



Public Health Law Program

To: California Department of Health Services Tuberculosis Control Branch
California Tuberculosis Control Association Legal Workgroup

From: Samantha Graff, JD, Staff Attorney
Marice Ashe, JD, MPH, Director

Re: Revised Memorandum on Procedural Due Process Requirements for Recipients of TB-
Control-Related Home Isolation and Work Exclusion Orders*

Date: September 21, 2005

Introduction

State and local health departments have broad constitutional and statutory authority to protect the public from the spread of communicable diseases. This authority is grounded in the “police power” of the fifty states. The police power is the natural prerogative of sovereign governments to enact laws, promulgate regulations, and take action to protect, preserve, and promote public health, safety, and welfare. In the words of the California Supreme Court, “The preservation of the public health is universally conceded to be one of the duties devolving upon the state”¹

The California Health and Safety Code codifies the authority of local health officers to protect the public health by stating that they “shall take measures as may be necessary to prevent the spread of the disease.”² This provision vests health officers with significant discretion in determining what measures are necessary to address particular communicable–disease–related problems or emergencies.³

The authority of local health officers, while very expansive, is subject to limitation by certain clauses in the U.S. and California Constitutions that protect individual rights. As with any other appropriate use of government authority to protect community well-being—from the enforcement of criminal statutes prohibiting murder to the issuance of parking tickets—a

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government action against an individual that affects that individual's liberty or property must be accompanied by certain "due process" protections for the individual.

This memo discusses the due process rights of patients in the context of TB home isolation and work exclusion orders. The California TB control statute⁴ contains extensive directives for health officers regarding the procedures that apply to a nonadherent TB patient who is subject to an order for civil detention. However, the statute is less comprehensive regarding the procedures that apply to a TB patient who receives a home isolation or work exclusion order. Specifically, the statute does not set forth procedures for a TB patient who wants to object to one of these orders. This memo addresses a series of questions relating to what, if any, additional procedures might accompany TB-control-related home isolation or work exclusion orders in light of constitutional due process standards. The memo provides practical suggestions for giving appropriate deference to individual rights without compromising the fundamental commitment to stop the spread of communicable disease.

Note that this analysis applies only to instances when a government agent issues a health order that is legally enforceable. It does not pertain to voluntary health agreements. For example, if a county physician gives a TB patient a list of requirements to maintain effective home isolation and simply requests that the patient comply with the requirements, that physician may not be invoking the power of the government to control the actions of the patient. Likewise, if the physician asks a patient to not go to work until a course of medication is complete, that physician may not be invoking the power of the government to control the actions of the patient. However, once a physician employed by a city or county health department issues a written order for home isolation or work exclusion pursuant to California Health and Safety Code section 121365, the physician *is* invoking the power of the government to control the actions of the patient and constitutional due process protections thus become relevant.

This memo is meant to serve as a springboard for developing or enhancing the working relationships between health departments and their legal counsel. Health officers are strongly encouraged to discuss all the issues raised in this memo with their local counsel.

Question A: What is constitutional due process and why does it apply to TB-control-related health orders?

Response: *The Due Process Clauses of the U.S. and California Constitutions require the government to have an appropriate justification and to use fair procedures when it deprives an individual of a life, liberty, or property interest. Since a TB-control-related home isolation or work exclusion order involves a government limitation on an individual's liberty and/or property interests, due process requirements apply.*

The Due Process Clause of the U.S. and California Constitutions prohibit the government from depriving individuals of "life, liberty, or property without due process of law."⁵ A health officer who issues a home isolation or work exclusion order is acting as an arm of the government, and those orders can interfere with an individual's liberty or property interests. By directing a patient to stay at home, a home isolation order implicates the patient's basic liberty interest in being free from physical confinement.⁶ By ordering a patient to stay away from his or

her workplace, a work exclusion order could have an impact on liberty and property interests associated with being free to fulfill contractual obligations, engage in an occupation, and earn a living.⁷ Note that it is well settled law that even temporary deprivations of an individual’s liberty or property trigger due process protections. The length or severity of the deprivation must be weighed in determining what kind of process is due—not whether process is due.⁸

When the government takes an action against an individual that directly deprives that individual of a life, liberty, or property interest, the government must abide by two discrete due process standards: substantive due process and procedural due process. *Substantive due process* requires the government to have an *appropriate justification* for depriving someone of life, liberty, or property. *Procedural due process* requires the government to use *fair procedures* when depriving someone of life, liberty, or property. The two key aspects of procedural due process are (1) adequate notice and (2) a meaningful opportunity to object.⁹ Over time, courts have developed specific tests (discussed below) for assessing whether the government has fulfilled its substantive and procedural due process obligations.

