

Bobby Jindal
GOVERNOR



Alan Levine
SECRETARY

State of Louisiana
Department of Health and Hospitals
Office of the Secretary

February 1, 2010

The Honorable Joel T. Chaisson II, President
Louisiana Senate
State Capitol
P.O. Box 94183
Baton Rouge, LA 70804

Dear President Chaisson:

In response to House Concurrent Resolution 102 (HCR 102) of the 2009 Regular Session, the Louisiana Department of Health and Hospitals (DHH) submits the enclosed report. The resolution requests that DHH study the use of living wills among Medicaid recipients, study ways to increase the use of living wills among Medicaid recipients, examine whether or not filling out living wills should be made a voluntary requirement for Medicaid applicants or persons being admitted into inpatient facilities, and report its findings to the legislature.

DHH is available to discuss the enclosed report and recommendations with you at your convenience. Please contact Ms. Rebecca DeLaSalle, DHH attorney in the office of the secretary, at (225) 342-9359 with any questions or comments you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Levine".

Alan Levine
Secretary

Enclosures

Bobby Jindal
GOVERNOR



Alan Levine
SECRETARY

State of Louisiana
Department of Health and Hospitals
Office of the Secretary

February 1, 2010

The Honorable Jim Tucker, Speaker
Louisiana House of Representatives
State Capitol
P.O. Box 44486
Baton Rouge, LA 70804

Dear Speaker Tucker:

In response to House Concurrent Resolution 102 (HCR 102) of the 2009 Regular Session, the Louisiana Department of Health and Hospitals (DHH) submits the enclosed report. The resolution requests that DHH study the use of living wills among Medicaid recipients, study ways to increase the use of living wills among Medicaid recipients, examine whether or not filling out living wills should be made a voluntary requirement for Medicaid applicants or persons being admitted into inpatient facilities, and report its findings to the legislature.

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State of Louisiana
Department of Health and Hospitals
Office of the Secretary

February 1, 2010

The Honorable Kay Katz, Chair
House Health and Welfare Committee
State Capitol
P.O. Box 44486
Baton Rouge, LA 70804

Dear Chairman Katz:

In response to House Concurrent Resolution 102 (HCR 102) of the 2009 Regular Session, the Louisiana Department of Health and Hospitals (DHH) submits the enclosed report. The resolution requests that DHH study the use of living wills among Medicaid recipients, study ways to increase the use of living wills among Medicaid recipients, examine whether or not filling out living wills should be made a voluntary requirement for Medicaid applicants or persons being admitted into inpatient facilities, and report its findings to the legislature.

DHH is available to discuss the enclosed report and recommendations with you and the members of the House Health and Welfare Committee. Please contact Ms. Rebecca DeLaSalle, DHH attorney in the office of the secretary, at (225) 342-9359 with any questions or comments you may have.

Sincerely,

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Alan Levine
Secretary

Enclosures

Bobby Jindal
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Alan Levine
SECRETARY

State of Louisiana
Department of Health and Hospitals
Office of the Secretary

February 1, 2010

The Honorable Willie Mount, Chair
Senate Health and Welfare Committee
State Capitol
P.O. Box 94183
Baton Rouge, LA 70804

Dear Chairman Mount:

In response to House Concurrent Resolution 102 (HCR 102) of the 2009 Regular Session, the Louisiana Department of Health and Hospitals (DHH) submits the enclosed report. The resolution requests that DHH study the use of living wills among Medicaid recipients, study ways to increase the use of living wills among Medicaid recipients, examine whether or not filling out living wills should be made a voluntary requirement for Medicaid applicants or persons being admitted into inpatient facilities, and to report its findings to the legislature.

DHH is available to discuss the enclosed report and recommendations with you and the members of the Senate Health and Welfare Committee. Please contact Ms. Rebecca DeLaSalle, DHH attorney in the office of the secretary, at (225) 342-9359 with any questions or comments you may have.

