

DEPARTMENT OF STATE HOSPITALS
FINAL STATEMENT OF REASONS

Incompetent to Stand Trial Admissions Process

California Code of Regulations
Title 9. Rehabilitative and Developmental Services
Division 1. Department of Mental Health
Chapter 16. State Hospital Operations
Article 7. Admissions

UPDATE OF INITIAL STATEMENT OF REASONS

Upon review of comments submitted, the Department of State Hospitals (DSH or the Department) determined that no substantial change to the text was needed. The minor changes and reasons for them are found below under the heading "Changes to the Text of Proposed Regulations." These edits did not create any substantial changes to the meaning of the text.

ECONOMIC IMPACT ASSESSMENT / ANALYSIS

DSH does not anticipate any non-discretionary costs or savings imposed on any local agency, as a result of the proposed regulations, during the current fiscal year and the two subsequent fiscal years. DSH does not anticipate any additional costs to the Department or any other state agency.

BENEFIT TO THE HEALTH AND WELFARE OF CALIFORNIA RESIDENTS, WORKER SAFETY, AND THE STATE'S ENVIRONMENT

The proposed regulations have no economic impact on the health and welfare of California residents, worker safety, or the State's environment.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose a mandate on local agencies or school districts.

CHANGES TO THE TEXT OF PROPOSED REGULATIONS

Initial modifications made to the originally proposed text are indicated as follows: added text is in underline and deleted text is in ~~strikeout~~.

Modifications made subsequent to the first 15-day comment period are indicated as follows: added text is in double underline and deleted text is in ~~double strikeout~~.

No further modifications were made subsequent to the second 15-day comment period.

Section 4710, subsection (b) is amended to:

- ~~“A court may commit an individual found judicially committed to the Department of State Hospitals as Incompetent to Stand Trial to may be placed in a jail-based competency program pursuant to Penal Code section 1370, prior to or concurrently with committing that individual to the Department of State Hospitals. If an individual found Incompetent to Stand Trial is judicially committed to the Department of State Hospitals and placed in a the jail-based competency program and that program determines that it cannot appropriately treat the individual, the individual shall be admitted to a state hospital according to the date the court committed the individual to the jail-based competency program or to the Department, whichever date is earlier to the Department.”~~

Section 4712, subsection (a) is amended to:

- ~~“The A county judicially committing an individual to the Department of State Hospitals as Incompetent to Stand Trial shall provide the following medical documentation of the individual, if available applicable, shall be provided with the individual’s commitment packet[.]”~~

Section 4712, subsection (b) is amended to:

- ~~“If the individual presents with Under any of the following conditions, the committing county shall provide medical documentation including treatment plans, if available applicable, shall be provided with the individual’s commitment packet[.]”~~

A new Section 4712, subsection (c) is to be added:

- “Prior to the individual’s transport to the state hospital, the committing county shall provide updated medical records to the state hospital under consideration for the individual’s placement.”

Section 4714, subsection (b) is amended to:

- ~~“To determine the security risk of an individual, the Department may The security risk assessment shall consider the following[.]”~~

A new Section 4716, subsection (b) is added:

- “In cases wherein the Department, upon review, discovers that a commitment packet is incomplete, it shall advise the committing county of any missing documentation within 14 calendar days of such discovery.”

Section 4716, subsection (d) is amended to:

- “Upon review of the commitment packet, the ~~Executive Medical~~ Director or designee of each state hospital under consideration for the individual’s placement has the final authority to determine whether the individual shall be placed at that particular state hospital. If the ~~Executive Medical~~ Director or designee determines that the individual is not appropriate for placement at that particular state hospital, the Department’s Director or designee shall determine the appropriate facility for the individual’s placement.”

Section 4717, subsection (e) is amended to:

- “Within ~~72 hours~~ 3 business days after the committing county’s clinician or designee contacts the Department’s medical director or designee and after receipt of sufficient documentation, the Department’s medical director or designee shall determine whether the individual’s psychiatric acuity may indicate the need for admission to a state hospital notwithstanding the date the court committed the individual to the Department. The determination of the Department’s medical director or designee shall be based only on medical documentation provided by the committing county pursuant to Section 4717, subsection (d) and, if warranted, discussions with the county’s clinician or designee.”

