

FINDING OF EMERGENCY

A. Department of State Hospital's (DSH) Finding of 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 Necessity for the Proposed Regulations

Over the past four years the DSH has seen a large increase in Incompetent to Stand Trial (Penal Code Sect. 1370) commitments referred from county courts to the department for treatment. As the referrals from around the state have increased the waitlist for patients to be admitted has also grown, despite expansion of capacity by the department. In response to this growing waitlist many county courts have responded by issuing standing orders with a set admission period or issuing orders to show cause (OSC) as to why a patient has not yet been admitted. The results of these standing orders and OSCs are inconsistent admission periods between counties, consumption of valuable court time, increased threat of the state being found in contempt, and longer wait times for admittance to DSH in which defendants reside in county jails without treatment.

In practice issuance of standing orders or OSCs slows down the admission time for 1370 defendants statewide for both logistical and administrative reasons. In terms of logistics, a standing order or OSC will cause DSH to admit a patient ahead of earlier referrals to avoid legal penalties, thus forcing other referrals to wait longer for admission and disrupting the flow of the waitlist in general, creating longer wait times overall. Administratively, these orders are also problematic as DSH's admission staff are not able to focus on: (1) coordination with counties to receive commitment referral packets; (2) review of said packets; and (3) coordination with the county for transportation and admission to the hospital. In an attempt to comply with OSCs, admission staff redirect their work on a 1370 defendant that staff may be working on at any one time to focus on the 1370 defendant that is the subject of a standing order or OSC.

In a recent published decision, the Court of Appeal for the First Appellate District upheld the Contra Costa County Superior Court's standing order to admit patients to DSH within 60 days of commitment. (*In re Loveton* (2016) 244 Cal.App.4th 1025.) This decision became final on April 12, 2016. This decision represented the first clear legal direction as to the appropriate admission timeframe. If courts throughout the state followed the precedent set forth in *In re Loveton* and ceased issuing standing orders and OSCs that were not in line with the decision, the problems described above would be ameliorated and wait times for admission to DSH would decrease.

Once *In re Loveton* became final on April 12, 2016, DSH waited to see if the decision would result in courts implementing *In re Loveton*. However, DSH has not seen a statewide implementation of the *In re Loveton* decision by the courts. DSH continues to receive OSCs for 1370 defendants awaiting admission that is not in line with the *In re Loveton* decision. Therefore, it is necessary to issue these regulations that, in part, outline DSH's admission priorities for Penal Code section 1370 defendants committed to DSH and show that standing orders and OSCs will not expedite admission of any one court's patients over another court's patients.

In *In re Loveton*, the Court also discussed the need for the superior courts to provide complete commitment referral packets to DSH. In the past, DSH has received numerous incomplete commitment packets from various counties, and in recent months, these incomplete packets have contributed to some delays in admitting patients for treatment to DSH. Following the April 12, 2016, finalization of *In re Loveton*, DSH spent a number of months vetting draft regulation language through DSH's hospital forensic experts, medical directors, executive management and the Health and Human Services Agency that oversees DSH, in order to provide a clear and comprehensive regulation guiding the different superior courts on what constitutes a complete commitment referral packet.

DSH proposes these emergency regulations in an effort to create a uniform admissions criteria and process for all patients committed to DSH statewide, to implement and conform statewide IST referral and admission processes to the *In Re Loveton* decision. The proposed emergency regulations would also help ensure that all the necessary documents are provided to an individual DSH hospital for a smooth admission and continuity of care. Implementation of this uniform process through these regulations will preserve the public peace, health and safety, or general welfare by allowing for decreased wait time for admission to DSH, resulting in quicker treatment for those pursuant to Penal Code 1370 in general, removal from the county jail where space is critical and treatment is not always available, decreased use of critical criminal court calendars, and equity for defendants awaiting admission throughout the state.

DSH duplicates Penal Code section 1370, subdivision (a)(3) in section 4711 pursuant to the California Code of Regulations, title 1, section 12, subdivision (b)(1), in order to provide clarity and meet the clarity standard. Duplication is necessary because the Penal Code section 1370 commitment packet documents listed in this section are clearly defined except for "medical records" under Penal Code section 1370, subdivision (a)(3)(I). Setting out a regulation only defining medical records could indicate this is the only documentation necessary for a complete Penal Code section 1370 commitment packet when the 1370 statute lists nine individual categories of documents that make-up a complete Penal Code section 1370 commitment packet.

Benefits of the Proposed Emergency Regulations

By implementing the *In re Loveton* appellate decision, the proposed emergency regulations will provide a uniform admissions criteria and help all the counties understand the admission process and allow uniformity within the various counties. The proposed emergency regulations will help DSH better serve those IST defendants committed to DSH and provide clarification as to what documents are needed and what will be reviewed. These regulations should reduce overall wait time for admission to DSH, help remove defendants from county jails, reduce time on criminal court calendars, and provide equity in admission process to defendants throughout the state.

Effect of the Proposed Emergency Regulations

- (1) DSH has done a search of existing statutes and regulations. These proposed regulations are not inconsistent or incompatible with existing statutes and regulations and will implement and comply with *In re Loveton*.
- (2) There are no federal regulations previously adopted or amended that prohibit the proposed regulations.
- (3) These regulations will provide uniform rules to all counties and will provide clarification in the admission process for all counties and individuals being admitted to DSH pursuant to Penal Code section 1370.

