

State of California  
**DEPARTMENT OF STATE HOSPITALS**

**Final Statement of Reasons for Rulemaking,  
Including Summary of Comments and Agency Response**

**THE PROPOSED AMENDMENTS TO THE  
PATIENT ELECTRONIC PROPERTY REGULATIONS,  
CALIFORNIA CODE OF REGULATIONS, TITLE 9, SECTION 4350**

Public Hearing Date: September 20, 2018

**I. GENERAL**

**A. ACTION TAKEN DURING THIS RULEMAKING**

The Department of State Hospitals (DSH) released the Initial Statement of Reasons for Rulemaking (ISOR) for the proposed amendments of Patient Electronic Property on August 3, 2018. The ISOR contains a description of the rationale for the proposed amendments of California Code of Regulations (CCR), title 9, section 4350. All documents associated with this rulemaking were made available to the public and are available on the DSH Internet Web site at: <http://www.dsh.ca.gov/Publications/Regulations.aspx>.

The 45-day comment period to consider the proposed rulemaking for amendments to the Patient Electronic Property regulations closed on September 17, 2018. Several comments were received. On September 20, 2018, DSH conducted a public hearing in accordance with the California Administrative Procedure Act, Government Code, title 2, division 3, part 1, chapter 3.5 (commencing with section 11340), at which oral and written comments were received. After holding the public hearing, DSH considered all timely and relevant comments received.

**B. MANDATES AND FISCAL IMPACTS TO LOCAL GOVERNMENTS AND SCHOOL DISTRICTS**

DSH has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code.

**C. CONSIDERATION OF ALTERNATIVES**

DSH has determined there are no reasonable alternatives considered by the Department that would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less

burdensome to affected private persons or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law. Two alternatives that DSH dismissed were provided in the ISOR. DSH did not receive comments preferring or supporting either alternative.

No alternatives were proposed to DSH that would lessen any adverse economic impact on small business.

**II. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL**

No modifications were made to the original proposal.

**III. SUMMARY OF COMMENTS AND AGENCY RESPONSE**

DSH received sixteen written comments during the 45-day comment period in response to the September 20, 2018, public hearing notice. Commenters provided five oral comments at the Hearing.

Listed below are the organizations and individuals that provided comments during the 45-day comment period:

No.	Commenter	Affiliation	Date received
1	Marc Endsley	Patient	September 4, 2018
2	Janice M. Bellucci	Alliance for Constitutional Sex Offence Law	September 7, 2018
3	Jean Mordaunt	Public	September 7, 2018
4	A.P. Millard	Public	September 8, 2018
5	Gwen Gipson	Public	September 8, 2018
6	Sam Consiglio	Patient	
7	Randee Grassini	Patient	September 14, 2018
8	Valena Broussard Dismukes	Public	September 17, 2018
9	Roger Hunnicutt	Public	
10	Nicholas J. Hyde, Anne Hadreas	Disability Rights California	September 17, 2018
11	Carole Urie	Returning Home Foundation	September 17, 2018
12	Paul A. Kreutzer	Public	September 17, 2018
13	Nelson Ridgway	Public	September 17, 2018
14	Richard Morgan <sup>1</sup>	Public	September 19, 2018
15	Thomas Pihl <sup>2</sup>	Public	September 20, 2018
16	Julia Franzen <sup>3</sup>	Former patient	September 26, 2018

<sup>1</sup> This comment was received outside the comment period; no response is required.

<sup>2</sup> This comment was received the day of the hearing and is included.

<sup>3</sup> This comment was received during the comment period for the second re-adoption of emergency regulations. No response is required but is included in this Final Statement of Reasons.

### **1. Commenter 1, 6, 8, 10**

**Comment:** There have only been a hand-full of sex offenders in the hospitals that have engaged in child pornography, and DSH stated in the Findings that those incidents could be and were handled without the Emergency Regulations.

**DSH Response:** This comment was considered but is rejected. DSH's efforts to address all those viewing and distributing child pornography within the hospitals before the Emergency Regulations were ineffective, and DSH was only able to detect some portion of the activity. DSH provided in the Initial Statement of Reasons that during the Emergency Regulations implementation, its knowledge of the breadth of issue continued to expand. Out of the 1300 patients at DSH-Coalinga, only 160 patients turned in devices claiming they only had legal material on them. Of those devices, three contained child pornography and child erotica images. Meanwhile, 1500-2000 pounds of material, about 60% of which consisted of DVDs, CDs, and USB devices, were turned in during the amnesty program and DSH continues to discover contraband within its hospitals.

