

**NEW YORK STATE OFFICE FOR THE AGING**

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David A. Paterson, Governor                      Michael Burgess, Director  
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<b>INFORMATION MEMORANDUM</b>	<b>Number 10-IM-02</b>
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**DATE:** May 13, 2010

**TO:** Area Agency on Aging Directors  
Long Term Care Ombudsman Program – Ombudsmen  
Legal Services Program

**SUBJECT: Guidance on the Family Health Care Decisions Act**

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**PURPOSE:** The purpose of this Information Memorandum is to inform you about a new state law known as the Family Health Care Decisions Act (FHCDA) that will become effective June 1, 2010. The FHCDA permits a patient’s family or close friend to act as his or her surrogate decision-maker with regard to health care when the patient lacks capacity to make such decisions.

**BACKGROUND:** On March 16, 2010 Governor Paterson signed into law the FHCDA to permit a family member or close friend to act as a patient’s surrogate decision-maker with regard to health care when the patient lacks capacity to make such decisions and has neither a health care proxy nor a living will.

Introduction

The Family Health Care Decisions Act (“FHCDA”), Chapter 8 of the Laws of 2010, adds a new Article 29-CC that establishes procedures authorizing family members or other persons close to patients, who lack decision-making capacity with regard to their health care, to decide about treatment, in consultation with health care professionals and in accord with specified safeguards.

Scope

The FHCDA would only apply in situations in which the patient is determined to lack capacity to make health care decisions. The attending physician must make

reasonable efforts to determine whether the patient has executed a health care proxy appointing a health care agent or to determine whether the patient falls within a class of people covered by Mental Hygiene Law §1750-b or other Mental Hygiene Law provisions.

It only applies to periods during which the individual is hospitalized or is residing in a residential health care facility and is unable to make health care decisions. A residential health care facility as defined in the FHCDA is a nursing home or a facility providing health-related services (i.e., a service in a facility which provides or offers lodging, board and physical care including but not limited to the recording of health information, dietary supervision and supervised hygienic services incident to such service). The act would not apply to a resident of an adult care facility (including an enriched housing program or an assisted living program) or a resident of an assisted living residence.

### Determination of Incapacity

Every adult patient of a hospital or resident of a residential health care facility is presumed to have capacity to make health care decisions unless there is a court-appointed guardian authorized to make health care decisions on his or her behalf. The attending physician (that is, a physician who has primary responsibility for treating the patient) following an assessment of the patient may determine that the patient lacks the ability to understand and appreciate the nature and consequences of proposed health care and to reach an informed decision. The assessment includes identification of the cause and extent of the patient's incapacity and the likelihood that the patient will regain decision-making capacity. If the attending believes that the incapacity is caused by a mental illness but the attending is not a board certified psychiatrist or neurologist, a physician who is board certified in one of these specialties must independently determine whether the patient lacks capacity. If the attending believes that the incapacity is caused by mental retardation or a developmental disability the attending would need to consult with a qualified physician or clinical psychologist trained and/or experienced in treating developmental disabilities.

In certain situations a concurring determination concerning the decision-making capacity of a patient or resident will be necessary. In a hospital, a concurring determination is needed only if a surrogate will need to make decisions about withdrawal or withholding of life-sustaining treatment. In a residential health care facility setting, an independent assessment by a qualified practitioner, directly employed by or affiliated with the facility, and concurring determination is always required. A qualified practitioner may be a registered nurse, nurse practitioner, physician, physician assistant, psychologist, or licensed clinical social worker.

The patient is required to be informed of the determination if there is any indication that the patient has the ability to comprehend the information. The attending is responsible for confirming that the patient continues to be unable to understand and appreciate the

nature and consequences of proposed health care and to reach an informed decision before following the surrogate's decision whenever there is a gap in time between the capacity determination and the care or treatment to be provided. If the patient objects to the determination that he or she is incapable of making care or treatment decisions such objection prevails unless a court determines otherwise.