Question B: Are TB-control-related home isolation or work exclusion orders based on an appropriate justification for substantive due process purposes?

Response: Almost always, since courts in substantive due process cases tend to defer to the judgment of public health officials who are acting to control the spread of disease.

Substantive due process requires the government to have an appropriate justification for taking an action that deprives someone of a liberty interest. When applying a substantive due process analysis to a communicable disease control scenario, courts tend to be readily persuaded that health officials have an appropriate justification for the good faith actions they take to control the spread of disease.

Judicial respect for the expertise of public health officials dates as far back as 1905, when the U.S. Supreme Court conducted a substantive due process analysis in the seminal case of *Jacobson v. Massachusetts*.¹⁰ There, the Court upheld a compulsory vaccination program, finding that “the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint . . . as the safety of the general public may demand.”¹¹ The Court emphasized that it is not a court’s role to second-guess a health department’s approach to controlling the spread of disease, so long as the department does not take an action “so arbitrary and oppressive . . . as to justify the interference of the courts to prevent . . . injustice, oppression, or an absurd consequence.”¹²

To determine if a government action is based on an appropriate justification, a modern court will assess (1) whether the government has a *worthy goal* and (2) whether there is a sufficient *fit* between the action and the goal. TB control is undoubtedly an extremely worthy goal.¹³ As for assessing the fit between the action and the goal, the strictest legal test asks whether the action is the “least restrictive alternative” to achieving the goal.¹⁴ The California TB control statute incorporates this test by requiring every TB-control-related health order to describe the appropriate less restrictive alternatives that were attempted and unsuccessful or that were considered and rejected.¹⁵ Therefore, a home isolation or work exclusion order will meet

the fit test so long as a health officer is able to explain why the order is the least restrictive alternative available under the circumstances to protect the health of an individual or the public at large.

Although public health officials can be confident that a home isolation or work exclusion order will be based on an appropriate justification for substantive due process purposes, they should still consider whether they are using fair procedures for procedural due process purposes.

Question C: Does a TB-control-related home isolation or work exclusion provide for fair procedures for procedural due process purposes?

Response: Yes, if it provides (1) adequate notice and (2) a meaningful opportunity to object.

(1) Notifying the patient

TB-control-related home isolation and work exclusion orders provide adequate notice if they follow the notice requirements in the California TB control statute and include information about how to object.

The U.S. Supreme Court has ruled that “[a]dequate notice under the Due Process Clause has two components. It must inform affected parties of the *action about to be taken* against them as well as of *procedures available for challenging that action*.”¹⁶ Each of these requirements serves a discrete purpose: “[A]dequate notice of the action itself permits the individual to evaluate its accuracy or propriety and to determine whether or not to contest it; notice of how to appeal ensures that available error-correction procedures will be effective.”¹⁷

Notice of the action about to be taken: When a health officer orders a TB patient to stay out of work or to remain isolated at home, notice is embodied in the home isolation or work exclusion order. The California TB control statute sets forth clear requirements regarding how a health officer should notify a patient of the action about to be taken against him or her.¹⁸ When a health officer issues a home isolation order, he or she must comply with additional notice-related requirements set forth in the California Code of Regulations.¹⁹ If a health officer follows the California TB control statute (and, if applicable, the regulations pertinent to home isolation) in drafting and delivering a TB-control-related health order, the health officer will almost certainly be providing sufficient notice of the action about to be taken against the patient. The statutory and regulatory requirements are specially designed to ensure that the patient understands the order, receives ample information to evaluate the accuracy or propriety of the order, and is able to determine whether or not to contest the order.

