

Advance Directives

Effective date: 3/26/14

Pursuant to the authority vested in the Public Health and Health Planning Council and subject to approval by the Commissioner of Health by Sections 2803, 2993 and 2994-t of the Public Health Law, sections 405.43 and 700.5 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulations of the State of New York are hereby repealed, and section 400.21 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulations of the State of New York is hereby amended effective upon the publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 405.43 is repealed.

Section 700.5 is repealed.

Section 400.21 is amended to read as follows:

§ 400.21 Advance directives

(a) Statement of purpose. [Recent advances in medical technology have brought forth a multitude of choices about medical treatment. Advances in emergency medical services have expanded the capacity of the health care system to save the lives of victims who previously would not have survived acute trauma. New drugs and new surgical techniques may prolong life, but may not necessarily halt the spread of progressive or degenerative illness. Life support systems can maintain unconscious patients for months or even years. Decisions about medical treatment based on the availability of this burgeoning medical technology are deeply personal.

They reflect basic values, personality traits and religious attitudes. An adult's capacity to tolerate pain, disfigurement or dependency must be considered.] The New York State Health Care Proxy Law allows an adult to designate another adult, such as a trusted friend or loved one who knows the person and his/her wishes, to make [these] treatment decisions if the adult becomes incapacitated and is unable to do so. The Health Care Proxy Law guarantees an adult's right to self-determination and the expression of this right through another adult. Advance directives [like the Health Care Proxy] also allow an adult to express his or her preference regarding health care treatment, including a desire to continue or to refuse treatment and life supports. In the absence of a health care proxy, [adults who express their wishes orally or in writing concerning life-sustaining treatment in a clear and convincing manner are entitled, based on decisions of both the United States Supreme Court and the New York State Court of Appeals, to have those wishes recognized] the Family Health Care Decisions Act allows a surrogate (a family member or close friend) to make treatment decisions on behalf of a patient, in accordance with the patient's wishes, if known, or if the patient's wishes are not known, in accordance with the patient's best interests. Facilities must ensure that all adult patients/residents are informed of their rights and are supported and protected as they exercise their right to formulate written or oral instructions regarding their health care in the event such adults become incapacitated and are unable to direct their own health care.

(b) Definitions. The following words or phrases shall have the following meanings:

(1) An advance directive means a type of written or oral instruction relating to the provision of

health care when an adult becomes incapacitated, including but not limited to a health care proxy, a consent [pursuant to Article 29-B of the Public Health Law] to the issuance of an order not to resuscitate or other medical orders for life-sustaining treatment (MOLST) recorded in a patient's/resident's medical record, and a living will.

(2) A health care proxy means a document created pursuant to Article 29-C of the Public Health Law which delegates the authority to another adult known as a health care agent to make health care decisions on behalf of the adult when that adult is incapacitated.

(3) A living will means a document which contains specific instructions concerning an adult's wishes about the type of health care choices and treatments that an adult does or does not want to receive[, but which does not designate an agent to make health care decisions].

(4) A health care agent or agent means an adult to whom authority to make health care decisions is delegated under a health care proxy.

(5) An adult means any person who is 18 years of age or older, or is the parent of a child, or has married.

(6) Medical orders for life-sustaining treatment (MOLST) means medical orders to provide, withhold or withdraw life-sustaining treatment. The MOLST form is an alternative form authorized by the Commissioner under subdivision six of section twenty-nine hundred ninety-four-dd of the public health law. The MOLST form and guidance and checklists for using the

MOLST form for any patient in any setting are posted on the department's website.

(c) Facility compliance. The facility shall ensure compliance with the requirements of law governing advance directives, including but not limited to Articles [29-B and] 29-C, 29-CC and 29-CCC of the Public Health Law.

