

State of California

HEALTH AND SAFETY CODE

Section 1418.8

1418.8. (a) The following definitions apply for purposes of this section:

(1) “Emergency” means a situation when medical treatment is immediately necessary for the preservation of life, the prevention of serious bodily harm, or the alleviation of severe physical pain or severe and sustained emotional distress.

(2) “Legal decisionmaker” means any of the following:

(A) A conservator, as authorized by Part 3 (commencing with Section 1800) and Part 4 (commencing with Section 2100) of Division 4 of the Probate Code.

(B) A person designated by a resident as an agent in an advanced health care directive pursuant to Part 1 (commencing with Section 4600) and Part 2 (commencing with Section 4670) of Division 4.7 of the Probate Code.

(C) A person designated by a resident as a surrogate pursuant to Part 1 (commencing with Section 4600) and Part 2 (commencing with Section 4670) of Division 4.7 of the Probate Code.

(D) A person appointed by a court authorizing treatment pursuant to Part 7 (commencing with Section 3200) of Division 4 of the Probate Code.

(E) A resident’s spouse or registered domestic partner.

(F) A parent or guardian of a resident who is a minor.

(G) A resident’s closest available relative or another person whom the resident’s physician and surgeon, nurse practitioner, or physician’s assistant reasonably believes has authority to make health decisions on behalf of the resident and that will make decisions in accordance with the resident’s best interests and expressed wishes and values to the extent known.

(H) Any other person authorized by state or federal law.

(3) “Patient” or “resident” means a patient or resident of a skilled nursing facility or an intermediate care facility.

(4) “Patient representative” means a competent person whose interests are aligned with a resident who has agreed to serve on an interdisciplinary team for the purposes of this section. A patient representative may be a family member or friend of the resident who is unable to take full responsibility for the health care decisions of the resident, but who has agreed to serve on the interdisciplinary team, or another person authorized by state or federal law. If a family member or friend is not available to serve as the patient representative, the Long-Term Care Patient Representative Program may designate a public patient representative.

(5) “Long-Term Care Patient Representative Program” means the program established pursuant to Chapter 3.6 (commencing with Section 9260) of Division 8.5 of the Welfare and Institutions Code in the California Department of Aging, including

the Office of the Long-Term Care Patient Representative and local long-term care patient representative programs, as defined in that chapter. Whenever this section requires a notice or communication to be provided to the Long-Term Care Patient Representative Program, the notice shall be provided to the California Department of Aging or the local long-term care patient representative program, as designated by the California Department of Aging pursuant to that chapter.

(6) "Public patient representative" means a patient representative selected by the Long-Term Care Patient Representative Program.

(7) "Facilities" means skilled nursing facilities and intermediate care facilities.

(b) If the attending physician and surgeon of a resident in a skilled nursing facility or intermediate care facility prescribes or orders a medical intervention that requires that informed consent be obtained prior to administration of the medical intervention, but is unable to obtain informed consent because the physician and surgeon determines that the resident lacks capacity to provide informed consent, the physician and surgeon shall document the determination that the resident lacks capacity and the basis for that determination in the resident's medical record, and shall inform the skilled nursing facility or intermediate care facility. For purposes of this subdivision, a resident lacks capacity to provide informed consent if the resident is unable to understand the nature and consequences of the proposed medical intervention, including its risks and benefits, or is unable to express a preference regarding the intervention. To make the determination regarding capacity, the physician shall interview the resident, review the resident's medical records, and consult with the staff of the skilled nursing facility or intermediate care facility, as appropriate, and family members and friends of the resident, if any have been identified. The facility shall make a reasonable effort to reach these identified individuals.

(c) (1) Upon being notified by the attending physician of a determination that a resident lacks capacity to provide informed consent, the skilled nursing facility or intermediate care facility shall act promptly and identify, or use due diligence to search for, a legal decisionmaker. If a legal decisionmaker cannot be identified or located, the skilled nursing or intermediate care facility shall take further steps to promptly identify, or use due diligence to search for, a patient representative to participate on an interdisciplinary team review as set forth in subdivision (e). Due diligence includes, at minimum, interviewing the resident, reviewing the medical records of the resident, and consulting with the staff of the skilled nursing or intermediate care facility, as appropriate, and with family members and friends of the resident, if any have been identified. The facility shall make a reasonable effort to reach these identified individuals.

