

November 30, 2015

Jamie Mack
Division of Public Health
417 Federal Street
Dover, DE 19901

RE: DPH Proposed DMOST Regulations [19 DE Reg. 388 (November 1, 2015)]

Dear Mr. Mack:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Public Health proposal to develop regulations implementing House Bill No. 400 Delaware Medical Orders for Scope of Treatment (DMOST).

The DMOST bill creates a new Title 25A which outlines the context and the mechanics for creating a DMOST by patients, their representatives, and health care providers.

The regulations mirror the statutory language for the most part and Council does not have any serious concerns. The most important feature is the promulgation of the form and plain language statement, which are the only forms that can be used. Council would like to share the following observations on the definitions and the form.

1.0 Definitions

First, in the definition of "Advance health care directive", the definition seeks to clarify that Advance Health Care Directives (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. This 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.

Second, 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. 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 a limited 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 indication of reliability regarding the ability of the interpreter to understand what is being communicated.

In addition, this section does not and cannot eliminate the requirement under the Americans with Disabilities Act (ADA) or state law that a health care facility provide effective communication for individuals with communication impairments. This should be clearly 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.

DMOST Form and Directions:

First, in the DMOST form, an “s” is needed in bullet 4 at the end of “measure.”

Second, 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.

Third, 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 gets lost in the rest of the box which is unfortunate since this is a very significant designation. The Division might consider using a yes/no box format or adding it to Box F.

Thank you for your consideration of our observations. If you have any questions, please contact me or Wendy Strauss at the GACEC office.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc