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Institutional Review Board (IRB) Researcher Education Series

VULNERABLE POPULATIONS

ADULTS WITH DECISIONAL IMPAIRMENT

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Defining Vulnerable Populations

"Vulnerability, in the context of research, should be understood to be a condition, either intrinsic or situational, of some individuals that puts them at greater risk of being used in eithically inappropriate ways in research" (National Bioethics Advisory Counsel, 2001)

Two general themes:

1. Have difficulty providing voluntary, informed consent arising from limitations in decision-making capacity or situations circumstances
2. Especially at risk for explotation or coercion

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Vulnerable Populations as defined by DHHS

As defined in the Common Rule:

subpart B: Pregnant Women, Fetuses, & Neonates

subpart C: Prisoners

subpart D: Children

Adults with Impaired Decision-Making Capacity

While the subparts outline additional requirements for each vulnerable population, those requirements are in addition to the ones outlined in 45 CFR 46 which apply to all research conducted using Human Subjects.

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Important Definitions

Decisional Capacity: potential participant's ability to make a meaningful decision about whether or not to participate

- This is protocol-specific and situation-specific

Decisional Impairment: potential participant's lack of ability to provide informed consent to participate in research resulting from physical, cognitive, or psychological conditions

Adults unable to provide informed consent may not be the subjects of research when the research can be performed with other appropriate subjects

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Why are Adults With Decisional Impairment Vulnerable?

In research, the first ethical principle is Respect for Persons, which explicitly encompasses both that a person's autonomy must be acknowledged and that those with diminished autonomy are entitled to protection.

Due to the limited autonomy of adults unable to consent, there is concern that:

- coercion or undue influence may taint the informed consent process
- individuals may not fully understand the information conveyed in the informed consent process.

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Types of Decisional Impairement

- Temporary Decisional Impairment - individuals in shock
- Permanent Decisional Impairment - intellectually disabled individuals
- Progressive Decisional Impairment - individuals with dementia or Alzheimer's
- Intermittent/Fluctuating Capacity - individuals with mental illness

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Intermittent/Fluctuating Capacity

Subject's capacity to consent may fluctuate so that they can now consent for them self or so that they now require use of an LAR to consent. Both circumstances warrant re-consenting.

Procedures for regularly re-determining capacity and the re-consenting process should be outlined in the protocol for the IRB to review.

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Legally Authorized Representative (LAR)

"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. If there is no applicable law addressing this issue, legally authorized representative means an individual recognized by institutional policy as acceptable for providing consent in the non-research context on behalf of the prospective subject to the subject's participation in the procedure(s) involved in the research."

This is the updated 2018 Common Rule Definition. It is important to note that the FDA has only adopted the first sentence of the definition.

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Legally Authorized Representative (LAR)

Applicable State Law

Louisiana has enacted LA Rev Stat § 40:1159.4 (2015) which outlines persons who may consent to surgical or medical treatment

Documenting LAR Consent at LSUHSC

LAR consent is documented on the LSUHSC Informed Consent Template using the LAR signature line.

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History of Codes & Committees for Adults with Decisional Impairment

Nuremberg Code (1947)

"Consent of next of kin or legal guardian is required; whenever mental state of patient permits… his own consent should be obtained."

Proposed language that was never adopted

Declaration of Helsinki (1964)

"3a… if he is legally incompetent, the consent of the legal guardian should be procured.

3b. The subject of clinical research should be in such a mental, physical, and legal state as to be able to exercise his power of choice."

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History of Codes & Committees for Adults with Decisional Impairment

National Research Act (1974)

Established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, who is charged with assessing and evaluating the requirements of informed consent to participate in research by children, prisoners, and the institutionalized mentally infirm.

National Commission Report (1978)

Made the following recommendations for those institutionalized mentally infirm:

1. Cannot be approached unless their healthcare professional has deemed it acceptable
2. Cannot be involved unless it is relevant to their condition
3. Cannot be involved over subject's objection unless authorized by court of law

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History of Codes & Committees for Adults with Decisional Impairment

Proposed Rule resulting from National Commission Report (1979)

Proposed establishment of subpart E, adopting the specific recommendations outlined in the National Commission Report. Ultimately, this was never adopted.

National Bioethics Advisory Commission (NBAC) (1998)

Recommended several regulatory changes to the Common Rule or the creation of a new subpart to address the needs of persons with decisional impairment.

DHHS Response to NBAC Report (2001)

DHHS agreed with the recommendations and needed clarifications but determined it would be most appropriately issued via guidance.

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History of Codes & Committees for Adults with Decisional Impairment

DHHS Advisory Committee (2002)

The National Human Research Protections Advisory Committee endorsed the NBAC report and recommended mirroring the process for approving research involving adults with decisional impairment mirror the process outlined in subpart D: Children

DHHS Advisory Committee (2009)

The Secretary's Advisory Committee on Human Research Protections requested that OHRP issue guidance for IRBs, recommended revision of the definition for LAR to be more clear, and recommended issuance of a new subpart.

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Evaluating Capacity to Consent

Decisional Impairement can be pre-determined when:

- It is documented by a qualified physician in the subject's medical record
- The individual has been ruled incompetent by a court of law

If there is a concern about a subject's capacity to consent, an assessment of capacity can be made using:

- A subjective assessment made by a qualified professional; or,
- A validated objective instrument designed to evaluate capacity

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What to Consider When Determining Capacity

Is the person able to absorb and understand the information provided in the consent?

Is the person able to comprehend the significance of the consent?

Is the person able to apply the information in the consent to make a reasoned decision about participating in the research?

Is the person able to express their decision to clearly participate?

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Including Adults with Decisional Impairement in Consent Processes

Even when a person is deemed to have decisional impairment, they should still be included in the consent process, to the extent possible. Suggestions for how to include them in the consent process include:

- Allowing the person to determine who can serve as LAR
- Seeking assent or respecting dissent, both of which can be communicated in a number of ways
- Communicating information in a way that can be understood by the person participating in the research

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Categories of Permitted Research

Research not involving greater than minimal risk

Requirements to Approve the Research:

- Consent from the LAR

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Categories of Permitted Research

Research involving greater than minimal risk but presenting the prospect of direct benefit to the individual subjects

Requirements to Approve the Research:

1. Risk must be justified by anticipated benefit to the subject participating
2. Risk/Benefit ratio is at least as favorable to the subjects as that presented by available alternative approaches
3. Consent from the LAR

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Categories of Permitted Research

Research involving greater than minimal risk and no prospect of direct benefit to individual subjects, but likely to yield generalizable knowledge about the subject's disorder or condition

Requirements to Approve the Research:

1. Risk is only slightly greater than minimal
2. Intervention/procedure presents experiences that are comparable to the subject's actual or expected medical, dental, psychological, social, or educational situations
3. Intervention/procedure is likely to yield generalizable knowledge of vital importance for the understanding the subject's disorder or condition
4. Consent from the LAR

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Other Laws to Consider

Department of Defense [10 U.S.C. 980]
When research is intended to be beneficial to the person participating, informed consent of the person or the LAR must be obtained in advance

The following federal laws and regulations may be implicated by the nature of the subject population, location of the research, or the type of research:
Disability and Rehabilitation Research Projects and Centers Program
U.S. Department of Education [34 CFR 350.4]
Americans with Disabilities Act [42 U.S.C. 126]

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Additional Resources

21 CFR 50.3(1) (FDA)
https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=50.3

LSUHSC - NO HRPP Policies and Procedures 7.01
https://www.lsuhsc.edu/administration/academic/ors/policies_procedures.aspx