An act to amend Section 1418.8 of, and to add Section 1266.8 to, the Health and Safety Code, and to add Chapter 3.6 (commencing with Section 9260) to Division 8.5 of the Welfare and Institutions Code, relating to health decisions.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1266.8 is added to the Health and Safety Code, to read:

1266.8. (a) The department shall calculate a charge for skilled nursing facilities and intermediate care facilities in an amount not to exceed the reasonable cost necessary to operate the California Department of Aging's Long-Term Care Patient Representative Program pursuant to Chapter 3.6 (commencing with Section 9260) of Division 8.5 of the Welfare and Institutions Code. The charge shall be calculated by the department on a per-bed basis.

(b) Commencing with the 2021–22 fiscal year, an applicant or licensee who applies to the department to obtain or renew a license to operate a skilled nursing facility or intermediate care facility shall pay the charge specified in subdivision (a), as a condition of receiving that license or renewal.

(c) The department shall collect the charge specified in subdivision (a) and deposit the funds collected in the State Department of Public Health Licensing and Certification Program Fund established pursuant to Section 1266.9. The funds shall be used, upon appropriation by the Legislature, solely for the purposes of the program.

(d) The department may use existing procedures applicable to this chapter for purposes of collecting and depositing the charge specified in subdivision (a), and taking appropriate action for an applicant's or licensee's failure to make payment.

SEC. 2. Section 1418.8 of the Health and Safety Code is amended to read:

1418.8. (a) ~~If~~ The following definitions apply for purposes of this section:

(1) "Emergency" means a situation when medical treatment is immediately necessary for the preservation of life, the prevention of serious bodily harm, or the alleviation of severe physical pain.

(2) "Legal decisionmaker" means a conservator, as authorized by Part 3 (commencing with Section 1800) and Part 4 (commencing with Section 2100) of Division 4 of the Probate Code, a person designated by a patient as an agent in an advanced health care directive or designated by the patient as a surrogate authorized by Part 1 (commencing with Section 4600) and Part 2 (commencing with Section 4670) of Division 4.7 of the Probate Code, or a person appointed by a court authorizing treatment pursuant to Part 7 (commencing with Section 3200) of Division 4 of the Probate Code.

(3) "Patient representative" means a competent person whose interests are aligned with a resident who has agreed to serve on an interdisciplinary team for the purposes of this section. A patient representative may be a family member or friend of the resident who is unable to take full responsibility for the health care decisions of the resident, but who has agreed to serve on the interdisciplinary team, or another person authorized by state or federal law. If a family member or friend is not available to serve as the patient representative, the Office of the Long-Term Care Patient Representative may designate a public patient representative.

(4) "Long-Term Care Patient Representative Program" means the program established pursuant to Chapter 3.6 (commencing with Section 9260) of Division 8.5 of the Welfare and Institutions Code in the California Department of Aging, including the Office of the Long-Term Care Patient Representative and local long-term care patient representative programs, as defined in that chapter. Whenever this section requires a notice or communication to be provided to the Long-Term Care Patient

Representative Program, the notice shall be provided to the Department of Aging or the local long-term care patient representative program, as designated by the California Department of Aging pursuant to that chapter.

(5) "Public patient representative" means a patient representative selected by the Long-Term Care Patient Representative Program.

(6) "Facilities" means skilled nursing facilities and intermediate care facilities.

(b) If the attending physician and surgeon of a resident in a skilled nursing facility or intermediate care facility prescribes or orders a medical intervention that requires that informed consent be obtained prior to administration of the medical intervention, but is unable to obtain informed consent because the physician and surgeon determines that the resident lacks capacity to ~~make decisions concerning his or her health care and that there is no person with legal authority to make those decisions on behalf of the resident, the physician and surgeon shall inform the skilled nursing facility or intermediate care facility.~~ provide informed consent, the physician and surgeon shall document the determination that the resident lacks capacity and the basis for that determination in the resident's medical record, and shall inform the skilled nursing facility or intermediate care facility. For purposes of this subdivision, a resident lacks capacity to provide informed consent if the resident is unable to understand the nature and consequences of the proposed medical intervention, including its risks and benefits, or is unable to express a preference regarding the intervention. To make the determination regarding capacity, the physician shall interview the patient, review the patient's medical records, and consult with the staff of the skilled nursing facility or intermediate care facility, as appropriate, and family members and friends of the resident, if any have been identified.

