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BISHOP URGES "NO" VOTE ON HB 656
CITING TECHNICAL FLAWS AND ETHICAL ISSUES

(MANCHESTER, NH) Bishop John B. McCormack has written to all state representatives and urged them to vote "No" on HB 656. He cites several serious ethical issues as well as technical flaws in the proposed legislation.

HB 656 seeks to repeal the current state laws (RSA 137-H and 137-J) regarding "medical decisions that need to be made for adults without capacity to make health care decisions for themselves and establishing procedures for Do Not Resuscitate Orders," and "Living Wills" and replace them with a new statute. The bill is scheduled for a vote in the House on Wednesday, February 15, 2006.

"I write to you both as a citizen concerned that the policy of the State is appropriate and as the Roman Catholic Bishop of Manchester," wrote Bishop McCormack. "I am hopeful that you will consider these concerns carefully. As you know, HB656 proposes to revise the laws relative to living wills and durable powers of attorney for health care in New Hampshire. The Diocese of Manchester is opposed to this legislation and to the amendments currently being developed in an effort to repair certain technical difficulties with the bill. While floor amendments have been prepared in an effort to improve the bill, I do not believe they make it acceptable."

The diocese had Dr. Peter Cataldo, an ethicist, study the proposed legislation in detail. The bishop agrees with the conclusions of Dr. Cataldo's analysis. (Full text of analysis is appended below.)

There are three aspects of HB 656 that make it ethically unjustified public policy. First, the bill incorrectly identifies "permanent unconsciousness" with "near death" and allows the withdrawal and withholding of life-sustaining treatment and medically-administered nutrition and hydration ("MANH") solely on the basis that a person is permanently unconscious. Second, the bill allows for the withdrawal of life-sustaining treatment for pregnant women under circumstances that would not be excessively

burdensome for the woman and would sustain the life of the unborn child. Third, the bill does not have an institutional conscience provision allowing a health care institution to transfer a patient whose "do not resuscitate" order would violate the conscience of the institution.

The bishop recognized that the legislature had spent a great deal of effort on this bill and asked them to take the time to reconsider the issue in the future. "I offer my gratitude to you for your public service to our state. Your willingness to serve as a legislator for the good of our community is valuable and important to our government. I assure you of my prayerful support and respect."

More information on this bill and others of interest to the Catholic Church is available at the diocese website, www.catholicchurchnh.org.

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Diocese of Manchester

Peter J. Cataldo, Ph.D.

Ethical Concerns as a Matter of Public Policy
Amendment to HB 656-FN
[Amendment Proposed by the Majority of the Committee on Judiciary (12/1/05)]

There are three aspects of HB 656 that make it ethically unjustified public policy. First, the bill incorrectly identifies permanent unconsciousness with near death and allows the withdrawal and withholding of life-sustaining treatment and medically-administered nutrition and hydration ("MANH") solely on the basis that a person is permanently unconscious. Second, the bill allows for the withdrawal of life-sustaining treatment for pregnant women under circumstances that would not be excessively burdensome for the woman and would sustain the life of the unborn child. Third, the bill does not have an institutional conscience provision allowing a health care institution to transfer a patient whose do not resuscitate order would violate the conscience of the institution.

I

The bill states that life-sustaining treatment is "any medical procedures or interventions which utilize mechanical or other medically administered means to sustain, restore, or supplant a vital function which, in the written judgment of the attending physician or ARNP, would serve only to artificially postpone the moment of death, and where the person is near death or is permanently unconscious" (137-J:2, XIV). This

statement wrongly associates permanent unconsciousness with being near death. This connection is made more explicit where the bill states that the withdrawal or withholding of life-sustaining treatment and MANH is "to permit the natural process of dying of those near death or in a permanently unconscious condition" (137-J:10, II). In a similar fashion, the Living Will instructs that life-sustaining treatment and MANH may be withdrawn or withheld if "I will remain in a permanently unconscious condition and where the application of life-sustaining treatment would serve only to artificially prolong the dying process" (137-J:19, II).

