

Research Involving Adults with Diminished Capacity

I. Purpose

This Procedure describes the process for enrolling adult subjects with diminished capacity to consent in human research.

II. Scope

This Procedure applies to all human research conducted under the auspices of the Einstein Institutional Review Board (“IRB”).

III. Definitions

Assent: An individual’s affirmative agreement to participate in research obtained in conjunction with permission from the individual’s legally authorized representative. Mere failure to object should not, absent affirmative agreement, be construed as assent.

Consent Capacity: an adult’s ability to understand information relevant to making an informed, voluntary decision to participate in research. This includes the ability to understand the purpose of the research and the procedures involved, to appreciate medical and other consequences of research (including risks and benefits), and to understand the alternative to enrollment in the study. It also includes the ability to decide and effectively communicate a choice about participation.

Diminished Capacity: a demonstrated limitation in an individual’s ability to perform any of the above enumerated functions.

IV. Procedure

The inclusion of subjects with diminished capacity in a research study must be approved by the IRB. The protocol must include a description of how and by whom consent capacity will be evaluated. Examples of research situations that may include subjects with diminished capacity include the following:

1. A research protocol specifically intended to study individuals with diminished capacity (e.g. Alzheimer’s disease; mental retardation; delirium).
2. A research protocol conducted in an environment (e.g. nursing home, ICU, ER) or on a population group (e.g. schizophrenic patients, intoxicated patients) in which it can be reasonably anticipated that some potential subjects will have diminished capacity, either permanently or at some time during the study.

Determining Capacity of an Adult Research Participant

Consent capacity is rarely an all-or-nothing situation. Capacity is best understood as occurring along a continuum from complete capacity to no capacity whatsoever. In some cases, it is obvious that potential subjects will not have capacity to consent (e.g. permanent vegetative state), and in such instances capacity assessment may not be required. Examples of different types of diminished capacity include:

- no capacity (e.g. permanent vegetative state)
- permanent (e.g. mental retardation)
- temporary (e.g. delirium)
- fluctuating (e.g. schizophrenia)
- diminishing (e.g. Alzheimer's disease)

Consent capacity is also decision-specific. It depends on the nature and complexity of the study, the study procedures and the decision-making process. The goal of the consent process for any study involving people with diminished capacity should be to respect the capacity they may retain by assuring their participation in the decision process at the appropriate level.

The assessment of a potential research participant's capacity should be made by staff who have been appropriately trained to evaluate capacity. In some cases, an adequate determination of capacity will require special expertise. If the subjects are Montefiore patients, the assessment and documentation of decision-making capacity must comply with Montefiore clinical policies on informed consent.

When enrolling populations at risk of diminished or fluctuating consent capacity, researchers should incorporate a formal process for capacity evaluation into the protocol's enrollment and screening process, along with a mechanism for securing surrogate consent as appropriate.

The protocol must describe the tools that will be used for assessment of capacity. Investigators may choose the appropriate assessment tool for their study. Two commonly used tools include the MacArthur Competence Assessment tool and the University of California, San Diego Brief Assessment of Capacity to Consent (UBACC).

Surrogate Consent for Adult Research Participation

Appointment of a Surrogate by the Subject

Adults who have diminished capacity and may not be able to evaluate the complexity of a specific research project, may retain the capacity to appoint a surrogate decision-maker and should be encouraged to do so. If the potential research subject retains the capacity to choose from among appropriate surrogates, as listed in the below hierarchy, their choice should be respected.

Selection of a Surrogate by the Investigator

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For research conducted in New York State, the IRB may authorize surrogate consent from a health care agent or another person according to the following hierarchy, derived from New York's Family Health Care Decisions Act (FHCDA)¹:

- An individual who is designated as a representative/agent through a health care proxy signed by both the subject and the appointed representative/agent. For a health care proxy to be effective, it must have been signed at a time when the subject had decision-making capacity. In addition, the health care proxy must not specifically prohibit research.
- A court-appointed guardian authorized to make health care decisions
- The patient's spouse or domestic partner
- The patient's adult child (son or daughter 18 years or older)
- The patient's parent
- The patient's brother or sister (18 years or older)
- A close relative or friend (A close relative or friend is any person 18 years or older who is a close friend of the patient or a relative of the patient other than a spouse, adult child, parent, brother, or sister. The close friend/relative must present a signed statement indicating that they have maintained regular contact with the patient and are familiar with the patient's activities, health, and religious or moral beliefs.)

For research conducted outside of New York State, the categories of persons who may act as legally authorized representatives will be considered by the IRB in accordance with applicable state or local law.

Surrogate consent for research should be based on the expressed preferences of the potential research participant, when known, or consistent with his/her prior behavior, beliefs and values, when preferences are not known.

