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California Office of Patients' Rights Information Notice #2021-01

Long-Acting Injectable Antipsychotic Medication on Short-term Lanterman-Petris-Short Act (LPS) Holds

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The California Office of Patients' Rights (COPR), under contract with the Department of State Hospitals and Memorandum of Understanding (MOU) with the California Department of Health Care Services 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 office is contacted from time-to-time by advocates regarding the use of long-acting psychotropic medication on patients on short-term LPS holds who have been determined to lack capacity at Riese hearings. The following is an updated version of a previous memo addressing this issue that includes reference to more recent case law. As explained below, the use of long-acting antipsychotic medication is on objecting individuals held pursuant to short-term LPS holds is not permissible.

I. Long-Acting Medication

The medications that are the subject of this memo are commonly referred to as "long-acting injectables" (LAIs), some examples include but are not limited to: Haldol Decanoate (haloperidol), Prolixin Decanoate (fluphenazine), Risperdal Consta (risperidone); Zyprexa Relprevv (olanzapine); Invega Sustenna (paliperidone palmitate); Abilify Maintena (aripiprazole).

These medications remain in the person's body at a therapeutic dose much longer than the oral and short-acting injectable forms of these medications, typically anywhere from two to four weeks.

Further, this memo addresses only the involuntary use of these medications on individuals held on the shorter-term LPS holds (Welfare and Institutions Code,

secs. 5150/5585.50, 5250, 5260, 5270.10). Nothing prevents the physician from offering, or the patient from consenting to these LAI medications on a voluntary basis.

II. Background: Involuntary Medication of Mental Health Clients

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, individuals have a protected liberty interest in avoiding involuntary administration of antipsychotic drugs. Under the LPS Act, both voluntary and involuntary patients have the right to consent/refuse medication. The right to refuse medication may only be denied in an emergency (as defined by law), or upon a determination of incapacity:

Emergency Definition

"Emergency" is defined in statute as "…situation in which action to impose treatment over the person's objection is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent…." Welf. & Inst. Code 5008(m)

Regulations outline how medications may be used in an emergency: "…If antipsychotic medication is administered during an emergency, such medication shall be only that which is required to treat the emergency condition and shall be provided in ways that are least restrictive of the personal liberty of the patient." Further, statute provides, in any circumstance- emergency or otherwise, "…[m]edication shall not be used as punishment, for the convenience of staff, as a substitute for program, or in quantities that interfere with the treatment program." Welf. & Inst. Code 5325.1; California Code of Regulations (CCR), title 9 secs. 853.

Determination of Incapacity

The determination that an individual lacks capacity to refuse medication is a legal determination. For individuals on short-term LPS holds, the determination of incapacity is made at a Riese hearing. The factors considered in Riese hearings are (1) whether the patient is aware of their situation, (2) whether the patient is able to understand the benefits and the risks of, as well as the alternatives to, the proposed intervention, and (3) whether the patient is able to understand and to knowingly and intelligently evaluate the information required to be given patients whose informed consent is sought and otherwise participate in the treatment decision by means of rational thought processes. Riese v. St. Mary's Hospital and Medical Center, 209 Cal.App.3d 1303 (1987).

The determination at a Riese hearing that a patient lacks capacity is not indefinite. The law provides that any determination of a person's incapacity to refuse treatment with antipsychotic medication made at a Riese hearing shall remain in

effect only for the duration of the short-term detention period or until the patient has been restored to capacity, whichever is sooner. Welf & Inst. Code 5336.

III. Use of LAIs for Patients on Short-Term LPS Holds Exceeds the Authority Granted Physicians under State Law

a. Authority to Involuntary Medicate is Limited to Duration of the Hold

Riese v St. Mary's Hospital and Medical Center, the case that established the right of individuals involuntarily detained under LPS to refuse psychotropic medication in nonemergency situations absent a judicial finding of incapacity, is codified at Welfare and Institution Code 5332 et seq. These sections provide that a capacity determination be made only upon the patient's refusal of medication…

If any person subject to detention pursuant to Section 5150, 5250, 5260, or 5270.15, and for whom antipsychotic medication has been prescribed, orally refuses or gives other indication of refusal of treatment with that medication, the medication shall be administered only when treatment staff have considered and determined that treatment alternatives to involuntary medication are unlikely to meet the needs of the patient, and upon a determination of that person's incapacity to refuse the treatment, in a hearing held for that purpose.

