CHAPTER 8

ADVANCE DIRECTIVES TO MAKE HEALTH CARE DECISIONS, DO NOT RESUSCITATE ORDERS (DNR ORDERS), AND DECLARATION OF DEATH

Authority

N.J.S.A. 30:1–12, 26:2H–53 et seq., 26:6A–1 et seq., and 42 U.S.C. 1395 cc.

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SUBCHAPTER 1. GENERAL PROVISIONS

10:8–1.1 Purpose

This chapter establishes and describes the Department of Human Services policies and procedures regarding patients' use of advance directives to make health care decisions, do not resuscitate (DNR) orders, and declaration of death.

10:8–1.2 Scope

The scope of this chapter applies throughout the Department of Human Services to all developmental centers within the Division of Developmental Disabilities and psychiatric hospitals within the Division of Mental Health and Hospitals.

10:8–1.3 Definitions

The following words and terms, when used in this chapter and in Department policies and procedures, have the following meanings:

"Advance directive" means a written document executed in accordance with the requirements of the New Jersey Advance Directives for Health Care Act (N.J.S.A. 26:2H–53 et seq.). It is a written instruction stating the declarant's specific wishes regarding the provision, withholding or withdrawal of any form of health care, including life-sustaining treatment. It may include either a proxy directive designating a health care representative or surrogate in the event the declarant subsequently lacks decision making capacity, or an instruction directive providing instructions and directions regarding the declarant's wishes for health care in the event the declarant subsequently lacks decision making capacity, or both.

"Declarant" means a competent adult of 18 years of age or older who executes an advance directive.

"Decision making capacity" means a patient's ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of each, and alternatives to any proposed health care, and to reach an informed decision. A patient's decision making capacity is evaluated relative to the demands of a particular health care decision.

"Division(s)" means the Division of Developmental Disabilities and the Division of Mental Health and Hospitals.

"Do not resuscitate order (DNR order)" means a physician's written order not to attempt cardiopulmonary resuscitation in the event the patient suffers a cardiac or respiratory arrest.

"Emergency care" means immediate treatment provided in a response to a sudden, acute and unanticipated medical crisis in order to avoid injury, impairment or death.

"Ethics Committee" means a multi-disciplinary standing committee of the facility which meets to review determinations to withhold or withdraw a patient's life-sustaining treatment as needed.

"Facility" means a Division of Developmental Disabilities Developmental Center and a Division of Mental Health and Hospitals Psychiatric Hospital.

"Health care decision" means a decision to accept or to refuse any treatment, service or procedure used to diagnose, treat or care for a patient's physical or mental condition, including life-sustaining treatment. Health care decision also means a decision to accept or to refuse the services of a particular physician, other health care professional or health

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care institution, including a decision to accept or to refuse a transfer of care.

"Health care representative" means the individual designated by a declarant pursuant to the proxy directive*[s]* part of an advance directive for the purpose of making health care decisions on the declarant's behalf, and includes an individual designated as an alternate health care representative who is acting as the declarant's health care representative in accordance with the terms and order of priority stated in an advance directive.

"Life-sustaining treatment" means the use of any medical device or procedure, artificially provided fluids and nutrition, drugs, surgery or therapy that uses mechanical or other artificial means to sustain, restore or supplant a vital bodily function, and thereby increase the expected life span of a patient.

"Permanently unconscious" means a medical condition that has been diagnosed in accordance with currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment. The term includes, without limitation, a persistent vegetative state or irreversible coma.

"Terminal condition" means the terminal stage of an irreversibly fatal illness, disease or condition. A determination of a specific life expectancy is not required as a precondition for a diagnosis of a "terminal condition," but a prognosis of a life expectancy of six months or less, with or without the provision of life-sustaining treatment, based upon reasonable medical certainty, shall be deemed to constitute a terminal condition.

SUBCHAPTER 2. POLICIES AND PROCEDURES

10:8–2.1 Advance directives to make health care decisions

(a) The Divisions shall have written policies and procedures in accord with the New Jersey Advance Directives For Health Care Act (N.J.S.A. 26:2H–53 et seq.) and the Administrative Procedure Act (N.J.S.A. 52:14B–1 et seq.) which shall supplement and implement the provisions of this chapter and the applicable laws.

(b) Upon admission to the facility and thereafter, as appropriate under the circumstances, such as after an emergency admission, the attending physician shall make an affirmative inquiry of each patient concerning the existence of an advance directive. If the patient is incapable to respond to this inquiry, request shall be made for the information from the patient's family or in the absence of family, another individual with the personal knowledge of the patient, if available and known to the facility. Inquiry shall be made of present patients, or their family or others, as appropriate.