(2) If the resident is able to express a preference as to the identity of the patient representative, or if the resident previously designated an individual to act as a patient representative, the facility shall make a good faith effort to utilize this individual as the patient representative to the extent that the individual is available and willing to serve on the interdisciplinary team.

(3) The facility shall document in the resident's records the efforts that were made to find a legal decisionmaker, or alternatively, a patient representative, to otherwise serve on the interdisciplinary team.

(4) In the event that a facility is unable to identify a family member or friend able to serve as the patient representative within 72 hours of a physician's determinations pursuant to subdivision (b), the skilled nursing facility or intermediate care facility shall contact the Long-Term Care Patient Representative Program for selection of a public patient representative.

(5) A facility may contact the Long-Term Care Patient Representative Program for selection of a public patient representative before the completion of 72 hours if the facility determines that a legal decisionmaker, family member, or friend is unlikely to be located. The facility shall continue to use due diligence to search for a legal decisionmaker or a family member or friend able to serve as the patient representative.

(6) If a family member or friend becomes available to serve as the patient representative after the selection of a public patient representative, the family member or friend may replace the public patient representative.

(d) (1) At least five days prior to conducting an interdisciplinary team review pursuant to subdivision (f), the facility shall provide notice to the resident and the patient representative in accordance with subdivision (m).

(2) (A) Notwithstanding paragraph (1), if the physician and surgeon determines that the resident will suffer harm or severe and sustained emotional distress if the prescribed medical intervention is delayed at least five days, an interdisciplinary team review may occur if notice is provided to the resident and patient representative at least 24 hours prior to conducting an interdisciplinary team review.

(B) The physician and surgeon shall document the determination that the resident will suffer harm or severe and sustained emotional distress if the prescribed intervention is delayed at least five days, and the basis for that determination, in the resident's medical record.

(3) The notice shall include information regarding all of the following:

(A) That the resident lacks capacity to provide informed consent and the reasons for that determination.

(B) That a legal decisionmaker is not available.

(C) A description of the proposed medical intervention that has been prescribed or ordered and the name and telephone number of the medical director of the facility and of the physician and surgeon who ordered the medical intervention.

(D) That a decision on whether to proceed with the medical intervention will be made using the interdisciplinary team review, an explanation of the interdisciplinary team review process for the administration of medical interventions, including that the resident has the right to have a patient representative participate in the interdisciplinary team review process, and that if the resident does not have a representative, a public patient representative from the Long-Term Care Patient Representative Program will be assigned.

(E) The date and time of the interdisciplinary team review.

(F) The name and contact information of the individual identified by the facility as the resident's patient representative, or that a public patient representative from the Long-Term Care Patient Representative Program will be assigned.

(G) The name, mailing address, email address, and telephone number of the designated local contact of the Long-Term Care Patient Representative Program.

(H) The name, mailing address, email address, and telephone number of the local office of the Long-Term Care Ombudsman.

(I) The name, mailing address, email address, and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities or mental disorders.

(J) That the resident has the right to judicial review to contest the physician and surgeon's determinations, the use of an interdisciplinary team to review and administer medical treatment, or the decisions made by the interdisciplinary team.

(4) The Long-Term Care Patient Representative Program shall provide a standardized template for the notice required by paragraph (3). A facility that utilizes the standardized template shall be responsible for adding information, in sufficient detail, pertaining to the resident and required contact information.

(5) The medical director of the facility or the physician and surgeon who ordered the medical intervention shall be available to discuss the risks and benefits associated with the medical intervention or interventions proposed, and available alternatives with the patient representative and the resident at least 48 hours prior to the interdisciplinary team review, except for interdisciplinary team reviews occurring with less than five days' prior notice pursuant to paragraph (2).

(e) (1) When a resident of a skilled nursing facility or intermediate care facility has been prescribed a medical intervention by a physician and surgeon that requires informed consent and the physician has determined that the resident lacks capacity to make health care decisions and the facility has determined that there is no legal decisionmaker, the facility shall, except as provided in subdivision (h), conduct an interdisciplinary team review of the prescribed medical intervention prior to the administration of the medical intervention. The interdisciplinary team shall oversee the care of the resident utilizing a team approach to assessment and care planning, and shall include the resident's attending physician, a registered professional nurse with responsibility for the resident, other appropriate staff in disciplines as determined by the resident's needs, and a patient representative, in accordance with applicable federal and state requirements. An interdisciplinary team review shall not occur without the participation of a patient representative and until the notice required by subdivision (d) has been provided to the resident and patient representative.

