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<b>Title</b>	<b>Northern Lakes CMHA Policies</b>
<b>Part 106</b>	<b>Supports and Services – NLCMHA Provided and Contract</b>
<b>Subpart J</b>	<b>Mental Health Code Protected Recipient Rights</b>
<b>Policy No.</b>	<b>106.1014</b>
<b>Subject</b>	<b>Advance Directives (RR)</b>

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### **Applicability**

Policy applies to all Northern Lakes CMHA activities, operations and sites and to all workforce members except members of the governing body. Policy also applies to any Network Provider and its employees, volunteers, or agents that have elected to adopt and adhere to Northern Lakes CMHA policies and procedures pertaining to Recipient Rights under the terms of its Participating Provider Agreement.

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### **Policy**

Northern Lakes CMHA and its contracted providers shall honor the right of all legally competent adult applicants and recipients to receive information about, to formulate, and to use any type of properly executed "Advance Directive" in compliance with all applicable federal and state law. This policy has been written to ensure full compliance with 42 CFR 438.10(g)(2) (which requires Prepaid Inpatient Health Plans to provide information on advance directives to enrollees) and the Northern Michigan Regional Entity Policy 07-02-003.

Under Michigan Law, there are two basic types of Advance Directives (Note in this policy "Advance Directive" applies to both types of Advance Directives):

Type One: 1. The Michigan Estates and Protected Individual's Code allows you to create an **Advance Directive for Medical and/or for Mental Health Care**. In these documents you designate another trusted individual, called a "**Patient Advocate**," to act as your agent who will be empowered to make care or treatment decisions on your behalf, based on your previously stated wishes, during a time when you are unable to give informed consent.

- A **Durable Power of Attorney for Health Care** is a document in which you direct your patient advocate, in writing, to consent or refuse to consent to certain types of **medical care** based on your previously stated wishes. In order for the patient advocate to make these decisions on your behalf, your physician **and** at least one other physician or licensed psychologist must first examine you and determine that you are unable to give informed consent to medical decisions. You have the right to revoke your patient advocate's authority at any time. The patient advocate's authority is also suspended when you are again able to give informed consent

• A **Durable Power of Attorney for Mental Health Care** also known as an **Advance Directive for Mental Health Care**, or a **Psychiatric Advance Directive (PAD)**, is a document in which you direct your patient advocate, in writing, to consent or refuse to consent to certain types of **mental health/psychiatric care** based on your previously stated wishes. In order for your patient advocate to make decisions on your behalf, a physician **and** a mental health professional of your choosing (who can be a physician, psychologist, registered nurse or masters-level social worker) must examine you and determine that you are unable to give informed consent to mental health care decisions. You have the right to revoke your patient advocate's authority at any time, unless you have chosen to waive this right in your Advance Directive for Mental Health Care. The patient advocate's authority is also suspended when you are again able to give informed consent.

Type Two: A **Do-Not-Resuscitate Order (DNR)** is a document created under the Michigan Do Not Resuscitate Procedures Act that allows you to direct, in writing, that you will not be resuscitated in the event you stop breathing or your heart stops. A DNR is not legally binding in a hospital, a nursing home, Adult Foster Care Home, or a mental health facility owned or operated by the Michigan Department of Health and Human Services.

