CHAPTER 85
LOCAL SUBSTITUTE MEDICAL DECISION-MAKING BOARDS

641—85.1(135) Purpose. The purpose of this chapter is to establish the requirements and procedures for local substitute medical decision-making boards. Counties may establish local substitute medical decision-making boards for patients who are incapable of making their own medical care decisions and who have no other surrogate decision maker available. If the patient has designated an individual to have durable power of attorney for health care or has a guardian or has family members who are reasonably available, willing and able to make medical care decisions, the case should not be submitted to the substitute medical decision-making board. If the patient has provided advance directives which cover the proposed care, the case should not be submitted to the board.

641—85.2(135) Definitions. For the purpose of these rules, the following definitions shall apply:

85.2(1) *"Conflict of interest"* means a standard which precludes the participation of a panel member in the proceedings with regard to a patient whenever the panel member is a relative of the patient, is a direct care provider of the patient or has a financial interest in the patient.

85.2(2) *"Correspondent"* means a person other than a relative of the patient who has demonstrated a genuine interest in promoting the best interest of a patient by having a personal relationship with the patient, by participating in the planning of a patient's care and treatment, by regularly visiting the patient, or by regularly communicating with the patient.

85.2(3) *"Department"* means Iowa department of public health.

85.2(4) *"Local board"* means a local substitute medical decision-making board established under Iowa Code section 135.29.

85.2(5) *"Medical care"* means care a reasonably prudent person would consider to be medically necessary. It includes, but is not limited to, procedures which involve any significant invasion of bodily integrity requiring an incision or producing substantial pain, discomfort, debilitation or which has a potential for significant bodily harm. This includes, but is not limited to, any medical, surgical or diagnostic intervention or procedure for which a general anesthetic is used. Medical care may include placement decisions where there is inadequate time to obtain appointment of a guardian and the placement is a medical consideration or a medical necessity.

The definition does not include discontinuance of medical treatment which is sustaining life functions because the board does not have authority to make this decision.

The definition also does not include the following types of care which can ordinarily be provided without special approval and do not need to be submitted to the board for consideration:

a. Routine office-based care or routine dental care;

b. Routine diagnosis or treatment such as extraction of bodily fluids for analysis, administration of medications or routine activities of daily living support;

c. Any procedure which is provided under emergency circumstances.

85.2(6) *"Other surrogate decision maker"* means an attorney-in-fact, guardian, spouse, adult child, parent or an adult sibling who is reasonably available, willing and able to make a medical care decision.

85.2(7) *"Panel"* means a group of three or more members of a local board who are appointed by the chairperson of that board to hear a case when an application has been filed with the board.

85.2(8) *"Patient"* means the person for whom the medical care decision is proposed. They may be in a hospital, long-term care facility, home, or other setting.

85.2(9) *"Person incapable of making their own medical care decisions"* means a patient who is unable to adequately understand and appreciate the nature and consequences of a proposed medical care decision, including the benefits and risks of the proposed medical care and of alternatives to such care, and cannot thereby reach an informed decision to consent or refuse such care in a knowing and voluntary manner that promotes the patient's well-being and autonomy. This incapability may be temporary or permanent.

85.2(10) *"Physician"* means any individual licensed under Iowa Code chapter 148.

85.2(11) Rescinded IAB 4/4/12, effective 5/9/12.
[**ARC 0061C**, IAB 4/4/12, effective 5/9/12]

641—85.3(135) Appointment of local boards.

85.3(1) The county board of supervisors may establish and fund a local substitute medical decision-making board. The board shall include one or more representatives from each of the following three categories:

a. Physicians, nurses, or psychologists licensed by the state of Iowa.

b. Attorneys admitted to the practice of law in Iowa or social workers.

c. Other individuals with recognized expertise or interest in persons unable to make their own medical care decisions not included in *"a"* and *"b"* above.

The county board of supervisors may appoint and fund a hospital ethics committee to serve as the local decision-making board provided that the composition of the committee fulfills the above requirements.

85.3(2) County boards of supervisors may join together to form a multicounty local substitute medical decision-making board pursuant to Iowa Code chapter 28E. If a multicounty board is established, the agreement shall specify the procedure for appointment of board members and the procedure for allocation of expenses.

