



ECHO[®] MOLST: Honoring Preferences at End-of-life

Who Determines Who Has the Right to Make End-of-life Decisions

COVID-19: Why it Matters



Presenter

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Learning Objectives

- Define capacity
- Describe determination of medical decision-making capacity
- Explain NYS Public Health Law and recent changes
- Review importance in terms of COVID-19

Capacity: Definition

- Capacity is the ability to:
 - take in information,
 - understand its meaning and
 - make an informed decision using the information
- Capacity allows us to function independently
- Capacity is not the same as competence

Capacity: Definition

- Includes Mental Skills Used to Function in Everyday Life
 - Memory: ability to remember things
 - Language
 - Ability to use logic
 - Ability to calculate
 - Ability and “flexibility” to turn attention from 1 task to another
 - Executive functions

Executive Functions

- Problem solving
- Planning
 - including appreciating consequences of an action
- Initiation, direction, execution of actions
- Sequencing
- Abstraction and insight
- Ability to monitor one's own behavior
- Inhibition of inappropriate behaviors
- Impact of frontal lobe function on ADLs and decisional capacity

Capacity Determination

- Capacity is task-specific
- Patient's capacity to make different decisions can vary
 - Medical care and treatment
 - Manage money
 - Write a will
 - Continue to drive
 - Possess firearms
- Key principle
 - Assessment of the patient's ability to understand the consequences of a decision

Advance Care Planning: Capacity is Task Specific

- Capacity to choose health care agent is different than the ability to make medical decisions
- Capacity to make medical decisions is based on the complexity of decisions
 - simple health care decisions
 - request for palliation (relief of pain and suffering)
 - complicated decisions regarding DNR and life-sustaining treatment

Medical Decision-Making Capacity: Three Key Patient Abilities

- Ability to understand relevant information about his or her condition, the probable outcomes of the disease and potential interventions, and its meaning in terms of the:
 - disease process
 - proposed therapy and alternative therapies;
 - advantages, adverse effects and complications of each therapy
 - Possible course of the disease without intervention
- Ability to make an informed decision using the information, based on his or her beliefs and values and understand the consequences of the decision
- Ability to communicate a decision

Cultural Differences

- Can make assessing medical decision-making more difficult
- Capacity assessment involves:
 - Abstract concepts not easily communicated in another language
 - Interpret value judgments on basis of what is considered reasonable
- **IMPORTANT:** Avoid assuming patients hold certain beliefs on the basis solely of ethnic background
 - Varying degrees of acculturation and assimilation of culture
 - Variation within an ethnic group
 - **Always** ask the patient about their personal values and beliefs!

Capacity Assessment: Key Elements

- Detailed medical history from the patient, with attention to the patient's ability to:
 - Organize time relationships
 - Recall facts
 - Reason abstractly
- Collateral history from family, if available
- Focused physical examination
- Assess cognition, function and screen for depression
- Testing to exclude reversible conditions that may cause temporary incapacity

Capacity Assessment: What “*Not*” To Do

- Purely base assessment on a third party’s opinion
- Simply have a conversation with the patient
- Merely use preferences expressed by patient
- Only use the MMSE score and designate a score below which the patient lacks capacity
- Consider “abnormal” answers as evidence of lack of capacity rather than recognizing the patient’s lifestyle and/or personal experience
- Disregard individual habits/behaviors which the person always had
- Use risky behavior as evidence

Who Determines Capacity

- Under NYSPHL, a patient is presumed to have capacity until determined the patient lacks capacity
- Concurrent determination required
- **Prior to May 28, 2018**, only a physician could determine the patient's capacity to make decisions to withhold and/or withdraw life-sustaining treatment with or without the MOLST
- Special expertise required:
 - Persons with DD/ID
 - Persons with Mental Illness

Can an NP Determine Capacity?

This table is accurate as of Feb 3, 2019.

