# Important Legal Changes to Psychiatric Holds in 2023

January 23, 2023

California Hospital Association

# Welcome

**Jaime Welcher**
Education Program Manager
California Hospital Association

California Hospital Association

# Continuing Education

Continuing education hours are offered for this program for compliance, health care executives, legal, and nursing.

Full attendance and completion of the online evaluation and attestation of attendance are required to receive CEs for this webinar.

# Questions

**Online Questions:** At any time, submit your questions in the chat box or raise hand feature at the bottom of your screen, press enter. We will take questions at the end of the presentation.

# Presenter

**Kirsten Barlow**
**Vice President, Policy**
**California Hospital Association**

Kirsten Barlow joined the California Hospital Association as Vice President, Policy in December 2021, where she manages behavioral health policy issues. Prior to that, she established an independent consulting practice providing policy, finance, and strategic expertise to clients, including: Aurrera Health Group; the National Alliance of Mental Illness – California; California Public Administrators, Public Guardians, and Public Conservators Association; California Hospital Association; Hospital Association of Southern California; and Hospital Council of Northern and Central California.

# Presenter

**Linda Garrett, Esq.**
**Partner**
**Garrett Law LLP**

Linda Garrett has worked with health care providers for over thirty-five years. She is experienced both as a medical malpractice defense attorney and as a risk management and loss prevention consultant. Among other things, she helps providers with credentialing, medical consent, medical confidentiality, defensive documentation, and incident response.

# Presenter

**Alicia Macklin, Esq.**
**Partner**
**Hooper, Lundy & Bookman, PC**

Alicia Macklin is a partner at Hooper Lundy & Bookman PC where she advises hospitals, health systems, and providers on a broad range of compliance, reimbursement, and operational issues, including those involving behavioral health treatment. She also focuses on EMTALA compliance. Her work with hospitals in this space involves reviewing and revising EMTALA policies, providing in-service education, managing investigations and surveys, and advising on EMTALA's intersection with state laws, including state involuntary civil commitment laws.

# Presenter

**Mike Phillips, Esq.**
**Senior Director of Patient Advocacy and Housing Services**
**Jewish Family Service of San Diego**

Mr. Phillips provides instruction and training for the behavioral health community, including providing information on due process rights for individuals receiving behavioral health treatment throughout the County of San Diego. He is currently consulting at the state level on behavioral health reform, including participation in the statewide Behavioral Health Action Coalition, and provides local and statewide law enforcement training on behavioral health issues.

# Disclaimer

- This presentation is solely for **educational purposes** and the matters presented herein do not constitute legal advice with respect to your particular situation
- The presentation does not constitute legal advice, or its application to the delivery of emergency health care services
- Attendees should consult with their own legal counsel and/or risk management for advice and guidance

# Agenda


- **The LPS Act**
- **EMTALA and Holds**
- **Implementing AB 2275**
- **Other Mental Health Laws**
  - ✓ 30-Day Holds, Data Collection, and Care Coordination

# LPS Act – Original Law as Written

(emergency hold: 2 step process)

**STEP 1**

WIC §5150(a) When a person, as a result of a mental health disorder, is

- a danger to others,
- or to himself or herself,
- or gravely disabled…

# LPS Act – Basic Rule (cont.)

**STEP 1**

WIC §5150(a)

- a peace officer,
- professional person in charge of a facility designated by the county for evaluation and treatment,
- member of the attending staff, as defined by regulation, of a facility designated by the county for evaluation and treatment,
- designated members of a mobile crisis team, or
- professional person designated by the county

# LPS Act – Basic Rule (cont.)

**STEP 1**

WIC §5150(a) (continued)

- may, upon probable cause, take, or cause to be taken,
- the person into custody for a period of up to 72 hours for:
  - ✓assessment, evaluation, and crisis intervention,
  - ✓or placement for evaluation and treatment in a facility designated by the county for evaluation and treatment and approved by the State Department of Health Care Services.

# LPS Act – Basic Rule (cont.)

**STEP 2**

## WIC §5151

(a) If the facility designated by the county for evaluation and treatment admits the person, it may detain the person for evaluation and treatment for a period not to exceed 72 hours....

