

# **HIPAA Privacy WorkGroups™**

*The innovative approach to self-implementation*

## December Double WorkGroups Sessions

**Authorizations      “Opt-Out” Uses  
and Related Issues      and Disclosures**

**Personal  
Representatives**

Lafayette, Louisiana – December 10, 2001  
Baton Rouge, Louisiana – December 12, 2001  
Monroe, Louisiana – December 14, 2001

(B) With respect to disclosures by a group health plan or a health insurance issuer or HMO with respect to a group

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health plan to the plan sponsor, to the extent that the requirements of § 164.504(f) apply and are met; or

(C) With respect to uses or disclosures by a health plan that is a government program providing public benefits, if eligibility for, or enrollment in, the health plan is determined by an agency other than the agency administering the health plan, or if the protected health information used to determine enrollment or eligibility in the health plan is collected by an agency other than the agency administering the health plan, and such activity is authorized by law, with respect to the collection and sharing of individually identifiable health information for the performance of such functions by the health plan and the agency other than the agency administering the health plan.

(iii) A covered entity that violates the satisfactory assurances it provided as a business associate of another covered entity will be in noncompliance with the standards, implementation specifications, and requirements of this paragraph and § 164.504(e).

(2) Implementation specification: documentation. A covered entity must document the satisfactory assurances required by paragraph (e)(1) of this section through a written contract or other written agreement or arrangement with the business associate that meets the applicable requirements of § 164.504(e).

(f) Standard: deceased individuals. A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual.

(g) (1) Standard: personal representatives. As specified in this paragraph, a covered entity must, except as provided in paragraphs (g)(3) and (g)(5) of this section, treat a personal representative as the individual for purposes of this subchapter.

(2) Implementation specification: adults and emancipated minors. If under applicable law a person has authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care<sup>2</sup>, a covered entity must treat such person as a personal

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<sup>2</sup> LA R.S. 40:1299.53 sets out who may consent to medical treatment. It provides:

“A. In addition to such other persons as may be authorized and empowered, any one of the following persons in the following order of priority, if there is no person in a prior class who is reasonably available, willing, and competent to act, is authorized and empowered to consent, either orally or otherwise, to any surgical or medical treatment or procedures including autopsy not prohibited by law which may be suggested, recommended, prescribed, or directed by a duly licensed physician:

- (1) Any adult, for himself.
- (2) The judicially appointed tutor or curator of the patient, if one has been appointed.
- (3) An agent acting pursuant to a valid mandate, specifically authorizing the agent to make health care decisions.
- (4) The patient's spouse not judicially separated.
- (5) An adult child of the patient.
- (6) Any parent, whether adult or minor, for his minor child.
- (7) The patient's sibling.
- (8) The patient's other ascendants or descendants.

representative under this subchapter, with respect to protected health information relevant to such personal representation.<sup>3</sup>

(3) Implementation specification: unemancipated minors. If under applicable law a parent, guardian, or other person acting *in loco parentis* has authority to act on behalf of an individual who is an unemancipated minor in making decisions related to

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health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation, except that such person may not be a personal representative of an unemancipated minor, and the minor has the authority to act as an individual, with respect to protected health information pertaining to a health care service, if:

(i) The minor consents to such health care service; no other consent to such health care service is required by law<sup>4</sup>, regardless of whether the consent of another person has also been obtained; and the minor has not requested that such person be treated as the personal representative;<sup>5</sup>

(ii) The minor may lawfully obtain such health care service without the consent of a parent, guardian, or other person acting *in loco parentis*, and the minor, a court, or another person authorized by law consents to such health care service; or

(iii) A parent, guardian, or other person acting *in loco parentis* assents to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service.

(4) Implementation specification: deceased individuals. If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

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(9) Any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward.

B. If there is more than one person within the above named class in Paragraphs (A)(1) through (9), the consent for surgical or medical treatment shall be given by a majority of those members of the class available for consultation.”

<sup>3</sup> “In general, a person's right to control protected health information (PHI) is based on that person's right (under state or other applicable law, e.g., tribal or military law) to control the health care itself.” *HHS Guidance on Privacy Rules*, July 6, 2001, § TA 164.502C.001.

<sup>4</sup> The following Louisiana statutes authorize minor's to consent to medical treatment without their parents' consent: LA R.S. 40:1065.1. Minor's consent for treatment of venereal diseases, LA R.S. 40:1095. Minors; consent to medical treatment, LA R.S. 40:1096. Treatment for drug abuse, LA R.S. 40:1097. Donation of blood.

<sup>5</sup> “There are exceptions in which a parent might not be the “personal representative” with respect to certain health information about a minor child. In the following situations, the Privacy Rule defers to determinations under other law that the parent does not control the minor's health care decisions and, thus, does not control the PHI related to that care.

When state or other law does not require consent of a parent or other person before a minor can obtain a particular health care service, and the minor consents to the health care service, the parent is not the minor's personal representative under the Privacy Rule.” *HHS Guidance on Privacy Rules*, July 6, 2001, § TA 164.502C.001

(5) Implementation specification: abuse, neglect, endangerment situations. Notwithstanding a State law or any requirement of this paragraph to the contrary, a covered entity may elect not to treat a person as the personal representative of an individual if:

(i) The covered entity has a reasonable belief that:

(A) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or

(B) Treating such person as the personal representative could endanger the individual; and

(ii) The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

(h) Standard: confidential communications. A covered health care provider or health plan must comply with the applicable requirements of § 164.522(b) in communicating protected health information.

## PARENTS AND MINORS

[45 CFR § 164.502(g)]

### General Requirements

The Privacy Rule provides individuals with certain rights with respect to their personal health information, including the right to obtain access to and to request amendment of health information about themselves. These rights rest with that individual, or with the “personal representative” of that individual. In general, a person's right to control protected health information (PHI) is based on that person's right (under state or other applicable law, e.g., tribal or military law) to control the health care itself.

Because a parent usually has authority to make health care decisions about his or her minor child, a parent is generally a “personal representative” of his or her minor child under the Privacy Rule and has the right to obtain access to health information about his or her minor child. This would also be true in the case of a guardian or other person acting *in loco parentis* of a minor.

There are exceptions in which a parent might not be the “personal representative” with respect to certain health information about a minor child. In the following situations, the Privacy Rule defers to determinations under other law that the parent does not control the minor’s health care decisions and, thus, does not control the PHI related to that care.

- When state or other law does not require consent of a parent or other person before a minor can obtain a particular health care service, and the minor consents to the health care service, the parent is not the minor’s personal representative under the Privacy Rule. For example, when a state law provides an adolescent the right to consent to mental health treatment without the consent of his or her parent, and the adolescent obtains such treatment without the consent of the parent, the parent is not the personal representative under the Privacy Rule for that treatment. The minor may choose to involve a parent in these health care decisions without giving up his or her right to control the related health information. Of course, the minor may always have the parent continue to be his or her personal representative even in these situations.
- When a court determines or other law authorizes someone other than the parent to make treatment decisions for a minor, the parent is not the personal representative of the minor for the relevant services. For example, courts may grant authority to make health care decisions for the minor to an adult other than the parent, to the minor, or the court may make the decision(s) itself. In order to not undermine these court decisions, the parent is not the personal representative under the Privacy Rule in these circumstances.

In the following situations, the Privacy Rule reflects current professional practice in determining that the parent is not the minor’s personal representative with respect to the relevant PHI:

- When a parent agrees to a confidential relationship between the minor and the physician, the parent does not have access to the health information related to that conversation or relationship. For example, if a physician asks the parent of a 16-year old if the physician can talk with the child confidentially about a medical condition and the parent agrees, the parent would not control the PHI that was discussed during that confidential conference.
- When a physician (or other covered entity) reasonably believes in his or her professional judgment that the child has been or may be subjected to abuse or neglect, or that treating the parent as the child's personal representative could endanger the child, the physician may choose not to treat the parent as the personal representative of the child.