This language wrongly associates someone who is permanently unconscious with persons who are near death. A person who is permanently unconscious may require medically administered means to supplant the lost ability to swallow, but otherwise might not be near death as an end stage cancer patient is near death. However, there are cases in which a person who is permanently unconscious is not near death and in which life-sustaining treatment or MANH would not cause significant complications. In such cases there may be an ethical obligation provide such care.

The definition of life-sustaining treatment may also be read as stating that it is ethically justifiable to withdraw or withhold life-sustaining treatment from a person solely because the person is permanently unconscious. There are other places in the bill that allow the withdrawal or withholding of life-sustaining treatment and MANH on the sole reason that a person is permanently unconscious. This is clear from the following option in the Durable Power of Attorney for Health Care: "Whether near death or not, if I become permanently unconscious I authorize my agent to direct that: (*Initial beside your choice of (a) or (b).*)___(a) life-sustaining treatment not be started, or if started, be discontinued" (137-J:19, I, A, 2). The condition of permanent unconsciousness affects neither the human dignity of the person who is in such a condition nor his or her fundamental human right to life-sustaining treatment or MANH that has a reasonable hope of benefit and will not pose an excessive burden.

II

The bill states that life-sustaining treatment cannot be withdrawn from a pregnant woman unless it "will be physically harmful to the principal or prolong severe pain which cannot be alleviated by medication" (137-J:5, V, c). What is meant by "physically harmful" is vague and could allow withdrawal of life-sustaining treatment when it is slightly harmful but not to the point of threatening the life or hastening the death of the pregnant woman. It is not clear how a woman who is in a coma or is permanently unconscious could experience severe pain. Both sets of circumstances are inconsistent with the ethically correct intent of this section to protect and preserve the life of the unborn child.

III

The bill allows a physician not to comply with a person's do not resuscitate order and have the patient transferred to the care of another physician. In such a case the bill states that the "attending physician or ARNP shall thereafter at the election of the person or agent permit the person or agent to obtain another attending physician or ARNP" (137-

J:27, III). A similar option should be extended to health care institutions to cover situations in which compliance with a do not resuscitate order would violate the conscience of the institution.

Other Technical Concerns

The Diocese of Manchester also believes the following issues, technical and substantive, exist with House Bill 656 as printed in the House Calendar for January 4, even with the floor amendment which we have seen which addresses and incorporates many suggestions we made, in addition to the analysis done by Peter Cataldo:

1. 2 II introduces the "advanced registered nurse practitioner" or "ARNP" as a medical professional who can make decisions. Prior law spoke only of physicians. This is a policy issue which should be addressed. Is it appropriate and good policy for non-physicians to make medical decisions on the issues covered by these matters in any or all of the functions nurses are allowed to perform in the new law? Existing law stresses the care and control of physicians.

2. In 2 XIV "Life sustaining treatment", there is the first reference to "near death" and "permanently unconscious." These are separate conditions and throughout existing law and the amendment need to be kept distinct. One who is "permanently unconscious" as determined by brain scan, etc., is not necessarily "near death." This is one of many new or amended definitions added to the law and not found in existing law. The new definition of "permanent unconscious" is far from the understanding of the term which underlies the current law, that of medically determinable "brain death" as determined by the destruction of the brain stem. It is a fundamental problem for the Diocese and for Catholic understanding and ethics. It needs to be changed.

3. In 2 XVII "Near death" is defined partially as where "death is imminent" without any definition of "imminent." There are various interpretations of this and it needs to be clarified and defined. Also, there is no definition of the "dying process."

4. In 5 (c), the words "unborn child" should be restored as they are in current law. Also, the term "physically harmful" in that provision is confusing and undefined and may be a provision that allows for discontinuing life support that is supposed to be prohibited in the section.

5. In the DNR section, there should be an institution conscience clause added—probably in 27 III. Protection language in that circumstance should be added to be sure that until the transfer of the patient, care has to be provided and/or the institution will not be liable for providing treatment consistent with its guiding philosophy.

6. In 10 III (a), the word "fetus" needs to be replaced with "unborn child" in the next to last line, as in current law.

7. Signing the documents requires two witnesses or a notary or justice of the peace. This is a change from current law which requires both and was done on purpose to reinforce the seriousness and formality of signing such documents, which should not be done too quickly or lightly. Retaining the prior requirement would be better than the change.