1. All legally competent adult applicants and recipients shall be provided an oral explanation and a written summary of rights to formulate any type of "Advance Directive" allowed under current Michigan Law as required by the Federal Patient Self-Determination of 1991 and implementing regulations for the provision of Medicaid-funded services at 42 CFR 438.6(i) and 42 CFR 438.10(g)(2). This shall occur at the frequency and in the manner specified in the procedures section of this policy.
2. A workforce member of Northern Lakes CMHA or of a contracted provider shall act in accordance with a recipient's "Advance Directive" when properly executed in a Durable Power of Attorney for Medical and/or Mental Health care decisions with a Patient Advocate Designation pursuant to Part 5 of the Michigan Estates and Protected Individuals Code (EPIC), PA 368 of 1998, MCL 5501 et seq. and, unless otherwise prohibited by law, a recipient's Do Not Resuscitate Declaration pursuant to the Michigan Do-Not Resuscitate Procedures Act (MDNRPA), PA 193 of 1996, MCL 333.1051 et seq. A recipient's "Advance Directive" may only be put into effect and implemented as specified in the procedures section of this policy.
3. A recipient's "Advance Directive" shall be put into effect and honored in a manner that promotes and protects the recipient's rights pursuant to the Michigan Mental Health Code, PA 258 of 1974, the Michigan Department of Health and Human Services Administrative Rules, and any applicable Northern Lakes CMHA policy and procedure pertaining to Recipient Rights.
4. A workforce member of Northern Lakes CMHA or of a contracted provider shall not condition the provision of services or otherwise discriminate against an applicant or a recipient based on whether or not he or she has executed or has declined to execute an "Advance Directive."
5. A workforce member of Northern Lakes CMHA or of a contracted provider shall not serve as a patient advocate for a recipient or as a witness to a patient advocate designation in a recipient's "Advance Directive."
6. Northern Lakes CMHA and its contracted providers shall ensure that all employees receive education and training regarding Advance Directives and in the implementation of this policy and procedure.

## **Procedures**

**A. EDUCATING RECIPIENTS ABOUT "ADVANCE DIRECTIVES":**

1. Providers shall supply written information regarding legal options and inquire as to whether or not a recipient currently has executed or has a desire to execute an "Advance Directive".

This information will include:

- A description of applicable federal and state laws,
- Information of the beneficiary's right to make decisions concerning his or her medical care.
- The right to accept or refuse treatment.

This shall be completed at the following points during service delivery:

- a. At admission to services during the initial assessment; and
  - b. During the Person Centered Planning process, especially during Crisis Planning; and
  - c. Whenever alternatives to guardianship are explored; and
  - d. Prior to the expiration of an Assisted Outpatient Treatment order;
  - e. No less than annually.
  - f. As soon as possible, but not later than 90 days after the effective date of a change in Michigan Law pertaining to any type of "Advance Directive."
2. A recipient shall be informed that an Advance Directive is the opportunity to formalize and articulate his or her preferences for treatment or care in the event that he or she experiences and serious medical or mental health condition and is unable to engage in decision making at that time. The recipient shall also be informed that the Advance Directive may also serve to preserve their wishes if their rights are divested through a court order for guardianship or involuntary treatment.
  3. A recipient shall also be informed of the following:
    - a. That he or she has the right to formulate or decline the opportunity to formulate an "Advance Directive."
    - b. That he or she has the right to revoke an "Advance Directive" at any time.
    - c. That the provision of mental health services are in no way contingent on the formulation of an "Advance Directive."
    - d. That the formulation an "Advance Directive" will not deny the recipient the right to refuse treatment (unless the recipient waives this right in his/her "Advance Directive").

4. Providers are encouraged to refer to the Michigan Advance Directive for Mental Health Care and informational brochure posted on the Michigan Department of Health and Human Services, and the Northern Lakes CMHA websites. This information can be reviewed for reference and provided to recipients.

A recipient who expresses an interest in formulating an "Advance Directive" shall be referred, as appropriate, to legal services, advocacy groups or agencies, or other resources that may be available to assist with the formulation of "Advance Directives."