Notice of the procedures available for challenging the action: The California TB control statute is silent regarding the health officer’s duty to inform a patient about the procedures that are available for contesting a home isolation or work exclusion order. However, in light of basic procedural due process principles, it probably would be prudent to include information in the order about how to object to the order.

(2) Offering the patient an opportunity to object

TB-control-related home isolation and work exclusion orders can provide a meaningful opportunity to object in various ways, depending on the type of order and the circumstances of the given jurisdiction.

The U.S. Supreme Court has consistently interpreted the Due Process Clause to require an opportunity to object “at a meaningful time and in a meaningful manner” when the government deprives an individual of a liberty interest.²⁰ It is important to recognize that the government need only provide the individual an *opportunity* to object, which the individual may or may not choose to take. The opportunity to object is often referred to as a “hearing.” Although the term “hearing” connotes a trial-type setting, an opportunity to object can, depending on the circumstances, entail anything from the chance to mail in a written complaint form to a full-fledged trial or trial-like proceeding.

Timing of Objection: The government often must provide an opportunity to object before it deprives an individual of his or her liberty or property. However, in the context of communicable disease orders, “post-deprivation” objections can be constitutional if the individual is considered an immediate danger to self or others and if the opportunity to object takes place within a reasonable time after the deprivation.²¹ Therefore, in issuing a home isolation or work exclusion order that is immediately effective, the health officer should explain in the order that the patient embodies an imminent threat to the population that the order is intended to protect (i.e., the people at the patient’s place of work or the general public) and should ensure that the patient has an opportunity to contest the order within a reasonable time after the order is issued.²²

Type of Objection: The California TB control statute contains no specific guidelines as to the manner (i.e., type) of opportunity to object that should be offered to the recipient of a home isolation or work exclusion order.²³ Some local government attorneys in California believe that due process does not require that an opportunity to object be offered in conjunction with the issuance of one of these orders. Others believe that due process does necessitate that some sort of opportunity to object be offered. Therefore, a health officer should work with his or her attorney to determine whether, and if so how, to implement procedures giving an opportunity to object.

Assuming a health officer decides to offer an opportunity to object, the appropriate form the objection takes may depend on whether the order is for home isolation or work exclusion. One option pertains only to home isolation orders. Under the California Penal Code, habeas corpus is available for any individual who believes he or she has been “unlawfully imprisoned or restrained of his liberty.”²⁴ A person may seek a writ of habeas corpus from a state court “to inquire into the cause of such imprisonment or restraint.”²⁵ If the court finds that the imprisonment or restraint is unlawful, the court can order that the individual be released or that the terms of imprisonment or restraint be modified. California courts have recognized habeas corpus to be a valid route to contesting isolation and quarantine orders.²⁶ Thus, in the instance of a home isolation order, it likely would satisfy due process to inform the recipient that he or she may file a petition for habeas corpus in court. Note that habeas corpus most probably is not available to recipients of work exclusion orders, since they are not being physically confined in

the manner contemplated by the habeas corpus statute. However, a health officer may offer the work exclusion due process procedures to recipients of home isolation orders as an alternative to habeas corpus.

Since the California statutes do not provide for procedures to object to TB-control-related work exclusion orders, a health officer and local counsel who decide to offer recipients an opportunity to object must create a set of procedures giving the patient a chance to object. The courts have established four factors that government officials should weigh in deciding upon a set of procedures:

1. The nature of the life, liberty, or property interest at stake
2. The fairness and reliability of the procedures leading up to the deprivation and the value, if any, of additional procedures
3. The fiscal and administrative burden on the government that additional procedures would entail²⁷
4. The importance of giving the individual the ability to present his or her side of the story before a responsible governmental official²⁸

How these four factors are weighed depends upon the nature of the situation at hand. In the words of the U.S. Supreme Court, “Due process is flexible and calls for such procedural protections as the particular situation demands.”²⁹