### **2. Commenter 1, 5, 13**

**Comment:** This regulation violates Constitutional rights, including due process, freedom from unreasonable search and seizure, privacy, and possession of personal property.

**DSH Response:** This comment was considered but is rejected. As detailed in the Initial Statement of Findings, DSH is unaware of any California legal precedent that individuals in a secure institution have a constitutional right to possess personal electronic devices. There is existing legal precedent from other jurisdictions upholding the constitutionality of rules and regulations similar to the proposed action.

### **3. Commenter 1, 10**

**Comment:** Child pornography is confined to one state hospital, yet this regulation applies to all state hospitals.

**DSH Response:** This comment was considered but is rejected. While DSH-Coalinga houses sexually violent predators (SVPs) and the bulk of any child pornography issue may be focused there that does not exempt other hospitals from facing child pornography concerns. Further, as discussed in detail in the Initial Statement of Reasons beginning on page nine, there are multiple issues these regulations seek to address, including the safety and security of the community, patients, and staff. A patient with access to personal electronic devices that are Wi-Fi or internet capable can create new victims, revictimize former victims, track hospital staff, harass hospital staff, and use seemingly innocent devices to connect to the internet. Also, page 6 of the Initial Statement of Reasons, identified that there are treatment related concerns for patients who have internet access and electronic devices. Finally, Welfare and Institutions Code section 4101 mandates that all the institutions under the jurisdiction of DSH shall be governed by uniform rules and regulations.

#### **4. Commenter 1**

**Comment:** The Emergency Regulations were completely unnecessary and inconsistent with the Government Code.

**DSH Response:** This comment is rejected as outside the scope of the current regular rulemaking proposal.

#### **5. Commenter 2, 3, 4, 5, 8, 11, 15**

**Comment:** Electronic devices are important for treatment, legal research and advocacy, and passive entertainment. While the Alliance for Constitutional Sex Office Law agrees that a total prohibition of electronic devices would not be proper, the proposed amendments are practically equivalent to a total prohibition on the electronic devices, which will needlessly burden patients.

**DSH Response:** This comment was considered but is rejected. Without an amendment, a full implementation of the existing title 9, California Code of Regulations (CCR) section 4350 (CCR section 4350) would still prohibit all desktop computers, laptop computers, and electronic gaming devices in the hospital. By amending the regulations, patients can have tablets and gaming devices approved for confined individuals as well as access to state owned computers in computer labs at the facilities. As part of the implementation process, hospitals are planning to or have created patient computer labs. At DSH-Coalinga, the computer labs expanded their hours for patient use from three hours, Monday through Friday, to nine hours a day, seven days a week wherein they can utilize the computers for treatment, research, and advocacy. DSH-Coalinga also expanded the computer labs' number of computers from 15 to 72. DSH-Coalinga has created a Social Gaming Center, which opened this year. The Social Gaming Center will allow patients supervised access to X-Box 360s, iPods, and board/card games. This will be open for nine hours a day, seven days a week.

#### **6. Commenter 2, 5, 6, 8, 9, 11, 13**

**Comment:** The Initial Statement of Reasons fails to discuss the legitimate needs of patients to maintain access to computers and electronic storage devices. Many DSH-Coalinga patients have lawfully possessed and used these devices without incident for over ten years.

**DSH Response:** This comment was considered but is rejected. As provided in the Initial Statement of Reasons, DSH objects to the statement that DSH-Coalinga patients have lawfully possessed and used these devices without incident for over ten years. Patients have been arrested and convicted for unlawful use of these devices. DSH has also found devices with illicit material for which it could not identify an owner, and as such could not pursue prosecution. Further, 1500-2000 pounds of devices were submitted during the amnesty program, during which DSH agreed not to search the devices for illicit materials in return for their surrender, indicative of a much larger issue. After the amnesty period, DSH continues to locate contraband devices, including

50 USB memory devices hidden in a wall. Such secretive and prohibited patient behavior is counterproductive to therapy as well as facilitates the potential storage and transfer of illicit material.

**7. Commenter 2, 9, 11, 13**

**Comment:** The provision that gives individual hospitals the discretion to permit contraband items to be accessible to patients on a supervised basis only is essentially meaningless because hospitals and individual staff members are free to disregard this provision in their discretion.

**DSH Response:** This comment was considered but is rejected. The default position of the regulations is to not permit items listed in subsection (a). Subsection (d) provides a means by which the hospital may permit subsection (a) items under supervision. So, subsection (d) does not amount to a further restriction, it permits hospitals to allow supervised access. Subsection (d) also references the hospitals' authority to increase restrictions pursuant to Welfare and Institutions Code section 7295, but no authority is granted to individual staff members.

