief medical officer; and

(B) The person to whom a significant procedure is proposed to be administered with a copy being made part of the person's record.

(5) Superintendent's Determination:

(a) The superintendent or chief medical officer shall approve or disapprove of the administration of the significant procedure to a person committed to the Division based on good cause provided that if the examining physician or psychiatric nurse practitioner found that one or more of the factors required by section (1) of this rule were not present or otherwise disapproved of the procedure; the superintendent or chief medical officer shall not approve the significant procedure and it shall not be performed;

(b) Approval of the significant procedure shall be only for as long as no substantial increase in risk is encountered in administering the significant procedure or significant procedure of a similar class during the term of a person's commitment, but in no case longer than 180 days. Disapproval shall be only for as long as no substantial change occurs in the person's condition during the term of commitment, but in no case longer than 180 days;

(c) Written notice of the superintendent's or chief medical officer's determination shall be provided to the patient and made part of the individual's record. This notice must be delivered to the patient and fully explained by facility medical staff. This notice must include a clear statement of the decision to treat without informed consent, specific basis for the decision, what evidence was relied on to make the decision and include a clear notice of the opportunity to ask for a contested case hearing with an administrative law judge if the patient disagrees with the decision. Attached must be a form with a simple procedure to request a hearing. The patient indicating in writing or verbally to any staff member a desire to challenge the institution's

decision will be sufficient to request a contested case hearing pursuant to OAR 309 114 0025. The patient shall have 48 hours to request a contested case hearing after receiving this notice. If the patient does not request a hearing within the 48 hour period or the patient subsequently withdraws his initial hearing request and is not already receiving the significant procedure, the institution may involuntarily administer the significant procedure. A patient retains the right to request an initial hearing on the decision to administer a significant procedure without informed consent at any time.

(d) If the patient withdraws his or her initial request for hearing or refuses to attend the initial hearing without good cause, the administrative law judge will issue a dismissal order pursuant to OAR 137-003-0672(3). A dismissal order will allow the institution to immediately administer the significant procedure without informed consent as if the patient had never requested a hearing. If a dismissal order is issued, the patient may request a second hearing. If the patient withdraws his second request for hearing or refuses to attend the second hearing without good cause, the hearing will occur as scheduled with the institution presenting a prima facie case pursuant to ORS 183.417(4) and the administrative law judge will issue a proposed order by default. The institution will then issue a final order by default.

(e) Records of all reports by independent examining physicians of the determinations of the superintendent or chief medical officer under this rule shall be maintained by the superintendent or chief medical officer in a separate file and shall be summarized each year. Such summaries shall show:

(A) Each type of proposed significant procedure for which consultation with an independent examining physician was sought;

(B) The number of times consultation was sought from a particular independent examining physician for each type of proposed significant procedure;

(C) The number of times each independent examining physician approved and disapproved each type of proposed significant procedure; and

(D) The number of times the superintendent or chief medical officer approved and disapproved each type of proposed significant procedure.

(f) The summaries referred to in subsection (5)(e) of this rule shall be public records and shall be made available to the public during reasonable business hours in accordance with ORS Chapter 192.

(6) When treatment is being administered without informed consent, the ward physician or psychiatric nurse practitioner will write a progress note addressing any changes in patient's capacity to give informed consent every 60 days.

(7) At any time that a patient's condition changes so that there appears to his or her treating physician or psychiatric nurse practitioner to be a substantial improvement in the patient's capacity to consent to or refuse treatment, a formal re assessment of the patient's capacity to

consent shall occur as described in OAR 309-114-0010 and 309-114-0020. No order to administer treatment without informed consent in non-emergency situations shall be valid for longer than 180 days or the duration of the commitment, whichever is shorter, without re establishing the need for the order by following the procedures described in 309-114-0010 and 309-114-0020.

(8) When an individual is transferred to a state institution from a community hospital or another state institution where he or she was already being treated with a significant procedure without informed consent, the receiving institution must apply OAR 309-114-0000 through 309-114-0030 no later than 7 days after the date of admission to the new institution. A state institution can honor an existing order for involuntary administration of a significant procedure without informed consent if procedures such as those outlined in 309-114-0010 through 309-114-0030 have already been applied and all necessary documentation is in the patient's file.

