S T A T E O F N E W Y O R K

5321

2013-2014 Regular Sessions

I N S E N A T E

May 16, 2013

Introduced by Sen. HANNON -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law and the surrogate's court procedure act, in relation to making technical, clarifying and coordinating amendments regarding health care agents and proxies, decisions under the family health care decisions act and non-hospital orders not to resuscitate, and amending provisions relating to health care decisions for people with developmental disabilities; and to repeal article 29-B of the public health law relating to orders not to resuscitate for residents of mental hygiene facilities

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Article 29-B of the public health law is REPEALED.

S 2. Subdivisions 4 and 10 of section 2980 of the public health law, subdivision 4 as added by chapter 752 of the laws of 1990, subdivision 10 as amended by chapter 23 of the laws of 1994, are amended and a new subdivision 8-a is added to read as follows:

4. "Health care" means any treatment, service or procedure to diagnose or treat an individual's physical or mental condition. PROVIDING NUTRITION OR HYDRATION ORALLY, WITHOUT RELIANCE ON MEDICAL TREATMENT, IS NOT HEALTH CARE UNDER THIS ARTICLE AND IS NOT SUBJECT TO THIS ARTICLE.

8-A. "HEALTH OR SOCIAL SERVICES PRACTITIONER" MEANS A REGISTERED PROFESSIONAL NURSE, NURSE PRACTITIONER, PHYSICIAN, PHYSICIAN ASSISTANT, PSYCHOLOGIST, LICENSED MASTER SOCIAL WORKER OR LICENSED CLINICAL SOCIAL WORKER, LICENSED OR CERTIFIED PURSUANT TO THE EDUCATION LAW ACTING WITHIN HIS OR HER SCOPE OF PRACTICE.

10. "Mental hygiene facility" means a residential facility, excluding family care homes, operated or licensed by the office of mental health or the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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S 3. Paragraph (b) of subdivision 1 of section 2981 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

(b) For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a [committee or] guardian of the person has been appointed for the adult pursuant to article [seventy-eight] EIGHTY-ONE of the mental hygiene law or article seventeen-A of the surrogate's court procedure act.

S 4. The fourth undesignated paragraph of paragraph (d) of subdivision 5 of section 2981 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. [Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition and hydration.] If you choose to state instructions, wishes, or limits, please do so below:

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S 5. Subdivision 2 of section 2982 of the public health law, as amended by chapter 230 of the laws of 2004, is amended to read as follows:

2. Decision-making standard. After consultation with a licensed physician, registered nurse, PHYSICIAN ASSISTANT, licensed psychologist, licensed master social worker, or a licensed clinical social worker, the agent shall make health care decisions: (a) in accordance with the principal's wishes, including the principal's religious and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests[; provided, however, that if the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding these measures].

S 5-a. Subdivisions 2, 3, 4, 5, 6 and 7 of section 2983 of the public health law are renumbered subdivisions 3, 4, 5, 6, 7 and 8.

S 6. Subdivision 1 of section 2983 of the public health law, as added by chapter 752 of the laws of 1990, paragraph (b) as amended by chapter 23 of the laws of 1994 and paragraph (c) as amended by section 7 of part J of chapter 56 of the laws of 2012, is amended to read as follows:

1. [Determination] INITIAL DETERMINATION by attending physician. [(a) A] AN INITIAL determination that a principal lacks capacity to make health care decisions shall be made by the attending physician to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending physician's opinion regarding the cause and nature of the principal's incapacity as well as its extent and probable duration. The determination shall be included in the patient's medical record. [For a decision to withdraw or withhold life-sustaining treatment, the attending physician who makes the determination that a principal lacks capacity to make health care decisions must consult with another physician to confirm such determination. Such consultation shall also be included within the patient's medical record] A PHYSICIAN WHO HAS BEEN APPOINTED AS A PATIENT'S AGENT SHALL NOT MAKE

THE DETERMINATION OF THE PATIENT'S CAPACITY TO MAKE HEALTH CARE DECISIONS.

2. CONCURRING DETERMINATIONS FOR LIFE-SUSTAINING TREATMENT DECISIONS. FOR A DECISION TO WITHDRAW OR WITHHOLD LIFE-SUSTAINING TREATMENT, THE FOLLOWING SHALL APPLY:

(A) THE INITIAL DETERMINATION THAT A PATIENT LACKS CAPACITY SHALL BE SUBJECT TO A CONCURRING DETERMINATION, INDEPENDENTLY MADE BY A HEALTH OR SOCIAL SERVICES PRACTITIONER. A CONCURRING DETERMINATION SHALL INCLUDE AN ASSESSMENT OF THE CAUSE AND EXTENT OF THE PATIENT'S INCAPACITY AND THE LIKELIHOOD THAT THE PATIENT WILL REGAIN DECISION-MAKING CAPACITY, AND SHALL BE INCLUDED IN THE PATIENT'S MEDICAL RECORD. HOSPITALS SHALL ADOPT WRITTEN POLICIES IDENTIFYING THE TRAINING AND CREDENTIALS OF HEALTH OR SOCIAL SERVICES PRACTITIONERS QUALIFIED TO PROVIDE CONCURRING DETERMINATIONS OF INCAPACITY CONDUCTED FOR HOSPITAL PATIENTS.

