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United States District Court, D. Connecticut.

CONNECTICUT ASSOCIATION FOR RETARDED CITIZENS, INC., Plaintiff,
v.
Gareth THORNE, et al., Defendants.

Civ. A. No. H–78–653 (JAC). | Feb. 9, 1993.

Attorneys and Law Firms

David C. Shaw, Hartford, CT, for plaintiff.

James P. Welsh, Asst. Atty. Gen., Hartford, CT, for defendants.

Opinion

RULING ON MOTION FOR PRELIMINARY INJUNCTION AND RECOMMENDED RULING ON MOTION TO JOIN THIRD–PARTY DEFENDANT

EAGAN, United States Magistrate Judge.

***1** The plaintiffs in this civil action have moved for a preliminary injunction against the Commissioners of the Connecticut Department of Mental Retardation ("DMR"), the Connecticut Department of Health Services ("DHS") and the Connecticut Department of Income Maintenance ("DIM"). By their motion for preliminary injunction, the plaintiffs seek to enjoin the above-mentioned state agencies to "take such actions as are necessary to adopt and implement DMR Medical Advisory # 87–2 and Paragraph XI–J of this court's Final Order of November 14, 1990".

Since DHS is not presently a party to this action, the plaintiffs have also moved to join DHS as a defendant pursuant to Rules 19 and 20 of the Federal Rules of Civil Procedure and pursuant to the All Writs Act, 28 U.S.C. § 1651(a). For the following reasons, the plaintiffs' motion for preliminary injunction motion to join are hereby granted.

I. Statement of the Facts

A. Procedural Background

This action was filed in December 1978 by the Connecticut Association for Retarded Citizens ("CARC"), a group of parents and advocates of mentally retarded individuals living in Connecticut. CARC challenged the care provided, the inadequate living conditions and the residential placement of the mentally retarded individuals who were residing at the Mansfield Training School and those individuals who had been transferred from the Mansfield Training School to long-term care facilities.[1]

In February 1980, the court issued an order allowing the plaintiffs to maintain the case as a class action. The parties consented to proceed before a United States Magistrate Judge pursuant to 28 U.S.C. 636, therefore, on May 6, 1983, the case was referred to Magistrate Judge F. Owen Eagan for all proceedings, including trial and the entry of judgment.

On April 9, 1984, the court approved a Consent Decree which was executed by the parties following six days of trial on the merits of the case. According to the terms of the Consent Decree, DMR and DIM agreed to overhaul what was at the time an antiquated and inadequate system for serving the mentally retarded in the state. Under the supervision of the court, the provisions of the Consent Decree were implemented. In November of 1990, this court, in an attempt to establish a framework for the final resolution of this action, issued its "Final Order".[2]

B. Findings of Fact

The Final Order provides, in pertinent part, that "the DMR defendants shall continue to enforce and seek full implementation of DMR Medical Advisory # 87–2 (regarding withholding of cardiopulmonary resuscitation for terminally ill DMR clients) with respect to all class members." Final Order, Section XI, Subsection I. The present dispute arises out of the provisions of the Final Order pertaining to the withholding of cardiopulmonary resuscitation ("CPR").

DMR Medical Advisory # 87–2 addresses the withholding of CPR from DMR clients. The medical directive to withhold CPR is known as a "Do Not Resuscitate Order" or a "No Code Order". Pursuant to Medical Advisory # 87–2, a patient's attending physician may place a Do Not Resuscitate Order in a medical file when that patient is deemed in a "terminal condition" and when the physician determines that the institution of CPR "would only postpone the moment of death for a brief period and would not be in the best interests of the patient."