Objection procedures that are appropriate in the instance of a TB-control-related work exclusion order may be unique as compared to those appropriate for similar health orders issued in the context of other diseases. They will be specially designed to accommodate the pathology of TB, the profile of the typical TB patient, and the multiple notice-related due process provisions that already exist in the California TB control statute. Moreover, the procedures could easily vary from jurisdiction to jurisdiction, since the third factor depends on the level of fiscal and administrative resources that a health department has to devote to the consideration of objections. That said, within a given jurisdiction, a health officer should be able to offer a standard procedure that would apply to all objections to a particular type of TB-control-related order.³⁰

After weighing the four factors, a health officer and his or her attorney might choose from a wide range of procedures reflecting different degrees of procedural due process. On the end of the spectrum that is least burdensome to the health department, a health officer might simply inform the recipient that he or she may file an action³¹ in civil court to contest the order.³² On the more burdensome end of the spectrum, a health officer might write in each work exclusion order that upon the recipient’s request, the health officer will initiate a civil court action for enforcement of the order.³³ In the middle of the spectrum, a health officer might establish a set of administrative review procedures within the health department. Depending on how the four factors balance out in a given scenario, an administrative review procedure can be as simple as filling out a complaint form or listing a phone number to initiate appeals, or as elaborate as an in-person proceeding before a judicial figure.³⁴

In deciding upon an appropriate objection procedure for recipients of TB-control-related home isolation and work exclusion orders, if a health officer makes the time and effort to weigh the four factors with legal counsel, he or she would go a long way toward ensuring that the resulting procedure satisfies due process.

Conclusion

A health officer can rest assured that a TB-control-related home isolation or work exclusion order is justified for substantive due process purposes. In a 1993 case involving a TB patient's challenge to an order for civil detention, a New Jersey court captured the importance of TB control programs: "The claim of 'disease' in a domestic setting has the same kind of power as the claim of 'national security' in matters relating to foreign policy. Both claims are very powerful arguments for executive action."³⁵ However, substantive due process is only one component of due process. In order to be in full step with due process principles, a health officer should consider whether his or her health department also is using fair procedures for procedural due process purposes.

ENDNOTES

¹ *Patrick v. Riley*, 209 Cal. 350, 354 (1930) (upholding bovine tuberculosis control law).

² Cal. Health & Safety Code § 120175.

³ *See Jew Ho v. Williamson* 103 F. 10, 22 (C.C.Cal. 1900); *Derrick v. Ontario Cmty. Hosp.*, 47 Cal. App. 3d 145, 152 (1975).

⁴ Cal. Health & Safety Code §§ 121350-121555.

⁵ U.S. Const. amends. V, XIV; Cal. Const. Art. I, § 7.

⁶ *See Demore v. Hyung Joon Kim*, 538 U.S. 510, 541 (2003) (“the basic liberty from physical confinement [lies] at the heart of due process”).

⁷ *See Meyer v. Nebraska*, 262 U.S. 390, 398 (1923) (liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract [and] . . . engage in any of the common occupations of life”); *Smith v. Texas*, 233 U.S. 630, 636 (1914) (“In so far as a man is deprived of the right to labor, his liberty is restricted [and] his capacity to earn wages and acquire property is lessened”).

⁸ *See Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (“The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property”); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (holding that a 10-day suspension from school is a cognizable deprivation of liberty and property). Note that due process standards apply equally to liberty and property deprivations. *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Zinermon v. Burch*, 494 U.S. 113, 131 (1990).

⁹ *See, e.g., Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 13 (1978); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

¹⁰ 197 U.S. 11 (1905).

¹¹ *Id.* at 29.

¹² *Id.* at 38.

¹³ *See, e.g., Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993) (recognizing the paramount importance of TB control programs).

¹⁴ *See id.*, 652 at 265 (upholding a city’s decision to hospitalize a persistently nonadherent active TB patient against his will because involuntary hospitalization was the least restrictive alternative available to ensure that he would not spread TB).

¹⁵ Cal. Health & Safety Code § 121367.

¹⁶ *Atkins v. Parker*, 472 U.S. 115, 152 (1985) (citing *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 13 (1978) and *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added)).