**8. Commenter 2, 9, 11, 13**

**Comment:** "A regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner v. Safley*, (1987) 482 U.S. 780." The Constitution requires that restrictions on patients' property be reasonable, narrowly tailored to treatment goals, and is not punitive in nature. This is because persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish. This proposed amendment to the regulation is punitive.

**DSH Response:** This comment was considered but is rejected. DSH has identified a problem and public safety concern of patients accessing child pornography and other illicit material or material inappropriate for the treatment of the patient and security of the facility and public. DSH has the duty to provide secure treatment for civilly and forensically committed patients and access to child pornography is detrimental to the treatment of the patients and presents a danger to the public. There is no way to know what is on an electronic device merely by looking at the exterior, and DSH documented the dangers to hospital security and treatment progress that may occur by allowing unsupervised possession of such devices. The evidence in support of such limitation comes not only from California's own experience, but across the nation. Therefore, this regulation is not issued for punitive reasons but for safety and to protect the therapeutic environment. The Courts have upheld this regulation and others like it as reasonable, narrowly tailored, and non-punitive.

**9. Commenter 2**

**Comment:** The Initial Statement of Reasons alleges that every patients' electronic device is being used to possess child pornography and certain devices, such as DVDs

and USBs do not facilitate communication with prohibited persons, obtain information about staff, or obtain maps of the hospital grounds.

**DSH Response:** This comment was considered but is rejected. DVDs and USBs are the primary source of storing digital information, including software to access the internet, and transferring the information. While every patient's device may not have child pornography or other illicit material, the ones that do constitute a breach of security and a breach of public safety. As the volume and burden to search all devices became impossible, it became problematic for DSH to secure the facility and the public. These amendments create some control over devices to better secure the facility and the public.

#### **10. Commenter 5**

**Comment:** To be fair and just, the regulation should not presume, without tangible proof, that all patients are incorrectly using their electronic devices so that all should be limited or restricted from devices.

**DSH Response:** This comment was considered but is rejected. DSH has a duty to provide a secure facility for inpatient mental health treatment and to apply regulations uniformly. DSH set forth in the Initial Statement of Reasons its inability to maintain confidence in the security of the facility and the public when patients are allowed unlimited possession of electronic devices. Further, this was an issue in 2010 when DSH adopted the original CCR section 4350, and the proposed amendments better apply the contraband restrictions to developing technology.

#### **11. Commenter 6**

**Comment:** A recent Supreme Court case held that sex offenders have a Constitutional right to access the internet.

**Agency Response:** This comment was considered but is rejected. As discussed during the Emergency Regulations process, the United States Supreme Court ruling did not apply to patients civilly committed to an inpatient facility. It applied to individuals required to register as sex offenders but not living in institutions.

#### **12. Commenter 6**

**Comment:** Enacting CCR section 4350 will do nothing more than make Coalinga State Hospital a very hostile environment. The problem could have been solved by simply installing TV reception in all patients' rooms.

**Agency Response:** This comment was considered but is rejected. DSH is working to maintain research, therapeutic, and entertainment options for its patients while eliminating illegal and illicit activities. Adding TV reception in every room would not accomplish this goal without eliminating the electronic methods of storing and distributing illegal or illicit materials or software to access the internet. Further, patients without appropriate coping skills would better address any hostility in therapy. DSH will

also take all measures necessary and appropriate to ensure the facilities remain safe and informed during this transition.

### **13. Commenter 7**

**Comment:** The 30 CD/DVD disk limit is unacceptable. The patients at DSH-Coalinga houses involuntary civil detainees, unlike the patients at the other four hospitals currently enforcing the 30-disk limit. Manufactured CD/DVDs cannot be altered, and definitely cannot be altered without the electronic devices to do so, so how can the disks store illegal/illicit material? What instances whereby a disk was used as a weapon and what prevents a patient from using one of the 30 disks as a weapon? Perhaps 100 disks would be a better limit.

**DSH Response:** This comment was considered but is rejected. First, DSH-Coalinga houses both civil and forensic patients, and the other hospitals also have both civil and forensic patients which prevents DSH from providing only one hospital an exception. Further, Welfare and Institutions Code section 4101 requires uniform regulation across all hospitals. Manufactured CD/DVDs generally cannot be altered, although this is not impossible, which supports DSH permitting patients to continue to possess manufactured disks as described in subsection (b), paragraph (4) of the proposed action.

There has not been a recent event where a disk was used as a weapon, but the 30-disk limit has existed at four of the five hospitals for several years. The proposed action would now codify this contraband limit for all hospitals. The hospitals reached this limit by balancing safety needs and immediate access to the disks. After patients began to purchase disks, the hospitals gradually lowered the limit to 30 disks, which DSH has found to be an appropriate limitation, which the proposed action codifies. The proposed amendments provide that patients may own more than 30 disks but may only have 30 within their immediate possession. Patients may exchange disks for other disks they may have in storage or other location as designated by the hospital. Further, the limit on the number of disks in a patient's room is not simply about space limitations but takes into account the shifting and slippery surface that results if the disks are knocked over in an emergency. Finally, nothing stops a patient from using one or more of the 30 disks as a weapon. But if a patient does so, that individual patient would have all the disks temporarily or permanently removed. In the meantime, the 30 disk limit provides patients sufficient variety and entertainment within their immediate access while prevent the disks from being used inappropriately.

### **14. Commenter 8**

**Comment:** Individual patients found in violation of certain communications and searches deemed dangerous could be individually restricted, leaving other patients available to participate in appropriate communications and searches, and at the least have access to the use of USB drives, CDs and DVDs.

**DSH Response:** This comment was considered but is rejected. Patients are still permitted to have manufactured CDs and DVDs. Each patient now has a state-issued 8GB USB memory device. If the commenter's use of the term "searches" refers to

internet searches, DSH prohibited patients from internet access beginning in 2003 pursuant to CCR section 891. Patients found in possession of illegal or harmful material are prosecuted, not individually restricted, as this is breaking the law. The current CCR section 4350 is more restrictive, as it prohibits patients from using electronics even on a therapeutic basis with supervision, and thus must be amended.

#### **15. Commenter 10**

**Comment:** DSH has not provided substantial evidence showing that CCR section 4350 is necessary as a state-wide regulation. The evidence provided only relates to a small fraction of one hospital, DSH-Coalinga. This is evidenced by the costs expended by each hospital to comply with the regulations

**DSH Response:** This comment was considered but is rejected. When DSH adopted CCR section 4350 in 2010, it was in response to all hospitals experiencing issues with patient access to and misuse of electronic devices. While the other hospitals became compliant with CCR section 4350, DSH-Coalinga operated under a moratorium due to pending litigation. In the subsequent years, the other hospitals have devised methods to provide electronic access in a controlled manner, many of which were used to design these proposed amendments so that all of the hospitals have a uniform approach. DSH-Coalinga requires the most modifications to comply with CCR section 4350, either the current regulation or as in this proposed action, and so costs for that hospital will be greater. Meanwhile, all DSH hospitals house patients of commitments other than SVP that have sex offender issues, and stalking or creating victims, accessing hospital images, etc., are not specific to only certain patient types. Also, targeting a regulation to patients committed under only legal framework would not only be impossible as the commitment types are frequently intermingled on the units and in the hospitals, but create equal protection issues. Finally, this proposed action seeks to simplify, delineate, and clarify the current CCR section 4350 as well as make the current regulation more applicable to changing technology. The current regulation already applies state-wide, even if the proposed amendments are not adopted.

#### **16. Commenter 10**

**Comment:** DSH has limited authority to regulate the rights of LPS patients, including the right to possess personal property.

**DSH Response:** This comment was considered but is rejected. LPS patients are county patients and not state patients. The number of LPS conservatees housed at DSH are just a percentage of LPS conservatees statewide. Those patients are located in county facilities, residential facilities, or with caregivers. DSH, however, has sole authority over DSH facilities. (See Welf. & Inst. Code, §§ 4011, 4100, 7295.) As county patients, LPS patients can only be placed at DSH facilities pursuant to contractual agreements. (Welf. & Inst. Code § 4330, et. seq.) Welfare and Institutions Code section 4330, et. seq. does not relinquish DSH's control over its hospitals or agree to adjust hospital needs to accommodate LPS patients, but instead offers a secured inpatient facility option to the counties for LPS patients in need of a high level of security. The contracts affirm the jurisdiction of DSH over their facilities. Further,

Probate Code section 5358 requires that the conservator place the LPS patient in the least restrictive housing. DSH is designed to be the most restrictive housing for those in need of that level of treatment. Patients appropriate for a lower level of restrictions should be alternatively placed. Finally, while Welfare and Institutions Code section 5325 provides that a patient has the right to possess their own property, this right is not absolute, and does not extend to contraband items.

#### **17. Commenter 10**

**Comment:** “USB device” is not defined, resulting in an ambiguous term open to conflicting interpretations and inconsistent enforcement. In addition to digital storage devices, lamps, reading lights, fans, etc. can be USB devices.

