

AMENDED IN SENATE MARCH 16, 2021

SENATE BILL

No. 460

Introduced by Senator Pan

February 16, 2021

An act to *amend Section 1418.8 of the Health and Safety Code, and to add Chapter 4.1 (commencing with Section 9350) to Division 8.5 of the Welfare and Institutions Code, relating to ~~aging~~: health decisions.*

LEGISLATIVE COUNSEL'S DIGEST

SB 460, as amended, Pan. ~~Office of the Patient Representative.~~
Long-term health facilities: patient representatives.

Existing law, the Mello-Granlund Older Californians Act, establishes the California Department of Aging in the California Health and Human Services Agency, and sets forth its mission to provide leadership to the area agencies on aging in developing systems of home- and community-based services that maintain individuals in their own homes or least restrictive homelike environments.

This bill would create the Office of the Patient Representative in the Department of Aging to train, certify, provide, and oversee patient representatives to protect the rights of nursing home residents, as specified. The bill would, among other things, require the office to establish appropriate eligibility, training, certification, and continuing education requirements for patient representatives and to convene a group of stakeholders to advise the office regarding the eligibility requirements. The bill would, among other things, require the office to collect and analyze data, including the number of residents represented, the number of interdisciplinary team meetings attended, and the number of cases in which judicial review was sought and to present that data in an annual public report delivered to the Legislature and posted on

the office's internet website. The bill would require patient representatives to perform various duties including reviewing the determinations that the resident lacks decisionmaking capacity *capacity, as defined, to make decisions* and no surrogate decisionmaker is available, as specified.

Existing law requires the attending physician and surgeon of a resident in a skilled nursing facility or intermediate care facility that prescribes or orders a medical intervention of a resident that requires the informed consent of a resident who lacks capacity to provide that consent and who does not have a person with legal authority to make those decision on behalf of the resident to inform the skilled nursing facility or intermediate care facility. Existing law requires the facility to conduct an interdisciplinary team review of the prescribed medical intervention prior to the administration of the medical intervention, subject to specified proceedings. Existing law authorizes a medical intervention prior to the facility convening an interdisciplinary team review in the case of an emergency, under specified circumstances. Existing law imposes civil penalties for a violation of these provisions.

This bill would require the physician and surgeon to document the determination that the resident lacks capacity, as defined, in the resident's medical record, and would require the skilled nursing facility or intermediate care facility to identify, or use due diligence to search for, a surrogate decisionmaker, as defined. The bill would require, among other things, if the resident lacks capacity and there is no surrogate decisionmaker, the skilled nursing facility or intermediate care facility to provide written notice to the resident and to the Office of the Patient Representative, as specified. The bill would require a copy of the notice to be included in the resident's records and to include specified information, including notice that the resident has the right to a patient representative. The bill would require the Office of the Patient Representative to designate someone to serve as the patient's representative if no family member or friend is available to serve in that capacity, and would prohibit a patient representative from being, among others, an employee or former employee of the facility, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 1418.8 of the Health and Safety Code is*
2 *amended to read:*

3 1418.8. (a) ~~For purposes of this section, the following terms~~
4 *have the following meanings:*

5 (1) *“Emergency” means a situation where medical treatment*
6 *is immediately necessary for the preservation of life, the prevention*
7 *of serious bodily harm, or the alleviation of severe physical pain.*

8 (2) *“Lacks capacity” means the resident is unable to understand*
9 *the nature and consequences of the proposed medical intervention,*
10 *including its risks and benefits, or is unable to express a preference*
11 *regarding the intervention.*

12 (3) *“Surrogate decisionmaker” means a person with legal*
13 *authority to make medical treatment decisions on behalf of a*
14 *patient, including a person designated under a valid durable power*
15 *of attorney for health care, a guardian, a conservator, or next of*
16 *kin.*

