

# Questions and Answers from *Supported Decision-Making & Supported Decision-Making Agreements: The Details* Trainings August 2022

## Questions & Answers

Q1. Can you cite the code related to capacity?

A1. The Virginia Code regarding capacity is [§ 54.1-2983.2](#).

Q2. What is the difference between *capacity* and *competency*?

A2. *Capacity* is a person's ability to understand information relevant to the decision, such as alternative options, their risks and benefits, to use the information in a logical way to make a decision. It is task specific and can change with time or the situation. *Competency* is a legal term that refers to a person's ability to do something successfully or efficiently, such as making important decisions. A judge has to declare someone legally incompetent in order for them to have a legal guardian or conservator. This means that the person is not able to make decisions on their own and someone is appointed to be responsible for making these decisions on behalf of the individual.

Q3. Is the Supporter a mandated reporter if they are not one of those individuals on the list?

A3. No, Supporters are only mandated reporters if they meet one of the criteria listed within Virginia Code [§ 63.2-1606 \(A\)](#). However, anyone (not just mandated reporters) can make a report to Adult Protective Services (APS) if there is suspicion of abuse, neglect, or exploitation.

Q4. Can you provide a link to the local CPS contacts?

A4. You can find contact information for your local Department of Social Services (DSS) by using [this link](#).

Q5. What if a person does not want a formal Supporter or SDMA?

A5. Individuals are not required to have SDMAs and are not required to have formal Supporters.

Q6. So we review the SDMA annually, but are we rewriting it, even if no changes are needed, on annual basis?

A6. No, if the SDMA is reviewed and there are no changes then there is nothing that needs to be rewritten. The SDMA is only rewritten or amended when there are changes that need to be made.

Q7. The concept is great, but the annual planning meeting (especially for someone with a Waiver) is already extensive. Has anyone considered this?

A7. It is not a requirement to create an SDMA at an annual meeting. The questions on the PC ISP asks if an individual has an SDMA, and if so, what was the initial effective date and what life areas are indicated on the SDMA. If someone indicates that they would like to create an SDMA

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while at the annual ISP meeting it would be okay to coordinate another time to meet with the individual to do so.

Q8. Are the SDMAs required for DBHDS services?

A8. No, SDMAs are not required by DBHDS.

Q9. If someone is subject to a guardianship order of some years' standing, but shows interest in making more decisions with help, is that person a candidate for supported decision-making as a substitute for the guardianship? We guess the judge would be skeptical, but supported decision-making was unknown back when the original order was issued.

A9. There is precedent in Virginia for individuals utilizing supported decision-making and SDMAs to overturn their guardianships. DBHDS is working to educate those in the legal system about SDMAs and how supported decision-making can be used to assist individuals with increasing their capacity in order to retain their legal rights. However, DBHDS does not currently have any guidance on how to utilize SDMAs in order to restore an individual's legal rights and competency. The [disAbility Law Center of Virginia](#) and the [National Resource Center for Supported Decision-Making](#) are resources to contact if you are in a similar situation.

Q10. Does the entire group of Supporters need to meet and sign at one time?

A10. No, Supporters can sign the Agreements page at different times, which can be indicated by the date of their signature.

Q11. Can you please elaborate on the 2<sup>nd</sup> principle for Supported Decision-Making in Virginia with a few examples?

A11. The 2<sup>nd</sup> principle for Supported Decision-Making in Virginia is "When an individual requires assistance in making decisions, the least restrictive option that meets the individual's needs should be pursued, and every effort should be made to maximize an individual's autonomy and independence." This means that when someone needs help with making a decision or choice, every effort to support the individual should be done in a manner that ensures the individual retains their legal rights and empowers the individual to make the final decision on their own before considering support options that would be more restrictive, or remove the individual's legal rights, such as legal guardianship. For example, if a person is indecisive about where they want to live, the team can recommend an SDMA as a next step so the person can identify a trusted individual (or multiple individuals) to assist with housing decisions.

Q12. What are key differences between a Power of Attorney (POA) vs. SDMA? If the person/supporter is the same for both documents, which one is more effective?

