WHO MAY CONSENT

1. Purpose
The purpose of this policy is to provide guidance regarding who may provide consent for health care and treatment, including placement in a health care facility, and/or release of protected health information (PHI). The intent of this policy is to ensure that all medical care and treatment decisions, including discharge planning and placement, and/or release of PHI are made with the consent of the patient or the patient's personal representative in accordance with federal and state laws and regulations.

2. Policy
Consent from appropriate individuals must be obtained prior to providing medical care and treatment, performing procedures, or releasing PHI.

3. Scope
All physicians and staff.

4. Who may consent to medical care and treatment and/or release of medical information

4.1. Adults with decision making capacity

4.1.1. Adult patients with decision-making capacity have the right to consent to their own medical care and treatment and release of PHI. This includes patients in police custody.

4.1.2. Adults with decision-making capacity have the right to designate someone else to make health care decisions through a Power of Attorney for Health Care. A patient may specify that the Power of Attorney takes effect immediately, while the patient still has capacity, or that it becomes effective only when the patient lacks capacity. (See 4.2.6.)
4.2. **Incapacitated patients**

4.2.1. In many circumstances, a patient may lack the capacity to make his/her own medical decisions. An adult patient may lack decision making capacity permanently (i.e. mentally deficient, senile) or temporarily (i.e. Head injury, alcohol or drug abuse). A patient is NOT incapacitated simply because he/she makes decisions or expresses choices that may not be in his/her “best interests” or are different from the recommendations of the health care team. Even if the patient's decision is not one that a reasonable person would make or the reasons for it are irrational, a patient may still have decision-making capacity.

4.2.2. If it is determined that the patient lacks the capacity to consent, whether temporarily or permanently, consent must be obtained from a third party who is an adult and has decision-making capacity. If the incapacitated patient has a personal representative or has previously executed an advance directive, consent must be obtained from the personal representative (See Section 4.2.4 below) or treatment decisions may be made in accordance with the advance directive.

4.2.3. Unless otherwise specified in an advance directive, authority to consent for a patient who temporarily lacks decision-making capacity ends upon return of the patient's ability to make his/her own medical treatment decisions.

4.2.4. In Hawaii, personal representatives for the purpose of granting consent include:

- a court appointed legal guardian who is authorized to make medical treatment decisions on behalf of the patient as evidenced by letters of guardianship or a court order, or
- a competent adult designated by the patient through a validly executed Power of Attorney for Health Care, or
- a surrogate decision-maker (See section 4.2.6 below).

A copy of the court order or letters of guardianship, the Power of Attorney for Health Care, or documentation of the designation of a surrogate decision-maker should be included in the medical record. The scope of a personal representative's powers may be specified and/or limited by the patient or the issuing court. If the court order, letters, Power of Attorney or designation of a surrogate decision-maker do not specifically limit the personal representative's authority to consent, the personal representative may consent to any treatment or procedure which the patient would be able to
consent to if capable of granting consent (see limitations on consent below).

4.2.5. If the incapacitated patient has a validly executed advance directive and the treatment involves decisions regarding end of life care, the healthcare team may proceed in accordance with the terms of the advance directive.

4.2.6. In the absence of a personal representative or advance directive, the health care team must obtain consent from a surrogate decision-maker. If the patient has not previously designated a surrogate decision-maker, a surrogate may be appointed.

Once a patient has been determined to lack decisional capacity, the patient's primary physician or physician's designee must make reasonable efforts to locate as many interested persons as practicable. The primary physician or designee must inform them that the patient lacks capacity and that a surrogate should be selected.

Interested persons must make reasonable efforts to select a surrogate. The person selected should have a close relationship with the patient and be currently informed of the patient's wishes. If any interested persons are unable to select a surrogate, then any of the interested persons may seek guardianship.

A surrogate who has been designated by the patient may make health care decisions for the patient that the patient could make on his/her behalf.

A surrogate who has not been designated by the patient may make all health care decisions for the patient except that decisions regarding artificial nutrition and hydration may be made by the surrogate only when the primary physician and a second independent physician certify in the patient's medical record that the provision or continuation of artificial nutrition or hydration is merely prolonging the act of dying and the patient is highly unlikely to have any neurological response in the future.

A supervising health care provider shall require written documentation of authority to act as surrogate decision-maker. (See Policy No. 414-03-021, Verification of Identity and Authority for Disclosures of Protected Health Information).
If the surrogate decision-maker's consent or refusal to consent appears to be in conflict with the patient's previously expressed wishes or not in the patient's best interests, the case should be referred to the Office of Regional Counsel and/or Legal Claims Management for further recommendations.

The patient's health care provider(s) will disclose to the surrogate only that amount of PHI that is necessary to accomplish the particular purpose(s) for which the PHI is being used. (See Policy No. 414-03-014, Minimum Necessary).

4.2.7. Limitations on consent for incapacitated patients

4.2.7.1. In the absence of a court appointed legal guardian with specific written court ordered authority to consent to sterilization of an incapacitated adult, no personal representative may consent to sterilization of the incapacitated adult except in an emergency. The personal representative seeking sterilization for the incapacitated adult is the appropriate party to petition the court for authority to consent to sterilization.

