



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

James W. Clyne, Jr.
Executive Deputy Commissioner

June 1, 2010

Dear Chief Executive Officer:

A new State law provides legal authority for surrogate consent to any type of health care decision for patients 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. Hospitals are required to follow the new law by June 1, 2010.

FHCDA continues the legal presumption that all patients can make their own decisions and desire life-sustaining treatment. It leaves in place current laws that allow for the appointment of legal guardians as well as the health care proxy law, which allows a patient to appoint a health care agent to make health care decisions in the event the patient loses the capacity to do so. In cases where patients 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 patient) or the domestic partner makes 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 patient’s wishes, or based on the patient’s best interests if the patient’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 patient 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 physicians at facilities to make any type of health care decision without going to court. The required procedures and clinical criteria 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 patient suffers cardiac or respiratory arrest. In the past, there was a special law for DNR orders, but now DNR orders in hospitals 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 your hospital's Ethics Review Committee (ERC). The recommendations of the ERC are advisory and nonbinding in hospitals, with two exceptions. A determination by the ERC is binding when the attending physician objects to a decision to withhold or withdraw nutrition and hydration provided by means of medical treatment for a patient who is neither expected to die within six months nor permanently unconscious, and the ERC determines that the decision does not meet the standards set forth in FHCDA. Also, the ERC must approve the decision of an unmarried, emancipated minor to withhold or withdraw life-sustaining treatment without the consent of a parent or guardian.

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

- Develop general policies and procedures to comply with the provisions of FHCDA, including policies regarding: which practitioners are qualified to make capacity determinations; decisions to withhold or withdraw life-sustaining treatment; review of decisions to withhold or withdraw life-sustaining treatment; documentation of clinical determinations; consent by surrogates; and decisions for patients without capacity for whom no surrogate is available. The Health Care Association of New York State and the Greater New York Hospital Association are partnering to create sample policies and forms that may guide hospitals when updating policies to be consistent with FHCDA.
- For determinations made under FHCDA, an 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 hospital. The hospital's ERC policy must specify ERC functions, composition and procedure for responding to matters presented to it under FHCDA.
- Make available to patients the Department's publication summarizing provision of the FDHA, including information applicable to DNR orders. This publication has been incorporated into the Department's "Your Rights as a Hospital Patient" brochure and the updated version is posted at the following link:
<http://www.health.state.ny.us/publications/1449.pdf>.
- Communicate the requirements of 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 patient consent is required for a DNR order for adult patients with capacity.
- Private hospitals that have a formally adopted policy expressly based on sincerely held religious beliefs or sincerely held moral convictions central to the hospital's operating principles must inform the patient or other decision maker of such policy prior to or upon admission if the policy would prevent the hospital from honoring a health care decision under FHCDA and if it is reasonably possible to do so.

In addition, please note that the Department has updated the Medical Orders for Life Sustaining Treatment (MOLST) form to align it with the FHCDA. The new form is available on the Department's website at: http://www.health.state.ny.us/professionals/patients/patient_rights/molst/ The Department will be making available additional information about MOLST to assist providers in completing and using the forms.

All staff should familiarize themselves with the requirements of FHCDA, which is Article 29-CC of the Public Health Law. Please do not hesitate to contact Ruth Leslie, Deputy Director of the Division of Certification and Surveillance, at (518) 402-1004 if you have any questions regarding the new law.

Sincerely,

A handwritten signature in cursive script that reads "Mary Ellen Hennessy". The signature is written in black ink and is positioned centrally below the word "Sincerely,".

Mary Ellen Hennessy
Director
Division of Certification and Surveillance