

General Information

Policy Name:	Capacity: Determining Patient Capacity
Category:	Risk Management
Applies To:	All Staff
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Associated Forms & Policies:	
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Policy

It is the policy of Crouse Hospital to ensure that any patient that is identified as possibly lacking capacity to make healthcare decisions is evaluated and designated as lacking capacity in accordance with New York State regulations.

NYS regulations indicate an attending physician can determine capacity of a patient.

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Procedure

Any adult patient who has not been previously identified as lacking capacity is presumed to have capacity to make health care decisions. In instances where any person involved in the care of a patient believes that the patient is lacking capacity to make informed decisions regarding their health care, they should contact the attending physician so a determination can be made.

Nursing should make contact with the attending physician and request that he/she complete an assessment of the patient to assess if the patient has or lacks decision making capacity. Documentation in the medical record should include the date, time and name of the person who contacted the attending physician. If the attending physician cannot be reached, staff should request a Hospitalist on duty perform the assessment of the patient.

Once determination is made by the attending physician, that a patient lacks decisional capacity, he/she will document his/her finding in the medical record per the following guidelines and the health care agent or surrogate will be then be contacted to inform them that they will now have authority to make healthcare

decisions for the patient.

Determining Capacity: Providing Notifications – Attending Physician

The initial determination that a patient lacks decision making capacity shall be made by the attending physician to a reasonable degree of medical certainty.

- The determination shall be documented in writing in the patient's medical record, and must contain the Attending physician's opinion regarding the cause and nature of the patient's incapacity, as well as the extent and probable duration of the incapacity.
- In situations that may lead to withholding or withdrawing a patient from life support, a second physician must independently determine whether the adult patient lacks decision-making capacity, and document this determination in the medical record, including their opinion regarding the cause, nature, extent, and probable duration of any incapacity.
- If the Attending Physician has determined that the patient lacks decision-making capacity and if the Physician consulted for a concurring determination disagrees with the Attending Physician's determination, the matter shall be referred for an Ethics consultation if it cannot otherwise be resolved.
- Notice of a determination that a Healthcare agent or surrogate will make health care decisions because the adult patient has been determined to lack decision-making capacity shall promptly be given:
 - To the patient, where there is any indication of the patient's ability to comprehend the information.
 - To the health care agent or to at least one person on the surrogate list in order of priority listed when persons in prior classes are not reasonably available pursuant to the Family Health Care Decisions Act (FHCDCA).
 - The Attending Physician will document the notifications in the medical record, including date and time, or if notification is not given due to an extenuating circumstance this will be documented and will include the reason.
- If the patient objects to the determination of incapacity or to a decision made by the health care agent or surrogate, the patient's objection or decision shall prevail unless or until a court of competent jurisdiction has determined that the patient lacks decision-making capacity or the patient is or has been adjudged incompetent for all purposes and, in the case of a patient's objection to treatment, makes any other findings required by law to authorize the treatment over patient's objection.
- Continued determination of the patient's capacity to make medical decisions should occur during all subsequent attending/patient visits and should be documented.

Determining Capacity: Patients with Mental Illness

- Attending physician examines the patient and if it is determined that the patient lacks capacity due to mental illness, then either the attending or concurring physician must be board certified or board eligible by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Neurology and Psychiatry, or must consult independently with a physician with these qualifications.
- The findings and/or the consultation note must be documented in the medical record.
- If the patient deemed to lack capacity has been transferred to Crouse for care from a mental hygiene facility, then the facility director must be promptly informed of the determination.

Determining Capacity: Patient with Developmental Disability

To determine if the patient lacks capacity due to a developmental disability, either the attending physician or the concurring physician or licensed psychologist must:

- Be employed by a Developmental Disabilities Service Organization (DDSO); or
- Have been employed for at least two (2) years in a facility or program operated, licensed, or authorized by the Office for People with Developmental Disabilities (OPWDD); or
- Have been approved by the Commissioner of OPWDD as either possessing specialized training or have 3 years' experience in providing services to individuals with Developmental Disability (DD); AND
- The consultation must be documented in the medical record, as well as information on the qualifications of the specialist providing the concurring determination on decision-making capacity.

Lack of Capacity Determined

When it is determined by the attending physician and/or others as deemed necessary to provide consultation or independent determination, the attending shall make reasonable efforts to determine if the patient has any prior advance directive (e.g., a healthcare proxy or living will) or any prior written order for life-sustaining treatment (e.g., a MOLST form). If the patient has not created a Health Care Proxy, MOLST or any other directive, then the attending physician shall identify the appropriate public health law surrogate pursuant to the FHCDA to address decisions needed for medical care.