17 **(b)** *If the attending physician and surgeon of a resident in a*
18 *skilled nursing facility or intermediate care facility prescribes or*
19 *orders a medical intervention that requires that informed consent*
20 *be obtained prior to administration of the medical intervention,*
21 *but is unable to obtain informed consent because the physician*
22 *and surgeon determines that the resident lacks capacity to make*
23 *decisions concerning his or her health care and that there is no*
24 *person with legal authority to make those decisions on behalf of*
25 *the resident, the physician and surgeon shall inform the skilled*
26 *nursing facility or intermediate care facility. the resident’s health*
27 *care, the physician and surgeon shall document the determination*
28 *that the resident lacks capacity, and the basis for that*
29 *determination, in the resident’s medical record, and inform the*
30 *skilled nursing facility or intermediate care facility. To make the*
31 *determination that the resident lacks capacity, the physician and*
32 *surgeon shall interview the patient, review the patient’s medical*
33 *records, and consult with skilled nursing or intermediate care*
34 *facility staff, as appropriate, and family members and friends of*
35 *the resident, if any have been identified.*

36 ~~(b) For purposes of subdivision (a), a resident lacks capacity to~~
37 ~~make a decision regarding his or her health care if the resident is~~
38 ~~unable to understand the nature and consequences of the proposed~~

1 medical intervention, including its risks and benefits, or is unable
2 to express a preference regarding the intervention. To make the
3 determination regarding capacity, the physician shall interview
4 the patient, review the patient's medical records, and consult with
5 skilled nursing or intermediate care facility staff, as appropriate,
6 and family members and friends of the resident, if any have been
7 identified.

8 (e) For purposes of subdivision (a), a person with legal authority
9 to make medical treatment decisions on behalf of a patient is a
10 person designated under a valid Durable Power of Attorney for
11 Health Care, a guardian, a conservator, or next of kin. To determine
12 the existence of a person with legal authority, the physician shall
13 interview the patient, review the medical records of the patient,
14 and consult with skilled nursing or intermediate care facility staff,
15 as appropriate, and with family members and friends of the
16 resident, if any have been identified.

17 (d) The attending physician and the skilled nursing facility or
18 intermediate care facility may initiate a medical intervention that
19 requires informed consent pursuant to subdivision (e) in accordance
20 with acceptable standards of practice.

21 (c) *Upon being notified by the attending physician of a*
22 *determination that a resident lacks capacity to provide informed*
23 *consent, the skilled nursing facility or intermediate care facility*
24 *shall identify, or use due diligence to search for, a surrogate*
25 *decisionmaker. Due diligence includes, at minimum, interviewing*
26 *the resident, reviewing the medical records of the resident, and*
27 *consulting with skilled nursing or intermediate care facility staff,*
28 *as appropriate, and with family members and friends of the*
29 *resident, if any have been identified. The facility shall document*
30 *in the resident's records what efforts were made to find a surrogate*
31 *decisionmaker.*

32 (d) (1) *If the physician and surgeon determines that a resident*
33 *lacks capacity, and the skilled nursing facility or intermediate care*
34 *facility determines that there is no surrogate decisionmaker, the*
35 *skilled nursing facility or intermediate care facility shall provide*
36 *a notice to the resident written in the resident's primary language.*

37 (2) *The notice described in paragraph (1) shall be delivered to*
38 *the resident and the Office of the Patient Representative,*
39 *established pursuant to Chapter 4.1 (commencing with Section*
40 *9350) of Division 8.5 of the Welfare and Institutions Code, at least*

1 10 days prior to the interdisciplinary team review as described in
2 subdivision (e).

3 (3) A copy of the written notice shall be entered into the
4 resident's records.

5 (4) The notice described in paragraph (1) shall include
6 information regarding all of the following:

7 (A) The resident lacks capacity and the reasons for that
8 determination.

9 (B) A surrogate decisionmaker is not available.

10 (C) A description of the proposed medical intervention that has
11 been prescribed or ordered.

12 (D) That a decision on whether to proceed with the medical
13 intervention will be made using the interdisciplinary team review
14 process.

15 (E) The date and time of the interdisciplinary team review.

