

Michigan State University Human Research Protection Program	
<i>Subject:</i> Special Categories of Research Subjects	
<i>Sub-Topic:</i> Individuals with Diminished Capacity	
<i>Section:</i> 6-8-D	
<i>Reviewed by:</i> IRB, MSU Legal Counsel, Proxy Consent Policy Development Committee, HRP/IRB Administrative Committee	<i>Approved by:</i> Vice President of Research and Graduate Studies, 2-1-2006.
<i>Related Sections:</i> 6-9-E	

Advance consent, including formal advance directives for research purposes, is the most appropriate mechanism for allowing individuals with decision making capacity to express their preferences regarding research participation, that should, in general, be respected when making decisions about research enrollment at points in the future when those individuals have lost decisional capacity.

However, most people do not have living wills, advanced directives, or legal documentation providing consent for research or durable power of attorney for proxy consent. In the absence of advance documentation, the laws in Michigan do not address if, or who, can make research decisions for minors, for incapacitated individuals, or for developmentally disabled persons. The absence of research consent privilege in the law however, should not be construed as a prohibition against proxy consent. It may simply be an omission based on practicality – the law cannot address all contingencies. It has generally been accepted that those authorized to make medical decisions for a patient also have the authority to make proxy research decisions. It is assumed, although not an absolute, that such an authorized person would make decisions based on the best interests of the patient.

There are various reasons for incapacitation and diminished decisional capacity that may relate to research subjects. Individuals may be totally incapacitated, unconscious or in a coma due to chronic disease, an acute event or trauma. Stroke or heart attack patients may have altered and varying levels of capacity. The use of drugs or sedation may diminish capacity. Developmentally disabled persons may have a mental or physical limitation which may impair their decisional capacity. Geriatric patients may have diminished decisional capacity due to progressive neurological diseases (e.g. Alzheimer’s Disease).

The issue of children has been addressed in the federal regulations, with the requirements of parental consent and (age appropriate) child assent. This may be viewed as a regulatory example for addressing the proxy consent issue. The MSU IRBs follow all the federal, state and university regulations regarding the participation of minors in research.

The Institutional Review Board is the proper body for the weighing of consent issues for particular research projects, assessing risk, balancing risks and benefits, and deciding what consent procedures are appropriate for each project. Thus, rather than a blanket policy allowing or not allowing proxy consent, the IRB must evaluate each proposal individually and make decisions appropriate to the subject population, risk, benefit, and protocol for each project.

The IRB will require the following for its decision-making:

1. A complete and standardized evaluation of the capacity of the subject to understand the consent process and sign an informed consent. The evaluation method should be one that has been referenced for use in the particular field of medicine. The explicit method for the evaluation should be provided to the IRB, and results should be documented in the medical and research record.
2. When appropriate, the IRB would allow a legally authorized representative or family member to sign a proxy informed consent, if that person is authorized to make decisions about medical care for the subject. The investigator should document in the medical and research record who is legally authorized to make medical decisions.
3. Whenever possible, the subject should be approached about research assent; that assent form and process should be based on the measured capacity of the subject. If used, the assent process should be presented to the IRB. The wishes of the subject should be respected regardless of proxy consent.
4. The investigator should provide detailed information and the risks and benefits of the research to the proxy and the subject (if the subject can possibly understand). The protocol should be based on good science and sound research design with the potential for significant beneficial results.

All protocols requiring decisions about proxy consent will be considered full board review protocols and will be reviewed by the entire committee. The IRB will document its decision for allowing or not allowing proxy consent.

The IRB may view differentially therapeutic vs. non-therapeutic protocols, with a primary factor being level of risk to the subjects weighed against the potential benefits to the subjects.

Since this type of research deals with vulnerable individuals the IRB should consider whether the vulnerable population is the one that will receive primary benefit from the research. Conversely, the research should not be conducted in a vulnerable population if it can be done in competent subjects.

In the absence of an advanced directive specifically including research, the IRB may allow for proxy consent. Proxy informed consent may be obtained from a surrogate

decision maker with reasonable knowledge of the subject, who shall include any of the following persons, in the descending order of priority:

- (1) The person's agent pursuant to an advance health care directive or power of attorney
- (2) The conservator or guardian with the authority to make health care decisions for the person.
- (3) The spouse of the person.
- (4) An adult son or daughter of the person.
- (5) A custodial parent of the person.
- (6) Any adult brother or sister of the person.
- (7) Any adult grandchild of the person.
- (8) An available adult relative with the closest degree of kinship to the person.

If there are conflicting opinions among these individuals, the highest-ranking proxy should have the final decision making authority. If there is a conflict within a group (e.g. brother – sister), which cannot be resolved, legal intervention may be required.