***2** A patient is deemed in a "terminal condition" under

Medical Advisory # 87–2 when he or she is in "the final stage of an incurable or irreversible medical condition which, in the opinion of the attending physician, will result in death." Medical Advisory # 87–2 further provides that: "[f]or the purpose of this medical advisory, the duration of the 'final stage' is considered to be days or weeks." When the attending physician determines that a patient is in a terminal condition and believes that a Do Not Resuscitate Order is appropriate, Medical Advisory # 87–2 requires that, upon request from a DMR director, the physician must seek a second opinion from a specialist in order to confirm the diagnosis. The attending physician is further directed to discuss the propriety of the Do Not Resuscitate Order with the patient or the patient's surrogate. If a physician believes a Do Not Resuscitate Order is appropriate, but cannot state that the patient is in a terminal condition within the meaning of the guidelines, Medical Advisory # 87–2 requires that certain procedural safeguards be followed, including the notification of the Attorney General.

Cardiopulmonary resuscitation is a unique medical procedure in that it is routinely administered without patient consent. Most hospital policies call for the initiation of CPR unless the patient has specifically refused it.[3] Dr. Joel Zaretsky, a DHS licensed physician, testified that he typically will initiate CPR on a patient who is not terminally ill unless a Do Not Resuscitate Order is present in that patient's medical file.

Dr. Zaretsky was uncertain who possessed the authority to consent to a Do Not Resuscitate Order or to place such an order in a patient's medical file. Dr. Zaretsky believes it is essential that there be uniform guidelines regarding the use of Do Not Resuscitate Orders.

The confusion surrounding Do Not Resuscitate Orders is not limited to questions of authority. Medical care providers who testified in this action also interpreted the scope and effect of Do Not Resuscitate Orders in significantly different ways. To some providers, a Do Not Resuscitate Order is a limited order that only requires that CPR be withheld. Other providers believe a Do Not Resuscitate Order mandates the withholding of all affirmative treatment in the event of respiratory or cardiac arrest. It is the policy of at least one nursing home in the state not to transfer a patient to the hospital in the event of respiratory or cardiac distress if that patient is the subject of a Do Not Resuscitate Order.

In addition to evidence setting forth the general DMR and DHS policies regarding Do Not Resuscitate Orders, the plaintiffs presented testimony and affidavits pertaining to the improper use of Do Not Resuscitate Orders in the medical files of specific classmembers.

Charles Carlson

Charles Carlson is a 59 year old male who is a classmember in this litigation. Mr. Carlson has been diagnosed with mental retardation associated with Down's Syndrome. Mr. Carlson lived in a DMR group home from 1984 through August 1992, and he was verbal, independent and carried out an active life.

***3** In the spring of 1992, Mr. Carlson began to experience loss of memory and loss of self care skills. The medical consensus was that he was experiencing Alzheimer's type dementia. In August of 1992, he was transferred to a DHS licensed nursing home. The nursing home medical records prepared by his physician, Joseph Vinciterio, M.D., notes Mr. Carlson's diagnosis as: MR 319 00 and progressive dementia 094.1, possibly of Alzheimer's type.

Mr. Carlson's advocate, James McGaughey, does not believe there is any basis for claiming Mr. Carlson is terminally ill.[4] Mr. Carlson's chart, however, indicates that "Charles is terminal". The nursing home has not obtained the opinion of a second physician as to whether Mr. Carlson has a terminal illness as required by Medical Advisory # 87–2, nor is there clear indication in the chart as to the basis for such a determination.

A Do Not Resuscitate Order was placed in Mr. Carlson's medical file by Dr. Vinciterio on August 29, 1992, as a result of a conversation with Mr. Carlson's sister and guardian, Dorothy Child. According to the nursing home, a Do Not Resuscitate Order means use of antibiotics and IV/fluids, but no CPR in the event of a medical emergency.

The Office of Protection and Advocacy entered the case in early September and, based on a conversation with Mrs. Child established that she did not want a Do Not Resuscitate Order in Mr. Carlson's file, but also that she did not want "heroic" measures taken. The Do Not Resuscitate Order was removed from Mr. Carlson's chart in early September following a conversation between the director of nursing at the nursing home and Rachel Pride, Mr. Carlson's advocate. A subsequent conversation between the director of nursing and Mrs. Child resulted in the reinstatement of the Do Not Resuscitate Order. That order remained in Mr. Carlson's file until September 18, 1992 when a DMR nurse intervened and the order was removed. At no time during these events was a complaint filed with DHS, and DHS has not investigated these events.

