

## FINDING OF EMERGENCY

### A. Department of Mental Health Finding That Emergency Regulatory Action Is Necessary

These regulations are being implemented on an emergency basis for the immediate preservation of the public peace, health and safety, or general welfare, within the meaning of Government Code Section 11346.1.

### B. Description of Specific Facts Which Constitute The Emergency

#### The Department of Mental Health (DMH) and the Office of Administrative Law (OAL) Have Been Inundated with Petitions Challenging DMH's Rules and Procedures as Underground Regulations

Since August 2007, DMH and its state mental hospitals have received 34 underground regulations challenges to their special orders, administrative directives, manuals and memoranda, and one motion for a temporary restraining order filed with the California Supreme Court challenging a version of the standardized assessment protocol that was being used to assess whether a person is a sexually violent predator.

To date, the OAL has denied a dozen or so of these underground regulations challenge petitions. These petitions have challenged hospital administrative directives on the topics of: the wellness and recovery planning team and manual; the clinical outcome evaluation system; research; treatment intervention; facility plan for services; computer moratorium; transfer to the California Department of Corrections and Rehabilitation Pursuant to Welfare and Institutions Code Section 7301; individual's mail and incoming packages; access to court and legal research materials; physical restraint; behavioral seclusion or restraint; the psychiatric physician manual, spending limit, trust office, search policies and procedures, and cost of care implementation.

However, OAL has made eight determinations of underground regulations. The eight OAL determinations of underground regulations involve hospital administrative directives and DMH's special order on matters dealing with individual patients' property and storage, contraband, individual patients' mail and packages, necessary involuntary administration of antipsychotic medication, the standardized assessment protocol used in evaluating whether a person is a sexually violent predator, and the "By Choice" incentive system.

In response to three other petitions, DMH has withdrawn from use one hospital administrative directive regarding rights of individuals served, one special order regarding research proposal review policy, and a version of the standardized assessment protocol used to evaluate whether a person is a sexually violent predator.

Other petitions are pending OAL's review or consideration. These petitions challenge DMH's policy against contraband, mail and packages, search policies and procedures, and generally on all subjects covered by the special orders and administrative directives. The number of underground regulations petition challenges is anticipated to continue to increase.

### The Necessity for the Proposed Regulations

DMH and its state hospitals are responsible for the execution of the laws relating to the care and custody of mentally disordered persons. The proposed regulations are necessary to effectuate the statutes relating to such care and custody of mentally disordered persons, as well as to clearly set forth in regulations the necessary legal requirements in order to ensure that DMH will not be hampered in its ability to carry out its responsibilities, and to ensure that the individual patients' and the public's safety and security will not be compromised by underground regulations challenges that have occurred and will continue to occur. The proposed regulations address the important safety and security topics of visitation of individual patients, state mental hospital police services, offsite transportation, complaints against hospital policy officers, counting of individual patients, contraband electronic devices and interment of unclaimed deceased individual patients. These emergency regulations also address the individual patients' well being issues regarding mail and packages, spending limits, patient's rights complaints, and in house hearing procedures regarding medication of mentally disordered offenders.

Regarding the proposed regulations concerning contraband electronic devices, there has been an influx of cell phones and wireless devices into DMH state hospitals. The use of wireless communication devices in DMH state hospitals presents a security risk by circumventing monitoring processes instituted to ensure patient, staff, and public safety. All DMH state hospitals report increasing numbers of contraband wireless communication devices among the patient population which are being inappropriately used to import illegal pornographic materials, facilitate contraband exchanges, communicate with external and internal individuals, and otherwise pose significant safety and security risks. One particular DMH hospital that specifically tracked reports involving wireless communication devices noted 19 incidents in just one month. Additionally, there was an incident at another DMH hospital where a wireless recording device was brought in and used to surreptitiously record confidential staff and patient conversations. These recordings were later smuggled to third parties outside of the state hospital.