**DSH Response:** This comment was considered but is rejected. Subsection (a), paragraph (4) defines a USB device as “Items capable of patient-accessible memory storage, including but not limited to Universal Serial Bus (USB) devices, also known as flash drives or thumb drives.” Thus, DSH is prohibiting only USB devices capable of patient-accessible memory for the purposes of this regulation.

#### **18. Commenter 10**

**Comment:** This regulation is then inconsistent with the LPS Act. Welfare and Institutions Code section 5325 contains no language suggesting that personal electronic devices should be excluded from the right to keep and use personal possessions.

**DSH Response:** This comment was considered but is rejected. This comment coupled with the prior comment as to the application of this regulation to LPS patients communicates a position that LPS patients at DSH should be treated differently, which is inappropriate. First, LPS patients are intermingled with other patients, including forensically committed patients at some of DSH’s facilities. Second, being a LPS patient does not preclude the patient from utilizing electronics for illegal or illicit means. Third, attempting to enforce differing contraband rules by the reason the patient is committed would be unsecure. Then, permitting patients committed under one legal framework to have contraband electronic devices while the other patients do not make the patient able to possess the electronic devices a target for harm or theft. Next, Welfare and Institutions Code section 4101 mandates that DSH shall create uniform rules and regulation for its facilities. Finally, Welfare and Institutions Code section 5325 also does not mandate that personal electronic devices must be provided to LPS patients. As with all patients, the proposed action will permit the use of electronic devices designed for confined individuals to allow a patient to listen to music, play games, watch a movie, etc. and gaming devices and items with patient-accessible memory can be used with supervision. This also means that all patients will have access to these types of devices and not just those that can afford them.

#### **19. Commenter 10**

**Comment:** CCR section 4350 conflicts with the Americans Disability Act for failure to provide a process to exempt disability-related reasonable accommodation.

**DSH Response:** This comment was considered but is rejected. First, the hospital would utilize devices compliant with the regulations. If none are available, medical necessity takes precedence and the patient would receive the necessary equipment. This would occur in the form of medical documentation and a prescription from a medical professional licensed to do so. As a health facility licensed by the Department of Health Care Services (DHCS) pursuant to Health and Safety Code section 1250, DHCS implements the utilization controls for medical supplies and durable medical equipment. (See Health & Saf. Code, §§ 1275, 14105.395; Cal. Code Regs., tit. 22, § 51321.) The situations referenced in the comment were already addressed pursuant to this response.

#### **20. Commenter 10**

**Comment:** CCR section 4350 conflicts with CCR section 883 which provides that non-LPS patients are to receive treatment in a method least restrictive of individual liberty and that promotes personal independence.

**DSH Response:** This comment was considered but is rejected. The proposed amendments better delineate the existing CCR section 4350 to address changing technology, but still prohibit the use of computers and most electronics. The existing CCR section 4350 does not directly provide for the possession of devices approved for confined individuals. The proposed amendments to the current regulation create a better balance of patient needs for entertainment with security concerns. As provided in the Initial Statement of Reasons, these amendments are also being made because DSH determined this method to be the least restrictive means of providing individual liberty and personal independence while appropriately maintaining a secured inpatient psychiatric facility.

#### **21. Commenter 11**

**Comment:** If the asserted goal is rehabilitation, this restriction is punitive and potentially arbitrary. It refers to computers as if they are contraband and not therapeutic support.

DSH Response: This comment was considered but is rejected. The mission of DSH is to provide secured inpatient psychiatric treatment for forensically and civilly committed patients. Many civilly committed patients, specifically SVPs and MDOs, have served their prison sentences but are deemed dangerous enough to require the secured inpatient services of DSH. Further, CCR section 4350 adopted computers as contraband in 2010.

#### **22. Commenter 12**

**Comment:** While DSH-Coalinga houses MDO and CDCR patients, its main function is to treat SVPs. Rather than having a recognized mental disorder, SVPs have a behavioral disorder. Therefore, SVPs have different treatment needs as they are not “triggered” as other patients.

**DSH Response:** This comment was considered but is rejected. Welfare and Institutions Code section 6600 defines “sexually violent predator” as “a person who has

been convicted of a sexually violent offense against one or more victims and *who has a diagnosed mental disorder* that makes the person a danger to the health and safety of others.” (Emphasis added.) The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) recognizes a range of paraphilic disorders as mental disorders, including but not solely consisting of pedophilia. Paraphilic disorders are recurrent, intense, sexually arousing fantasies, urges, or behaviors that are distressing or disabling and that involve inanimate objects, children, or nonconsenting adults, or suffering or humiliation of oneself or the partner with the potential to cause harm. In addition to paraphilic disorders, a SVP can have a personality disorder recognized by the DSM-V as a diagnosable mental disorder. While perhaps not triggering delusions, patients with these mental disorders can still be triggered into urges to sexually offend. Triggers could be seemingly innocent or fleeting, including images of diaper commercials or videos involving preferred victims. Learning to handle these triggers and subsequent urges requires appropriate treatment as well as appropriate security.