**SUMMARY OF AND RESPONSE TO PUBLIC COMMENTS RECEIVED DURING
(1) THE 45-DAY PUBLIC COMMENT PERIOD AND PUBLIC HEARING THEREON; (2) THE
FIRST SUPPLEMENTAL 15-DAY COMMENT PERIOD; AND (3) THE SECOND
SUPPLEMENTAL 15-DAY COMMENT PERIOD**

Commenter # 1: Deedrea Edgar, California Attorneys for Criminal Justice, Written Comments (February 27, 2017) and Oral Testimony (February 24, 2017)

COMMENT 1.1: Commenter “request[s] the Department to remove proposed regulation [section] 4710, subdivision (b) as it appears to be an inaccurate and oversimplified description of current legal authority under Penal Code Section 1370. . . . Adding this subsection referencing ‘jail based treatment’ among all the other proposed rules for hospital admissions seems to unnecessarily invoke a topic that is not uniformly addressed in the proposed rules and is not uniformly realized in all counties despite the general legal authority that such programs can exist.”

Response: DSH disagrees with the comment. This subsection’s language is clear in acknowledging that the court has the authority to commit a person to DSH, or elsewhere, as it deems appropriate, and that this regulation is limited only to the population of IST defendants committed to DSH. In light of AB 103, when a court commits an IST defendant to DSH, the Department has latitude to determine whether to place an IST defendant in a state hospital or in a jail-based competency treatment program. This subsection addresses the date of admission to a DSH hospital of IST defendants who had been treated at a jail-based competency treatment program, were not restored to competency, and subsequently required mental competence restoration at a state hospital.

COMMENT 1.2: Commenter “recommend[s] that any [] determination of risk on any patient[, pursuant to proposed Regulation rules 4714 and 4715,] be maintained for the sole purpose of hospital admissions and treatment only. . . . [Commenter is] concerned that labeling individuals with risk levels . . . can further marginalize them . . . when returned to their committing court and community.”

Response: DSH’s assessment of an IST defendant’s security risk is an administrative tool to determine the most suitable state hospital in which to place the IST defendant. Whether an IST defendant is a “low risk” or a “high risk” is not a legal designation or a legal label that the Department is making. This security risk evaluation will not be placed in a patient’s medical chart or any other file related to the patient.

Commenter # 2: Stephanie Regular, Office of the Public Defender in Contra Costa County, Written Comments (February 23, 2017) and Oral Testimony (February 24, 2017)

COMMENT 2.1: Commenter remarks that “[t]he regulations do not provide courts and counsel with an expectation that individuals will be treated fairly. Instead, these regulations ensure that all individuals will be subjected to the same due process violations of excessive delays in access to necessary mental health treatment.”

Response: DSH disagrees with the comment. The proposed regulations aim to make uniform the admissions process statewide by instituting an orderly way to queuing patients by dates of commitment and by identifying necessary documentation state hospitals require to process admission. In light of this streamlining, courts, counsel, and patients will be able to have reliable, clear expectation on how a patient will be processed for admission to a state hospital.

COMMENT 2.2: Commenter states that “[t]hese regulations will not ensure fairness nor will they decrease DSH’s exposure to further litigation unless DSH begins to admit all IST defendants within 60 days from the date of commitment”

Response: DSH disagrees with the comment. The proposed regulations aim to make uniform the admissions process statewide by instituting an orderly way to queue patients by dates of commitment and by identifying necessary documentation state hospitals require to process admission. Further, “decreas[ing] DSH’s exposure to further litigation” is beyond the scope of these proposed regulations. Ordering admission of patients by the dates of their commitment and requiring counties to furnish DSH with the same pertinent documentation for each patient ensure that each patient and committing county is treated fairly.

COMMENT 2.3: Commenter “request[s] the following amendment to the guidelines: ‘Absent good cause stated in writing by DSH and communicated to the committing court as soon as that cause is known, all judicially committed individuals will be admitted within 60 days of the commitment.’”

