Implementing the Family Health Care Decisions Act

Albany Medical Center
Family Health Care Decisions Act Algorithms
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Prefatory Notes Concerning the Algorithms
These algorithms are based on the Family Health Care Decision Act (FHCDATA) signed into law on March 16, 2010 and codified in New York Public Health Law Art. 29-CC (2010). For example, if a patient has a health care proxy, NY Public Health Law Art. 29-C governs and practitioners should follow the agent’s directives.

These algorithms are intended for hospitals and the algorithms for nursing homes would be slightly different.

These algorithms are intended to inform practitioners about the basic steps contemplated by the FHCDATA for securing consent on behalf of an incapable patient. They are not intended to foster a mechanical approach to these fact-sensitive and emotionally sensitive cases. Moreover, these algorithms are intended to help guide practitioners but are not intended to cover all possible issues that might arise. Advice regarding disputes or ethical issues, including those concerning proposed health care, should be directed to a member of the Ethics Review Committee. Questions about interpretation of laws, possible court proceedings or other legal issues should be directed to the AMC Legal Department. While seeking advice and counsel as suggested by the directive statements in some of the final boxes of each algorithm, the team should continue to provide care consistent with good medical practice and reasonable medical judgment. In addition, the team should properly document in the medical record as dictated by hospital policy and/or good medical practice; specific documentation is only noted in boxes in chart 3 and 7 to specify circumstances that are unique under the FHCDATA.

The FHCDATA and these algorithms also do not affect existing law and policy concerning implied consent to health care in an emergency nor do they affect existing law with respect to sterilization.

If a patient regains capacity at any point, the authority of a surrogate or attending physician to make decisions for the patient lapses. The patient with decision-making capacity should give informed consent or refusal for the treatment plan.

There are two situations in which the FHCDATA confers binding authority on the Ethics Review Committee decision. These two situations include:

- Chart 5: When an attending physician objects to the surrogate's decision to withhold or withdraw medically administered life-sustaining nutrition and hydration.
- Chart 7: Withholding or withdrawing life-sustaining treatment from an emancipated minor.
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Chart 1: Adult Patient: Determination of Capacity

Does the patient have capacity? Does the patient "understand and appreciate the nature and consequences of [the proposed treatment], including the benefits and risks, [and alternatives]?"

Yes

Obtain informed consent or refusal for treatment

No

Does the patient lack capacity because of mental illness?²

Yes

Confirm whether FHCDA applies to the patient²; consult psychiatrist to determine capacity

No

Does the patient lack capacity because of mental retardation or developmental disability?²

Yes

Confirm whether FHCDA applies to the patient²; if indicated, consult qualified practitioner who will assist in determining capacity²

No

Does the patient object to determination of capacity?²

Yes

Consult legal counsel

No

Has the patient previously expressed preferences or wishes about the proposed treatment?

Yes

See Chart 2

No

Does the patient have an advance directive?²

Yes

Follow advance directive

No

See Chart 3

* Decisions for most patients who have developmental disabilities, and for some patients who are transferred from mental health facilities, are governed by other laws, in particular the Health Care Decision Act for Persons with Developmental Disabilities. Check applicable policy or consult legal counsel.
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Chart 2: Adult Patient Without Capacity: Prior Decision

Did the patient, while with capacity, give informed refusal or consent to treatment orally or in writing?

Is there an advance directive?

Follow advance directive

Does it involve withholding or withdrawing life-sustaining treatment?

Honor patient's prior wishes

If a surrogate has been identified, does surrogate object?

Continue treatment; consult Ethics Review Committee

Was it (a) made orally during hospitalization in front of 2 witnesses 18 years or older including one who is affiliated with the hospital or (b) made in writing?

If a surrogate has been identified, does surrogate object?

Write DNR order and withhold or withdraw treatment

See Chart 3

See Chart 3
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Chart 3: Adult Patient Without Capacity: Surrogate Designation

* Decisions for most patients who have developmental disabilities, and for some patients who are transferred from mental health facilities, are governed by other laws, in particular the Health Care Decisions Act for Persons with Developmental Disabilities. Check applicable policy or consult legal counsel.

Confirm whether FHICDA applies to the patient*; Was the patient transferred from a mental health facility?