Gail Johnson

The death of one classmember in particular, Gail Johnson, illustrates the confusion surrounding the use of Do Not Resuscitate Orders and the potential for unfortunate results. Gail Johnson was a fifty-five year old woman

diagnosed with Down's Syndrome who was a DMR client and a classmember in the present action. Gail Johnson's retardation rendered her unable to consent to legal decisions, however, she was not in a "persistent vegetative state" and she was fully aware of her surroundings. Gail Johnson was legally blind, and was diagnosed with aspiration pneumonia and Alzheimer's disease. Gail Johnson's attending physician, Dr. Joel Zaretsky, did not believe she was in a terminal condition.

In May 1992, the probate court appointed Deborah Kern as Gail Johnson's legal guardian. Ms. Kern had never met Ms. Johnson prior to April 1992, and Ms. Kern was not related to Gail Johnson. At the time Deborah Kern was appointed her guardian, Gail Johnson was in poor health and often had difficulty breathing due to the presence of mucous in her trachea.

***4** In early June 1992, Ms. Johnson was admitted to Griffin Hospital because of her respiratory problems. While she resided at Griffin Hospital, Dominic Thomas, an attorney who had represented Gail Johnson during the probate hearing at which Ms. Kern was appointed guardian, requested that a probate hearing be held to determine the propriety of a Do Not Resuscitate Order in Gail's file. Following a hearing in chambers, the probate judge issued a letter stating that he did not believe he possessed the authority to enter an order permitting a Do Not Resuscitate Order. At the urging of Mr. Thomas, Dr. Zaretsky, nevertheless, placed a Do Not Resuscitate Order in Gail Johnson's file. Ms. Johnson remained subject to the Do Not Resuscitate Order while she remained at Griffin Hospital.[5]

In August of 1992, Ms. Kern consented to Gail Johnson's transfer from Griffin Hospital to the Silver Springs Nursing Center ("Silver Springs"), a nursing home licensed by DHS. Shortly after her transfer to Silver Springs, Ms. Johnson experienced further respiratory difficulty, and she was transferred to the Veteran's Memorial Hospital ("Veteran's Memorial") which is also licensed by DHS. Gail Johnson's attending physician at that time contacted Ms. Kern and recommended that a Do Not Resuscitate Order be placed in her file at Veteran's Memorial. Ms. Kern consented to a Do Not Resuscitate Order only for the stay at Veteran's Memorial, and at that time Ms. Kern emphasized that in the event of a mucous plug, Gail Johnson should be suctioned.

Ms. Johnson was subsequently released from Veteran's Memorial, and she was transferred back to Silver Springs. Following further respiratory complications, she was again transferred back to the hospital. She spent approximately one week at Veteran's Memorial, and was again transferred back to Silver Springs.

On the night of September 26, 1992, Gail Johnson experienced further respiratory distress. Since the duty nurse at Silver Springs believed that Ms. Johnson was under a Do Not Resuscitate Order, the nurse telephoned the attending physician seeking permission to send her to the hospital.[6] The attending physician had last examined Ms. Johnson two days prior to this phone call, however, the duty nurse did not receive permission to transport her to the hospital. Gail Johnson was not transferred to the hospital, and shortly thereafter she died of respiratory failure.

Representatives of the nursing home acknowledged significant confusion as to whether Gail Johnson was subject to a Do Not Resuscitate Order at Silver Springs. Upon a review of its records, Silver Springs found that Gail Johnson was not under a Do Not Resuscitate Order and that Ms. Kern had not consented to such an order at Silver Springs.

Margaret Hall

Margaret Hall was a 48 year old retarded woman. Ms. Hall's attending physician placed a Do Not Resuscitate Order in her medical file at a time when she was neither in a terminal condition, nor was she comatose. The physician's opinion was based, in part, upon her mental retardation. Ms. Hall's doctor stated: "she remains severely retarded with a CT scan that shows little normal brain tissue. Furthermore, she lives a bed-to-chair, total care existence with no hope of improvement. Based on her overall condition and significant medical problems, her father would like a DNR order. I totally agree, and view his request as very appropriate."

