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DQA Memo 21-005
Replaces DQA Memo 15-001

To: Ambulatory Surgical Centers

From: Ann Hansen, Director
Bureau of Health Services

Via: Otis L. Woods, Administrator
Division of Quality Assurance

Suspension of Advance Directives

BACKGROUND

Ambulatory Surgical Centers (ASC) certified in the Medicare program as free-standing surgical centers provide elective surgical services to patients who do not require inpatient hospitalization. These surgical services are not to exceed 24 hours of stay following an admission to the center. The Division of Quality Assurance (DQA) regulates ASCs under contract with the Centers for Medicare and Medicaid Services (CMS) to ensure their compliance with the Conditions of Coverage for ASCs.

Surveys conducted by DQA on behalf of the Medicare program have resulted in findings that some centers have a policy that the ASC will not honor a patient's advanced directive, and will have patients sign consent for this practice prior to their elective surgery.

This memo analyzes Medicare requirements for an ASC's compliance with a patient's advance directive and Wisconsin law governing advance directives.

APPLICABLE LAW

Federal Law and Guidance

Code of Federal Regulations

42 C.F.R. § 489.100

For 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.

42 C.F.R. § 416.50

The ASC must inform the patient or the patient's representative or surrogate of the patient's rights and must protect and promote the exercise of these rights, as set forth in this section. The ASC must also

post the written notice of patient rights in a place or places within the ASC likely to be noticed by patients waiting for treatment or by the patient's representative or surrogate, if applicable.

(c) Standard: Advance directives. The ASC must comply with the following requirements:

- (1) Provide the patient or, as appropriate, the patient's representative with written information concerning its policies on advance directives, including a description of applicable State health and safety laws and, if requested, official State advance directive forms.
- (2) Inform the patient or, as appropriate, the patient's representative of the patient's right to make informed decisions regarding the patient's care.
- (3) Document in a prominent part of the patient's current medical record, whether or not the individual has executed an advance directive.

CMS Interpretive Guidelines for 42 C.F.R. § 416.50(c)

Each ASC patient has the right to formulate an advance directive consistent with applicable State law and to have ASC staff implement and comply with the advance directive, subject to the ASC's limitations on the basis of conscience. To the degree permitted by State law, and to the maximum extent practicable, the ASC must respect the patient's wishes and follow that process.

The ASC must include in the information concerning its advance directive policies a clear and precise statement of limitation if the ASC cannot implement an advance directive on the basis of conscience or any other specific reason that is permitted under State law. A blanket statement of refusal by the ASC to comply with any patient advance directives is not permissible. However, if and to the extent permitted under State law, the ASC may decline to implement elements of an advance directive on the basis of conscience or any other reason permitted under State law if it includes in the information concerning its advance directive policies a clear and precise statement of limitation. A statement of limitation must:

- Clarify any differences between ASC-wide conscience objections and those that may be raised by individual ASC staff;
- Identify the state legal authority permitting such objection; and
- Describe the range of medical conditions and procedures affected by the objection.

Wisconsin Law

Wisconsin Statutes Chapter 154: Advance Directives

Wis. Stat. § 154.03 Declaration to physicians (also known as a “living will”)

DIRECTIVES TO ATTENDING PHYSICIAN

1. This document authorizes the withholding or withdrawal of life-sustaining procedures or of feeding tubes when 2 physicians, one of whom is the attending physician, have personally examined and certified in writing that the patient has a terminal condition or is in a persistent vegetative state.

2. The choices in this document were made by a competent adult. Under the law, the patient's stated desires must be followed unless you believe that withholding or withdrawing life-sustaining procedures or feeding tubes would cause the patient pain or reduced comfort and that the pain or discomfort cannot be alleviated through pain relief measures. If the patient's stated desires are that life-sustaining procedures or feeding tubes be used, this directive must be followed.
3. If you feel that you cannot comply with this document, you must make a good faith attempt to transfer the patient to another physician who will comply. Refusal or failure to make a good faith attempt to do so constitutes unprofessional conduct.
4. If you know that the patient is pregnant, this document has no effect during her pregnancy.

Wisconsin Statutes Chapter 155: Power of Attorney for Health Care

Wis. Stat. § 155.01 Definitions. In this chapter:

(5) "Health care decision" means an informed decision in the exercise of the right to accept, maintain, discontinue or refuse health care.

Wis. Stat. § 155.20 Health care agent; powers; limitations.

(4) A health care agent may consent to the withholding or withdrawal of a feeding tube for the principal if the power of attorney for health care instrument so authorizes, unless the principal's attending physician advises that, in his or her professional judgment, the withholding or withdrawal will cause the principal pain or reduce the principal's comfort. A health care agent may not consent to the withholding or withdrawal of orally ingested nutrition or hydration unless provision of the nutrition or hydration is medically contraindicated.

Wis. Stat. § 155.30 Power of attorney for health care instrument; form.

GENERAL STATEMENT OF AUTHORITY GRANTED

Unless I have specified otherwise in this document, if I ever have incapacity I instruct my health care provider to obtain the health care decision of my health care agent, if I need treatment, for all of my health care and treatment. I have discussed my desires thoroughly with my health care agent and believe that he or she understands my philosophy regarding the health care decisions I would make if I were able. I desire that my wishes be carried out through the authority given to my health care agent under this document.

ANALYSIS

For purposes of this memo, an advance directive refers to a living will or that portion of a patient's power of attorney for health care (POAHC) document that directs a physician to provide or discontinue life-sustaining care or to withhold or withdraw a feeding tube. 42 C.F.R. § 416.50(c) includes advance directive requirements for ASCs. The language of this section is included above.

CMS' guidelines interpreting 42 C.F.R. § 416.50(c) prohibit a Medicare certified ASC from having a blanket policy that it will refuse to comply with all patient advance directives. These guidelines also state that ASC patients have a right to develop advance directives consistent with their state's laws and have the ASC staff comply with the advance directive subject to limitations permitted by state law. CMS' guidelines require an ASC that will refuse to comply with an advance directive under permissible

state limitations to include in its advance directive policy a specific statement of limitation. This statement of limitation must do the following:

- (1) Clarify any differences between ASC-wide conscience objections and those that may be raised by individual ASC staff;
- (2) Identify the state legal authority permitting such objection; and
- (3) Describe the range of medical conditions and procedures affected by the objection.

State law governs the permissible reasons for which an ASC may refuse to comply with a patient's advance directive. Wisconsin law permits a patient's advance directive to not be followed under three circumstances. These circumstances, including on what basis the objection may be raised, include the following:

- (1) When the physician believes that withholding or withdrawing life-sustaining procedures or feeding tubes would cause the patient pain or reduced comfort and that pain or discomfort cannot be alleviated through pain relief measures.
 - This objection may be raised by an individual physician on a case-by-case basis.
- (2) When the physician feels he cannot comply with the advance directive due to a conscience objection.
 - This objection may be raised by an individual physician.
- (3) When the patient is pregnant. An advance directive has no effect if the physician knows the patient is pregnant.
 - This objection may be raised on an ASC-wide basis.

SUMMARY

A Medicare-certified ASC must honor a patient's advance directive unless one of the three exceptions permitted by Wisconsin law exists. If an ASC has a policy that it will decline to follow a patient's advance directive based on one or more of these exceptions, it must include in its advance directive policies a statement of limitation that meets the requirements identified above.

QUESTIONS

If you have questions regarding this memo, please contact the Acute Care Compliance Section. Contact information is available at: <https://www.dhs.wisconsin.gov/regulations/asc/contacts.htm>.