~~(b) For purposes of subdivision (a), a resident lacks capacity to make a decision regarding his or her health care if the resident is unable to understand the nature and consequences of the proposed medical intervention, including its risks and benefits, or is unable to express a preference regarding the intervention. To make the determination regarding capacity, the physician shall interview the patient, review the patient's medical records, and consult with skilled nursing or intermediate care facility staff, as appropriate, and family members and friends of the resident, if any have been identified.~~

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

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

(c) (1) (A) Upon being notified by the attending physician of a determination that a resident lacks capacity to provide informed consent, the skilled nursing facility or intermediate care facility shall act promptly and identify, or use due diligence to search for, a legal decisionmaker. If a legal decisionmaker cannot be identified or located, the skilled nursing or intermediate care facility shall take further steps to

promptly identify, or use due diligence to search for, a patient representative to participate on an interdisciplinary team review as set forth in subdivision (e). Due diligence includes, at minimum, interviewing the resident, reviewing the medical records of the resident, and consulting with the staff of the skilled nursing or intermediate care facility, as appropriate, and with family members and friends of the resident, if any have been identified.

(B) If the resident is able to express a preference as to the identity of the patient representative, or if the resident previously designated an individual to act as a patient representative, the facility shall make a good faith effort to utilize this individual as the patient representative to the extent that the individual is available and willing to serve on the interdisciplinary team.

(C) The facility shall document in the resident's records the efforts that were made to find a legal decisionmaker, or alternatively, a patient representative, to otherwise serve on the interdisciplinary team.

(2) In the event that a facility is unable to identify a family member or friend able to serve as the patient representative within 72 hours of a physician's determinations pursuant to subdivision (b), the skilled nursing facility or intermediate care facility shall contact the Long-Term Care Patient Representative Program for selection of a public patient representative.

(3) If a family member or friend becomes available after the selection of a public patient representative, the family member or friend may replace the public patient representative.

(d) If the physician and surgeon determines that a resident lacks capacity to provide informed consent, and the skilled nursing facility or intermediate care facility determines that there is no legal decisionmaker, the skilled nursing facility or intermediate care facility may conduct an interdisciplinary team review of the proposed medical intervention only after providing notice to the resident and the patient representative in accordance with subdivision (m). The notice shall include information regarding all of the following:

(1) That the resident lacks capacity to provide informed consent and the reasons for that determination.

(2) That a legal decisionmaker is not available.

(3) A description of the proposed medical intervention that has been prescribed or ordered, the risks and benefits associated with the intervention proposed, and available alternatives.

(4) That a decision on whether to proceed with the medical intervention will be made using the interdisciplinary team review and an explanation of the interdisciplinary team review process for the administration of medical interventions.

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

(6) The name and contact information of the individual identified by the facility as the resident's patient representative, that the resident has the right to have a patient representative participate in the interdisciplinary team review process, and that if the resident does not have a representative, a public patient representative from the Long-Term Care Patient Representative Program will be assigned.

(7) The name, mailing address, email address, and telephone number of the designated local contact of the Long-Term Care Patient Representative Program.

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

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

(10) That the resident has the right to judicial review to contest the physician and surgeon's determinations, the use of an interdisciplinary team to review and administer medical treatment, or the decisions made by the interdisciplinary team.

(e) ~~Where~~ (1) When a resident of a skilled nursing facility or intermediate care facility has been prescribed a medical intervention by a physician and surgeon that requires informed consent and the physician has determined that the resident lacks capacity to make health care decisions and ~~there is no person with legal authority to make those decisions on behalf of the resident~~, the facility has determined that there is no legal decisionmaker, the facility shall, except as provided in subdivision (h), conduct an interdisciplinary team review of the prescribed medical intervention prior to the administration of the medical intervention. The interdisciplinary team shall oversee the care of the resident utilizing a team approach to assessment and care planning, and shall include the resident's attending physician, a registered professional nurse with responsibility for the resident, other appropriate staff in disciplines as determined by the resident's needs, ~~and, where practicable,~~ and a patient representative, in accordance with applicable federal and state requirements. ~~The review shall include all of the following:~~ An interdisciplinary team review shall not occur without the participation of a patient representative and until the notice required by subdivision (d) has been provided to the resident and patient representative.

