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California Office of Patients' Rights

Information Notice #2020-01

Postponement and the Certification Review Hearings

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The California Office of Patients' Rights (COPR), under contract with the Department of State Hospitals, provides technical assistance and training to county patients' rights advocates, conducts program reviews of county patients' rights programs, and investigates patients' rights complaints that the county patients' rights advocate has been unable to resolve.

This is an informational notice to give guidance to county patients' rights advocates to review regarding postponements on behalf of the patient they are representing for their certification hearing.

Postponement and Section 5256 of the Welfare & Institutions Code

Welfare & Institutions Code, Section 5256 provides the following:

When a person is certified for intensive treatment pursuant to Sections 5250 and 5270.15, a certification review hearing shall be held unless judicial review has been requested as provided in Sections 5275 and 5276. 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.

Please note that the code does not say postponed by the request of the patient or advocate "*and approved by the hearing officer.*" The phrase "postponed by request" of the patient or their attorney or advocate, is to distinguish this from a "request" by the facility to postpone. The facility has the burden in certification hearings; the facility has had up to 7 days to gather information to justify further detention. The facility does not get extra time to prepare for the certification hearing. The client has

a right to postpone their hearing or to have the PRA exercise that right on their behalf.

Analogy to a criminal suspect helps to clarify this point further. When the suspect is being questioned, he can REQUEST to speak with an attorney. He must “request” to speak with an attorney to indicate to the officers his desire to do so. However, the fact that he must request to speak to an attorney does not imply that the officers questioning him have the ability to determine whether or not he CAN speak with an attorney. Much like the court’s language touches on below, *only* the suspect has the power to stop questioning by requesting a lawyer. The officers do not get to opine on the reasonableness of the request.

Trial Order found in Golin v. Allenby,

The Trial Order found in Golin v. Allenby, et al. (2015 WL 10634530) further supports the opinions above. In this case a dependent adult (Nancy) was held at a facility for grave disability on a 5150. They subsequently went for a 5250 hold (14 days) which entitled Nancy to a hearing within 4 days (W&I Code Section 5254, Section 5256.)

The court noted, “Pursuant to Section 5256, the certification hearing must be held within four days ‘unless postponed by request of the person or his or her attorney or advocate.’ Thus *only* Nancy or her mental health advocate had the power to continue the hearing.” (Emphasis in original).

The courts reading of Section 5256 supports the plain reading interpretation we endorse above, namely, that **ONLY** the patient and/or advocate can postpone the hearing and there is nothing in this code to suggest that a hearing officer has ultimate power to accept or decline a postponement request.

Reasons for Postponement

While we are hopeful that eventually the above rationale and intent of The Lanterman, Petris, Short Act, (LPS) will prevail and be followed statewide, we also recognize the reality that many counties are allowing Hearing Officers to decline postponement requests that, in the officers’ opinion, are not justifiable. As such, in those counties allowing hearing officer discretion regarding postponements, the client and advocate should have a justifiable reason for postponing the hearing.

Examples may include:

- the client is too sedated or experiencing side effects from medication that affect their ability to fully participate; Determine whether the certified person has recently taken any medication and if so the probable effects W&I Code Section 5256.4 (a) (5) and LPS Proceedings Bench Guide Section 120-4(7);

- the client is in restraints and cannot attend or the hearing would have to take place in the seclusion room which may be prejudicial, not to mention demeaning; for the hearing to proceed under those conditions as they are prejudicial; or W&I Code Section 5256.1 & LPS Bench Guide Section 120.33;
- the client has family or other support people they wish to attend to testify or to provide support, or evidence of Third Party Assistance but they were not notified of the hearing in a timely manner or are unable to make it at the time the hearing is scheduled and have a likelihood of being able to attend if the hearing is postponed, W&I Code 5256.4 (c) & LPS Proceedings Bench Guide Section 120-4 (6);
- The patient wishes to meet with their doctor or treatment team member to discuss voluntarily staying at the hospital and participating in treatment. W&I Code Section 5001, 5150, 5151, 5250;

This is not an exclusive list, but these are some common circumstances that we view as reasonable justification as to why a patient may want their advocate to postpone their hearing.

In conclusion, advocates should try, where possible, to address these issues directly with the LPS hearing officer at some time *other* than immediately before or during the certification review hearing. If this is not successful, the advocate should consider enlisting the help of the local mental health director, public defender or county counsel in addressing the issue. LPS hearing officers are selected from a list of eligible persons unanimously approved by a panel composed of the local mental health director, the county public defender, and the county counsel or district attorney designated by the county board of supervisors. This panel has an obligation to ensure that individuals placed on the approved list are qualified, and understand and apply the law correctly.

County patients' rights advocates can contact California Office of Patients' Rights for technical assistance at any time.

This information is not intended to be viewed as legal advice, or take the place of advice given by legal counsel. Rather, this is intended to be an informational document about specific state laws and regulations outlining mental health advocacy. If specific legal advice is sought, it is recommended this be sought after from legal counsel.