

## **SECTION V.11. Informed Consent and Negotiated Risk Procedures**

### **A. Definitions**

1. Self-determination is the right of every legally competent individual to make decisions regarding his or her own life, regardless of the nature of the decisions or the consequences to himself/herself.
2. Informed consent is the process in which a legally competent individual or his/her legal guardian is given the opportunity to make a fully informed decision regarding the individual's Choices for Care (CFC) services, using all information available that may influence that decision.
3. Negotiated risk is a process of negotiation which involves the individual or his/her legal guardian, case manager or flexible choices consultant and service provider(s), and which results in a formal written agreement. This process respects the individual's preferences, choices, and capabilities, and is designed to decrease the possibility that the individual's decisions or choices will place the individual or others at risk of significant harm.
4. Acceptable risk is the level of risk to an individual or his/her legal guardian is willing to accept after the informed consent process. Factors associated with risk to the individual may include, but are not limited to:
  - The individual's medical condition,
  - Behaviors,
  - Life style preferences,
  - Living environment,
  - Level of care needs, or
  - Refusal of services.
5. Risk of significant harm is the imminent or foreseeable (i.e. within the next 30 days) risk of death, serious or permanent injury, or illness serious enough to result in hospitalization.

### **B. Procedures**

1. DAIL staff and all CFC providers shall support an individual's right to self-determination to the maximum extent possible and shall assist a participant in making decisions through informed consent.
2. Case managers and service providers shall support an individual's informed choice regarding life, liberty, and the pursuit of health and happiness, unless the participant's actions or decisions put other persons at risk of significant harm.

3. The individual has the right to receive services under conditions of acceptable risk in which the individual assumes the risk associated with decisions that he/she makes under conditions of informed consent.
4. If a CFC provider, or other concerned party believes that an individual is making decisions that put themselves or others at risk of significant harm, the provider shall confer with the individual's case manager (if applicable).
5. If the case manager believes that the individual has the capacity to understand the options available and the consequences of his/her decisions, and that others are not at risk, the case manager shall relay this information to the provider or concerned party. The concerns of others, along with the case manager's responses, shall be placed in the participant's case management record.
6. If the case manager questions the individual's ability to understand the consequences of decisions or choices and to give informed consent, the case manager must promptly assess the individual's mental status or arrange for a prompt assessment of the individual's mental status by a qualified medical professional or mental health professional.
7. Substantially impaired: If, after an assessment of the individual's mental status suggests the individual's capacity to understand the consequences of his/her decisions or choices is substantially impaired, and as a result the individual or others are at risk of significant harm, the case manager must take action to assure the protection of the health and welfare of the individual. Action steps may include the following:
  - a. Review of the participant's status and situation with Medicaid Waiver team;
  - b. Modification of the CFC Service Plan;
  - c. Initiating proceedings to secure guardianship.
8. Not substantially impaired: If an assessment of the individual's mental status suggests the individual's capacity to understand the consequences of his/her decision or choices is NOT substantially impaired, but are still placing him/herself at significant risk of harm, the case manager shall review the individual's status and situation with the Medicaid Waiver team and service providers. The Medicaid Waiver team will review other services or actions, which may ameliorate the risk of harm, and present these to the individual.
9. Negotiated risk agreement: If the individual refuses other services or proposed actions, or risk of significant harm to him/her remains in spite of the services or actions taken, the case manager and/or provider(s) shall attempt to initiate a negotiated risk agreement. A negotiated risk agreement may only be utilized with an individual whose capacity to understand the consequences of his/her decision is not substantially impaired or his/her legal guardian. The written negotiated risk agreement shall include:
  - a. A description of the individual's needs, including a description of those needs which cannot be met;

- b. A description of the services which can be provided or will not reduce the risk;
  - c. A description of the potential risks to the individual;
  - d. A statement that other service options have been explained to the individual (or legal guardian), and that the individual (or legal guardian) understands and accepts the risks associated with the current plan; and
  - e. Signatures of the individual (or legal guardian), case manager, and relevant other parties.
10. If a negotiated risk agreement is created, a copy of the agreement shall be given to the individual, case manager and applicable service providers. A copy of the agreement shall be placed in the individual's case management record.
11. Others at risk of harm: If the assessment reveals that the individual is able to understand the consequences of her/his decisions, but is putting other persons at risk of significant harm, the case manager and the local waiver team shall consider involuntary termination of services (*See Denials and Terminations*). The provider(s) shall follow internal protocol relative to the situation. When appropriate, referrals shall be made to other professionals, such as, but not limited to, local police, Adult Protective Services, mental health services, etc.
12. When disagreement exists among the case manager, providers and/or members of the Medicaid Waiver Team, the case manager shall request technical assistance from the Department of Disabilities, Aging and Independent Living (DAIL).
13. Guardianship: Any person who believes that a participant is not able to understand the consequences of his/her decisions, or that an individual cannot provide informed consent due to a mental or cognitive impairment, may initiate a petition for guardianship through the local probate court at any time.
14. Abuse, neglect or exploitation: Pursuant to Vermont statute 33 V.S.A. § 6903, all Long-Term Care service providers are mandated reporters. If at any time, the case manager or provider(s) suspects the individual's health and welfare is a risk due to the action of another person (legal guardian, family, friends, provider, etc.), the case manager or provider(s) must report to the Department of Disabilities, Aging and Independent Living, Division of Adult Protective Services at 1-800-564-1612.