(2) The interdisciplinary team review shall include all of the following:

(A) A review of the physician's assessment of the resident's condition.

(B) The reason for the proposed use of the medical intervention.

(C) A discussion of the desires of the resident, if known. To determine the desires of the resident, the interdisciplinary team shall interview the resident, review the resident's medical records, consult with family members or friends, if any have been identified, and review any prior expressions of the resident's health care wishes,

including checking registries for an advanced health care directive or physician's orders for life-sustaining treatment, as specified in Part 4 (commencing with Section 4780) of Division 4.7 of the Probate Code, executed prior to the physician's determinations in subdivision (b) and not executed by the resident during any period of incapacity, to the extent available and capable of being timely accessed. Any specific prior expression of the resident's health care wishes shall be afforded particular consideration unless the wishes are inconsistent with the best interests of the resident, require medically ineffective health care, or are contrary to generally accepted health care standards applicable to the health care provider, institution, or resident.

(D) The type of medical intervention to be used in the resident's care, including its probable frequency and duration.

(E) The probable impact on the resident's condition, with and without the use of the medical intervention.

(F) Reasonable alternative medical interventions considered or utilized and reasons for their discontinuance or inappropriateness.

(3) The patient representative shall have access to all of the resident's medical records and otherwise confidential health information in the possession of the facility necessary to prepare for and participate in the interdisciplinary team review.

(f) A notice of the outcome of the interdisciplinary team review and of the resident's right to judicial review shall be provided to the resident and patient representative in accordance with subdivision (m).

(g) The interdisciplinary team shall periodically evaluate the use of the prescribed medical intervention at least quarterly, upon a significant change in the resident's medical condition, or upon the resident's or the patient representative's request. The facility shall provide notice of the interdisciplinary team review pursuant to subdivision (d) and the outcome of the interdisciplinary team review pursuant to subdivision (f).

(h) (1) In case of an emergency, after obtaining a physician and surgeon's order as necessary, a skilled nursing or intermediate care facility may administer a medical intervention that requires informed consent prior to the facility issuing the notice required pursuant to subdivision (d) and prior to convening an interdisciplinary team review. The emergency shall be documented in the resident's records and, within 24 hours, notice of the intervention and the resident's right to judicial review shall be provided to the resident and the patient representative, pursuant to subdivision (m). The facility shall conduct the interdisciplinary team review within one week of the emergency for an evaluation of the medical intervention.

(2) In cases where an emergency results in the application of a medical intervention to treat severe and sustained emotional distress, or the application of physical or chemical restraints, the facility shall notify the Long-Term Care Patient Representative Program within 24 hours of administration of the intervention and shall make prompt efforts to convene an interdisciplinary team review within three days of administration of the intervention, but no later than one week. The facility shall notify the Long-Term Care Patient Representative Program of an emergency medical intervention described by this paragraph even if an alternative patient representative is available.

(3) If a facility fails to conduct an interdisciplinary team review within the time specified by this subdivision for any reason, including, but not limited to, if a previously identified family member or friend is not available to participate as a patient representative, the facility shall notify the Long-Term Care Patient Representative Program of the delay and its causes. The program may assign a public patient representative when appropriate.

(i) (1) Physicians and surgeons, skilled nursing facilities, and intermediate care facilities shall not be required to obtain a court order pursuant to Section 3201 of the Probate Code prior to administering a medical intervention which requires informed consent if the requirements of this section are met. Except in case of emergency, as provided in subdivision (h), the proposed medical intervention shall not be administered until it has been reviewed and authorized by the interdisciplinary team, after having reached a consensus, the resident and the patient representative have received notice pursuant to subdivision (f) of the outcome of the interdisciplinary review team process, and the resident has had reasonable opportunity to seek judicial review. If judicial review is sought, the intervention shall not be administered until a final determination is made by a court, except in cases of emergency as provided in subdivision (h).

