§ 2983. Determination of lack of capacity to make health care decisions for the purpose of empowering agent. 1. Determination by attending practitioner. (a) A determination that a principal lacks capacity to make health care decisions shall be made by the attending practitioner to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending practitioner's opinion regarding the cause and nature of the principal's incapacity as well as its extent and probable duration. The determination shall be included in the patient's medical record. For a decision to withdraw or withhold life-sustaining treatment, the attending practitioner who makes the determination that a principal lacks capacity to make health care decisions must consult with another physician, physician assistant, or nurse practitioner to confirm such determination. Such consultation shall also be included within the patient's medical record.

(b) If an attending practitioner of a patient in a general hospital or mental hygiene facility determines that a patient lacks capacity because of mental illness, the attending practitioner who makes the determination must be, or must consult, for the purpose of confirming the determination, with a qualified psychiatrist. A record of such consultation shall be included in the patient's medical record.

(c) If the attending practitioner determines that a patient lacks capacity because of a developmental disability, the attending practitioner who makes the determination must be, or must consult, for the purpose of confirming the determination, with a physician, nurse practitioner, physician assistant, or clinical psychologist who either is employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician, nurse practitioner, physician assistant, or clinical psychologist possess specialized training or three years experience in treating developmental disabilities. A record of such consultation shall be included in the patient's medical record.

(d) A physician, physician assistant, or nurse practitioner who has been appointed as a patient's agent shall not make the determination of the patient's capacity to make health care decisions.

2. Request for a determination. If requested by the agent, an attending practitioner shall make a determination regarding the principal's capacity to make health care decisions for the purposes of this article.

3. Notice of determination. Notice of a determination that a principal lacks capacity to make health care decisions shall promptly be given: (a) to the principal, orally and in writing, where there is any indication of the principal's ability to comprehend such notice; (b) to the agent; (c) if the principal is in or is transferred from a mental hygiene facility, to the facility director; and (d) to the guardian of the principal, if any.

4. Limited purpose of determination. A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that the patient lacks capacity for any other purpose.

5. Priority of principal's decision. Notwithstanding a determination pursuant to this section that the principal lacks capacity to make health care decisions, where a principal objects to the determination of incapacity or to a health care decision made by an agent, the principal's objection or decision shall prevail unless the principal is determined by a court of competent jurisdiction to lack capacity to make health care decisions.

6. Confirmation of lack of capacity. (a) The attending practitioner shall confirm the principal's continued incapacity before complying with an agent's health care decisions, other than those decisions made at or about the time of the initial determination made pursuant to subdivision one of this section. The confirmation shall be stated in writing and shall be included in the principal's medical record.

(b) The notice requirements set forth in subdivision three of this

section shall not apply to the confirmation required by this subdivision.

7. Effect of recovery of capacity. In the event the attending practitioner determines that the principal has regained capacity, the authority of the agent shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.