(d) Policies and procedures. The facility shall be responsible for developing, implementing and maintaining written policies and procedures addressing advance directives and shall:

(1) [furnish] make the following material available to each adult patient/resident, or if the adult patient/resident lacks capacity, to the family member or other adult who speaks on the patient's/resident's behalf at or prior to the time of admission to the facility as an inpatient or an outpatient and to each member of the facility's staff who provides patient/resident care. A facility need not provide these items more than once to an outpatient receiving services on a recurring basis:

(i) the description of State law prepared by the department entitled ["Planning in Advance for your Medical Treatment,"] "Deciding About Health Care: A Guide for Patients and Families," which summarizes the rights, duties and requirements of Articles [29-B and] 29-C, 29-CC and 29-CCC [and the right of an adult to formulate advance directives as expressed in final decisions of courts of competent jurisdiction]; and

(ii) the pamphlet prepared by the department entitled "Health Care Proxy: Appointing your Health Care Agent [-]in New York State[']s Proxy Law," containing a sample health care proxy form[; and

(iii) a summary of the facility's policy regarding the implementation of these rights];

(2) ensure that there is documentation in each adult's medical record indicating whether or not the adult has executed a health care proxy under Article 29-C of the Public Health Law, or whether the adult has provided written or oral advance instructions about treatment to facility staff responsible for the patient's care or to facility employees upon admission;

(3) assess advance directives other than those described in Articles [29-B and] 29-C, 29-CC and 29-CCC of the Public Health Law. Nothing herein shall be construed to require that a facility must or may not seek a court determination that any individual advance directive has been expressed in a clear and convincing manner;

(4) provide in-service education to staff involved in the provision of care including medical staff concerning the facility's policies and procedures concerned with advance directives;

(5) provide (individually or with others) education to the community on issues concerning advance directives;

(6) ensure that an adult is not discriminated against in the provision of care or otherwise discriminated against based on whether or not the adult has executed an advance directive; and

(7) in addition, a nursing home shall:

(i) educate adult residents about the authority delegated under a health care proxy, what a proxy may include or omit, and how a proxy is created, revoked, or changed as requested by the resident;

(ii) ensure that each resident who creates a proxy while residing at the facility does so voluntarily; and

(iii) designate one or more individuals to educate the residents, respond to questions and assist residents in creating, revoking or changing a proxy.

(e) Medical orders for life-sustaining treatment (MOLST). To implement a patient's wishes regarding cardiopulmonary resuscitation (CPR) and other life-sustaining treatment, facilities may, if appropriate, utilize the department approved MOLST form for patients with serious health conditions who:

(1) want to avoid or receive any or all life-sustaining treatment; or

(2) can reasonably be expected to die within one year.

(f) Rights to be publicized. The facility shall post in a public place in the facility the rights, duties and requirements of this section. Such statement may be included in any other statement of patient's/resident's rights required to be posted.

REGULATORY IMPACT STATEMENT

Statutory Authority:

The authority for the promulgation of this regulation is contained in Public Health Law (PHL) Sections 2803, 2993 and 2994-t. PHL Section 2803 authorizes the Public Health and Health Planning Council (PHHPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of Article 28 of the Public Health Law, and to establish minimum standards governing the operation of health care facilities. PHL Sections 2993 and 2994-t authorize the Commissioner in consultation with the Commissioners of the Offices of Mental Health (OMH) and People With Developmental Disabilities (OPWDD) to establish such regulations as may be necessary for the implementation of Article 29-C (Health Care Agents and Proxies) and Article 29-CC (Family Health Care Decisions Act) respectively.

Legislative Objectives:

The legislative intent of PHL Article 28 is to provide for the protection and promotion of the health of the inhabitants of the State of New York by delivering high quality hospital and related services in a safe and efficient manner at a reasonable cost. The intent of PHL Article 29-C is to establish a decision making process to allow competent adults to appoint an agent to decide about health care treatment in the event they lose decision-making capacity. PHL Article 29-CC establishes a decision-making process applicable to decisions in general hospitals and nursing homes whereby a surrogate is selected and empowered to make health care decisions for patients who lack capacity to make their own health care decisions and who have not otherwise appointed an agent to make health care decisions pursuant to Article 29-C or provided clear and convincing

evidence of their treatment wishes.

