



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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November 24, 2015

Mr. Jamie Mack
Division of Public Health
Jesse Cooper Building
417 Federal Street
Dover, DE 19901

RE: 19 DE Reg. 388 [DPH Proposed DMOST Regulation]

Dear Mr. Mack:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Public Health's (DPH's) proposal to repeal and replace its Delaware Medical Orders for Scope of Treatment ("DMOST") regulation. The proposed regulation was published as 19 DE Reg. 388 in the November 1, 2015 issue of the Register of Regulations.

A DMOST is a clinical process in which patients, with serious, advanced illness or frailty, or their authorized representatives if they lack decision-making capacity, discuss and have reduced to a medical order their goals of care and treatment choices. The DMOST order must be signed by the patient or representative, and a health care practitioner, in order to be valid. The DMOST is not meant to supplant advance health care directives ("AHCD"); rather it is meant to address a more immediate need for a medical order reflecting current goals and treatment choices that can be followed by emergency medical personnel and treatment providers in multiple settings. AHCDs are of limited utility in emergency situations, situations where people are transferring frequently between locations (home, nursing home, hospital) or situations where the AHCD doesn't address a specific medical decision that has to be made.

The regulations mirror the statutory language in large measure. The most important feature is the promulgation of the form and plain language statement, which are the only forms that can be used. SCPD has the following observations.

1.0 Definitions.

"Advance health care directive." The definition seeks to clarify that AHCDs that are valid where executed are to be honored in Delaware. However, the regulatory definition adds the phrase "valid under Delaware law" to the statutory definition, and the language suggests that the only out of state AHCDs that are recognized in Delaware are ones that are valid where executed and in Delaware. This requirement would prove unworkable and is inconsistent with the statutory language in 16 Del Code §2503A(a) and of 16 Del. Code §2517, which plainly states that AHCDs valid where executed are honored in Delaware, whether they strictly comport to Delaware law or not.

Section 4.0 is sort of a catch-all section for a number of important principles.

Section 4.7 addresses situations where a person has decision-making capacity but is unable to communicate by speaking or writing. In those circumstances, the person is allowed to communicate through the method by which they usually communicate, so long as the person interpreting understands that method, and this must be documented in the medical record. There is always a concern in these circumstances that the person interpreting is actually doing so and not substituting their own words or wishes. The requirement that there be a notation in the chart is something of a safeguard. However, it would be appropriate to add a requirement that there be a witness to this communication, and that a health care practitioner has noted some indicia of reliability regarding the interpreter's ability to understand what is being communicated. Additionally, this section does not and cannot eliminate the requirement under the ADA or state law that a health care facility provides effective communication for people with communication impairments. This should be stated in the regulation. It would be unfortunate for this regulation to be used to deny qualified interpreters when they are required, and sanction the use of lay interpreters or family members, which is often inappropriate.

In the DMOST form, in the first bullet point section, an "s" is needed in bullet 4 at the end of "measure." In Section E, it is unclear who is signing on the line to the immediate right. You have to check the directions to be sure. Additionally, the line regarding whether an appointed representative can alter a DMOST should be set off in some fashion, either by bolding or by line. It very much gets lost in the rest of the box, and it is a very significant designation. SCPD recommends that you consider doing a yes/no box format, or adding it to Box F.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

Sincerely,



Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: Ms. Karyl Rattay, DHSS-DPH
Ms. Debbie Gottschalk, DHSS
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

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