The process for surrogate selection and level of surrogate must be approved by the IRB. The IRB has discretion to limit the classes of persons who may act as the legally authorized representative for a given study, given that each class of persons may have varying degrees of understanding of the wishes of the impaired individual regarding research participation. In general, the riskier the research protocol and more remote the prospect of direct benefit, the closer (by kinship or intimacy level) the legally authorized representative should be to an impaired individual in order to consent to the impaired individual's participation in research.

Subjects at Risk of Losing Consent Capacity

Consent capacity can be affected by disorders with progressive or fluctuating courses. In cases where a subject's cognitive condition is expected to deteriorate or fluctuate, it may make sense to re-evaluate consent capacity (and, as appropriate, strategies for consent enhancement) at several intervals during the study, especially in long-term studies that may involve multiple phases. In addition, such changes in clinical status may affect, for example, the risk/benefit considerations, appropriate alternatives to study participation, and need for additional safeguards or monitoring.

When consent capacity could diminish during the course of a study, it may be most appropriate to transition to surrogate consent and decision-making. In these cases, involving at the start of the study an

¹ For exceptions to this hierarchy, contact the Office of Human Research Affairs ("OHRA") for guidance.

individual who could serve as a surrogate later on may be most prudent, and the subject's wishes regarding participation in the study should be documented. For individuals with conditions that bring about fluctuating levels of consent capacity, it is important to consider the timing of the assessment and consent; it may make sense to time the initial consent carefully to avoid periods when prospective subjects may be experiencing heightened impairments, e.g., an individual with schizophrenia who is refusing medication or acute drug intoxication. In all cases, respecting a subject's right to withdrawal from a research study is a continuation of the initial consent process, and consideration should be given to ensuring that diminished capacity does not limit this right.

Subject's Assent and Dissent

Adults whose capacity is impaired may still be able to comprehend some aspects of the research study. Assent is the affirmative agreement to participate by the potential research participant. When a potential research participant is capable of providing assent, he/she will only be enrolled in a research study if he/she assents and has a consenting surrogate. If a potential research participant assents but a surrogate does not provide consent, the individual will not be enrolled in the study.

Dissent is any objection to participation by the potential research subject. In general, the dissent of a potential research participant will be respected; overriding a research participant's dissent would only be considered in cases where there is a prospect of direct benefit, which is only available in the research context. The IRB will determine when it is appropriate to override a potential subject's dissent and this will be determined on a case-by-case basis.

The researcher should clearly state how the assent process will occur and how assent and dissent will be documented.

In cases where the research participant is unable to provide assent or dissent, enrollment of the individual in research will be based on surrogate consent. The subject's inability to provide assent should be documented. The subject's ability to assent should be re-evaluated, and there should be a process for re-evaluation at certain intervals, as appropriate to the research protocol.

Research Participants who Regain Capacity

If the research participant regains capacity, written consent from the research participant must be obtained prior to continued participation in research.

Category of Research Including Subjects with Diminished Capacity

The following categories of research may include persons with diminished capacity:

Studies that are minimal risk

Subjects with diminished capacity may be enrolled in studies with minimal risk even if the research offers no direct benefit to subjects.

Studies that involve a minor increase over minimal risk and a prospect of direct benefit

The risks must be reasonable in relation to the prospective benefits. Full IRB review is required. The IRB may recommend additional safeguards.

Studies that involve a minor increase over minimal risk and no prospect of direct benefit

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The risks must be reasonable in relation to an assessment of the scientific merit and probability that the study will further the understanding of the etiology, prevention, diagnosis, pathophysiology or alleviation or treatment of a condition that specifically affects the research population. Full IRB review is required. The IRB may recommend additional safeguards.

Studies that involve greater than minimal risk with a prospect of direct benefit

The prospect of direct benefit must only be available in the context of research and standard treatment may not be withheld. Full IRB review is required. Requests to enroll individual subjects in such studies (i.e., the subject without capacity is not expected, such as a patient with senile dementia for an oncology study) may be made to the IRB via a protocol exception request. The IRB Chair may approve such individual subjects with consultation of general counsel.

Studies that involve greater than minimal risk with no direct benefit

If the research protocol can be carried out by enrolling only subjects who have the capacity to consent, then only subjects with capacity may be enrolled. If the research addresses a significant clinical issue related to diminished capacity that can only be done with patients who lack capacity to consent, researchers should approach the Office of Human Research Affairs (“OHRA”) to see if the study is permissible. The risks must be reasonable in relation to an assessment of the scientific merit and probability that the study will further the understanding of the etiology, prevention, diagnosis, pathophysiology or alleviation or treatment of a condition that specifically affects the research population. Full IRB review is required.

V. Effective Date

Effective as of: July 1, 2020

VI. Procedure Management and Responsibilities

Einstein’s Office of Human Research Affairs is the Responsible Office under this Procedure. The Executive Dean is the Responsible Executive for this Procedure. The OHRA Director is the Responsible Officer for the management of this Procedure.