16 (F) That the resident has the right to have a patient
17 representative participate in the interdisciplinary team review
18 process and that if the resident does not have a representative, an
19 independent representative from the Office of the Patient
20 Representative will be assigned.

21 (G) The name, mailing address mailing, email address, and
22 telephone number of the local office of the Long-Term Care
23 Ombudsman.

24 (H) The name, mailing address, email address, and telephone
25 number of the agency responsible for the protection and advocacy
26 of individuals with developmental disabilities or mental disorders.

27 (I) That the resident has the right to judicial review to contest
28 the physician and surgeon's determinations, the use of an
29 interdisciplinary team review, or the decisions made by the
30 interdisciplinary team.

31 (e) ~~Where~~When a resident of a skilled nursing facility or
32 intermediate care facility has been prescribed a medical
33 intervention by a physician and surgeon that requires informed
34 consent and the physician has determined that the resident lacks
35 capacity to make health care decisions and ~~there is no person with~~
36 ~~legal authority to make those decisions on behalf of the resident,~~
37 ~~the facility has determined that there is no surrogate~~
38 ~~decisionmaker,~~ the facility shall, except as provided in subdivision
39 ~~(h)~~, (i), conduct an interdisciplinary team review of the prescribed
40 medical intervention prior to the administration of the medical

1 intervention. The interdisciplinary team shall oversee the care of
2 the resident utilizing a team approach to assessment and care
3 planning, and shall include the resident's attending physician, a
4 registered professional nurse with responsibility for the resident,
5 other appropriate staff in disciplines as determined by the resident's
6 needs, ~~and, where practicable,~~ *and* a patient representative, in
7 accordance with applicable federal and state requirements. The
8 review shall include all of the following:

9 (1) A review of the physician's assessment of the resident's
10 condition.

11 (2) The reason for the proposed use of the medical intervention.

12 (3) A discussion of the desires of the patient, where known. To
13 determine the desires of the resident, the interdisciplinary team
14 shall interview the patient, review the patient's medical records,
15 ~~and consult with family members or friends, if any have been~~
16 ~~identified.~~ *identified, and review any prior expressions of the*
17 *resident's health care wishes, including checking registries for an*
18 *advanced health care directive or physician's orders for*
19 *life-sustaining treatment.*

20 (4) The type of medical intervention to be used in the resident's
21 care, including its probable frequency and duration.

22 (5) The probable impact on the resident's condition, with and
23 without the use of the medical intervention.

24 (6) Reasonable alternative medical interventions considered or
25 utilized and reasons for their discontinuance or inappropriateness.

26 *(f) The outcome of the interdisciplinary team review shall be*
27 *documented in the resident's records, and communicated in writing*
28 *to the resident in the resident's primary language, and to the*
29 *resident's representative, including a statement regarding the*
30 *resident's right to judicial review.*

31 ~~(f)~~

32 *(g) A patient representative may include a family member or*
33 *friend of the resident who is unable to take full responsibility for*
34 *the health care decisions of the resident, but who has agreed to*
35 *serve on the interdisciplinary team, or other person authorized by*
36 *state or federal law. The patient representative shall not be an*
37 *employee or former employee of the skilled nursing facility or*
38 *intermediate care facility, paid by the facility, an employee of a*
39 *vendor to the facility, or a provider of health care to the resident.*
40 *The patient representative shall have access to all of the resident's*

1 records and otherwise confidential health information. If no family
2 member or friend is available to serve as the patient representative,
3 the Office of the Patient Representative shall designate someone
4 to serve as the patient's representative.