### **23. Commenter 12**

**Comment:** Records demonstrate that of the 2387 patients admitted to DSH-Coalinga since 2006, there have only been 29 who have been criminally charged with possession of child pornography with only 17 convicted. Of the devices turned in by 160 patients, only three had deleted videos and images identified as child pornography. DSH does not state that the 1500-2000 pounds of confiscated material contained child pornography.

**DSH Response:** This comment was considered but is rejected. Of the 2387 patients ever admitted to DSH-Coalinga, not all of these patients are SVPs and it is unknown how many possessed electronic devices. Under the amnesty agreement, DSH agreed to let patients give up their devices in return for not searching the devices for illegal or illicit material. DSH openly invited patients to turn in devices for search and transfer to the state-issued USB memory devices or to be mailed out. This resulted in 1500-2000 pounds of items turned in without risking a search for criminal items and 160 devices submitted for review, of which three contained child pornography. DSH struggles to maintain security measures in light of the technology possessed by the patients. Therefore, DSH adopted CCR section 4350 in 2010, and this proposed amendment will better clarify the specific application to include changing technology and issues discovered after the 2010 adoption.

Moreover, many factors go into the ability to arrest and convict an individual accused of a crime. A device found with child pornography needs to be specifically linked to an individual possessing it to secure a conviction. As demonstrated in the Initial Statement of Reasons, this is not necessarily possible if devices are found, but DSH is unable to determine their owner. For example, DSH-Coalinga located approximately 50 devices hidden in the wall of a day room but was unable to link them to specific patients. There are steps required to confirm that the image is indeed child pornography as defined by the law, including that the person in the image needs to be confirmed to have been a minor at the time of the image. In short, just to begin the process is more detailed than finding images or video of what appears to be children in sexual positions or acts. There

are many facets in the criminal justice system such that every arrest does not always result in a successful prosecution. The number of arrests alone does not correspond to the actual level of child pornography activity at DSH hospitals.

**24. Commenter 13**

**Comment:** The regulation should guarantee patients access or ownership of computers, USB drives and CDs/DVDs.

**DSH Response:** This comment was considered but is rejected. The hospitals cannot guarantee any property that is not medically necessary. A patient may use property for harm to themselves or others, including those intent on self-harm, diagnoses which subject a patient to use these devices for self-harm, or those who use property as weapons. Under these amendments, patients will have the ability to own manufactured CDs/DVDs and may own computerized devices designed for confined individuals. Additionally, the hospitals provide access to computers in computer labs and provide state-issued USB drives to the patients.

**25. Commenter 16**

**Comment:** The proposed regulations are a good thing because patients must now develop human interaction skills to pass the time. In addition, if child pornography was being distributed, then drastic measures needed to be taken.

**DSH Response:** This comment was considered and is accepted. Building a reliance upon human interaction skills over isolating electronic activities does provide excellent therapeutic benefit. Further, as provided in the Initial Statement of Reasons, child pornography was being distributed, and DSH accepts the support for the efforts to cease this activity.

**Listed below are the organizations and individuals that presented oral testimony at the September 20, 2018 Hearing:**

1	Janice M. Bellucci	Alliance for Constitutional Sex Offense La
2	Carole Urie	Returning Home Foundation
3	Roger Hunnicutt	Public
4	David Harren	Public
5	Laura Gibson	Parent

**A. Commenter 1**

**Comment:** There is no epidemic of child pornography at DSH. Of the more than 2000 patients ever admitted to Coalinga, only 17 people have been arrested.

**DSH Response:** This comment was considered but is rejected. As stated in our Initial Statement of Reasons, page 5, it was patients of DSH-Coalinga that stated to the Court that there was an epidemic of child pornography at DSH-Coalinga. The remainder of this comment is addressed in comment and response number 22 above.

**B. Commenter 1, 3**

**Comment:** Why is DSH treating these patients worse than prisoners? Prisoners are given more access to electronic devices than DSH patients.

**DSH Response:** This comment was considered but is rejected. DSH understands that the California Department of Corrections and Rehabilitation (CDCR) is one of the biggest purchasers of devices designed for confined individuals but is a separate institution and outside the scope of this proposed action. DSH is responsible for state hospitals under its jurisdiction and to provide appropriate treatment and security for the mentally ill requiring placement in a secured facility. DSH is not responsible for CDCR prisons. For the reasons set forth in the Initial Statement of Reasons, DSH is proposing the amendments to CCR section 4350 to specifically permit devices for confined individuals and better delineate contraband boundaries. This would create more secure and more therapeutic facilities.

