



AGUDATH ISRAEL OF AMERICA LEGAL SUPPORT SERVICES

42 Broadway, New York, NY 10004 • (212) 797-9000 • Fax (646) 254-1650

To Whom It May Concern:

This is in response to your inquiry regarding the rights of a patient who may appear to have suffered the clinical condition known as “brain death”, but whose religious tradition does not accept the concept of brain death.

This subject is covered by section 400.16 of the Rules and Regulations of the New York State Health Department, a copy of which is enclosed. Please note that the regulation obligates a hospital to notify the patient’s next of kin, before completing the tests that may establish irreversible cessation of all functions of the brain, that a determination of brain death will soon be completed. This affords the next of kin an opportunity to assert, on behalf of the patient, a religious objection to any determination of death based on such neurological criteria, in which case a hospital must make “reasonable accommodation” of the patient’s religious belief.

The regulation itself does not define the term “reasonable”. The regulatory history of this provision, however, does offer guidance. In the “Assessment of Public Comment”, issued by the Health Department at the time of the regulation’s promulgation, the Department identified the type of situation where religious accommodation would be unreasonable: where there is a shortage of life-sustaining equipment, and accommodation would “cause harm or death to another patient who was not potentially brain dead.” This has led one commentator to note that “[p]resumably, in this context, the only factor outweighing the religious belief is the welfare of another patient. Thus accommodation is, in almost all cases, mandated.” Goldberg, *Choosing Life After Death: Respecting Religious Beliefs and Moral Convictions in Near Death Situations*, 39 Syracuse L. Rev. 1197, 1255 (1988).

Accordingly, absent a situation of medical triage, if the patient’s next of kin advises the hospital that the patient would have a religious objection to a determination of death based on irreversible cessation of brain function, the hospital is legally bound to accommodate that objection.

Please feel free to share this letter with whomever, and to be in touch with me if you have any additional questions, or require additional assistance.

Sincerely,

Mordechai Biser, Esq.

Enclosure



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OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 10. DEPARTMENT OF HEALTH CHAPTER V. MEDICAL FACILITIES

SUBCHAPTER A. MEDICAL FACILITIES--MINIMUM STANDARDS

ARTICLE 1. GENERAL

PART 400. ALL FACILITIES - GENERAL REQUIREMENTS

Text is current through November 15, 2004.

Section 400.16 Determination of death.

- (a) An individual who has sustained either:
- (1) irreversible cessation of circulatory and respiratory functions; or
 - (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.
- (b) A determination of death must be made in accordance with accepted medical standards.
- (c) Death, as determined in accordance with paragraph (a)(2) of this section, shall be deemed to have occurred as of the time of the completion of the determination of death.
- (d) Prior to the completion of a determination of death of an individual in accordance with paragraph (a)(2) of this section, the hospital shall make reasonable efforts to notify the individual's next of kin or other person closest to the individual that such determination will soon be completed.
- (e) Each hospital shall establish and implement a written policy regarding determinations of death in accordance with paragraph (a)(2) of this section. Such policy shall include:
- (1) a description of the tests to be employed in making the determination;
 - (2) a procedure for the notification of the individual's next of kin or other person closest to the individual in accordance with subdivision (d) of this section; and
 - (3) a procedure for the reasonable accommodation of the individual's religious or moral objection to the determination as expressed by the individual, or by the next of kin or other person closest to the individual.