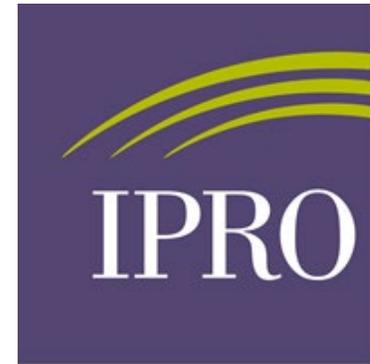
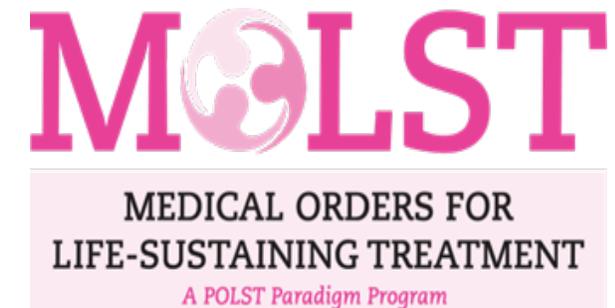


ECHO MOLST +  
eMOLST:  
*Honoring  
Preferences at  
End-of-life*



Better healthcare,  
realized.



# Session 3

## Who Determines Who Has the Right to Make Decisions

### **Presenter**

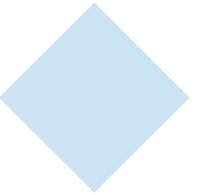
#### **Katie Orem, MPH**

Geriatrics & Palliative Care Program Manager

Excellus BlueCross BlueShield

eMOLST Administrator for New York State

The speaker has no significant financial conflicts of interest to disclose.



# Learning Objectives



- Define capacity
- Describe determination of medical decision-making capacity
- Explain NYS Public Health Law requirements and recent changes

# 8-Step MOLST Protocol



Developed for NYS MOLST, Bomba, 2005; revised 2011

1. Prepare for discussion
  - Understand patient's health status, prognosis & ability to consent
  - Retrieve completed Advance Directives
  - Determine decision-maker & PHL legal requirements
2. Determine what the patient/family know
3. Explore goals, hopes and expectations
4. Suggest realistic goals
5. Respond empathetically
6. Use MOLST to guide choices & finalize patient wishes
  - Shared, informed medical decision-making and conflict resolution
7. Complete and sign MOLST
  - Follow PHL and document conversation
8. Review and revise periodically

# Who Makes the Decision?

Under NYSPL, a patient is presumed to have capacity until determined the patient lacks capacity.

- Patient
- Health Care Agent
- FHCDA Surrogate
- No FHCDA Surrogate
- SCPA 1750-b Surrogate



# FHCDA Surrogate Prioritized List

- Attending physician, NP, or PA must identify & notify a person from the class highest in priority who is reasonably available, willing, & competent to serve as a surrogate decision-maker
- Such person may designate any other person on the list to be surrogate, provided no one in a class higher in priority than the person designated objects
- Surrogate List
  1. Patient's guardian authorized to decide about health care pursuant to Mental Hygiene Law Article 81
  2. Patient's spouse, if not legally separated from the patient, or the domestic partner
  3. Patient's son or daughter, age 18 or older
  4. Patient's parent
  5. Patient's brother or sister, age 18 or older
  6. Patient's actively involved close friend, age 18 or older

# SCPA 1750-b Surrogate Prioritized List

Identify and list the name of the appropriate 1750-b Surrogate

- a. 17-A guardian \_\_\_\_\_
- b. actively involved spouse \_\_\_\_\_
- c. actively involved parent \_\_\_\_\_
- d. actively involved adult child \_\_\_\_\_
- e. actively involved adult sibling \_\_\_\_\_
- f. actively involved family member \_\_\_\_\_
- g. Willowbrook CAB (full representation)
- h. Surrogate Decision Making Committee (MHL Article 80)

# Willowbrook Consumer Advisory Board (CAB)

## Authority to Make Medical Decisions

- CAB serves as Health Care Agent
- CAB serves as Guardian
- CAB acting pursuant to 14 N.Y.C.R.R. 633.11 relating to Professional Medical Treatment [not including End-of-Life Decisions]
- CAB acting as “deemed” Guardian pursuant to S.C.P.A. §1750-b with respect to End-of-Life Decisions
- CAB as “Close Friend” under Family Health Care Decisions Act