85.3(3) Board members shall be appointed to terms of three years with staggered terms.

85.3(4) The board shall elect a chairperson at the first meeting of each fiscal year.

85.3(5) The county board of supervisors shall notify the department when a local board is appointed and shall submit a list of the members appointed.
[**ARC 0061C**, IAB 4/4/12, effective 5/9/12]

641—85.4(135) Filing an application.

85.4(1) Any person having knowledge and concern may file the application on behalf of any patient residing within the geographic area served by the local board, when the person filing the application believes the patient is incapable of decision making, is in need of medical care, and has no other surrogate decision maker available.

85.4(2) The local board of the county of residence of the patient shall have jurisdiction except the local board may, by mutual consent, transfer jurisdiction to the local board in the county where the treatment is being considered.

85.4(3) The application shall be made in writing and shall include the following:

a. The relationship of the person filing the application to the patient.

b. A statement that the patient does not have an attorney-in-fact, guardian, spouse, adult child, parent or an adult sibling who is reasonably available, willing and able to make the medical care decision. The application shall provide the factual basis for such a statement, including the efforts made to contact such persons.

c. The reasons for believing that the person lacks the capability to consent to or refuse medical care and the factual basis supported by an appropriate statement for this belief.

d. The patient's opinion regarding the proposed care, if known, and the source(s) of the information regarding this opinion.

e. If the patient's opinion regarding the proposed care is not known, the person filing the application shall include a stated opinion on whether the best interests of the patient would be promoted by such care and the basis for the opinion.

f. Any other information that may be necessary to determine the need for such care, including a copy of a second medical or dental opinion which would be required by a prudent physician or dentist based on the nature of the proposed medical care.

g. A statement, completed, signed and dated by a physician or dentist including:

(1) A description of the proposed medical care and the patient's medical or dental condition which requires such treatment indicating the date of diagnosis;

(2) The risks and benefits to the patient of the proposed care and any alternative treatments including consideration and consequences of nontreatment; and

(3) A statement whether the patient has any medical or dental condition which would prevent the patient's travel to or presence at the panel meeting and including a description of such condition.

h. The application shall be signed and dated by the person filing it stating that the information on the application is true to the best of that person's knowledge, except for any portion signed and dated by another person who shall make a similar statement as to that portion.

641—85.5(135) Notification of patient and review of application.

85.5(1) When an application is received, the patient shall be notified that an application has been submitted, a hearing will be scheduled, and the patient will be notified of the time and place of the hearing. The notification shall inform the patient of the right to be present, to testify orally or in writing, and to designate someone to represent the patient at the hearing. The hearing shall be held no less than 48 hours after the patient receives this notification.

85.5(2) The board chairperson or designee shall preliminarily review the application to ascertain whether additional information may be necessary to assist the board in determining the patient's need for surrogate decision making and in determining whether the patient's best interests will be served by consenting to or refusing medical care on the patient's behalf. The board chairperson or designee may:

a. Request and shall, not withstanding any other law to the contrary, be entitled to receive from any physician, hospital or health care facility or person licensed to render health care, any information which is relevant to the patient's need for surrogate decision making or for the proposed medical care. Such information may include, among other things: information regarding the patient's preferences regarding medical care; facts regarding the patient's attorney-in-fact, guardian, spouse, adult child, parent, or an adult sibling; facts and professional opinions regarding the patient's inability to consent to or refuse medical care; and facts and professional opinions regarding whether the proposed medical care is in the patient's best interests; the board chairperson or designee shall maintain the confidentiality of records as required by Iowa Code chapters 22, 141, and 228, and 42 Code of Federal Regulations Part 2, as of January 1, 1992, or any other applicable confidentiality law provision;

b. Consult with any other person who might assist in such a determination of the best interests of the patient, including ascertainment of the personal beliefs and values of the patient.

641—85.6(135) Panel appointment and procedures.

85.6(1) When an application is filed, the chairperson shall appoint a panel to handle the case and designate a panel chairperson. The panel shall consist of at least three members with at least one from each category listed in rule 85.3(135). A person shall not participate on a panel for a case when that person has a conflict of interest. The panel may include the entire local board.