4.2.7.2. If authority to consent for the sterilization of an adult who lacks decision-making capacity has been granted by the court, obtain a copy of the court order or letters of guardianship. Retain a copy of either document for inclusion in the patient's medical record.

4.2.8. Incapacitated patients with no personal representative.

4.2.8.1. If an incapacitated patient has no personal representative, the health care team will make a referral for Social Worker assistance. The Social Worker will pursue further attempts to locate any available relatives.

4.2.8.2. If the patient has no relatives available or willing to function as a surrogate decision-maker, guardianship proceedings should be initiated.

4.2.8.3. While guardianship is being pursued, the health care team, with the assistance of the Social Worker and the Bioethics Committee as necessary, may proceed with medically indicated non-emergency treatment and discharge planning in accordance with the following:

- The attending physician must certify in writing that the patient is not competent to make an informed decision. Another physician or practitioner,
otherwise unrelated to the case (i.e. Mental Health), also must make this determination after examining the patient. Such determination shall be made a part of the patient's medical record.

- The diligent efforts made to locate a relative or other appropriate surrogate decision-maker must be documented in the patient's medical record.
- The attending physician must document in the patient's medical record the treatment decision proposed and the facts indicating that such treatment decision is appropriate. A second opinion should be obtained from another physician and the second physician must document his/her agreement with the treatment decision proposed.

4.3. **Minors**

4.3.1. A minor is not an adult under state law and, therefore, generally does not have the right to consent to medical care and treatment and to the release of PHI, except in certain circumstances (See Section 4.3.5 below).

4.3.2. Parental Consent

4.3.2.1. In most cases, consent for medical care and treatment and release of PHI pertaining to a minor, including a minor in police custody, must be obtained from the minor's parent.

4.3.2.2. In general, either parent can consent to treatment of, and release of PHI pertaining to, a minor. However, when the parents are in disagreement and there is no court decision or written agreement concerning control or custody of the child, do not proceed with treatment. In an emergency, healthcare providers may proceed under the emergency exception to consent (See Section 4.4 below).

4.3.2.3. If the parents are unavailable at the time of treatment, ascertain whether the minor's parents have authorized someone to grant consent in their absence. If authority has been delegated to a competent adult, obtain a copy of the authorization signed by the parents. In an emergency, health care providers may proceed under the emergency exception to consent (See Section 4.4 below).

4.3.2.4. In cases of abandoned minors, staff shall establish that the minor has been abandoned by his/her parents. If no other relatives are available and there is no court appointed
guardian, contact the Office of Regional Counsel and/or Legal Claims Management for guidance.

4.3.2.5. Divorced Parents.

4.3.2.5.1. In the case of minors of divorced parents, consent shall be obtained from the parent with court ordered legal custody of the child. If both parents have joint legal custody of the child, the consent of either parent is sufficient.

4.3.2.5.2. Obtain a copy of the order awarding custody for inclusion in the chart (See Policy No. 414-03-021, Verification of Identity and Authority for Disclosures of Protected Health Information).

4.3.3. Guardian Consent.

4.3.3.1. If a legal guardian with power to make medical treatment decisions has been appointed for the minor, the legal guardian must consent to the medical care and treatment or on behalf of the minor, except as provided in Section 4.3.5.4 below. A copy of the court document awarding legal guardianship should be included in the patient’s medical record. (See Policy No. 414-03-021, Verification of Identity and Authority for Disclosures of Protected Health Information).

4.3.3.2. If the letters of guardianship or court order do not specifically limit the guardian's authority to consent, the guardian may consent to any treatment or procedure for which the parent would be able to consent.

4.3.4. Limitations on Parental/Guardian Consent.

4.3.4.1. No parent, personal representative or legal guardian may consent to the sterilization of any minor, unless a court has specifically addressed the issue and granted a legal guardian the authority to consent as set forth in the letters of guardianship.

4.3.4.2. Family Court may order that a physician, surgeon, psychiatrist, psychologist examine a minor who is the subject of a petition, and it may order treatment of a minor who has been adjudicated by the court. Except in cases of authority, the Probation Officer is given the duty of locating the parents of the minor. Should the parents object, Family Court can order the treatment.
4.3.5. Circumstances under which a Minor has Legal Capacity to Consent.

4.3.5.1. An emancipated minor may consent to his/her medical care and treatment and release of PHI. A minor is "emancipated" if he/she is, or has been, legally married, including a minor who is now divorced, or totally self-supporting. A copy of the minor's certified marriage certificate, or other documentation of his/her emancipated status should be included in the medical record. (See Policy No. 414-03-021, Verification of Identity and Authority for Disclosures of Protected Health Information).

4.3.5.2. A minor who is a parent and has not surrendered custody of the child may consent to the medical care and treatment, and release of PHI, for his/her child.

4.3.5.3. A patient over fourteen (14) years of age may consent if seeking treatment for venereal disease, pregnancy or family planning, but may not consent to surgery or any procedure to induce abortion. Information regarding the care may be provided to the patient's parent, spouse, personal representative, legal guardian or custodian at the discretion of the treating physician after consultation with the patient.