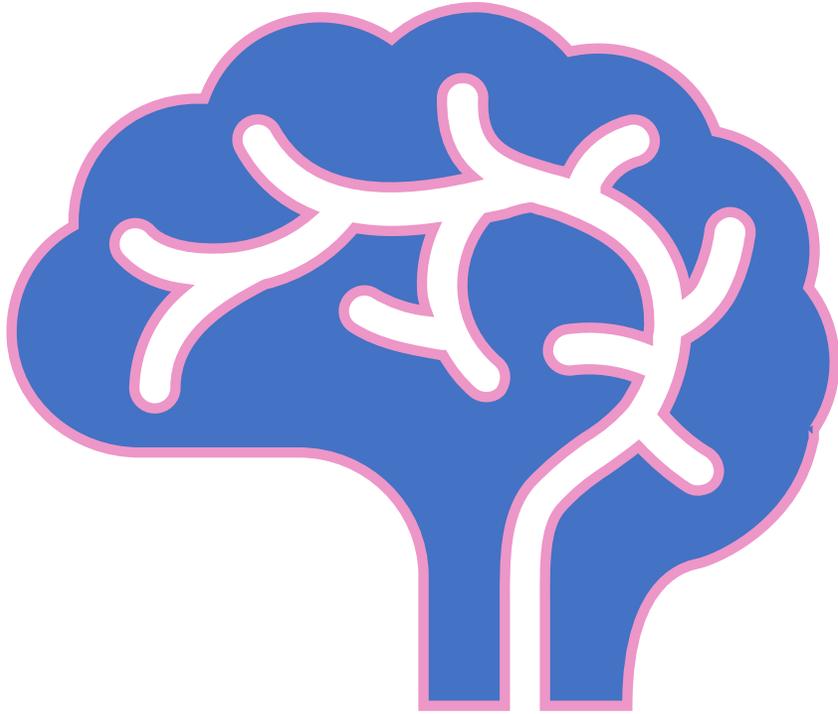
Willowbrook  
Consumer Advisory  
Board (CAB)

When is CAB the 1750-b  
surrogate?

- CAB is the 17A guardian
- CAB provides full representation for a class member

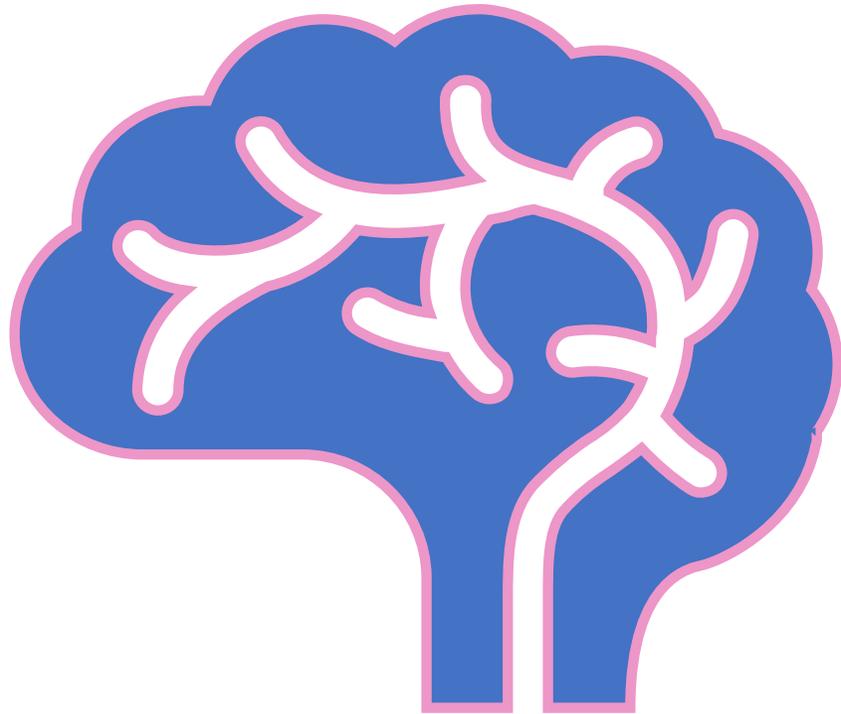
CAB is **NOT** the 1750-b  
Surrogate when CAB  
provides co-representation