***5** Ms. Hall's father was very active in her life, and he acted as her guardian. Although his daughter was not in a terminal condition, Mr. Hall consented to a Do Not Resuscitate Order in his daughter's medical file. Ms. Hall's advocate attempted to change Mr. Hall's and the physician's stance regarding the Do Not Resuscitate Order, however, the advocate was unsuccessful. The Do Not Resuscitate Order remained in Ms. Hall's file for over one year while she was not diagnosed as "terminal".

Subsequently, Ms. Hall was diagnosed with liver cancer. At that point the advocate did not believe the Do Not Resuscitate Order was inappropriate, and his efforts to remove the order ceased. Ms. Hall passed away on July 12, 1992.

Albert Wyka

Albert Wyka is a 66 year old mildly retarded individual who has been diagnosed with juvenile diabetes. Although Mr. Wyka is blind and he has a hearing impairment, in no way could he be considered "terminal". He is presently housed in a DHS licensed nursing home.

Mr. Wyka has a medical guardian, however, the guardian is unrelated to him. Following a stroke, Mr. Wyka was admitted to the Gardner Heights Nursing Home for rehabilitation. A Do Not Resuscitate Order was placed in Mr. Wyka's medical file seventeen days after being admitted to the nursing home despite the fact that he was only admitted to the home for rehabilitation and despite the fact that he was not "terminal". Mr. Wyka's advocate and his treating nurses have attempted to have the medical directive removed from his file, however, they have been unsuccessful in their efforts.

"K.P.", "C.C." and "E.S."

The plaintiffs set forth evidence surrounding the placement of Do Not Resuscitate Orders in the files of three other classmembers. In one of those cases, after a hearing before the Hartford probate court to determine the propriety of a Do Not Resuscitate Order, classmember "K.P." was found competent to consent to the order. With respect to "C.C." and "E.S.", the court finds that those classmembers were subject to Do Not Resuscitate Orders while they were housed in DHS licensed facilities and while they were not considered terminal. In those cases, the safeguards set forth in Medical Advisory # 87–2 were not followed.

II. Discussion

A. Joinder of the Connecticut Department of Health Services

The plaintiffs now have moved for a preliminary injunction against the defendants DMR and DIM, and against DHS, claiming that the state agencies have refused to ensure the implementation of DMR Medical Advisory # 87–2 in violation of the Final Order and the Due Process Clause of the Fourteenth Amendment. DHS was not a party to the Final Order, however, the plaintiffs claim that the All Writs Act, 28 U.S.C. § 1651(a), gives this court the power to join DHS as a party and to issue the relief requested in its motion for preliminary injunction.

The All Writs Act, 28 U.S.C. § 1651(a), provides that a federal court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." A federal court has the power to issue such orders that "may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Telephone Company,* 434 U.S. 159, 172 (1977). The court's power under the All Writs Act reaches to all persons who are in a position to frustrate the implementation of a court order, including those persons who are not parties to the original action. *New York Telephone Company,* 434 U.S. at 174; *United States v. International Brotherhood of Teamsters, etc.,* 968 F.2d 1506, 1512 (2d Cir.1992). The court's power even extends to parties who have not engaged in any affirmative conduct to frustrate such a court order, but rather, are merely *in a position to frustrate* the order of the court. *New York Telephone Company,* 434 U.S. at 174.

***6** The plaintiffs in this action claim that DHS has actively frustrated the implementation of Medical Advisory # 87–2, therefore, DHS must be joined as a party to the motion for preliminary injunction. Based upon the testimony presented by the plaintiff, the court agrees that DHS must be joined in this case.

During the four days of hearings on the pending motion, both DHS and DMR were represented by the Attorney General for the State of Connecticut, and both state agencies were given an opportunity to rebut the plaintiffs' claims. Neither DHS nor DMR aggressively disputed the fact that Do Not Resuscitate Orders that violated the safeguards set out in the Final Order were present in the files of classmembers in DHS licensed facilities.[7] Rather, DHS maintained the position that it was not a party to the action, therefore, this court could not enforce the terms of the Final Order against it.

