# STATE OF NEW YORK

2178

2021-2022 Regular Sessions

# IN ASSEMBLY

January 14, 2021

Introduced by M. of A. PRETLOW, GOTTFRIED -- read once and referred to the Committee on Health

AN ACT to amend the public health law and the surrogate's court procedure act, in relation to conforming and improving the process for determining incapacity

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. 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.

§ 2. Subdivision 1 of section 2983 of the public health law, as amended by chapter 708 of the laws of 2019, is amended to read as follows:

1. [~~Determination~~] **Initial determination** by attending practitioner. [~~(a) A~~] **An initial** determination that a principal lacks capacity to make health care decisions shall be made by the attending practitioner to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending practitioner'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 practitioner who makes the determination that a principal lacks capacity to make health care decisions must consult with another physician, physician assistant, or nurse practitioner to confirm such determination. Such consultation shall also be included within the patient's medical record.~~] **A practitioner 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:**

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

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(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 practitioner of a patient in a general hospital or mental hygiene facility determines that a patient lacks capacity because of mental illness, [~~the attending practitioner who makes the determination must be, or must consult, for the purpose of confirming the determination, with a qualified psychiatrist~~] either such practitioner or the concurring practitioner must have the following qualifications: a practitioner 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 practitioner determines that a patient lacks capacity because of a developmental disability, [~~the attending practitioner who makes the determination must be, or must consult, for the purpose of confirming the determination, with~~] either such practitioner 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 written policies adopted by the hospital; or (ii) for a patient in any setting, a physician, nurse practitioner, physician assistant, 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, nurse practitioner, physician assistant, 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, physician assistant, or nurse practitioner who has been appointed as a patient's agent shall not make the determination of the patient's capacity to make health care decisions.~~]

§ 3. Subdivision 3 of section 2994-c of the public health law, as amended by chapter 708 of the laws of 2019, is amended to read as follows:

3. Concurring determinations for life-sustaining treatment decisions. For a decision to withdraw or withhold life-sustaining treatment, 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 practitioner 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 practitioner makes an initial determination that a patient lacks decision-making capacity because of a developmental disability, either such physician, nurse practitioner [~~or~~], physician assistant**, 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 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 practitioner 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 practitioner's determination, the matter shall be referred to the ethics review committee if it cannot otherwise be resolved.

§ 4. Subdivisions 3 and 4 of section 2994-cc of the public health law, as amended by chapter 708 of the laws of 2019, 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, nurse practitioner or physician assistant~~] **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, nurse practitioner or physician assistant~~] **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, nurse practitioner or physician assistant~~] **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, nurse practitioner or physician assistant~~] **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. Paragraph (a) of subdivision 4 of section 1750-b of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

(a) The attending [~~physician~~] **practitioner**, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, [~~must confirm~~] **shall initially determine** to a reasonable degree of medical certainty that the person who is intellectually disabled lacks capacity to make health care decisions. The determination thereof shall be included in the person who is intellectually disabled's medical record, and shall contain such attending [~~physician's~~] **practitioner's** opinion regarding the cause and nature of the person who is intellectually disabled's incapacity as well as its extent and probable duration. The attending [~~physician~~] **practitioner** who makes [~~the confirmation~~] **such initial determination** shall consult with another **practitioner,** physician, or a licensed psychologist, to further confirm the person who is intellectually disabled's lack of capacity. [~~The~~] **If the attending practitioner makes an initial determination that a patient lacks capacity to make health care decisions because of intellectual disability, then the** attending [~~physician who makes the confirmation,~~] **practitioner** or the physician or licensed psychologist with whom the attending [~~physician~~] **practioner** 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 for people with developmental disabilities, or [~~(iii)~~] **(C)** have been approved by the commissioner of the office for people with 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 intellectual disability. A record of such consultation shall be included in the person who is intellectually disabled's medical record.

§ 6. Subdivision 4 of section 2982 of the public health law, as amended by chapter 370 of the laws of 1991, is amended to read as follows:

4. Priority over other surrogates. Health care decisions by an agent on a principal's behalf pursuant to this article shall have priority over decisions by any other person, except as otherwise provided in the health care proxy or in subdivision [~~five~~] **six** of section two thousand nine hundred eighty-three of this article.

§ 7. Subdivision 2 of section 2984 of the public health law, as added by chapter 752 of the laws of 1990, is amended to read as follows:

2. A health care provider shall comply with health care decisions made by an agent in good faith under a health care proxy to the same extent as if such decisions had been made by the principal, subject to any limitations in the health care proxy and pursuant to the provisions of subdivision [~~five~~] **six** of section two thousand nine hundred eighty-three of this article.

§ 8. Paragraph (b) of subdivision 7 of section 2983 of the public health law, as amended by chapter 708 of the laws of 2019 and such subdivision as renumbered by section one of this act, is amended to read as follows:

(b) The notice requirements set forth in subdivision [~~three~~] **four** of this section shall not apply to the confirmation required by this subdivision.

§ 9. 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 section two of this act shall apply to the decisions made pursuant to health care proxies created prior to the effective date of this act as well as those created thereafter.