A12. A Power of Attorney is appointed by the individual, not the court. There are different types of Power of Attorneys and typically someone will name a single individual as their POA

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and include a backup. An individual with an SDMA can appoint as many Supporters as they want. Those selected as POAs or Supporters need to agree to this role. There are certain responsibilities that POAs can have, such as making decisions for an individual should they be incapacitated (in the case of a durable POA), however an SDMA never gives Supporters the ability to make decisions for the Decision Maker, no matter the situation. An individual can have both a POA and an SDMA, as they serve different purposes.

Q13. I would like to share these tools with other families. Are the resources in the Padlet available on DBHDS's website? Or will your Padlet link stay active permanently?

A13. All documents can now be found on the [DBHDS website](#).

Q14. Do physicians acknowledge SDMAs and the idea of supported decision-making?

A14. While SDMAs are new to Virginia Code, everyone has the right to invite those they want to their medical appointments and to ask for assistance by anyone they want when making medical decisions. DBHDS is working to provide education about supported decision-making and SDMAs to those in the medical field.

Q15. Just to clarify, this would not be appropriate for someone who has a legal guardian, correct?

A15. SDMAs are currently an option for individuals who retain all of their legal rights and competency. Individuals with legal guardians have been deemed legally incompetent and do not retain all of their legal rights. Please see A9 for more information.

Q16. If the person has an authorized representative (determined to not have capacity), they would not have an SDMA, correct?

A16. Capacity is time and task specific. A capacity evaluation does not determine if someone is legally incompetent, therefore the individual retains their legal rights, including their ability to make decisions and have a supported decision-making agreement. Per Virginia Code [12VAC35-115-145\(4\)](#) "Capacity evaluations shall . . . indicate the specific type of decision for which the individual's capacity is being evaluated (e.g., medical) and shall indicate what specific type of decision the individual has or does not have the capacity to make. Capacity evaluations shall address the type of supports that might be used to increase the individual's decision-making capabilities." Additionally [12VAC35-115-146\(A\)](#) states, ". . .the provider shall recognize and obtain consent or authorization for those decisions for which the individual lacks capacity." This means they may have an AR for certain decisions and an SDMA and Supporter(s) for other decisions.

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Q17. It seems to me that the Virginia SDMA template is only for those who can understand all aspects of supported decision making (i.e., significance, purpose, process, and execution). What about those who have much lower IQs, how will they understand this document?

A17. The Virginia SDMA template and all supporting documents are written using plain language and can be completed with the help of others. However, supported decision-making and SDMA's are not an appropriate option for everyone. The types of support someone needs varies from person to person. PEATC and the disAbility Law Center of Virginia have excellent pamphlets and tools for individuals and parents discussing different decision-making options. Links to their websites are in the "Online Resources" section below.

Q18. What is the legal status of an SDMA? Is it like a will or similar to Letter of Intent attached to a will? Is it not legally binding but encouraged to be honored?

A18. SDMA's are not legally binding documents in Virginia, however they are encouraged to be honored. The decisions an individual makes with support can be legally binding.

Q19. Is there any opportunity to attend a meeting where an SDMA is created? Even a simulated one would be very educational and informational so that parents can experience different roles to practice this process?

A19. DBHDS will continue to offer trainings, as well as post recordings of trainings and educational information online to help individuals and families understand the process of creating a SDMA on the [DBHDS website](#). If you would like further assistance, please contact the Supported Decision-Making Community Resource Consultant, Sara Thompson, at [Sara.Thompson@dbhds.virginia.gov](mailto:Sara.Thompson@dbhds.virginia.gov).

Q20. Can a Supporter speak to the Decision Maker's life outside of their assigned area of need? What happens if some of the Supporters do not agree with the decisions being made? How are disagreements handled? Dignity of risk is very scary for me, as a parent.

A20. The Decision Maker decides what areas of life Supporters assist them in. These are sometimes different from what is stated on the SDMA and that is okay, provided it is the Decision Maker's choice. There might be times when a Decision Maker makes a choice that a Supporter does not agree with, however it remains the legal right of the Decision Maker to make that choice. Supporters can assist the individual with understanding their options and risks and benefits of each option to the extent that the Decision Maker wants, however Decision Makers have the right to dignity of risk. Dignity of risk can be scary for parents or anyone that cares for another individual. However, this is part of the learning process and provides individuals the opportunity to have self-determination.