¹⁷ *Id.*

¹⁸ Section 121367(a) states that any TB-control-related health order must be in writing and must set forth: the legal authority upon which the order is issued; an individualized assessment of the patient’s circumstances or behavior constituting the basis for the issuance of the order; the less restrictive alternatives that were attempted and unsuccessful or were considered and rejected; the name of the recipient; the period of time during which the order shall remain effective; the location; the payor source if known; and other terms and conditions as may be necessary to protect the public health. Moreover, section 121367(a) requires a copy of the order to be served upon the recipient, and section 121369(a) mandates that, if necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals be provided in accordance with applicable law.

¹⁹ *See* Cal. Code Regs. §§2514-2524. These regulations require health officers to issue instructions to the patient and household members prescribing the isolation technique to be followed. Section 2516 sets forth specific measures

that must be taken in the instance of “strict isolation.” Section 2518 permits the health officer to issue whatever instructions might be appropriate in the instance of “modified isolation.”

²⁰ *Demore v. Hyung Joon Kim*, 538 U.S. 510, 541 (2003) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

²¹ *Cf. Menefee & Son v. Dep’t of Food and Agric.*, 199 Cal. App. 3d 774, 781 (1988) (“[I]n some emergency situations the legitimate and overriding interests of the government may permit summary action. In such circumstances the opportunity for a hearing may be postponed but not eliminated.” (internal citation omitted)); 7 Witkin, *Summary of California Law, Constitutional Law* § 537 (9th ed. 1990).

²² The health officer should consult with legal counsel regarding what would constitute a reasonable time. To be conservative, the health officer could base the timing on two statutory schemes that impose greater restrictions on the individual. Under the California TB control statute, if the recipient of a civil detention order requests release, the health officer must seek court review within 72 hours of the request, and a court must authorize the detention within five days of the request in order for the detention to continue. *See* Cal. Health & Safety Code § 121366. (Note that if the 72-hour period ends on a weekend day or legal holiday, the hearing shall take place on the first business day thereafter.) Under the California Welfare and Institutions Code, a “mentally disordered person” who is taken into custody for evaluation must be certified for treatment by two medical professionals within 72 hours in order for the detainee to remain in custody. Following certification, the person is entitled to an administrative certification review hearing within four days, or, in the alternative, is entitled to a court hearing by writ of habeas corpus within two working days after a petition is filed. *See* Cal. Welf. & Inst. Code §§ 5250, 5251, 5256, 5276. In both of these statutes, the custodial agency must take some action within 72 hours, and the outside time frame within which a detainee is entitled to a hearing is seven days from the date of the initial detention.

²³ This silence may render the California TB control statute constitutionally infirm. *See Leslie’s Pool Mart, Inc. v. Dep’t of Food and Agric.*, 223 Cal. App. 3d 1524 (1990); *Menefee & Son v. Dep’t of Food and Agric.*, 199 Cal. App. 3d 774 (1988); *Phillips v. San Luis Obispo County Dep’t of Animal Regulation*, 183 Cal. App. 3d 372 (1986); *Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal. 3d 294 (1977); *People v. Lockheed Shipbuilding and Constr. Co.*, 25 Cal. App. 3d 776 (1973); *Merco Constr. Engineers v. Los Angeles Unified Sch. Dist.*, 274 Cal. App. 2d 154 (1969) (all invalidating statutes/ordinances authorizing an administrative agency to seize property in an emergency situation without providing for a pre- or post-deprivation hearing and holding that the availability of a “collateral” judicial action did not cure the omission). *See also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Zinermon v. Burch*, 494 U.S. 113, 131 (1990) (noting that due process standards apply equally to liberty and property deprivations.) However, the California Supreme Court has asserted that “courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.” *People v. Falsetta*, 21 Cal. 4th 903, 912-13 (1999). The availability of habeas corpus probably rescues the statute from unconstitutionality, as least with respect to home isolation orders, since habeas corpus is part of the overall California statutory framework and is universally available for the express purpose of challenging an allegedly unlawful restraint. Moreover, the availability of a hearing arguably could be inferred from certain statutory provisions. *See* Cal. Health & Safety Code § 121365 (allowing health officers to “make application to a court for enforcement” of TB-control-related health orders); *id.* § 121367 (requiring health officers to include in every TB-control-related health order an individualized assessment and the less restrictive alternatives that were attempted and unsuccessful or considered and rejected, and perhaps implicitly laying the groundwork for some sort of hearing).