(b) Prior to admitting a person to the facility for treatment and evaluation pursuant to Section 5150, the professional person in charge of the facility or a designee shall assess the individual to determine the appropriateness of the involuntary detention. This assessment shall be made face-to-face either in person or by synchronous interaction [utilizing] both audio and visual components.

# LPS Act as Written vs. Reality

**STEP 1: 5150 – "hold and transport" (to designated LPS facility)**

**BIG GAP**

**medically clear**

**find bed**

**arrange safe transfer**

**STEP 2: 5151 – "assess and admit" (for evaluation & treatment, if least restrictive)**

# EMTALA and State Law Tensions

# EMTALA Core Obligations

- Medical screening examination
- Further examination and stabilizing treatment for a patient with an emergency condition
- On-call coverage
- Transfer/discharge of patients
- Acceptance of unstabilized ED patients requiring a higher level of care
- No delay of required services for insurance or payment reasons

# Who is Covered by EMTALA

- Individual presents to “dedicated emergency department” seeking/in need of examination or treatment for a **medical** condition
- Individual presents elsewhere on hospital property seeking/in need of examination or treatment for potential **emergency** condition
- Individual in a hospital-owned/operated ambulance not under EMS direction
- Individual in a non-hospital owned/operated ambulance on hospital property

# Application of EMTALA Rules to Psychiatric Patients

California Hospital Association

**Basic Principles**:

- CMS considers medical and psychiatric EMCs to be co-equal, without different rules or exceptions
- EMTALA rules and guidance do not address involuntary holds
- EMTALA preempts any state or local law that directly conflicts with the EMTALA statute and regulations (42 U.S.C. § 1395dd(f))
  - ✓ States may have more restrictive laws that will be enforced unless they conflict with EMTALA

# Psychiatric Emergency Medical Condition v. 5150 Hold

**Similarities, but not congruence –**

- A 5150 hold is based on **probable cause** by a peace officer or a county-authorized professional as a legal mechanism to take a person involuntarily to a designated facility for an assessment of a behavioral health condition
- Psychiatric Emergency Medical Condition (EMC) is based on a **clinical judgment** of an ED physician or other qualified professional designated by the hospital medical staff

# Psychiatric EMC v. 5150 Hold

**Similarities, but not congruence –**

- A psychiatric EMC may not meet the probable cause standard for a 5150 hold
- A 5150 hold does not always mean that a person has a psychiatric EMC
- A determination that a patient's psychiatric EMC is stabilized does not itself alter the status of a 5150 involuntary hold
- Documentation must be clear as to whether the ED physician has determined if the psychiatric EMC is stabilized

# Psychiatric EMC v. 5150 Hold (cont.)

**The practical reality – stabilized or unstabilized**

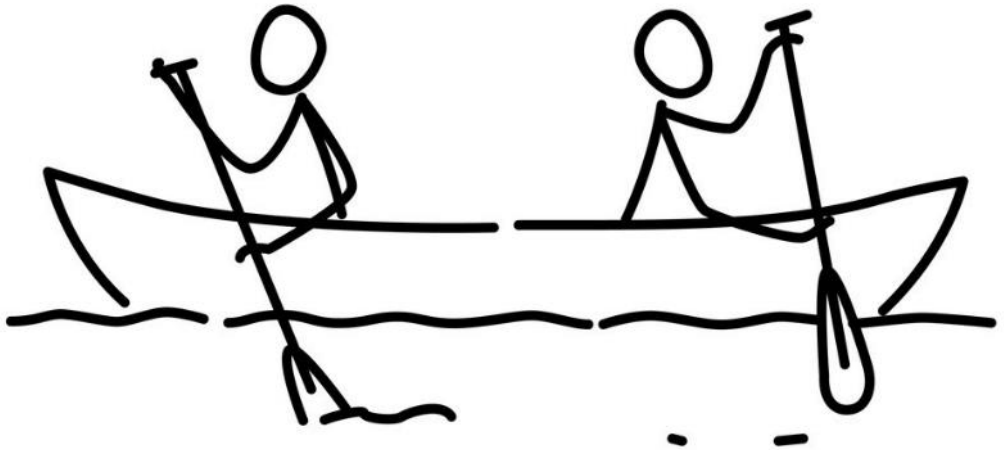
- ✓ EMTALA does not recognize involuntary holds, but …
- ✓ Surveyors often use the 5150 hold as a variable in determining the presence of a psychiatric EMC

