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3440 Harden Street Ext (29203)  
PO Box 4706, Columbia, South Carolina 29240  
803/898-9600  
Toll Free: 888/DSN-INFO  
Website: [www.ddsn.sc.gov](http://www.ddsn.sc.gov)

Reference Number: 535-07-DD

Title Document: Obtaining Health Care Consent for Minors and Adults with Intellectual Disability and Related Disability (ID/RD), Which Includes Autism

Date of Issue: January 20, 1989  
Effective Date: January 20, 1989  
Last Review Date: December 13, 2018  
Date of Last Revision: December 13, 2018 **(REVISED)**

Applicability: Providers Rendering Health Care to Those Who Reside in a ICF/IID or a Facility Providing Residential Habilitation who also have ID/RD

## **PURPOSE**

This directive establishes procedures to identify persons required to give legally valid consent for health care for people, including minors, receiving residential services from the South Carolina Department of Disabilities and Special Needs (DDSN) under the categories of Intellectual Disability/Related Disability (ID/RD). Based on the definition of health care as defined in the Adult Health Care Consent Act (AHCA) found at S.C. Code Ann. § 44-66-10 (2018). DDSN, Disabilities and Special Needs (DSN) Boards and qualified providers render health care in the following ways:

- 1) Medical/diagnostic care;
- 2) Medical/diagnostic procedures;
- 3) Administration of medication; and
- 4) Intermediate Care Facilities for Individuals with Intellectual Disability (ICF/IID): admissions, placement, programming, and discharge.

### **DISTRICT I**

P.O. Box 239  
Clinton, SC 29325-5328  
Phone: (864) 938-3497

Midlands Center - Phone: 803/935-7500  
Whitten Center - Phone: 864/833-2733

### **DISTRICT II**

9995 Miles Jamison Road  
Summerville, SC 29485  
Phone: 843/832-5576

Coastal Center - Phone: 843/873-5750  
Pee Dee Center - Phone: 843/664-2600  
Saleeby Center - Phone: 843/332-4104

## PHILOSOPHY

People who have Intellectual Disability or Related Disability are fully entitled to all the human and legal rights available to other citizens. The presence of a disability is not, in and of itself, a reason to assume the person is unable to consent. Because, however, a person's disability may adversely impact his/her decision making ability, scrutiny must be given when health care consent from a person with a disability is required.

The level of scrutiny to be given to someone's ability to consent to health care must be balanced by the risks associated with the proposed health care, the person's ability to understand his/her condition, and the health care proposed. In all cases where consent for health care is required, the person with a disability must give the consent, unless one of the following criteria is met:

- 1) Legal guardian has been appointed and authority to give health care consent is within the scope of the guardianship;
- 2) A Power of Attorney, which related to health care, has been properly executed and the authority to consent is within the scope of the Power of Attorney;
- 3) The person is a minor under age 16;
- 4) The person's inability to consent has been certified by two physicians;
- 5) The person is a minor 16 or 17 years of age being asked to consent to an operation.

## DEFINITIONS

The following definitions are consistent with definitions included in the Adult Health Care Consent Act S.C. Code Ann. § 44-66-10 (2018):

**Adult:** In South Carolina, a person 18 years of age or older is an adult. For health care consent, an adult is anyone over 16 years of age who is proposed any health care, except an operation. Adults must be 18 years of age or older to consent to an operation.

**Adult Health Care Consent Act:** This statute provides a legally recognized method of obtaining valid consent from an authorized person when the person is unable to consent on his/her own behalf. The Act is found at S.C. Code Ann. § 44-66-10 (2018).

**Authorized Person:** An "authorized person" is a person listed in the priority of consent givers for minors and adults pursuant to S.C. Code Ann. § 44-26-60 (2018) and § 44-66-30 (2018) in conjunction with S.C. Code Ann. § 44-26-50 (2018) and S.C. Code Ann. § 44-26-60(2018).

