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§482.13(b)(3) The patient has the right to formulate advance directives and to have hospital staff and practitioners who provide care in the hospital comply with these directives, in accordance with §489.100 of this part (Definition), §489.102 of this part (Requirements for providers), and §489.104 of this part (Effective dates).

Interpretive Guidelines §482.13(b)(3)

An advance directive is defined at §489.100 as “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.” The patient (inpatient or outpatient) has the right to formulate advance directives, and to have hospital staff implement and comply with their advance directive. The regulation at 42 CFR 489.102 specifies the rights of a patient (as permitted by State law) to make medical care decisions, including the right to accept or refuse medical or surgical treatment and the right to formulate, at the individual’s option, advance directives.

In the advance directive, the patient may provide guidance as to his/her wishes concerning provision of care in certain situations; alternatively the patient may delegate decision-making authority to another individual, as permitted by State law. (In addition, the patient may use the advance directive to designate a “support person,” as that term is used in §482.13(h), for purposes of exercising the patient’s visitation rights.) When a patient who is incapacitated has executed an advance directive designating a particular individual to make medical decisions for him/her when incapacitated, the hospital must, when presented with the document, provide the designated individual the information required to make informed decisions about the patient’s care. (See also the requirements at §482.13(b)(2).) The hospital must also seek the consent of the patient’s representative when informed consent is required for a care decision. The explicit designation of a representative in the patient’s advance directive takes precedence over any non-designated relationship and continues throughout the patient’s inpatient stay or, as applicable, outpatient visit, unless the patient ceases to be incapacitated and expressly withdraws the designation, either orally or in writing.

§489.102 also requires the hospital to:

- Provide written notice of its policies regarding the implementation of patients’ rights to make decisions concerning medical care, such as the right to formulate advance directives. If an individual is incapacitated or otherwise unable to communicate, the hospital may provide the advance directive information required under §489.102 to the individual’s “family or surrogate in the same manner that it issues other materials about policies and procedures to the family of the incapacitated individual or to a surrogate or other concerned persons in accordance with State law.” (§489.102(e)) The guidance concerning the regulation at §482.13(a)(1) governing notice to the patient or the patient’s representative of the patient’s rights applies to the required provision of notice concerning the hospital’s advance directive policies. Although both inpatients and outpatients have the same rights under §482.13(a)(1), §489.102(b)(1) requires that notice of the hospital’s advance directive policy be provided at the time an individual is admitted as an inpatient. However, in view of the broader notice requirements at §482.13(a)(1), the hospital should also provide the advance directive notice to outpatients (or their representatives) who are in the emergency department, who are in an observation status, or who are undergoing same-day surgery. The notice should be presented at the time of registration. Notice is not required for other outpatients, given that they are unlikely to become incapacitated.
- The notice must include a clear and precise statement of limitation if the hospital cannot implement an advance directive on the basis of conscience. At a minimum, a statement of limitation should:
 - Clarify any differences between institution-wide conscience objections and those that may be raised by individual physicians or other practitioners;

- Identify the State legal authority permitting such an objection; and
- Describe the range of medical conditions or procedures affected by the conscience objection.

It should be noted that this provision allowing for certain conscience objections to implementing an advance directive is narrowly focused on the directive's content related to medical conditions or procedures. This provision would not allow a hospital or individual physician or practitioner to refuse to honor those portions of an advance directive that designate an individual as the patient's representative and/or support person, given that such designation does not concern a medical condition or procedure.

Issuance of the written notice of the hospital's advance directive policies to the patient or the patient's representative must be documented in the patient's medical record.

- Document in a prominent part of the patient's medical record whether or not the patient has executed an advance directive;
- Not condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive;
- Ensure compliance with requirements of State law concerning advance directives and inform individuals that complaints concerning the advance directive requirements may be filed with the State survey and certification agency;
- Provide for the education of staff concerning its policies and procedures on advance directives. The right to formulate advance directives includes the right to formulate a psychiatric advance directive (as allowed by State law); and
- Provide community education regarding advance directives and the hospital must document its efforts.

A **psychiatric advance directive** is akin to a traditional advance directive for health care. This type of advance directive might be prepared by an individual who is concerned that at some time he or she may be subject to involuntary psychiatric commitment or treatment. The psychiatric advance directive may cover a range of subjects, and may name another person who is authorized to make decisions for the individual if he or she is determined to be legally incompetent to make his/her own choices. It may also provide the patient's instructions about hospitalization, alternatives to hospitalization, the use of medications, types of therapies, and the patient's wishes concerning restraint or seclusion. The patient may designate who should be notified upon his/her admission to the hospital, as well as who should not be permitted to visit him or her. State laws regarding the use of psychiatric advance directives vary.

In accordance with State law, a psychiatric advance directive should be accorded the same respect and consideration that a traditional advance directive for health care is given. Hospitals should carefully coordinate how the choices of a patient balance with the rights of other patients, staff, and individuals in the event that a dangerous situation arises.

However, even if State law has not explicitly spoken to the use of psychiatric advance directives, consideration should be given to them inasmuch as this regulation also supports the patient's right to participate in the development and implementation of his or her plan of care. When the patient is, for whatever reason, unable to communicate his/her wishes, the preferences expressed in the psychiatric advance directive can give critical insight to the MD/DOs, nurses, and other staff as they develop a plan of care and treatment for the

patient.

Survey Procedures §482.13(b)(3)

- Review the hospital's advance directive notice. Does it advise inpatients or applicable outpatients, or their representatives, of the patient's right to formulate an advance directive and to have hospital staff comply with the advance directive (in accordance with State law)? Does it include a clear, precise and valid statement of limitation if the hospital cannot implement an advance directive on the basis of conscience?
- Review the records of a sample of patients for evidence of hospital compliance with advance directive notice requirements. Does every inpatient or applicable outpatient record contain documentation that notice of the hospital's advance directives policy was provided at the time of admission or registration? Is there documentation of whether or not each patient has an advance directive? For those patients who have reported an advance directive, has a copy of the patient's advance directive been placed in the medical record?
- What mechanism does the hospital have in place to allow patients to formulate an advance directive or to update their current advance directive? Is there evidence that the hospital is promoting and protecting each patient's right to formulate an advance directive?
- Determine to what extent the hospital complies, as permitted under State law, with patient advance directives that delegate decisions about the patient's care to a designated individual.
- Determine to what extent the hospital educates its staff regarding advance directives.
- Interview staff to determine their knowledge of the advance directives of the patients in their care.
- Determine to what extent the hospital provides education for the patient population (inpatient and outpatient) regarding one's rights under State law to formulate advance directives.