85.6(2) Upon appointment of the panel, the board chairperson or designee shall provide a copy of the application to each panel member accompanied by a notice of the time, place and date of the panel hearing on the application. The notice of the hearing shall also be provided to the patient, the person who filed the application, and any other interested party, if known. The notice shall inform the recipients of the procedures of the panel, including the opportunity for the recipient to be present and to be heard. The notice shall be given no less that 24 hours prior to the scheduled time for the hearing.

85.6(3) The general procedures of the hearing are as follows:

a. The panel shall be empowered to administer oaths and take testimony from any person who might assist the panel in making its decision. It shall also be empowered to conduct its proceeding via telephone conference calls in appropriate cases, unless someone objects and requests a face-to-face hearing.

b. A record of the deliberations and proceedings of the panel shall be made and retained for ten years. Such record shall include any information, record, assessment or consultation submitted to or considered by the panel.

c. The panel and each member of the local board shall maintain the confidentiality of records as required by Iowa Code chapters 22, 141, and 228 and 42 Code of Federal Regulations Part 2 or any other applicable confidentiality law provision.

d. The patient shall have the right to be present at the hearing and the right to express feelings to the panel orally or in writing and the right to designate someone to represent the patient before the panel.

e. If at any time during the pendency or prior to initiation of treatment, an attorney-in-fact, guardian, spouse, adult child, parent or an adult sibling is reasonably available, willing and able to consent to or refuse such care on the patient's behalf, objects to the panel acting upon the application, the proceedings regarding such patient shall cease. A record of any such person's objection shall be included as part of the record as provided for by this section.

f. The panel shall issue its written decision within 24 hours after the conclusion of the hearing. The decision shall state when the decision shall become effective and shall include a statement describing the right of appeal. The written decision shall be issued to the necessary persons, including the patient.

g. If the decision is hand-delivered, it shall not be effective sooner than 24 hours after the written decision is delivered to the patient or the person designated by the patient in 85.6(3)*"e."* If the decision is sent by certified mail, return receipt requested, it shall not be effective sooner than 48 hours after it is mailed. The date, time, and method of delivery of the decision to the patient shall be noted in the record.

h. A panel determination that a patient is in need of surrogate decision making for the proposed medical care shall not be valid for any future medical care and shall not be construed or deemed valid for any other purpose or for any other future medical care unless the determination explicitly applies to related or continuing treatment necessitated by the original treatment. No panel determination shall be valid after 60 days from its effective date unless the determination explicitly states otherwise.

i. All information, records, assessments or consultations submitted to or considered by the panel or board and the panel and board deliberations are confidential as required by Iowa Code chapters 22, 141, and 228 and 42 Code of Federal Regulations Part 2 or any other applicable confidentiality law provision.

641—85.7(135) Panel determination of need for surrogate decision making. The panel's determination of the patient's need for surrogate decision making shall be made in accordance with the following provisions:

85.7(1) The panel shall decide based upon a preponderance of evidence whether the patient is in need of surrogate decision making by determining that the patient: lacks the ability to consent to or refuse the proposed medical care and does not have an attorney-in-fact, guardian, spouse, adult child, parent, or an adult sibling who is reasonably available, willing and able to make such a decision.

The method of determining patient's capability to consent to or refuse care shall include examination of patient by a licensed physician with a written report to the local board.

When practical, the panel members shall personally interview and observe the patient as a part of the hearing. If a personal appearance by the patient before the panel is not practical, then either the panel chairperson shall designate a member of the panel to interview and observe the patient prior to the hearing or the panel shall require one of the following:

1. Written report of examination by psychiatrist.
2. Written report of examination by psychologist.
3. Written report of examination by physician not involved in case.
4. Written report from a department of human services investigator involved with patient.
5. Written report from long-term care case management project.

85.7(2) In making the determination of whether the patient lacks the capacity to consent to or refuse the proposed medical care, the panel or board shall consider whether the patient is unable to adequately understand and appreciate the nature and consequences of the proposed medical care.

85.7(3) A majority of the panel members must vote in the affirmative that the patient is in need of surrogate decision making or the patient will be deemed not to need surrogate decision making.

85.7(4) A panel determination that a patient is in need of surrogate decision making shall not be construed or deemed to be a legal determination that such person is incompetent.