(2) The interdisciplinary team review shall include all of the following:

~~(1)~~

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

~~(2)~~

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

~~(3)~~

(C) A discussion of the desires of the patient, ~~where~~ if known. To determine the desires of the resident, the interdisciplinary team shall interview the patient, review the patient's medical records, ~~and~~ consult with family members or friends, if any have been ~~identified.~~ identified, and review any prior writings describing the resident's health care wishes, including checking registries for an advanced health care directive or physician's orders for life-sustaining treatment executed prior to the physician's determinations in subdivision (b) and not executed by the resident during any period of incapacity.

~~(4)~~

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

~~(5)~~

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

~~(6)~~

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

~~(f) A patient representative may include a family member or friend of the resident who is unable to take full responsibility for the health care decisions of the resident, but who has agreed to serve on the interdisciplinary team, or other person authorized by state or federal law.~~

(3) The patient representative shall have access to all of the resident's medical records and otherwise confidential health information necessary to prepare for and participate in the interdisciplinary team review.

(f) A notice of the outcome of the interdisciplinary team review and of the resident's right to judicial review shall be provided to the resident and patient representative in accordance with subdivision (m).

(g) The interdisciplinary team shall periodically evaluate the use of the prescribed medical intervention at least ~~quarterly or~~ quarterly, upon a significant change in the resident's medical ~~condition.~~ condition, or upon the resident's or the patient representative's request. The facility shall provide notice of the interdisciplinary team review pursuant to subdivision (d) and the outcome of the interdisciplinary team review pursuant to subdivision (f).

(h) In case of an emergency, after obtaining a physician and surgeon's order as necessary, a skilled nursing or intermediate care facility may administer a medical intervention that requires informed consent prior to the facility issuing the notice required pursuant to subdivision (d) and prior to convening an interdisciplinary team review. ~~If the emergency results in the application of physical or chemical restraints, the~~ The emergency shall be documented in the resident's records and, within 24 hours, notice of the intervention and the resident's right to judicial review shall be provided to the resident and the patient representative, pursuant to subdivision (m). The facility shall conduct the interdisciplinary team ~~shall meet~~ review within one week of the emergency for an evaluation of the medical intervention. The facility shall notify the Long-Term Care Patient Representative Program if an interdisciplinary team has not met within one week after administering an emergency medical intervention.

(i) Physicians and ~~surgeons and~~ surgeons, skilled nursing ~~facilities~~ facilities, and intermediate care facilities shall not be required to obtain a court order pursuant to Section 3201 of the Probate Code prior to administering a medical intervention which requires informed consent if the requirements of this section are met. Except in case of emergency, as provided in subdivision (h), the proposed medical intervention shall not be administered until it has been reviewed and authorized by the interdisciplinary team, the resident and the patient representative have received notice pursuant to subdivision (f) of the outcome of the interdisciplinary review team process, and the resident has had reasonable opportunity to seek judicial review. If judicial review is sought, the intervention shall not be administered until a final determination is made by a court, except in cases of emergency as provided in subdivision (h).

(j) ~~Nothing in this section shall in any way~~ This section does not affect the right of a resident of a skilled nursing facility or intermediate care facility for whom medical intervention has been prescribed, ordered, or administered pursuant to this section to seek appropriate judicial ~~relief to review the decision~~ relief, at any time, to review the decision to provide the medical ~~intervention.~~ intervention, the determinations of the physician or surgeon, or the actions of the skilled nursing facility or intermediate care facility to conduct an interdisciplinary team review.

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

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

(*l*) (1) A facility that conducts an interdisciplinary review shall provide to the Long-Term Care Patient Representative Program data summarizing the notices provided to all residents pursuant to subdivisions (d), (f), and (h), including the total number of interdisciplinary reviews conducted, the number of unique patients who have had an interdisciplinary team review conducted, the total number of emergency medical interventions authorized pursuant to subdivision (h), the number of unique patients who have had an emergency medical intervention authorized, a tabulation of medical interventions authorized by type, a tabulation of the outcomes of the interdisciplinary team reviews, a tabulation of instances when judicial review was sought, and any other demographic or statistical data as may be requested by the program. Facilities shall report data annually and at any other time, as requested, in a format specified by the program.