# Capacity: Definition



- Capacity is the ability to:
  - take in information,
  - understand its meaning and
  - make an informed decision using the information
- Capacity allows us to function independently
- Capacity is not the same as competence

# Capacity: Definition



- Includes Mental Skills Used to Function in Everyday Life
  - Memory
  - Language
  - Ability to use logic
  - Ability to calculate
  - Ability and “flexibility” to turn attention from 1 task to another
  - Executive functions

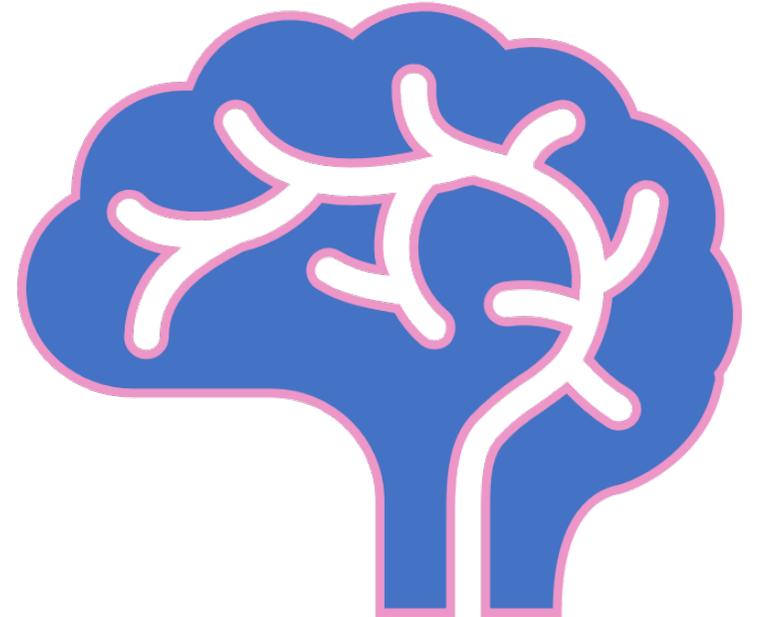
# Executive Functions

- Problem solving
- Planning
  - including appreciating consequences of an action
- Initiation, direction, execution of actions
- Sequencing
- Abstraction and insight
- Ability to monitor one's own behavior
- Inhibition of inappropriate behaviors
- Impact of frontal lobe function on ADLs and decisional capacity