Needs and Benefits:

While the Health Care Proxy Law in PHL Article 29-C outlines health care agent and proxy provisions to allow someone to designate another adult to make treatment decisions if he/she becomes incapacitated and is unable to do so, the Family Health Care Decisions Act in Article 29-CC would fill the gap by establishing a decision making process where a surrogate is selected and empowered to make such decisions for incapacitated individuals who have not otherwise appointed an agent pursuant to the Health Care Proxy Law, or provided clear and convincing evidence of their treatment wishes. This amendment will conform the regulations to the Public Health Law as amended by Chapter 8 of the Laws of 2010, which added the Family Health Care Decisions Act (FHCDA – Article 29-CC), made Article 29-B no longer applicable to PHL Article 28 facilities and added a new PHL Article 29-CCC, which provides authority for Medical Orders for Life-Sustaining Treatment (MOLST).

Costs:

This proposal will not increase costs to the Department or to the facilities required to comply. These amendments merely update the regulation to reflect current practice and to conform to statutory changes.

Local Government Mandates:

This regulation does not impose any new programs, services, duties, or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

Facilities must be responsible for developing, implementing and maintaining written policies and procedures addressing advance directives and furnish to each adult patient/resident or family member or other adult who speaks on the patient's behalf if the patient/resident lacks capacity: (1) the description of the State law "Deciding About Health Care: A Guide for Patients and Families," and (2) the pamphlet prepared by the Department entitled "Health Care Proxy: Appointing your Health Care Agent in New York State." Facilities must also ensure that there is documentation in each adult's medical record indicating whether or not the adult has executed a health care proxy under PHL Article 29-C, or whether the adult has provided written or oral advance instructions about treatment to facility staff responsible for the patient's care or to facility employees upon admission. Facilities may utilize the Department approved form for Medical Orders for Life-Sustaining Treatment (MOLST) to implement a patient's wishes regarding cardiopulmonary resuscitation (CPR) and other life sustaining treatment. Facilities must provide information about MOLST to patients with serious health conditions who: (1) want to avoid or receive any or all life-sustaining treatment, or (2) can reasonably be expected to die within one year.

Duplication:

This regulation does not duplicate any other state or federal law or regulation.

Alternatives:

The current regulation is out of date. This proposal updates the regulation to reflect current practice and statutory changes.

Federal Standards:

This regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

The proposed rule will become effective upon publication of a Notice of Adoption in the State Register.

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REGULATORY FLEXIBILITY ANALYSIS
FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS

Pursuant to section 202-b of the State Administrative Procedure Act, a regulatory flexibility analysis is not required. The proposed rule will not impose an adverse economic impact on any of the facilities and will not impose a negative impact on local governments. These provisions will not impose any additional recordkeeping, reporting and other compliance requirements on any party since the proposal simply updates already existing advance directive requirements.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a “cure period” or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one was not included. This regulation creates no new penalty or sanction. Hence, a cure period is not necessary.

RURAL AREA FLEXIBILITY ANALYSIS

Pursuant to section 202-bb of the State Administrative Procedure Act, a rural area flexibility analysis is not required. This measure implements provisions set forth in the Family Health Care Decisions Act (FHCDA) that establishes a decision making process, applicable to decisions in general hospitals and nursing homes, whereby a surrogate is selected and empowered to make health care decisions for patients who lack capacity to make their own health care decisions or provided clear and convincing evidence of their wishes.

The proposed rule will not impose an adverse economic impact on hospitals and diagnostic treatment centers located in rural areas in New York State and will not impose any additional recordkeeping, reporting and other compliance requirements since the proposal simply updates already existing advance directive requirements.

JOB IMPACT STATEMENT

A Job Impact Statement is not included because it is apparent from the nature and purpose of these amendments that they will not have a substantial adverse impact on jobs and employment opportunities. This proposal merely updates the advance directive provisions in section 400.21 of 10 NYCRR to reflect current practice and statutory changes.