(2) The department may require a facility to include the information described in paragraph (1) in the resident's minimum data set, as specified by Section 14110.15 of the Welfare and Institutions Code. The department shall obtain any federal approval necessary to implement this paragraph.

(m) (1) Whenever this section requires a notice to be provided to a resident, the notice shall be provided orally and in writing in the resident's preferred language. If the resident is hearing impaired or vision impaired, the facility shall provide notice in an accessible format.

(2) Whenever this section requires a notice to be provided to a resident, a copy of the notice in writing, and a second copy translated into English if applicable, shall be concurrently provided to the resident's patient representative. If a patient representative has not been identified, or if the patient representative cannot be readily contacted, the concurrent notice shall be provided to the Long-Term Care Patient Representative Program.

(3) A copy of a written notice required to be provided by this section, and if applicable a second copy translated into English, shall be entered into the patient's record.

(n) A patient representative shall not be financially compensated by, have a financial interest in, or be an employee or former employee of the licensee, the licensee's entities, organizations, subsidiaries, affiliates, parent companies or vendors of the skilled nursing facility or intermediate care facility, or a provider of health care to the resident

(o) If the Long-Term Care Patient Representative Program is not operational, a facility shall provide all notices otherwise required by this section to be provided to the Long-Term Care Patient Representative Program, to the local Long-Term Care Ombudsman or any other person or entity as may be permitted by law.

SEC. 3. Chapter 3.6 (commencing with Section 9260) is added to Division 8.5 of the Welfare and Institutions Code, to read:

CHAPTER 3.6. OFFICE OF THE LONG-TERM CARE PATIENT REPRESENTATIVE

9260. (a) (1) The Long-Term Care Patient Representative Program is established within the California Department of Aging to provide public patient representatives for residents of skilled nursing or intermediate care facilities to participate in interdisciplinary team reviews held pursuant to Section 1418.8 of the Health and Safety Code in the event that a family member, friend, or other person authorized by state or federal law cannot be located, or is otherwise unavailable, unwilling, or unable to participate as a patient representative.

(2) The Office of the Long-Term Care Patient Representative is established within the California Department of Aging to coordinate and oversee the statewide provision of public patient representative services and to train and certify individuals who serve as public patient representatives in the Long-Term Care Patient Representative Program.

(b) The department may enter into agreements with area agencies on aging, government agencies, or nonprofit organizations to provide patient representative services as local long-term care patient representative programs ("local program"). Contracts between the department and local programs shall be exempt from Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code.

(c) The department shall provide every skilled nursing facility and intermediate care facility, and update as needed, contact information for local programs to be used for required notices.

(d) The department shall collect, analyze, and report data related to the program, including the number of residents represented and the number of interdisciplinary team meetings attended.

9265. (a) The department shall establish appropriate eligibility, training, certification, and continuing education requirements for public patient representatives. An individual shall not serve as a public patient representative until and unless the individual obtains and maintains certification pursuant to this section.

(b) Each public patient representative for the program shall obtain a criminal offender record clearance prior to entry into any skilled nursing facility or intermediate care facility.

(c) The certification process shall ensure that each public patient representative is not prohibited from serving as a patient representative by Section 1418.8 of the Health and Safety Code.

9270. (a) A public patient representative shall not participate in an interdisciplinary team review of a decision to withdraw or withhold life-sustaining medical treatment interventions.

(b) Notwithstanding subdivision (a), a public patient representative may participate in an interdisciplinary team review to provide or initiate hospice or comfort care. The public patient representative shall ascertain whether that care is consistent with the resident's individual health care instructions, if any, and other expressed

wishes, to the extent known, or otherwise whether the proposed intervention appears consistent with the best interest of the resident.

9275. A public patient representative assigned by the program to an interdisciplinary team review shall do all of the following:

(a) Conduct a review to confirm that all criteria are met for an interdisciplinary team to convene for a resident and for the assignment of a patient representative by the program, as required by Section 1418.8 of the Health and Safety Code, including reviewing a copy of all written notices from the facility to the resident regarding the physician's determination that the resident lacks the ability to provide informed consent, and the facility's determination that there is no surrogate decisionmaker.

