

Concerns for Nevada Medical Providers: Use of AB 128 Form May Result in ADA Liability and Loss of Immunity

by Thomas F. Coleman, J.D.

On March 9, 2015, the Nevada Assembly Judiciary Committee passed AB 128 – a bill creating a medical power of attorney for adults with intellectual disabilities. To be eligible to use the power of attorney form authorized by the bill, an adult must have an IQ of 70 or less.

The wording of the bill is confusing. In some places it indicates that medical decisions are made jointly by the principal (person with intellectual disability) and the agent (person designated in the form). In another place it states that the principal makes the medical decision.

This mixed message is problematic enough – especially for medical providers who must obtain informed consent from someone – but what causes greater concern is the level of difficulty that people with intellectual disabilities may have in understanding what the document means.

For a contract to be valid, the person who signs it must understand what it means. This is often referred to as the capacity to contract.

If a person speaks only Spanish and a contract is written in English, no one would question that the person signing it lacks the capacity to understand it. Use of a Spanish-to-English interpreter would help, but if the person also has an intellectual disability, the problem goes beyond the issue of interpretation. It also involves the capacity to comprehend words, sentences, and concepts.

In terms of AB 128, the power of attorney form can only be used by people with an IQ of 70 or lower. Some users of the form will have an IQ of 50, while others may have an IQ of 40, or 30, or even lower. Therefore, whether someone has the capacity to understand what the document means, and realize the nature of the rights they are surrendering, requires a situation-specific evaluation. An assessment of capacity will need to be performed in each case.

The Disability and Guardianship Project alerted the Assembly Judiciary Committee to problems with the AB 128 medical form. We stated: “Many people with intellectual disabilities will not know what the following terms mean, terms which are essential to the contract – insert, designate, agent, health care, decisions, treatment, necessary, paperwork, records, alternative, principal, and authorized.”

We have performed “readability” tests on the form. The results are consistent with the prior concerns we sent to the committee. This form may not be understood by most people with intellectual disabilities.

Some tests placed the AB 128 form at the 11th and 12th grade reading level. Others placed it at the 7th and 8th grade level. The average of the tests scored it as 8.5.

Many people who would use this form are reading at the 2nd

to 3rd grade level. Using a form that is known to score at the 8th grade level is more than problematic – it may result in liability or eliminate immunity from liability.

When a medical provider has an adult patient with a known intellectual disability, the provider must take precautions to insure that the patient understands what is happening, unless the patient has a guardian. In that case, the provider obtains informed consent from the guardian.

If a medical provider relies “in good faith” on a power of attorney form signed by the patient, the provider may be immune from liability for obtaining all or a portion of the informed consent from the designated agent. However, if the form is written at the 8th grade level and the provider knows or should know that the patient functions at a 2nd grade level of understanding, good faith would be lacking. Immunity would not exist. That is one reason why the AB 128 power of attorney form could be a major concern to doctors.

The second aspect of liability is under the Americans with Disabilities Act. The ADA prohibits discrimination on the basis of disability in the delivery of services. Medical providers have liability under Title 3 of the act.

Use of a power of attorney form is one part of the medical process. Using a form that a doctor knows is above the comprehension level of a patient could be interpreted as a form of disability discrimination.

If something were to go wrong, there could be a lawsuit by a surviving sibling, or an estranged spouse who is the other parent of the patient. If a lawsuit is filed, the medical provider will could be the target.

AB 128 needs to be more thoroughly vetted. The form it authorizes should be field tested by a neutral agency with research expertise in this area. The results of the testing could be used by proponents to craft a form that would serve as a national model.

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AB 128 Medical Power of Attorney Form May Not Be Understood by Most Adults with Intellectual Disabilities

The medical power of attorney form authorized by AB 128 is intended for adults with an IQ below 70 – people with mild, moderate, severe and profound intellectual disabilities. Adults with an IQ above 70 would not be allowed to use this form.

The average of several readability tests for the form scores it at grade level 8.5. Some tests score it at grades 10 and 11.

Below is one published report about the grade level reading abilities of people at all four levels of intellectual disabilities

It is reasonable to argue that a form intended for use by people with mild, moderate, severe and profound intellectual disabilities should be no more than third grade level to make sure that most people with an IQ below 70 are be able to understand what they are reading. Even then, the form would be above the comprehension level of a significant percent of its intended users.

If an individual cannot understand this form (which is an agency contract), then the individual lacks the capacity to enter into this legal agreement. A doctor who knows that the form is at a grade 8.5 level of comprehension would not have a “good faith” belief that the patient understood the terms of the contract at the time it was signed. As a result, such a doctor may not have immunity from liability for accepting such a document as an authorization.

The form created by AB 128 should be field tested on a large sample group in each of the four categories (mild, moderate, severe, profound) of intellectual disability. Such an analysis is appropriate, indeed prudent, considering that the AB 128 approach has never been adopted by any state. Any field testing should be done by a neutral agency.

The results of such testing would allow a more “user friendly” form to be created which could result in more people with intellectual disabilities being able to understand it.

This paper is from the University of British Columbia.

Intellectual Disabilities: Children’s Developmental Trajectory from the Early Years to Adolescence

[P]arents and caregivers often want to know what to expect as their child moves into adolescence and adulthood. In general, children with mild intellectual disabilities can achieve academic abilities up to around a grade 6 level (Wilmshurst, 2005). Typically, in BC, children remain with their same-aged peers throughout the academic career no matter their level of intellectual disability, and receive either adapted curriculum, which leads to a diploma, or a modified curriculum, which focuses more on vocational and life skills training, and does not lead to a formal high school diploma. They can usually read and write, and have social and communication skills adequate for self-support. Adults with mild ID generally live successfully in their communities, with their disability becoming less prominent once academic demands have been removed. They tend to live either independently or in a supported environment, and they are usually (80% of the time) able to acquire employment. Vocationally, they tend to be employed in unskilled or semi-skilled positions (Batshaw & Perret, 1992) and their wages tend to be much lower than those of their peers with

higher IQs (Murray, 1998). They may need occasional support with more complex tasks, like filing taxes or applying for jobs. Given that university students likely have IQs in the High Average range or above, they will not be able to gain entrance to competitive post-secondary educational programs. Many individuals with mild intellectual disability are able to raise a family, although they will likely need support (APA, 2013).

Children with moderate intellectual disability generally show noticeable delays in their language and social skills prior to school entry, although they are typically speaking by kindergarten. They are not able to receive a high school diploma. They follow a modified academic program and usually can gain academic skills **up to an approximate grade 2 level** (Wilmschurst, 2005). Acquiring basic reading, writing, and math skills is a challenge. They usually have adequate communication skills to function and can benefit from occupational training programs. They can usually obtain employment in semi-skilled or unskilled positions when provided with supervision and structure. As adults, they are usually unable to live independently, but can engage in their own self-care in a supervised living environment.

Children with severe or profound mental retardation are often identified very early in childhood or infancy (Jacobson & Mulick, 1996). Whereas children with mild intellectual disabilities may show intact motor skills, for example, children with severe or profound intellectual disabilities tend to be profoundly impaired across all domains of functioning. Unlike children with mild intellectual disabilities, children in this severity range very often show identifiable biological abnormalities that are linked to their cognitive deficit, and are high risk for long-term health problems (e.g., neurological, neuromuscular, visual, auditory, cardiovascular, etc.). They may also engage in self-injurious behaviours such as head-banging, biting, and scratching. By school age, they may be able to use some limited language, ambulate independently, and engage in some basic self-care, such as toileting. They are usually **unable to develop reading or writing skills**, and require residential supervision and support for the duration of their lives.


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Link to full article:


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Reading Ease

A higher score indicates easier readability; scores usually range between 0 and 100.

Readability Formula	Score
Flesch-Kincaid Reading Ease	70.6

Grade Levels

A grade level (based on the USA education system) is equivalent to the number of years of education a person has had. Scores over 22 should generally be taken to mean graduate level text.