The evidence presented reveals that DHS is in a position to completely frustrate the implementation of the Final Order. DHS claims it is not obligated to comply with the Final Order because it is not a party to this litigation. DMR, on the other hand, claims that it is powerless to enforce the Final Order when DMR transfers a classmember to a facility licensed by DHS because DMR claims it has no control over physicians or the facilities licensed by DHS. The result of this state agency inaction is that the protections of the Final Order apply to classmembers while they are housed in DMR group homes, but are ignored when DMR transfers a classmember to a DHS nursing home or hospital.

This court can not sanction such a result. DHS is in a position to render the Final Order meaningless because virtually every classmember will be transferred, by DMR, into a facility licensed by DHS at some point in their lives. The court finds that joinder of DHS is essential to ensure that the protections set forth in the Final Order for mentally retarded individuals who are in the care of the state are not forfeited in those cases when one state agency, DMR, chooses to place a classmember in a facility licensed by another state agency, DHS. To rule otherwise would be to permit DMR to circumvent the protections set forth in the Final Order.

B. Plaintiffs' Motion for Preliminary Injunction

Although the court finds it essential that DHS be joined as a party to this action, it still must be determined whether the plaintiffs are entitled to the relief they seek. The plaintiffs' claim for relief is based upon two separate grounds—1) that the defendant state agencies have violated the Final Order, and 2) that the defendant state agencies have violated the Due Process Clause of the Fourteenth Amendment. For the following reasons, the court finds that the plaintiffs have succeed in proving both grounds for relief.

1. Preliminary Injunction Standard

The standard for obtaining a preliminary injunction in the Second Circuit is well established. The moving party must demonstrate "a) irreparable harm, and b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping decidedly in the movant's favor." *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979); *U.S.A. Network v. Jones Intercable, Inc.,* 704 F.Supp. 488, 491 (S.D.N.Y.1989).

***7** In this action, it cannot be disputed that in the absence of the requested relief, the plaintiffs may suffer irreparable harm. Some classmembers subject to Do Not Resuscitate Orders may experience respiratory or cardiac failure without receiving the benefit of CPR.[8] Although the use of CPR may not necessarily succeed in extending the life of an individual, the withholding of CPR takes away any possibility that the patient's life will be extended. The denial of that possibility of life constitutes irreparable harm.

2. Violation of the Final Order

The plaintiffs have also proven that they are entitled to relief because they have proven that they are likely to succeed on the merits of their claims. The court hereby finds that DMR has violated the portions of the Final Order pertaining to the withholding of CPR in facilities licensed by DHS. Furthermore, the court finds that DHS is also responsible for the failure to implement the provisions of the Final Order.

The Final Order incorporates Medical Advisory # 87–2 which sets forth the policy that: "The Department of Mental Retardation (DMR) expects the same quality of medical care for the clients under its aegis as that provided to non-retarded individuals." Medical Advisory # 87–2 is entitled "WITHHOLDING CARDIOPULMONARY RESUSCITATION OF TERMINALLY ILL DMR CLIENTS Guidelines for Regional and Training School Directors and Physicians who provide care to DMR Clients". Medical Advisory # 87–2, and thus the Final Order, prohibits the placement of Do Not Resuscitate Orders in the files of patients who are not terminally ill unless certain procedural safeguards are followed.

After a careful review of all the evidence presented in this case, the court finds that the plaintiffs have proven that the defendant state agencies have violated Medical Advisory # 87–2 and the Final Order. Although DMR has essentially complied with the Final Order when classmembers are housed in DMR run group homes or facilities, the situation is drastically different when DMR places a client in a DHS licensed facility. The evidence reveals that in those facilities that are licensed by DHS, the protections of the Final Order vanish. DHS ignores the existence of Medical Advisory # 87–2, and additionally has made no effort to make the providers that it licenses aware of the existence of the Final Order. Furthermore, DMR washes its hands of the problem by claiming that it cannot control the actions of DHS or the physicians and facilities DHS licenses. DMR should not be able to avoid its obligations under the Final Order, and DHS, contrary to its position in this case, should not be able to flagrantly disregard the protections set forth in the Final Order.