(b) Meet and, if possible, interview the resident prior to an interdisciplinary team meeting for initial review of a proposed treatment intervention or quarterly review of that intervention, or upon a change of condition in the resident necessitating a change in the proposed intervention.

(c) Review the medical and clinical records of the resident.

(d) Review policies and procedures of the facility.

(e) Participate in the interdisciplinary team review of the proposed intervention, considering the factors required by Section 1418.8 of the Health and Safety Code, including the risks and benefits of the proposed intervention, and any alternatives, and consider whether the proposed intervention is either consistent with the resident's preferences or best approximation of preferences, if known, or otherwise whether the proposed intervention appears consistent with the best interests of the resident.

(f) Articulate the resident's preferences, if known, or best approximation of preferences.

(g) Identify and report any concerns regarding abuse and neglect of the resident to the Office of the Long-Term Care Ombudsman, the State Department of Public Health, and other appropriate organizations or agencies.

9280. Upon request of the department, the Attorney General shall represent the department, local programs, and the program's representatives in litigation concerning affairs of the office, unless the Attorney General represents another state agency, in which case the agency or the department shall employ other counsel.

9285. Notwithstanding the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), the department may implement this chapter, in whole or in part, by means of a program memo or other similar instruction.

9290. (a) The State of California, the California Department of Aging, local programs, and any employee or representative of the program shall not be held liable for civil damages on the account of any harm, injury, or death resulting from any act or omission by the state, department, program, or its employees or representatives in good faith performance of the duties and responsibilities under this chapter.

(b) All communications by employees or representatives of the State of California, the California Department of Aging, and local programs, if reasonably related to the duties and responsibilities under this chapter and done in good faith, shall be privileged, and that privilege shall serve as a defense to any action in libel or slander.

9295. (a) Notwithstanding any other provision of this chapter, the department is not required to begin providing public patient representatives pursuant to this chapter until July 1, 2022, or the date that the Director of the California Department of Aging

certifies to the State Public Health Officer and provides public notice that the Long-Term Care Patient Representative Program is operational, whichever is earlier.

(b) This chapter shall be implemented subject to collection of the charge specified in subdivision (a) of Section 1266.8 of the Health and Safety Code.

LEGISLATIVE COUNSEL'S DIGEST

Bill No.
as introduced, _____.
General Subject: Long-Term Care Patient Representative Program.

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 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 Long-Term Care Patient Representative Program and the Office of the Long-Term Care Patient Representative in the California 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. The bill would, among other things, require the department to collect and analyze data, including the number of residents represented and the number of interdisciplinary team meetings attended, and would require public patient representatives to perform various duties, including reviewing determinations that the resident lacks the ability to provide informed consent and that 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 who 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 decisions 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 act promptly and identify, or use due diligence to search for, a legal decisionmaker, as defined. If no legal decisionmaker can be identified or located, the bill would require the facility to take further steps to promptly identify, or use due diligence to search for, a patient representative to participate in an interdisciplinary team review, as specified. The bill would require, among other things, that if the resident lacks capacity and there is no legal decisionmaker or patient representative, the skilled nursing facility or intermediate care facility to provide notice to the resident and to 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 Long-Term Care Patient Representative Program to assign a public patient 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. The bill would prohibit an interdisciplinary review team review from occurring until a patient representative is available to participate.

The bill would require a notice of the outcome of the interdisciplinary team review, and of the resident's right to judicial review, to be provided to the resident and the patient representative, as prescribed. The bill also would also revise existing procedures for administration of a medical intervention that involves informed consent in the case of an emergency.

The bill would require the State Department of Public Health to calculate a charge for skilled nursing facilities and intermediate care facilities in an amount not to exceed the reasonable cost necessary to operate the program, as specified. Commencing with the 2021–22 fiscal year, the bill would require an applicant or licensee that applies to the department to obtain or renew a license to operate a skilled nursing facility or intermediate care facility, to pay the specified charge as a condition of receiving the license or renewal. The bill would require the funds to be deposited in the State Department of Public Health Licensing and Certification Program Fund to be available upon appropriation by the Legislature. The bill would make implementation of the program subject to collection of the charge.

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