(b) If an attending physician of a patient in a general hospital or mental hygiene facility determines that a patient lacks capacity because of mental illness, [the attending physician who makes the determination must be, or must consult, for the purpose of confirming the determination, with a qualified psychiatrist] EITHER SUCH PHYSICIAN OR THE CONCURRING PRACTITIONER MUST HAVE THE FOLLOWING QUALIFICATIONS: A PHYSICIAN LICENSED TO PRACTICE MEDICINE IN NEW YORK STATE, WHO IS A DIPLOMATE OR ELIGIBLE TO BE CERTIFIED BY THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY OR WHO IS CERTIFIED BY THE AMERICAN OSTEOPATHIC BOARD OF NEUROLOGY AND PSYCHIATRY OR IS ELIGIBLE TO BE CERTIFIED BY THAT BOARD. A record of such consultation shall be included in the patient's medical record.

(c) If the attending physician determines that a patient lacks capacity because of a developmental disability, [the attending physician who makes the determination must be, or must consult, for the purpose of confirming the determination, with] EITHER SUCH PHYSICIAN OR THE CONCURRING PRACTITIONER MUST HAVE THE FOLLOWING QUALIFICATIONS: EITHER (I) FOR A PATIENT IN A HOSPITAL, A HEALTH OR SOCIAL SERVICES PRACTITIONER QUALIFIED BY TRAINING OR EXPERIENCE TO MAKE SUCH DETERMINATION IN ACCORDANCE WITH THE WRITTEN POLICIES ADOPTED BY THE HOSPITAL; OR (II) FOR A PATIENT IN ANY SETTING, a physician or clinical psychologist who either is employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or clinical psychologist possess specialized training or three years experience in treating developmental disabilities. A record of such consultation shall be included in the patient's medical record.

[(d) A physician who has been appointed as a patient's agent shall not make the determination of the patient's capacity to make health care decisions.]

S 7. Subdivision 4 of section 2983 of the public health law, as added by chapter 752 of the laws of 1990 and as renumbered by section five-a of this act, is amended to read as follows:

4. Notice of determination. Notice of a determination that a principal lacks capacity to make health care decisions shall promptly be given: (a) to the principal, orally and in writing, where there is any indication of the principal's ability to comprehend such notice; (b) to the agent; AND (c) if the principal is in or is transferred from a mental

hygiene facility, to the facility director[; and (d) to the conservator for, or committee of, the principal].

S 8. Subdivision 2 of section 2991 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

2. Such procedures shall be established in accordance with regulations issued by the commissioners of health, mental health, and [mental retardation and] developmental disabilities for facilities subject to their respective regulatory authorities.

S 9. The opening paragraph of section 2992 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

The health care provider, the [conservator for, or committee] GUARDIAN of the principal UNDER ARTICLE EIGHTY-ONE OF THE MENTAL HYGIENE LAW OR ARTICLE SEVENTEEN-A OF THE SURROGATE'S COURT PROCEDURE ACT, members of the principal's family, a close friend of the principal as defined in subdivision [five] FOUR of section [two thousand nine] TWENTY-NINE hundred [sixty-one] NINETY-FOUR-A of this chapter, or the commissioner [of health], THE COMMISSIONER OF mental health, or [mental retardation and] THE COMMISSIONER OF developmental disabilities may commence a special proceeding pursuant to article four of the civil practice law and rules, in a court of competent jurisdiction, with respect to any dispute arising under this article, including, but not limited to, a proceeding to:

S 10. Section 2993 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

S 2993. Regulations. The commissioner [of health], in consultation with the commissioners of [the office of] mental health and [the office of mental retardation and] developmental disabilities, shall establish such regulations as may be necessary for the implementation of this article, subject to the provisions of subdivision two of section [two thousand nine] TWENTY-NINE hundred ninety-one of this article.

S 11. Subdivisions 17, 20 and 26 of section 2994-a of the public health law, as added by chapter 8 of the laws of 2010, are amended to read as follows:

17. "Health or social [service] SERVICES practitioner" means a registered professional nurse, nurse practitioner, physician, physician assistant, psychologist, LICENSED MASTER SOCIAL WORKER or licensed clinical social worker, licensed or certified pursuant to the education law acting within his or her scope of practice.

