

COMPLIANCE ALERT

Overview of the Family Health Care Decisions Act:

The New York State Legislature announced passage of the Family Health Care Decisions Act (FHCDA) on February 25, 2010. The FHCDA amends public health law to allow family members to make health care decisions, including decisions about the withholding or withdrawal of life-sustaining treatment, on behalf of patients who lose their ability to make such decisions and have not prepared advance directives regarding their wishes.

The Act establishes a protocol by which health care practitioners can determine whether a patient in a general hospital or nursing home has decision-making capacity and, for patients without such capacity, requires the selection of a surrogate from a list of individuals ranked in order of priority, including family members, domestic partners and close friends. The FHCDA contains various safeguards to prevent inappropriate decisions, including procedures for a patient, family member or physician to assert objections to the selection of a particular person as a surrogate or to a decision made by a surrogate.

The addition of this priority listing will impact the rights of family members, but more significantly domestic partners and close friends, to make decisions where they have not previously been able to do so for lack of clear and convincing evidence to show that they are acting as the individual would have if competent. An advance directive, such as a living will or a health care proxy, can serve as clear and convincing evidence of a patient's wishes, but many people do not prepare such directives while they are competent to do so.

The FHCDA does not apply to individuals without decision-making capacity who have developmental disabilities or who reside in mental health facilities, if health care decisions for these individuals can be made under other laws or regulations, such as the Health Care Decisions Act for persons with developmental disabilities.

The second part of the FHCDA addresses Non-Hospital Orders Not to Resuscitate. This section (Article 29-CCC) clarifies that home care services agency personnel and hospice personnel, as well as emergency medical services personnel and hospital emergency room staff, can honor nonhospital DNR orders.

Significance:

The FHCDA will significantly change and improve the manner in which health care decisions are determined for residents determined not to have capacity. Families were formerly hard-pressed to produce the documentation to support their right to act as a surrogate in the absence of a Health Care Proxy or Living Will. The FHCDA will empower families, and give new authority to domestic partners and close friends of residents. This legislation will also have great significance for those without capacity who also lack family or others to advocate on their behalf.

The FHCDA addresses the following significant points:

1. Applicability:

- a. Does not impact residents who have designated a health care agent in compliance with all NYS applicable rules and regulations for Health Care Proxy;
- b. Does not impact residents for whom a guardian has been appointed under article 17A of the Surrogate's Court Procedure Act, or pursuant to OMIT or OMRDD regulations;

2. Establishes procedures for the determination of incapacity for purposes of authorizing surrogate decisions for adult residents;

3. Lists, in order of priority, who may act as a surrogate, and the role and responsibilities of the surrogate;

4. Outlines the role of physician, inclusive of procedures for addressing the physician's objections to the decisions of a surrogate;

5. Establishes a procedure for making health care decisions for adult residents who have lost decision-making capacity and have no available family member or friend to act as a surrogate;

6. Outlines the criteria for the establishment, organization, and responsibility of an Ethics Review Committee; and

7. Clarifies the roles and responsibilities of home care services, hospice, emergency medical services and hospital emergency personnel with regard to Non-Hospital DNR orders.

Implications for Nursing Homes:

Note:

A complete copy of the FHCDA can be obtained at: <http://files.statesurge.com/file/5238496>

In view of the changes to the manner in which advance directives are executed for residents determined to be without capacity, review and revision of facility practices should be addressed as follows:

1. Policy Review: Policies and procedures for advance directives should be reviewed and revised to ensure regulatory compliance. Special attention should be paid to policies addressing:

- a. Definitions for and identification of domestic partners and close friends of residents;
- b. Identification and communication of the "priority listing" of potential surrogates;
- c. Procedures for the determination of capacity;
- d. Physician' role and responsibilities with regard to advance directives;
- e. Establishing participation criteria, parameters of authority, and day-to-day function of the facility's Ethics Review Committee; and
- f. Procedures regarding Non-Hospital Do Not Resuscitate Orders

2. Advance Directives Education:

- a. Notice of this legislation and its impact on residents, staff and families, along with policy changes the facility will enact to achieve compliance, should be communicated via Resident Council, Family Council and through general staff education.
- b. This education should occur upon admission, at each quarterly review of the plan of care regarding advance directives, and upon a significant change in the decision-making capacity of the resident.

Client Services: HCG has prepared policy and staff education resources to assist you in complying with the changes outlined in the Family Health Care Decisions Act. Today's long term care communities have so much diversity in age, circumstance, and care needs, it is essential for all facilities to not only acknowledge the responsibility this legislation requires, but develop and sustain policies and practices that will ensure compliance and the safeguarding of every resident's right with regard to advance directives.

HCG provides a variety of programs and services to assist your facility in achieving and maintaining compliance in all areas of care and service. Please don't hesitate to call us if we can assist you in any way.

Thank you.

- Infection Control Programs
- Behavior Management
- Mock Surveys
- "Culture Change" and Quality of Life Initiatives
- Risk Management
- Quality Assurance Programs
- Resident Assessment and Care Planning
- Therapeutic Recreation Enhancement
- Provider of Infection Control Training for License Renewal
- Staffing Analysis
- Disaster Preparedness
- Physician Service Compliance
- Plans of Correction and Enforcement Actions