**C. Commenter 2, 4**

**Comment:** The “R” in CDCR is for rehabilitation. This proposed action refers to computers as if they are contraband and not therapeutic support.

**DSH Response:** This comment was considered but is rejected. This comment is addressed in comment and response number 20 above.

**D. Commenter 2, 3**

**Comment:** These civil detainees are getting less civil liberties than prisoners.

**DSH Response:** This comment was considered but is rejected. As provided in comment and response numbers 2 and 8, there is no Constitutional right to electronic devices. Courts in California and other jurisdictions have upheld restrictions similar to these amendments as being reasonable, narrowly tailored, and non-punitive. Moreover, the current regulation and the proposed amendments have been challenged in both state and federal courts, and to date, no court has found them to be invalid. Finally, as provided in comment and response numbers 8 and 13, DSH houses both civil and forensic patients at all of our hospitals.

**E. Commenter 2**

**Comment:** This proposed action treats electronic devices as contraband and ignores that the patients have had them for a while.

**DSH Response:** This comment was considered but is rejected. Many electronic devices are currently contraband as provided in CCR section 4350 prior to the emergency regulations and this proposed action. This proposed action better delineates contraband requirements and allowances, and addresses changes in technology. The remainder of this response is addressed in comment and response numbers 6 and 20 above.

#### **F. Commenter 2**

**Comment:** As the mother of a sex offender who later had his conviction overturned, some of the patients may be committed as a fluke. These regulations are overbroad as they include those improperly committed.

**DSH Response:** This comment was considered but is rejected. Pursuant to Welfare and Institutions Code section 6600 et seq., DSH does not commit a patient, but the patient is committed by the findings of a judge or jury. DSH is tasked with providing secure inpatient treatment to those committed to our facilities and the Courts must determine the legality of their placement.

#### **G. Commenter 2**

**Comment:** The ability for the staff to determine contraband is inappropriate.

**DSH Response:** This comment was considered but is rejected. This comment is addressed in comment and response number 7 above.

#### **H. Commenter 3**

**Comment:** Even the worst, most violent felons can have devices, including Walkenhorst devices.

**DSH Response:** This comment was considered but is rejected. DSH is responsible to provide appropriate treatment and security for the mentally ill requiring placement in a secured facility. The proposed action specifically permits devices for confined individuals, including Walkenhorst, and better delineates contraband boundaries. This would create a more secure and therapeutic facility.

#### **I. Commenter 3**

**Comment:** Without something to do, patients won't have hope or incentives.

**DSH Response:** This comment was considered but is rejected. As provided in comment and response 5 above, the hospitals either have or are creating areas of supervised computerized entertainment, and all hospitals have computer labs for patient use. As addressed in comment and response 23, the practice of human interaction skills could benefit many patients. DSH encourages its patients to participate in therapy and group activities to achieve out-patient or less restrictive placement. The hospitals provide a wide range of incentives built into the therapeutic programming and non-electronic entertainment is available. Depression or lack of hope due to the removal of electronic devices can and will be addressed by a patient's treatment team.

#### **J. Commenter 3**

**Comment:** Think of the staff – without electronics, the patients could become unsafe for the staff.

**DSH Response:** This comment was considered but is rejected. Patients without appropriate coping skills need to address the matter in therapy. Four of the five DSH

hospitals are currently compliant or nearly compliant with the proposed amendments and the patients have successfully demonstrated their ability to maintain a therapeutic environment without such devices. Since the implementation of the proposed amendments as Emergency Regulations, some patients have verbally conceded to the Executive Director of DSH-Coalinga that the therapeutic environment has indeed improved. That patients may become violent or unsafe without the electronic items or that the electronic items are the sole coping device for some patients further supports the need for device removal as interfering with learning appropriate coping methods. DSH will also take all measures necessary and appropriate to ensure the facilities and staff remain safe and informed during this transition.

#### **K. Commenter 3**

**Comment:** The timing of the proposed action is suspect – it appears to be retribution for the Coalinga City Sales Tax.

**DSH Response:** This comment was considered but is rejected. DSH did not consider the Coalinga City Sales Tax relevant to amendments to a current regulation controlling patient possession of electronics. The sales tax provisions or proposals of any jurisdiction were not included in the analysis to propose amendments to CCR section 4350.

#### **L. Commenter 4**

**Comment:** In therapy, the goal is to treat patients. Everything should be done to make them healthy, and not act on what they could do in the future.