## **B. DOCUMENTATION**

1. The provision of information and planning regarding "Advance Directives" shall be clearly and thoroughly documented in a recipient's record. This shall include by having the applicant or recipient sign the Northern Lakes CMHA Required Information Checklist at the initial contact and at the Annual Review. At these times the applicant or recipient shall be provided the NLCMHA Information on Advance Directives handout in addition to the applicable Member Handbook.
2. Documentation shall accurately reflect a recipient's decision to accept or decline the opportunity to formulate an "Advance Directive."
3. If a recipient has executed any type of "Advance Directive," copies of the document and the statement of acceptance by the patient advocate shall be obtained and entered into the recipient's clinical record. Both the physical and electronic record shall include a prominent "flag" indicating that the recipient has executed an "Advance Directive" and whether or not it is included in the record. Copies shall be sent to and maintained by all provider sites where the recipient receives services and, when applicable, a licensed psychiatric hospital or unit to which the recipient is admitted.
4. A recipient's "Advance Directive" shall be reviewed by all providers designated in the recipient's Individual Plan of Services, with documentation of the review entered into the recipient's record. If a recipient has executed any type of "Advance Directive," this shall be specified in the recipient's Individual Plan of Services.
5. If a recipient's "Advance Directive" is put into effect upon a determination that the recipient has been determined to be unable to participate in treatment decisions (as described below), this shall be entered into the recipient's record.
6. Documentation shall be entered into a recipient's record of all subsequent evaluations of the recipient's capacity to participate in treatment decisions and of the revocation or suspension of the "Advance Directive," either by the recipient's statement of revocation or upon a determination that the recipient is again able to participate in treatment decisions.

## **C. RECOGNIZING A LEGALLY BINDING "ADVANCE DIRECTIVE"**

1. An "Advance directive" must be in writing, be signed by the recipient, be witnessed by two individuals, be dated, be executed voluntarily, include the acceptance of the patient advocate designation and, before its implementation, be made part of the

recipient's record.

2. A Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care may include a statement of the recipient's desires on and the patient advocate's powers regarding care, custody, and medical treatment or mental health treatment, or both, and the making of an anatomical gift of all or part of the recipient's body under part 101 of the public health code, 1978 PA 368, MCL 333.10101 to 333.10109.
3. The Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care must include a statement that the authority conferred upon the designated patient advocate is exercisable only when the recipient is unable to participate in medical or mental health treatment decisions, as applicable, and, in the case of the authority to make an anatomical gift a statement that the authority remains exercisable after the recipient's death.
4. A Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care must substantially include all of the following:
  - a. That the patient advocate designation is not effective unless the patient/recipient is unable to participate in decisions regarding the patient's/recipient's medical or mental health, as applicable. If this patient advocate designation includes the authority to make an anatomical gift as described in section 5506 of the EPIC, the authority remains exercisable after the patient's death.
  - b. That the patient advocate shall not exercise powers concerning the patient's/recipient's care, custody, and medical or mental health treatment that the patient/recipient, if the patient/recipient were able to participate in the decision, could not have exercised on his or her own behalf.
  - c. That the patient advocate designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient/recipient who is pregnant that would result in the pregnant patient's death.
  - d. A patient advocate may make a decision to withhold or withdraw treatment that would allow a patient/recipient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.
  - e. That the patient advocate shall not receive compensation for the performance of his or her authority, rights, and responsibilities, but a patient advocate may be reimbursed for actual and necessary expenses incurred in the performance of his or her authority, rights, and responsibilities.
  - f. That the patient advocate shall act in accordance with the standards of care applicable to fiduciaries when acting for the patient and shall act consistent with the patient's best interests. The known desires of the patient expressed or evidenced while the patient is able to participate in medical or mental health treatment decisions are presumed to be in the patient's best interests.
  - g. That the patient/recipient may revoke his or her Durable Power of Attorney for

Health Care, and/or Advance Directive for Mental Health Care at any time and in any manner sufficient to communicate an intent to revoke;

OR

That the recipient has waived the right to revoke an Advance Directive for Mental Health Care as to the designated patient advocate's power to exercise mental health treatment decisions by making the waiver part of the document containing the designation.

- h. That the patient advocate may revoke his or her acceptance of the patient advocate designation at any time and in any manner sufficient to communicate an intent to revoke.
- i. That the recipient, if admitted to a health facility or agency has the rights enumerated in section 20201 of the Public Health Code, 1978 PA 368, MCL 333.20201 and in Chapter 7 and 7a of the Michigan Mental Health Code, 1974 PA 258.