- Yes
  - Notify the director of the mental hygiene facility and the mental hygiene legal service.
  - Follow advance directive

- No
  - Does patient have an advance directive?
    - Yes
      - Follow advance directive
    - No
      - See Chart 4

Without a healthcare proxy, the attending physician must identify the appropriate candidate from the following ordered list who is available, willing and competent to serve as a surrogate:

1. A guardian legally authorized to make health care decisions
2. Spouse, if not legally separated, or domestic partner
3. A son or daughter 18 years or older
4. A parent
5. A brother or sister 18 years or older
6. A close friend

If more than one person in the class might qualify, the attending physician uses the following factors to identify one to serve as surrogate: (a) Who might be better able to make decisions in accordance with patient’s best interests? (b) Who makes regular contact with the patient? (c) Who has demonstrated care and concern for the patient? (d) Who is available to visit? (e) Who is available to engage in face-to-face contact with providers?

- Was surrogate identified?
  - Yes
    - Designate and document in the medical record the identity and authority of the surrogate
    - Does someone else on the surrogate list object?
      - Yes
        - Continue treatment; consult Ethics Review Committee
      - No
        - Does patient object?
          - Yes
            - Continue treatment; consult legal counsel
          - No
            - Follow surrogate's decision based on (a) patient's wishes or (b) in patient’s best interests

- No
  - Does the decision involve withholding or withdrawing treatment?
    - Yes
      - See Chart 5
    - No
      - Continue treatment; consult legal counsel
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Chart 4: Adult Patient Without Capacity: No Surrogate

Does patient have an advance directive? Yes → Follow advance directive

No →

Does the decision involve routine medical care? Yes → Attend physician may authorize based on (a) patient's wishes or (b) in patient's best interests

No →

Does the decision involve major medical care? Yes → Attend physician may authorize based on (a) patient's wishes or (b) in patient's best interests with the concurrence of a second physician

No →

Does the decision involve withholding or withdrawing life-sustaining treatment? Yes →

Is death imminent with or without treatment and does treatment not violate acceptable medical standards? Yes →

Continue treatment; consult Ethics Review Committee

No →

Does a second physician concur? Yes →

Write DNR order and withhold or withdraw treatment

No →

Continue treatment; consult legal counsel
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Chart 5: Adult Patient Without Capacity: Surrogate Identified; Withholding or Withdrawing Life-Sustaining Treatment

Continued from Chart 3

Does the surrogate express the decision to withhold or withdraw life-sustaining treatment in accordance with patient's wishes or best interests?  

Yes: Follow surrogate's decision based on (a) patient's wishes or (b) in patient's best interests.

No: Does the attending physician object to withholding or withdrawing treatment?

Yes: Transfer care or consult Ethics Review Committee.

No: Is the patient terminally ill or permanently unconscious?

Yes: Does the surrogate think that treatment would be an extraordinary burden to the patient?

No: Continue treatment.

Yes: Has the attending physician, to a reasonable degree of medical certainty, diagnosed the patient as having an illness or disease that will cause death within 6 months or that the patient is permanently unconscious?

No: Does a second physician concur?

Yes: Write DNR order and withhold or withdraw treatment.

No: Continue treatment; consult Ethics Review Committee.

Yes: Does a second physician concur that the patient has an irreversible or incurable condition?

Yes: Write DNR order and withhold or withdraw treatment.

No: Continue treatment; consult Ethics Review Committee.

* FHCDATA requires agreement by the Ethics Review Committee if this decision involves medically administered life-sustaining nutrition and hydration.
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Chart 6a: Minor Patient: Withholding or Withdrawing Life-Sustaining Treatment

- **Is the minor an emancipated minor?**
  - Yes: See Chart 7
  - No: **Does the minor have capacity?**
    - Yes: Did the minor and the parent/guardian consent to withhold or withdraw treatment?
      - Yes: Write DNR order and withhold or withdraw treatment
      - No: Continue treatment; consult Ethics Review Committee
    - No: Continue treatment; consult legal counsel

- **Does the minor object to determination of capacity?**
  - Yes: Continue treatment; consult Ethics Review Committee
  - No: **Does the minor have a parent or guardian available?**
    - Yes: Is the parent or guardian making the decision in the best interests of the patient?
      - Yes: Continue to Chart 6b
      - No: Continue treatment; consult legal counsel
    - No: Continue treatment; consult legal counsel
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Chart 7: Emancipated Minors: Withholding or Withdrawing Life-Sustaining Treatment

Is the minor an emancipated minor? 

- No → See Chart 6

- Yes 
  
  Does the patient have capacity? 

  - No 
    - Is it due to mental illness or developmental disability? 
      - Yes → Consider consulting another physician specializing in this field and consult legal counsel
      - No → Continue treatment; consult legal counsel
  
  - Yes → Call Ethics Review Committee*

Does Ethics Review Committee and attending physician agree that withholding or withdrawing life-sustaining treatment is in the patient's best interests?

