1. PURPOSE

The purpose of this procedure is to describe additional protections for persons with impaired decision-making capacity.

2. PROCEDURE

It is the procedure of the IRB that research involving decisionally impaired participants who cannot provide voluntary informed consent must include appropriate additional protections in accordance with the requirements of Health and Human Services regulations 45 CFR §46.111(b). The PI and IRB need to ensure that provisions are made to obtain legally effective informed consent prospectively from each research participant or permission from the human subjects legally authorized representative (LAR).

3. SPECIFIC PROCEDURES

3.1 Definitions:

A. Decisionally impaired participants:

A person that lacks the ability to reason, exhibit sound judgment and provide voluntary consent to participate in research. The impairment may impact voluntary consent to participate in research. The impairment may fluctuate (e.g., mental disorders, under the influence of drugs or alcohol), decline with time (e.g., Alzheimer's), or result from health conditions (e.g., coma or other infirmity) or developmental disorders.

Note: Capacity, defined as an individual's ability to make an informed decision should not be confused with competence. Competence is a legal state, not a medical one. Competence refers to the degree of mental soundness necessary to make decisions about a specific issue or to carry out a specific act. All adults are presumed to be competent unless adjudicated otherwise by a court. Incompetence is defined by one's functional deficits, which are judged to be sufficiently great that the person cannot meet the demands of a specific decision-making situation, weighed in light of its potential consequences. Only a court can make a determination of incompetence.

B. Legally Authorized Representative (LAR) as defined by FDA and DHHS Regulations:

An individual or judicial or other body authorized under applicable law to consent on behalf of a prospective human subject to the subject's participation in the procedures(s) involved in the research.

- FDA regulation 21 CFR §50.20 states that no PI may involve a human being as a subject in research covered by these regulations unless the PI has obtained the legally effective informed consent of the human subject or the human subject's LAR.
- HHS regulation 45 CFR §46.116 states that if a human subject is not legally competent to consent to participate in a study, the federal regulations require that a legally authorized representative consent for the human subject.
- HHS regulation 45 CFR §46.102(i) states that if there is no applicable law addressing this issue, LAR means an individual recognized by institutional policy as acceptable for providing consent in the non-research context on behalf of the prospective subject.

Legally Authorized Representative (LAR) in South Dakota:
A LAR is one of the following, listed in order of priority:

1. A designated proxy (such as a durable power of attorney for health care). This is an individual named in a legally effective Health Care Power of Attorney (POA-HC) or a durable power of attorney which includes the POA-HC executed by the human subject while the human subject had decision-making capacity, or
2. Court-appointed guardian. This is a legal guardian who has been appointed by a court to make decisions for a human subject who has been judicially judged to be incompetent, or
3. Next-of-Kin. **South Dakota codified law** describes next-of-kin in the following order: spouse (if not legally separated), adult child, parent, adult sibling, grandparent or an adult grandchild, adult aunt or uncle, or an adult niece or nephew.

C. Institutionally Authorized Surrogate
In the absence of a LAR as described above, no one can provide legally effective consent on behalf of a participant to the participant's participation in research. Under federal regulations, Institutionally Authorized Surrogates who do not meet the DHHS definition of Legally Authorized Representatives may not provide consent on behalf of another individual unless the IRB has waived the requirement for informed consent.

3.2 PI's Responsibilities

- PI must apply to the IRB for the approval to use a LAR for consent that is specific to the particular study being reviewed.
    - LAR consent is typically only considered in research studies relating to cognitive impairment, lack of decision-making capacity, or serious or life-threatening disease as conditions of the research.
    - Upon approval of the IRB for use within a specific protocol, the PI shall apply the use of LAR consent on a case-by-case basis.
- If a potential adult research participant is identified, but lacks decision-making capacity for healthcare decisions and consent:
    - The PI, the treating physician, and others involved as members of the research team must document in the research record:
        - The basis for their determination that the patient lacks decision-making capacity.
        - The identity of the LAR, as defined above. (A copy of the legal form authorizing the durable power of attorney, etc. should be maintained in the research records.)
        - The process by which the human subject was enrolled or declined to be enrolled in the research.

