



STATE OF NEW YORK DEPARTMENT OF HEALTH

161 Delaware Avenue Delmar, New York 12054

Richard F. Daines, M.D.
Commissioner

James W. Clyne, Jr.
Executive Deputy Commissioner

May 28, 2010

DAL: DRS-NH 10-04
SUBJECT: Family Health Care Decisions Act

Dear Administrator:

A new State law will provide legal authority for surrogate consent to any type of health care decision for residents who cannot make their own decisions and have not signed health care proxies. The Family Health Care Decisions Act (FHCDA) was signed into law by Governor Paterson on March 16, 2010. Nursing homes are required to follow the new law by June 1, 2010.

The FHCDA continues the legal presumption that all residents can make their own decisions and desire life-sustaining treatment. It leaves in place existing laws that allow for the appointment of legal guardians as well as the health care proxy law, which allows a resident to appoint a health care agent to make health care decisions in the event the resident loses the capacity to do so. In cases where residents cannot make their own decisions and do not have a legal guardian or health care proxy, there was a need to have a law specifying who has legal authority to make health care decisions. FHCDA contains such a surrogate list.

Under the surrogate list, the spouse (if not legally separated from the resident) or the domestic partner makes health care decisions. If there is no spouse or domestic partner, an adult child can make health care decisions. Next on the list is a parent, then an adult sibling, and finally a close friend. The terms "domestic partner" and "close friend" are defined in the law.

Surrogates can make any type of health care decision, including a decision to withhold or withdraw life-sustaining treatment. Decisions must always be made based on the resident's wishes, or based on the resident's best interests if the resident's wishes are not known. The law specifies the clinical criteria under which decisions to withhold or withdraw life sustaining treatment may be made.

The law clarifies how the legal guardian of a minor resident can consent to withholding or withdrawing life-sustaining treatment for a minor, and also allows emancipated minors to make such decisions for themselves.

In the event that no one on the surrogate list is available, FHCDA allows authorized physicians at the facility to make any type of health care decision without going to court. The required procedures vary depending upon whether the treatment is routine medical treatment, major medical treatment, or a decision to withhold or withdraw life-sustaining treatment.

FHCDA changes existing law regarding Do Not Resuscitate (DNR) orders. A DNR order is an order not to attempt cardiopulmonary resuscitation (CPR) in the event a resident suffers cardiac or respiratory arrest. Previously, there was a special law for DNR orders, but now DNR orders in nursing homes will be issued under the provisions of FHCDA that apply to any decision to withhold or withdraw life-sustaining treatment.

Disagreements about surrogate decision-making can be referred to an Ethics Review Committee (ERC). The recommendations of the ERC are usually advisory and nonbinding. One exception is that a determination by the ERC is binding when the ERC does not agree with a decision to withhold or withdraw life-sustaining treatment for a resident who is not permanently unconscious or expected to die within six months. This exception does not apply to decisions regarding the initiation of CPR.

Nursing homes are required to complete the following activities by **June 1, 2010** to be compliant with the FHCDA:

- Develop general policies and procedures to comply with the provisions of the FHCDA, including policies for the following:
 - Identify training and credentials of health or social services practitioners who are qualified to make concurring determinations regarding decision-making capacity;
 - Implement and provide ongoing review of decisions to withhold or withdraw life-sustaining treatment in accordance with accepted medical standards;
 - Develop procedures for handling health care decisions when the decision is contrary to a formally adopted policy of the facility that is expressly based on sincerely held religious beliefs or moral convictions central to the facility's operating principles;
 - Provide for the governance of ERC functions, composition and procedure; and
 - Develop any other policies necessary to comply with the FHCDA.
- Establish or affiliate with an ERC. The ERC must include a minimum of five (5) members: at least three (3) must be health or social services practitioners, including one (1) registered nurse and one (1) physician. At least one (1) member must be a person without any governance, employment or contractual relationship with the nursing home. Additionally, the residents' council (or the residents' council of another nursing home that participates in the ERC) must be given the opportunity to appoint two (2) members to the ERC. These individuals **may not** be either a resident of the facility or a resident's family member.

- Make available to all residents and interested parties (within a reasonable time) the Department's publication summarizing provisions of the FHCDA, including information applicable to DNR orders. This publication will be available on the Department's website by June 1, 2010.
- Communicate the requirements of the FHCDA to the Medical Director and all attending physicians. Such communication should be clear that there is no longer any "therapeutic exception" to the rule that resident consent is required for a DNR order for adult residents with capacity.

All staff should familiarize themselves with the requirements of the FHCDA, which is Article 29-CC of the Public Health Law. The New York State Department of Health brochure entitled, "Your Rights As A Nursing Home Resident In New York State and Nursing Home Responsibilities," has been revised to reflect the provisions of this new law. This brochure can be found on the Department's public website.

Sincerely,



Jacqueline Pappalardi
Director
Division of Residential Services

cc: M. Kissinger
C. Williams
V. Deetz