20. "Mental hygiene facility" means a facility operated or licensed by the office of mental health or the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities as defined in subdivision six of section 1.03 of the mental hygiene law.

26. "Person connected with the case" means the patient, any person on the surrogate list, a parent or guardian of a minor patient, [the] A hospital administrator, an attending physician, any other health or social services practitioner who is or has been directly involved in the patient's care, and any duly authorized state agency, including the facility director or regional director for a patient transferred from a mental hygiene facility and the facility director for a patient transferred from a correctional facility.

S 12. Section 2994-b of the public health law is amended by adding a new subdivision 1-a to read as follows:

1-A. THIS ARTICLE SHALL ALSO APPLY TO DECISIONS REGARDING ORDERS NOT TO RESUSCITATE FOR A PATIENT WHO LACKS DECISION-MAKING CAPACITY IN A HOSPITAL AS DEFINED BY SECTION 1.03 OF THE MENTAL HYGIENE LAW.

S 13. The opening paragraph and paragraph (a) of subdivision 3 of section 2994-b of the public health law, as added by chapter 8 of the laws of 2010, are amended to read as follows:

Prior to seeking or relying upon a health care decision by a surrogate for a patient under this article, if the attending physician has reason to believe that the patient has a history of receiving services for [mental retardation or] a developmental disability; it reasonably appears to the attending physician that the patient has [mental retardation or] a developmental disability; or the attending physician has reason to believe that the patient has been transferred from a mental hygiene facility operated or licensed by the office of mental health, then such physician shall make reasonable efforts to determine whether paragraphs (a), (b) or (c) of this subdivision are applicable:

(a) If the patient has a guardian appointed by a court pursuant to article seventeen-A of the surrogate's court procedure act, health care decisions for the patient shall be governed by section seventeen hundred fifty-b of the surrogate's court [proceedure] PROCEDURE act and not by this article.

S 14. Subdivision 3 of section 2994-c of the public health law, as added by chapter 8 of the laws of 2010, paragraph (b) as amended by chapter 167 of the laws of 2011, subparagraph (ii) of paragraph (c) as amended by section 8 of part J of chapter 56 of the laws of 2012, is amended to read as follows:

3. Concurring determinations FOR LIFE-SUSTAINING TREATMENT DECISIONS. FOR A DECISION TO WITHDRAW OR WITHHOLD LIFE-SUSTAINING TREATMENT, THEN THE FOLLOWING SHALL APPLY: (a) An initial determination that a patient lacks decision-making capacity shall be subject to a concurring determination, independently made, [where required by this subdivision] BY A HEALTH OR SOCIAL SERVICES PRACTITIONER EMPLOYED OR OTHERWISE FORMALLY AFFILIATED WITH THE HOSPITAL. A concurring determination shall include an assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain decision-making capacity, and shall be included in the patient's medical record. Hospitals shall adopt written policies identifying the training and credentials of health or social services practitioners qualified to provide concurring determinations of incapacity.

(b) [(i) In a residential health care facility, a health or social services practitioner employed by or otherwise formally affiliated with the facility must independently determine whether an adult patient lacks decision-making capacity.

(ii) In a general hospital a health or social services practitioner employed by or otherwise formally affiliated with the facility must independently determine whether an adult patient lacks decision-making capacity if the surrogate's decision concerns the withdrawal or withholding of life-sustaining treatment.

(iii)] With respect to decisions regarding hospice care for a patient in a general hospital or residential health care facility, the health or social services practitioner must be employed by or otherwise formally affiliated with the general hospital or residential health care facility.

(c) (i) If the attending physician makes an initial determination that a patient lacks decision-making capacity because of mental illness, either such physician OR THE CONCURRING PRACTITIONER must have the following qualifications[, or another physician with the following qualifications must independently determine whether the patient lacks decision-making capacity]: a physician licensed to practice medicine in New

York state, who is a diplomate or eligible to be certified by the American Board of Psychiatry and Neurology or who is certified by the American Osteopathic Board of Neurology and Psychiatry or is eligible to be certified by that board. A record of such consultation shall be included in the patient's medical record.

(ii) If the attending physician makes an initial determination that a patient lacks decision-making capacity because of a developmental disability, either such physician OR THE CONCURRING PRACTITIONER must have the following qualifications[, or another professional with the following qualifications must independently determine whether the patient lacks decision-making capacity]: EITHER (A) A HEALTH OR SOCIAL SERVICES PRACTITIONER QUALIFIED BY TRAINING OR EXPERIENCE TO MAKE SUCH DETERMINATION IN ACCORDANCE WITH THE WRITTEN POLICIES ADOPTED BY THE HOSPITAL, OR (B) a physician or clinical psychologist who either is employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or clinical psychologist possess specialized training or three years experience in treating developmental disabilities. A record of such consultation shall be included in the patient's medical record.