(c) The attending physician shall note in the patient's medical records whether or not an advance directive exists, and the name of the patient's health care representative, if any, and shall attach a copy of the advance directive to the patient's medical records. The attending physician or other health care professional, as applicable, shall document in the same manner the reaffirmation, modification, or revocation of an advance directive, if he has knowledge of such action.

(d) The written statement of New Jersey State law approved by the Commissioner of the Department of Health (Appendix I) regarding patients' rights to make decisions concerning the right to accept, refuse, or choose from alternatives of medical and/or surgical treatment and the right to formulate an advance directive, shall be provided to present patients and to each patient upon admission, or where the patient is unable to respond, to family or other representative. The written statement shall be made available in any language in which it is translated and made available by the Department of Health and a translator or reader shall be provided as needed.

(e) The Divisions/facilities shall ensure that appropriate informational materials concerning advance directives are provided to all interested patients and their families and health care representatives, and that assistance is provided to all patients interested in discussing and executing an advance directive.

(f) The facilities shall have an ethics committee consistent with this chapter, the New Jersey Advance Directives for Health Care Act (N.J.S.A. 26:2H–53 et seq.) and the Administrative Procedure Act (N.J.S.A. 52:14B–1 et seq.). The facilities shall ensure participation on the ethics committee by individuals with medical, nursing, legal, social work, and clergy backgrounds. The ethics committee shall provide a forum for patients, families, and staff to discuss and reach decisions on determinations to withhold or withdraw a patient's life-sustaining treatment.

(g) In the event of disagreement among the patient, health care representative, a health care professional involved in the patient's care, or the attending physician concerning the patient's decision making capacity or the appropriate interpretation and application of the terms of an advance directive to the patient's course of treatment, the parties may seek to resolve the disagreement by means of consultation with the ethics committee. If necessary, the parties may then seek resolution by a court of competent jurisdiction.

(h) The Divisions/facilities shall ensure the timely transfer of the patient's medical records, including a copy of the patient's advance directive, if any, in situations in which a transfer of care is necessary.

(i) The Divisions/facilities shall provide education to staff, patients, and their families and health care representatives about the advisability, benefits, and burdens of rehabilitative treatment, therapy and services, including, but not limited to, family and social services, self-help and advocacy services, employment and community living, and use of assistive devices as appropriate to assist in the health care decision making process.

(j) The Divisions/facilities shall not condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive.

(k) An advance directive does not imply that any other care or treatment may be withheld or withdrawn, and in all cases measures shall be taken to provide the patient with maximum comfort and freedom from pain consistent with an advance directive.

10:8–2.2 Do not resuscitate orders (DNR orders)

(a) Do not resuscitate orders (DNR orders) may be issued by the attending physician consistent with the terms of an advance directive, or as otherwise directed by a competent patient or the legal guardian on behalf of an incompetent patient.

(b) Do not resuscitate orders shall be regularly and frequently re-evaluated, at least every 14 calendar days, by the attending physician who shall enter the order and such periodic re-evaluations in the patient's medical record in the form of signed and dated written documentation.

(c) The Divisions/facilities shall not condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has a do not resuscitate order.

(d) A do not resuscitate order does not imply that any other care or treatment may be withheld or withdrawn, and, in all cases, measures shall be taken to provide the patient with maximum comfort and freedom from pain.

10:8–2.3 Declaration of death

(a) The Divisions/facilities shall ensure that the declaration of death of patients, in instances where applicable, is in accordance with the New Jersey Declaration of Death Act (N.J.S.A. 26:6A–1 et seq.) and the rules promulgated by the New Jersey Board of Medical Examiners (N.J.A.C. 13:35–6A) which address declaration of death based on neurological criteria (brain death).

(b) The Divisions/facilities shall provide, at a minimum, for the following, in the case of declarations of death based upon neurological criteria, in accord with N.J.A.C. 13:35–6A:

1. The attending physician at a facility and a corroborating physician may certify that an individual is brain dead.

2. The corroborating physician shall be a neurologist or a neurosurgeon.

3. The attending physician and corroborating physician shall both document in the patient record the results of all tests required by N.J.A.C. 13:35–6A.5.

4. A patient may be pronounced brain dead, if it is determined by the attending physician and confirmed independently by the corroborating physician, after an appropriate period of time, that brain death has occurred.