### The Finding of Emergency

DMH finds that the proposed regulations are necessary to address an emergency. An emergency is "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." Gov. Code Section 11342.545. Any disruption or prevention of DMH's ability to enforce the safety and security requirements, and the provisions regarding the well being of the individual patients in its

facilities, that are set forth in the proposed regulations will create serious harm to the public peace, health, safety, and general welfare.

The non-emergency rulemaking process timetable will not afford DMH with the expediency necessary to adopt regulations should a court, in giving deference to an existing or future determination of underground regulations, prohibit DMH from using the affected administrative directives or special orders that are important to safety and security and to the well being interests of the individual patients. Emergency regulations are necessary to ensure that important safety, security and individual well being interests are addressed quickly and properly through the OAL's rulemaking process once and for all.

Also, the above-described petitions and OAL determinations of underground regulations, and anticipated petitions and possible future OAL determinations of underground regulations, have drawn and will continue to draw time and attention away from, and create barriers to, the carrying out of DMH's and the state hospitals' responsibilities. A non-emergency rulemaking action would not allow DMH and its state hospitals the ability to as quickly as possible remove existing and anticipated barriers to their ability to provide the best mental health care to individual patients, and to hopefully once and for all put to rest the underground regulations petition challenges.

### C. Authority and Reference Citations

Authority: Welfare and Institutions Code Sections 4005.1, 4015, 4027, 4101, 5326, and 7225

Reference: Welfare and Institutions Code Sections 4005.1, 4027, 4101, 4109, 4311-4313, 5008, 5300, 5325(a), (e), 5326, 5332, 5333, 7104 and 7232, and 6600 et seq.

Penal Code Sections 832.5, 832.7, 1026, 1367, 1370, 2600, 2684, 2962 and 2972.

Title 9, California Code of Regulations Sections 864, 884(b)(1), (6) and (7), and 885

*Keyhea v. Rushen* (1986) 178 Cal.App.3d 526; *In re Kanuri Surgery QAWI*, on Habeas Corpus (2004) 32 Cal.4<sup>th</sup> 1; *In Re Locks* (2000) 79 Cal.App.4<sup>th</sup> 890; *In Re Calhoun* (2004) 121 Cal.App.4<sup>th</sup> 1315.

### D. Informative Digest and Policy Statement Overview

#### Policy Statement

The objective of the proposed action is to implement, interpret, or make specific the above-identified sections of the Welfare and Institutions Code, Penal Code, and amend Title 9, California Code of Regulations Sections 884 and 885 to ensure operation efficiency and compliance with all lawful requirements involving areas of safety and security, and individual patient's support services.

## Existing Law

Welfare and Institutions Code Section 4005.1 provides that DMH may adopt and enforce rules and regulations necessary to carry out its duties.

Welfare & Institutions Code Section 4027 allows DMH to adopt regulations relating to patients' rights and procedures applicable to inpatient services.

Welfare and Institutions Code Section 4101 provides that all institutions under the jurisdiction of DMH shall be governed by uniform rule and regulation of DMH.

Welfare & Institutions Code Sections 4109 and 4311-4313, allow DMH to establish regulations regarding police officers in state hospitals for the enforcement of hospital rules and regulations in hospital buildings and for the preservation and protection of state property.

Welfare & Institutions Code Section 5008 contains definitions for "Evaluation," "Court-ordered evaluation," "Intensive treatment," "Referral," "Crisis intervention," "Prepetition screening," "Conservatorship investigation," "Peace Officer," "Court," "Antipsychotic medication," and "Emergency," as used in the Welfare & Institutions Code.

Welfare & Institutions Code Section 5300 specifies that after an individual patient's 14-day period of intensive treatment, the individual patient may be confined for up to an additional 180 days if any of the following exist: (a) has made a threat of bodily harm to another while in custody and presents a danger of inflicting harm on others as a result of a mental disorder; (b) has inflicted or attempted to inflict bodily harm to another while in custody; (c) the person made a serious threat within 7 days of being taken into custody and demonstrates a danger of inflicting substantial physical harm upon others.

Welfare & Institutions Code Section 5325(c), and Title 9 of the California Code of Regulations Section 884(b)(4) require that patients in state hospitals be allowed to see visitors.