Response: DSH disagrees with the comment. The requested language is beyond the scope of the proposed regulations, which aim to streamline and make uniform the admissions process of those determined to be Incompetent to Stand Trial to state hospitals. The proposed regulations address, among other things, the queue of patients in the admissions process based on the date of commitment; an avenue for admissions notwithstanding the date of commitment if a patient is experiencing a psychiatrically acute situation; and records which state hospitals require to process admissions. The scope of these proposed regulations does not include a timeline or deadline for a patient’s admission.

COMMENT 2.4: Commenter states that “we have a tremendous problem in this state as to the shortage of mental health beds. However, continued attention to regulations such as what is proposed today will not solve this problem.”

Response: DSH has no substantive response. The proposed regulations do not aim to remedy the problem of the “shortage of mental health beds.” Solving that problem is beyond the scope of the proposed regulations.

COMMENT 2.5: Commenter states that the language in section 4710, subsection (b) is “ambiguous” and “seems to give DSH the sole discretion of where to place [a patient].” Commenter notes that “the court . . . [is the one who] directs commitment.”

Response: DSH disagrees with the comment. This subsection's language is clear in acknowledging that the court has the authority to commit a person to DSH or elsewhere, as it deems appropriate under Penal Code section 1370, and this regulation does not limit the court's authority with regard to available mental health facilities to which to commit IST defendants. In light of AB 103, when a court commits an IST defendant to DSH, the Department has latitude to determine whether to place an IST defendant in a state hospital or in a jail-based competency treatment program. DSH has amended this subsection to clarify the subsection aims to regulate only the date of admission to a state hospital of an IST defendant previously treated at a jail-based competency program.

Commenter # 3: Nicholas Hyde, Disability Rights California, Written Comments (February 27, 2017 and May 9, 2017)

COMMENT 3.1: Commenter notes that outpatient mental health treatment is substantially cost-effective and urges DSH to "take advantage of community placements."

Response: DSH disagrees with the comment insofar as DSH's taking advantage of outpatient treatment. Regulating outpatient or community mental health treatment is beyond the regulatory authority of DSH.

COMMENT 3.2: Commenter notes that "the criteria [in proposed section 4710, subsection (a)] do not take into account geographical location" and recommends the following language as subsection (a)(5): "The geographical proximity of the state hospital to the county in which the individual has been charged, with priority given to the nearest hospital with an available bed."

Response: DSH disagrees with the comment. Proposed section 4710 is titled "Date of Admission of Individuals Found Incompetent to Stand Trial," and subsection (a) addresses not criteria but factors which may affect the actual admission date of an IST defendant. Considering geographical proximity to the county of commitment, much less giving it priority, is beyond the scope of this regulation.

COMMENT 3.3: Commenter states that proposed section 4710, subsection (b) "does not provide for public or private treatment programs, or the community-based residential treatment program established in the California Welfare & Institutions Code § 5670.5, all of which are authorized under §1370" and that it "appears to prioritize jail-based treatment over hospital treatment. [Commenter] recommends language allowing for alternative placement that does not prioritize jail-based treatment." Commenter specifically recommends that "individuals committed and/or admitted by the courts to the Department of State Hospitals who are placed in a public or private treatment program, including a county jail treatment facility or a community based residential treatment system."

Response: DSH disagrees with the comment. The court has sole discretion, pursuant to Penal Code section 1370, to commit an IST defendant to DSH or a public or private treatment facility. In light of AB 103, when a court commits an IST defendant to DSH, the Department has latitude to determine whether to place an IST defendant in a state hospital or in a jail-based competency treatment program. The addition of Commenter's proposed language would be beyond the scope of DSH's regulatory authority. The scope of the regulations is limited only to defendants committed by the court to DSH and as such do not address the placement of defendants who may have been committed by the court to other public or private treatment facility. This particular section of the regulations address only the admission date of defendants who were previously

treated at a jail-based competency program before admission to a state hospital. The statute still allows for the patient to be placed in a public or private treatment program. This regulation specifically addresses only IST defendants who are committed to the Department and placed, as determined by DSH, in either a state hospital or a jail-based competency treatment program. The community-based program is through the conditional release program and is not addressed in this regulation.