- Yes → Attempt to notify parents before proceeding and document this in medical record; write DNR order and withhold or withdraw treatment

- No

* FHCDA requires agreement by the Ethics Review Committee if this decision involves medically administered life-sustaining nutrition and hydration.
Endnotes

1. Mental illness means "a mental disease or condition manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent the person afflicted requires care, treatment, and rehabilitation. For purposes of this policy, mental illness does not include dementia or other disorders related to dementia such as Alzheimer's disease."

2. Developmental disability means "a disability that originates before the patient is twenty-two (22) years of age, has continued or can be expected to continue indefinitely, is a substantial handicap to the person's ability to function normally in society, and the condition falls into one of the following categories: (i) is attributable to mental retardation, cerebral palsy, epilepsy, neurological impairment, familial dysautonomia or autism; or (ii) is attributable to any condition closely related to mental retardation that causes a similar impairment of intellectual functioning, or requires treatment and services similar to those with mental retardation; or (iii) is attributable to cyclosia resulting from a disability listed in category (i) or (ii) herein."

3. Either the attending physician must have the following qualifications or another professional with such qualifications must make an independent determination, to a reasonable degree of medical certainty, whether the patient lacks decision-making capacity: a physician or clinical psychologist employed by a developmental disabilities services office named in the Mental Hygiene Law Section 13.17, or has been employed for a minimum of two years to provide care and services in a facility operated by OMRDD, or who has been approved by OMRDD regulations.

4. An advance directive is either (i) a "health care agent" meaning an individual designated by a competent adult using a health care proxy or (ii) a "living will" or medical directive that expresses the patient's wishes or preferences or (iii) a Do-Not-Resuscitate Order that may be expressed on a MOLST Form.

5. Did the patient understand and appreciate the risks and benefits of the proposed treatment including alternatives and either make an informed decision to accept the proposed treatment or refuse the treatment?

6. Mental health facility is a facility operated or licensed by the Office of Mental Health (OMH) or OMRDD, including psychiatric and developmental centers, institutions, clinics, wards, wings or units at hospitals operated to provide services for the mentally disabled.

7. These are restrictions on who may serve as a surrogate including "an operator, administrator, or employee of a hospital or a mental hygiene facility from which the patient was transferred, or a physician who has privileges at the hospital or a health care provider under contract with the hospital may not serve as the surrogate for any adult who is a patient of such hospital unless such individual is related to the patient by blood, marriage, domestic partnership, or adoption, or is a close friend of the patient whose friendship with the patient preceded the patient's admission to the facility. If a physician serves as surrogate, the physician shall not act as the patient's attending physician after his or her authority as surrogate begins."

8. In assessing the best interests of the patient, the following factors should be taken into consideration: dignity and uniqueness of every person; the possibility and extent of preserving the patient's life; the preservation, improvement or restoration of the patient's health or functioning; the relief of the patient's suffering; and any other values that a reasonable person in the patient's circumstances would wish to consider. Decisions should be patient-centered and consistent with the patient's values, including the patient's religious and moral beliefs, to the extent feasible.

9. Routine medical decisions are "any treatment, service, or procedure to diagnose or treat an individual's physical or mental condition, such as the administration of medication, the extraction of bodily fluids for analysis, or dental care performed with a local anesthetic, for which health care providers ordinarily do not seek specific consent from the patient or authorized representative. It shall not include the long-term provision of treatment such as ventilator support or a nasogastric tube but shall include such treatment when provided as part of post-operative care or in response to an acute illness and recovery is reasonably expected within one month or less."

10. Major Medical Treatment means "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition: (i) where general anesthetic is used; or (ii) which involves any significant risk; or (iii) which involves any significant invasion of bodily integrity requiring an incision, producing substantial pain, discomfort, debilitation or having a significant recovery period; or (iv) which involves the use of physical restraints, as specified in regulations promulgated by the commissioner, except in an emergency; or (v) which involves the use of psychoactive medications, except when provided as part of post-operative care or in response to an acute illness and treatment is reasonably expected to be administered over a period of forty-eight hours or less, or when provided in an emergency."

11. Emancipated Minor is a minor who is the parent of a child, or is 16 years of age or older and living independently from his or her parent(s) or guardian.

12. Minor's are presumed to lack the capacity to make decisions about life-sustaining treatment. However, the attending physician in consultation with the minor's parent(s) or guardian may determine that the minor has capacity make such decisions.

13. An attending physician who has reason to believe that the minor patient has a non-custodial parent or guardian who has not been informed of the decision shall make reasonable efforts to determine if the uninformed parent or guardian has maintained substantial and continuous contact with the minor and, if so, shall make diligent efforts to notify that parent or guardian prior to implementing the decision.

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