3. Due Process Violation

In further support of their motion for preliminary injunction, the plaintiffs claim that the failure of DHS and DMR to adopt uniform procedures surrounding the use of Do Not Resuscitate Orders will deprive classmembers of necessary life saving medical treatment in violation of the Due Process Clause of the Fourteenth Amendment. *See, Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990). In this case, the critical medical decision to refuse potentially beneficial medical treatment is often made by a surrogate decision maker on behalf of an incompetent individual under the care of the state without adherence to any procedural safeguards to determine whether the decision reflects the wishes of the patient. The plaintiffs claim that the failure to adhere to *any uniform* procedural safeguards to ensure that the decision would reflect the wishes of the patient violates the Due Process Clause.

***8** DHS, on the other hand, denies that it has violated the constitutional rights of any classmembers, and rather, claims that the enforcement of the provisions in the Final Order regarding the withholding of CPR would violate the classmembers' *right to refuse* treatment which is set forth

in *Cruzan.* DHS claims that the plaintiffs have misinterpreted *Cruzan.* DHS contends that *Cruzan* stands only for the proposition that a state may constitutionally require procedural safeguards that limit a person's right to refuse medical treatment.

DHS claims that compliance with the Final Order would prevent a mentally retarded individual, who may never have been competent to make medical decisions, from ever exercising his or her right to refuse medical treatment. This court does not agree with the defendant. DHS is correct that the holding in *Cruzan* was limited to the issue whether Missouri's procedural safeguards violated the right to refuse treatment. The Supreme Court, however, also clearly stated that "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Cruzan,* at 261.[9]

The Fourteenth Amendment provides that no person shall be deprived of "life, liberty, or property, without due process of law." The Supreme Court has recognized that a person who is competent has a constitutionally protected liberty interest to refuse unwanted medical treatments as well as a constitutional interest in life. If a state is to permissibly interfere with those interests, the constitutional interests must be balanced against the opposing relevant state interests. *Cruzan,* at 278–79.

The issue in *Cruzan* was whether a state could permissibly interfere with an individual's right to refuse treatment by requiring clear and convincing proof that the individual had chosen, or would have chosen if they were able, to refuse to receive the benefit of extraordinary treatment. When that difficult choice is thrust into the hands of a substitute decision maker, most states, including Missouri, insist that certain procedural safeguards must be met to determine whether the surrogate's decision would reflect the incompetent person's decision.[10]

Cruzan only addressed whether the degree of proof required by the state violated Nancy Cruzan's right to refuse treatment. The Court balanced that right against the state interests in preserving life, preventing suicide and the interest in avoiding making decisions about the quality of a life of a particular individual. The Court held that Missouri's procedural safeguards, which required clear and convincing proof that the surrogate decision maker's choice reflected Nancy Cruzan's choice, did not violate her right to refuse treatment. *Cruzan,* at 286–87.

The novel issue raised in this case by the present motion is whether it is constitutionally permissible for two state agencies to participate in life and death medical decisions without adhering to any procedural safeguards to ensure that the decision would reflect the wishes of the patient. The concept that such a crucial medical decision must comply with a patient's wishes is based upon the basic right of self determination. The fundamental right of self determination mandates that no court, government or entity should substitute its judgment as to what is an acceptable quality of life for another. "[D]espite its pitfalls and inevitable uncertainties, the inquiry must always be narrowed to the patient's expressed intent." *In re Westchester County Medical Center on behalf of O'Connor,* 531 N.E.2d 607, 613, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988).

***9** Implicit in the statutes and cases addressing the withdrawal of life support is the presumption that a person would accept treatment. This presumption is based upon the notion that the consequences of an erroneous decision that did not comply with the wishes of the patient weigh heavily in favor of presuming that a person would choose to accept treatment. "An erroneous decision not to terminate results in a maintenance of the status quo.... or simply the death of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction." *Cruzan,* at 19.