Readability Formula	Grade
Flesch-Kincaid Grade Level	8.5
Gunning-Fog Score	10.9
Coleman-Liau Index	7.3
SMOG Index	7.5
Automated Readability Index	7.2
Average Grade Level	8.3

Text Statistics

Character Count	2,482
Syllable Count	864
Word Count	633
Sentence Count	31
Characters per Word	3.9
Syllables per Word	1.4
Words per Sentence	20.4



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Readability Formulas

Free readability tools to check for Reading Levels,
Reading Assessment, and Reading Grade Levels.

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Text Readability Consensus Calculator

Purpose: Our Text Readability Consensus Calculator uses 7 popular readability formulas to calculate the average grade level, reading age, and text difficult of your sample text.

Your Results:

Your text: DURABLE POWER OF ATTORNEY FOR HEALTH CARE DECISION ...([show all text](#))

Flesch Reading Ease score: **70.5** (text scale)
Flesch Reading Ease scored your text: **fairly easy to read.**
[\[f\]](#) | [\[a\]](#) | [\[r\]](#)

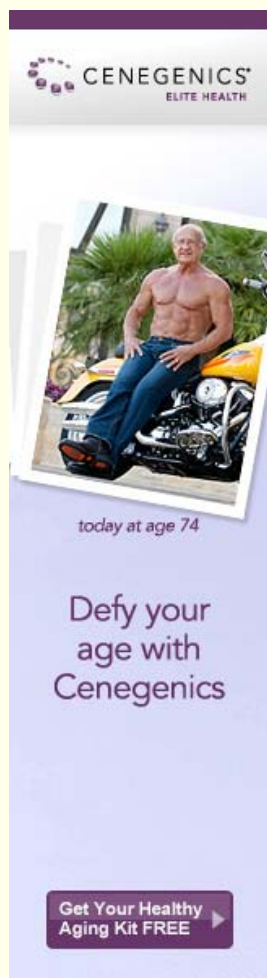
Gunning Fog: **10.9** (text scale)
Gunning Fog scored your text: **hard to read.**
[\[f\]](#) | [\[a\]](#) | [\[r\]](#)

Flesch-Kincaid Grade Level: **8.5**
Grade level: **Ninth Grade.**
[\[f\]](#) | [\[a\]](#) | [\[r\]](#)

The Coleman-Liau Index: **5**
Grade level: **Fifth Grade**
[\[f\]](#) | [\[a\]](#) | [\[r\]](#)

The SMOG Index: **7.5**
Grade level: **Eighth grade**
[\[f\]](#) | [\[a\]](#) | [\[r\]](#)

Automated Readability Index: **7.3**
Grade level: **11-13 yrs. old (Sixth and Seventh graders)**
[\[f\]](#) | [\[a\]](#) | [\[r\]](#)



Site Map

Linsear Write Formula : 11.8

Grade level: Twelfth Grade.

[\[f\]](#) | [\[a\]](#) | [\[r\]](#)

Readability Consensus

Based on 8 readability formulas, we have scored your text:

Grade Level: 8

Reading Level: fairly easy to read.

Reader's Age: 12-14 yrs. old (Seventh and Eighth graders)

[Show Word Statistics](#)

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[Click here to score another text](#)

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The Readability Test Tool

Let's make the unreadable readable

Readability Test Results

This page has an average [grade level](#) of about 8.

It should be easily understood by 13 to 14 year olds.

[Tweet this result!](#)

Readability Indices


Flesch Kincaid Reading Ease	70.5	<div></div>
Flesch Kincaid Grade Level	8.5	<div></div>
Gunning Fog Score	10.9	<div></div>
SMOG Index	7.5	<div></div>
Coleman Liau Index	7.3	<div></div>
Automated Readability Index	7.3	<div></div>

Text Statistics

No. of sentences	31
No. of words	632
No. of complex words	50
Percent of complex words	7.91%
Average words per sentence	20.39
Average syllables per word	1.37


What do these results mean?

The indicator bars give a visual guide for the readability of the text. Red is a low readability score. Green is easily readable.