²⁴ Cal. Penal Code § 1473(a).

²⁵ *Id.*

²⁶ *See, e.g., In re Fisher*, 74 Cal. App. 225 (1925); *In re Halko*, 246 Cal. App. 2d 553 (1966).

²⁷ *See Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (articulating the first three factors).

²⁸ *See People v. Ramirez*, 25 Cal. 3d 260, 269 (1979) (adding the fourth interest to the list of three factors set forth by the U.S. Supreme Court in *Goldberg* and *Mathews*).

²⁹ *Mathews*, 424 U.S. at 334 (internal citations omitted).

³⁰ This is particularly advisable in light of the constitutional doctrine of equal protection, which requires similarly situated people to receive similar procedural safeguards.

³¹ This action would entail a writ of mandamus. There are two types of mandamus: administrative and ordinary. An ordinary writ of mandamus applies to legislative-like and executive-like actions (*see* California Code of Civil Procedure § 1085), while an administrative writ of mandamus applies to judicial-like actions (*see id.* § 1094.5). The remedies available for each type of writ are slightly different. California statutes and case law are not clear about which type of mandamus would apply if a recipient wanted to challenge a health order, and there are arguments to be made that a health order has executive-like and judicial-like characteristics. Depending on the type of writ sought, one possible judicial remedy would be to require the health officer to provide a fair hearing for the patient challenging the work exclusion or home isolation order. This would circle the health officer right back to the position of determining what would constitute a meaningful first-line mechanism for disputing the order. Note that if the health officer chooses to offer an administrative hearing, administrative mandamus would be available to the subject of a work exclusion order once the administrative procedures have been exhausted.

³² This approach is legally suspect when viewed in light of the cases discussed in note 23 above. These cases suggest that the ability of an individual to challenge a health order via a “collateral” judicial action (e.g., a court action for a writ of mandamus) is no substitute for the availability of a hearing specifically provided to address the merits of the order.

³³ The California TB control statute gives health officers the option to “make application to a court for enforcement” of TB-control-related health orders. Cal. Health & Safety Code § 121365. If a health officer wanted to take a conservative approach, he or she could write in each work exclusion order that the health officer will seek court review if the patient wants to contest the validity of the order. The health officer could then advise the court to track the portion of the California TB control statute regarding hearings for patients subject to civil detention orders. Under the California TB control statute, the recipient of a civil detention order is entitled to a court hearing characterized by several strong due process protections, including the right to have counsel provided and the right to court review within five days of a request for release. *See* Cal. Health & Safety Code §§ 121366, 121367. By recommending that a court apply the same protections to the recipient of a work exclusion order—even though a work exclusion order involves a lesser deprivation than a civil detention order—a health officer would basically be invoking a statutory safe harbor.

Note that the Illinois communicable disease statute was recently revised in part to require court review of all (including TB-control-related) isolation orders. *See, e.g.*, Ill. Comp. Stat. § 2305/2(b), (c) (2005). The Alaska legislature is in the process of revising its communicable disease statute and is in negotiations with the ACLU regarding the role of the courts in reviewing isolation and quarantine orders. *See* Ann Potempa, “Quarantine quandary: Experts try to balance privacy and safety,” Anchorage Daily News, March 15, 2005.

³⁴ Administrative hearings can satisfy due process without the rules and formalities of a court hearing so long as they give an individual a fair chance to explain his or her argument to a neutral decision maker. *See Mathews*, 424 U.S. at 348. Note that if a health officer chooses to offer an administrative hearing, court review would be available to the subject of a work exclusion order once the administrative review procedures have been exhausted. *See* California Code of Civil Procedure § 1094.5.