- **Responsibility**: ED physician must determine if a psychiatric EMC is stabilized or unstabilized
- **Critical**: medical clearance or a transfer of an ED psychiatric patient does not mean that the psychiatric condition is stabilized

# Psychiatric EMC v. 5150 Hold (cont.)

**The practical reality – transfer decisions**

- **Responsibility**: If the psychiatric EMC is unstabilized, the treating physician determines the transfer decision process



# Transfer of Psychiatric Patients

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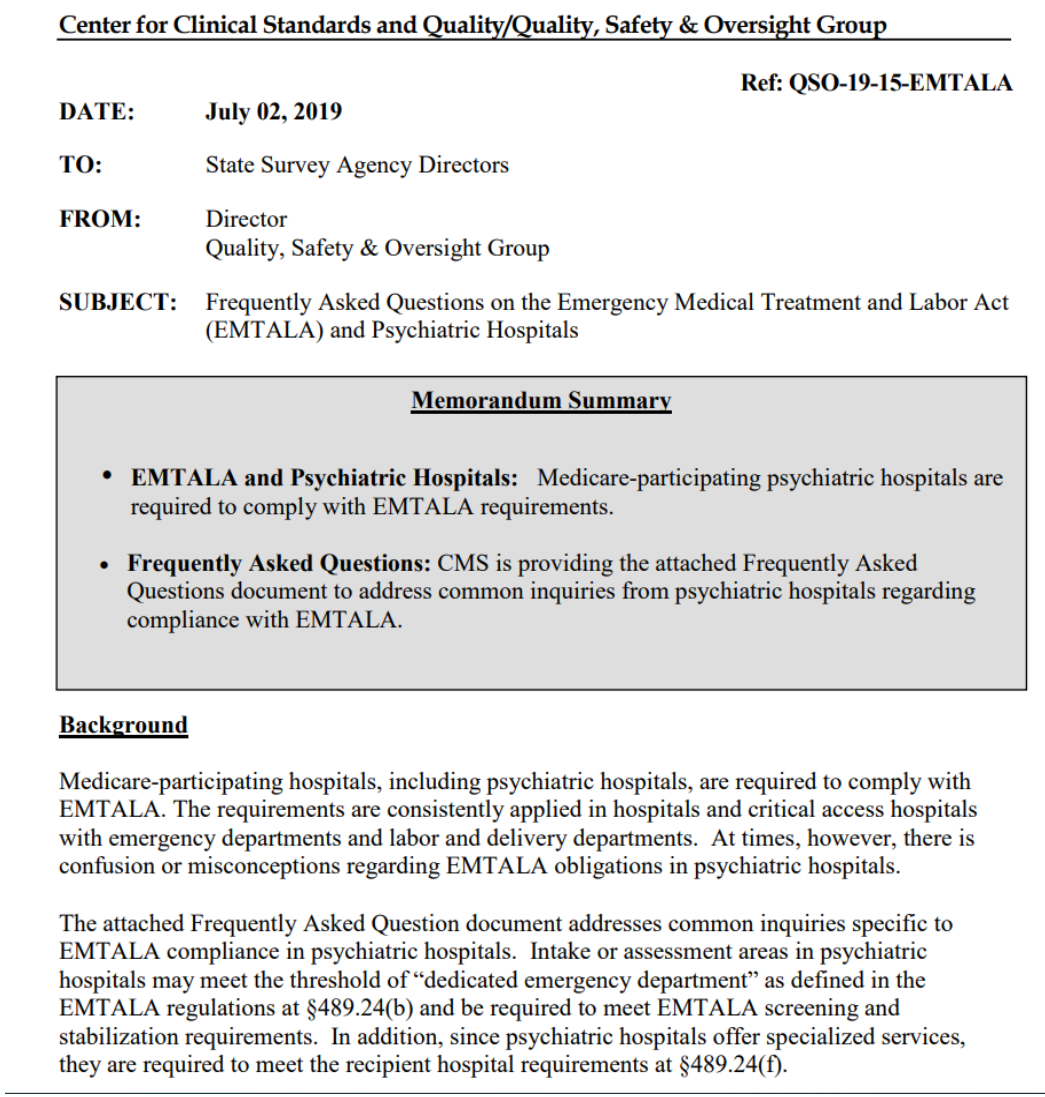
## EMTALA: Accepting Hospital Obligation

