



Sandra Shewry
Acting Director

State of California—Health and Human
Services Agency
**California Department of
Public Health**



GAVIN NEWSOM
Governor

October 30, 2020

AFL 20-83

TO: Skilled Nursing Facilities (SNFs)
Intermediate Care Facilities (ICFs)

SUBJECT: Interdisciplinary Team (IDT) Authorized Medical Interventions for
Residents Unable to Provide Informed Consent and Without a Health Care Decision Maker

AUTHORITY: Health and Safety Code (HSC) section 1418.8

All Facilities Letter (AFL) Summary

This AFL notifies SNFs and ICFs of the appellate court's decision in *California Advocates for Nursing Home Reform (CANHR), et al. v. Sonia Angell, Director of CDPH*, regarding the interdisciplinary team (IDT) process codified in HSC section 1418.8. The AFL provides guidance and clarification to facilities regarding the court's decision pertaining to the IDT process.

HSC section 1418.8 authorizes an IDT at a SNF or ICF to make treatment decisions for residents when a physician determines the resident is unable to provide informed consent for a proposed treatment intervention because they cannot articulate a decision or cannot understand the risks or benefits of a proposed intervention and where the resident has no health care decision maker to consent to the proposed intervention. The Court of Appeal decision upheld the constitutionality of HSC section 1418.8.

Judgment

On January 27, 2020, the Alameda Superior Court issued a modified judgment of the Court of Appeal decision, which upheld the constitutionality of HSC section 1418.8. The modified judgment requires that facilities provide both verbal and written notice to a resident before administering a treatment intervention or a change in treatment that an IDT authorized, except in cases of emergency. In addition, the modified judgment authorizes SNFs or ICFs to continue providing IDT medical treatment interventions to those residents already receiving such treatment before January 27, 2020. Facilities must provide verbal and written notice to residents already receiving treatments and must provide updated verbal and written notice upon any changes in treatment.

Implementation

The judgment clarifies the process that SNFs and ICFs must complete before administering any IDT authorized medical treatment.

Except in cases of emergency, SNFs and ICFs shall do all the following before initiating IDT authorized medical interventions requiring informed consent:

(1) Provide written and verbal notice to the resident

The notice to the resident shall include all the following:

- The physician's determinations regarding the resident's inability to provide informed consent for a proposed medical treatment intervention;
- The proposed medical treatment intervention;
- The lack of a health care decision maker available for the resident and a description of the facility's efforts to locate a health care decision maker for the resident;
- An explanation of the IDT process and how the IDT will make treatment decisions for the resident until the resident regains the ability to provide informed consent
- That a patient representative of the resident's choosing shall participate as a member of the IDT; and
- That the resident may seek judicial adjudication of the physician's and the IDT's determinations.

Further, before administering a medical intervention, except in cases of emergency, the written notice to the resident shall be concurrently provided to a competent person whose interests are aligned with the patient.

(2) Provide written notice to a person whose interests are aligned with a resident or to a local ombudsman

A "competent person whose interests are aligned with the resident" may be the following:

- A competent friend or family member for whom the resident provides written authorization for the release and sharing of the resident's confidential medical information and to receive the written notice; or
- A competent person or entity authorized by law.

If, after reasonably diligent efforts, a facility is unable to locate a competent person whose interests are aligned with the resident's or the resident cannot provide authorization or consent for a person to receive confidential medical information and the written notice, the facility may send the written notice to the local ombudsman in the county or counties in which the facility is located.

"Reasonably diligent efforts" may vary depending on the specific circumstances of the resident and the facility. When residents are admitted, the SNF or ICF should consider having the new resident identify any competent friends, family members, or other individuals or entities to whom the resident will authorize release of confidential medical information and consent for their participation in an IDT should the need arise.

(3) Include a patient representative participation in the IDT

Except in cases of emergency, before IDT authorized administration of a medical intervention requiring informed consent, a patient representative shall participate in the IDT process and decision-making for the resident on a proposed medical treatment intervention. Where no family member or friend is willing to serve as patient representative, facilities must attempt to locate, with reasonable diligence, a person or entity willing and able to serve as a patient representative. If unable to locate a person or entity to serve as a patient representative, a facility may apply to the superior court for the appointment of a conservator, a health care decision maker, or a public guardian, pursuant to Probate Code Section 2920, or for an order of medical treatment, pursuant to Probate Code Section 3200.