Stat. Auth.: ORS 179.040 & 413.042
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-880, cert. ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 1-2009(Temp), f. & cert. ef. 1-23-09 thru 7-22-09; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 6-2010(Temp), f. & cert. ef. 3-24-10 thru 9-20-10; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; MHS 4-2011, f. & cert. ef. 5-19-11; MHS 12-2013(Temp), f. & cert. ef. 10-29-13 thru 4-27-14; MHS 9-2014, f. & cert. ef. 4-24-14; MHS 2-2015(Temp), f. & cert. ef. 4-24-15 thru 10-20-15; MHS 5-2015, f. & cert. ef. 8-28-15

309-114-0025

Contested Case Hearing

(1) Patient’s Rights: A patient has the right to contest the hospital’s determination that it has good cause to involuntarily administer a significant procedure without informed consent pursuant to OAR 309-114-0020(5)(c). If the patient is a minor or legally incapacitated, the parents or guardian has the right to contest the hospital’s determination that it has good cause to involuntarily administer a significant procedure without informed consent pursuant to 309-114-0020(5)(c).

(a) Instructions and a simple method of requesting such a hearing shall be provided to every patient when he or she receives notice that the institution intends to administer a significant procedure without informed consent. The patient indicating in writing or verbally to any staff member a desire to challenge the institution’s decision will be sufficient to request a contested case hearing.

(b) A patient’s verbal or written request for a hearing implies consent to the release of his or her records and protected health information to his or her representative, the institution’s representative, and the Office of Administrative Hearings for the purpose of preparing for and conducting the contested case hearing.

(c) After filing a request for an administrative hearing, an attorney or certified law student will be appointed by the Division to represent any patient who requests one. The patient has the right to be represented at the hearing by a representative appointed and paid by the state. The patient also has the right to be represented at the hearing by an attorney or certified law student of his or her choice and at his or her own expense.

(d) If a patient requests a contested case hearing and is not already receiving the significant procedure pursuant to a valid physician's or psychiatric nurse practitioner's order the patient has the right to not receive the significant procedure prior to and during the hearing. If the patient is already receiving the significant procedure pursuant to a valid physician's or psychiatric nurse practitioner's order, the institution may continue to administer the significant procedure to the patient until the final order is issued.

(2) Contested Case Hearing: The administrative hearing will conform to the requirements set forth in ORS 183.413 through 183.500, and the Attorney General's Model Rules at OAR 137-003-0501 and the following:

(a) The hearing must be held within 14 days of the date of the patient's request, unless the patient or his or her representative or the state institution's representative requests a delay for good cause or the patient or his or her representative and the state institution's representative agree to a postponement. Good cause includes, but is not limited to, the following circumstances: the patient's ward is quarantined at the time of the hearing, additional time is required to access necessary and relevant records not in the possession of the state institution, or titration of the patient's medication is necessary to allow minimally adequate communication by the patient with his or her representative for purposes of the hearing.

(b) These hearings are closed to all non-participants, except personnel from the institution or the Attorney General's Office, personnel from Disability Rights Oregon, personnel from the Office of Administrative Hearings, or members of the patient's family. Any exceptions to this policy must be agreed to in advance by the institution's representative and the patient or their representative. The institution may exclude non-participants, otherwise allowed to attend these hearings, who are disruptive or represent a safety concern.

(c) In lieu of discovery, the patient or his or her representative will be provided with the treating physician's or psychiatric nurse practitioner's form, independent examining physician's evaluation form, the superintendent's or chief medical officer's form approving or disapproving of the administration of the significant procedure, and the preprinted information regarding the risks and benefits of the proposed significant procedures. The patient or his or her representative may also review the patient's chart and consult with the patient's treating physician or psychiatric nurse practitioner.

(d) The following procedures are not available in these contested case hearings: summary determination procedures as defined in OAR 137-003-580, pre-hearing motions as defined in 137-003-0630, and pre-determination review procedures in 137-003-0640.

(e) A final order must be issued by the administrative law judge within two days, excluding weekends and holidays, after the hearing, except when the administrative law judge determines that there is good cause to delay the final order. All final orders must be issued within 3 days of the close of the hearing or the record, whichever is later, excluding weekends and holidays. A final order is effective immediately upon being signed or as otherwise provided in the order.

(f) If after the hearing, the administrative law judge determines that there is an issue not raised by a party or the agency that impacts the outcome of the case, the administrative law judge must grant a continuance for good cause and inform the institution's representative and the patient or his or her representative so that they may present additional arguments and evidence on that issue.

(g) The administrative law judge must determine whether to affirm or reverse the state institution's decision that it has good cause to involuntarily administer a significant procedure without informed consent from the patient as defined by the factors in OAR 309-114-0020(1) with regards to the significant procedures listed on the treating physician's or psychiatric nurse practitioner's informed consent form.