Sincerely,

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Alan Levine
Secretary

Enclosures

**USE OF LIVING WILLS
AMONG MEDICAID
RECIPIENTS**

REPORT PREPARED IN RESPONSE TO HCR
102 OF THE 2009 REGULAR SESSION

JANUARY 11, 2010

Contact:

Louisiana Department of Health and Hospitals
Rebecca DeLaSalle
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P.O. Box 3836
225-342-9359
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EXECUTIVE SUMMARY

The charge of the resolution is as follows:

- 1) The Louisiana Department of Health and Hospitals was urged and requested to “study the use of living wills among Medicaid recipients, including but not limited to studying ways to increase the use of living wills among Medicaid recipients”; and
- 2) The Louisiana Department of Health and Hospitals should “examine whether or not filling out living wills should be a voluntary requirement for Medicaid applicants or persons being admitted into inpatient facilities.”

REPORT TO THE LEGISLATURE

CURRENT USE OF LIVING WILLS AMONG MEDICAID RECIPIENTS

The use of living wills among Medicaid recipients is unknown as this data has not been collected. Even if the number of Medicaid recipients who had executed a living will could be studied, such a study would not measure the frequency of which living wills are actually used when a person dies.

“Approximately two-thirds of all adults have no Living Will or other advance directive.”¹ Although the number of Medicaid recipients who have a living will is unknown, factors associated with participation in advance care planning have been identified. Factors that are all related to greater likelihood of advance directive completion are: “Older age, greater disease burden, certain conditions, white race, higher socioeconomic status, knowledge about advance directives or end-of-life treatment options, a positive attitude toward end-of-life discussions, a long-standing relationship with a primary care physician (PCP), and whether a person’s PCP has an advance directive.”²

Barriers to advance care planning and living will completion have also been identified. “Factors such as access to care and trust in clinicians and the healthcare system contribute to a willingness to engage in advance care planning and complete advance care directives.”³ “An impediment for members of some cultural minorities is the language barrier between patients and their physicians.”⁴ “Another barrier is the reluctance of many physicians to discuss advance care planning with their patients.”⁵ Physicians cite a number of reasons for such reluctance including but not limited to “lack of time, lack of formal training in and knowledge of palliative care measures, belief that patients and families do not want to engage in such discussions, association of palliative care with death, and lack of belief that

¹ “Myths and Facts About Health Care Advance Directives,” American Bar Association Commission on Law & Aging, 8 January 2010. <<http://www.abanet.org/aging/pdfs/mythsfacts0409.pdf>>

² “Advance Directives and Advance Care Planning: Report to Congress,” prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008, p.

³ “Advance Directives and Advance Care Planning: Report to Congress,” prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008, p.

⁴ “Advance Directives and Advance Care Planning: Report to Congress,” prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008, p.

⁵ “Advance Directives and Advance Care Planning: Report to Congress,” prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008, p.

such discussions are needed.”⁶ It is also possible that members of disenfranchised ethnic groups perceive living wills as a means of limiting their access to health care and the quality of care they will receive. Some individuals have less trust in the medical care system; others may have cultural norms that do not place value on autonomy.

OBJECTIVE SHOULD BE ONGOING DIALOGUE OF ADVANCE CARE PLANNING BETWEEN MEDICAL PROVIDER AND PATIENT

The focus of advance care planning should shift from a focus on formal written advance directive forms to a developmental discussion that is an ongoing process. Historically, efforts have been focused on a transactional approach with the goal being a living will or some other form of an advanced directive but the nature of how one wants to be cared for in a future hypothetical situation is far more subjective than making a contemporaneous selection. Ideally, support should be given to a variety of models that recognize advance care planning as a fundamental process rather than a product. “Specific attention could be given to models that translate into immediate medical orders to guide specific treatment decisions such as the POLST program paradigm.”⁷ Louisiana law recognizes oral declarations as well as written declarations as a way to make a valid living will; therefore, it is important to recognize the significance of an ongoing dialogue between the patient and the patient’s doctor and not just a written form that can be easily verbally modified.⁹

WAYS TO INCREASE THE USE OF LIVING WILLS AMONG MEDICAID RECIPIENTS

One way an increase in the use of living wills may be achieved is if the Department of Health and Hospitals utilized the POLST paradigm (LaPOST is the POLST initiative in Louisiana) and included the LaPOST form in the application process to Medicaid recipients who apply for nursing home care and certain other services. This option would be completely voluntary but may facilitate an ongoing dialogue between the Medicaid recipient and their medical provider.