### **Relation to State Law**

In addition to the provisions (described above) tying the right to control information to the right to control treatment, the Privacy Rule also states that it does not preempt state laws that specifically address disclosure of health information about a minor to a parent (§ 160.202). This is true whether the state law authorizes or prohibits such disclosure. Thus, if a physician believes that disclosure of information about a minor would endanger that minor, but a state law requires disclosure to a parent, the physician may comply with the state law without violating the Privacy Rule. Similarly, a provider may comply with a state law that requires disclosure to a parent and would not have to accommodate a request for confidential communications that would be contrary to state law.

### **Frequently Asked Questions**

**Q: Does the Privacy Rule allow parents the right to see their children's medical records?**

**A:** The Privacy Rule generally allows parents, as their minor children's personal representatives, to have access to information about the health and well-being of their children when state or other underlying law allows parents to make treatment decisions for the child. There are two exceptions: (1) when the parent agrees that the minor and the health care provider may have a confidential relationship, the provider is allowed to withhold information from the parent to the extent of that agreement; and (2) when the provider reasonably believes in his or her professional judgment that the child has been or may be subjected to abuse or neglect, or that treating the parent as the child's personal representative could endanger the child, the provider is permitted not to treat the parent as the child's personal representative with respect to health information.

Secretary Thompson has stated that he is reassessing these provisions of the regulation.

**Q: Does the Privacy Rule provide rights for children to be treated without parental consent?**

**A:** No. The Privacy Rule does not address consent to treatment, nor does it preempt or change state or other laws that address consent to treatment. The Rule addresses access to health information, not the underlying treatment.

**Q: If a child receives emergency medical care without a parent's consent, can the parent get all information about the child's treatment and condition?**

**A:** Generally, yes. Even though the parent did not provide consent to the treatment in this situation, under the Privacy Rule, the parent would still be the child's personal representative. This would not be so only when the minor provided consent (and no other consent is required) or the treating physician suspects abuse or neglect or reasonably believes that releasing the information to the parent will endanger the child.

**CHAPTER XI. CONSENT TO TREATMENT**

- a. Who may consent?
  - i. *General*
  - ii. *Minors*
  - iii. *Mentally retarded & developmentally disabled*
- b. How is consent given?
- c. Emergencies
- d. Right to refuse treatment
- e. Miscellaneous

**a. Who may consent?**

**i. General**

**R.S. 40:1299.51. Part not applicable to abortion and sterilization**

The provisions of this Part [R.S. 40:1299.51 – 1299.58] shall not apply in any manner whatsoever to the subjects of abortion and sterilization, which subjects shall continue to be governed by existing law independently of the terms and provisions of this Part.

**R.S. 40:1299.52. Part not applicable to care and treatment of mentally ill; exception**

Except as provided in R.S. 40:1299.58, the provisions of this Part shall not apply to the care and treatment of the mentally ill, which subject shall continue to be governed by existing law independently of the terms and provisions of this Part.

**R.S. 40:1299.53. Persons who may consent to surgical or medical treatment**

A. In addition to such other persons as may be authorized and empowered, any one of the following persons in the following order of priority, if there is no person in a prior class who is reasonably

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C.C.P. - Code of Civil Procedure; C.E. - Code of Evidence; CFR – Code of Federal Regulation; Ch.C - Children's Code; C.Cr.P. - Code of Criminal Procedure; LAC - Louisiana Administrative Code; R.S. - Revised Statutes

available, willing, and competent to act, is authorized and empowered to consent, either orally or otherwise, to any surgical or medical treatment or procedures including autopsy not prohibited by law which may be suggested, recommended, prescribed, or directed by a duly licensed physician:

- (1) Any adult, for himself.
- (2) The judicially appointed tutor or curator of the patient, if one has been appointed.
- (3) An agent acting pursuant to a valid mandate, specifically authorizing the agent to make health care decisions.
- (4) The patient's spouse not judicially separated.
- (5) An adult child of the patient.
- (6) Any parent, whether adult or minor, for his minor child.
- (7) The patient's sibling.
- (8) The patient's other ascendants or descendants.
- (9) Any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward.