**D. PUTTING A DURABLE POWER OF ATTORNEY FOR HEALTH AND/OR MENTAL HEALTH CARE DECISIONS INTO EFFECT:**

- 1. Determination of patient advocate's authority to act:
  - a. The authority of a patient advocate under a Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care is exercisable only when the recipient is unable to participate in medical treatment or, as applicable, mental health treatment decisions, as follows:
    - i. Medical Decisions: The recipient's (patient's) attending physician and another physician or licensed psychologist shall determine upon examination of the patient whether the patient is unable to participate in medical treatment decisions, shall put the determination in writing, shall make the determination part of the patient's medical record, and shall review the determination not less than annually. If the recipient's religious beliefs prohibit an examination and this is stated in the designation, the recipient must indicate in the designation how the determination under this subsection shall be made.
    - ii. Mental Health Treatment Decisions: The determination of the recipient's ability to make mental health treatment decisions shall be made and a patient advocate may exercise the power to make mental health treatment decisions only if a physician and a mental health practitioner both certify, in writing and after examination of the patient, that the recipient is unable to give or refuse informed consent to mental health treatment. The recipient may, in the document containing the patient advocate designation, designate a physician, a mental health practitioner, or both, to make the determination under this subsection. If a physician or mental health practitioner designated by the recipient is unable or unwilling to conduct the examination and make the determination required by this subsection within a reasonable time, the examination and determination shall be

made by another physician or mental health practitioner, as applicable.

- b. As specified in ~~MDCH~~ MDHHS Administrative Rule 7003, a determination that a recipient is unable make treatment decisions shall be based on a presumption of the recipient's competency and with due respect for the recipient's right to voluntariness. The determination shall include an evaluation that there is sufficient reason to substantially doubt the recipient's comprehension based upon:
    - i. The person's ability to understand, appreciate, reason, and make a choice
    - ii. At a specific point in time
    - iii. Based on the person's functional abilities or deficits To meet the demands of a specific decision-making situation
    - iv. Weighed in light of the potential consequences.
  - c. If a dispute arises as to whether the recipient is unable to participate in medical or mental health treatment decisions, a petition may be filed with the court in the county in which the recipient resides or is located requesting the court's determination as to whether the recipient is unable to participate in decisions regarding medical treatment or mental health treatment, as applicable. If a petition is filed under this subsection, the court shall appoint a guardian ad litem to represent the recipient for the purposes of this subsection. The court shall conduct a hearing on a petition under this subsection as soon as possible and not later than 7 days after the court receives the petition. As soon as possible and not later than 7 days after the hearing, the court shall determine whether or not the recipient is able to participate in decisions regarding medical treatment or mental health treatment, as applicable. If the court determines that the recipient is unable to participate in the decisions, the patient advocate's authority, rights, and responsibilities are effective. If the court determines that the recipient is able to participate in the decisions, the patient advocate's authority, rights, and responsibilities are not effective.
2. The authority, rights, responsibilities, and limitations of a designated patient advocate are as follows:
- a. A patient advocate shall act in accordance with the standards of care applicable to fiduciaries in exercising his or her powers.
  - b. A patient advocate shall take reasonable steps to follow the desires, instructions, or guidelines given by the recipient while the recipient was able to participate in decisions regarding care, custody, medical treatment, or mental health treatment, as applicable, whether given orally or as written in the designation.
  - c. A patient advocate shall not exercise powers concerning the recipient's care, custody, and medical or mental health treatment that the patient, if the recipient were able to participate in the decision, could not have exercised on his or her own behalf.
  - d. The designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a recipient who is pregnant that would result in the pregnant recipient's death.