A health officer and his or her legal counsel might want to consider the following issues if they decide to take the administrative hearing route:

- **Notice of the opportunity to be heard:** As discussed above, it is probably prudent for the order to contain instructions about how to request a hearing. A more conservative form of notice might also inform the patient that he or she will have the right to file a writ of mandamus to appeal the final administrative decision. *See* California Code of Civil Procedure § 1094.5.
- **Timing:** As discussed above, “post-deprivation” hearings are constitutional if the individual is considered an immediate danger to self or others and if the hearing takes place within a reasonable time after the deprivation. A health department should seek legal advice about how to document the nature of the danger and about what would constitute a reasonable time.
- **Venue:** A health department should discuss with legal counsel whether to provide written, telephonic, or in-person hearings. If different types of hearings will be offered to different categories of people (e.g., depending on levels of infectiousness), these differences should be explained and applied consistently to avoid claims of discrimination.

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- Confrontation of adverse witnesses: Related to the venue question is the question of whether the patient should be given a chance to confront the issuing health official in person. Since the health order already includes an individualized assessment and addresses less restrictive alternatives, the issuing health official might not be legally required to appear in person.

The U.S. Supreme Court gives great deference to “the reliability and probative worth of written medical records.” *Mathews*, 424 U.S. at 344. In *Mathews v. Eldridge*, the Court examined the federal administrative hearing procedures that accompanied the termination of social security disability benefits. The procedures allowed benefits to be terminated based on an agency review of the recipient’s case file, including medical records and a questionnaire completed by the recipient. The Court upheld the procedures against Eldridge’s claim that he should have been offered a pre-deprivation trial-type hearing before an administrative law judge. The Court stated that the “decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists concerning a subject whom they have personally examined.” *Id.* at 344. The Court found that this type of decision involved a low likelihood of error, especially when viewed in comparison to a decision to deny welfare benefits, where issues of witness credibility and veracity tend to be critical. The low likelihood of error in turn reduced the probable value of additional procedural safeguards—including the right to confront witnesses at a pre-deprivation hearing. The Court took into account that the procedures did provide for a post-deprivation trial-type hearing before an administrative law judge as well as the possibility of subsequent judicial review.

It is hard to know how *Mathews* would apply to the question of whether the recipient of a TB-control-related work exclusion order should be entitled to confront the issuing health official in person. Just as in the *Mathews* scenario, health officers issuing TB-control-related health orders base their actions on “routine, standard, and unbiased” medical determinations—thus reducing the importance of an in-person confrontation. However, the hearing in the TB context generally occurs after the deprivation, and the social security hearing procedure did provide for a post-deprivation in-person administrative hearing.

- Patient presentation of evidence: The hearing should give the patient an opportunity to present written and/or verbal evidence that he or she does not meet the legal basis for the order or that the order is not necessary to protect the health of any individual or the public at large. Although parties in administrative hearings are entitled to retain their own legal counsel, they usually are not entitled to have legal counsel provided by the government. *See Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); California Administrative Hearing Practice §§ 1.72, 4.3 (Continuing Education of the Bar, ed. 2004).
- Interpreter: The department should translate the complaint document or provide an oral interpreter, as appropriate, if the patient has trouble communicating in English.
- Neutral hearing officer: The department should ensure that the hearing officer is “neutral” in that he or she did not have a direct hand in issuing the health order. (The standard of neutrality in an administrative setting is less exacting than that in a judicial proceeding, especially when the financial interests of the hearing officer are not at stake. *See Haas v. County of San Bernadino*, 27 Cal. 4th 1017, 1027 (2002).) Since California Health and Safety Code section 120115(k) defines “health officer” to include his or her designee, a designee could issue TB-control-related health orders, leaving a health officer available to serve as a hearing officer. Alternatively, health officers from neighboring counties could enter into memoranda of understanding agreeing to serve as hearing officers for one another. Another option might entail tapping into an existing pool of hearing officers used by the health department for other types of hearings.
- Hearing records: It would be prudent for the department to keep copies of written hearings or to record oral hearings in order to maintain a complete record, since administrative hearings are subject to judicial review upon appeal.
- Decision: The hearing officer should issue a final written decision as soon as possible after the completion of the hearing. The decision should make a determination about whether the order will be upheld, annulled, or modified and should explain the basis for that determination. The department should give the decision to the patient as soon as possible after it is issued. The department should work with counsel to set a time frame for issuing administrative decisions and informing patients of these decisions.

³⁵ *Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993).