- "Th[e] requirement to accept an appropriate transfer applies to any Medicare-participating hospital with specialized capabilities, ***regardless of whether the hospital has a dedicated emergency department***…

For example, if an individual is found to have an emergency medical condition that requires specialized psychiatric capabilities, a psychiatric hospital that participates in Medicare and has capacity is obligated to accept an appropriate transfer of that individual. It does not matter if the psychiatric hospital does not have a dedicated emergency department." (CMS Int. Guidelines, Tag A-2411)



**Center for Clinical Standards and Quality/Quality, Safety & Oversight Group**

**Ref: QSO-19-15-EMTALA**

**DATE:** **July 02, 2019**

**TO:** State Survey Agency Directors

**FROM:** Director
Quality, Safety & Oversight Group

**SUBJECT:** Frequently Asked Questions on the Emergency Medical Treatment and Labor Act (EMTALA) and Psychiatric Hospitals

**Memorandum Summary**

- **EMTALA and Psychiatric Hospitals:** Medicare-participating psychiatric hospitals are required to comply with EMTALA requirements.
- **Frequently Asked Questions:** CMS is providing the attached Frequently Asked Questions document to address common inquiries from psychiatric hospitals regarding compliance with EMTALA.

**Background**

Medicare-participating hospitals, including psychiatric hospitals, are required to comply with EMTALA. The requirements are consistently applied in hospitals and critical access hospitals with emergency departments and labor and delivery departments. At times, however, there is confusion or misconceptions regarding EMTALA obligations in psychiatric hospitals.

The attached Frequently Asked Question document addresses common inquiries specific to EMTALA compliance in psychiatric hospitals. Intake or assessment areas in psychiatric hospitals may meet the threshold of "dedicated emergency department" as defined in the EMTALA regulations at §489.24(b) and be required to meet EMTALA screening and stabilization requirements. In addition, since psychiatric hospitals offer specialized services, they are required to meet the recipient hospital requirements at §489.24(f).

# The “medical screening” step – not contemplated and not addressed in original law

“Medical screening” was never contemplated in the law when first written, probably because authors had specific patients in mind:

- Patients who currently were hospitalized in state mental hospitals who had no access to:
  - ✓street drugs
  - ✓alcohol
  - ✓weapons
  - ✓other means of self-harm
- Patients with access to doctors and nurses whose physical health was therefore relatively stable

# Other beliefs of the LPS authors

Medications would soon be available to successfully treat (and in some cases cure) mental illness, and those medications would be:

- Readily available
- Affordable
- Free from side-effects
- Something patients would want to take

# Because physical health issues weren't contemplated or addressed…

We didn't (and still don't) have answers to these questions:

- What happens to the "hold" if it turns out that the patient has an intervening, superseding physical condition/medical emergency that requires admission to inpatient care (e.g., in the ICU)?
- What "standards" are appropriate for the medical screening exam, i.e., what tests should be done?
- What if the patient refuses diagnostic testing?

# Other “law vs. reality” issues

- In 1969, when the LPS Act went into effect, there were more beds and facilities that could provide secure inpatient care (about 30% more) and California’s population was smaller!
- The authors of the LPS Act believed there would be crisis centers in all communities that would be designated to assist patients experiencing a psychiatric emergency condition
- The current staffing crisis (and looming “retirement cliff”) didn’t exist

# The “medical clearance” step presents a delay (or “gap”) between Steps 1 and 2

- Delays also due to difficulties in “finding a bed” once a patient is deemed “medically clear”
  - ✓especially for patients who are young, old, pregnant, COVID-exposed or sick, aggressive, or who need help managing some other co-occurring medical condition
- Delays also due to difficulties in arranging safe and appropriate transport to an LPS-designated facility

# The gap between Step 1 and Step 2 involves the passage of time…

…and in some cases, even more than 72 hours…

but measured from …?

