

Denial of Rights

Welfare & Institutions Code § 5325
LPS Patients Rights

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Patients' Rights Advocacy Training – 2003

RIGHTS THAT HAVE THE ABILITY TO BE DENIED

One of the primary responsibilities of advocates is to protect and advocate for the rights of individuals with mental illness. Protecting these rights most often arises when a hospital or other facility staff seeks to deny a patient their rights. This Information discusses what constitutes good cause, the steps facilities must take when a right is denied, how rights are restored and what advocates can do to insure that rights are not improperly denied.

California Welfare & Institutions Code Section 5600.2 (a). Persons with mental disabilities retain all the rights, privileges, opportunities and responsibilities as other citizens unless specifically limited by federal or state law or regulation.

Only the rights set forth in Welfare and Institutions Code Section 5325 may be denied for good cause if the facility demonstrates that the criteria discussed below has been met.

These “deniable” rights are:

1. The right to wear one’s own clothing.
2. The right to keep and use one’s own personal possessions, including toilet articles, in a place accessible to the patient.
3. The right to keep and spend a reasonable sum of one’s money
Canteen expenses and for small purchases.
4. The right to have access to individual storage space for his or her private use.
5. The right to see visitors each day.
6. The right to have reasonable access to telephones, both to make and receive confidential calls or to have such calls made for them.
7. The right to have ready access to letter-writing materials, including stamps
8. The right to mail and receive unopened correspondence.

GOOD CAUSE FOR DENIAL OF RIGHTS

State regulations provide the only mechanism by which the rights guaranteed in California Welfare and Institutions Code § 5325 may be denied. In order for a facility to deny or restrict any of these rights a facility must show good cause. Good cause for the denial of a right exists when the professional person in charge of the facility or his designee has good reason to believe one or all of the following:

- 1) That the exercise of the specific right would be injurious to the patient;
or
- 2) That there is evidence that the specific right, if exercised, would seriously infringe on the rights of others;
or
- 3) That the institution or facility would suffer serious damage if the specific right is not denied;
and
- 4) That there is no less restrictive way of protecting the interest specified in a, b, or c above. California Code of Regulations, tit.9, § 865.2

A facility has to show two things: 1) exercising the right would injure the patient, infringe on other's rights or cause damage to the facility; **and** 2) there is no less restrictive way of addressing the situation. Advocates often indicate that facilities do not demonstrate that less restrictive measures have been considered. For example, facilities will deny a patient the right to use the telephone for repeatedly calling 9-1-1 without first using the less restrictive measure of observing the patient dial the telephone and then allowing them to complete the call in a confidential manner.

It is also clear that when a right is denied, the reason given for denying the right must have some clear relationship to the right denied. California Code of Regulation, tit 9 Section 5865.2 (b). If for example, a patient is denied the right to keep his cigarettes because he continues to set fires when smoking and the less restrictive measures have been unsuccessful (direct supervision when smoking.)

RIGHTS MAY NOT BE DENIED IN ADVANCE OR AS PART OF TREATMENT

Facility staff sometimes mistakenly believes that they can deny a right as a condition of admission, as part of a treatment plan, or because the patient or another person speaking on the patient's behalf has agreed to the denial. None of these reasons meet the good cause criteria. State laws and regulations specify the following:

- Rights may not be denied as a condition of admission, as part of a treatment plan, or for the convenience of staff, for punishment nor may they be treated as a privilege to be earned. California Code of Regulations, tit 9 Section 865.2(b)(c).
- Treatment modalities may not include any denial of rights. California Code of Regulations, tit 9 Section 865.2(c).
- Waivers signed by the patient, responsible relative, guardian, conservator cannot be used to deny a right. California Code of Regulations, tit 9 Section 865.2 (c); California Welfare & Institutions Code Section 5325.

NOTIFICATION AND DOCUMENTATION OF DENIAL OF RIGHTS

Title 9 also require that facilities follow certain notification and documentation procedures before they denial a patient's rights.

- Patients are entitled to an explanation for each denial of rights. This means that a patient must be told each time a right is denied and the reason why the right was denied. The patient must also be told of the content of the notation in his/her treatment record. California Code of Regulations, tit 9, Section 865.3 (a) (b).
- Each denial of a patient's right must be noted in the patient's treatment record. Documentation must take place immediately, whenever a right has been denied. Pursuant to California Code of Regulations, tit 9 Section 865.3 the documentation must include the following:
 - The date and time the right was denied.
 - The specific right denied.

- Good cause for the denial of the right including less restrictive ways considered or tried.
 - Date of review if the denial was extended beyond 30 days.
 - The signature of the professional person in charge of the facility or his/her designee authorizing the denial of rights.
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- Each denial of a right must be documented regardless of the gravity of the reason for the denial or the frequency with which a specific right is denied in a particular facility or to a particular individual. California Code of Regulations, tit 9 Section 865.2 (c).

 - All denial of rights must be reported each quarter to the California Office of Patients' Rights. The Office of Patients' Rights prepares a report for the State Department of Mental Health regarding statewide denial of patient's rights.

RESTORATION OF THE RIGHT

Once a right is denied it must be restored as soon as good cause for the denial is no longer present and the date of the restoration must be documented in the patient's chart. California Code of Regulations, tit.9, §§ 865.5, 866.

This means that a facility is obligated to continually assess whether or not good cause exists for the denial of a right. If for example, The patient who had his right to carry his own cigarettes denied, must be given frequent opportunities to show that he can keep possession of his cigarettes without harming himself or the facility.