(4) Provide a reasonable opportunity for judicial review to a resident

What constitutes a "reasonable opportunity" may vary depending on the unique circumstances of the resident. The SNF or ICF must always act in the resident's best interests.

Policy and Procedures at SNFs and ICFs

SNFs and ICFs should update, develop, adopt, and implement policies and procedures (P&Ps) to ensure compliance with requirements for residents under HSC section 1418.8. P&Ps should include the following:

- Process for verbal and written notice that incorporates effective communication methods with residents, such as providing notice in the resident's preferred language
- Process for voluntary consent by the resident and identification, selection and participation of a patient representative on the IDT and for a competent person whose interests are aligned with the resident who may receive the written notice
- Process for efforts to select and secure a patient representative to participate on the IDT
- Process for reasonable opportunity for residents to communicate or undertake:
 - objection or disagreement with a proposed medical intervention or with the physician's determination of the resident's inability to consent to a proposed medical intervention
 - judicial adjudication of the physician's or the IDT's determinations
- Process for emergency IDT medical treatment interventions, subsequent verbal and written notice to the resident and competent person whose interests are aligned with the resident, and participation of a patient representative on the IDT after administration of emergency IDT medical treatment interventions

Medical Record Documentation

In the event an IDT is convened for a resident under HSC 1418.8, facilities shall maintain documentation in the medical record of all the following:

- A copy of the written notice to the resident, description of the verbal notice to the resident, and the method and timing of service of both notices
- Description of efforts to identify and locate a competent person whose interests are aligned with the resident, a copy of the resident's written authorization for that person to receive their confidential medical information, and the written notice, and a copy of the notice sent to the selected individual or the local ombudsman
- Description of efforts to obtain a resident's voluntary selection and consent for an individual to serve as the resident's patient representative to participate on the IDT
- Description of a resident's voluntary consent to authorize a competent person whose interests are aligned with the resident's to receive the written notice and to receive confidential medical information and for a resident's patient representative to participate on the IDT

Compliance Deadline for IDT Patient Representative Participation

For residents that do not currently have a patient representative participating on an IDT, the facility should make timely and good faith efforts to locate and obtain a patient representative on behalf of the resident. By July 27, 2021, if no patient representative has been selected, a SNF seeking to continue authorized treatment interventions of the IDT shall apply to the superior court for the appointment of a conservator, a health care decision maker, or a public guardian, pursuant to Probate Code Section 2920, or for an order of medical treatment, pursuant to Probate Code Section 3200. Court intervention sought by a facility for the continuation of IDT medical treatment interventions for a resident should be sought in a timely manner to serve the resident's best interests and that will not otherwise jeopardize the resident's health or safety or cause a delay or cessation of necessary medical treatment for a resident.

Compliance

CDPH will verify compliance with requirements of HSC section 1418.8 during periodic surveys and complaint investigations. SNFs and ICFs not complying with the requirements will be subject to enforcement actions. If a SNF or ICF cannot comply with requirements for HSC section 1418.8, the facility shall not use the IDT process to make decisions for a resident.

Additional Information on Informed Consent

SNFs should read this AFL together with AFL 11-08 and AFL 11-31, both of which provide guidance on the interpretation and implementation of Title 22 California Code of Regulations (CCR), section 72528(c), pertaining to informed consent. Facilities should also review CDPH's informed consent FAQs.

For questions regarding this AFL, please contact HSC1418.8Questions@cdph.ca.gov.

Sincerely,

Original signed by Heidi W. Steinecker

Heidi W. Steinecker
Deputy Director

Center for Health Care Quality, MS 0512 . P.O. Box 997377 . Sacramento, CA
95899-7377
(916) 324-6630 . (916) 324-4820 FAX
Department Website (cdph.ca.gov)



Page Last Updated : October 30, 2020