COMMENT 3.4: Commenter notes that section 4715, subsection (a) “impl[ies] that IST patients may [] be placed [only] into a state hospital” and “recommends changing the title of §4715 to clarify that patients will not be limited to hospital placement.” Commenter suggests the following language for this subsection’s title: “Appropriate Placement of Individuals Found Incompetent to Stand Trial According to Security Assessment When Placing an Individual in a State Hospital.”

Response: DSH disagrees with the comment. The entirety of the proposed regulations addresses the admissions process to a state hospital only. Changing the title of section 4715 to include “When Placing an Individual in a State Hospital” would be redundant.

COMMENT 3.5: Commenter proposes the addition of this language to section 4715: “The facility requesting placement shall timely complete the packet to ensure placement occurs no later than 60 days from a judicial commitment order.”

Response: DSH disagrees with the comment. Commenter’s proposed language is contrary to statute. Penal Code section 1370 provides that the county of commitment shall provide a commitment packet to the DSH subsequent to the court’s commitment order. The statute charges the county to complete the commitment packet, not a state hospital.

COMMENT 3.6: Commenter recommends that DSH amend language in proposed section 4716, subsection (a) “to make explicit that a commitment packet must be completed soon enough for placement to occur within [the] 60 day timeframe [per *Loveton*].” Commenter suggests the following language: “The facility requesting placement shall timely complete the packet to ensure placement occurs no later than 60 days from a judicial commitment order.”

Response: DSH disagrees with the comment. To add the suggested language is to regulate action by a county, and this is beyond the scope of DSH’s regulatory authority. The proposed regulations address, among other things, the records which state hospitals require to process admissions. These records originate from the county of commitment. Moreover, the scope of these proposed regulations does not include a timeline for a patient’s admission.

COMMENT 3.7: Commenter asserts that the death of Los Angeles County inmate David Damits is “evidence of the inappropriate nature of placement in jail units for this vulnerable population.”

Response: DSH has no substantive response. The comment is unrelated to the substance of the proposed regulations.

COMMENT 3.8: Commenter suggests that DSH is “unnecessarily limit[s]” placement options by “exclud[ing] [community-based treatment] programs from DSH’s available options.” Commenter also notes that statute says that the community program director or designee evaluates the appropriate placement for a defendant. Moreover, Commenter recommends that DSH “allow and encourage [] placement into community programs.”

Response: DSH disagrees with the comment. As Commenter notes, the community program director evaluates the appropriate placement for a defendant and gives that recommendation to the court. The court has sole discretion, pursuant to Penal Code section 1370, to commit an IST defendant to DSH or a public or private treatment facility. In light of AB 103, when a court commits an IST defendant to DSH, the Department has latitude to determine whether to place an IST defendant in a state hospital or in a jail-based competency treatment program. DSH does not have authority to select, “allow[,] or encourage” to which other public or private program a patient is committed. The scope of the regulations is limited only to defendants committed by the court to DSH and as such do not address defendants committed by the court to other public or private treatment facility. The regulations are consistent with and not in conflict with statute.

COMMENT 3.9: Commenter references Welfare and Institutions Code section 7228 which states that a person who is not a high security risk “shall be treated as near to the patient’s community as possible, if an appropriate treatment program is available.” Commenter notes that the regulations do not “encourage placement near a patient’s own community.” Further, Commenter submits that “[p]lacement in settings other than a state hospital is what the plain language of [section] 7228 provides.”

Response: DSH disagrees with the comment. As Commenter notes, proximity to community is by statute a consideration for placement. If a patient is not a high security risk, DSH treats the patient as near to his or her community as possible, if there is an appropriate treatment program available there. In compliance with the statute, DSH places each patient at the most appropriate facility. The statute does not require DSH to “encourage” placement near the patient’s own community but only to so place if there is an appropriate treatment program available there. Moreover, Commenter mischaracterizes section 7228. The statute begins, “Prior to admission, the State Department of State Hospitals shall evaluate each patient committed pursuant to Section 1026 or 1370 of the Penal Code to determine the placement of the patient to the appropriate state hospital.” This statute’s scope is limited only to placements to a state hospital, contrary to what Commenter claims the “plain language of [section] 7228 provides,” which is to place patients “in settings other than a state hospital.” The regulations are consistent with and not in conflict with statute.