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75

This free online software tool calculates readability : Coleman Liau index, Flesch Kincaid Grade Level, ARI (Automated Readability Index), SMOG. The measure of readability used here is the indication of number of years of education that a person needs to be able to understand the text easily on the first reading. Comprehension tests and skills training. This tool is made primarily for English texts but might work also for some other languages. In general, these tests penalize writers for polysyllabic words and long, complex sentences. Your writing will score better when you: use simpler diction, write short sentences. It also displays complicated sentences (with many words and syllables) with suggestions for what you might do to improve its readability.

Number of characters (without spaces) :	2,484.00
Number of words :	632.00
Number of sentences :	31.00
Average number of characters per word :	3.93
Average number of syllables per word :	1.38
Average number of words per sentence:	20.39

Indication of the number of years of formal education that a person requires in order to easily understand the text on the first reading

Gunning Fog index :	11.07
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Approximate representation of the U.S. grade level needed to comprehend the text :

Coleman Liau index :	5.88
Flesch Kincaid Grade level :	8.62
ARI (Automated Readability Index) :	7.28
SMOG :	9.67

Flesch Reading Ease :	69.55
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List of sentences which we suggest you should consider to rewrite to improve readability of the text :

- (insert the name of the person you wish to designate as your agent to make for health care decisions for you) as my agent to make for health care decisions for me if I am sick or hurt and need to see a doctor or go to the hospital.
- (insert the name of another person you wish to designate as your alternative agent to make health care decisions for you) as my agent to make for health care decisions for me as authorized in this document.
- If I am able to communicate, I would like the doctor at the hospital to speak with me and my agent about what care or treatment I should receive, even if I am unable to understand what is being said about me.
- If I am unable to communicate because of my illness or injury, I would like my agent to make decisions about my care or treatment based on what he/she thinks I would do and what is best for me.
- I also understand that I can take away this power from my agent at any time, either by telling him or her that they are no longer my agent or by putting it in writing.
- I would like my agent to help me to decide if I need to see a dentist and help me make decisions about what care or treatment I should receive from the dentist.



Writing Sample Readability Analyzer

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This Writing Sample Analyzer is the same analyzer that previously appeared on BlueCentauri.com. I moved it here to my primary domain to accommodate everyone who uses it.

Writing Sample Analyzer

This writing sample analyzer takes a sample of your writing and then calculates the number of sentences, words, and characters in your sample. As it's calculating these statistics it makes estimates as to how many syllables are present in each word. Using these numbers, it then calculates the *Flesch Reading Ease*, *Fog Scale Level*, and *Flesch-Kincaid Grade Level*, which are three of the most common readability algorithms. Simply supply a sample of your writing and then click "Analyze."

Text Sample:

Number of Sentences:

Words Per Sentence:

Characters Per Word:

Flesch Reading Ease:

[What does this mean?](#)

Fog Scale Level:

[What does this mean?](#)

Flesch-Kincaid Grade Level:

[What does this mean?](#)

[The Flesch Reading Ease Scale:](#)

The Flesch score relies on the number of syllables and sentence lengths to determine the reading ease of the sample. 20 words per sentence with 1.5 syllables per word yields a Flesch score of 60 and is taken to be plain English. A score in the range of 60-70 corresponds to 8th/9th grade English

level. A score between 50 and 60 corresponds to a 10th/12th grade level. Below 30 is college graduate level. To give you a feel for what the different levels are like, most states require scores from 40 to 50 for insurance documents.

The Fog Scale:

The Fog scale is similar to the Flesch scale in that it uses syllable counts and sentence length. The scale uses the percentage of 'Foggy' words, those that contain 3 or more syllables.

A fog score of 5 is readable, 10 is hard, 15 is difficult, and 20 is very difficult.

The Flesch-Kincaid Grade Level :

The Flesch-Kincaid Grade Level heuristic indicates that the average student in the grade level produced by the scale can read the text.

Questions? Read more about the writing sample analyzer on my [FAQ Blog Post](#)



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