In the present case, not only does this court find that the Final Order does not unconstitutionally interfere with the classmembers' right to refuse treatment, this court believes that the defendant state agencies have violated the classmembers' right to life. It is important to note that this case does not involve the removal of life support systems from individuals who are comatose or who are in a persistent vegetative state, nor does it involve the use of extraordinary measures to keep such individuals alive. Instead, this case involves medical directives that are placed in patients' medical files prior to the onset of a terminal illness by a physician. The directives mandate the withholding of a routinely used medical procedure that possibly could save an individual's life. As a result of these medical orders, no affirmative action is taken when a patient experiences respiratory or cardiac distress. The evidence in this case reveals that these medical directives are often placed in the files of incompetent individuals by surrogate decision makers who have no relation to the patients and who are often appointed by the state. These decisions are being made without adherence to any procedural safeguards to determine whether such orders would comply with the patients' wishes. The court has found that the decision to place such orders in the classmembers' medical files is often based, in part, upon the individuals' mental retardation.

This court does not question the constitutionality of surrogates making important medical decisions for incompetent patients. However, the problem with the conduct of the defendants in this case is that, in the facilities licensed by DHS, decisions are made by doctors

licensed by the state and guardians appointed by the state that result in the withholding of potentially beneficial treatment without adherence to any mechanism or uniform procedural safeguards to determine whether the decisions comply with the wishes of the patients.

DMR may or may not ever learn of the placement of a Do Not Resuscitate Order in a classmember's file. When DMR, the state agency responsible for the care and treatment of these classmembers, is made aware that a Do Not Resuscitate Order has been mistakenly or improperly placed in a classmember's file, that agency takes virtually no action to remedy the situation. Either no process is in place to correct the situation, or if such a process is in place, DMR takes no action because it claims it has no authority. DHS, on the other hand, claims simply that it need not comply with the process.

***10** Especially troubling is the fact that the important state interests implicated in cases of this nature, such as the state's interest in preserving life and preventing suicide, and the individuals right to life, have curiously been ignored by both DMR and DHS in this case involving retarded individuals. These individuals are subject to the care and custody of DHS and DMR, however, those state agencies fail to even acknowledge these individuals' right to life. DHS's failure to advocate the usual state interests that are implicated in cases of this nature is particularly noteworthy in light of its position in *McConnell.*

Both state agencies evoked testimony that when a classmember has passed away, the state has a process in place, through the medical quality assurance board, to review the medical providers' conduct following the death of a classmember. This after the fact review simply does not cure the Due Process violation.

The probate court also does not provide an acceptable forum for review. As the testimony in this action revealed, these orders are originally placed in medical files without resorting to the courts to determine whether they are proper. Only after a Do Not Resuscitate Order is questioned by another provider or advocate does the possibility of review arise. These orders, thus, may remain in a file indefinitely until someone who is inclined to question their propriety is made aware of their existence. Even then, as the Gail Johnson case illustrates, it is not entirely clear whether the probate court has jurisdiction to review these orders.

The court *does* agree with DHS that, in those situations when a classmember has never been competent, and thus, has never been able to express his or her intent regarding life sustaining treatment, that individual may never be able to exercise his or her right to refuse treatment. In these situations, however, the right to life must outweigh the right to refuse treatment. The consequences of a decision to withhold treatment that would contradict the wishes of the classmember mandate such a result because the court believes that if an erroneous decision is made, it is better to err on the side of preserving life.

III. Conclusion

For the foregoing reasons, the court hereby grants the plaintiffs' motions to join (Documents 1459, 1464) and hereby grants the plaintiffs' motion for preliminary injunction (Document # 1461).

The significant confusion over the existence and scope of Do Not Resuscitate Orders and the confusion surrounding the question of who has authority to make such a decision cannot continue. As Dr. Zaretsky indicated, there is a need to establish uniform guidelines to clarify this difficult issue for medical care providers.