Welfare & Institutions Code Section 5325(a) provides that LPS patients may spend a reasonable sum of their own money.

Welfare & Institutions Code Section 5325(e) and Title 9 of California Code of Regulations Section 884(b) (6), provide that both LPS and Non-LPS patients have a right to send and receive mail. "LPS" means that the placement in or commitment to the facility is pursuant to the Lanterman-Petris-Short (LPS) Act, commencing with Section 5000, of Part 1, Division 5 of the Welfare and Institutions Code). "Non-LPS" means that the placement in or commitment to the facility is pursuant to legal authority other than the LPS Act.

Welfare and Institutions Code Section 5326 provides that a DMH facility may, for good cause, deny a person certain rights under Section 5325.

Welfare and Institutions Code Section 5332 provides that antipsychotic medication may be administered to persons detained pursuant to section 5150, 5250, 5260 or 5270.15 when treatment staff have determined that treatment alternatives are unlikely to meet the needs of the patient. Additionally, each State Hospital is required to develop internal procedures for the facilitation of filing petitions for capacity hearings for individual patients.

Welfare and Institutions Code Section 5333 states that persons subject to a hearing on capacity pursuant to Section 5332 has a right to representation. Additionally, petitions for capacity hearings must be filed with the superior court.

Welfare and Institutions Code Sections 6600 et seq. define the term “sexually violent predator” and detail the procedures for finding that a person is a sexually violent predator, in addition to stating the requirements for confinement, post-commitment examinations, treatment and release criteria for such persons.

California Welfare & Institutions Code Section 7232, provides that state hospitals shall require individual patients to wear clothing that allows them to be readily identified.

Penal Code Sections 832.5 and 832.7, provide that there shall be a complaint process for citizens to initiate against police officers.

Penal Code Section 1026 describes the requirements for when a person may plead not guilty by reason of insanity and the commitment and placement requirements for such persons.

Penal Code Section 1367 states that a person may not be required to be tried for a felony unless certain competency requirements are met.

Penal Code Section 1370 describes the commitment procedures for a person found to be incompetent to stand trial.

Penal Code Section 2600 states that although rights may only be denied prisoners which are reasonably related to legitimate penological interests, that a hearing pursuant to *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526 may permit the administration of involuntary medication, and such hearing may be conducted at the facility where the inmate is located.

Penal Code Section 2684 states that a mentally ill individual patient may be transferred from a State Prison to a State Hospital if the director of corrections determines that the individual patient’s treatment would be expedited at such State Hospital.

Penal Code Section 2962 describes the commitment procedures for a paroled prisoner found to have a severe mental disorder that is not in remission and cannot be kept in remission without treatment.

Penal Code Section 2972 describes the commitment procedures upon discharge for a prisoner found to be mentally disordered. It also provides that DMH may adopt regulations to modify the rights of patients involuntarily admitted to a DMH facility.

California Health & Safety Code Section 7104, requires the coroner to take possession of the body of an indigent person for interment.

Title 9, California Code of Regulations Section 864 describes the complaint procedure and the appeal process for LPS patients.

Title 9, California Code of Regulations Section 884, parts (b)(1), (6) and (7) give patients the right to keep and use personal possessions as space permits, except items and materials that are listed as contraband, a right to have access to letter writing materials and to mail and receive correspondence, and a right to receive packages.

Title 9, California Code of Regulations Section 885 describes the complaint procedure and the appeal process for Non-LPS patients.

*In re Kanuri Surgery QAWI*, on Habeas Corpus (2004) 32 Cal.4<sup>th</sup> 1, held that “an MDO can be compelled to be treated with antipsychotic medication under the following nonemergency circumstances: (1) he is determined by a court to be incompetent to refuse medical treatment; (2) the MDO is determined by a court to be a danger to others within the meaning of Welfare and Institutions Code section 5300.” That court also held that a hearing is not required for patients found to be imminently dangerous under Welfare and Institutions Code Section 5300.