The surrogate identified and contacted must be willing to act as the decision maker, be able to make healthcare decisions and act in the best interests of the patient. If a surrogate is at any time determined to not be acting in the best interests of the patient, identifying and contacting another individual willing and able to make decisions in the best interests of the patient will occur. Documentation in the medical record of the situation will occur.

If the patient is deemed to lack capacity due to mental illness, the staff will follow the approved OMH lists of persons authorized to act as a decision maker.

If the patient is deemed to lack capacity due to developmental disability, the staff will follow the approved OPWDD list of persons authorized to act as a decision maker.

Staff can contact Care Coordination for help identifying the appropriate decision maker, and a care coordinator may be consulted to help initiate any necessary Surrogate Decision Making Committee proceedings (see addendum III).

In any other situation where the provider cannot find an approved agent under any of the above listed methods, then he/she should contact the Office of Risk Management.

Patient Regains Capacity To Make Healthcare Decisions

If it is determined during the course of treatment that the patient has regained the capacity to make healthcare decisions, the attending physician shall enter the finding within the medical record. Additionally, the attending physician and/or a member of the nursing staff or Care Coordination team will inform the agent that the patient has regained the capacity to make their own healthcare decisions and that the agent will no longer be asked to make decisions while the patient retains capacity to do so for themselves.

References

NYS Public Health Law Section 29-C
14 NYCRR, Section 13.17
NYS Family Health Care Decisions Act
NYS OPWDD
NYS Patients' Rights
MOLST

Mental Health Hygiene law section 13.17

OMH

Definitions

Decision Making Capacity:

A medical determination made by a physician that a patient has the ability to understand and appreciate the risks, benefits, alternatives and consequences of proposed healthcare decisions and to reach an informed decision.

Incompetent:

A legal determination by a court that an individual lacks the ability to make all decisions, including health care decisions and decisions about creating a health care proxy.

Attending Physician:

The physician, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient. Where more than one physician shares such responsibility, or where a physician is acting on the attending physician's behalf, any such physician may act as the attending physician pursuant to Article 29-C.

Mental Illness:

A mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law, provided, however, that mental illness shall not include dementia, such as Alzheimer's disease or other disorders related to dementia.

Health Care Proxy:

A document delegating the authority to make health care decisions, executed in accordance with the requirements of Article 29.

Health Care Agent or Agent:

An adult to whom authority to make health care decisions is delegated under a health care proxy.

Health Care Decision:

Any decision to consent or refuse to consent to health care.

Medical Orders for Life-Sustaining Treatment (MOLST) Forms:

An actionable physician order and legal document outlining treatment preferences which travels across health care settings with the patient.

Family Health Care Decisions Act:

A New York State law that enables family and/or friends of a patient that lacks capacity and does not have a healthcare agent to provide guidance and decision making regarding on-going medical care.

Developmental Disability:

A disability (attributable to intellectual delay, cerebral palsy, epilepsy, neurological impairment, autism or other similar condition) diagnosed before the age of 22 years and is a substantial handicap to the person's ability to function independently.

Domestic Partner:

A person who meets any of the following standards: (a) is formally in a domestic partnership or relationship with the patient that is legally recognized in the United States, or is listed as the patient's domestic partner

in any registry maintained by the patient's or partner's employer, or any state, municipal or foreign jurisdiction; or (b) is formally recognized as a beneficiary or covered person under the patient's employment benefits or health insurance or the patient is a beneficiary under such benefits or the potential surrogate; or (c) the patient and the potential surrogate are mutually interdependent for support, as shown by or demonstrated by common ownership or leasing of a home or personal property, common house holding, shared income or expenses, children in common, or intention to marry.

Surrogate:

The person selected to make health care decision for a patient without capacity and who has not been appointed a health care agent which includes in order of priority; (a) legal guardian; (b) spouse if not separated or domestic partner; (c) adult child; (d) parent; (e) adult sibling; (f) patient representative or (g) close friend or relative.

Close Friend:

Any person 18 years of age or older who is a close friend of the patient who has maintained regular contact with the patient and is familiar with the patient's activities, health, and religious or moral beliefs and presents a signed statement or affidavit to that effect to the physician.

Addendums, Diagrams & Illustrations

Not Applicable