Increasing effective advanced care planning could be accomplished through utilization of a communications approach including the use of health information technology interventions. “Advanced directives have been considered ends in themselves instead of encouraging substantive communication about clinical circumstances and medical possibilities and facilitating communication about how the individual’s values would dictate choices, based on medical realities.”¹⁰ Providing Medicaid recipients with extensive information on living wills as well as a LaPOST form or other form may facilitate a dialogue between the patient and the patient’s physician and could result in an increase of Medicaid recipients utilizing living wills or other advance directives.

⁶ “Advance Directives and Advance Care Planning: Report to Congress,” prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008, p.

⁷ Advance Directives and Advance Care Planning: Report to Congress,” prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008, p.

⁸ POLST is an acronym for Physicians Order for Life-Sustaining Treatment

⁹ Declarations Concerning Life-Sustaining Procedures (Louisiana Natural Death Act) L.R.S. 40:1299.58 et.seq.

¹⁰ Advance Directives and Advance Care Planning: Report to Congress,” prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008, p.

A PERSON CANNOT BE COMPELLED TO COMPLETE A LIVING WILL

The effect of the 1991 Patient Self-Determination Act was an increase in the number of advance directives that were documented in patient medical records as well as the number of patients who reported having discussed advance care planning with their physicians. The Act did not affect an increase in the overall proportion of patients with an advance directive. "Subsequent to this Act there was a large increase in advance directive completion among nursing home residents."¹¹

Medicaid benefits cannot be conditioned upon completion of a living will or other advanced directive as this would be unconstitutional and in conflict with Medicaid regulation. A person has a constitutional right to choose their own medical treatment.¹²¹³ In a medical context, respect for a patient's autonomy is considered a fundamental ethical principle. This belief is the central premise and very foundation of the concept of informed consent and health care decision-making.

CONCLUSION

The use of living wills among Medicaid recipients is unknown but approximately two-thirds of all adults have no living will or other advance directive. The focus of advance care planning should be on a developmental discussion between the patient and the patient's physician. Support should be given to a model that recognizes advance care planning as an ongoing process rather than a product. Specific attention could be given to models that translate into immediate medical orders to guide specific treatment decisions such as the POLST program paradigm.

One way an increase in the use of living wills may be achieved among Medicaid recipients is if the Department of Health and Hospitals utilized the POLST paradigm and included the form in the application process for those recipients or potential recipients who apply for nursing home care and certain other services. This option would be completely voluntary but may facilitate an ongoing dialogue between the Medicaid recipient and their medical provider. Providing extensive information on advance care planning may facilitate a dialogue between the patient and the patient's physician and could result in an increase of Medicaid recipients utilizing living wills or other advance directives.

¹¹ Advance Directives and Advance Care Planning: Report to Congress," prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008, p.

¹² Cruzan v. Director, Missouri Department of Health, et.al., 497 U.S. 261 (1990)

¹³ Karen Ann Quinlan v. New Jersey, 70 N.J. 10, 355 A.2d 647 (NJ 1976)

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“Advance Directives and Advance Care Planning: Report to Congress,” prepared by U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, August 2008.

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Regular Session 2009

HOUSE CONCURRENT RESOLUTION NO. 102

BY REPRESENTATIVE BALDONE

A CONCURRENT RESOLUTION

To urge and request the Department of Health and Hospitals, bureau of healthcare financing, to study the use of living wills among Medicaid recipients and report to the House and Senate committees on health and welfare no later than February 1, 2010.

WHEREAS, many Louisiana citizens are living longer, healthier, and more productive lives; and

WHEREAS, as medical science advances, families increasingly have to make difficult decisions about life support with little or no direction from their loved ones; and

WHEREAS, Medicaid recipients are some of Louisiana's poorest citizens and do not have access to the legal and estate planning resources as do other citizens; and

WHEREAS, Medicaid recipients deserve to have choices when it comes to advanced directives and living wills; and

WHEREAS, the Centers for Medicare & Medicaid Services (CMS) has rules and regulations regarding advance directives for Medicaid recipients in hospitals and nursing homes.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Department of Health and Hospitals to study the use of living wills among Medicaid recipients, including but not limited to studying ways to increase the use of living wills among Medicaid recipients, and to report its findings to the House and Senate committees on health and welfare no later than February 1, 2010.

BE IT FURTHER RESOLVED that the department should examine whether or not filling out living wills should be made a voluntary requirement for Medicaid applicants or persons being admitted into inpatient facilities.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the Department of Health and Hospitals, bureau of healthcare financing.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE