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THE SCHOOL-BASED DO-NOT-RESUSCITATE-ORDER

Jessica Adelman

Katie Jones¹ was not the typical second grader at Laremont School in Lake County, Illinois. Instead of carrying her lunchbox and book-bag to school like most children her age, Katie carried a do-not-resuscitate order attached to her wheelchair.

Katie’s brain was deprived of oxygen before birth, resulting in a condition called cerebral palsy. She cannot walk, cannot talk, and can only be fed through a tube in her stomach. Over the past two years, her condition has worsened. After a heart-wrenching discussion with each other and Katie’s physicians, her parents decided to create a DNR order, which specifically requested that in the event Katie went to cardiopulmonary arrest, she should not be resuscitated.

A DNR of this type is fairly common; however, they are generally only seen in hospitals and nursing homes. School-aged children rarely have to confront life-and-death issues; therefore, school districts are presented with a unique problem when a terminally ill student and her family decide to exercise her right to refuse medical treatment. After two years of discussion, school officials for Lake County finally agreed to honor such directives despite protest from the public.

Some have asked Katie’s parents, if she cannot sit up without the assistance of others, why she is even in a public school to begin with. Katie’s mother, Beth, told the Chicago Tribune last summer that could keenly see how much her daughter enjoyed her trips to Laremont School in the Special Education District of Lake County. In fact, Katie visibly beamed at her mother from her wheelchair when they waited for the school bus. Despite Katie’s obvious enjoyment with her time at school, her parents filled out a DNR order when Katie was near death every night for three weeks. “They have some control over this whole uncontrollable disease that their child has lived through,” Kimberly Battle-Miller, a doctor at a hospice who has worked with the Jones family, told the Chronicle.² On May 23, 2009, Katie died at home from complications related to her ill-

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¹ Jeff Long, Girl in Medical Quandary Dies, CHICAGO TRIBUNE, May 28, 2009, at 14.
ness. However, she continues to be an example of how states, including Illinois, must formulate a clear DNR order policy by balancing the interests of the family, the school personnel, and medical staff before they are presented with a terminally ill student’s request for the implementation of her DNR order.

INTRODUCTION OF THE PROBLEM

The public school system today has been confronted with a growing number of issues, ranging from school violence to overcrowding; however, one non-traditional issue with which it has recently been presented is how to respond to out-of-hospital cardiopulmonary arrests among students who are conflicted with terminal chronic conditions. Among school-aged children, 10-15% have ongoing health care problems, while 1-2% have severe chronic illnesses, including end-stage heart, liver, kidney disease, and cancer. This 1-2% of students presents the public school system with a variety of unique problems, from lack of funding or sufficient training for school personnel; however, quite likely the most complicated issue is the possible existence of a DNR order. DNR orders for students with serious medical conditions are an increasingly prevalent phenomenon in the public school setting. The legal considerations that surround a child with a DNR order will dramatically affect school policies around the country.

BACKGROUND

What is a Do-Not-Resuscitate Order?

Cardiopulmonary resuscitation, or commonly known to as CPR, is a term that includes several procedures that are used when a patient’s heartbeat or breathing has stopped and needs to be restored. “Do Not Resuscitate” Orders are orders written by physicians which “direct that in the event of a cardiac respiratory arrest, the patient is not be given CPR.” The DNR is generally part of an advance directive by a patient who wishes to refuse CPR under certain circumstances: for instance, where the patient has a terminal condition and experiences cardiac arrest. DNR orders are

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written with the permission of the patient or a minor patient's parent, after discussing it with appropriate medical specialists and after the hospital ethics committee reviews it.\(^8\)

DNR orders become involved in the court setting in two instances. First, health care providers will seek a declaratory judgment to approve a decision to issue a DNR for a patient who is unable to make the decision himself.\(^9\) The second situation occurs after the decision regarding the DNR has been made, and the court must decide whether liability should attach to a provider for injuries caused by executing or not executing the order.\(^10\) Rarely, a court order is required in some cases and the patient receives independent legal representation.\(^11\) Resuscitation in these situations may constitute a positive violation of an individual's right to die with dignity.\(^12\) When parents and children make the decision to abstain from futile resuscitative attempts, it is not because there is a small chance it may work, but rather because there is virtually no chance that anything good would result from such efforts.\(^13\)

Although DNR orders are most often written in the hospital setting, the use of "out-of-hospital" do not resuscitate orders ("OOH DNR") is increasing exponentially among patients with terminal illnesses, especially children and adolescent patients.\(^14\) Critics of the OOH DNR order maintain that they are confusing because, unlike in-hospital DNR orders, OOH DNR orders are executed by strangers, sometimes non-medical personnel, and not by chronic care providers who usually accompany in-hospital DNR orders.\(^15\) OOH DNR orders are tools that essentially protect the child from "medical assault" in that they uphold the DNR decision in settings other than an acute care unit.\(^16\) The setting that is particularly salient for the child is the school.

The state deems children incompetent, with a few exceptions, to participate in the establishment of an advance directive; therefore, parents often

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10. Vernaglia, supra note 9, at 793.
11. Gelfman, supra note 8, at 358.
15. Levetown, supra note 14, at 78.
16. Id.
decide to create an OOH DNR order on behalf of their children. When parents make this decision, they are confronted with a wide array of legal and ethical issues. It is at this point in their children's illness when many parents realize that although they might be the only ones legally able to make this decision on behalf of their children, other entities, such as federal and state legislatures and school boards are also indirectly included in this decision.

Advances in pediatric medicine have made it possible for children with terminal illnesses to live longer and to even attend school. When more children with severe medical problems survive, it is not surprising that palliative care principles have encouraged parents to confront end-of-life-issues in a proactive manner. Those who believe DNR orders should be honored in the school setting argue that it should be done so based on a duty to protect vulnerable children. This duty to protect is more specifically a duty to protect the child from unwarranted medical interventions. Instead of denying children the possibility of honoring DNR orders in schools, the duty to protect children from painful and ineffective interventions at the end of life should be recognized.

Proponents of honoring DNR orders in the school setting also argue medical autonomy, that "common law establishes the constitutional right to make reasonable health-care decisions on behalf of their children, decisions that may include physician-approved DNR orders for certain pediatric patients with terminal illnesses." When a student has either signed or had her surrogate sign the DNR order, it is an encroachment of her constitutional rights to make her own decisions concerning her health.

Performing CPR against the wishes of the child and the child's parents, albeit well-intentioned, will only create suffering, an inevitable trip to the emergency room or intensive care unit, and ultimately a lonely, extended, and technological death. The terminally ill child should not be obligated to remain in the traditional medical setting simply to ensure that his decision to forgo life-sustaining medical treatment is honored; this decision should be honored wherever the child goes, including school.

18. Weise, supra note 17, at 81.
19. Id.
20. Id.
22. Kimberly, supra note 21, at 61.
23. Levetown, supra note 14, at 78.
The arguments against honoring DNR orders in the school setting are primarily focused on the problems that would arise should the law involve schools in the health care decisions of a child, including end-of-life care. DNR orders are normally implemented in the healthcare environment, and expecting school personnel to make split-second medical decisions that are normally expected of medical professionals who have experience in this kind of environment is not appropriate.

Another concern is the ambiguity of some DNR orders; more specifically, what treatment is allowed and what treatment is prohibited. For instance, some DNR orders do not address choking or gurgling, or whether treatment to ameliorate pain and other symptoms is proscribed. How should a teacher respond when a terminally ill student who has a valid DNR order chokes on his lunch or experiences some other kind of problem unrelated to the child's illness that requires emergency medical attention?

FEDERAL STATUTE AND LEGAL PRINCIPLES AFFECTING SCHOOL-BASED DNR DECISIONS

IDEA

Medically fragile children are given the opportunity to participate in the educational process through the enactment of the Individuals with Disabilities Education Act (IDEA). IDEA provides children the right to a "free appropriate public education" in the "least restrictive environment" appropriate to their unique needs. The statute defines "least restrictive environment" as when: "to the maximum extent appropriate, children with disabilities... are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." After IDEA was enacted, large populations of children with special healthcare needs who were initially prevented from attending public

25. Krautkramer, supra note 24, at 86.
schools were now entitled to a public school education. Since its passage in 1975, IDEA has led to a profound increase in the number of young people ages 3-21 enrolled in public schools and receiving special education services. In 1976-77, approximately 3.7 million children (or about 8% of the total public school population) received services under IDEA. In 2006, the number of students enrolled has increased to 6.7 million, or 14% of the total public school enrollment.

It has been suggested by several authorities, including the Florida State Department of Education, that that IDEA can be used to require school districts to provide “related services” to honor DNR orders. The DNR, Florida’s Department of Education suggests, is one form of the “unique need” that special education is meant to meet under IDEA.

§ 504 OF THE 1973 REHABILITATION ACT

When Congress passed the Rehabilitation Act in 1973, it banned discrimination on the basis of disability and mandated access to federally funded programs, including public schools, for people with disabilities. There are many overlaps between IDEA and §504 because those students who are eligible for special education services under IDEA are a smaller subset of all students who are eligible for those services under §504. The most notable overlap between §504 and IDEA is that they both require school districts to make an affirmative effort to identify children with disabilities, to evaluate them, and to determine whether they are eligible for individualized support services in school.

Doctrine of Informed Consent and In Loco Parentis

The legal concept of informed consent is a doctrine that applies to all physicians in every area of medicine. “Informed consent” is founded on the principle that “every human being of adult years and sound mind has a

29. Id.
30. Id.
31. Id.
32. Kimberly, supra note 21, at 61.
33. Id.
34. Mary H.B. Gelfman, supra note 8, at 335.
35. Id.
36. Id. at 336.
right to determine what shall be done with his own body." This principle is pervasive throughout all informed consent cases and even in situations that call for emergency care and generally can only be ignored by legally recognized exceptions. The exception to informed consent that directly concerns the issue of DNR in the school setting is the medical emergency of the minor patient.

An exception to the doctrine of informed consent applies when a physician reasonably believes that disclosure to the patient would pose a serious threat to the patient's well-being and is therefore not under a duty of disclosure. This exception is especially applicable to emergency care situations where the law understands that mechanically forcing the duty of informed consent may be harmful to the patient’s health and possibly the patient’s life. Therefore, the patient is presumed to have given his or her consent in certain medical emergency situations. This rule also extends to minors in the same way that it applies to adult patients, where the “physicians are not held liable for treating a minor without parental consent when an emergency exists and immediate injury or death could result from the delay associated with attempting to obtain parental consent.”

The common law doctrine of in loco parentis is founded in part on the concept that parents have authority over their children. The school then stands in place of the parents, (in loco parentis) who are private persons. By standing in the place of the parent, the school is meant to share the parent’s concern for the welfare of the individual student and to exercise the power in the same way as the parent.

In loco parentis is a doctrine that permeates the school setting by extending to situations that allow teachers to perform their duties as teachers and to activities connected with the school program. Despite the doctrine’s ability to essentially put the teacher in the parent’s shoes, it is limited to situations regarding medical treatment. In loco parentis does not give the school the authority to exercise judgment in the treatment of an injury that the student suffers while under the care of a teacher employed

40. Id.
41. Id.
42. Id.
45. Id. at 36.
by the school. In reviewing this doctrine and applying it to the school setting, courts have often held that medical treatment is not adequately related to the activities connected with the school curriculum and program. Due to this lack connection between medical treatment and the school’s role in its academic curriculum, the law does not give teachers the ability to attempt medical treatment on students. Therefore, courts essentially leave the medical treatment of a minor student for the parents of the child to decide and not the teacher or the school as a whole.

However, in emergency situations, the *in loco parentis* doctrine, in combination with the doctrine of informed consent, allows the teacher to make emergency medical decisions that are in the best interest of the student because that is presumably what a parent would do. Consent to CPR is generally implied under the emergency exception to the informed consent doctrine. In situations where CPR is specifically requested to not be administered, such as a DNR order that has been signed by the physician and the parents, or in some cases, the minor patient himself, CPR should be not be given. If the school acts contrary to the patient’s request that is explicitly listed in the DNR and the school does administer CPR, the school could be at risk for battery and a range of other torts.

Proponents of honoring the DNR in the school setting use the both the doctrines of *in loco parentis* and informed consent to argue that school officials have no legal foundation for substituting their medical judgment for that of the parents and the child’s physician. The doctrine of *in loco parentis* as applied to the medical treatment of children in schools is analogous to the doctrine of informed consent, which prevents physicians from substituting their judgment as to what is appropriate medical care for that of their patients, or, in this case, of the parents.

When a teacher or school nurse performs CPR on a child that has a DNR requesting that no CPR be administered, that school official is improperly substituting his or her own judgment for the judgment of both the parents and physicians. The emergency medical treatment exception to informed consent is based

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49. *Id.*
on the principle that consent for the treatment is implicit; however, a DNR order exists primarily to make consent, or in this case a refusal to consent, explicit.\textsuperscript{55} The Second Restatement of Torts §892 D comment (a) states that "if the actor knows or has reason to know, because of past refusal of consent in other circumstances, that consent would not be given, he is not privileged to act."\textsuperscript{56} Accordingly, consent for CPR or any other life-sustaining procedure listed in the DNR can never be assumed when there is a valid DNR order available.\textsuperscript{57}

Case Law

Very few cases have ruled directly on the role of the DNR in the school setting. In the Massachusetts case, \textit{ABC School v. Mr. and Mrs. M}, the parents of a severely physically and mentally handicapped child requested that the public school she attended honor her DNR order.\textsuperscript{58} The DNR order did not preclude some treatment but, because of the child's medically fragile condition, the order sought to prevent the administration of other potentially life-saving interventions such as CPR.\textsuperscript{59} The school sought a declaratory and injunctive relief allowing it to refuse to honor the order, arguing, in part, that the DNR order was at odds with its "preservation of life" policy.\textsuperscript{60} The minor's parents argued that refusing to honor their daughter's DNR order violated her constitutional right to refuse medical treatment.\textsuperscript{61} The court ordered the school to comply with the DNR order and specifically denied the school's request that its personnel be shielded from liability in the event that it violates the DNR order and administers aid pursuant to the state law that declares "no teacher who, in good faith, rendered emergency first aid shall be liable in a suit for damages as a result of his acts."\textsuperscript{62}

In a similar case in Lewiston, Maine, the school district did not accept the DNR order for a severely handicapped student.\textsuperscript{63} The mother of a twelve-year-old child requested that the school not perform chest compressions in the event that she goes into cardiopulmonary arrest at school, a

\textsuperscript{56} Restatement of Torts §892D cmt. A (1979).
\textsuperscript{58} \textit{ABC School v. Mr. and Mrs. M}, 1997 Mass. Super. LEXIS 34 (1997).
\textsuperscript{60} \textit{ABC School}, 1997 Mass. Super. LEXIS 43 at 1.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Constante, \textit{supra} note 51, at 421.
risk that was related to her medical condition. The school board issued a policy that teachers were not to follow a DNR order but rather must develop an individually designed resuscitation plan (IRP) that must be used in the event of an emergency. The Office of Civil Rights held that the IRP was nondiscriminatory when it considered four factors. First, the IRP had been designed by a multidisciplinary team consisting of physicians, nurses, and school administrators. Second, the IRP was based on expert medical opinions and was properly documented. Third, it had a requirement for a second medical opinion. Finally, the IRP was valid for a limited amount of time and had to be reassessed periodically. In addition, the Maine teachers' union specifically requested that the school be released from the obligation to honor a DNR order and was denied.

The Opinions of National Professional Organizations

Professional organizations that have an interest in the welfare of students in any capacity have developed their own opinions on whether honoring DNR orders in the school setting is appropriate. The National Education Association (NEA) is the largest labor union in the country and represents public school teachers; it holds the opinion that DNR orders should be honored in the school setting on an individual basis. The NEA recommends that requests to honor DNR orders be handled on a case-by-case basis, specifically recommending that no request be granted until the school district establishes a support "team" consisting of the child's parents, teachers, physicians, school nurse, and school administrators.

The National Association of School Nurses (NASN) holds the opinion that DNR orders for medically fragile students must be examined on an individual basis in accordance with state and local laws. The NASN focuses its position on the requirement that each student with a DNR order must have an Individualized Health Care Plan (IHCP) which, in some states, may have to include a court order to honor the DNR order.

64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Sewell, supra note 59, at 5.
71. Id.
73. Id.
The American Academy of Pediatrics (AAP) has created a list of recommendations and guidelines for parents of children who have a DNR order in place.\textsuperscript{74} The AAP specifically supports the "withholding of non-beneficial, life-sustaining medical treatment for children in accordance with current medical, ethical, and legal standards."\textsuperscript{75} The AAP's stance on DNR orders in the school setting, meaning that it supports a child who decides, or whose parents decide, to continue education in school for as long as is reasonable. This reasonableness test, the AAP understands, could include a DNR plan in school.\textsuperscript{76}

\textbf{LIABILITY ANALYSIS}

Once a DNR is made valid, the next question is whether the school has the legal obligation to honor it, and, in the event that it does, what the legal repercussions are once a DNR has been executed. "It is one thing to say that students do not shed their rights at the schoolhouse door, and something else to determine how the right to refuse treatment fits into the educational setting."\textsuperscript{77} The primary concern of the school district regarding whether or not to honor a DNR is whether it will be held liable to the student or the student’s parents for failure to provide emergency medical care, or to other students for allowing an occurrence that is emotionally damaging to them.\textsuperscript{78} It is in the best interest of the school to act in accordance with state law, and it is argued that state law generally ensures that DNR orders, a legal document, be honored.