B. If there is more than one person within the above named class in Paragraphs (A)(1) through (9), the consent for surgical or medical treatment shall be given by a majority of those members of the class available for consultation.

#### **R.S. 40:1299.55. Construction of part**

The provisions of this Part shall be liberally construed, and all relationships set forth herein shall include the marital, adoptive, foster and step-relations as well as the natural whole blood. A consent by one person so authorized and empowered shall be sufficient. Any person acting in good faith shall be justified in relying on the representations of any person purporting to give such a consent, including, but not limited to, his identity, his age, his marital status, his emancipation, and his relationship to any other person for whom the consent is purportedly given.

#### **R.S. 9:975. Non-legal custodian; consent for certain services; affidavit, form of<sup>1</sup>**

- A. (1) A non-legal custodian, who is not a foster parent caring for a child in the custody of the Office of Community Services, shall be authorized to give legal consent for a child in his custody to receive any medical or educational services for which parental consent is usually required by executing the affidavit described in Paragraph (B)(4) of this Section. The affidavit shall not be valid for more than one year after the date on which it is executed.
- (2) The decision of a non-legal custodian to consent to or to refuse medical or educational services for a child in his custody shall be superseded by any contravening decision of a parent or a person

<sup>1</sup> Added by Act 410 of 2001, effective June 15, 2001.

having legal custody of the child, provided the decision of the legal custodian does not jeopardize the life, health, safety, or welfare of the child.

(3) Nothing in this Section shall apply to, or give authority for, an abortion as provided in R.S. 40:1299.35.5.

B. (1) No person who acts in good faith reliance on a non-legal custodian properly executed affidavit, having no actual knowledge of any facts contrary to those stated in the affidavit, shall be subject to civil liability or criminal prosecution, or to professional disciplinary procedure, for any action which would have been proper if the facts had been as he believed them to be. This paragraph shall apply even if medical or educational services are rendered to a child in contravention of the wishes of the parent or legal custodian of that child. However, the person rendering the services must not have actual knowledge of the wishes of the parent or legal custodian.

(2) A person who relies on a properly executed affidavit has no obligation to make further inquiry or investigation. Nothing herein shall relieve any person of responsibility for violations of other provisions of law, rules, or regulations.

(3) If the child ceases to live with the non-legal custodian, the non-legal custodian shall notify all parties to whom he has transmitted the affidavit or to whom he has caused the affidavit to be transmitted.

(4) A non-legal custodian's affidavit shall be invalid unless it substantially contains, in not less than ten-point boldface type, or a reasonable equivalent thereof, the warning statement beginning with the word "warning" specified in this Paragraph. The warning statement shall be enclosed in a box with three-point rule lines. The non-legal custodian's affidavit shall be in substantially the following form:

**NON-LEGAL CUSTODIAN'S AFFIDAVIT<sup>2</sup>**

Use of this affidavit is authorized by R.S. 9:975

**INSTRUCTIONS:** Completion of items 1 through 4 and the signing of the affidavit are sufficient to authorize educational services and school-related medical services for the named child. Completion of items 5 through 8 is additionally required to authorize any other medical services. Please print clearly.

The child named below lives in my home and I am 18 years of age or older.