(d) If an attending physician has determined that the patient lacks decision-making capacity and if the health or social services practitioner consulted for a concurring determination disagrees with the attending physician's determination, the matter shall be referred to the ethics review committee if it cannot otherwise be resolved.

S 15. Paragraph (a) of subdivision 5 of section 2994-d of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

(a)(i) Treatment would be an extraordinary burden to the patient and an attending physician determines, with the independent concurrence of another physician, that, to a reasonable degree of medical certainty and in accord with accepted medical standards, (A) the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided; or (B) the patient is permanently unconscious; or

(ii) The provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition, as determined by an attending physician with the independent concurrence of another physician to a reasonable degree of medical certainty and in accord with accepted medical standards; OR

(III) WITH RESPECT TO A DECISION TO ENTER AN ORDER NOT TO RESUSCITATE, AN ATTENDING PHYSICIAN DETERMINES, WITH THE INDEPENDENT CONCURRENCE OF A SECOND PHYSICIAN, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, THAT IN THE EVENT OF A CARDIAC OR RESPIRATORY ARREST, RESUSCITATION WOULD BE UNSUCCESSFUL IN RESTORING CARDIAC AND RESPIRATORY FUNCTION OR THAT THE PATIENT WILL EXPERIENCE REPEATED ARREST IN A SHORT TIME PERIOD BEFORE DEATH OCCURS.

S 16. Paragraph (b) of subdivision 3 of section 2994-e of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

(b) If the hospital can with reasonable efforts ascertain the identity of the parents or guardian of an emancipated minor patient, the hospital shall MAKE REASONABLE EFFORTS TO notify such persons prior to withholding or withdrawing life-sustaining treatment pursuant to this subdivision.

S 17. Subdivision 3 of section 2994-f of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

3. Notwithstanding the provisions of this section or subdivision one of section twenty-nine hundred ninety-four-q of this article, if a surrogate directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the patient, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the surrogate's decision pending either transfer of the patient to a willing hospital or individual health care provider, or judicial review in accordance with section twenty-nine hundred ninety-four-r of this article. THIS REQUIREMENT SHALL NOT APPLY WHEN THE HOSPITAL OR INDIVIDUAL HEALTH CARE PROVIDER IS CARRYING OUT A PATIENT'S DECISION MADE PURSUANT TO SUBPARAGRAPH (II) OF PARAGRAPH (A) OF SUBDIVISION THREE OF SECTION TWENTY-NINE HUNDRED NINETY-FOUR-D OF THIS ARTICLE.

S 18. Paragraph (b) of subdivision 5 of section 2994-g of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

(b) If the attending physician, with independent concurrence of a second physician designated by the hospital, determines to a reasonable degree of medical certainty that:

(i) (A) life-sustaining treatment offers the patient no medical benefit because the patient will die imminently, even if the treatment is provided; and

[(ii)] (B) the provision of life-sustaining treatment would violate accepted medical standards, then such treatment may be withdrawn or withheld from an adult patient who has been determined to lack decision-making capacity pursuant to section twenty-nine hundred ninety-four-c of this article, without judicial approval. This paragraph shall not apply to any treatment necessary to alleviate pain or discomfort; OR

(II) IN THE EVENT OF CARDIAC OR RESPIRATORY ARREST, RESUSCITATION WILL BE UNSUCCESSFUL IN RESTORING CARDIAC AND RESPIRATORY FUNCTION OR THAT THE PATIENT WILL EXPERIENCE REPEATED ARREST IN A SHORT TIME PERIOD BEFORE DEATH OCCURS, THEN AN ORDER NOT TO RESUSCITATE MAY BE ENTERED FOR AN ADULT PATIENT WHO HAS BEEN DETERMINED TO LACK DECISION-MAKING CAPACITY PURSUANT TO SECTION TWENTY-NINE HUNDRED NINETY-FOUR-C OF THIS ARTICLE, WITHOUT JUDICIAL APPROVAL.

S 19. Subparagraph (iv) of paragraph (b) of subdivision 4 of section 2994-m of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

(iv) Following ethics review committee consideration of a case concerning the withdrawal or withholding of life-sustaining treatment, treatment shall not be withdrawn or withheld until THE HOSPITAL MAKES DILIGENT EFFORTS TO INFORM the persons identified in subparagraph (iii) of this paragraph [have been informed] of the committee's response to the case.

S 20. Subdivision 2 of section 2994-t of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

2. The commissioner, in consultation with the commissioners of [the office of] mental health and [the office of mental retardation and] developmental disabilities, shall promulgate regulations identifying the

credentials of health care professionals qualified to provide an independent determination, pursuant to subdivision three of section twenty-nine hundred ninety-four-c of this article, that a patient lacks decision-making capacity because of mental illness or developmental disability.