*Keyhea v. Rushen* (1986) 178 Cal.App.3d 526, held that a state prisoner cannot be involuntarily given psychotropic medication for more than three days unless the prisoner is found, as a result of a mental disorder, to be (1) gravely disabled and incompetent to refuse medication, or (2) a danger to others, or (3) a danger to self. A state prisoner may be certified for additional involuntary medication up to 21 days pursuant to the requirements and procedures set forth in Section II of the *Keyhea* Injunction.

*In Re Locks* (2000) 79 Cal.App.4<sup>th</sup> 890, held that patients found not guilty by reason of insanity are not entitled to a competency hearing. “Locks had a judicial hearing under section 1026 in which he was found not guilty by reason of insanity...Section 1026 requires that he be confined in a mental hospital for treatment...By implication, section 1026.2 presumes that he is a danger to others...while Locks is being treated at a state hospital for his continuing insanity, he is not entitled to a hearing to determine his competence to refuse treatment.” *Id.* at 897.

*In Re Calhoun* (2004) 121 Cal.App.4<sup>th</sup> 1315 held that sexually violent predators (SVPs) may be compelled to be treated with antipsychotic medication under certain non-emergency circumstances: “[I]n conformity with the Qawi holding concerning MDO’s, we hold “that an [SVP] can be compelled to be treated with antipsychotic medication under the following nonemergency circumstances: (1) he is determined by a court to be incompetent to refuse medical treatment: (2) [he] is determined by a court to be a danger to others within the meaning of ...section 5300.” *Id.* at 1354.

## E. Summary of Proposed New Regulations and Amendment to Existing Regulations

### Section 4100

Section 4100 describes the scope of the regulations in Title 9, Chapter 16.

### Section 4105

Section 4105 contains definitions for the terms, “state hospital,” “facility,” “individual patient,” and “patient” as used in Title 9, Chapter 16.

### Section 4205

Section 4205 sets forth a patient spending limit which governs the expenditure of patients’ personal funds. **(Although this explanation and the proposed regulations language of Section 4205 were included in the five-day notice of the intended filing of these emergency regulations, DMH has decided not to include Section 4205 in the emergency regulations filing. DMH wants to give further thoughts and consideration to the spending limit requirements.)**

### Section 4210

Section 4210 sets forth procedures for conducting administrative hearings on state hospital grounds to determine whether individual patients may be administered medication involuntarily. Section 4210 also provides that the appropriate court hearing as required by applicable law shall be requested as soon as possible by the state hospitals concurrent with, or subsequent to, the administrative hearing. Subsection (a) states that State Hospitals may conduct hearings to determine whether individual patients may be given interim involuntary antipsychotic medication. Subsection (b) states the prerequisite requirements which must be met before the administrative hearing process may be initiated. Subsection (c) describes the criteria for the administrative hearing including the requirements for: (1) patient notice; (2) hearing panel members; (3) evidence to be presented by the State Hospital; (4) evidence which may be presented by the patient; (5) patient representation; (6) panel decision-making; (7) appeal process; and (8) duration and effect of the panel’s decision. Subsection (d) specifies that this regulation shall not affect any existing patient’s right to judicial review of these proceedings; and Subsection (e) specifies that this regulation shall not affect any existing legal authority of the state hospital to involuntarily medicate these patients in emergency situations.

### Section 4300

Section 4300 sets forth the visiting hour standards for all individual patients and prohibits conjugal visits. Subsection (a) sets the days of the week and times for visiting hours. Subsection (b) sets out requirements for private attorney-client meeting areas. Subsection (c) allows for suspension of visiting hours for safety and security concerns and staffing limitations. Subsection (d) prohibits conjugal visits.

### Section 4310

Section 4310 sets forth the visiting hour standards for all Non-LPS individual patients who are being treated in offsite hospitals. Subsection (a) gives the parameters for when patients in offsite hospitals may receive visitors. Subsection (b) gives the parameters of visiting hours for patients being treated in offsite hospitals who are in critical condition or suffering from a terminal disease.