- the law was not clear on **when** the 72-hr clock started!

# The “clock problem” under the old LPS Act (< AB 2275)

- **WIC §5150(a)** … May, upon probable cause, take, or cause to be taken, the person into custody *for a period of up to 72 hours*….

- **WIC §5151(a)** If the facility designated by the county for evaluation and treatment admits the person, it may detain the person for evaluation and treatment *for a period not to exceed 72 hours*. … (exception for Sat, Sun & holidays in some cases)

# What to do if time ran out?

- What did we do if we “ran out of time” and the person was still a danger to self (DTS), danger to others (DTO) or Gravely Disabled (GD), and still in the emergency department of a non-designated facility or some other location?
- In reality, we had only four options (none of them addressed in the law) if 72 hours passed and the patient had still not been admitted into a designated facility:
  - ✓“extend” or “stretch” the existing hold;
  - ✓ignore the clock (or delay its start until WIC §5151);
  - ✓write another hold (i.e., “serial,” “stacked,” or “parking lot” holds); or,
  - ✓release the patient

# AB 2275 – Addresses some of these thorny issues (effective 1/1/23)

- One clock start time at WIC §5150 when patient is first detained (at "Step 1")
- Adds "due process" if 72 hours has elapsed and patient is still detained, but not yet admitted to designated LPS facility
  - ✓the **Patients' Rights Advocate (PRA) must be notified** by facility where patient is currently detained
  - ✓**right to a certification review hearing before the end of day 7** (if patient is still detained) regardless of patient's location

Assembly Bill 2275

# AB 2275 addresses time delays in local ED or CSU

- The time frame originally contemplated in LPS Act:
  - ✓ **72 hours (3 days)** receiving evaluation and treatment pursuant to the "emergency hold" (WIC §5150), plus …
  - ✓ **14-day hold** (WIC §5250), if needed, that started when the initial 72 hours ended, and triggered a certification review hearing **within 4 days** of that decision (i.e., not more than 7 days after the initial "5150 hold" was written)

# AB 2275 addresses time delays in the local ED or CSU

- **WIC §5256(b) (new)** – addresses time frame for 5150 plus "due process" **right to a certification review hearing** (if patient is still detained > 72 hrs):
  - ✓**within 7 days** from the date the patient was first detained, **regardless of the patient's location**

3 days + 4 days = **7 days (max)**

# A closer look....

# The Clock

| Old Law | New Law (1/1/23) |
| --- | --- |
| **WIC §5150(a)** When a person, as a result of a mental health disorder, is a danger to others, or to themselves, or gravely disabled, [identified individuals], upon probable cause, take, or cause to be taken, the person into custody *for a period of up to 72 hours….* | **WIC §5150(a)** When a person, as a result of a mental health disorder, is a danger to others, or to themselves, or gravely disabled, [identified individuals] may, upon probable cause, take, or cause to be taken, the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention, or placement for evaluation and treatment in a [designated] facility …<br><br>…The 72-hour period begins at the time when the person is first detained. At a minimum, assessment, as defined in Section 5150.4, and evaluation, as defined in subdivision (a) of Section 5008, shall be conducted and provided on an ongoing basis. … |

# The Clock (cont.)

| Old Law | New Law (1/1/23) |
|---|---|
| **WIC §5151(a)** If the facility designated by the county for evaluation and treatment admits the person, it may detain the person for evaluation and treatment *for a period not to exceed 72 hours*. … | **WIC §5151(a)** If the facility designated by the county for evaluation and treatment admits the person, it may detain the person for evaluation and treatment for a period not to exceed 72 hours from the time that the person was first detained pursuant to Section 5150. Saturdays, Sundays, and holidays may be excluded from the period if the State Department of Health Care Services certifies for each facility that evaluation and treatment services cannot reasonably be made available on those days. … |

# Notify the PRA if patient has not been released within 72 hrs

| Old Law | New Law (1/1/23) |
|---|---|
| Time beyond the first 72 hours, when person has not yet been admitted into a designated LPS facility, had never been addressed in the law before. | **WIC §5150(k) (new)**<br>**A facility to which a person** who is involuntarily detained pursuant to this section **is transported shall notify the county patients' rights advocate**, as defined in Section 5500, **if a person has not been released within 72 hours of the involuntary detention**. |