**DSH Response:** This comment was considered and is accepted in part and rejected in part. DSH concurs that the goal is to treat patients and provide a healthy and appropriate environment. To that end, the proposed action intends to minimize illegal and illicit activity and provide a safe and therapeutic inpatient facility. However, DSH is also tasked with providing security and must be proactive in doing so. Law requires that one hospital is placed on CDCR grounds and another hospital have CDCR perimeter protection in addition to the hospital police at each of those facilities.

#### **M. Commenter 5**

**Comment:** DSH should think like a parent and treat the patients as family or one of your own. If one child does something, it doesn't mean you punish the rest.

**DSH Response:** This comment was considered but is rejected. DSH strives to provide effective treatment in a safe environment and in a responsible manner. The proposed action is not designed to punish but rather better secure the facilities to protect the patients, staff, facilities and public. This proposed action is an effort to better apply CCR section 4350 adopted in 2010.

## Overall Summary of Comments and Responses

Most of the comments focused on a feeling of unfairness of the proposed action. The commenters offered very few alternatives to the proposed action and no textual changes.

While doing nothing is an option, it is not a reasonable option DSH is willing to entertain. The current CCR section 4350 prohibits electronic devices with wired, wireless, or modifiable capabilities to connect to a network. The current law also prohibits electronic gaming devices and gives examples of prohibited items but does not provide guidance, an allowance for use of electronic items under supervision, or a provision regarding electronic items designed for confined individuals. The current law also does not address patient-accessible digital storage, which has become the easiest method by which illegal and illicit material is stored, viewed, and distributed.

Several comments also referenced Constitutional rights, civil liberties, and declarations that the regulation is punitive and over-restrictive.

The main issue is the patient's possession of a massive amount of digital storage, such as a single patient possessing multiple terabytes of storage, and its demonstrated misuse. Since this proposed action seeks to limit electronic devices and patient-accessible digital storage, the proposed action is logically connected to the issue. As provided in the Findings of Emergency and the Initial Statement of Reasons, there is no Constitutional right to electronic devices, and computer labs, writing materials, phones, etc. are provided to patients to perform First Amendment communications. Further, other jurisdictions have concurred that restricting electronic items for confined individuals, including those that are civilly committed, is a reasonable measure to address internet access and child pornography distribution. Therefore, the proposed action reasonably addresses the issue. The proposed action permits electronic devices approved for confined individuals as appropriate and prohibited devices to be used under supervision for therapeutic support, therefore the proposed action is narrowly tailored. As the proposed action is logically connected, reasonable, and narrowly tailored, the action is not punitive in nature nor a violation of the Constitution.

Some comments referenced DSH-Coalinga as the sole source of concern and therefore should be the only hospital subject to the proposed action.

The current CCR section 4350 applies to all hospitals. DSH adopted the regulation in response to all hospitals expressing security concerns regarding patients increasing use of electronics. Once the regulation was adopted, four of the five hospitals moved into compliance. DSH-Coalinga instituted a moratorium on current devices, but future devices were prohibited pending the outcome of litigation regarding the regulation. The current CCR section 4350 did not address burned CD/DVDs or digital storage, and the use of these items skyrocketed, mostly at DSH-Coalinga. As DSH-Coalinga must make the most changes to come into compliance with the proposed action and the current regulation, including a removal of the moratorium, it incorrectly appears as if DSH-

Coalinga is the sole hospital with safety concerns. However, child pornography concerns are not limited solely to SVPs, but to patients of any commitment type who have pedophilia issues. Stalking previous victims, creating new victims, or generating images of the hospital are safety issues not limited to patients of any single commitment type.

A few comments questioned the authority of DSH to create this proposed action.

The Legislature granted DSH sole jurisdiction and authority over the state hospitals for the mentally ill. Pursuant to Welfare and Institutions Code section 7295, "To ensure its safety and security, a state hospital that is under the jurisdiction of the State Department of State Hospitals, as listed in Section 4100, may develop a list of items that are deemed contraband and prohibited on hospital grounds and control and eliminate contraband on hospital grounds. ... the hospital and the department may implement, interpret, or make specific this section without taking regulatory action." Thus, DSH is granted full authority to declare items as contraband for the safety and security of the facilities. DSH adopted a regulatory action in 2010 pursuant to the authority of Welfare and Institutions Code sections 4005.1 and 4101 to codify the contraband list to ensure uniformity and consistency without requiring review every six months. The proposed action seeks to improve the current regulation for all the reasons provided in the Initial Statement of Reasons under the same jurisdiction and authority granted to DSH to manage its facilities.