**Consent:** As used in this directive, "consent" means the voluntary agreement to proposed health care by a person or authorized person with sufficient mental ability to make an informed choice.

**Emergency:** In context of the Adult Health Care Consent Act, an “emergency” is a situation where a person is in immediate need of specific health care to prevent death, permanent disfigurement, loss or impairment of the functioning of a bodily member/organ, or other serious threat to the health of the person. The immediate need for such care would override any delay caused by attempting to locate an authorized person to give consent for the proposed health care and/or in locating two physicians to certify the person as unable to consent.

**Guardian:** A “guardian” is a person appointed by a court to act and make decisions on behalf of another (ward).” The court order appointing the guardian should be read carefully to determine if any limitations have been placed on the guardian as to making decisions about health care. It should be noted that a “conservator” is not the same as a “guardian.” A “conservator” is a person appointed solely to conserve and protect the ward’s estate and property. A conservator does not have authority to make health care decisions for the ward.

**Health Care:** As described in the Adult Health Care Consent Act, “health care” means a procedure to diagnose or treat a disease, ailment, defect, abnormality or complaint, whether of physical or mental origin. It includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and includes if indicated by this directive the placement in or removal from a facility that provides these forms of care.

For the purpose of this directive, health care is grouped into four (4) categories:

- 1) Medical/diagnostic care;
- 2) Medical/diagnostic procedures;
- 3) Administration of medication; and,
- 4) Admissions/placement/programming/discharge to or from an ICF/IID.

**Health Care Power of Attorney:** A person designated by another person to make health care decisions on their behalf. The Healthcare Power of Attorney must be on a form as authorized by S.C. Code Ann. § 62-5-504 (2017).

**Health Care Professional:** A person who is licensed, certified or otherwise authorized by the laws of this State to provide health care to members of the public. For DDSN, DSN Boards and DDSN qualified providers, the following staff members fall within the definition:

- Physicians;
- Physician Assistants;
- Nurse Practitioners;
- Registered Nurses (RNs);
- Licensed Practical Nurses (LPNs);
- Board Certified Behavior Analysts;
- Licensed Psychologists, Licensed Professional Counselors;

- Licensed Physical Therapists;
- Licensed Occupational Therapists; and
- Licensed Speech Therapists.

**Health Care Provider:** A person, health care facility, organization, or corporation licensed, certified or otherwise authorized or permitted by the laws of this State to administer health care. For DDSN, DSN Boards and DDSN qualified providers, the following are considered health care providers:

- Physicians;
- Physician Assistants;
- Nurse Practitioners;
- Registered Nurses (RNs);
- Licensed Practical Nurses (LPNs); and
- ICFs/IID.

**Minor:** A person under the age of 18 is considered a “minor” in South Carolina, excluding a person who has been legally married or emancipated as decreed by the family court, S.C. Code Ann. § 63-1-40 (1) (2010). A minor under the age of 16 is deemed unable to give consent for health care by virtue of the status of his/her age. A minor who has reached the age of 16 may consent to any health service except operations, unless the operation is essential to the health or life of the minor in the opinion of the attending physician and a consultant physician, if one is available, S.C. Code Ann. § 63-5-340 (2010) and § 63-5-350 (2010).

**Patient:** An individual 16 years of age or older who presents or is presented to a health care provider for treatment. In this Directive, “person” “minor” and “patient” will be used interchangeably to describe the person with an Intellectual Disability or Related Disability receiving services from DDSN, a DSN Board or a DDSN qualified provider.

**Physician:** An individual who is licensed to practice medicine or osteopathy pursuant to S.C. Code Ann. § 40-47-5 et seq. (2011).