A district that responds to DNR orders on other than the legal level hasn’t checked state law or explored whether the order is in the best interest of the child.\textsuperscript{79} The decision has already been made by way of the order. . . and it is not for a doctor or school personnel to make medical interventions inconsistent with the order.\textsuperscript{80}

The liability of schools is an issue of state law and is subject to differing interpretations of the exceptions to civil immunity that many states provide.\textsuperscript{81} Under \textit{Peck v. Board of Education of City of Mount Vernon}, a school would not be held liable if timely medical attention would have

\begin{footnotesize}
\begin{enumerate}
\item[75.] Constante, \textit{supra} note 51, at 420.
\item[76.] \textit{Id}.
\item[77.] Scofield, \textit{supra} note 50, at 7.
\item[78.] \textit{Id}.
\item[79.] Constante, \textit{supra} note 51, at 420.
\item[80.] \textit{Id}.
\item[81.] Scofield, \textit{supra} note 50, at 7.
\end{enumerate}
\end{footnotesize}
A school does not violate whatever duty it has to protect its students when it does not provide CPR to someone with a valid DNR order.\textsuperscript{82} The school district must also be weary of the fact that when it takes on the responsibility to provide medical care, in the way of issuing CPR, it must do so competently.\textsuperscript{84} When considering the liability the school may have to a child who was not resuscitated, the state must balance the possibility for a claim against the school for compensatory and punitive damages.\textsuperscript{85} This claim would also come from the child; however, instead of suing the school for administering a form of resuscitation, the child could sue for attempting to revive him against his wishes.\textsuperscript{86} In the event that the school does administer CPR against the express wishes in the DNR order, the school would not be protected by good Samaritan laws.\textsuperscript{87}

In \textit{Czaplick v Gooding}, the court ruled that a principal can be held liable for not calling an ambulance and for failing to render adequate first aid to the child in need of emergency care.\textsuperscript{88} In \textit{Barth v. Board of Education, City of Chicago}, school officials were held liable for failing to take a student to the hospital after the student’s parent instructed the school to do so.\textsuperscript{89}

Another source of liability for the school when a DNR order is honored stems from the concern for the possibility of inflicting emotional harm on the other students.\textsuperscript{90} The intentional infliction of emotional distress claim would essentially be borne from the exercise of one student’s lawful right.\textsuperscript{91} The act of witnessing a student undergo cardiopulmonary arrest can be traumatic enough for other students, but adding the possibility that the school personnel, people normally expected to help, would not engage in CPR or other life sustaining efforts could rise to the level of outrageous conduct and hence leave the school vulnerable to a lawsuit.

It is for these reasons that the school district must have more than a hypothetical list of guidelines from ambiguous policies. The more specific rules that the school district and its personnel have, the better the district can serve the unique needs of the student instead of being preoccupied by

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\item \textsuperscript{83} \textit{Scofield}, \textit{supra} note 50, at 7.
\item \textsuperscript{84} \textit{Id}.
\item \textsuperscript{85} \textit{Id}.
\item \textsuperscript{86} \textit{Id}.
\item \textsuperscript{87} \textit{Id}.
\item \textsuperscript{88} \textit{Czaplinki v. Gooding Joint School Dist.}, 775 P.2d 640, 646 (Idaho 1989).
\item \textsuperscript{89} \textit{Barth by Barth v. Board of Educ. of City of Chicago}, 490 N.E.2d 77, 84 (Ill. App. Ct. 1986).
\item \textsuperscript{90} \textit{Scofield}, \textit{supra} note 50, at 8.
\item \textsuperscript{91} \textit{Id}.
\end{itemize}
the possibility of litigation. Unfortunately, this is not often the case. In reality, the school districts throughout the United States are bombarded with conflicting policies and laws and this is neither efficient nor effective when confronting the unique issue of a DNR order in the school setting.