# Capacity Assessment of Four Functional Abilities

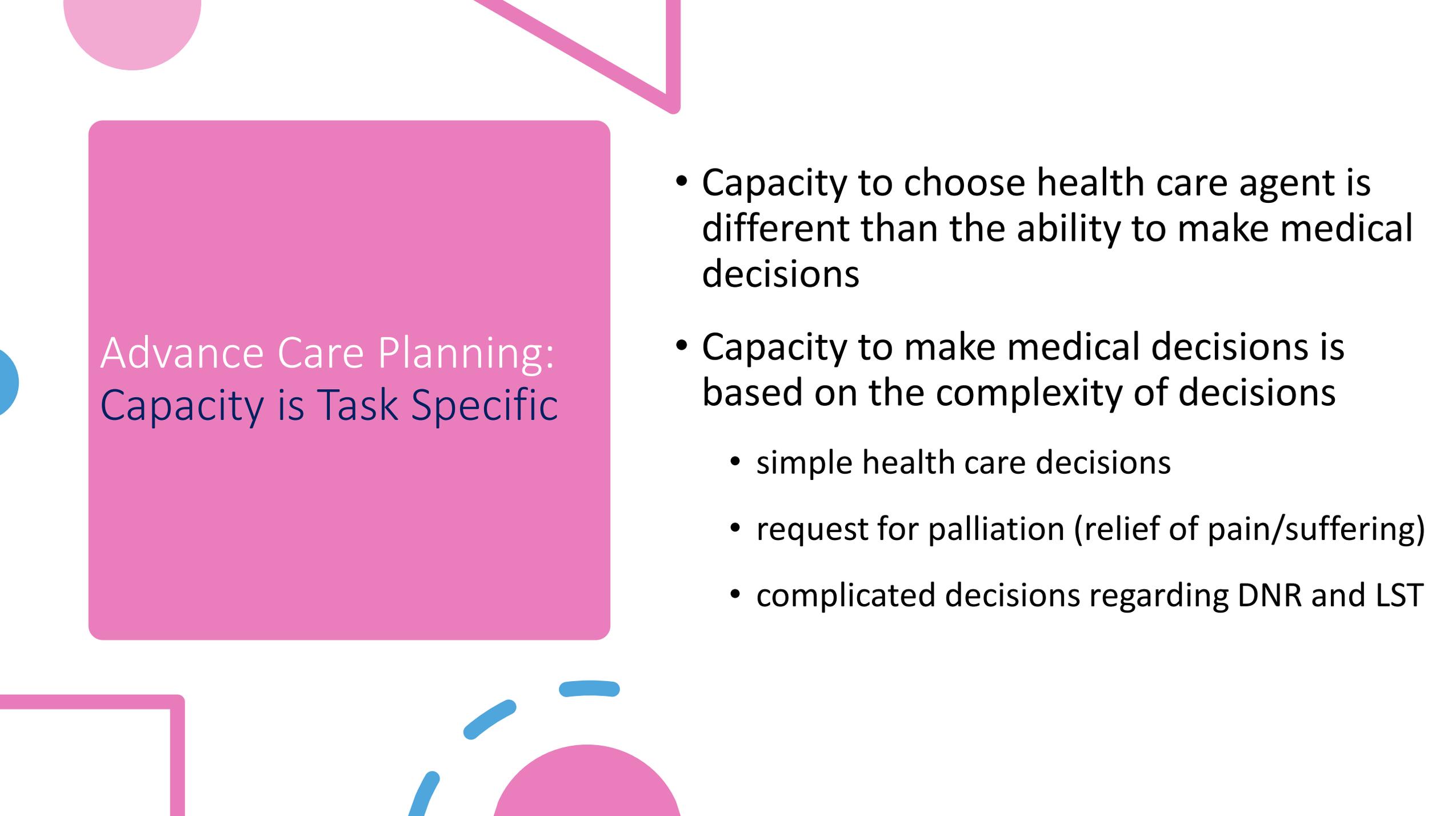
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1. ability to ***express a choice***
2. ability to ***understand*** information relevant to decision in question
3. ability to ***appreciate*** the significance of that information for one's own situation, especially concerning one's illness and the probable consequences of one's treatment options
4. ability to ***reason*** with relevant information so as to engage in a logical process of weighing treatment options



# Capacity Determination

- Capacity is **task-specific**
- Patient's capacity to make different decisions can vary
  - Medical care and treatment
  - Manage money
  - Write a will
  - Continue to drive
  - Possess firearms
- **Key principle**
  - Assessment of the patient's ability to understand the consequences of a decision

A decorative background featuring various geometric shapes in shades of pink and blue. At the top left, there is a pink circle and a pink triangle pointing downwards. On the left side, there is a blue circle. At the bottom, there are several blue curved lines and a pink circle. The main content is contained within a large pink rounded rectangle.

## Advance Care Planning: Capacity is Task Specific

- Capacity to choose health care agent is different than the ability to make medical decisions
- Capacity to make medical decisions is based on the complexity of decisions
  - simple health care decisions
  - request for palliation (relief of pain/suffering)
  - complicated decisions regarding DNR and LST

# Medical Decision- Making Capacity: 3 Key Patient Abilities

- Ability to understand relevant information about his or her condition, the probable outcomes of the disease and potential interventions, and its meaning in terms of the:
  - disease process
  - proposed therapy and alternative therapies;
  - advantages, adverse effects & complications of therapy
  - possible course of the disease without intervention
- Ability to make an informed decision using the information, based on his/her beliefs, values, and understand the consequences of the decision
- Ability to communicate a decision

# Cultural Differences

- Can make assessing medical decision-making more difficult
- Capacity assessment involves:
  - Abstract concepts not easily communicated in another language
  - Interpret value judgments on basis of what is considered reasonable
- **IMPORTANT:** Avoid assuming patients hold certain beliefs on the basis solely of ethnic background
  - Varying degrees of acculturation and assimilation of culture
  - Variation within an ethnic group
  - Always ask the patient about their personal values and beliefs!