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Q21. So must I use Virginia SDMA template form?

A21. No. The Virginia Supported Decision-Making Agreement template will be provided online as a Word document, as well as a fillable PDF, once finalized. However, individuals are not required to use this form for their own agreement, if they do not want to. If creating your own SDMA, it is recommended that you include the following information: 1. Who the Decision Maker wants as their Supporter(s), 2. When the Decision Maker wants help, 3. How the Decision Maker wants to receive help, 4. Indication that the Decision Maker and Supporter(s) agree to the information documented in the form of signatures from all individuals.

Q22. Can an SDMA replace legal guardianship?

A22. Individuals must have legal competency (i.e. not be deemed legally incompetent by a court) in order to be a Decision Maker and have a supported decision-making agreement. As long as someone has legal competence, they have a legal right to make decisions on their own. [There is precedent in Virginia](#) of individuals using SDMAs to support their case for overturning their legal guardianships, however Virginia does not have documented guidance on this process at this time. Please see A9 for more information.

Q23. What is an example of what would go in the life area of “Other” on the Virginia SDMA template?

A23. “Other” is provided as an option to further personalize the SDMA if there is something specific to the Decision Maker that is not already covered in any of the other life areas. Some examples could be help with planning for end of life or funeral details or help with planning for childbirth.

Q24. Can we say that if someone has a POA, then an SDMA is not necessary if it has the same Supporters. Is that reasonable?

A24. Not necessarily. Please see A12 above.

Q25. Is it possible to get a sample of the SDMA documents to know how to write them effectively?

A25. Yes, examples of completed Virginia SDMA templates and the Discovery Tools can be found on the [DBHDS website](#).

Q26. How does an individual with DD learn to identify differences in the various types of manipulations or exploitations that are in your presentation? Is there a program or website that people can use to educate/help individuals with DD? Are LEAP and PEATC the best resources?

A26. Both LEAP and PEATC are excellent resources for helping individuals with DD learn more about manipulation and exploitation. Links to their websites are in the resource sections below.

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Q27. Is there an app or interactive discovery tools that we can use instead of word documents?

A27. No, at this time all forms are available on the [DBHDS website](#) as Word documents and fillable PDFs. We are working to create additional content (videos and guidance tools), which will be on the website once completed.

Q28. I am sorry, but can you explain what the health passport is again?

A28. The Health Passport is a document created by an individual when they go through VCU's [Community & Health Advocacy Training \(CHAT\)](#). The document is a tool individuals can use to help them communicate and advocate for themselves at medical appointments.

Q29. It looks very objective, but in life when a Supporter is not available or the Decision Maker wants a different Supporter than the one listed in the agreement, if it is not in the agreement, he/she will not get the support they need, when needed? Would selecting "All Supporters" be more effective or not?

A29. Decision Makers can receive support from anyone they want and in any part of their life, whether or not that person is listed on their SDMA. The SDMA serves as a way for individuals in the Decision Maker's life to better know how the Decision Maker wants them to provide support and for others to know who the Decision Maker wants support from, depending on the decision or issue. People have different strengths and knowledge, which should be taken into consideration when thinking about who you want as a Supporter and in what areas of life they help. If none of the Supporters lists for a specific scenario are available, it is okay to look for additional supporters, beyond those listed on the agreement, if needed and agreed to by the Decision Maker.

Q30. Does a notary's signature make the SDMA a legally binding document?

A30. No, a notary is only verifying the identities of those who have signed the SDMA and has no impact on the legal status of a document. Please see A18 above.

Q31. Is there a form for creating a POA?

A31. There are many online resources for finding templates for Power of Attorney. The disAbility Law Center of Virginia has a [do it yourself Power of Attorney form](#) along with instructions.

Q32. Can this go along with the ISP?

A32. The PC ISP asks a few questions about SDMAs, however any of the Discovery Tools and/or the Virginia SDMA template can be used to help answer questions on the ISP or provide another way to discover information.