- e. A patient advocate may make a decision to withhold or withdraw treatment that would allow a recipient to die only if the recipient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the recipient's death.
  - f. A patient advocate may choose to have the recipient placed under hospice care.
  - g. A patient advocate under this section shall not delegate his or her powers to another individual without prior authorization by the recipient.
  - h. With regard to mental health treatment decisions, the patient advocate shall only consent to the forced administration of medication or to inpatient hospitalization, other than hospitalization as a formal voluntary patient under section 415 of the mental health code, 1974 PA 258, MCL 330.1415, if the recipient has expressed in a clear and convincing manner that the patient advocate is authorized to consent to that treatment. If a recipient is hospitalized as a formal voluntary patient under an application executed by his or her patient advocate, the patient retains the right to terminate the hospitalization under section 419 of the mental health code, 1974 PA 258, MCL 330.1419.
  - i. A Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care is suspended when the patient regains the ability to participate in decisions regarding medical treatment or mental health treatment, as applicable. The suspension is effective as long as the patient is able to participate in those decisions. If the patient subsequently is determined as above to be unable to participate in decisions regarding medical treatment or mental health treatment, as applicable, the patient advocate's authority, rights, responsibilities, and limitations are again effective.
3. Revocation of Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care.
- a. A Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care is revoked by 1 or more of the following:
    - i. The recipient's death, except that part of the Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care if any, that authorizes the patient advocate to make an anatomical gift of all or part of the deceased patient's body in accordance with this act and section 10102 of the public health code, 1978 PA 368, MCL 333.10102.
    - ii. An order of removal by the probate court as described above.
    - iii. The patient advocate's resignation or removal by the court, unless a successor patient advocate has been designated.
    - iv. The recipient's revocation of the Durable Power of Attorney for Health Care,

and/or Advance Directive for Mental Health Care, as follows:

- d. Unless the recipient has waived the right to revoke the Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care even if the patient is unable to participate in medical treatment decisions, a recipient may revoke a Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care at any time and in any manner by which he or she is able to communicate an intent to revoke the patient advocate designation. If there is a dispute as to the intent of the recipient to revoke the Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care, the court may make a determination on the patient's intent to revoke the patient advocate designation. If the revocation is not in writing, an individual who witnesses a revocation of a Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care shall describe in writing the circumstances of the revocation, must sign the writing, and shall notify, if possible, the patient advocate of the revocation. If the recipient's physician, mental health professional, or health facility has notice of the recipient's revocation of a patient advocate designation, the physician, mental health professional, or health facility shall note the revocation in the recipient's records and shall notify the patient advocate.
- e. Mental health treatment provided to a recipient who has communicated his or her intent to revoke a designation in which the patient has waived his or her right to revoke shall not continue for more than 30 consecutive days, and the waiver does not affect the patient's rights under section 419 of the mental health code, 1974 PA 258, MCL 330.1419.
- v. A subsequent Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care that revokes the prior directive either expressly or by inconsistency.
- vi. The occurrence of a provision for revocation contained in the Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care
- vii. If a Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care is executed during a recipient's marriage naming the patient's spouse as the patient advocate, the patient advocate designation is suspended during the pendency of an action for separate maintenance, annulment, or divorce and is revoked upon the entry of a judgment of separate maintenance, annulment, or divorce, unless the patient has named a successor individual to serve as a patient advocate. If a successor patient advocate is named, that individual acts as the patient advocate.
- viii. The revocation of a Durable Power of Attorney for Health Care, and/or Advance Directive for Mental Health Care does not revoke or terminate the agency as to the patient advocate or other person who acts in good faith under the patient advocate designation and without actual knowledge of the revocation. Unless the action is otherwise invalid or unenforceable, an action taken without knowledge of the revocation binds the patient and his or her heirs, devisees, and personal

representatives. A sworn statement executed by the patient advocate stating that, at the time of doing an act in accordance with the patient advocate designation, he or she did not have actual knowledge of the revocation of the patient advocate designation is, in the absence of fraud, conclusive proof that the patient advocate did not have actual knowledge of the revocation at the time of the act.

4. Binding Effect:

Irrespective of a previously expressed or evidenced desire, a current desire by a recipient to have provided, and not withheld or withdrawn, a specific life-extending care, custody, or medical treatment is binding on the patient advocate, if known by the patient advocate, regardless of the then ability or inability of the patient to participate in care, custody, or medical treatment decisions or the patient's competency.