# Capacity Assessment: Key Elements

- Detailed **medical history** from the patient, attention to patient's ability to:
  - Organize time relationships
  - Recall facts
  - Reason abstractly
  - Collateral history from family, if available
- Focused **physical examination**
  - Assess cognition, function and screen for depression
- **Testing** to exclude reversible conditions that may cause temporary incapacity



# Capacity Assessment: What “Not” To Do

- Purely base assessment on a third party’s opinion
- Simply have a conversation with the patient
- Merely use preferences expressed by patient
- Only use the MMSE score and designate a score below which the patient lacks capacity
- Consider “abnormal” answers as evidence of lack of capacity rather than recognizing the patient’s lifestyle and/or personal experience
- Disregard individual habits/behaviors which the person always had
- Use risky behavior as evidence





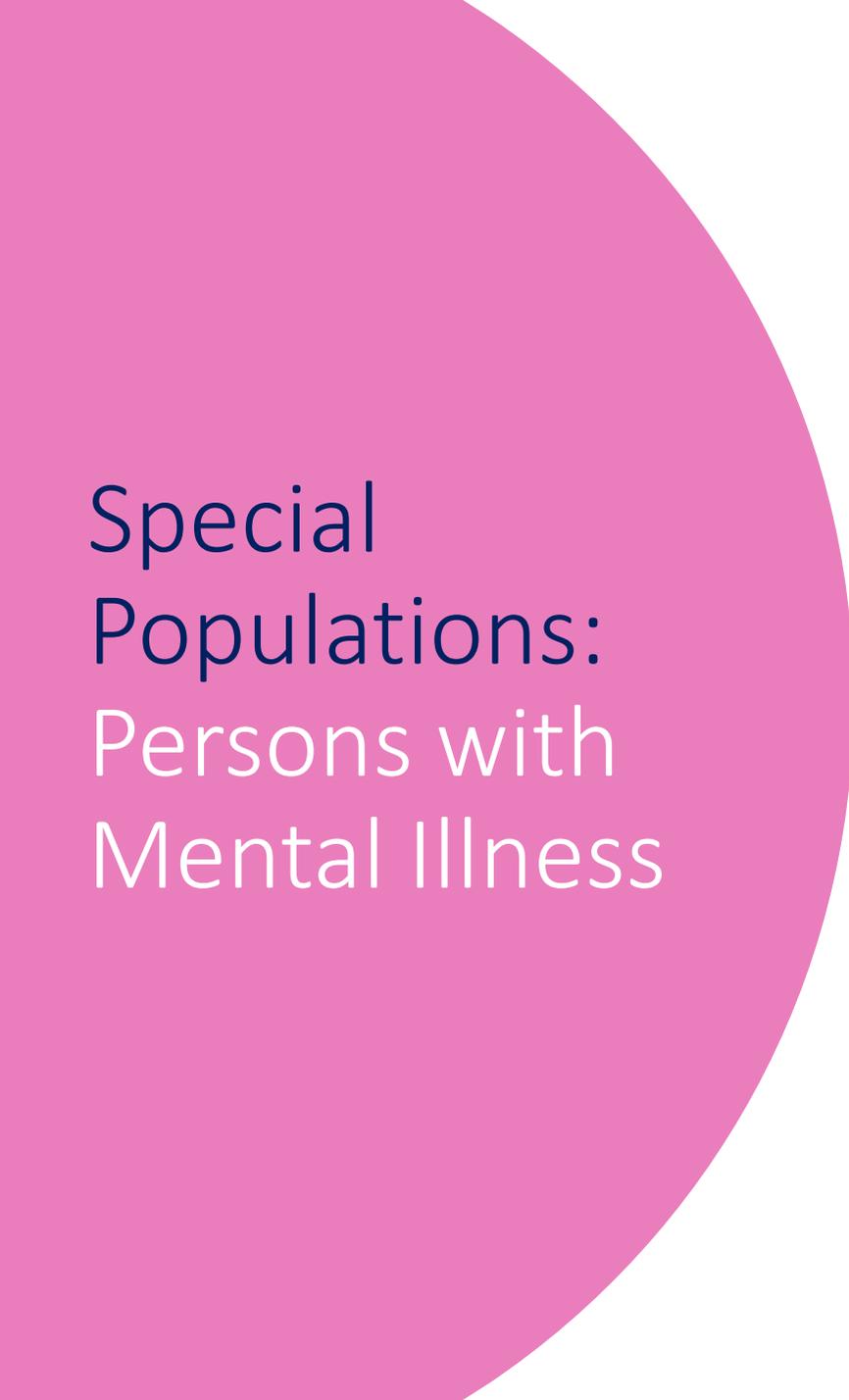
# Legal Requirements

# Who Determines Capacity

- Under NYSPHL, a patient is presumed to have capacity until determined the patient lacks capacity
- **Prior to May 28, 2018:** only a physician could determine the patient's capacity to make decisions to withhold and/or withdraw life-sustaining treatment with or without the MOLST
- **May 28, 2018:** NPs can determine capacity under FHCDA
- **February 3, 2019:** NPs can determine capacity under HCP law
- **June 17, 2020:** PAs can determine capacity under HCP law & FHCDA
- **N.B:** §SCPA 1750-b did not change

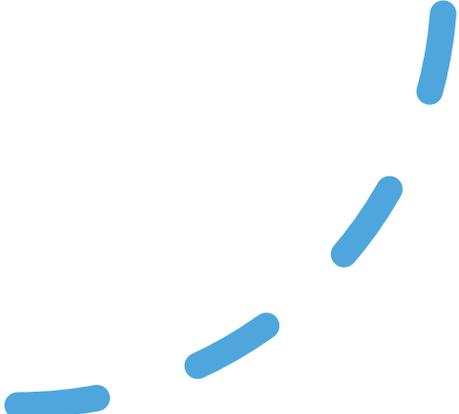
# Who Provides Concurrent Capacity Determination

- Under NYSPHL, concurrent capacity determination is required with special requirements for certain populations
- **Prior to June 1, 2010:** only a physician could render a concurrent capacity determination about the patient's capacity to make decisions to withhold and/or withdraw life-sustaining treatment with or without the MOLST
- **June 1, 2010:** with FHCDA, a health or social services practitioner employed by, or formally affiliated with, the facility (**RNs, NPs, physicians, PAs, psychologist, LCSW**)
- **February 3, 2019:** NPs can render a concurrent capacity determination under HCP law
- **June 17, 2020:** PAs can render a concurrent capacity determination under HCP law
- **N.B:** §SCPA 1750-b did not change



# Special Populations: Persons with Mental Illness

## Persons with Mental Illness

- One of the two practitioners who determined that the patient lacks medical decision-making capacity is a physician who is a qualified psychiatrist.
