

# FEDERAL PATIENT SELF-DETERMINATION ACT

## FINAL REGULATIONS

### **PART 489-PROVIDER AND SUPPLIER AGREEMENTS**

The authority citation for part 489 continues to read as follows:

Authority: Secs. 1102, 1861, 1864, 1866, 1867, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395x, 1395aa, 1395cc, 1395dd, and 1395hh) and sec. 602 (k) of Pub. L. 9621 (42 U.S.C 1395ww note).

### **Subpart 1 Advance Directives**

#### **Section 489.100 Definitions**

For the purposes of this part “advance directive” means a written instruction, such as a living will or durable power of attorney for health care, recognized under state law (whether statutory or as recognized by the courts of the State), relating to the provision of health care when the individual is incapacitated.

#### **Section 489.102 Requirements for providers**

- (a) Hospitals, rural primary care hospitals, skilled nursing facilities, nursing facilities, home health agencies, providers of home health-care (and for Medicaid purposes, providers of personal care services), and hospices must maintain written policies and procedures concerning advance directives with respect to all adult individuals receiving medical care by or through the provider and are required to:
- (1) Provide written information to such individuals concerning—
    - (i) An individual’s rights under State law (whether statutory or recognized by courts of the State) to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate, at the individual’s option, advance directives. Providers are permitted to contract with other entities to furnish this information but are still legally responsible for ensuring that the requirements of this section are met. Providers are to update and disseminate amended information as soon as possible, but no later than 90 days from the effective date of the changes to State law; and
    - (ii) The written policies of the provider or organization respecting the implementation of such rights, including a clear and precise statement of limitation if the provider cannot implement an advance directive on the basis of conscience. At a minimum, a provider’s statement of limitation should:
      - (A) Clarify any differences between institution wide conscience objections and those that may be raised by individual physicians:
      - (B) Identify the state legal authority permitting such objections.
      - (C) Describe the range of medical conditions or procedures affected by the conscientious objection.
  - (2) Document in the individual’s medical record whether or not-the individual has executed an advance directive.
  - (3) Not condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive.
  - (4) Ensure compliance with requirements of State law (whether statutory- or recognized by the courts of the State) regarding advance directives. The provider must inform individuals that complaints concerning the advance directive requirements may be filed with the State survey and certification agency.
  - (5) Provide education for staff concerning its policies and procedures on advance directive; and,
  - (6) Provide for community education regarding issues concerning advance directives that may

include material required in paragraph (a)(1) of this section, either directly or in concert with other providers and organizations. Separate community education materials may be developed and used, at the discretion of providers. The same written materials do not have to be provided in all settings, but the material should define what constitutes an advance directive, emphasizing that an advance directive is designed to enhance an incapacitated individual's control over medical treatment, and describe applicable State law concerning advance directives. A provider must be able to document its community education efforts.

- (b) The information specified in paragraph (a) of this section is furnished:
- (1) In the case of a hospital, at the time of the individual's admission as an inpatient.
  - (2) In the case of a skilled nursing facility at the time of the individual's admission as a resident.
  - (3)(i) In the case of a home health agency, in advance of the individual coming under the care of the agency. HHA may furnish advance directives information to a patient at the time of the first home visit, as long as the information is furnished before care is provided.
  - (ii) In the case of personal care services, in advance of the individual coming under the care of the personal care services provider. The personal care provider may furnish advance directives information to a patient at the time of the first home visit, as long as the information is furnished before care is provided.
  - (4) In the case of a hospice program, at the time of initial receipt of hospice care by the individual in the program.
- (c) The providers listed in paragraph (a) of this section—
- (1) Are not required to provide care that conflicts with an advance directive.
  - (2) Are not required to implement an advance directive if, as a matter of conscience, the provider cannot implement an advance directive and State law allows any health care provider or any agent of such provider to conscientiously object.
- (d) Prepaid or eligible organizations (as specified in sections 1883 (a)(1)(A) and 1876 (b) of the Act) must meet the requirements specified in ' 417.436 of this chapter. \*\*
- (e) If an adult individual is incapacitated- at the time of admission or at the start of care and is unable to receive information-(due to the incapacitating conditions or a mental disorder) or articulate whether or not he or she has executed an advance directive, then the provider may give advance directive information to the individual's family or surrogate in the same manner that it issues other material about policies and procedures to the family of the incapacitated individual or to a surrogate or other concerned persons in accordance with State law. The provider is not relieved of its obligation to provide this information to the individual once he or she is no longer incapacitated or unable to receive such information. Follow up procedures must be in place to provide the information to the individual directly at the appropriate time.

\*\* The Regulations governing prepaid organizations (HMOs) mirror this part. Information is to be provided to individuals at the time of enrollment.

***Federal Register Citations:***

Final Revisions: Vol. 60. No. 123, Tuesday, June 27, 1995, page 33294 forward

Interim Final Rule: Vol. 57 No. 45, Friday March 6, 1992, pages 8194-8204