S 21. Section 2994-u of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

S 2994-u. Rights to be publicized. The commissioner shall prepare a statement summarizing the rights, duties, and requirements of this article and shall require that a copy of such statement be furnished to [patients] A PATIENT or to [persons on] the surrogate [list known to the hospital], or to the [parents or guardians] PARENT OR GUARDIAN of A minor [patients] PATIENT, at or prior to admission to the hospital, or within a reasonable time thereafter, and to [each member of the hospital's staff directly involved with patient care] ANY PERSON ON THE SURROGATE LIST WHO REQUESTS A COPY OF SUCH STATEMENT FROM THE HOSPITAL. THE STATEMENT SHALL ALSO BE MADE AVAILABLE TO THE HOSPITAL CLINICAL STAFF.

S 22. The commissioner of health shall revise the statement of rights that hospitals are required to post (known as the Patient's Bill of Rights) pursuant to paragraph (g) of subdivision 1 of section 2803 of the public health law, by replacing the clause regarding orders not to resuscitate with a statement that more generally informs patients of their right to receive from the hospital upon admission, and upon request, a more complete statement of their rights with respect to deciding about health care, including appointing a health care agent, consenting to do-not-resuscitate orders and making other life-sustaining treatment decisions. The clause should also state in substance that the hospital will also provide such statement upon request to any family member or friend of a patient who lacks decision-making capacity.

S 23. Subdivisions 12 and 13 of section 2994-aa of the public health law, subdivision 12 as added by chapter 8 of the laws of 2010 and subdivision 13 as amended by chapter 167 of the laws of 2011, are amended and a new subdivision 14-a is added to read as follows:

12. "Mental hygiene facility" means a residential facility operated or licensed by the office of mental health [or the office of mental retardation and developmental disabilities].

13. "Nonhospital order not to resuscitate" means an order that directs emergency medical services personnel, hospice personnel, HOME CARE SERVICES AGENCY PERSONNEL, SCHOOL HEALTH PERSONNEL, and hospital emergency services personnel not to attempt cardiopulmonary resuscitation in the event a patient suffers cardiac or respiratory arrest.

14-A. "SCHOOL HEALTH PERSONNEL" MEANS A SCHOOL-BASED PHYSICIAN, NURSE, PHYSICIAN ASSISTANT OR NURSE PRACTITIONER.

S 24. Paragraph (a) of subdivision 1 of section 2994-bb of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

(a) Emergency medical services personnel, home care services agency personnel, hospice personnel, SCHOOL HEALTH PERSONNEL, and hospital emergency services personnel shall honor nonhospital orders not to resuscitate, except as provided in section twenty-nine hundred ninety-four-ee of this article.

S 25. Subdivisions 3, 4 and 5 of section 2994-cc of the public health law, subdivisions 3 and 5 as added by chapter 8 of the laws of 2010 and subdivision 4 as amended by section 131 of subpart B of part C of chapter 62 of the laws of 2011, are amended to read as follows:

3. Consent by a surrogate shall be governed by article twenty-nine-CC of this chapter, except that[: (a) a second determination of capacity shall be made by a health or social services practitioner; and (b)] the authority of the ethics review committee set forth in article twenty-nine-CC of this chapter shall apply only to nonhospital orders issued in a hospital OR HOSPICE.

4. (a) When the concurrence of a second [physician] HEALTH OR SOCIAL SERVICES PRACTITIONER is sought to fulfill the requirements for the issuance of a nonhospital order not to resuscitate for patients in a correctional facility, such second [physician] HEALTH OR SOCIAL SERVICES PRACTITIONER shall be selected by the chief medical officer of the department of corrections and community supervision or his or her designee.

(b) When the concurrence of a second [physician] HEALTH OR SOCIAL SERVICES PRACTITIONER is sought to fulfill the requirements for the issuance of a nonhospital order not to resuscitate for [hospice and] home care patients, such second [physician] HEALTH OR SOCIAL SERVICES PRACTITIONER shall be selected [by the hospice medical director or hospice nurse coordinator designated by the medical director or] by the home care services agency director of patient care services[, as appropriate to the patient].

5. Consent by a patient or a surrogate for a patient [in a mental hygiene facility shall be governed by article twenty-nine-B of this chapter] IN A FACILITY OPERATED OR LICENSED BY THE OFFICE OF MENTAL HEALTH SHALL BE GOVERNED BY THIS ARTICLE. CONSENT BY A PATIENT WHO IS INTELLECTUALLY OR OTHERWISE DEVELOPMENTALLY DISABLED AND IS ELIGIBLE FOR LIFE-SUSTAINING TREATMENT DECISIONS PURSUANT TO SECTION SEVENTEEN HUNDRED FIFTY-B OF THE SURROGATE'S COURT PROCEDURE ACT SHALL BE GOVERNED BY THAT SECTION.