### Section 4315

Section 4315 sets forth the responsibilities of the Department of Police Services and states that the Department of Police Services may work with and obtain assistance from other local, state or federal law enforcement agencies. Subsection (a) delineates the responsibilities of the hospital's police services department. Subsection (b) clarifies that it is permissible for hospital police to work with state and local law enforcement. Subsection (c) states that the Hospital Administrator is the senior law enforcement official of a state hospital.

### Section 4320

Section 4320 sets forth the ability of state hospitals to coordinate with the California Department of Corrections and Rehabilitation and law enforcement agencies to arrange for the transportation of individual patients to and from state hospitals.

### Section 4325

Section 4325 sets forth the complaint procedures and the process for handling of complaints against a state hospital peace officer. Subsection (a) sets forth the requirement that all complaints be submitted in writing, and the requirements for information which must be contained in the written complaint and optional complaint form. Subsection (b) sets forth the requirements for investigating complaints; and Subsection (c) sets forth the possible dispositions for the complaint.

### Section 4330

Section 4330 sets forth the procedures in counting individual patients of state hospitals. Subsection (a) specifies the number of counts that must be performed each day. Subsection (b) proscribes the scope of counts.

#### Section 4340

Section 4340 sets forth the protocol for interment of unclaimed deceased individual patients in state hospitals. Subsection (a) states that if a patient has an advance directive, then it must be followed. Subsection (b) states the procedures for interring the patient with a relative or the coroner if the patient does not have an advance directive.

#### Section 4350

Section 4350 identifies as a prohibited contraband wired and/or wireless electronic devices that have communication and/or internet capabilities, and provides examples of such prohibited electronic devices.

#### Section 4400

Section 4400 sets forth the procedures for patients to submit a complaint. This section also sets forth requirements for information which must be contained in the written patient's rights complaint and optional complaint form. Subsection (a) specifies the process for a patient to file a patient's rights complaint. Subsection (b) specifies what content must be on an optional complaint form. **(Although this explanation and the proposed regulations language of Section 4400 were included in the five-day notice of the intended filing of these emergency regulations, DMH has decided not to include Section 4400 in the emergency regulations filing. DMH wants to give further thoughts and consideration to the exact language and approach regarding written patient's rights complaint requirements.)**

#### Section 4415

Section 4415 sets forth the formal facility policy on the dimensions, weight and volume of mail allowed as such policy is required pursuant to Title 9, California Code of Regulations Section 884 (b)(6).

#### Section 4420

Section 4420 sets forth the formal facility policy on the dimensions, weight, volume, and number of packages allowed as such policy is required pursuant to Title 9, California Code of Regulations Section 884 (b)(7). Subsection (a) gives the definition of "packages", as differentiated from "mail." Subsection (b) gives the maximum dimensions and weight of packages. Subsection (c) allows the hospital to limit the volume of a patient's packages in certain circumstances. Subsection (d) states that packages sent to the facility that are not within the limits set forth in subsection (b) and (c) above shall be returned to the sender. Subsection (e) states that these limitations do

not apply to confidential mail. **(Please note that a non substantive change was made to correct a cross reference error in the earlier noticed version of subsection (a) of Section 4420. Subsection (a) of Section 4420 had referenced the definition in “Section 4415 (a)”. As Section 4415 is only one sentence and does not have a subsection (a), the notation “(a)” was removed in the cross reference.)**

Amendment to Title 9, California Code of Regulations Section 864

Section 864 is being amended, by adding a subsection (e) to clarify that the procedures in section 864 do not apply to state hospitals, but that the complaint procedures for LPS state hospital patients are the same as those set forth in Title 9, California Code of Regulations Section 885 for Non-LPS state hospital patients.

F. Technical, Theoretical, and Empirical Study or Report

None

G. Determinations

The Substantial Difference from Existing Comparable Federal Regulations or Statute. None.

Mandates on Local Agencies or School Districts. None.

Mandate Requires State Reimbursement Pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. None.

Costs to Any Local Agency or School District that Requires Reimbursement Pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. None

Non-discretionary Costs or Savings Imposed on Local Agencies. None.

Costs or Savings to Any State Agency. None

Costs or Savings in Federal Funding to the State. None.

Costs or Savings to Individuals or Businesses. None.