**Reasonable Accommodations:** Will include, but not be limited to, using technology and devices, receiving assistance with communication; having additional time and focused discussion to process information; providing tailored information oriented to the comprehension level of the alleged incapacitated individual; and accessing services from community organizations and governmental agencies.” (As defined in S.C. Code § 62-5-101 (23)(b)(1) Supp. 2017)

**Supported Decision Making:** The process by which an individual with a disability, with capacity, uses designated “Supporters” to assist in explaining information, weighing various options and communicating decisions, to the extent needed by the individual. The Supporter does not have any decision-making authority and services only to assist the individual in making informed decisions.

***Treatment:*** The broad range of emergency, outpatient, intermediate, and inpatient services and care that may be extended to a patient to diagnose and treat a human disease, ailment, defect, abnormality or complaint, whether of physical or mental origin. Treatment includes, but is not limited to psychiatric, psychological, substance abuse, and counseling services.

***Unable to Consent:*** The inability of someone to appreciate the nature and implications of his/her health condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner.

### **INITIAL PROCESS**

The health care provider for each individual event will raise the question of a person's ability to give valid consent for health care. The issue would not arise in isolation, but in connection with an identified health care need for which specific health care services are proposed such as the following:

1. Medical/diagnostic care (e.g., physical examinations, prescribing medications, x-rays, swallowing studies, etc.);
2. Medical/diagnostic procedures (e.g., surgery/operation, colonoscopy, etc.);
3. Medication administration; or
4. Admission/placement/programming/discharge to or from an ICF/IID.

When health care is proposed, valid consent must be obtained prior to initiation and implementation of the health care.

The staff person responsible for developing the service/support plan, the ICF/IID interdisciplinary team or the health care provider who is employed by DDSN, a DSN Board or contracted provider must ensure that the requirements of this directive are met. If the proposed health care is based on traditional medical activities such as treatment/diagnostic care and/or procedures, then the health care provider is responsible for the obtaining valid consent. However, if proposed health care involves the administering of medications, or the admission/placement/programming/discharge to or from an ICF/IID, then the staff person responsible for developing the service/support plan or the ICF/IID interdisciplinary team must ensure compliance with this directive. This does not negate a person's right to privacy under the Health Insurance Portability and Accountability Act (HIPAA).

### **ASSESSMENT OF ABILITY TO CONSENT**

The process of obtaining consent involves a verbal dialogue that is reduced to a written consent form. With persons who have an Intellectual or Related Disability this dialogue must be tailored to the person's intellectual level and the person must be provided any needed augmentative or

alternative communication devices/technology to assist in that dialogue. The dialogue will focus on the following topics:

- 1) The person's current health condition or problem;
- 2) The intended or proposed health care;
- 3) The anticipated benefits of the health care;
- 4) The potential risks, adverse outcomes or side effects;
- 5) Possible alternative approaches and their risks and benefits; and
- 6) Risks/benefits of not having the proposed health care.

If the person cannot appreciate the nature and implications of his/her condition and the proposed health care, make a reasoned decision concerning the proposed health care, or communicate his/her decision in an unambiguous manner, even with reasonable accommodations and support, then the person is suspected to be unable to give valid consent.

If suspected to be unable to give valid consent, the person shall be referred to two (2) physicians, one of whom is not employed by DDSN and not a DDSN contracted provider. Each physician must examine the person and make a judgement about ability to consent. An individual may designate supporters to assist them in understanding information related to their healthcare, consistent with the Supported Decision Making Model.

If the two (2) physicians based on their examination and knowledge of accommodations and support available to the individual determine that the person can give consent, then the person shall give consent for him/herself. This determination must be documented (see Attachment 3).

If the two (2) physicians, based on their examination, determine that the person cannot give consent, an authorized person will be selected from the person's Supported Decision Making Agreement. If no agreement is in place, then a personal representative will be selected by the health care provider from the statutory list of priorities. The physicians must document their determinations and include their opinions regarding the cause and the nature of the person's inability to consent, its extent, and probable duration.

If, in the opinion of the two (2) physicians, the person is unable to consent, but the person's inability to consent is temporary, and the health care professional responsible for the care of the person determines that the delay occasioned by postponing treatment until the person regains the ability to consent will not result in significant detriment to the person's health, then no authorized person will be selected and the proposed health care will be postponed until the person is able to provide consent.

