CHAPTER 21

Legally Authorized Representative in Research

Federal Regulations (45 CFR Part 46.116 & 21 CFR 50.3(l) and 50.20.) permit investigators to obtain consent from a legally authorized representative (LAR) in research that involves enrollment of prospective research subjects who are unable to provide consent on their own behalf. The South Caroline Code of Laws Title 44-66-10, also referred to as the Health Care Consent Act defines who may serve as an LAR in research in the state of South Carolina.

1. Definitions

a. **Legally Authorized Representative (LAR)**

As defined in Federal Regulations 45 CFR 46.10 (c) and 21 CFR 50.3 (1) LAR means "an individual or judicial, or other body authorized under applicable consent law to consent on behalf of a prospective research subject to the subject's participation in the procedure(s) involved in the research". The 2018 Revised Common Rule provides clarification to supplement this definition, however *this is only relevant to jurisdictions where there is no applicable law allowing for an LAR to provide consent on behalf of a prospective research subject.*

b. **"Unable to Consent**" as defined in the SC Title 44-66-10(8) means unable to appreciate the implications of the existing medical condition and proposed treatment/research, to make a reasoned decision concerning the proposed health care/research, or to communicate in an unambiguous manner.

c. **Capacity to Consent**

The ability of the individual to understand choices presented, to appreciate the implications of choosing one alternative or the other, and to make and communicate a decision. Capacity is generally defined in terms of four criteria: Understanding, appreciation, reasoning, and choice.

***NOTE**:* a potential participant may have the mental capacity to make a thoughtful decision, however, may not have the cognitive or physical function to read and sign a research consent form. In these cases, the Assent for Cognitively Impaired Adults should be utilized in conjunction with the approved IRB consent document.

***NOTE**:* The information in this chapter does not apply to minors unless the minor is married or have been determined to be judicially emancipated. See *Chapter 15-IRB Review of Research Involving Children.*

2. Determination of the Use of an LAR:

a. Research involving adults who are unable to consent may occur only when the IRB determines that the proposed research:

i. Does not present greater than minimal risk

ii. Presents a greater probability of direct benefit to the subject than harm to the subject, or

iii. Poses greater than minimal risk and no prospect of direct benefit to individual subjects, but likely to yield generalizable knowledge about the subjects' disorder or condition that is of vital importance to understanding or amelioration of the

subject's disorder or condition.

iv. In addition, the IRB determines the research cannot be performed solely on adults who can consent, and the focus of the research is the disorder leading to the lack of decision-making capacity.

v. Where the subject of the research is not directly related to the subject's lack of decision-making capacity, the investigator has presented a compelling case for including adults unable to consent.

3. Assessment

a. It is the responsibility of the investigators to determine and monitor the decision-making capacity of subjects enrolled in research.

b. Assessment of decision-making capacity must be made prior any potential subject providing consent. (This may take the form of a conscious, but informal assessment by study personnel authorized to obtain consent.)

c. For individuals at significant risk for lack of decision-making, an evaluation by a qualified practitioner (who may be a member of the research team) must occur.

d. The process for this assessment must by described in the relevant IRB approved protocol.

e. The assessment may include use of standardized assessment tools of decisional capacity, however, is not limited to formal assessment tools.

f. If the individual is deemed to lack decision-making capacity at the time of participation in the study, an LAR must provide informed consent.

g. Ongoing Assessment requirements:

i. Ongoing assessment must include the likelihood of fluctuating or changing decision making capacity.

ii. Individuals, who because of a known condition, are at risk for temporary (e.g., head trauma) or fluctuating (e.g., mental health conditions such as schizophrenia) lack of decision-making capacity must be reassessed at appropriate time throughout their participation in the study.

iii. If decision making capacity is regained, the consent process must be repeated with the subject and obtain the subject's consent to continue in the study.

iv. Should a subject lose decision-making capacity during the course of the study, they must be reconsented by an appropriate LAR and reassessed for fluctuating capacity and need for ongoing reassessment.

v. If an individual deemed to have reduced decision-making capacity objects or resists to participation in a study, that person MUST be withdrawn from the study.