5 ~~(g)~~

6 (h) The interdisciplinary team shall periodically evaluate the
7 use of the prescribed medical intervention at least ~~quarterly or~~
8 ~~quarterly~~, upon a significant change in the resident's medical
9 ~~condition. condition, or upon the resident's or the resident's~~
10 ~~representative's request. The skilled nursing facility or intermediate~~
11 ~~care facility shall provide notice of this evaluation by the~~
12 ~~interdisciplinary team in accordance with subdivision (d), and~~
13 ~~shall enter a copy of this notice, as well as the result of the~~
14 ~~evaluation, in the resident's records.~~

15 ~~(h)~~

16 (i) In case of an emergency, after obtaining a physician and
17 surgeon's order as necessary, a skilled nursing or intermediate care
18 facility may administer a medical intervention that requires
19 informed consent prior to the facility *issuing the notice required*
20 *pursuant to subdivision (d) and prior to convening an*
21 *interdisciplinary team review. The emergency shall be documented*
22 *in the resident's records and written notice of the intervention and*
23 *the resident's right to judicial review shall be provided to the*
24 *resident and the resident's representative, if known, or the Office*
25 *of the Patient Representative, if unknown, within 24 hours. If the*
26 *emergency results in the application of physical or chemical*
27 *restraints, the interdisciplinary team shall meet within one week*
28 *of the emergency for an evaluation of the medical intervention.*

29 ~~(i) Physicians and surgeons and skilled nursing facilities~~

30 (j) *Physicians and surgeons, skilled nursing facilities, and*
31 *intermediate care facilities shall not be required to obtain a court*
32 *order pursuant to Section 3201 of the Probate Code prior to*
33 *administering a medical intervention which requires informed*
34 *consent if the requirements of this section are met. The prescribed*
35 *medical intervention shall not be initiated until the resident has*
36 *received written notice, pursuant to subdivision (d), of the outcome*
37 *of the interdisciplinary review team process, and has had an*
38 *opportunity to seek judicial review. If judicial review is sought,*
39 *the intervention shall not be initiated until after the review has*
40 *been decided, except in the case of emergency.*

1 (j)
 2 (k) Nothing in this section shall in any way affect the right of a
 3 resident of a skilled nursing facility or intermediate care facility
 4 for whom medical intervention has been prescribed, ordered, or
 5 administered pursuant to this section to seek appropriate judicial
 6 relief, at any time, in order to review the decision that a patient
 7 lacks capacity, that the patient lacks a surrogate decisionmaker,
 8 or to provide the medical intervention.

9 ~~(k) No~~
 10 (l) A physician or other health care provider, whose action under
 11 this section is in accordance with reasonable medical standards,
 12 is shall not be subject to administrative sanction if the physician
 13 or health care provider believes in good faith that the action is
 14 consistent with this section and the desires of the resident, or if
 15 unknown, the best interests of the resident.

16 ~~(l) The determinations required to be made pursuant to~~
 17 ~~subdivisions (a), (e), and (g), and the basis for those determinations~~
 18 ~~shall be documented in the patient's medical record and shall be~~
 19 ~~made available to the patient's representative for review.~~

20 (m) The use of an interdisciplinary team to provide consent to
 21 a prescribed medical intervention shall be noted in the resident's
 22 minimum data set, as specified by Section 14110.15 of the Welfare
 23 and Institutions Code.

24 SECTION 1.

25 SEC. 2. Chapter 4.1 (commencing with Section 9350) is added
 26 to Division 8.5 of the Welfare and Institutions Code, to read:

27
 28 CHAPTER 4.1. OFFICE OF THE PATIENT REPRESENTATIVE
 29

30 9350. The Office of the Patient Representative is hereby
 31 established within the Department of Aging to train, certify,
 32 provide, and oversee patient representatives to protect the rights
 33 of nursing home residents pursuant to Section 1418.8 of the Health
 34 and Safety Code.

35 9351. (a) The Office of the Patient Representative shall
 36 establish appropriate eligibility, training, certification, and
 37 continuing education requirements for patient representatives. The
 38 Department of Aging shall convene a group of stakeholders to
 39 advise the office regarding the eligibility requirements of patient
 40 representatives.

1 (b) Each patient representative shall have a criminal offender
2 record clearance conducted by the State Department of Social
3 Services. A clearance pursuant to Section 1569.17 of the Health
4 and Safety Code shall constitute clearances for the purpose of entry
5 to any long-term care facility.