3.3 IRB Guidelines

The use of a LAR is a protocol-specific request of the PI, and must be reviewed and approved accordingly by the IRB:

- A decisionally impaired participant may participate in research involving *greater than minimal risk* only if the research potentially offers the prospect of direct therapeutic benefit to that participant, and if a LAR is available and provides proxy consent.
- A decisionally impaired participant may participate in research involving *minimal or slightly above minimal risk* without direct participant benefit if a LAR is available and provides proxy consent.
- The IRB will consult legal counsel for any questions regarding the use of a LAR for the research study being reviewed. The IRB shall utilize consultants as necessary to ensure appropriate expertise. Such consultants may not vote with the IRB or contribute to the quorum.
- The determination that a prospective participant is decisionally impaired may need to be assessed on a continual basis throughout the research as capacity to consent/assent may fluctuate based on the prospective participant's state of impairment, including the ability for the subject to provide their own consent to continue research participation. If the IRB deems continual assessment necessary, the research protocol must describe a plan for reassessing capacity for individuals who exhibit fluctuating capacity levels, or if the research involves a population where it would be reasonably expected that capacity would be regained.

3.4 Criteria for IRB Approval:

A. **Compelling reason**: The PI must demonstrate to the IRB that there is a compelling reason to include persons with impaired decision-making capacity as subjects.

B. **Favorable risk/benefit ratio**: The proposed research entails no significant risks, tangible or intangible or, if the research presents some probability of harm, there must be at least a greater prospect of direct benefit to the participant.
Persons with impaired decision-making capacity will not be human subjects of research that imposes a risk of injury unless that research is intended to benefit that human subject and the probability of benefit is greater than the probability of harm.

C. **Voluntary participation:** In situations where the potential research subject has an impaired decision-making capacity and is unable to provide informed consent, the PI should still attempt to obtain assent from the potential subject.
Some persons may resist participating in a research protocol that has been approved by their LAR. Under no circumstances may human subjects be forced or coerced to participate.

D. **Well-informed representatives**: It is of utmost importance to ensure that the human subject's LAR is well informed regarding their roles and obligations to protect the person with impaired decision-making capacity. LARs must be given descriptions of the proposed research study. The LAR must be told that their obligation is to try to determine what the human subject would do if competent, or if the human subject's wishes cannot be determined, what they think is in this person's best interest.

3.5 IRB Determination and Documentation

If the criteria mentioned above are met, the IRB may approve the inclusion of human subjects with impaired decision-making capacity in the research projects on the basis of informed consent from a LAR.

4. RESPONSIBILITY

IRB Staff and/or Chair are responsible for providing the PI with guidance to ensure the rights and welfare of the participant have been maintained.

Chair and IRB Members are responsible for the review of the research, consent, assent and ensuring all safeguards are in place, using an appropriate IRB Checklist.

5. APPLICABLE REGULATIONS AND GUIDELINES

45 CFR §46.102(i)
45 CFR §46.111(b)
45 CFR §46.116-117
21 CFR §50.20
21 CFR §56.111(b)

REVISION HISTORY

Revision Number	Version Date	Approved By	Date Approved
2.0	8/11/2020	Avera Institutional Official	9/22/2020
• Changed the title of this SOP to be in alignment with current regulations. • Revised and cleaned up definitions to make them easier to understand. • Clarified and added to the IRB Guidelines, for clarification. • Removed the term “incompetent” as much as possible, and instead maintained the term “Impaired Decision-making Capacity,” as that seems more appropriate. • Removed the regulations pertaining to Department of Veterans Affairs, as that is not applicable for our institution. • Added applicable regulations to the reference list.			
1.0	August 2016	Director HSRP / August 2016	