The Finding of Emergency

DSH finds that the proposed regulatory amendment is 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, § 11342.545.) DSH currently is attempting to admit patients simultaneously and in a timely manner from all 58 counties, while IST referrals from many of these counties have been increasing substantially week after week. DSH would like to implement these emergency regulations as soon as possible to immediately conform to the process set forth in the recently issued *In re Loveton* decision. *In re Loveton* was decided and published on February 11, 2016, and became final on April 12, 2016. While DSH is also working on system-wide bed expansion, DSH has been sued by the ACLU in Alameda Superior Court as well as being sued in a potential class action lawsuit in federal court from Ventura County patients, where both lawsuits challenge the timelines standards and processes related to IST referrals. Further, when a patient has not been admitted to DSH after a period of time, some courts have released the patient into the community.

Accordingly, these emergency regulations will implement the recent *In re Loveton* decision, and in doing so, provide necessary clarification of the process, timelines, and the order in which patients shall be admitted to DSH by all of the superior courts. The emergency regulations will also help ensure that the counties are aware of all of the

necessary requirements and better ensure a smooth transition of patient care. The proposed regulations would provide all the committing courts a clear understanding of how and when the patients will be admitted to DSH. The proposed regulations will also assist in ensuring a better delivery of treatment. These regulations will preserve the public peace, health and safety, or general welfare by allowing for decreased wait time for admission to DSH, resulting in quicker treatment for those pursuant to Penal Code 1370 in general, removal from the county jail where space is critical and treatment is not always available, decreased use of critical criminal court calendars, and equity for defendants awaiting admission throughout the state.

C. Authority and Reference Citations

Authority: Welfare and Institutions Code sections 4005.1, 4027, 4101, and 7225.

References: Penal Code sections 1370, 1370.01; Welfare and Institutions Code sections 7228, 7230; Code of Federal Regulations, title 45, section 164.508, and *In re Loveton* (2016) 244 Cal.App.4th 1025.

D. Informative Digest and Policy Statement Overview

Policy Statement

The objective of the proposed action is to implement, interpret, or make specific state policy regarding Penal Code section 1370, as set forth in the *In re Loveton* decision. The regulation would clarify what specific documents need to be provided to DSH for admission to a DSH hospital, as well as providing direction on how and when a patient will be admitted. The regulation will provide for a uniform admissions procedure statewide, where counties and IST individuals will be treated uniformly and equally.

Existing Law

Currently, the patients are committed to DSH by the courts and are involuntarily held at the respective county facility. These patients are committed to DSH due to a mental illness. DSH is responsible for providing the care and treatment, and the safety and security of these patients. Penal Code section 1370, subdivision (a)(3), currently provides what documents are needed for a commitment packet in order to be admitted to a DSH hospital. However, the law does not provide or account for how to prioritize admissions of patients from the various committing counties simultaneously. This has led some courts to issue OSCs for 1370 defendants awaiting admission that is not in line with the *In re Loveton* decision.

E. Summary of Proposed New Regulations

Add Section 4700

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4700 to provide definitions of terminology that is used by current statutes and by the proposed regulations.

Add Section 4710

This regulatory action would add Title 9, Division 1, Chapter, 16, Article 7, Section 4710 to provide the factors that DSH will use to determine when a patient will be admitted to a DSH facility.

Add Section 4711

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4711 to clarify the specific documents that are required for the admission of a patient to DSH.

Add Section 4712

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4712 to provide further direction as to what kind of medical documentation and information is required.

Add Section 4713

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4713 to provide direction of how the medical documentation and information will be reviewed and by whom.

Add Section 4714

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4714 to provide what is evaluated in determining the security risk to determine placement at a hospital within the DSH system.

Add Section 4715

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4715 to clarify that a patient cannot be admitted to a hospital within DSH, until a commitment packet as described in section 4711 is received, reviewed, and approved by DSH.

Add Section 4716

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4716 to provide an exception of when a patient may be more rapidly admitted to DSH and the documentation needed to provide the necessary information to determine psychiatric acuity.

Add Section 4717

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4717 to provide the different security risk levels at the various DSH hospitals.

F. Technical, Theoretical, and Empirical Study or Report

None

G. Determinations

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

Incompatibility with Existing Laws and Regulations: None

Mandates on Local Agencies or School Districts: County courts are State funded, and the courts are statutorily required to provide the commitment packet pursuant to Penal Code section 1370.

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: DSH anticipates that there will be no fiscal impact in the current State Fiscal Year to Local Agencies.

Non-discretionary Costs or Savings Imposed on Local Agencies: While there might be additional county personnel resources involved in implementing a part of these regulations, DSH anticipates there will be no fiscal impact in the current State Fiscal Year to Local Agencies.

Costs or Savings to Any State Agency: DSH anticipates that there may be some increased state legal costs, as DSH may be ordered to appear in court more frequently, until all of the courts become comfortable with the new proposed regulation and the new timeline these emergency regulations will create in admissions for all the Penal Code section 1370 patients throughout the state.

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

Costs or Savings to Individuals or Businesses: DSH is not aware of any cost impacts that an individual or business would necessarily incur in reasonable compliance with the proposed action.

MATERIAL INCORPORATED BY REFERENCE

Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, Published May 18, 2013.