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Q33. Who can be an SDMA Facilitator?

A33. Anyone that the Decision Maker trusts, and who agrees to this role, can be an SDMA Facilitator. SDMA Facilitators must follow the same guidelines as Supporters regarding issues of abuse, exploitation, undue influence, and conflicts of interest.

Q34. So as a provider, I cannot be an SDMA Facilitator?

A34. No, a provider can serve as an SDMA Facilitator, provided the roles and responsibilities of the SDMA Facilitator do not present as a conflict of interest with their role as a provider.

Q35. Did you say that this agreement was only for individuals over 18 years old?

A35. Yes, individuals must be 18 years old or older to have an SDMA.

Q36. Who should keep the document (SDMA)? Most of us in Human Services scan documents.

A36. The Decision Maker can give a copy of the SDMA to anyone they want. It is recommended for at least the following to have a copy of the SDMA: all Supporters, medical specialists, case managers/support coordinators, and providers.

Q37. Can you send the educational release and medical release form again? They were unable to be downloaded and saved.

A37. These forms can be located on the [DBHDS website](#).

Q38. If an individual wants their ISP team to be their Supporters, aren't we already in that role? Just trying to see how this would make a difference when we are already taking on this role.

A38. Individuals that are part of someone's ISP team are serving as supporters in a different way. If a Decision Maker wants anyone from their ISP team to be a Supporter on their SDMA, then they are asking that person to formally document that they are agreeing to support them in specific areas of life and in specific ways, as documented in the SDMA.

Q39. Is this something that can be worked on prior to the individual turning 18 so that it is ready by their 18th birthday?

A39. Yes, the process of creating an SDMA can take time and is something that can be worked on prior to an individual turning 18.

Q40. Could the Supported Decision-Making Agreement be used instead of an Authorized Representative (AR)?

A40. Yes, a supported decision-making agreement can help establish that an authorized representative is not needed. It is best practice to try least restrictive options before exploring more restrictive, substitute decision-making options.

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Q41. How will this information be integrated into the DBHDS Human Rights Regulations?

A41. A periodic review is in progress for the *Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded, or Operated by the Department of Behavioral Health and Developmental Services* (Human Rights regulations). There are amendments expected in an action to be brought for promulgation, in 2023 to clarify processes and provide stakeholders with information necessary to help assure the rights of individuals receiving services from providers licensed, funded, or operated by DBHDS. The planned amendments will also identify and amend any incorrect, incomplete, or outdated legal references. You can [register as a public user](#) to receive emails when regulatory actions or meetings are posted to the Virginia Regulatory Town Hall, for the agencies, boards, or regulations you select.

Q42. Supported decision-making and SDMAs seem to pose some conflict with Human Rights Regulations as currently written. Both general and most specifically into the Authorized Representative section.

A42. Authorized Representative means “a person permitted by law or the Human Rights regulations to authorize the disclosure of information or to consent to treatment and services or participation in human research”. Authorized Representatives, unlike Supporters, have decision-making authority. When a DBHDS provider is uncertain about an individual’s capacity, the Human Rights regulations require the provider to obtain a capacity evaluation. Based on the results of the evaluation, the provider shall determine the need for a substitute decision maker. At this time, the provider may determine the better and least restrictive option is an SDMA. Please also see A40 above.

Q43. So, the key is that the person (Decision Maker) still has to have the capacity to provide consent?

A43. Yes, the Decision Maker needs to have the capacity to provide consent solely on their own, which is strengthened by using the support of others (supported decision-making).

Q44. Is this something we should integrate into the annual ISP meeting, at the time of intake, or at any given time throughout routine meetings with an individual?

A44. If an individual has an SDMA, then the types of supports and Supporters listed on the agreement should be utilized anytime a situation selected on the agreement arises. Please see A32 for additional ways to use the SDMA and/or Discovery Tools.



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Q45. Can individuals put their support coordinator as a person to help them make decisions or is that a conflict of interest/out of the job description?

A45. Support Coordinators can serve as Supporters on an SDMA, provided their employer agrees to this arrangement. However, they need to recuse themselves from any types of support that could be considered a conflict of interest with their paid position.

