

Denial of Rights

Basic Training

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Patients' Rights Advocacy Training – 2008

OVERVIEW

One of the primary responsibilities of advocates is to protect and advocate for the rights of individuals receiving mental health services. Protecting these rights most often arises when a hospital or other facility staff seeks to deny a resident one or more of their rights. This Handout 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 5325.1 states:

*“Persons with mental illness have the **same legal rights and responsibilities guaranteed all other persons** by the Federal Constitution and laws and the Constitution and laws of the State of California, unless specifically limited by federal or state law or regulations. No otherwise qualified person by reason of having been involuntarily detained for evaluation or treatment under provisions of this part or having been admitted as a voluntary patient to any health facility, as defined in Section 1250 of the Health and Safety Code, in which psychiatric evaluation or treatment is offered shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, which receives public funds.”*

PATIENTS’ RIGHTS

Patients’ rights can be found in federal and state: constitutions, statutes, regulations, and cases.

There are two basic areas of Patients’ Rights in the Welfare & Institutions Code for individuals on an LPS commitment;

§5325 - Rights that are subject to the Denial of Rights process and

§5325.1 - Rights Not subject to the Denial of Rights process

In addition, there is another set of rights which applies to individuals committed to state hospitals for mental health treatment pursuant to legal authority other than the LPS Act (e.g., Incompetent to Stand Trial, Not Guilty by Reason of Insanity, etc.) that are found in 9 CCR §§ 880, et. seq.

This presentation will focus on deniable LPS rights.

RIGHTS SUBJECT TO A DENIAL

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

ONLY THE FOLLOWING RIGHTS MAY BE DENIED FOR GOOD CAUSE:

1. Right to wear one's own clothes; WIC 5325 (a)
2. Right to keep & use one's own personal possessions, including toilet articles WIC 5325 (a)
3. Right to keep and be allowed to spend a reasonable sum of one's own money for canteen expenses and small purchases WIC 5325 (a)
4. Right to have access to individual storage space for one's private use WIC 5325 (b)
5. Right to see visitors each day WIC 5325 (c)
6. Right to have reasonable access to telephones, both to make and receive confidential calls or to have such calls made for them WIC 5325 (d)
7. Right to have ready access to letter writing materials, including stamps WIC 5325 (e)
8. Right to mail and receive unopened correspondence WIC 5325 (e)

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

A right cannot be denied 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.
- If an individual is at a facility on a voluntary basis, they may elect to discharge themselves from the facility rather than voluntarily accepting a denial of rights. California Code of Regulations, tit 9 Section 865(d)

GOOD CAUSE FOR DENIAL OF RIGHTS

Welfare & Institutions Code § 5326, implemented by CCR, Title 9, 865.2, provides the method 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 demonstrating 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.

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, title 9 Section 5865.2 (b).

For example, an individual's right to have visitors may not be denied because they have repeatedly used the phone to call 9-1-1.

NOTIFICATION AND DOCUMENTATION OF DENIAL OF RIGHTS

CCR Title 9 also requires that facilities follow certain notification and documentation procedures before they deny 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.
- 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 California 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, title 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, and 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.

Cal. Code Regs. Tit. 9, 865.3
Documentation of Denial of Rights

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.

A right shall not continue to be denied a resident when the good cause for its denial no longer exists. When a right has been denied, staff shall employ the least restrictive means of managing the behavior problem which led to the denial.

Cal. Code Regs. Tit. 9, 866
Quarterly Reports to the Director of Health

Cal. Code Regs. Tit. 9, 867
Access to Denial of Rights Information

ANALYSIS OF DENIAL OF RIGHTS

Is there a right?

Can that right be denied?

Is it an absolute denial or a restriction?

If there is a restriction in place, is it within reasonable limits.

(Could the patient exercise the right if they were not in restraint or seclusion?)

Is there a reason given for the denial?

Does the reason constitute "good cause"?

Is the reason given for the denial related to the right denied?

Were there less restrictive alternatives tried to address the reason prior to the denial?

Was the denial punishment, substitute for programming or for staff convenience? (Should not be)

Was the denial part of a treatment plan? (Should not be)

Was the denial properly documented?

Was the right restored when good cause no longer existed?