WHAT ADVOCATES CAN DO TO INSURE RIGHTS ARE ONLY DENIED FOR GOOD CAUSE

Monitoring is one of the most effective ways advocates can insure that facilities are following the appropriate procedures for denying rights. Advocates have the authority to access patient treatment records. California Welfare & Inst. Code §§ 5520(b), 5545. A good practice is to randomly review charts at each facility on a periodic basis. When reviewing charts for good cause denial, the advocate should request the facilities procedures for denials, then look for the following:

- ✓ Are denials of rights noted in the patient treatment records? If an advocate randomly selects a number of patient charts, it would be unusual not to see some denial of rights.
- ✓ The time when the denial of rights occurred. Does the notation appear to be made at the time the right was denied? For example, one might expect to see denial of rights notations made throughout the day rather than at the end of a shift.
- ✓ Does the denial of rights include the required documentation including: date and time, specific right denied, good cause, signature of person in charge of the facility or designee.
- ✓ Is there adequate documentation of good cause? For example does the treatment record note both the reason for the denial (injury to the patient, infringement on other's rights, serious damage to the facility) **and** consideration of other less restrictive alternatives.
- ✓ Do the treatment records reflect that the patient was notified of the denial of rights?
- ✓ Do the treatment records indicate that the right was denied for an impermissible reason such as a condition of admission, part of a treatment plan or waivers signed by the patient or others?
- ✓ Do the treatment records reflect when the right was restored (if applicable)? If the right was denied longer than 30 days and the record does not indicate regular review dates or documentation for the continued denial, there is a procedural problem.

If the advocate notices serious problems with the denial of rights process and/or documents, the advocate should consider preparing a written report for the facility and/or mental health director and discuss the report with pertinent staff.

Training is another good strategy to use to protect patients' rights. Training can be particularly effective when following the monitoring of treatment records. When the training follows monitoring, the advocate can point to specific concerns he/she may have regarding the way in which the facility denies rights and/or documents denial of rights. Effective training would cover the following points:

- ✓ What rights can be denied? What rights can not be denied?
- ✓ What constitutes “good cause” and what a facility must do to document good cause.
- ✓ How to properly document denial of rights including notification to the patient.
- ✓ What does not constitute “good cause”? For example, waivers of rights, including denial of rights as part of a treatment plan.

WHAT COUNTS AS A DENIAL?

In the current reporting system, there are 10 categories of denials that must be documented. Quarterly reporting; Restraint and Seclusion are actually stated as #9 & #10 in the Denial of Rights. # 1 - #8 being the “Legal Rights” listed on the DOR and the “Legal Rights” in W&I 5325.

1. Right to wear one’s own clothes
2. Right to keep and use one’s own personal possessions
3. Right to keep and be allowed to spend a *reasonable* sum of one’s own money
4. Right to have access to individual storage space for one’s own private use
5. Right to see visitors each day
6. Right to have *reasonable* access to telephone, both to make and receive confidential calls, or to have such calls made for one
7. Right to have access to letter writing materials, including stamps
8. Right to mail and receive unopened correspondence
9. Seclusion (involuntary isolation in a locked room)
10. Restraint (any physical device used to immobilize patient because of behavioral problems)

AUTHORITY FOR “DENIAL OF RIGHTS”

GOOD CAUSE STANDARD

The rights under Cal. Welf. & Inst. Code 5325 may be denied only when “Good Cause” exists to deny these rights.

Cal. Welf & Inst. Code 5326.

The professional person in charge of the facility or his or her designee may, for good cause, deny a person any of the rights under Section 5325, ...

To ensure that these rights are denied only for good cause, the Director of Mental Health shall adopt regulations specifying the conditions under which they may be denied.

Cal. Code Regs. Tit. 9, 861

List of Rights.=(W&I code 5325)

Cal. Code Regs. Tit. 9, 865.2

Good Cause for Denial of Rights.

There must be a demonstrated danger to self, others, or the institution.

Denial cannot be used:

- As a condition of admission
- As a part of the treatment plan
- As punishment
- For the management of the facility or the convenience of staff

Cal. Code Regs. Tit. 9, 865.3

Documentation of Denial of Rights. (AT 2824-DOR Report)

Cal. Code Regs. Tit. 9, 865.4

Seclusion and Restraint.

(C) Documentation of the SECTION 861 RIGHTS ACTUALLY DENIED a person in seclusion or restraints shall be entered in the patient’s record.

Cal. Code Regs. Tit. 9, 865.5

Restoration of Rights.

Cal. Code Regs. Tit. 9, 866

ANALYSIS OF DENIAL OF RIGHTS

1. IS THERE A RIGHT?
2. CAN THAT RIGHT BE DENIED?
3. IS IT AN ABSOLUTE DENIAL OR A RESTRICTION?
4. IF RESTRICTION, IS IT WITHIN REASONABLE LIMITS. (COULD THE PATIENT EXERCISE THE RIGHT IF THEY WERE NOT IN RESTRAINT OR SECLUSION?)
5. IS THERE A REASON GIVEN FOR THE DENIAL?
6. DOES THE REASON CONSTITUTE “GOOD CAUSE”?
7. IS THE REASON GIVEN FOR THE DENIAL RELATED TO THE RIGHT DENIED?
8. WERE THERE LESS RESTRICTIVE ALTERNATIVES TRIED TO ADDRESS THE REASON PRIOR TO THE DENIAL?
9. WAS THE DENIAL PUNISHMENT, SUBSTITUTE FOR PROGRAMMING OR FOR STAFF CONVENIENCE? (SHOULD NOT BE)
10. WAS THE DENIAL PART OF A TREATMENT PLAN? (SHOULD NOT BE)
11. WAS THE DENIAL PROPERLY DOCUMENTED?
12. WAS THE RIGHT RESTORED WHEN GOOD CAUSE NO LONGER EXISTED?