healthpolicy@oag.state.md.us

E-MAIL

(410) 576-7003 **(410) 576-6327**

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Vanessa Rosengart, LGSW
Director of Social Services
HCR • Manor Care
10714 Potomac Tennis Lane
Potomac, Maryland 20854-4419

Dear Ms. Rosengart:

I am writing in response to your letter of July 30, 2001, in which you posed three questions about the Maryland Health Care Decisions Act and its procedures for decisions about life-sustaining procedures when a patient is incapable of making these decisions. Your questions (somewhat rephrased) and my responses are as follows:

1. In this scenario, a nursing home resident's attending physician has written an order that resuscitation not be attempted ("DNR order") and has also completed an EMS/DNR order. These physician orders are consistent with both the resident's instructional advance directive and the surrogate decision maker's request. They evidently are *not* based on a certification that CPR would be "medically ineffective," within the meaning of the Health Care Decisions Act. Under these circumstances, may the DNR status be implemented immediately, or may the status be implemented only after the attending physician and a second physician certify in writing that the resident is in a qualifying condition (terminal or end-state condition, or persistent vegetative state) and lacks decision-making capacity?

In order for the decision about DNR status to come within the Health Care Decisions Act and its immunity provision, the certifications of qualifying condition and incapacity must be completed. §5-606(b) of the Health-General Article, Maryland Code. To minimize the risk that an unwanted procedure would be performed, the nursing home should have in place

procedures for the timely completion of the certifications required by the Health Care Decisions Act.

I would also point out that the EMS/DNR order is of questionable validity. That is, when the basis for an EMS/DNR order is an instruction in an advance directive or the authorization of the surrogate, then the EMS/DNR order itself requires that the certification of condition be completed prior to the physician's signing of the order.

2. May an EMS/DNR order alone serve as the basis for entry of a DNR order within a nursing home – that is, without need for certification of the resident's condition and incapacity or authorization by a surrogate?

When a resident arrives at nursing home with an apparently valid EMS/DNR order, the nursing home is authorized, but not legally required, to place the resident in DNR status based on the EMS/DNR order. This is so because §5-608(a)(3) of the Act authorizes any health care provider to "provide, withhold, or withdraw treatment in accordance an [EMS/DNR order] if [the] health care provider sees either the order or a valid, legible, and patient identifying [EMS/DNR order] in bracelet form."

In my view, the existence of an apparently valid order creates at least a strong presumption that the prerequisites of the Health Care Decisions Act were met prior to the entry of the EMS/DNR order. Of course, as discussed in my response to your first question, if a nursing home is aware that the Act's prerequisites were not met, despite the prior entry of an EMS/DNR order, the facility should take appropriate steps to obtain the certifications required by the Act prior to implementing DNR status.

3. Assuming that a resident's DNR status was properly based on a surrogate's decision after the requisite certifications, does the Act require that new certifications be made and a new decision obtained from the surrogate if the resident is readmitted to the facility after a stay in a hospital?

Readmission to the facility does not by itself require a revisiting of previously valid certifications or a surrogate's decision. Rather, the pertinent question is whether the period of hospitalization marked a significant change in the resident's condition. If, upon readmission, the resident is in the same or worse medical condition than before the hospitalization, no new certifications or decisions are called for. The prior ones remain valid. If, however, the resident's condition has significantly improved as a result of the hospital treatment, then the attending physician should review the prior certification to

determine if they are still medically valid, and the surrogate should review his or her prior decision about attempted CPR in light of the resident's changed condition.

I hope that this letter of advice, although not an opinion of the Attorney General, is fully responsive to your inquiry. Please let me know if I may be of further assistance.

Very truly yours,

Jack Schwartz
Assistant Attorney General
Director, Health Policy Development