After hearing on the plaintiffs' motion for preliminary injunction, it is hereby ORDERED that:

1) The Commissioners of the Connecticut Departments of Mental Retardation, Health Services and Income Maintenance shall take all necessary and appropriate actions to implement DMR Medical Advisory # 87–2 as interpreted by this court for all classmembers with all deliberate speed, including, but not limited to, publication of Medical Advisory # 87–2 to all providers of medical care to any classmember;

***11** 2) That the Commissioners of DMR, DHS and DIM shall submit a plan to implement DMR Medical Advisory # 87–2 for all classmembers who are housed in facilities licensed by DHS and by DMR within 45 days of this order. An amended or alternative Medical Advisory may be implemented subject to the approval of this court.

DMR and DIM consented to trial and judgment before a United States Magistrate Judge in this case, therefore, this court's order, as it applies to DMR and DIM, shall be treated as a ruling from the district court. Since DHS did not execute the consent form, however, the ruling on the motion to join and the ruling on the motion for preliminary injunction, as they apply to DHS, shall be treated as recommended rulings.

Any objections by DHS to the recommended rulings must be filed with the Clerk of Courts within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. *See,* 28 U.S.C. § 636(b)(1); Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; *Small v. Secretary of H.H.S.,* 892 F.2d 15, 16 (2d Cir.1989).

Footnotes

1 At its peak of operations in the 1960's, the Mansfield Training School housed approximately 1,870 persons.

2 The court contemplated the need to retain jurisdiction over this matter in order to effectuate and oversee the implementation of the Final Order. Final Order, Section XIII, Subsection C provides: "The court shall retain jurisdiction over this matter for all purposes. The reference of this action to F. Owen Eagan, United States Magistrate Judge, ... shall continue for the purpose of effectuating this order and any further proceedings herein".

3 Rather than opposing this motion with medical testimony, DHS requested that the court review medical journals which it submitted on September 30, 1992. This finding of fact is based upon medical journals submitted by DHS describing the risks and benefits of CPR, specifically, Alvin H. Moss, *Informing the Patient about Cardiopulmonary Resuscitation: When the Risks Outweigh the Benefits,* 4 JOURNAL OF GENERAL INTERNAL MEDICINE 349 (July/August 1989).

4 In accordance with the Final Order, it is DMR's policy that each DMR client have the opportunity to be represented by an advocate. Advocates are chosen, if possible by the client, or by a family member or guardian, or in the alternative DMR will attempt to obtain advocates for its clients.

5 This Do Not Resuscitate Order applied only while Gail Johnson remained at Griffin Hospital because a Do Not Resuscitate Order does not follow a patient from one facility to another.

6 Silver Spring's policy was that a patient subject to a Do Not Resuscitate Order could not be transferred to the hospital without a doctor's permission.

7 In fact, DMR has filed no written opposition to the motion as required by Local Rule 9(a)(1).

8 In fact, classmember Gail Johnson's death occurred during the pendency of this motion.

9 Curiously the Attorney General, in fact the same Assistant Attorney General representing DHS in this case, took the opposite position in the seminal case in Connecticut regarding the withdrawal of life support, *McConnell v. Beverly Enterprises–Connecticut, Inc.,* 209 Conn. 692, 553 A.2d 596 (1989). In *McConnell,* the trial court found clear and convincing evidence that Carol McConnell, who had been injured in an automobile accident, did not wish to be kept alive by life support systems. Mrs. McConnell had been a head nurse in an emergency room, and she had often stated her views that she did not want to be kept alive by extraordinary means. In addition, Mrs. McConnell's family consented to the removal of a feeding tube. Nevertheless, the Attorney General argued in that case that the state's compelling interest in preventing suicide should outweigh the right to refuse treatment. In this case, which involves a mentally retarded individual, the Attorney General has inexplicably chosen to ignore those important state interests.

10 The Connecticut legislature also has enacted statutory safeguards to determine whether a decision to terminate life support complies with the intent of the patient. *See,* Conn.Gen.Stat § 19a–570 et seq.; *McConnell,* 209 Conn. at 692. Although the issue is not before this court, it is highly likely that the state agencies have violated state law in this case.