(h) A final order affirming or reversing the institution's decision to involuntarily administer a significant procedure to the patient without informed consent includes all significant procedures listed on the treating physician's or psychiatric nurse practitioner's informed consent form and all unlisted significant procedures of a similar class.

(i) A final order approving the involuntary administration of the significant procedure without informed consent shall be reexamined if the treating physician or psychiatric nurse practitioner determines that there is a substantial increase in the risk to the patient in administering the significant procedure during the term of a person's commitment, but in no case longer than 180 days. Approval of the significant procedure may also be reexamined pursuant to OAR 309-114-0020(8) if the treating physician or psychiatric nurse practitioner determines that there is substantial improvement in the patient's capacity.

(j) A final order disapproving the involuntary administration of the significant procedure without informed consent lasts for no longer than 180 days. If a substantial change in the patient's condition occurs during this time, the institution may re-evaluate the patient using the entire OAR 309-114-0020 process, and must additionally document and explain what substantial change in the person's capacity has occurred since the administrative law judge decision was issued.

(k) If the final order reverses the institution's decision to involuntarily administer a significant procedure and the patient is already receiving the significant procedure, then the hospital may continue to administer the significant procedure to the extent it is necessary to develop and implement a titration plan to safely discontinue the significant procedure according to current clinical practice.

(l) If the patient withdraws his initial request for hearing or refuses to attend the initial hearing without good cause, the administrative law judge will issue a dismissal order pursuant to OAR

137-003-0672(3). A dismissal order will allow the institution to immediately administer the significant procedure without informed consent as if the patient had never requested a hearing. If a dismissal order is issued, the patient may request a second hearing. If the patient withdraws his second request for hearing or refuses to attend the second hearing without good cause, the hearing will occur as scheduled with the institution presenting a prima facie case pursuant to ORS 183.417(4) and the administrative law judge will issue a final order by default. The final order by default will be issued in a manner consistent with the time frames and process outlined in OAR 309-114-0025(2).

(m) Any administrative law judge who will preside over a hearing regarding involuntary administration of a significant procedure without informed consent must complete agency approved training unique to administration of psychiatric treatment without consent. This training shall be developed by the Division in consultation with Disability Rights Oregon.

(n) Subject to the approval of the Attorney General, an agency officer or employee is authorized to appear, but not make legal argument, on behalf of the agency in contested case hearings involving the involuntary administration of a significant procedure to a patient.

(A) For purposes of this rule, the term “legal argument” is used as defined in ORS 183.452 and OAR 137-003-0545.

(B) When an agency officer or employee represents the agency, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. Where such objections involve legal argument, the presiding officer shall provide reasonable opportunity for the agency officer or employee to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after the conclusion of the hearing.

Stat. Auth.: ORS 179.040
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHD 3-1983, f. 2-24-83, ef. 3-26-83; MHD 3-1988, f. 4-12-88, (and corrected 5-17-88), cert ef. 6-1-88; MHS 14-2007(Temp), f. 11-30-07, cert. ef. 12-1-07 thru 5-29-08; MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 3-2009, f. & cert. ef. 6-26-09; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 15-2014(Temp), f. & cert. ef. 12-1-14 thru 5-29-15; Administrative correction, 6-23-15

309-114-0030

Notice to Patients and Employees

(1) Upon a patient's admission, the state institutions shall inform the patient, orally and in writing, of the rights, policies, and procedures set forth in these rules. In addition, a clear and simple summary of the contents, including the title, number, and purpose of these rules, and instructions on how to obtain a copy of the rules and advice about their content shall be prominently displayed in areas frequented by patients in all state institutions.

(2) All employees of state institutions involved in patient care shall be notified in writing at the commencement of his or her employment, or, for present employees, within a reasonable time after the effective date of these rules, of the rights, policies, and procedures set forth in these rules. These employees shall participate in a training program regarding the rules, their meaning and application.

Stat. Auth.: ORS 179.040
Stats. Implemented: ORS 179.321, 426.070 & 426.385
Hist.: MHS 2-2008(Temp), f. & cert. ef. 4-7-08 thru 10-4-08; MHS 6-2008, f. & cert. ef. 7-25-08; MHS 12-2010, f. & cert. ef. 9-9-10; MHS 13-2010(Temp), f. & cert. ef. 11-19-10 thru 5-18-11; Administrative correction, 6-28-11