Once identified, the proxy bases a decision on one of three standards, in the following hierarchy:

- Explicit directive, i.e., the instructions expressed by the patient when capacitated
- Substituted judgment, i.e., inferences about what the patient would likely want in this situation based on what is known about his prior behavior and decision making
- Best interest, i.e., what the proxy believes is best for the patient

The investigators should discuss these standards with the proxy during the consent process.

If there is no person available to provide proxy consent, the subject cannot be enrolled in any research protocol.

If a person with diminished decisional capacity is enrolled in a research project under proxy consent, and the subject gains or regains competent decisional capacity, that subject must provide his/her consent before they can be involved in any further research. The subject has the right to revoke the proxy consent and have any past research data purged.

The granting of permission for investigators by the IRB to obtain proxy consent is a serious responsibility of the IRB. The IRB is obligated to provide an in-depth review, discussion and documentation of the issues before allowing or not allowing proxy consent. This policy allows for the flexibility for the IRB to make decisions about proxy consent and provides the best possible protection for the rights and welfare of the patients, while still allowing important research to be performed. It provides for the complete assessment of the subject and attempts to get the most appropriate consent and assent possible.

Definitions

Decisional Capacity – a clinical determination of a patient’s ability to make decisions about treatment interventions or other health-related matters. Capacity is determined by the health care practitioner or, ideally, by the health care team with the aid of cognitive testing, discussion over time, and observation. Capacity is related to memory but is not extinguished by memory loss. Persons are considered to have decisional capacity if they can understand their health condition; can consider the benefits, burdens, and risks of care options; can weigh the consequences of treatment against their preferences and values; can reach a decision that is consistent over time; and can communicate that decision to others.

Incapacitated Individual – means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.

Developmentally Disabled Person — a person with either of the following characteristics: 1) The person is older than five years of age and has a severe, chronic condition attributable to a mental and/or physical impairment. This condition manifested before the individual's 22nd birthday, is likely to continue indefinitely, and results in substantial functional limitations in three or more areas of major life activity, including self-care, language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency. Because of his or her condition, the person needs individually planned services that are of lifelong or extended duration, or 2) The person is age five or younger and has a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in a developmental disability as defined in (1) above if services are not provided. (Michigan Mental Health Code)

Legally authorized representative Pursuant to OHRP regulations “ “legally authorized representative” means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject’s participation in the procedure(s) involved in the research.” (45 CFR 46.102(c))

Pursuant to FDA regulations, “ “legally authorized representative” means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject’s participation in the procedure(s) involved in the research.” (21 CFR 50.3(l))

The person responsible for making health care decisions for an incapacitated or developmentally disabled adult is likely to be the person who should make decisions regarding the patient’s participation in IRB-approved research studies.

If the proposed research is limited to medical procedures, the legally authorized representative of an incapacitated or developmentally disabled adult may be:

1. the person's agent pursuant to an advance health care directive or power of attorney;
2. the conservator or guardian with the authority to make health care decisions for the person;
3. the spouse of the person;
4. an adult son or daughter of the person;
5. a parent of the person;
6. any adult brother or sister of the person;
7. any adult grandchild of the person;
8. an available adult relative with familiarity with the patient with the closest degree of kinship to the person.

If the proposed research is non-medical, the legally authorized representative may be:

1. the conservator or guardian with the authority to make all decisions regarding the incapacitated or developmentally disabled individual;
2. the spouse of the person;
3. an adult son or daughter of the person;
4. a parent of the person;
5. any adult brother or sister of the person;
6. any adult grandchild of the person;
7. an available adult relative with familiarity with the patient with the closest degree of kinship to the person.

MSU does not have a blanket policy allowing or not allowing proxy consent. The IRB must evaluate each proposal individually, with input from the MSU Office of the General Counsel, to determine whether consent from a legally authorized representative is acceptable.

"Medical" refers to the practice of medicine by a licensed provider or an individual under the direction of a licensed provider. The practice of medicine means the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts. (Reference MCL 333.17001(d))

Power of attorney - A durable power of attorney is a power of attorney by which an individual designates another as their attorney in fact in writing. Within that power of attorney an individual may designate an individual as a patient advocate, to exercise powers concerning care, custody, and medical or mental health treatment decisions for the individual making the patient advocate designation. The patient advocate's restrictions do not specifically exclude research decisions. MCL 700.5501-5512

Advanced Directives – legal statements that allow persons to articulate values and establish treatment preferences to be honored in the future when capacity has lapsed.

Living Will - a living will lists the interventions the patient would request, accept, or reject in the future, usually at the end of life.