Policy and practice under Act 114

The Green Mountian Psychiatric Care Center's Non Emergency Involuntary Medication Policy (http://mentalhealth.vermont.gov/sites/dmh/files/policies/GMPCC/Non-emergency_Involuntary_Medication.pdf) — which is essentially the same as the Non Emergency Involuntary Medication Policy that was in effect at the former state hospital — defines competence as
"**The ability of an individual to make a decision and appreciate the consequences**."

In Section 1 of "Treatment Considerations" the policy states factors for the treatment team to consider when deciding whether to file an application for involuntary medication. Only one factor among those listed relates to assessment of capacity or competence:
"The patient's ability to assimilate material facts and render a *reasonable* decision to accept or refuse treatment."

This language is inconsistent with the statutory requirement. Whether a patient's decision is considered "reasonable" by the treatment team is **irrelevant** to whether that person can make a [reasoned] decision and appreciate the consequences.

The policy continues:

"2. If the Medical Director determines, after such a review, that the patient has been provided with adequate and necessary information to decide for him or her self whether to accept the proposed treatment and that **progress in treatment is not compromised or unduly delayed by the decision of the patient to refuse psychotropic medication,** the patient's decision shall be honored."
3. If, after review and at any point in hospitalization, the treating physician in consultation with the Medical Director and following a review of issues in (1) above determines that **a patient's decision to refuse psychotropic medication is compromising appropriate clinical care or unduly delaying improved mental health, application for non-emergency involuntary medication shall be initiated.** At a minimum, patients refusing psychotropic medication that has been recommended as part of the comprehensive treatment plan should be re-evaluated every 30 days by the Medical Director or designee."

To understate, this is not in keeping with legislative intent as articulated in Act 114:

"It is the intention of the general assembly to **recognize the right of a legally competent person to determine whether or not to accept medical treatment,** including involuntary medication, absent an emergency or a determination that the person **is incompetent and lacks the ability to make a decision and appreciate the consequences**."

Nor is it in synch with this procedural requirement:

18 V.S.A. §7629

(c) The petition shall include a certification from the treating physician, executed under penalty of perjury, that includes the following information:
.....
(2) the necessity for involuntary medication, including **the person's *competency to decide to accept or refuse medication***"
18 V.S.A. 7624 (c)(2)

or this standard:

"In determining whether or not the person is competent to make a decision regarding the proposed treatment, the court shall consider **whether the person is able to make a decision and appreciate the consequences of that decision.**"
18 V.S.A. §7625(c)

Courts don't necessarily apply the statutory standard either:

However, as to the critical issue of **whether the patient possesses the insight and willingness to accept a regimen of treatment without compulsion**, I believe the records from contested proceedings would demonstrate careful inquiry of treating physicians as to their attempts to explain to their patients the basis for a recommended course of medication, and in particular, the expectation that a request for a judicial order will be made in the absence of voluntary compliance. The responses to such inquiries have grown more particular, I believe, as the Court's expectations have become known. Further, there is some basis for inferring that careful attention to efforts to promote voluntary treatment, in coordination with the preparation of applications for involuntary medication, may result in a somewhat higher incidence of acceptance of such treatment without judicial compulsion.

-- Judge Wesley, DMH Act 114 report, Jan. 2013
(http://www.leg.state.vt.us/reports/2013ExternalReports/285571.pdf)

Judge Wesley does not appear to even contemplates the possibility of competent refusal. He also commented that he had been "directly involved with each case [in the Windham unit of Family Court] seeking an order for involuntary medication since Sept. 2011."