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GAVIN NEWSOM
Governor

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AFL 23-18

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
(This AFL supersedes AFL 20-83.2)

AUTHORITY: Health and Safety Code (HSC) section 1418.8

All Facilities Letter Summary

- This AFL notifies SNFs and ICFs of the new requirements pertaining to the interdisciplinary team (IDT) process.
- Effective January 27, 2023, the California Department of Aging's (CDA's) Long-Term Care Patient Representative Program (LTCPRP) is operational. The Office of the Long-Term Care Patient Representative (OLTCPR) provides public patient representatives to participate in the IDT process for residents who require a medical intervention that requires informed consent in the absence of a conservator, family member, friend, or legal surrogate decision maker.

Background

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 legal decision maker to consent to the proposed intervention.

In 2019, the California Advocates for Nursing Home Reform (CANHR) challenged the constitutionality of HSC section 1418.8 under the California Constitution by a petition for writ of mandate against the Director of the California Department of Public Health (CDPH), arguing it violates due process by not requiring facilities to notify the resident of the use of an IDT and the IDT's decisions. CDPH issued AFL 20-83.2 on August 31, 2022, to notify SNFs and ICFs of the appellate court's decision in *CANHR, et al. v. Sonia Angell, Director of CDPH* and to provide interim guidance regarding the IDT process. The decision required 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.

Assembly Bill (AB) 135 (Chapter 85, Statutes of 2021) was enacted to repeal and add new provisions to HSC section 1418.8. The bill created the LTCPRP and OLTCPR within CDA to train, certify, provide, and oversee patient representatives to protect the rights of SNF and ICF residents. Pursuant to HSC section 1418.8(p), this section became effective once the LTCPRP became operational in accordance with the Welfare and Intuitions Code (WIC) section 9295.

This AFL notifies SNFs and ICFs that, effective January 27, 2023, the CDA's LTCPRP is operational and there are new requirements pertaining to the IDT process. OLTCPR provides public patient representatives to participate in the IDT process for residents who require a medical intervention that requires informed consent in the absence of a conservator, family member, friend, or legal surrogate decision maker (collectively, legal decision maker).

IDT Requirements

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

(1) Identify a patient representative

A patient representative must participate in the IDT process and decision-making for the resident on a proposed medical treatment intervention. The patient representative must have access to all the resident's medical records and otherwise confidential health information in the possession of the facility necessary to prepare for and participate in the IDT review. Facilities must attempt to locate, with reasonable diligence, a person or entity willing and able to serve as a patient representative.

Effective January 27, 2023, if a facility is unable to identify a legal decision maker that is able to serve as the patient representative within 72 hours of a physician's determination that the resident lacks capacity to provide informed consent, the facility must contact CDA's LTCPRP for selection of a public patient representative. A facility may contact LTCPRP for selection of a public patient representative before the completion of 72 hours if the facility determines that a legal decision maker is unlikely to be located; however, the facility must continue to use due diligence to search for a legal decision maker able to serve as the patient representative. If a legal decision maker becomes available to serve as the patient representative after the selection of a public patient representative, the legal decision maker may replace the public patient representative.

Additional information, resources, and tools regarding LTCPRP can be found on CDA's OLTCPR webpage. For questions about LTCPRP, please contact OLTCPR at OPR@aging.ca.gov.

(2) Provide written and verbal notice to the resident and patient representative at least five days before conducting an IDT review

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 IDT review may occur if notice is provided to the resident at least 24 hours prior to conducting an IDT review. The physician and surgeon must 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.

The notice to the resident must include all the following:

- That the resident lacks capacity to provide informed consent and the reasons for that determination;
- That a legal decisionmaker is not available;
- 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;

- That a decision on whether to proceed with the medical intervention will be made using the IDT review, along with an explanation of the IDT review process for the administration of medical interventions, including that the resident has the right to have a patient representative participate in the IDT review process, and that if the resident does not have a representative, a public patient representative from the LTCPRP will be assigned;
- The date and time of the IDT review;
- 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 LTCPRP will be assigned;
- The name, mailing address, email address, and telephone number of the designated local contact of LTCPRP;
- The name, mailing address, email address, and telephone number of the local office of the Long-Term Care Ombudsman; and
- 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; and
- 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.

(3) Conduct an IDT review of the prescribed medical intervention before administration of the medical intervention

The IDT must oversee the care of the resident using a team approach to assessment and care planning, and must 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 IDT review must not occur without the participation of a patient representative and until the notice required has been provided to the resident and patient representative.

The IDT review must include all the following:

- A review of the physician's assessment of the resident's condition;
- The reason for the proposed use of the medical intervention;
- A discussion of the desires of the resident, if known;
    - To determine the desires of the resident, the IDT must 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 that the resident lacks capacity to provide informed consent 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 must 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.
- The type of medical intervention to be used in the resident's care, including its probable frequency and duration;
- The probable impact on the resident's condition, with and without the use of the medical intervention; and
- Reasonable alternative medical interventions considered or utilized and reasons for their discontinuance or inappropriateness.

(4) Provide a notice of the outcome of the IDT review and of the resident's right to judicial review to the resident and patient representative

Policies 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. Pursuant to Title 22 California Code of Regulations (CCR) section 72527 for SNFs and Title 22 CCR section 73523 for ICFs, facilities are required to establish and implement written P&Ps on residents' rights to be fully informed and to consent. Facilities must make a copy of these policies available to the patient and to any representative of the patient. 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 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; and
    - 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 patient representative, 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 section 1418.8, facilities must maintain documentation in the medical record of all the following:

- The physician and surgeon's determination that the resident lacks capacity to provide informed consent;
- A copy of a written notice required to be provided by this section, and if applicable, a second copy translated into English;
- Description of efforts that were made to find a legal decisionmaker, or alternatively, a patient representative, to otherwise serve on the interdisciplinary team;
- 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; and
- 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

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 all the requirements in HSC section 1418.8, the facility must not use the IDT process to make decisions for a resident. In addition to CDPH enforcement actions, failure to comply may result in other legal risks for facilities for which CDPH does not have oversight.

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 Cassie Dunham

Cassie Dunham

Deputy Director

Resources:

- The Office of the Long-Term-Care Patient Representative (OLTCPR) webpage
- OLTCPR Training and Resources
- AFL 11-08
- AFL 11-31
- CDPH's Informed Consent FAQs

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