COMMENT 3.10: Commenter recommends that the regulations “make clear that placement must occur within [60 days]” pursuant to the *In Re Loveton* decision.

Response: DSH disagrees with the comment. The purpose of these regulations is to clarify the treatment admissions process for defendants found incompetent to stand trial and who have been committed by the court to DSH for such treatment. The admissions process set forth in these regulations focuses on the logistics and order of admissions, such as the documentation that is necessary and clinical factors which may affect a defendant’s actual admission date. The proposed regulations address the order of admission when there are competing factors affecting the admission date.

Commenter # 4: Paul Sheppard, Humboldt County Department of Health & Human Services, Written Comment (June 7, 2017)

COMMENT 4.1: Commenter suggests a change to section 4713 to reflect that the triage nurse notify the county of commitment of any missing or incomplete medical documentation in the patient’s commitment packet within five days of the county’s submission of the packet.

Response: DSH has accommodated this comment by adding a new subsection (b) in section 4716 which states that DSH shall inform the county of commitment of any missing documentation in a patient's commitment packet within 14 days of discovery. DSH believes that 14 days is a more feasible amount of time than the five days suggested by Commenter.

COMMENT 4.2: Commenter suggests that a new subsection (c) in section 4717 be added to provide for a penalty in the event that DSH does not admit an IST defendant within 60 days; the penalty would be a daily rate at the county jail level, for each day beyond 60 that the IST defendant remains at the county jail, payable to the county of commitment.

Response: DSH disagrees with the comment. Paying the county of commitment for each day beyond 60 that the IST defendant remains at the county jail finds no support in statute and is beyond the scope of the regulatory authority of DSH.

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD AND THE TWO SUPPLEMENTAL 15-DAY COMMENT PERIODS THE TEXT WAS MADE AVAILABLE TO THE PUBLIC

The original text was made available for a 45-day public comment period from January 13, 2017 through February 27, 2017. On February 24, 2017, DSH held a public hearing on the original text and received comments both in writing and at the hearing. The comments at the hearing were duplicative and reflective of the comments submitted by the same persons in writing. In light of comments received, DSH modified the text.

The modified text was made available for a 15-day public comment period from April 21, 2017 through May 9, 2017. DSH received comments, as stated above, on the modified text and made additional modifications.

The text with the additional modifications was made available for a second 15-day comment period from August 14, 2017 through August 29, 2017. DSH did not receive comments during the second 15-day comment period.

ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

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

ALTERNATIVES DETERMINATION

DSH has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The amendments adopted by DSH are the only regulatory provisions identified by DSH that accomplish the goal of streamlining the admission of IST defendants to a state hospital by ensuring that courts and counties understand that all IST defendants are subject to the same

factors and considerations which may affect the actual date of admission to a state hospital. Except as set forth and discussed in the summary of and responses to comments, no other alternatives have been proposed or otherwise brought to the attention of DSH.

INCORPORATION BY REFERENCE

The Department has determined that it would be cumbersome, unduly expensive, or otherwise impractical to publish the DSM-5 (2013) in the California Code of Regulations.

The incorporated document is readily available online at: <http://dsm.psychiatryonline.org/doi/book/10.1176/appi.books.9780890425596>, and was made available in the context of this rulemaking in the manner specified in Government Code section 11346.5, subdivision (b).

AVAILABILITY OF FINAL STATEMENT OF REASONS

Pursuant to Government Code section 11346.5, subdivision (a)(19), DSH has prepared and will make available copies of the Final Statement of Reasons (FSOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains all information on which the proposal is based, is available online at <http://www.dsh.ca.gov/Publications/Regulations.aspx>, and copies are available upon request to DSH's contact person:

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In the event the contact person is unavailable, requests for copies should be directed to the following back-up person:

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Electronic copies of the rulemaking file documents may also be requested via email: DSH.Regulations@dsh.ca.gov.