1. Name of child: \_\_\_\_\_
2. Child's date of birth: \_\_\_\_\_
3. My name (*adult giving authorization*): \_\_\_\_\_

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<sup>2</sup> Note that affidavits are typically notarized, but the form contained in Act 410 of 2001 does not contain a space for a notary's signature.

4. My home address: \_\_\_\_\_  
\_\_\_\_\_
5.  I am a non-legal custodian. \_\_\_\_\_
6. Check one or both (for example, if one parent was advised and the other cannot be located):  I have advised the parent(s) or legal custodian(s) of the child of my intent to authorize the rendering of educational or medical services, and have received no objection.  
 I am unable to contact the parent(s) or legal custodian(s) of the child at this time, to notify them of my intended authorization.
7. Affiant's date of birth: \_\_\_\_\_
8. Affiant's Louisiana driver's license number or identification card number: \_\_\_\_\_

**WARNING:** Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.

I declare under penalty of perjury under the laws of Louisiana that the foregoing is true and correct.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

**NOTICES:**

1. This declaration does not affect the rights of the child's parent or legal guardian regarding the care, custody, and control of the child, and does not mean that the non-legal custodian has legal custody of the child.
2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.
3. This affidavit is not valid for more than one year after the date on which it is executed.

**ADDITIONAL INFORMATION:**

**TO NON-LEGAL CUSTODIANS:**

1. If the child stops living with you, you are required to notify anyone to whom you have given this affidavit as well as anyone of whom you have actual knowledge who received the affidavit from a third party.
2. If you do not have the information in item 8 (Louisiana driver's license or identification card), you must provide another form of identification such as your social security card number.

**TO SCHOOL OFFICIALS:**

The school district may require additional reasonable evidence that the non-legal custodian lives at the address provided in item 4.

**TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:**

1. No person who acts in good faith reliance upon a non-legal custodian's affidavit to render educational or medical services, without actual knowledge of facts contrary to those stated in the affidavit, is subject to criminal prosecution or civil liability to any person, or subject to any professional disciplinary action, for such reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

**ii. Minors**
**R.S. 40:1065.1. Minor's consent for treatment of venereal diseases**

A. Consent to the provision of medical or surgical care or services by a hospital or public clinic, or to the performance of medical or surgical care or services by a physician, licensed to practice medicine in this state, when executed by a minor who is or believes himself to be afflicted with a venereal disease, shall be valid and binding as if the minor had achieved his majority. Any such consent shall not be subject to a later disaffirmance by reason of his minority.

B. The consent of a spouse, parent, guardian or any other person standing in a fiduciary capacity to the minor shall not be necessary in order to authorize such hospital care or services or medical or surgical care or services to be provided by a physician licensed to practice medicine to such a minor.

C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

D. No physician licensed to practice medicine in this state shall incur civil or criminal liability in connection with any examination, diagnosis and treatment authorized by this section except for negligence.

**R.S. 40:1095. Minors; consent to medical treatment**

A. (1) Consent to the provision of medical or surgical care or services by a hospital or public clinic, or to the performance of medical or surgical care or services by a physician, licensed to practice medicine in this state, when executed by a minor who is or believes himself to be afflicted with an illness or

disease, shall be valid and binding as if the minor had achieved his majority. Any such consent shall not be subject to a later disaffirmance by reason of his minority.

(2) A minor may consent to medical care or the administration of medication by a hospital licensed to provide hospital services or by a physician licensed to practice medicine in this state for the purpose of alleviating or reducing pain, discomfort, or distress of and during labor and childbirth. The manner of administration of medications includes but is not limited to intravenous, intramuscular, epidural, and spinal. This consent shall be valid and binding as if the minor had achieved her majority, and shall not be subject to a later disaffirmance by reason of her minority.

B. The consent of a spouse, parent, guardian or any other person standing in a fiduciary capacity to the minor shall not be necessary in order to authorize such hospital care or services or medical or surgical care or services, or administration of drugs to be provided by a physician licensed to practice medicine to such a minor.