#### Who may make decisions on behalf of an incapacitated patient?

The Act establishes the following order of priority among the classes of persons who may serve as the surrogate: a court appointed guardian; the spouse or domestic partner; an adult son or daughter; a parent; an adult sibling; or a close friend. The surrogate shall be someone who is reasonably available from the class highest in priority. That person may designate someone else who is on the list and is reasonably available unless someone in a class higher in priority than the designated person objects. The Act does not indicate who will be responsible for identifying the person who is authorized to be the patient's surrogate. If there is any indication that the patient has the ability to comprehend the information the patient must be told who has been identified to act as his or her surrogate for treatment decisions.

If the family member or friend who assumes the role of surrogate is a physician, he or she may not also act as the patient's attending physician.

A close friend is defined as "a person who has maintained such regular contact with the patient as to be familiar with the patient's activities, health and religious or moral beliefs and presents a written signed statement to that effect to the attending physician."

For a patient who has been determined to be unable to make health care decisions and does not have a health care agent or anyone who is able to serve as a surrogate decision-maker, the hospital or residential health care facility is required to try to discern the patient's wishes and preferences and record its findings in the patient's medical record. The attending physician may make decisions regarding routine medical treatment however, if the attending concludes that the patient requires major medical treatment, the attending makes a recommendation and may proceed only upon concurrence from another physician who has determined independently that the proposed treatment is appropriate.

#### Surrogate Access to Medical Record Information

The hospital or residential health care facility and the practitioners providing care to the patient have a duty to provide information that the surrogate decision-maker will need in order to make an informed decision. The health care provider is to provide information about the patient's diagnosis, prognosis, an explanation of the proposed health care including the benefits and risks of an alternative to such care.

## Ethics Review Committee – Role and Responsibilities

Each hospital and residential health care facility must either establish at least one ethics review committee or participate in an ethics review committee that serves multiple facilities. The committee is an interdisciplinary committee that serves for the most part in an advisory capacity. The Act (PHL §2994-m(3)) establishes minimum criteria for the composition of the committee and specifies that a residential health care facility must offer the residents' council the opportunity to appoint up to two persons to the ethics review committee serving the facility, however the appointees must have expertise in or a demonstrated commitment to patient or nursing home resident rights or to care and treatment of older persons but may not be either a resident or a family member of a resident.

The committee must give notice that it will be meeting to discuss issues pertaining to a patient's health care to the patient, so long as there is any indication that the patient is able to comprehend the information, the surrogate and others on the surrogate list directly involved in the decision or dispute, the attending physician and anyone else the committee deems appropriate. The notice should explain the committee's procedures, composition and role.

Generally its decisions are nonbinding however in a few instances committee approval is required by statute. The committee considers any health care matter presented to it by the patient, a person on the surrogate list (i.e., he or she need not be the surrogate), the hospital or residential health care facility administrator, an attending physician, a health or social services practitioner directly involved in the patient's care or a duly authorized state agency (e.g., director of a mental hygiene facility). The committee may provide advice on the ethical aspects of the proposed care, make a recommendation about proposed care, or provide assistance in resolving a dispute about proposed care.

There are two categories of situations involving adult patients in which the committee must act to approve or disapprove the proposed health care. The first category involves decisions to withhold or withdraw life-sustaining treatment for a patient residing in a residential health care facility or to withhold or withdraw nutrition or hydration delivered by medical means for a general hospital patient and the attending physician objects. The second category involves decisions made on behalf of an adult for whom there is no surrogate involving major medical treatment when the physician consulted for a concurring opinion or another practitioner involved directly with the case objects to the proposed treatment.

### Health Care Decision by Surrogate Decision-maker

If a patient was able to make decisions during the hospitalization or stay in a residential health care facility and consented verbally to proposed health care in the presence of two witnesses or had given written consent, the attending physician may proceed based upon such consent. The attending is required to note the consent in the patient's medical record. If a surrogate decision-maker had been identified prior to the patient

making such a decision, the attending is required to make reasonable efforts to notify the surrogate prior to implementing the patient's decision.

The Act directs that the surrogate decision-maker base decisions on the patient's wishes or the patient's best interest if his or her wishes are not known and cannot be ascertained with reasonable diligence. The surrogate decision-maker is responsible for assessing the patient's best interests. He or she is to consider the patient's dignity; the possibility and extent of preserving the patient's life; the preservation, improvement or restoration of the patient's health or functioning; the relief of suffering; and any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider. In essence, the surrogate decision-maker is to apply the patient's values, including religious and moral beliefs, to the extent reasonably possible. The Act does not impose a set of values. The Act emphasizes applying the patient's values.