California Association of Mental Health Patients' Rights Advocates, Patients' Rights Advocacy Directory: https://www.camhpra.com/pra-directory

# Right to Certification Review Hearing w/in 7 days

| Old Law | New Law (1/1/23) |
|---|---|
| Time beyond the first 72 hours, when person has not yet been admitted into a designated LPS facility, had never been addressed in the law before; in some cases, this period might even be extended to 6 days (e.g., if a SECOND "hold" was written) or even beyond (e.g., in counties that wrote "serial holds" a THIRD hold might even be written at the end of Day 6, or said another way, at the start of Day 7. | **WIC §5256(b) (new)**<br>When a person has not been certified for intensive treatment pursuant to Section 5250 and remains detained pursuant to Section 5150, a certification review hearing shall be held within seven days of the date the person was initially detained pursuant to Section 5150, unless judicial review has been requested as provided in Sections 5275 and 5276. |

# Right to Information re: certification process

| New "due process rights" | New Law (1/1/23) |
| --- | --- |
|  | **WIC §5256(b) (new) - continued**<br>The professional person in charge of the facility designated by the county for evaluation and treatment, or an individual designated by the county if the person is not in a designated facility, shall inform the detained person of their rights with respect to the hearing, such as the right to the assistance of another person, including the county patients' rights advocate, to prepare for the hearing, shall answer questions and address concerns regarding involuntary detention, and shall inform them of their rights pursuant to Section 5254.1. |

# Right to Certification Review Hearing

| New "due process" rights | New Law (1/1/23) |
| --- | --- |
|  <br>*Collette Hughes (attorney for Eleanor Riese); movie telling that story: 55 Steps, with Hilary Swank and Helena Bonham Carter* | **WIC §5256(b) (new) – continued**<br>An attorney or county patients' rights advocate shall meet with the person to discuss the commitment process and to assist the person in preparing for the certification review hearing or to answer questions or otherwise assist the person as appropriate. The certification review hearing shall be conducted in accordance with Sections 5256.1, 5256.2, 5256.3, 5256.4, 5256.5, 5256.6, and 5256.7 and the detained person shall be considered a person certified. |

# Postponement of Cert. Review Hearing for 48 hours?

| Old Law | New Law (1/1/23) |
|---|---|
| **WIC §5256**. When a person is certified for intensive treatment pursuant to Sections 5250 and 5270.15, ....<br>The certification review hearing **shall be within four days of the date on which the person is certified** for a period of intensive treatment unless postponed by request of the person or his or her attorney or advocate. Hearings may be postponed for 48 hours or, in counties with a population of 100,000 or less, until the next regularly scheduled hearing date. | **WIC §5256(a)** When a person is certified for intensive treatment pursuant to Section 5250 or 5270.15, ....<br>The certification review hearing **shall be within four days of the date on which the person is certified** for a period of intensive treatment unless postponed by request of the person or their attorney or advocate.<br><br>**(Postponement language has been dropped; intentional?)** |

# AB 2275 Applies to Minors as well as Adults

| Old Law | New Law (1/1/23) (almost identical) |
|---|---|
| **WIC §5585**. This part shall apply only to the initial 72 hours of mental health evaluation and treatment provided to a minor. …To the extent that this part conflicts with any other provisions of law, it is the intent of the Legislature that this part shall apply. Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000)). | **WIC §5585.20 (amended)**. This part shall apply only to the initial 72 hours of mental health evaluation and treatment provided to a minor. …To the extent that this part conflicts with any other law, it is the intent of the Legislature that this part shall apply. Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000)). |

# Important “To Do” List

# AB 2275 – Implementing New Due Process Steps

- Make sure all non-LPS designated facilities that provide “medical screening” and all CSUs, etc. have the name(s) and contact information of County Patients’ Rights Advocate (PRA), and hours of operation.