As mentioned above, a determination of incapacity is time-limited. The court in Riese stated:

…If the patient is judicially determined incapable of giving informed consent, and if he or she is being detained for 72–hour treatment and evaluation under section 5150 or for not more than 14 days of intensive treatment under section 5250, the patient may thereupon be required to accept the drug treatment that has been medically prescribed…

Section 5336 of the Welf. & Inst. Code codified the essence of this language:

Any determination of a person's incapacity to refuse treatment with antipsychotic medication made pursuant to Section 5334 shall remain in effect only for the duration of the detention period described in Section 5150 or 5250, or both, or until capacity has been restored according to standards developed pursuant to subdivision (c) of Section 5332, or by court determination, whichever is sooner.

The physician's authority to medicate the individual is limited to the period of detention and does not extend beyond that period. Each new period of detention (with the exception of the combined 72-hour and 14-day hold) requires a new hearing and determination of incapacity for the individual to continue to be involuntarily medicated.

The Los Angeles County Superior Court Rules reflect this time-limited authority to treat:

Superior Court of California, County of Los Angeles, Court Rules, Rule

4.132 (g) Holding periods. Each additional holding period necessitates a new medication capacity hearing if the patient continues to refuse medication, unless the hearing was conducted during the initial 72-hour evaluation period, in which case, the finding of the hearing officer continues through the expiration of the 14-day hold.

As all the above illustrates, the physician has no authority under state law to continue to medicate a protesting individual with LAI beyond the end of the hold. Further, the mandate for a new capacity determination with each new period of detention would be meaningless if the physician could simply administer a LAI at or near the end of each hold. Further, as explained below, the use of LAIs at the beginning of a 17 day or 30-day detention period is equally problematic.

b. Preemption of the Court's Meaningful Exercise of its Authority and Denial of the Patient's Right to Review

Individuals who are found to lack capacity at Riese hearings, have the right to appeal that determination to the Superior Court for a de novo review where the Riese hearing conducted court-appointed commissioner or hearing officer, or to the court of appeal for review where the hearing was conducted by a judge. Welf. & Inst. Code, sec. 5534(e) and (f).

The use of a LAI effectively nullifies the patient's right to review of the capacity determination and prevents the Superior Court from meaningful exercise of its authority. Even if the patient were to appeal the determination, and the Superior Court determined that they have capacity to refuse antipsychotic medication, the court cannot remove the medication from the person's body. Although the court upholds the patient's right to choose, it is a meaningless decision. The use of LAI's preempts the Superior Court's authority for perhaps weeks to come.

c. Denial of the Right of Patients with Regained Capacity to Consent to/Refuse Medication or Exercise the Rights of a Voluntary Patient.

The capacity of individuals with mental health diagnoses is not static. The patient's understanding of their situation and of the risks, benefits and alternative treatment should be assessed on an ongoing basis. A determination of incapacity at a Riese hearing remains in effect only for the duration of the hold or until the patient has been restored to capacity, whichever is sooner. The use of a LAI can have the effect of involuntary medicating the patient long after they have gained/regained capacity to give or withhold consent.

Similarly, the use of LAIs greatly restricts the rights of the patient to exercise their rights should they become a voluntary patient. Regulations provide that the refusal

to consent to antipsychotic medication does not, in and of itself, constitute grounds for involuntary commitment. The LPS Act clearly supports the commonly held clinical view that it is more therapeutic to treat individuals on a voluntary basis than an involuntary one. On many occasions, an individual brought in and initially treated on an involuntary hold will sign in and change their status from involuntary to voluntary. Welf. & Inst. Code 5003; CCR, title 9 sec. 855

All patients have the right to participate in their treatment planning to the extent possible. Voluntary patients have the right to consent to the type, dosage, frequency and method of administration of medication. The use of a LAI may prevent the patient from true engagement in the "therapeutic alliance" with treatment staff. The patient is unable to consent to a lesser dose of medication or request a different class of medication. The use of an LAI in such circumstances essentially locks the patient out of meaningful participation in the treatment planning process.