6 (c) Patient representatives shall not be a current or former
7 licensee, or owner, employee, or volunteer of a skilled nursing or
8 intermediate care facility. Notwithstanding this prohibition, former
9 employees and volunteers are not precluded from serving as patient
10 representatives at the facilities where they previously served after
11 two years of separation. Former employees and volunteers are not
12 precluded from serving as patient representatives for facilities that
13 they were not previously affiliated with.

14 (d) The Office of the Patient Representative shall communicate
15 with every skilled nursing and intermediate care facility to provide,
16 and update as needed, contact information to use for notices
17 provided to residents.

18 (e) The Office of the Patient Representative may work with
19 Area Agencies on Aging or other nonprofit entities to provide
20 patient representatives.

21 9352. (a) The Office of the Patient Representative shall collect
22 and analyze data, including the number of residents represented,
23 the number of interdisciplinary team meetings attended, and the
24 number of cases in which judicial review was sought. The collected
25 data shall be the basis for an annual public report delivered to the
26 Legislature and posted on the Office of the Patient Representative's
27 internet website.

28 (b) The report required to be submitted pursuant to subdivision
29 (a) shall be submitted in compliance with Section 9795 of the
30 Government Code.

31 9353. The Office of the Patient Representative shall ensure
32 residents who seek judicial review pursuant to Section 1418.8 of
33 the Health and Safety Code are provided adequate legal counsel
34 for that purpose.

35 9354. (a) Patient representatives shall perform all of the
36 following duties:

37 (a)

38 (1) Receive written notices from facilities issued pursuant to
39 Section 1418.8 of the Health and Safety Code.

40 (b)

- 1 (2) Meet and interview the resident who is the subject of a notice
- 2 at the initiation of the representation and, at the discretion of the
- 3 representative, thereafter.
- 4 (e)
- 5 (3) Verify that the resident received the notice.
- 6 (f)
- 7 (4) Review the determinations that the resident lacks
- 8 decisionmaking capacity and no surrogate decisionmaker is
- 9 available.
- 10 (e)
- 11 (5) Participate in the interdisciplinary team review.
- 12 (f)
- 13 (6) Articulate the resident’s perspective if it can be determined
- 14 and advocate for the resident’s wishes if known.
- 15 (g)
- 16 (7) Identify and report any concerns regarding the care or
- 17 wellbeing of the resident to the Department of Public Health and
- 18 appropriate organization or agency.
- 19 (h)
- 20 (8) Review the nature of the proposed interventions requiring
- 21 informed consent and the alternatives to those interventions, and
- 22 consider whether they appear consistent with the best interests of
- 23 the resident.
- 24 (i)
- 25 (9) Express agreement or disagreement with the other members
- 26 of the interdisciplinary team regarding proposed interventions
- 27 under review and seek to reach consensus on the proposed or
- 28 alternative interventions, if possible.
- 29 (j)
- 30 (10) Make referrals, as appropriate, to appropriate legal counsel
- 31 identified by the Department of Aging, when further or additional
- 32 actions may be appropriate, to protect the interests of residents
- 33 including legal action contesting the determinations that the
- 34 resident lacks ~~decisionmaking capacity~~, *capacity to make decisions*,
- 35 that no surrogate decisionmaker is available, or contested
- 36 interventions requiring informed consent.
- 37 (b) *For purposes of this section, the following terms have the*
- 38 *following meanings:*

1 (1) “Lacks capacity” has the same meaning as set forth in
2 paragraph (2) of subdivision (a) of Section 1418.8 of the Health
3 and Safety Code.

4 (2) “Surrogate decisionmaker” has the same meaning as set
5 forth in paragraph (3) of subdivision (a) of Section 1418.8 of the
6 Health and Safety Code.

7 9355. (a) The Office of *the* Patient Representative shall adopt
8 any regulations necessary to implement this chapter consistent
9 with Chapter 3.5 (commencing with Section 11340) of Part 1 of
10 Division 3 of Title 2 of the Government Code.

11 (b) The state shall disburse all funds not directed to the Office
12 of *the* Patient Representative to each of the counties’ Area Agency
13 on Aging using an allotment proportional to the number of nursing
14 home beds in that county.

O