## **AUTHORIZED PERSONS**

### **I. Minors**

In accordance with S. C. Code Ann. § 44-26-60 (2018), if a person is a minor under the age of 16 or is 16-17 years of age and in need of an operation, consent for his/her health care must be

given by an authorized person selected by the health care provider based on the following order of priority:

1. Legal guardian with court order;
2. Parent;
3. Grandparent or adult sibling;
4. Other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the minor;
5. Other person who reasonably is believed by the health care professional to have a close relationship with the minor; or
6. Authorized designee of DDSN. "Authorized designees" include the State Director of DDSN, DDSN Regional Center Facility Administrators, DDSN Autism Division Director, Executive Directors of Boards of Disabilities and Special Needs, and Executive Directors/Chief Executive Officers of DDSN Qualified Provider Agencies (see Attachment 4).

Documentation of efforts to locate an authorized person identified in the priority listing shall be recorded in the minor's medical record (see Attachment 2).

Should persons of equal priority disagree on whether certain health care should be provided, the health care provider or any person interested in the welfare of the minor may petition the probate court for an order to determine what care is to be provided or for the appointment of a temporary or permanent guardian.

Priority should not be given to someone the health care provider determines is not reasonably available, or is not willing or unable to make health care decisions for the minor.

In an emergency, health care may be provided to a minor without consent under the same emergency provision applicable to adults, even where the inability of the minor to consent is based solely on his/her minority.

## **II. Adults**

The Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 (2018), sets forth a process for obtaining consent when an adult is unable to consent for health care.

In accordance with S.C. Code Ann. § 44-66-30 (2018) and as re-ordered by the DSN Commission on July 20, 2017, when an adult has been determined by two (2) physicians to be unable to consent to proposed health care, then consent for the his/her proposed health care must be given by an authorized person selected by the health care provider based on the following order of priority:

1. A guardian appointed by the court, pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of guardianship;

2. An attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to S.C. Code § 62-5-501 (Supp. 2017), if the decision is within the scope of his authority;
3. A person given priority to make health care decisions for the patient by another statutory provision;
4. A spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
  - a) Entry of a pendente lite order in a divorce or separate maintenance action;
  - b) Formal signing of a written property or marital settlement agreement; or
  - c) Entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
5. An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
6. A parent of the patient;
7. An adult sibling of the patient, or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
8. 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;
9. Any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those other adult relatives who are reasonably available for consultation.
10. Authorized Designee of DDSN: "Authorized designees" include the DDSN State Director, DDSN Regional Center Facility Administrators, DDSN Autism Division Director, Executive Directors of Boards of Disabilities and Special Needs, or Executive Directors/Chief Executive Officers of DDSN Qualified Provider Agencies (see Attachment 4).

**NOTE:** DDSN is given the priority to make health care decisions for adults under S.C. Code Ann. § 44-66-30 (A)(3)(2018) because there is another statutory provision which gives DDSN that right. The statutory authority that permits DDSN to make health care decisions for adults is found at S.C. Code Ann. § 44-26-50 (2018)., which gives DDSN the priority at number eight (8) in the list of persons who may make health care decisions under S.C. Code Ann. § 44-66-30 (2018). DDSN has requested an opinion from the

Office of the Attorney General on the priority of the agency. The South Carolina Office of the Attorney General issued an opinion on June 21, 2018 that authorizes DDSN to be listed last (#10) in list of those given the authority to consent for those persons with ID/RD unable to consent to health care pursuant to the AHCA (see Attachment 5).

In keeping with DDSN's values and philosophy, DDSN will exercise the authority given by S. C. Code § 44-60-30 (2018) and S.C. Code § 44-26-50 (2018) only in situations in which the person is unable to consent for needed health care and he/she either has no relatives or no relatives are willing or able to make health care decisions. Therefore, when health care decisions cannot be made by the person and he/she does not have an authorized person or persons as listed in Numbers 1 through 9, then an authorized designee of DDSN will serve as the authorized person to consent to health care.