S 26. Subdivisions 2 and 6 of section 2994-dd of the public health law, subdivision 2 as added by chapter 8 of the laws of 2010 and subdivision 6 as amended by section 10 of part J of chapter 56 of the laws of 2012, are amended to read as follows:

2. A nonhospital order not to resuscitate shall be issued upon a standard form prescribed by the commissioner. [The commissioner shall also develop a] A standard bracelet [that] OR OTHER ARTICLE may be worn by a patient with a nonhospital order not to resuscitate to identify that status; provided, however, that no person may require a patient to wear such a bracelet OR OTHER ARTICLE and that no person may require a patient to wear such a bracelet OR OTHER ARTICLE as a condition for honoring a nonhospital order not to resuscitate or for providing health care services.

6. The commissioner may authorize the use of one or more alternative forms for issuing a nonhospital order not to resuscitate (in place of the standard form prescribed by the commissioner under subdivision two of this section). Such alternative form or forms may also be used to issue a non-hospital do not intubate order. Any such alternative forms intended for use for persons with developmental disabilities or persons with mental illness who are incapable of making their own health care decisions or who have a guardian of the person appointed pursuant to article eighty-one of the mental hygiene law or article seventeen-A of the surrogate's court procedure act must also be approved by the commissioner of developmental disabilities or the commissioner of mental health, as appropriate. An alternative form under this subdivision shall otherwise conform with applicable federal and state law. This subdivision does not limit, restrict or impair the use of an alternative form

for issuing an order not to resuscitate in a general hospital or residential health care facility under article twenty-eight of this chapter or a hospital under subdivision ten of section 1.03 of the mental hygiene law OR A DEVELOPMENTAL DISABILITIES SERVICES OFFICE UNDER SECTION 13.17 OF THE MENTAL HYGIENE LAW.

S 27. Section 2994-ff of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

S 2994-ff. Interinstitutional transfer. If a patient with a nonhospital order not to resuscitate is admitted to a hospital, the order shall be treated as an order not to resuscitate for a patient transferred from another hospital, and shall be governed by article twenty-nine-CC of this chapter[, except that any such order for a patient admitted to a mental hygiene facility shall be governed by article twenty-nine-B of this chapter].

S 28. Section 2994-gg of the public health law, as added by chapter 8 of the laws of 2010, is amended to read as follows:

S 2994-gg. Immunity. No person shall be subjected to criminal prosecution or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith pursuant to this [section] ARTICLE a nonhospital order not to resuscitate, for disregarding a nonhospital order pursuant to section twenty-nine hundred ninety-four-ee of this article, or for other actions taken reasonably and in good faith pursuant to this [section] ARTICLE.

S 29. The section heading of section 1750-b of the surrogate's court procedure act, as added by chapter 500 of the laws of 2002, is amended to read as follows:

Health care decisions for [mentally retarded persons] PEOPLE WITH DEVELOPMENTAL DISABILITIES

S 30. Subdivision 1 of section 1750-b of the surrogate's court procedure act is amended by adding two new paragraphs (d) and (e) to read as follows:

(D) A PERSON DESCRIBED IN THE FIRST SENTENCE OF PARAGRAPH (A) OF THIS SUBDIVISION WHO IS FOUND BY THE ATTENDING PHYSICIAN TO HAVE CAPACITY TO MAKE HIS OR HER OWN HEALTH CARE DECISIONS, PURSUANT TO PARAGRAPH (A) OF SUBDIVISION FOUR OF THIS SECTION, UPON NOTICE TO THE CHIEF EXECUTIVE OFFICER OF A RESIDENTIAL FACILITY OPERATED, LICENSED OR AUTHORIZED BY THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, IN WHICH FACILITY THE PATIENT RESIDES OR FROM WHICH HE OR SHE WAS TRANSFERRED, AND THE MENTAL HYGIENE LEGAL SERVICE, MAY MAKE HIS OR HER OWN DECISIONS RELATING TO LIFE-SUSTAINING TREATMENT.

(E) A PERSON DESCRIBED IN THE FIRST SENTENCE OF PARAGRAPH (A) OF THIS SECTION WHO HAS A VALID HEALTH CARE PROXY AT THE TIME OF A HEALTH CARE DECISION, INCLUDING A DECISION INVOLVING LIFE-SUSTAINING TREATMENT, SHALL HAVE SUCH DECISIONS MADE IN ACCORDANCE WITH ARTICLE TWENTY-NINE-C OF THE PUBLIC HEALTH LAW. IF FOR ANY REASON THE AGENT OR AN ALTERNATE AGENT IS NOT REASONABLY AVAILABLE, WILLING AND COMPETENT TO SERVE AND THE PATIENT IS OTHERWISE ELIGIBLE TO HAVE A DECISION AS TO LIFE-SUSTAINING TREATMENT MADE PURSUANT TO THIS SECTION, ANY GUARDIAN OR PERSON OR ENTITY ENTITLED TO EXERCISE THE AUTHORITY OF A GUARDIAN UNDER PARAGRAPH (A) OF THIS SUBDIVISION MAY MAKE SUCH DECISION.