Contradictions Between State Laws and School District Policies

An unprecedented study that assessed eighty public school districts in the United States’ fifty largest cities revealed that most school districts (about 80%) did not have any policies, regulations, or protocols for dealing with students with existing out of hospital DNR orders. In addition, most school districts (76%) either would not honor a DNR order that a child had or were unsure if they even could honor it. The six cities that do allow school personnel to honor DNR orders are those in Boston MA, Cheyenne WY, Grand Rapids MI, Jefferson County KY, Palm Beach County FL, and Washington DC.

Seventeen states and DC supply statutory authorization of advance health care decisions for children, while the remaining 34 states only provide this type of authorization for adults. However, it is important to note that of these 18 jurisdictions, only 5 have laws that expressly provide legal protection against criminal or civil liability to school personnel who do not attempt resuscitation and therefore honor the student’s DNR order. In the entire country, including DC, only 16 states and DC have legal protection for school personnel who honor a DNR order in school. Of the 19 school districts that state that they would honor a DNR order, 13 of those districts are located within a state that lacks laws to protect school personnel from criminal or civil liability honoring the DNR order. In the alternative, of the 61 districts reporting that they would not honor a DNR order that a student has, 18 are located in states that have laws that would give school personnel liability protection.

Although Illinois lacks a clearly established policy on DNR orders within the school setting, other states have varied case law concerning the role of schools in the implementation of DNR orders, and court rulings are sparse. Statutory law among the other 49 states and DC is also deficient and, with a few exceptions, most State Attorneys General have yet to take

92. Kimberly, supra note 21, at 59.
93. Id.
94. Kimberly, supra note 21, at 60.
95. Id.
96. Id.
97. Id.
98. Id.
positions. This lack of clarity leaves open the very real possibility of future legal questions, ranging from implementation of the DNR to liability issues with which the school may be confronted.

In 1994, Maryland became one of the few states whose Attorney General has explicitly addressed the implementation of DNR orders in the school setting. Its Attorney General stated that school officials may not perform emergency procedures on a terminally ill child that are contrary to the parents’ decision and the physician’s order. The policy statement also specifically notes that the only action the school should take when a child with a valid DNR order suffers cardiopulmonary arrest is to provide comfort and reassurance. Maryland rebuts the opponents of implementing DNR orders in schools, who argue that not performing life-sustaining treatment is in effect doing nothing. In other words, schools are not prohibited from calling emergency medical services such as 911 because the act of calling is not considered a “medical treatment.”

Iowa’s Attorney General holds a contrasting opinion as to whether the school has a duty to comply with a DNR order that a student has created with his or her parents and the physician. The policy of Iowa is that the school is not required to honor a DNR order because Iowa state law does not consider a school a licensed health care provider. The Attorney General advises the school to seek a court order before it agrees to refrain from calling medical services or performing first aid to a terminally ill student.

Furthermore, school districts within certain states have attempted to answer the DNR order in the school question by referencing already established statutes that address DNR orders generally. In Delaware, a statute states that “health care decisions shall mean a decision made by an individual or the individual’s agent, surrogate, or guardian regarding the individual’s health care including do not resuscitate orders.” The inference is that schools must comply with DNR orders.

California defines a DNR order as a “written document signed by the

100. Id.
102. Id.
103. Constante, supra note 51, at 422.
104. Iowa Attorney General. (Opinion of the Attorney General, no. 88-3-3[L]) (March 10, 1988)
105. Iowa Attorney General. (Opinion of the Attorney General, no. 88-3-3[L]) (March 10, 1988)
106. Constante, supra note 51, at 422.
109. Constante, supra note 51, at 422.
individual, or a legally recognized surrogate health care decision maker, and a physician. Like most health care statutes, a specific definition is given for a "health care provider," but the statute does not state whether or not this definition includes school nurses who are not engaged as emergency response employees. School nurses are generally considered emergency response employees, and thus would not be expected to comply with a DNR order.

A PLAN FOR ILLINOIS

Illinois is not immune to the problem of addressing DNR orders in the school setting. The state as a whole does not have specific statutes or case law that directly addresses DNR orders in the public school setting; however, several school districts within the state have established policies regarding this sensitive issue. A few of these school districts have based their policies on their own interpretation of Illinois' common law and statutory law that concerns advance directives in general. Before one can decide how Illinois should confront the issue of whether to honor a DNR order in the public school setting, one must understand general advance directive law and policy; more specifically, DNR orders as applied to adults in the hospital setting.

