

## 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

On July 14, 2014, the Court of Appeal of the State of California, Second Appellate District, *In re Greenshields*, decided that persons who are found not guilty by reason of insanity (NGI) have the same constitutional right as Mentally Disordered Offenders (MDOs) and Sexually Violent Predators (SVPs) to refuse antipsychotic medication.

A defendant found to be NGI requires a finding beyond a reasonable doubt that at the time of the offense, he or she had a mental disorder that rendered them dangerous to others. A defendant found to be NGI is presumed to be insane during their confinement. Like the MDOs and the SVPs in prior court cases, NGIs have not yet been adjudicated to be incompetent to refuse antipsychotic medication or dangerous within the meaning of Welfare and Institutions Code Section 5300.

The court directed DSH to refrain from administering antipsychotic medication to Mr. Greenshields against his will in a nonemergency situation unless a trial court determines he is (1) incompetent to refuse the treatment, or (2) a danger to others within the meaning of Welfare and Institutions Code Section 5300, i.e., whether he committed the types of violent or threatening acts specified in Section 5300 within the year prior to his recommitment.

This court decision sets precedence for the involuntary medication of the 1,371 NGI patients currently under the care and treatment of DSH. By implication of the commitment statutes, Penal Code section 1026.2, an NGI is presumed to be a danger to others. In order to preserve public safety and protect the other 7,000 patients and 10,000 employees, DSH is filing this emergency regulatory action to amend Section 4210 – Interim Involuntary Medication Hearing Procedures Regarding Mentally Disordered Offenders and Sexually Violent Predators, to include the NGI population.

## Benefits of the Proposed Regulations

These proposed emergency regulations provide the same hearing processes and procedures afforded to NGIs as are afforded to MDO and SVP patients. Efficacy of most antipsychotic medications requires long term administration for optimal benefit. Emergency medication, as allowed by Welfare and Institutions Code Section 5008(m), must be ceased once the emergent situation ends. To limit medication administration to only emergency situations would hinder successful long-term treatment. The hearing panels in the proposed emergency regulations provide due process to patients, while providing the State Hospitals with a means to consistently medicate a patient who has shown that they pose a danger to others or lack capacity to make decisions regarding antipsychotic medications.

## Affect of the Proposed Regulations

- (1) These proposed regulations are consistent with existing regulations pertaining to MDO and SVP patients, as well as statutes pertaining to patients admitted under Incompetent to Stand Trial (IST) (Penal Code 1370(a)(2)(B) laws.
- (2) There are no federal regulations previously adopted or amended on this subject.

## 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.”

(Government Code Section 11342.545) Any disruption or prevention of DSH's ability to appropriately treat violent NGI patients through necessary involuntary medication will create serious harm to public peace, health, safety, and general welfare to the other 7,000 patients and 10,000 employees. The failure to treat psychotic illness with medication causes worsening of the disease and can defeat overall treatment goals for a patient. Appropriate regulations must be enacted immediately to ensure DSH has the continued ability to provide appropriate involuntary antipsychotic medication to violent NGI patients in order to protect public peace, health, safety and general welfare.

## C. Authority and Reference Citations

Authority: Welfare and Institutions Code Sections 4005.1, 4027, and 4101.

References: *In Re Qawi* (2004) 32 Cal.4th 1; *In Re Calhoun* (2004) 121 Cal.App.4th 1315; *In Re Greenshields* (2014) 227 Cal. App.4th 1284; *Washington v. Harper* (1990) 494 U.S. 201; Sections 1026 and 2962, Penal Code; and Sections 5300 and 6600, Welfare and Institutions Code.

## D. Informative Digest and Policy Statement Overview

### Policy Statement

The objective of the proposed action is to implement, interpret, or make specific Penal Code Section 1026 and Welfare and Institutions Code Section 5300 by clarifying in regulations the criteria, terms and provisions of the involuntary medication hearing process.

### Existing Law

Penal Code Section 1026(a) provides that a person found to be insane at the time the offense was committed shall be “confined in a state hospital for the care and treatment of the mentally disordered or any other appropriate public or private treatment facility approved by the community director, or ...on outpatient status, unless the court finds the defendant’s sanity is fully recovered.”

Penal Code Section 1026.5 authorizes the court to extend the term of commitment for treatment for NGI’s beyond “the longest term of imprisonment which could have been imposed for the offense” (subdivision (a)(1)) if “by reason of a mental disease, defect, or disorder [the NGI defendant] represents a substantial danger of physical harm to others” (subdivision (b)(1)).

As a result of prior court decisions, CCR Title 9, Section 4210, was adopted to allow State Hospitals to conduct administrative hearings on hospital grounds to determine the necessity to administer non-emergency interim involuntary antipsychotic medication to MDOs admitted under Penal Code Section 2962, and SVPs admitted under Welfare and Institutions Code Section 6600. The appropriate court hearings as required by applicable law must be requested as soon as possible by the State Hospitals concurrent with, or subsequent to, the administrative hearing.

## E. Summary of Proposed New Regulations

### Amend Section 4210

This regulatory action would amend Title 9, Division 1, Chapter 16, Section 4210 to allow DSH to conduct administrative hearings on hospital grounds to determine the necessity to administer non-emergency inter involuntary antipsychotic medication to patients admitted under a not guilty by reason of insanity please as currently described in Penal Code Section 1026.

## F. Technical, Theoretical, and Empirical Study or Report

None

## G. Determinations

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

Mandates on Local Agencies or School Districts: County courts are State funded and DSH will be voluntarily reimbursing the counties for any costs associated with this regulation, so a mandate does not exist.

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

Non-discretionary Costs or Savings Imposed on Local Agencies: 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 a cost of \$3,176 to the Department in the current State Fiscal Year.

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

Costs or Savings to Individuals or Businesses: The Department 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

None.