4. IRB Assessment responsibilities:

a. As part of IRB review of the submitted protocol, the appropriateness of the assessment plan will be reviewed. The plan must be detailed in the initial application and must include:

i. Methods to identify at risk individuals,

ii. Methods of original assessment,

iii. The position(s) and qualification(s) of the practitioner(s) making the assessment,

iv. The risk of fluctuating or temporary incapacity, and if this risk exists, the timing and methodology of re-assessment.

v. Adjustments to the submitted plan are required if it is determined that the plan does not provide sufficient rigor to assure that the noted issues will addressed.

5. Assent

a) Adults with diminished decision-making capacity may retain sufficient capacity to provide meaningful assent regarding their participation in the proposed research project.

b) Assent is an affirmative agreement to participate in the research. **Absence of an objection or an inability to object can not be considered "assent".**

c) If in the judgement of the investigator, the adult potential subject retains sufficient decisional capacity to reason, and that individual does not want to participate in the research, the investigator or the person obtaining the consent must honor the potential subject's decision.

d) The IRB may determine that assent for some or all adults is not required. If required of some but not all, the investigator will provide a plan for determination of which participants should assent, which participants will have the decision-making capacity to consent, or which participants may experience improvement in their decision-making capacity during the course of the study and the plan for reconsenting of these participants when appropriate.

e) When assent of an adult with impaired decision-making capacity is required, the IRB must determine the appropriate method, if any, of documenting assent. This decision will be based on considerations such as the length and complexity of the research, the adult's condition, and any psychological conditions or implications.

6. Identifying an Appropriate Legally Authorized Representative

As defined in the South Carolina Adult Health Care Consent Act, the persons who may make health care decisions for an individual who is unable to consent in order of priority:

a) A guardian appointed by the court

b) An attorney-in-fact appointed by the subject in a durable power of attorney, if the decision is within the scope of that individual's authority

c) A spouse of the patient unless the spouse and the patient are separated (see Title 44-66-10 for further specifics on this class)

d) An adult child of the subject, or if the patient has more than one adult child, a majority of adult children who are reasonably available for consultation

e) A parent of the patient (for adult subjects only)

f) An adult sibling of the subject, or if the subject has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation

g) A grandparent of the patient, or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation

h) Any other adult relative by blood or marriage who is reasonably is believed by the investigator to have a close personal relationship with the subject. If there is more than one such relative, a majority of those who can reasonably be consulted.

The South Carolina Adult Health Care Consent Act addresses multiple other issues that could arise should an individual(s) in the above noted classes is not available and the requirements for decision-making in these situations.

The South Carolina consent act also states that "a person authorized to make decisions on behalf of a potential subject shall base those decision on the subject's wishes to the extent that the subject's wishes can be determined". Where the subject's wishes cannot be determined that person shall base the decision on the subject's best interest.

A person authorized to make health decisions either may consent or withhold consent on behalf of the subject.

7. Other Consent Considerations:

a. Consent of Non-English-Speaking Subjects - See IRB Policies_ Chapter 11

https://academics.prismahealth.org/getmedia/dbeb770d-b844-432f-9ce1-bf98d12617b7/chapter-11_required-elements-of-informed-consent.pdf

b. Consent of Minors in Research - See IRB Policies_ Chapter 15

c. https://academics.prismahealth.org/getmedia/d82ba4e8-219b-45f4-811c-e844c3b197fc/chapter-15_irb-review-of-reearch-involving-children.pdf

d. Review of Research Involving Adults as Vulnerable Participants – See IRB Policies _ Chapter 16

https://academics.prismahealth.org/getmedia/5cc7c12a-9f1a-4d27-8ba8-ee3d08b28927/chapter-16_review-of-research-involving-adults-as-vulnerable-participants.pdf

e. South Carolina Adult Health Care Consent Act

https://www.scstatehouse.gov/code/t44c066.php