

<b>SOP: IC 702</b> <b>Version No.: 05</b> <b>Effective Date: 7/1/08</b>	<b>RESEARCH INVOLVING  DECISIONALLY INCAPACITATED  ADULT INDIVIDUALS</b>	<b>Supersedes  Document  Dated: 5/17/07</b>
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## 1. POLICY

When mental impairments render a potential adult research subject unable to give consent to participate in a prospective research study, federal research regulations state that the investigator must obtain written informed consent from a “legally authorized representative” prior to enrolling the potential subject into the research study. Federal research regulations define a “Legally Authorized Representative” as 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 C.F.R. § 46.102(c); 21 C.F.R. § 50.3(1)). Federal regulations provide no specific information about who may, or may not, qualify as a “legally authorized representative.” Wisconsin statutory law explicitly addresses the issue of who may provide consent for research participation on behalf of a decisionally incapacitated adult: (a) when experimental treatment is aimed at individuals being treated for mental illness, developmental disabilities, alcoholism or drug dependency; and (b) in chapter 54 of the Wisconsin Statutes (“Guardianships and Conservatorships”).

The purposes of this policy are:

- \* to outline who may qualify as a “legally authorized representative” (“LAR”)for enrolling decisionally incapacitated adult subjects (18 years old or older) into research studies that involve experimental treatment and/or investigational articles; and
- \* describe circumstances in which LARs may enroll decisionally incapacitated adults into such studies.

It is the IRB’s position that in limited circumstances, as described herein, it may be appropriate and in the subject’s best interest to allow a decisionally incapacitated prospective subject to be enrolled into a research study based on the consent of the subject’s guardian, health care agent, or other surrogate decision maker(s). (Please note that this policy has no effect on enrollment of children into research studies, nor on “emergency research” as defined in 21 C.F.R. § 50.24 and Policy SC 503).

### Specific Policies

#### 1.1. Definitions

The following are definitions of key terms used in this policy. The definition of other terms not defined herein shall have the meaning set forth in the Glossary.

When research is conducted in Wisconsin, **“Legally Authorized Representative”** means

- (1) the individual’s health care agent designated in a valid and activated

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power of attorney for health care (“Health Care Agent”);

**OR**

(2) the individual’s legally-appointed guardian of the person (“Guardian”);

**OR**

(3) the individual’s surrogate decisionmaker, or the consensus of surrogate decisionmakers, as set forth in section 1.2.3 below.

**“Incompetent”** means a person adjudged by a court, on account of his/her developmental disability, serious and persistent mental illness, degenerative brain disorder or other like incapacities, to be unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his/her physical health and safety.

**“Decisionally Incapacitated”** means:

(1) the individual is Incompetent as defined above;

**OR**

(2) one independent medical doctor (other than the PI), has determined and documented that the individual lacks the capacity to consent to health care decisions and/or participation in research studies on his or her own behalf

**OR**

(3) it is evident that the prospective adult subject is temporarily unable to make decisions due to his or her condition , and therefore a determination of decisional incapacity may be made by the individual's attending physician or the PI and determination by an independent physician will not be required. Such situations may include an adult prospective subject who is under general anesthesia, or individuals in an emergent medical situation requiring immediate treatment (e.g. individuals experiencing an acute myocardial infarction).

**“Independent Physician”** means a physician who is not involved in the research study at issue.

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## 1.2. Guidelines

### 1.2.1. Use of Consent for Research Participation from “Legally Authorized Representative” Prohibited in Certain Studies

*Wisconsin law expressly prohibits utilizing informed consent from a guardian, alone, for research involving incompetent subjects who are being treated for mental illness, developmental disabilities, alcoholism or drug dependency (Wis. Stat. § 51.61(1)(j) and Wis. Adm. Code HFS § 94.14); and Wisconsin law precludes a health care agent from consenting to the principal’s participation in experimental mental health research (Wis. Stat. § 155.20(3)). In light of these restrictions, decisionally incapacitated individuals may not be enrolled in research involving treatment for mental health, developmental disabilities or alcohol or drug abuse.*

### 1.2.2. Consent for Decisionally Incapacitated Adult’s Research Participation from a Guardian

Wisconsin law provides that a court may authorize a guardian of the person to consent to his/her ward’s participation in research in the following circumstances:

A. There is no clear and convincing evidence that the ward never would have consented to research participation; and (i) the research might help the ward, or (ii) the research might help others and involves no more than minimal risk of harm to the ward.

B. The research complies with applicable federal regulations and with the American Association on Mental Deficiency’s human subjects research principles; it involves greater than minimal risk of harm to the ward; it might not help the ward but might help others; and there is clear and convincing evidence that the ward would have elected to participate in such research.

C. There is no clear and convincing evidence that the ward would never have consented to any experimental treatment; the ward’s mental or physical status presents a life-threatening condition for which the proposed experimental treatment may be life-saving; all other reasonable traditional alternatives have been exhausted; two examining physicians have recommended the proposed experimental treatment; and the proposed experimental treatment is in the ward’s best interest.

If a guardian has been granted the power to authorize his/her ward’s research participation as described in any of the above subsections, the guardian may provide such consent.

### 1.2.3. Consent for Decisionally Incapacitated Adult’s Research Participation

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from a Health Care Agent or Other Surrogate

Except as specified otherwise in paragraphs 1.2.1 or 1.2.2, above, it is ethically appropriate to allow a Legally Authorized Representative to consent to the research participation of a decisionally incapacitated individual when:

- participation of the individual in the research would accord with his/her likely preferences under the circumstances;

**AND**

- the experimental treatment presents the prospect of direct benefit to the individual, (e.g. no other comparable treatment is available or there is genuine uncertainty about the effectiveness of standard care); or
- risks to the prospective adult subject are small in relation to the potential benefit of the research to society.