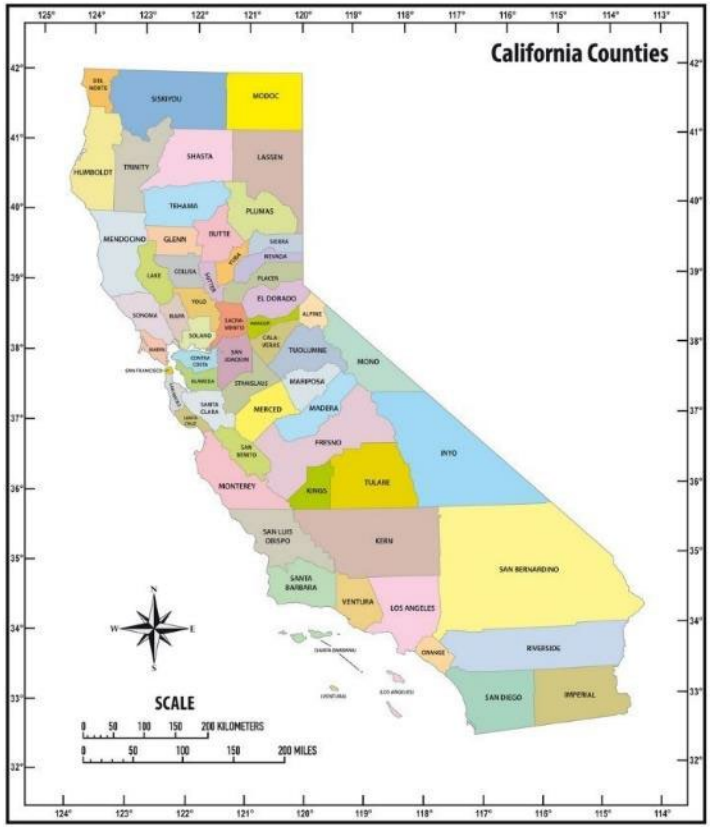
- All non-LPS designated facilities where patients may be taken for medical screening and/or stabilization need to educate facility staff about AB 2275, and when and how they will notify the County PRA.

# AB 2275 –Implementing New Due Process Steps (cont.)

Write detailed protocols for certification review hearings including:

- Notification of staff/PRA/attorney who will help patient prepare for hearing
- Scheduling of the hearing officer
- Arranging for appropriate private setting/room for the hearing (security?)
- Arranging for entry to ED for PRA, attorney, others there to assist the patient or attend the hearing
- Use of facility's telehealth technology, or use of someone else's equipment, in facilities where hearings may be conducted if telehealth technology will be utilized
- Documentation notifying patient of results in writing

# Practical Solutions – What One County is Doing





# Other mental health laws to be aware of....

# Extending 30-Day Holds (SB 1227)


- ***Current law*** (WIC §5270.10, *et seq.*): if County Board of Supervisors authorizes…
  - ✓ Following a 14-day period of intensive treatment, individual may be certified for an additional **30 days of intensive treatment**
  - ✓ Certain legal requirements, including certification review hearing, must be followed

- ***New law*** (WIC §5270.55): if individual on 30-day hold remains gravely disabled and unwilling or unable to accept treatment voluntarily, may file petition in superior court for up to an **additional 30 days of intensive treatment**

Senate Bill 1227

# Extending 30-Day Holds (SB 1227) (cont.)

- The petition seeking approval from the court for up to 30 additional days of intensive treatment must be filed **after 15 days of the initial 30 day hold but at least 7 days before it expires** (between the start of day 16 through day 22!)
  - ✓the Court must immediately appoint the public defender or other attorney to represent the person if they don't already have counsel
- Reasonable attempts shall be made by the facility to notify family members or other person(s) designated by the patient, unless the patient requests that this not be done.
- The law requires the court to either deny the petition or order an evidentiary hearing to be held **within two court days after the petition is filed**.

Senate Bill 1227

# Extending 30-Day Holds (SB 1227) (cont.)

**The Court may order the person held for up to an additional 30 days if it finds:**

- the person as a result of a mental disorder (or impairment by chronic alcoholism) is gravely disabled; **and,**
- person has been advised of but has not accepted voluntary treatment; **and,**
- facility is designated by the county and equipped and staffed to provide the intensive treatment; **and,**
- the person is likely to benefit from the continued treatment.