Illinois does not recognize a claim for "wrongful life." This means that a patient whose valid DNR order is disregarded by a health care provider cannot sue the health care provider for wrongfully maintaining his life. Illinois courts have held that a "wrongful life" suit is against the public policy of the state to preserve life. However, Illinois does recognize that unwanted life-saving treatment should not go unpunished. In Anderson v. St. Francis-St. George Hospital, the court held that a hospital could not be found liable for its violation of a DNR order, notwithstanding the fact that after the patient was resuscitated, he experienced a stroke which left him paralyzed for life. However, the court did recognize that recovery for violation of a DNR order might exist under some circumstances, such as a tort action. Other consequences for violating a valid DNR order that Illinois common law has established are damages arising from any battery inflicted upon the patient, in addition to appropriate li-

111. Sewell, supra note 59, at 9.
112. Id.
113. Supra note 5.
censing sanctions against the medical professionals. Generally, the damages that the patient may collect must be based strictly upon negligence or battery theories, "rather than upon a theory which considered the extent of suffering beyond that which would normally have occurred if therapy had not been initiated."

Moreover, Illinois statutory law also addresses the legal repercussions for a health care professional who, in good faith, complies with a DNR order made in accordance with the Health Care Surrogate Act. The health care professional or health care provider "will not be held subject to any criminal or civil liability, except for willful and wanton misconduct, and may not be found to have committed an act of unprofessional conduct."

However, the fact remains that Illinois policy is silent on DNR orders in the school setting. It is evident from other states and jurisdictions that few districts have developed a succinct policy on in-school DNR orders, and because medically fragile students will always attend public schools, this problem needs to be addressed immediately. The few school districts that have attempted to do what the state has yet to do have each created conflicting policies. Chicago Public Schools’ policy is that, barring a court order, school personnel must ignore a DNR order and do everything possible to save a child’s life. Similarly, Lee County does not generally honor DNR orders in the school setting; however, parents can seek an exception under which they must raise the issue within student’s individualized education program team, a team associated with IDEA. The team would then make an individualized determination regarding the emergency medical treatment needs of the student. Community Consolidated School District 93, which includes Hanover Park and Bloomingdale, considers DNR on a case-by-case basis. The District states that a student seeking a DNR order must submit an Illinois Department of Public Health

116. Id.
117. Id.
118. 22 Ill. Prac., The Law of Medical Practice in Illinois §32:7 (2009) (Health Care Surrogate Act grants a surrogate the authority to execute a DNR Order Form for patients who lack decision making capacity without requiring the presence of a qualifying condition). 22 ILPRAC §32:7
119. 755 ILCS 40/65 (2010).
Uniform DNR Advance Direct form, signed by a parent and an Illinois licensed physician, and then the district will develop an individualized health plan with other school personnel.\textsuperscript{124} If the student is receiving special education services pursuant to IDEA of §504 of the Rehabilitation Act, the IEP team will be involved in the development of the IHP.\textsuperscript{125}

The inconsistencies among laws that allow for a DNR order outside the hospital have led to confusion among the school district administrative staff. Their understanding of the laws that are applicable to OOH DNR orders is significant because the school district administrative staff is responsible for the development and execution of school district policy and procedure: more specifically, the policies and procedures relating to DNR orders in the school setting.\textsuperscript{126}

Unfortunately, it appears that the only time school districts in Illinois, and essentially in the entire country, develop DNR order policies are when they are immediately faced with parents of a child who request that their child's DNR order be honored. This is hardly the best way to develop a DNR policy that not only takes the child's medical interests into account but also considers the other parties who are involved in the decision of whether to honor a DNR order in the school setting: the school nurse, the teachers, The interests of the other students should be taken into account, as well.

The role of the school nurse is significant in coordinating care for terminally ill students in the school setting. Treatment that school nurses normally administer includes suctioning tracheotomies, urinary catheterization, monitoring ventilator settings, and administering psychotropic medication.\textsuperscript{127} School nurses are not simply a section of people who can be harmed when DNR orders are honored in the school setting; they are the initial assessors of the student's condition and maintenance of her DNR order record.\textsuperscript{128} Nurses should be the first ones to decide whether a child is simply choking or experiencing cardiac or respiratory arrest, which teachers or other school personnel cannot easily or accurately assess.\textsuperscript{129}

Since teachers are the individuals who have the most exposure to the terminally ill child with an active DNR order, their interests and concerns

\begin{itemize}
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Martha Hone-Warren, supra note 4, at 99.
  \item \textsuperscript{127} Bergren, M. D. 2004 Testimony on HIPAA and FERPA in Schools Representing the National Association of School Nurses, before the National Committee on Vital Health Statistics Subcommittee on Privacy and Confidentiality. 19 February, Available at \url{http://www.nasn.org/resources/hiptestberma.pdf}
  \item \textsuperscript{128} Gladys White, \textit{Nurses at the Helm}, 5 \textit{AM. J. OF BIOETHICS} 83 (2005).
  \item \textsuperscript{129} White, supra note 128, at 83.
\end{itemize}
about honoring the order should be addressed. Teachers who have a moral objection to being required to honor the DNR often have an opt-out option, the same as health care providers do in traditional health care facilities where those with an objection to a DNR order can be transferred from the direct care of that specific patient.130 Here, teachers have the responsibility to inform school administrators of their moral objection and, consequently, that child would most likely be transferred to another classroom and placed under the care of a teacher who does not share that moral objection and can carry out the DNR order.131

The interests of the other school children should be addressed, as well. Understandably, witnessing another student go into cardiac or respiratory arrest can be traumatizing. Combine that with the fact that, while cooperating with a DNR order, their teachers appear to be doing “nothing,” and the experience can be extremely damaging to other students. In reality, the teacher would not be doing “nothing.” Rather, she would be providing comfort and care by touching the child, wiping her brow, holding her hands, and other things that convey care.132 This interest can easily be addressed by effective communication between all parties involved to create a plan to make the carrying out of the DNR order as smooth as possible. For instance, in Katie’s situation, her parents created an individualized health plan in the event that she go into cardiac or respiratory arrest. After Katie’s parents and the paramedics were called, Katie would be moved to the nurse’s office to be shielded from other children. A solution as simple as moving the child’s body can protect other children from an inevitable, yet potentially traumatizing, part of life.

Moreover, those who make the argument that the possibility of witnessing school personnel allowing a peer die at school is too damaging for the other children fail to recognize that most terminally ill children do not die at school because when they near death, their energy levels are so low that they would stop attending school.133 Supporters of honoring the DNR order at school state that the OOH DNR is merely an “insurance policy” against unwanted and non-beneficial interventions to be used in the rare time a child would die at school.134 Death is an unavoidable part of life, and every year, healthy children die at school as result of athletic injuries, accidents, or violence. The notion that there will be incredible emotional backlash from honoring an OOH DNR is misguided: “school personnel

131. Savage, supra note 130, at 73.
133. Leveton, supra note 14, at 79.
134. Id.
and students are not the ones implementing the order, they are the ones in-
forming the well-trained EMS personnel of the child's baseline health
status and the parents' decisions regarding beneficial care.135 Allowing a
child to die naturally at school can be a non-traumatic experience if there
is effective communication between the family, school officials, the health
care team, and EMS personnel.136

When the parents of a terminally ill child make the difficult decision
to sign a DNR order on behalf of their child, it is equally important for
them to involve the student in an Individualized Health Care Plan (IHCP)
and Emergency Plan that can be developed with the school nurse and then
discussed with all the parties that the child's DNR order affects – the par-
ents, administrators, physicians, and teachers.137 The IHCP plan can ad-
dress the interests of the teachers, nurses, and the other students.

Illinois must formulate a state-wide plan that can be universally ap-
plicated to address the combined interests of the teachers, nurses, other stu-
dents, and most importantly, the terminally ill child. Almost equally im-
portant in creating this plan is including within it liability protection. The
first thought of a teacher or nurse who must ignore their natural instinct to
resuscitate the child should not be whether they could be held liable for
abiding by the law. Although it is possible that the DNR order may be
executed incorrectly or not at all, it is a risk that the school must be willing
to take because denying the child the right to die without medical interven-
tion is a far greater interest. Illinois must create a plan to protect all school
personnel from liability when they honor the DNR order. Families, like
Katie's family, should only be concerned with spending time with their
terminally ill child and not whether their child's valid DNR order would
be honored when they step through the doors of the schoolhouse.

135. Id.
136. Id.
137. White, supra note 128, at 83.