4.3.5.4. For minors who are 14 through 17 years of age, the right to authorize release of PHI may be exercised by the minor or the parent or personal representative. If the minor and parent or personal representative do not agree, the minor's authorization shall control.

4.4. Emergency Exception

4.4.1. Where treatment appears to be immediately necessary to prevent deterioration or aggravation of the patient's condition, treatment may proceed without the patient's consent if the patient, his/her parent if a minor or his/her personal representative are unable to give consent. This includes stabilizing treatment and detention of a patient who is under the influence of drugs or alcohol in order to prevent harm to the patient or others.

4.4.2. The emergency exception to consent is based on the theory that if the patient was able, or if a parent or personal representative was present, such consent would be given. If the emergency is a result of the patient's earlier refusal to consent or the healthcare provider has strong evidence that the patient would refuse (i.e. the
healthcare provider knows the patient's religious beliefs do not allow certain treatment), the exception will not apply.

4.4.3. In an emergency situation, staff must first determine that the patient is unable to give consent. Diligent attempts must be made to contact the patient's parent or personal representative, to obtain consent. However, do not withhold treatment that is medically necessary to prevent deterioration of the patient's condition while attempting to contact the personal representative.

4.4.4. When medical care and treatment is provided in an emergency situation without express consent, the following information must be documented in the patient's medical record:

• the facts and circumstances which made medical treatment immediately necessary,
• the facts and circumstances which substantiate a determination that the patient was unable to consent, and
• attempts to locate a parent or personal representative.

4.5. **Legal Assistance**

4.5.1. Obtain assistance, legal interpretation and clarification from the Office of Regional Counsel and/or Legal Claims Management as needed.

5. **Definitions**

- "**Advance Health Care Directive**": an individual instruction or a power of attorney for health care.
- "**Adult**": any person who is eighteen (18) years of age or older.
- "**Capacity**": an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision.
- "**Emancipated Minor**": means a person under eighteen years of age who is totally self-supporting. (Hawaii Revised Statues Chapter 327E November 17, 2004).
- "**Incapacitated Person**": any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning one's person.
• "Interested Persons": the patient's spouse, unless legally separated or estranged, a reciprocal beneficiary, any adult, child, either parent of the patient, an adult sibling or adult grandchild of the patient, or any adult who has exhibited special care and concern for the patient and who is familiar with the patient's personal values.

• "Minor": any person under eighteen (18) years of age.

• "Surrogate": means an individual, other than a patient’s agent or guardian, authorized under HRS Chapter 327E to make a health care decision for the patient (Hawaii Revised Statutes Chapter 327E November 17, 2004).

• "Power of Attorney for Health Care Decisions": the designation of an agent to make health care decisions for the individual granting the power.

• "Personal Representative": A person who has legal authority to act for a member or patient for health care decisions.

• "Primary Physician": a physician designated by an individual or the individual's agent, guardian, or surrogate, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

• "Protected Health Information (PHI)": PHI is individually identifiable information (oral, written or electronic) about a member/patient's physical or mental health, the receipt of health care, or payment for that care. PHI includes individually identifiable member/patient payment, dues, enrollment, and dis-enrollment information. Individually identifiable health information in KP employment records is not PHI; however, it may be subject to other state and federal privacy protections.

6. Responsibilities

The Legal Claims Management Department shall be responsible for implementing and maintaining this policy.

7. Maintenance

This policy shall be reviewed at least annually and revised as necessary to ensure its compliance with federal and state laws.
8. References

- Hawaii Revised Statutes, Chapter 327 D
- Hawaii Revised Statutes, Chapter 327 E
- Hawaii Revised Statutes, Chapter 551D
- Hawaii Revised Statutes, Chapter 560: 5-101
- Hawaii Revised Statutes, Chapter 560: 5-204
- Hawaii Revised Statutes, Chapter 560: 5-601
- Hawaii Revised Statutes, Chapter 571-44
- Hawaii Revised Statutes, Chapter 577-3
- Hawaii Revised Statutes, Chapter 577-25
- Hawaii Revised Statutes, Chapter 577A
- Hawaii Revised Statutes, Chapter 671-3
- KPHI Policy No. 414-03-021, Verification of identity and Authority for Disclosures of Protected Health Information
- KPHI Policy No. 414-03-018, Personal Representatives
- KPHI Policy No. 414-03-014, Minimum Necessary
- KPHI Policy No. 414-03-017, Notifying and Communicating with Family members and Others
- HIPAA Privacy Rule, 45 CFR §§ 164.508 and 164.512

9. Implementation

This policy is in effect upon approval of approving authorities and shall be published and disseminated within thirty (30) days. All entities, departments and individuals affected by this policy shall prepare and implement procedures consistent with this policy and conduct appropriate education to ensure consistent and uniform implementation.

10. Review and Approval

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| Endorsed by:    | Legal Department                             |

Kaiser Foundation Health Plan, Inc
Kaiser Foundation Hospitals, Inc. Hawaii.
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