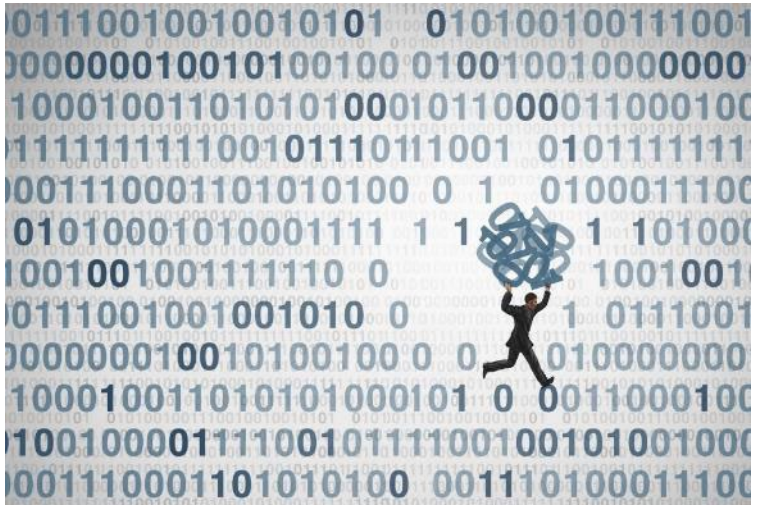
Senate Bill 1227

# Data Collection (SB 929)

- Health and Judiciary Committees: the State does not have complete data on involuntary holds in California!
- SB 929 requires **quarterly** reporting on long list of data points **related to involuntary holds**
- Who is responsible?
  - ✓ Judicial Council, County Behavioral Health Directors, Designated LPS facilities, and other entities

DHCS –

- Will publish annual reports
- Can implement a plan of correction against **<u>counties or facilities</u>** that fail to submit data in a timely manner!



Senate Bill 929

# SB 929 Reporting: County BH director, designated facilities, and other entities involved in implementing Section 5150

(1) number of persons in designated and approved facilities
- admitted or detained for 72-hour evaluation and treatment,
- admitted for 14-day and 30-day periods of intensive treatment, and
- admitted for 180-day post-certification intensive treatment in each county.

(2) number of persons transferred to mental health facilities pursuant to section 4011.6 of the Penal Code in each county.

(3) number of persons for whom temporary conservatorships are established in each county.

(4) number of persons for whom conservatorships are established in each county.

(5) the number of persons admitted or detained for:
- 72-hour evaluation and treatment, 14-day, and 30-day periods of intensive treatment, and 180-day post certification intensive treatment; and,
- for each period of detainment, whether the person was detained: once, between 2-5 times, between 6-8 times, and greater than 8 times.

(6) Clinical outcomes for individuals identified in paragraphs numbers (1) to (4).

(7) Services provided or offered to individuals identified in paragraphs (1) to (4)

(8) The waiting periods for individuals prior to receiving an evaluation in a designated and approved facility pursuant to Section 5150 or 5151 and waiting periods for individuals prior to receiving treatment services in a designated facility, including the reasons for waiting periods

(9) If the source of admission is an emergency department, the date and time of service and release from emergency care.

(10) Demographic data of those receiving care, including age, sex, gender identity, race, ethnicity, primary language, sexual orientation, veteran status, and housing status, to the extent those data are available.

(11) The number of all county-contracted beds.

# Care Coordination (AB 2242)

- The law requires the Department of Health Care Services to convene a stakeholder group on or before **12/1/23** to create a "model care coordination plan" with implementation of model care coordination plans on or before **8/1/24** by all LPS-designated facilities.
- New care coordination plan requirements:
  - ✓ Individuals being discharged from admission to a facility for 72-hour evaluation and treatment, or release after being detained for evaluation and treatment, or at termination of an LPS conservatorship
  - ✓ Collaboration between individual, county behavioral health department, health care payer (if different from the county), with input and recommendations from the facility
  - ✓ First follow-up appointment with an appropriate behavioral health professional
- The health plan, mental health plan, primary care provider, or other appropriate provider must make a good faith effort to contact the referred individual no fewer than three times, either by email, telephone, mail, or in-person outreach

Assembly Bill 2242

# Contact Information

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# Thank You

Thank you for participating in today's webinar.

An online evaluation will be sent to you shortly.

For education questions, contact:
education@calhospital.org