d. Denial of the Patient's Right to Treatment Provided in the Least Restrictive Manner and the Right to be Free of Unnecessary or Excessive Medication

Welf. & Inst. Code 5325.1, subsections (a) and (c) provide that that mental health clients shall be provided treatment in ways that are least restrictive of their personal liberty and the right to be free from harm, including unnecessary or excessive medication, respectively. There are a number of ways in which antipsychotics may be administered, including orally, short-acting or long-acting injection. Obviously, the court would not allow the use of a long-acting medication in an emergency, as the use of a multi-week medication to treat a short-term emergency is clearly prohibited. The use of an LAI after a Riese hearing raises the same type of legal issues. The use of a single injection with several weeks potency, absent a compelling state interest, when less intrusive alternatives are available, deprives the individual of their rights under both of these subsections.

e. Use of LAIs Deprives the Legally Authorized Decision-Maker from Making Treatment Decisions

At the termination of the 14-day or 30-day hold, individuals who remain unable to provide for their basic needs due to a mental health disorder and who are unwilling or unable to accept treatment voluntarily, may be referred for temporary LPS conservatorship. In the case, K.G. v Meredith, 204 Cal.App.4th 164 (2012), the court reaffirmed the right of mental health clients to consent to medication absent a judicial determination of incapacity. The Court of Appeal held that temporary conservatees are entitled to a judicial determination of incapacity before they lose their rights to make treatment decisions. This is required even if the patient had previously been determined to lack capacity under a short-term

commitment pursuant to Riese. Here again the use of the LAI on the short-term hold prevents the Superior Court from meaningful exercise of its authority.

Further, if the court determines that the conservatee lacks capacity to make treatment decisions, the authority to make such decisions goes to the temporary conservator, not the physician. The use of a LAI during the short-term hold prior to the petition for conservatorship, deprives the temporary conservator of their legal authority to determine which, if any, medication they will consent to on the conservatee's behalf.

IV. Other Considerations

The use of oral medication and/or short-acting injectables gives treatment staff the opportunity to engage the patient in a way that the use of LAIs does not. As mentioned previously, capacity is not static. Involving the patient in their own treatment should be an ongoing effort. Each interaction in which the patient is offered/given medication is an opportunity for staff to engage the patient in a conversation about the medication and its benefits and potential side effects and to assess the patient for regained capacity. Assessing for capacity is an interactive process, and the regular contact with the patient that daily medication administration provides is an opportunity to educate and inform patient, assess for side effects and reaffirm improvement in symptoms, engaging the patient in therapeutic process.

V. Conclusion

Long Acting Injectables should not be used in short-term hold situations unless the patient is deemed to have capacity and voluntarily agrees to LAIs after being provided the information needed for the patient to give informed consent.

The Due Process Clauses of the Fifth and Fourteenth Amendments provides the Federal protections against involuntary medications and the LPS Act provides the State procedures and guidance to ensure the rights of mental health clients under a short-term hold are not violated.

While involuntary medication of patients on a short-term hold can occur in an emergency as described above, the use of LAIs is not appropriate in because the medication will stay in the patient's system much longer than needed to address the emergency. The same is true if the mental health client is deemed to not have capacity while on a short-term hold. The use of a single injection with several week potency, absent a compelling state interest, when less intrusive alternatives are available, deprives the individual of their rights under Welf. & Inst. Code 5325.1 (b) and (c).

Lastly, if a mental health client on a short-term hold is unable to care for their basic needs after the 14 or 30 day hold they may be referred to a temporary

conservatorship. The use of LAI may take away any meaningful decision making from the temporary conservator. Further, mental health clients have a right to consent or refuse medication absent a judicial determination of incapacity. The Court of Appeal held that temporary conservatees are entitled to a judicial determination of incapacity even if the mental health client had previously been determined to lack capacity under a short-term commitment pursuant to Riese. Here again the use of the LAI on the short-term hold prevents the Superior Court from exercising its protective role in determining whether an individual can refuse medication. It essentially would render any judicial determination of capacity meaningless, since the patient cannot have the drug removed from their blood stream if they decided they did not want to be on the LAI.