85.7(5) In the event the panel or board has determined the patient to be capable of decision making, then the patient's consent to or refusal of such treatment, if given, shall constitute valid consent or refusal. No other consent shall be required by a provider of health services.

641—85.8(135) Panel determination regarding proposed medical care decision. If a patient has been determined by the panel to be in need of surrogate decision making, the panel's determination regarding the proposed medical care shall be made in accordance with the following provisions:

85.8(1) The past or present expression of wishes by the patient will be presumed valid unless clearly overcome by other evidence. The patient's autonomy should always be respected.

85.8(2) If there is no clear preference by the patient, the panel shall make the determination whether the proposed medical care is in the best interests of the patient based upon a preponderance of the evidence by considering the following standards:

a. The burdens of the treatment to the patient in terms of pain and suffering outweighing the benefits or whether the proposed treatment would merely prolong the patient's suffering and not provide any net benefit;

b. The degree, expected duration, and constancy of pain with and without treatment, and the possibility that the pain could be mitigated by less intrusive forms of medical treatment including the administration of medications;

c. The likely prognosis, expectant level of functioning, degree of humiliation and dependency with or without the proposed medical care; and

d. Evaluation of treatment options, including nontreatment, and their benefits and risks compared to those of the proposed medical care.

85.8(3) A majority of the panel members must vote in the affirmative for a valid determination of consent to or refusal of medical care on behalf of the patient.

85.8(4) The panel determination consenting to or refusing medical care shall constitute valid consent to or refusal of such treatment in the same manner and to the same extent as if the patient were able to consent or refuse on the patient's own behalf.

85.8(5) The panel's consent to medical care shall state that any tissues or parts surgically removed may be disposed of or preserved by the provider of health services in accordance with customary practice.

641—85.9(135) Right of appeal.

85.9(1) The patient, the person who filed the application, or a correspondent may appeal the local board's decision to the department. The appeal must be made before the date and time that the consent becomes effective. The person appealing shall notify the local board or the department of the appeal. The notice of the appeal shall be in writing or by telephone followed by a written appeal to the department. If the appeal is initially made by telephone, the written appeal to the department shall be postmarked within 48 hours of the telephone notice. The written appeal shall state the reason for the appeal. If the initial appeal is made to the local board, the local board representative shall immediately notify the department and the health care provider. If the initial appeal is made to the department, the department representative shall immediately notify the local board and the health care provider.

85.9(2) Upon receipt of the notice of appeal, the local board shall immediately provide a copy of the record of the case to the department. The department shall review the record to determine whether the determination by the local panel is supported by substantial evidence. The department shall also review new information which is submitted regarding the case. The department's decision shall be based on a review of the record and a review of any new information and shall be made in accordance with the provisions for local panel determination in rules 641—85.7(135) and 641—85.8(135). The department's decision shall be promptly sent by certified mail, return receipt requested, or otherwise provided by any other means that will provide more timely or reliable written notice to: the patient, the person filing the appeal, the person who filed the application and the chairperson of the local board. If any of these persons are dissatisfied with the department's decision, an appeal may be taken in the manner provided by Iowa Code chapter 17A.

[**ARC 0061C**, IAB 4/4/12, effective 5/9/12]

641—85.10(135) Records and reports. Each fiscal year, prior to October 1, the local board shall submit an annual report to the department on forms provided by the department. The report shall include summary information regarding the number, nature and disposition of applications filed with the local

board in the preceding year. It shall also include a list of the local board members and officers for the new year and such other information as the department may deem necessary. Authorized representatives of the department shall have access to all records of the local boards. All record information which is excluded from public access and inspection pursuant to Iowa Code chapter 22, 141A or 228 and 42 Code of Federal Regulations Part 2, or any other confidentiality law provision shall be respected by the department.
[**ARC 0061C**, IAB 4/4/12, effective 5/9/12]

641—85.11(135) Liability. The local substitute medical decision-making board and its members shall not be held liable, jointly or separately, for any actions or omissions taken or made in the official discharge of their duties, except those acts or omissions constituting willful or wanton misconduct.
[**ARC 0061C**, IAB 4/4/12, effective 5/9/12]

These rules are intended to implement Iowa Code section 135.29.

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