Purpose	Initial Determination	Concurring Determination	Explanation
To empower a health care agent	Yes, as of February 3, 2019	Yes, as of February 3, 2019	<ul style="list-style-type: none"> As a result of the 2018 amendment to the health care proxy law, the determination of incapacity can be by the "attending physician" or "attending nurse practitioner." In life-sustaining treatment cases the attending physician or nurse practitioner must consult with "another physician or nurse practitioner." This means the HCP Law does allow an NP to determine incapacity or provide the required concurrent determination.
To empower a FHCDA surrogate	Yes, as of May 28, 2018	Yes	<ul style="list-style-type: none"> The FHCDA, in PHL 2994-c, as of May 28, provides that the determination of incapacity must be by the "attending physician or attending nurse practitioner." In life-sustaining treatment cases there must be a concurring determination by a "health or social services practitioner" which includes an NP. This means that the FHCDA does allow an NP to determine incapacity or provide the required concurring determination.
To empower a § SCPA 1750-b surrogate (decisions for patients with intellectual disabilities)	No	No	<ul style="list-style-type: none"> § SCPA 1750-b(4)(a) provides that in life-sustaining treatment cases the "attending physician" as defined in PHL 2980.2 must determine incapacity. The attending physician must consult with another physician or licensed psychologist. Either the attending or consult must have special qualifications relating to the treatment of persons with intellectual disabilities. This means that § SCPA 1750-b does not allow an NP to determine incapacity or provide the required consult.

Adapted from tables created by Robert N. Swidler, V.P. Legal Services, St. Peter's Health Partners, Albany NY

Can an PA Determine Capacity?

This table is accurate as of June 17, 2020.

Purpose	Initial Determination	Concurring Determination	Explanation
To empower a health care agent	Yes, as of June 17, 2020	Yes, as of June 17, 2020	<ul style="list-style-type: none"> As a result of the 2019 amendment to the health care proxy law, the determination of incapacity can be by the attending practitioner – a physician, nurse practitioner or physician assistant. In life-sustaining treatment cases the attending practitioner must consult with another physician, nurse practitioner or physician assistant. This means the HCP Law does allow PAs to determine incapacity or provide the required concurrent determination. In cases where the patient lacks capacity due to mental illness a psychiatrist must be the concurring.
To empower a FHCDA surrogate	Yes, as of June 17, 2020	Yes	<ul style="list-style-type: none"> The FHCDA, in PHL 2994-c, as of June 17, provides that the determination of incapacity must be by the attending practitioner (a physician, nurse practitioner or physician assistant.) In life-sustaining treatment cases there must be a concurring determination by a "health or social services practitioner" which includes a PA. This means that the FHCDA does allow a PA to determine incapacity or provide the required concurring determination.
To empower a § SCPA 1750-b surrogate (decisions for patients with intellectual disabilities)	No	No	<ul style="list-style-type: none"> § SCPA 1750-b(4)(a) provides that in life-sustaining treatment cases the "attending physician" as defined in PHL 2980.2 must determine incapacity. The attending physician must consult with another physician or licensed psychologist. Either the attending or consult must have special qualifications relating to the treatment of persons with intellectual disabilities. This means that § SCPA 1750-b does not allow an PA to determine incapacity or provide the required consult.

Adapted from tables created by Robert N. Swidler, V.P. Legal Services, St. Peter's Health Partners, Albany NY

Keypoints

- Capacity is the assessment of the patient's ability to understand the consequences of a decision.
- Capacity is “task specific.”
- Authority of NPs to determine capacity
 - To empower a FHCDA Surrogate, **as of** May 28, 2018
 - To empower a health care agent, **as of** February 3, 2019
- Authority of PAs to determine capacity
 - To empower a health care agent/FHCDA Surrogate, **as of** June 17, 2020
- Authority of NPs & PAs does **NOT** extend to 1750-b
 - **Only a physician can determine capacity**

References

- COVID-19: MOLST & eMOLST Guidance
<https://molst.org/blog/newsletter/molst-update-march-2020/>
- [Authority of Physician Assistants & Current NYS Law](#) on [MOLST.org](#)
- [Authority of Nurse Practitioners & Current NYS Law](#) on [MOLST.org](#)
- See [Up-to-date References](#) for Assessment of decision-making capacity in adults