(2) If an interdisciplinary team does not reach consensus to authorize or continue a medical intervention, and the facility decides to proceed with the intervention, the facility shall petition to obtain a court order pursuant to Section 3201 of the Probate Code to authorize the medical intervention.

(j) This section does not affect the right of a resident of a skilled nursing facility or intermediate care facility for whom medical intervention has been prescribed, ordered, or administered pursuant to this section to seek appropriate judicial relief, at any time, to review the decision that a resident lacks capacity, that the resident lacks a legal decisionmaker, or to provide the medical intervention.

(k) A physician or other health care provider whose action under this section is in accordance with reasonable medical standards shall not be subject to administrative sanction if the physician or health care provider believes in good faith that the action is consistent with this section and the desires of the resident, or if unknown, the best interests of the resident.

(l) (1) A facility that conducts an interdisciplinary review shall provide to the Long-Term Care Patient Representative Program data summarizing the notices provided to all residents pursuant to subdivisions (d), (f), and (h), including all of the following:

(A) The total number of interdisciplinary reviews conducted.

(B) The number of unique residents who have had an interdisciplinary team review conducted.

(C) The total number of emergency medical interventions authorized pursuant to subdivision (h).

(D) The number of unique residents who have had an emergency medical intervention authorized.

(E) A tabulation of medical interventions authorized by type.

(F) A tabulation of the outcomes of the interdisciplinary team reviews.

(G) A tabulation of instances when judicial review was sought.

(H) A tabulation of emergency medical interventions where the interdisciplinary team failed to meet within the time required by subdivision (h), including the causes of the delay and the number of days after the intervention that the interdisciplinary team finally met.

(I) Any other demographic or statistical data as may be required by the program.

(2) Facilities shall report data annually and at any other time, as requested, in a format specified by the program.

(3) The department may require a facility to include the information described in paragraph (1) in the resident's minimum data set, as specified by Section 14110.15 of the Welfare and Institutions Code. The department shall obtain any federal approval necessary to implement this paragraph.

(m) (1) Whenever this section requires a notice to be provided to a resident, the notice shall be provided orally and in writing. The notice shall be provided in the resident's primary or preferred language, if known; however, if written translation services are not timely available, oral notice shall be provided in the resident's primary or preferred language and written notice may be provided in English. If the resident is hearing impaired or vision impaired, the facility shall provide notice in an accessible format.

(2) Whenever this section requires a notice to be provided to a resident, a copy of the notice in writing, and a second copy translated into English if applicable, shall be concurrently provided to the resident's patient representative. If a patient representative has not been identified, or if the patient representative cannot be readily contacted, the concurrent notice shall be provided to the Long-Term Care Patient Representative Program.

(3) A copy of a written notice required to be provided by this section, and if applicable, a second copy translated into English, shall be entered into the resident's record.

(n) (1) A patient representative shall not be a provider of health care to the resident and shall not be financially compensated by, have a financial interest in, or be an employee, former employee, or volunteer of the facility or related entities. Related organizations include the facility licensee's entities, organizations, subsidiaries, affiliates, parent companies, contractors, subcontractors, or vendors.

(2) Notwithstanding paragraph (1), a family member of the resident may serve as a patient representative if they are an employee, former employee, or volunteer of the facility or related entities. A former employee or volunteer may serve as a patient representative at the facility they were previously affiliated with after two years of separation from the facility or related entities. A former employee or volunteer is not precluded from serving as a patient representative for a facility that they were not previously affiliated with.

(o) If the Long-Term Care Patient Representative Program is not operational, a facility shall provide all notices otherwise required by this section to be provided to the Long-Term Care Patient Representative Program, to the local Long-Term Care Ombudsman or any other person or entity as may be permitted by law.

(p) This section shall become operative on the earlier of the following dates:

(1) January 1, 2022, or the date the Director of the California Department of Aging certifies to the State Public Health Officer and provides public notice that the Long-Term Care Patient Representative Program is operational pursuant to Section 9295 of the Welfare and Institutions Code, whichever is later.

(2) July 1, 2022.

(Repealed (in Sec. 10) and added by Stats. 2021, Ch. 85, Sec. 11. (AB 135) Effective July 16, 2021. Conditionally operative July 1, 2022, or earlier date, as prescribed by its own provisions.)