### **1.3. IRB Submission Requirements**

When an investigator plans to enroll decisionally incapacitated adult research subjects, the following questions must be answered on the IRB Submission Form (FO 301-A):

A. Could the research be conducted with decisional subjects?

B. Could the subjects receive the same management that they will receive in the research study outside of the setting of a research protocol?

C. Will participation in the study increase the risk of harm or discomfort compared to what is expected with the management that the subject will receive if (s)he does not participate in the research study?

D. Will participating in the study increase the chance that the subject will experience a favorable outcome compared to what is expected with the management that the subject will receive if (s)he does not participate in the research study?

E. What is the magnitude of the benefit that future patients, or society in general, may experience as a result of the subject participating in this study?

F. Who is the independent physician who will be making the incapacity determination and completing the Declaration of Incapacity (form IC 702-A) to be filed in the subject's medical record and the investigator-maintained research record? (Note: In very limited circumstances, the IRB may waive this

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requirement.)

G. Who will be assessing the prospective subject’s likely preferences regarding research participation, and how will that assessment be performed?

**1.4. IRB Considerations**

For review by the convened IRB, the Primary Reviewer will take the IRB through the determinations in IC 702-B or IC 702-C. This discussion will serve to determine whether the research can be approved, and to make all other required determinations.

For review using the expedited procedure, the reviewer uses IC 702-B or IC 702-C to determine whether the research may include adults that are decisionally incapacitated, and to make all other required determinations.

**1.5. Practical Considerations**

1.5.1. When the IRB determines that permission for the enrollment of decisionally incapacitated adults in a specific study may be given by a Health Care Agent, a Guardian or other surrogate(s), such determination shall be set forth in the IRB approval letter, which shall include applicable conditions and limitations.

1.5.2. If the prospective research subject has designated a Health Care Agent or has a Guardian, the investigator is not authorized by the IRB to seek consent from other surrogate(s), and must refrain from doing so in such cases. If the prospective research subject has a Guardian, applicable statutory procedures for securing authorization for the subject’s research participation must be followed.

1.5.3. In the event that the prospective research subject has neither a Guardian nor a Health Care Agent, the investigator may be granted authority by the IRB to seek consent from other surrogate(s). The following individuals are considered other “surrogate(s)”: spouse or domestic partner (as defined in Aurora Health Care System Administrative Policy #151); adult children; parents; adult siblings; and/or other close relatives or friends who are aware of the prospective research subject’s values and likely preferences concerning research participation. If there are a number of other surrogates, as described above, the investigator must obtain consensus of such individuals. If there is a disagreement among the individual surrogates, the adult prospective subject shall be immediately disqualified by the investigator as a subject in the research study

1.5.4. If the IRB has granted permission for the enrollment of decisionally incapacitated adults in a specific study, but at or any time after enrollment an incapacitated individual verbally or physically objects to or resists participation, his/her participation will be terminated.

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1.5.5. Studies involving subjects who are decisionally incapacitated may take place over extended periods. The IRB should consider whether periodic re-consenting of individuals should be required to ensure that a subject’s continued involvement is voluntary. The IRB may require that Investigators re-consent subjects after taking into account the study’s anticipated length and the condition of the individuals to be included (e.g., subjects with progressive neurological disorders). Additionally, the IRB should consider whether, and when, it should require a reassessment of decision-making capacity.

## **1.6. Additional IRB Requirements**

The IRB may require any or all of the following subject protection measures in studies where decisionally incapacitated adults are enrolled in a research study.

1.6.1. The Principal Investigator must personally obtain documented informed consent from the Health Care Agent, Guardian, or other surrogate.

1.6.2. The consent process must be monitored by an individual deemed appropriate by the IRB.

1.6.3. Assent must be obtained (and documented) from the prospective subject for participation in the research according to the determinations made by the IRB.

1.6.4. In circumstances where a temporary mental incapacity existed at the time of enrollment into the study, consent for continuation in the research study will be obtained from the subject once/if the temporary condition has resolved.

1.6.5. The Principal Investigator must provide to the IRB, within 5 working days, a report on each decisionally incapacitated subject enrolled into the research study.- This report should include:

- the date and time of the consent process;
- the name of the individual(s) who gave consent for the decisionally incapacitated individual to take part in the research study, and their relationship to the subject;
- whether the subject previously expressed preferences regarding research participation and, if so, the nature of those preferences, and to whom/how/when they were they expressed;
- if applicable, the name of the Independent Physician who made the incapacity determination;

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- the progress to date of the subject in the study;
- if applicable, the name and contact information of the consent monitor;
- a copy of the signed consent document. If applicable, a copy of subject-signed consent documents stating their willingness to continue participating in the research study should also be included.

## 2. SCOPE

This policy applies to all research submitted to the IRB in which a subject's Legally Authorized Representative will give permission for participation in research.

## 3. APPLICABLE REGULATIONS AND GUIDELINES

21 C.F.R. § 50.3(l)

45 C.F.R. § 46.102(c)

Wis. Admin. Code HFS 94.16

Wis. Stat. § 155.20 (3)

Wis. Stats. Chapter 54

ICH Guidelines 4.8.13

*In re Guardianship of LW*, 167 Wis. 2d 53, 482 N.W. 2d 60 (1992)

## 4. REFERENCES TO OTHER APPLICABLE SOPS

SOP 301

SOP 501

SOP 502

SOP 503

SOP 701

Aurora Metro Administrative and Multidisciplinary Clinical Policy Manual; Policy No. Clin-47

Aurora Health Care System Administrative Manual, Policy No. 98, "Patient Rights"

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Aurora Health Care System Administrative Manual, Policy No. 151, "Domestic Partner Benefits"