S 31. Paragraph (a) of subdivision 4 of section 1750-b of the surrogate's court procedure act, as added by chapter 500 of the laws of 2002, subparagraph (i) as amended by section 18 of part J of chapter 56 of the laws of 2012, is amended to read as follows:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a

reasonable degree of medical certainty that the mentally retarded person lacks capacity to make health care decisions. The determination thereof shall be included in the mentally retarded person's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the mentally retarded person's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a licensed psychologist, to further confirm the mentally retarded person's lack of capacity. [The] IF THE ATTENDING PHYSICIAN MAKES AN INITIAL DETERMINATION THAT A PATIENT LACKS CAPACITY TO MAKE HEALTH CARE DECISIONS BECAUSE OF MENTAL RETARDATION, THEN THE attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults[,] EITHER (I) FOR A PATIENT IN A GENERAL HOSPITAL, RESIDENTIAL HEALTH CARE FACILITY OR HOSPICE, must [(i)] BE QUALIFIED BY TRAINING OR EXPERIENCE TO MAKE SUCH DETERMINATION, IN ACCORDANCE WITH POLICIES ADOPTED BY THE GENERAL HOSPITAL, RESIDENTIAL HEALTH CARE FACILITY OR HOSPICE; OR (II) FOR A PATIENT IN ANY SETTING, MUST (A) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or [(ii)] (B) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities, or [(iii)] (C) have been approved by the commissioner of [mental retardation and] developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating mental retardation. A record of such consultation shall be included in the mentally retarded person's medical record.

S 32. Subparagraphs (i) and (ii) of paragraph (b) of subdivision 4 of section 1750-b of the surrogate's court procedure act, as added by chapter 500 of the laws of 2002, are amended to read as follows:

(i) the mentally retarded person has a medical condition as follows:

A. a terminal condition, [as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law] WHICH SHALL MEAN AN ILLNESS OR INJURY FROM WHICH THERE IS NO RECOVERY, AND WHICH CAN REASONABLY BE EXPECTED TO CAUSE DEATH WITHIN ONE YEAR; or

B. permanent unconsciousness; or

C. a medical condition other than such person's mental retardation which requires life-sustaining treatment, is irreversible and which will continue indefinitely; [and] OR

D. IN THE CASE OF A DECISION TO ENTER AN ORDER NOT TO RESUSCITATE, THAT IN THE EVENT OF CARDIAC OR RESPIRATORY ARREST SUCH RESUSCITATION WOULD BE UNSUCCESSFUL IN RESTORING CARDIAC AND RESPIRATORY FUNCTION OR THAT THE PATIENT WILL EXPERIENCE REPEATED ARREST IN A SHORT TIME PERIOD BEFORE DEATH OCCURS; AND

(ii) EXCEPT IN THE CASE OF A DECISION TO ENTER AN ORDER NOT TO RESUSCITATE BASED ON CLAUSE D OF SUBPARAGRAPH (I) OF THIS PARAGRAPH, the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's mental retardation; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's mental retardation; and

S 33. Subparagraph (ii) of paragraph (e) of subdivision 4 of section 1750-b of the surrogate's court procedure act, as added by chapter 500 of the laws of 2002, is amended to read as follows:

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service. NOTIFICATION TO THE FACILITY DIRECTOR AND THE MENTAL HYGIENE LEGAL SERVICE SHALL NOT DELAY ISSUANCE OF AN ORDER NOT TO RESUSCITATE; and

S 34. Subdivision 4 of section 1750-b of the surrogate's court procedure act is amended by adding two new paragraphs (f) and (g) to read as follows:

(F) IN THE CASE OF A PERSON FOR WHOM "GUARDIAN" MEANS A SURROGATE DECISION-MAKING COMMITTEE PURSUANT TO THIS SECTION, AN ORDER NOT TO RESUSCITATE MAY BE ENTERED, WITHOUT REVIEW OR APPROVAL BY SUCH COMMITTEE, IF THE ATTENDING PHYSICIAN DETERMINES, WITH THE INDEPENDENT CONCURRENCE OF A SECOND PHYSICIAN, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, THAT IN THE EVENT OF CARDIAC OR RESPIRATORY ARREST RESUSCITATION WOULD BE UNSUCCESSFUL IN RESTORING CARDIAC AND RESPIRATORY FUNCTION OR THAT THE PATIENT WILL EXPERIENCE REPEATED ARREST IN A SHORT TIME PERIOD BEFORE DEATH OCCURS.