Q46. How are SDMAs used along with Authorized Representatives (AR) and in situations when people do not have capacity, but can't identify an AR since SDMAs are not in Human Rights regulations?

A46. Individuals must have capacity, and not be deemed legally incapacitated by a court, to be a Decision Maker and have a SDMA. When a DBHDS provider is uncertain about an individual's capacity, the Human Rights regulations require the provider to obtain a capacity evaluation. Based on the results of this evaluation, the provider may determine the individual needs to have an AR for certain decisions and can have a SDMA and Supporter(s) for other decisions. In situations when individuals do not have capacity and an AR is not available, a SDMA is not an appropriate alternative. If no one is available to serve as an AR, a DBHDS provider may designate a "Next Friend" after a review and finding by the Local Human Rights Committee in accordance with [12VAC35-115-146](#) Please also see A16 and A22 above.

Q47. What should you do if someone is in a medical emergency, but can't make a decision or refuses to make a decision? What would an SDMA do?

A47. Having a POA, Advance Medical Directive, or even creating a Health Passport through the CHAT training can help in these types of situations. An SDMA could help a medical professional know who to contact to assist the individual when they need to make a decision, but it does not provide anyone else the authority to make a decision for the individual.

Q48. How often should we review and updated an SDMA?

A48. SDMAs should be reviewed annually, at a minimum. The SDMA only needs to be updated when an individual indicates that they would like to make a change to when they receive support, how they receive support, or who they receive support from.

Q49. Are Supporters liable for the help and information they provide?

A49. No, Supporters are not legally liable for the advice they provide and the decisions or actions the Decision Maker makes based on the advice. However, if the advice or actions of a Supporter meet the criteria for abuse, neglect, or exploitation then they could be found liable.

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## Online Resources

ACLU- <https://www.aclu.org/issues/disability-rights/integration-and-autonomy-people-disabilities/supported-decision-making>

The Arc of Northern Virginia- <https://thearcofnova.org/programs-services/sdm-resource-library/>

DBHDS- <https://dbhds.virginia.gov/supported-decision-making-supported-decision-making-agreements/>

disAbility Law Center of Virginia- <https://www.dlcv.org/supported-decision-making>

PEATC- <https://peatc.org/services/transition-to-adulthood/>

Supported Decision Making- <http://www.supporteddecisionmaking.org/>

Virginia WINGS booklet-  
[https://www.vacourts.gov/courts/circuit/resources/guardian\\_options\\_pamphlet.pdf](https://www.vacourts.gov/courts/circuit/resources/guardian_options_pamphlet.pdf)

## DBHDS ListServ Links

Provider ListServ- <https://lp.constantcontactpages.com/su/Z8Uy2i7/providernetwork>

IFSP ListServ- [https://visitor.r20.constantcontact.com/manage/optin?v=001NS8xgn0k-e1BuXO55PsJubloM38XQzLESzaljV7GR7HZXTvUu3YNaADZjNA7pQGuCodps1dgeyllxPz6rSO6bnJ\\_hIPS\\_cw8gcVa0rz7ZeMZrEdNfnnCMG5sOGpaCzzCPUKE4ZHhMS1\\_NfhXfxd\\_zW6RrduzeSX](https://visitor.r20.constantcontact.com/manage/optin?v=001NS8xgn0k-e1BuXO55PsJubloM38XQzLESzaljV7GR7HZXTvUu3YNaADZjNA7pQGuCodps1dgeyllxPz6rSO6bnJ_hIPS_cw8gcVa0rz7ZeMZrEdNfnnCMG5sOGpaCzzCPUKE4ZHhMS1_NfhXfxd_zW6RrduzeSX)

## Additional Training Options (not provided by DBHDS)

DARS Adult Protective Services Mandated Reporters Training-  
<https://vadars.org/aps/AdultProtServ.ht>

Health Advocacy Training CHAT- <https://cdl.partnership.vcu.edu/health-advocacy-training-chat/>

Healthy Relationships LEAP- <https://cdl.partnership.vcu.edu/healthy-relationships-leap/>

Person Centered Thinking- <https://partnership.vcu.edu/PCT/trainingschedule.html>