Documentation of efforts to locate an authorized person identified in the priority listing must be recorded in the person's medical record (see Attachment 2).

Priority must not be given to an authorized person who the health care provider determines is not reasonably available, is not willing to make health care decisions for the patient, or is unable to consent.

### **EXCEPTIONS**

For those unable to consent, health care for the relief of pain and suffering may be provided without consent at any time an authorized person in the priority list is unavailable. In an emergency, the person's inability to consent may be certified by a health care professional responsible for the care of the person if the health care professional states in writing in the person's record that the delay occasioned by obtaining certification from two (2) physicians would be detrimental to the person's health. The health care professional shall give an opinion regarding the cause and nature of the inability to consent, its extent and its probable duration. This opinion must be documented.

For those unable to consent, in emergency situations, health care may be provided without consent if no person on the priority list is immediately available, and in the reasonable medical judgment of the health care professional responsible for the care of the person, the delay occasioned by attempting to locate an authorized person to make the health care decision would present a substantial risk of death, permanent disfigurement, impairment of a bodily member/organ, or other serious threat to the health of the person.

Health care decisions on behalf of a person who is unable to consent may be made by an authorized person identified by the priority list if no other authorized person having a higher priority is available immediately, and in the reasonable medical judgment of the health care professional responsible for the care of the person, a delay occasioned by attempting to locate an authorized person having a higher priority presents a substantial risk or serious threat to the health of the person.

For those unable to consent, health care may be provided without consent where there is no authorized person who is reasonably available and willing to make the decision, and in the reasonable medical judgment of the health care professional responsible for the care of the person, the health care is necessary for the relief of suffering, restoration of bodily function or to preserve the life, health or bodily integrity of the person.

**ADDITIONAL NOTES**

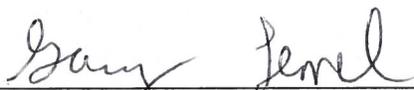
The Adult Health Care Consent Act does not authorize the provision of health care where the attending physician or other responsible health care professional has actual knowledge that the health care is contrary to the religious beliefs of the person, unless the person, while able to consent, stated contrary intent to the physician or health care professional.

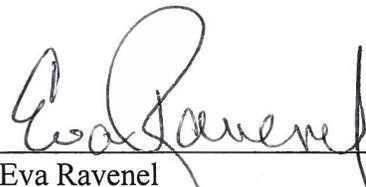
The Adult Health Care Consent Act does not authorize health care to a person unable to consent if the attending physician or responsible health care professional has actual knowledge that the proposed health care is contrary to the person’s unambiguous and un-contradicted instructions expressed at the time when the person was able to consent.

A person who in good faith makes a health care decision as provided in the Adult Health Care Consent Act is not subject to civil or criminal liability on account of the substance of the decision.

A person who consents on behalf of a person unable to consent does not by virtue of that consent become liable for the costs of the health care provided to the person.

A health care provider, who in good faith relies on a health care decision made by an authorized person is not subject to civil and criminal liability or disciplinary penalty on account of reliance on the decision.

  
\_\_\_\_\_  
Gary Lemel  
Vice Chairman

  
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Eva Ravenel  
Chairman

To access the following attachments, please see the agency website page “Current Directives” at: <https://www.ddsn.sc.gov/about-us/directives/current-directives>

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| Attachment 1  | Health Care Consent Instructions   |
| Attachment 2  | Health Care Consent - Identification and Selection of Authorized Person                      |
| Attachment 3  | Health Care Consent - Physician Certification  |
| Attachment 4  | Establishment of Authorized Designees of DDSN for Health Care Decisions and Responsibilities |
| Attachment 5: | SC Attorney General’s Opinion dated June 21, 2018  |