  - The determination by the qualified psychiatrist is documented in the medical record.
- 

# Special Populations Persons with Developmental Disabilities

## Persons with Intellectual/Developmental Disabilities

- Attending Physician determines capacity
- Concurring Physician or Licensed Psychologist
- Either the attending physician or the concurring physician or licensed psychologist must:
  - (a) be employed by a DDSO; or
  - (b) have been employed for at least 2 years in a facility or program operated, licensed or authorized by OPWDD; or
  - (c) have been approved by the commissioner of OPWDD as either possessing specialized training or have 3 years experience in providing services to individuals with DD.

# Can an NP Determine Capacity?

This table is accurate as of February 3, 2019.

Purpose	Initial Determination	Concurring Determination	Explanation
To empower a health care agent	Yes As of February 3, 2019	Yes As of February 3, 2019	<ul style="list-style-type: none"> <li>As a result of the 2018 amendment to the health care proxy law, the determination of incapacity can be by the "attending physician" or "attending nurse practitioner."</li> <li>In life-sustaining treatment cases the attending physician or nurse practitioner must consult with "another physician or nurse practitioner."</li> <li>This means the HCP Law does allow an NP to determine incapacity or provide the required concurrent determination.</li> </ul>
To empower a FHCDA surrogate	Yes As of May 28, 2018	Yes As of June 1, 2010	<ul style="list-style-type: none"> <li>The FHCDA, in PHL 2994-c, as of May 28, provides that the determination of incapacity must be by the "attending physician or attending nurse practitioner." In life-sustaining treatment cases there must be a concurring determination by a "health or social services practitioner" which includes an NP.</li> <li>This means that the FHCDA does allow an NP to determine incapacity or provide the required concurring determination.</li> </ul>
To empower a § SCPA 1750-b surrogate (decisions for patients with intellectual disabilities)	No	No	<ul style="list-style-type: none"> <li>§ SCPA 1750-b(4)(a) provides that in life-sustaining treatment cases the "attending physician" as defined in PHL 2980.2 must determine incapacity.</li> <li>The attending physician must consult with another physician or licensed psychologist. Either the attending or consult must have special qualifications relating to the treatment of persons with intellectual disabilities.</li> <li>This means that § SCPA 1750-b does not allow an NP to determine incapacity or provide the required consult.</li> </ul>