5. If the patient declared brain dead is, or may be, an organ donor, then neither the attending physician nor the corroborating physician shall have any responsibility for, or interest in, any contemplated recovery or transplant of that patient's organs.

6. Death shall not be declared on the basis of neurological criteria, if either the attending physician or corroborating physician has any reason to believe, based on available medical records or from information provided by the patient's family, that such a declaration would violate the patient's religious beliefs.

7. The attending physician and the corroborating physician shall both certify the patient's death in the patient's medical record, and the attending physician shall certify death on the death certificate.

8. Subject to (b)6 above, the brain dead patient may be removed from any life-sustaining treatment.

APPENDIX I

New Jersey Department of Health

YOUR RIGHT TO MAKE HEALTH CARE DECISIONS IN NEW JERSEY

This document explains your rights to make decisions about your own health care under New Jersey law. It also tells you how to plan ahead for your health care if you become unable to decide for yourself because of an illness or accident. It contains a general statement of your rights and some common questions and answers.

Your Basic Rights

You have the right to receive an understandable explanation from your doctor of your complete medical condition, expected results, benefits and risks of the treatment recommended by your doctor, and reasonable medical alternatives. You have the right to accept or refuse any procedure or treatment used to diagnose or treat your physical or mental condition, including life-sustaining treatment.

You also have the right to control decisions about your health care in the event you become unable to make your

own decisions in the future by completing an advance directive.

What happens if I'm unable to decide about my health care?

If you become unable to make treatment decisions, due to illness or an accident, those caring for you will need to know about your values and wishes in making decisions on your behalf. That's why it's important to write an advance directive.

What is an advance directive?

An advance directive is a document that allows you to direct who will make health care decisions for you and to state your wishes for medical treatment if you become unable to decide for yourself in the future. Your advance directive may be used to accept or refuse any procedure or treatment, including life-sustaining treatment.

What types of advance directives can I use?

There are three kinds of advance directives that you can use to say what you want and who you want your doctors to listen to:

A **PROXY DIRECTIVE** (also called a "durable power of attorney for health care") lets you name a "health care representative", such as a family member or friend, to make health care decisions on your behalf.

An **INSTRUCTION DIRECTIVE** (also called a "living will") lets you state what kinds of medical treatments you would accept or reject in certain situations.

A **COMBINED DIRECTIVE** lets you do both. It lets you name a health care representative and tells that person your treatment wishes.

Who can fill out these forms?

You can fill out an advance directive in New Jersey if you are 18 years or older and you are able to make your own decisions. You do not need a lawyer to fill it out.

Who should I talk to about advance directives?

You should talk to your doctor, family members, close friends, or others you trust to help you. Your doctor or a member of our staff can give you more information about how to fill out an advance directive.

What should I do with my advance directive?

You should talk to your doctor about it and give a copy to him or her. You should also give a copy to your health care representative, family member(s), or others close to you. Bring a copy with you when you must receive care from a hospital, nursing home, or other health care agency. Your advance directive becomes part of your medical records.

What if I don't have an advance directive?

If you become unable to make treatment decisions and you do not have an advance directive, your close family members will talk to your doctor and in most cases, may then make decisions on your behalf. However, if your family members, doctor, or other caregivers disagree about your medical care, it may be necessary for a court to appoint someone as your legal guardian. (This also may be needed if you do not have a family member to make decisions on your behalf.) If you are age 60 or older, and you become unable to decide for yourself, it may also be necessary that the Ombudsman for the Institutionalized Elderly review a decision to forego life-sustaining treatment. That's why it's important to put your wishes in writing to make it clear who should decide for you and to help your family and doctor know what you want.

Will my advance directive be followed?

Yes. Everyone responsible for your care must respect your wishes that you have stated in your advance directive. However, if your doctor, nurse, or other professional has a sincere objection to respecting your wishes to refuse life-sustaining treatment, he or she may have your care transferred to another professional who will carry them out.

What if I change my mind?

You can change or revoke any of these documents at a later time.

Will I still be treated if I don't fill out an advance directive?

Yes. You don't have to fill out any forms if you don't want to and you will still get medical treatment. Your insurance company also cannot deny coverage based on whether or not you have an advance directive.

What other information and resources are available to me?

Your doctor or a member of our staff can provide you with more information about our policies on advance directives. You also may ask for written informational materials and help. If there is a question or disagreement about your health care wishes, we have an ethics committee or other individuals who can help.

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