C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

D. No hospital and no physician licensed to practice medicine in this state shall incur civil or criminal liability in connection with any examination, diagnosis and treatment authorized by this section except for negligence.

#### **R.S. 40:1096. Treatment for drug abuse**

A. Consent to the provision of medical or surgical care or services by a hospital or public clinic, or to the performance of medical or surgical care or services by a physician, licensed to practice medicine in this state, when executed by a minor who is or believes himself to be addicted to a narcotic or other drug, shall be valid and binding as if the minor had achieved his majority. Any such consent shall not be subject to a later disaffirmance by reason of his minority.

B. The consent of a spouse, parent, guardian or any other person standing in a fiduciary capacity to the minor shall not be necessary in order to authorize such hospital care or services or medical or surgical care or services to be provided by a physician licensed to practice medicine to such a minor.

C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

D. No hospital and no physician licensed to practice medicine in this state shall incur civil or criminal liability in connection with any examination, diagnosis and treatment authorized by this section except for negligence.

### **R.S. 40:1097. Donation of blood**

Notwithstanding any other provision of the laws of the state of Louisiana, a minor who has reached the age of seventeen years may give consent to the donation of his or her blood and to the penetration of tissue necessary to accomplish such donation, but such minor shall not be compensated therefor. Such consent shall not be subject to deferments because of minority, and the consent of the parents or guardian of such a minor shall not be required in order to authorize such donation and penetration of tissue.

<p><b>iii. Mentally retarded and developmentally disabled</b></p>
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### **R.S. 40:1299.58. Consent to surgical or medical treatment for mentally retarded or developmentally disabled persons and residents of state-operated nursing homes<sup>3</sup>**

A. Upon the written recommendation of the treating physician, the following persons may consent to any surgical or medical treatment on behalf of any mentally retarded or developmentally disabled person who is a recipient of service from a state-operated supported living or supervised independent living program, or personal care attendant program for the mentally retarded or developmentally disabled, or who is a resident of a state school or community home for the mentally retarded or developmentally disabled, state-supervised extended family living program, or a nonstate-operated residential facility, community or group home for the mentally retarded or developmentally disabled or who is a resident of a state-operated nursing home:

- (1) For a resident of a state school or a state-operated community home for the mentally retarded, the superintendent of the state school.
- (2) For a resident of a state-supervised extended family living program, or a recipient of service from a state-operated supported living or supervised independent living program, or personal care attendant program for the mentally retarded or developmentally disabled, the office for citizens with developmental disabilities administrator or manager with administrative authority over the extended family living program, supported living or supervised independent living program, or personal care attendant program for the region where the home is located or the program is being provided.
- (3) For a resident of a nonstate-operated residential facility, community, or group home for the mentally retarded, the chief executive officer of the provider organization which administers or

<sup>3</sup> Amended by Act 519 of 2001, effective August 15, 2001.

operates the facility or home.

(4) For a resident of a state-operated nursing home, the administrator of the home or facility.

B. Consent for any surgical or medical treatment on behalf of a mentally retarded person or a resident in a facility, home, or program as described in R.S. 40:1299.58(A) is authorized under the following circumstances:

- (1) When all reasonable efforts to contact the parent, family, or guardian of the resident have failed or
- (2) When the resident's record does not contain the name of the parent, family member, or guardian.

C. Consent given pursuant to this Section shall be in writing and shall comply with the provisions of R.S. 40:1299.40(A). A copy of the signed written consent form and of the physician's written recommendation shall be placed in the resident's permanent record.

D. Nothing contained in this Section shall be construed to authorize consent to surgical or medical treatment for a resident if the parent, family member, or guardian of the resident has been contacted and has refused to consent to medical treatment for the resident.

E. Consent to surgical or medical treatment for residents will be implied where an emergency, as defined in R.S. 40:1299.54, exists.

F. As used in this Section, mentally retarded includes the developmentally disabled.