# Can a PA Determine Capacity?

This table is accurate as of June 17, 2020.

Purpose	Initial Determination	Concurring Determination	Explanation
To empower a health care agent	Yes As of June 17, 2020.	Yes As of June 17, 2020	<ul style="list-style-type: none"> <li>As a result of the 2019 amendment to the Health Care Proxy Law the determination of incapacity can be by the attending practitioner (a physician, nurse practitioner or physician assistant).</li> <li>In life-sustaining treatment cases the attending practitioner must consult with another physician, nurse practitioner or physician assistant.</li> <li>This means PAs can determine incapacity or provide concurring determinations of incapacity. In cases where the patient lacks capacity due to mental illness a psychiatrist must be the concurring.</li> </ul>
To empower a FHCDA surrogate	Yes As of June 17, 2020	Yes As of June 1, 2010	<ul style="list-style-type: none"> <li>The FHCDA provides that the determination of incapacity must be by the “attending practitioner” (physician, nurse practitioner or physician assistant).</li> <li>In life-sustaining treatment cases there must be a concurring determination by a “health or social services practitioner” which also includes a PA.</li> <li>This means the FHCDA allows PAs to determine incapacity or provide the required concurring determination. In cases where the patient lacks capacity due to mental illness a psychiatrist must be the concurring.</li> </ul>
To empower a § SCPA 1750-b surrogate (decisions for patients with intellectual disabilities)	<u>No</u>	<u>No</u>	<ul style="list-style-type: none"> <li>§ SCPA 1750-b(4)(a) provides that in life-sustaining treatment cases the "attending physician" as defined in PHL 2980.2 must determine incapacity.</li> <li>The attending physician must consult with another physician or licensed psychologist. Either the attending or consult must have special qualifications relating to the treatment of persons with intellectual disabilities.</li> <li>This means that § SCPA 1750-b does not allow a PA to determine incapacity or provide the required consult.</li> </ul>

# Key Points

Capacity is the assessment of the patient's ability to understand the consequences of a decision.

Special requirements exist for patients based on PHL & SCPA 1750-b.

Physicians, NPs and PAs have the authority to determine capacity and provide concurrent capacity determination for the general population.

Under FHCDA, a health or social service practitioner employed by the facility can provide a concurrent determination.

Definition of health practitioner: RN, NP, physicians, PA, psychologist, LCSW

If a patient lacks capacity due to mental illness, at least one determination must be by a qualified psychiatrist.

For a patient with I/DD, special requirements must be met by either the attending or concurring physician or licensed psychologist.



Resources

# Advance Care Planning

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Learn More



## How MOLST is Done

MOLST is based on communication between the patient and their physician. The 8-Step MOLST Protocol outlines the necessary steps.

Subscribe to NY MOLST Update on [MOLST.org](https://www.molst.org)

Learn More



# Videos

CompassionAndSupportYouTubeChannel (ACP/MOLST video playlists)

<http://www.youtube.com/user/CompassionAndSupport?feature=mhee>

Demonstrating Thoughtful MOLST Discussions

[Hospital & Hospice](#) Settings

[Nursing Home](#) Setting

[Step 1: Prepare for Discussion](#) from the 8-Step MOLST Protocol

# References

- [Capacity determination](#) on MOLST.org
- [Authority of Nurse Practitioners Under Current NYS Law](#)
- [Authority of Physician Assistants as of June 17, 2020](#)
- See [Up-to-Date](#) References for Assessment of Decision-Making Capacity in Adults
- More at [Resources](#) on MOLST.org