(G) FOR A PATIENT RESIDING IN A FACILITY OPERATED, LICENSED OR AUTHORIZED BY THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES AS TO WHOM AN ORDER NOT TO RESUSCITATE HAS BEEN ENTERED, THE ATTENDING PHYSICIAN SHALL REVIEW WHETHER THE ORDER IS STILL APPROPRIATE AT SUCH TIMES AND IN SUCH MANNER AS IS PRESCRIBED BY SUBDIVISION FOUR OF SECTION TWENTY-NINE HUNDRED NINETY-FOUR-DD OF THE PUBLIC HEALTH LAW.

S 35. Paragraph (a) of subdivision 5 of section 1750-b of the surrogate's court procedure act is amended by adding a new closing paragraph to read as follows:

NOTWITHSTANDING THE FOREGOING, IN CASES WHERE THE ATTENDING PHYSICIAN HAS NOTIFIED THE CHIEF EXECUTIVE OFFICER OF AN AGENCY AND THE MENTAL HYGIENE LEGAL SERVICE OF THE ENTRY OF AN ORDER NOT TO RESUSCITATE PURSUANT TO SUBPARAGRAPH (II) OF PARAGRAPH (E) OF SUBDIVISION FOUR OF THIS SECTION, AND IF SUCH NOTICE INCLUDES EITHER THE PHYSICIAN'S STATEMENT OF THE DIAGNOSTIC AND PROGNOSTIC BASIS FOR THE MEDICAL DETERMINATION IN SUPPORT OF THE ORDER OR AN EXCERPT FROM THE PATIENT'S MEDICAL RECORD THAT IS SUFFICIENT TO SUPPORT SUCH DETERMINATION, AN ORDER NOT TO RESUSCITATE SHALL NOT BE STAYED BY AN OBJECTION BY THE PERSONS DESCRIBED IN SUBPARAGRAPHS (V) OR (VI) OF THIS PARAGRAPH UNLESS THE OBJECTION IS ACCOMPANIED BY (A) A WRITTEN STATEMENT BY THE OBJECTING PARTY SETTING FORTH A BASIS FOR ASSERTING THAT A STANDARD IN THIS ARTICLE FOR ENTERING SUCH AN ORDER HAS NOT BEEN MET; AND (B) IF THE BASIS RELATES TO THE FAILURE TO MEET MEDICAL CRITERIA IN THIS ARTICLE FOR THE ISSUANCE OF THE ORDER, A WRITTEN STATEMENT BY A HEALTH OR SOCIAL SERVICES PRACTITIONER, AS DEFINED IN SUBDIVISION SEVENTEEN OF SECTION TWENTY-NINE HUNDRED NINETY-FOUR-A OF THE PUBLIC HEALTH LAW SETTING FORTH THE PROFESSIONAL'S OPINION, BASED ON HIS OR HER REVIEW OF THE AFOREMENTIONED STATEMENT OR MEDICAL RECORD EXCERPT AND CONSULTATION WITH THE PATIENT'S ATTENDING PHYSICIAN, THAT THE MEDICAL CRITERIA IN THIS ARTICLE FOR ENTERING SUCH ORDER HAS NOT BEEN MET.

S 36. Paragraph (d) of subdivision 5 of section 1750-b of the surrogate's court procedure act, as added by chapter 262 of the laws of 2008, is amended to read as follows:

(d) Dispute mediation. In the event of an objection pursuant to this subdivision, at the request of the objecting party or person or entity authorized to act as a guardian under this section, except a surrogate decision making committee established pursuant to article eighty of the mental hygiene law, such objection shall be referred to [a dispute mediation system, established pursuant to section two thousand nine hundred seventy-two] AN ETHICS REVIEW COMMITTEE, ESTABLISHED PURSUANT TO SECTION TWENTY-NINE HUNDRED NINETY-FOUR-M of the public health law or similar entity for mediating disputes in a hospice, such as a patient's advocate's office[,] OR hospital chaplain's office [or ethics committee], as described in writing and adopted by the governing authority of such hospice, for non-binding mediation. In the event that such dispute cannot be resolved within seventy-two hours or no such mediation entity exists or is reasonably available for mediation of a dispute, the objection [shall] MAY proceed to judicial review pursuant to this subdivision. The party requesting mediation shall provide notification to those parties entitled to notice pursuant to paragraph (a) of this subdivision.

S 37. This act shall take effect on the ninetieth day after it shall have become a law, provided that the amendments to article 29-C of the public health law, made by sections two through ten of this act shall apply to decisions made pursuant to health care proxies created prior to the effective date of this act as well as those created thereafter.