### Health Care Decision for an Adult without Surrogates

The Act establishes procedures that hospitals and residential health care facilities must follow with regard to any patient who lacks capacity to make health care decisions for whom there is no possible surrogate. The decision may never be based on the financial interests of the facility or health care provider.

If the decision involves routine medical treatment only, the attending physician may proceed with the treatment. This includes short-term use of ventilator support or a nasogastric tube when recovery is expected to be within one month or less. Hospitals and residential health care facilities will have to create a process to designate physicians to independently review and make a determination about major medical treatment proposed by a patient's attending physician. If the consulting physician objects to the attending physician's proposed course of treatment or if another member of the facility's staff, also directly responsible for the patient's care, objects, the matter must be sent to the facility's ethics review committee.

### Decisions about Life-Sustaining Treatment

The new law (Public Health Law §2994-d(5) and §2994-g(5)) addresses decisions to withhold or withdraw life-sustaining treatment made by a surrogate or, if there is no one from one of the priority classes who is available, willing and competent, by a court or the hospital. The Act defines the term life-sustaining treatment as "any medical treatment or procedure without which the patient will die within a relatively short time, as determined by an attending physician to a reasonable degree of medical certainty." Cardiopulmonary resuscitation ("CPR") is presumed to be life-sustaining treatment.

The surrogate or court only may make decisions about life-sustaining treatment if two physicians determine independently that either (1) the patient's illness or injury is likely to cause death within six months regardless of whether or not treatment is provided or the patient is permanently unconscious; or (2) that provision of treatment would be

inhumane or extraordinarily burdensome and the patient has an irreversible or incurable condition. If these conditions are met, a surrogate or a court must base the decision upon the patient's wishes or, if such wishes are not ascertainable, upon the patient's best interests.

For a resident of a residential health care facility, either the ethics review committee or a court must review the surrogate's decision and agree that the standards have been met. No such review is required for decisions to withhold CPR. If the decision concerns the withdrawal or withholding of nutrition or hydration provided by medical means, and the attending physician disagrees with the surrogate's decision to withdraw or withhold nutrition or hydration, the ethics review committee or a court must agree that the surrogate's decision meets the statutory standards.

### Conscience Objections

The Act recognizes the possibility that certain decisions regarding treatment may be contrary to either a facility or practitioner's sincerely held religious beliefs or moral convictions. A facility is required to inform the patient, family or surrogate at the time of admission, if possible, of the facility's policy. The Act allows for the prompt transfer of a patient to another facility or to another practitioner able to honor the decision. If no transfer is possible the facility may seek judicial relief. An individual practitioner unable to honor a health care decision made pursuant to this Act because it is contrary to his or her sincerely held religious beliefs or sincerely held moral conviction must promptly inform the person who made the decision and the facility of his or her refusal to honor the decision. The facility is responsible for the prompt transfer of the patient to another practitioner willing to honor the decision.

### Patient Rights to Challenge Actions Taken Pursuant to FHCDA

The patient's decisions prevail unless a court of competent jurisdiction has determined that he or she lacks decision-making capacity or the patient has been adjudged incompetent for all purposes and, in the case of a patient's objection to treatment, the court makes any other finding required by law to authorize the treatment.

#### **PROGRAMS AFFECTED:**

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| <input type="checkbox"/> Title III-B | <input type="checkbox"/> Title III-C-1 | <input type="checkbox"/> Title III-C-2 |
| <input type="checkbox"/> Title III-D | <input type="checkbox"/> Title III-E   | <input type="checkbox"/> CSE           |
| <input type="checkbox"/> SNAP        | <input type="checkbox"/> Energy        |  |
| <input type="checkbox"/> EISEP       | <input type="checkbox"/> NSIP          | <input type="checkbox"/> Title V       |
| <input type="checkbox"/> HIICAP      | <input type="checkbox"/> LTCOP         |  |
| <input type="checkbox"/> Other:      |  |  |

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