5. Liability of provider:

- a. A person providing, performing, withholding, or withdrawing care, custody, or medical or mental health treatment as a result of the decision of an individual who is reasonably believed to be a patient advocate and who is reasonably believed to be acting within the authority granted by the designation is liable in the same manner and to the same extent as if the patient had made the decision on his or her own behalf.
- b. A person providing care, custody, or medical or mental health treatment to a recipient is bound by sound medical or, if applicable, mental health treatment practice and by a patient advocate's instructions if the patient advocate complies with the terms of the patient advocate designation, but is not bound by the patient advocate's instructions if the patient advocate does not comply with it.

6. Exceptions:

- a. A mental health professional who provides mental health treatment to a recipient shall comply with the desires of the recipient as expressed in the designation. If 1 or more of the following apply to a desire of the recipient as expressed in the designation, the mental health professional is not bound to follow that desire, but shall follow the patient's other desires as expressed in the designation:
  - i. In the opinion of the mental health professional, compliance is not consistent with generally accepted community practice standards of treatment.
  - ii. The treatment requested is not reasonably available.
  - iii. Compliance is not consistent with applicable law.
  - iv. Compliance is not consistent with court-ordered treatment.
  - v. In the opinion of the mental health professional, there is a psychiatric emergency endangering the life of the recipient or another individual and compliance is not

appropriate under the circumstances.

- vi. If a dispute arises as to whether a patient advocate is acting consistent with the patient's best interests or is not complying with the patient advocate designation or with applicable law, a petition may be filed with the court in the county in which the patient resides or is located requesting the court's determination as to the continuation of the designation or the removal of the patient advocate.

7. Restrictions:

- a. A patient advocate cannot make a medical treatment decision to withhold or withdraw treatment from a pregnant recipient that would result in the pregnant recipient's death.
- b. A provider shall not require a patient advocate designation to be executed as a condition of providing, withholding, or withdrawing care, custody, or medical or mental health treatment.
- c. A patient advocate designation shall not be construed to condone, allow, permit, authorize, or approve suicide or homicide.
- d. A patient advocate designation shall not be used to authorize or compel care, custody, or medical or mental health treatment decisions for a recipient who objects on religious grounds.

**E. PUTTING A DO-NOT-RESUSCITATE ORDER INTO EFFECT**

1. A "Do-not-resuscitate order" is a document executed by an individual age 18 or older who is of sound mind (a "declarant") or by a patient advocate designated by the individual given such authority directing that, in the event that the individual suffers cessation of both spontaneous respiration and circulation, resuscitation will not be initiated.
2. If a recipient has executed a "Do-not-resuscitate order" it shall be maintained in the recipient's records at all provider sites where the recipient receives services.
3. Under the MDNRPA, a "Do-not-resuscitate order" may only be implemented in a location outside of a hospital, a nursing home, or a mental health facility. Therefore, a "Do-not-resuscitate order" may not be implemented by providers of residential services as AFC Licensing Rules require a licensee to initiate life saving measures to resuscitate a resident who suffers cessation of both spontaneous respiration and circulation. However, Emergency Medical Services personnel called to the facility shall be provided with the recipient's "Do-not-resuscitate order" upon arrival.
4. In all other locations, if a health professional employed by or under contract with Northern Lakes CMHA or a contracted provider become alerted to a recipient whose respiration or circulation has ceased, the health professional shall determine if the declarant has 1 or more vital signs, whether or not the health professional views or is provided with an order that is alleged to have been signed by the declarant or other

person authorized to execute an order.

If the health professional determines that the declarant has no vital signs, and if the health professional determines that the declarant is wearing a do-not-resuscitate identification bracelet or is provided with a do-not-resuscitate order for the declarant, he or she shall not attempt to resuscitate the declarant.

Attachments: Information on Advance Directives  
Required Information Checklist

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