



# CALIFORNIA DEPARTMENT OF State Hospitals

## **NOTICE OF READOPTION OF EMERGENCY AMENDMENTS AND FINDING OF EMERGENCY** **Emergency Regulations for Patient Electronic Property**

### **REQUEST FOR RE-ADOPTION OF EMERGENCY REGULATION**

The Department of State Hospitals (Department/DSH) finds that an emergency continues to exist and that the emergency regulations (OAL Matter Number: 2018-0102-02E), California Code of Regulations, title 9, sections 4350 (section 4350), were originally approved by the Office of Administrative Law (OAL) and became effective January 12, 2018. Since the emergency regulations are set to expire on July 12, 2018, it is necessary to re-adopt the existing emergency regulations for an additional 90-day period 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, and to allow for DSH to finalize the permanent regulations and submit them to OAL. The emergency concerns remain unchanged from the original adoption of the emergency amendments.

### **NOTICE AND INTRODUCTION**

NOTICE IS HEREBY GIVEN that the Department proposes to amend the regulations on an emergency basis as described below. Government Code section 11346.2, subdivision (a)(2), requires that, at least five working days prior to the submission of the proposed emergency action to the OAL, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

In addition to the five-day comment period for the emergency filing indicated above, there will be the routine 45-day public comment period when these regulations are permanently amended via the regular rulemaking process which will be completed within 90 days of OAL's approval of the re-adoption of this emergency package.

## **WRITTEN COMMENT PERIOD**

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed emergency action to OAL. Comments may also be submitted to OAL by facsimile (FAX) at 916-323-6826. The Department plans to file the emergency rulemaking package with OAL five working days from the date of this notice. If you would like to make comments on the Finding of Emergency or the proposed emergency regulations, the comments must be received by both the Department and OAL within five calendar days of the Department's filing of the emergency regulations with OAL. Please check the OAL website at [www.oal.ca.gov](http://www.oal.ca.gov) to find out when the emergency regulation is filed with OAL.

Comments should be sent simultaneously to:

Department of State Hospitals  
**RE: Emergency- Patient Electronic Property**  
Attn: Amy Whiting  
1600 9<sup>th</sup> Street, Rm 410  
Sacramento, CA 95814

and

Office of Administrative Law  
**RE: Emergency- Patient Electronic Property**  
Reference Attorney  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

## **FINDING OF EMERGENCY**

### **Readopting Emergency Regulations are Necessary**

#### **FACTS**

In 2009, DSH (known as the Department of Mental Health at that time) filed emergency regulations to adopt California Code of Regulations (CCR) section 4350. In 2010, these regulations became permanent. At the time, DSH's state hospitals reported increasing numbers of patients possessing contraband wireless communication devices and using them to import illegal pornographic materials, facilitate contraband exchanges, and communicate with external and internal individuals for victimization purposes. DSH adopted the 2010 regulations to help eliminate these significant safety and security risks.

In response to multiple DSH-Coalinga patients filing an injunction against these regulations, in 2010 DSH-Coalinga imposed a moratorium on enforcement of the regulation for patients currently possessing prohibited items, provided that the devices

could not access the internet pursuant to CCR section 891 and DSH could search the item at any time for illegal or illicit items. DSH-Coalinga's moratorium remained in place until January 2018, when DSH adopted the emergency regulations for this proposed amendment. The remaining hospitals incorporated standards in compliance with the 2010 regulation.

In the years since DSH adopted the 2010 regulation, patients continuously challenged the regulation. During the same time, technology significantly changed, as did the ability for patients to override electronic device safeguards. As a result, DSH assessed how it could better control data storage devices that were not addressed in the original regulation. Specifically, the capacity of digital memory devices increased from an average of 850MB to a terabyte or even five terabytes. Without limit, patients obtained massive amounts of data storage capability, which is unnecessary due to their confinement in an inpatient facility. These changes in the technology, the data capacity, and the patients use of the devices made it impossible to effectively enforce the current CCR section 4350 and the moratorium. Gaming devices also became increasingly advanced, by including the ability to play outside media, burn discs, and access the internet. DSH discovered that these gaming devices and memory devices could store software that would override features designed to deny internet access. At the same time, patients' ability to purchase televisions or non-"smart" devices became more difficult and expensive.

Digital data storage and internet communication obtained by downloaded software permits patients to access, exchange, and/or profit from illegal material and communications, including child pornography, finding and harassing old victims, finding and creating new victims, accessing visuals of the hospitals for escape or other illicit purposes, obtaining information with which to harass or victimize staff, etc. With recent court rulings supporting the restriction of electronic devices and recent arrests demonstrating actual dangers from access to such devices, DSH's readoption of emergency regulations is well supported. If DSH is unable to address these issues it will endanger the patients, staff, and the public by permitting patients to access the internet where they may coordinate harmful activities; burn, download, and exchange illegal materials; and revictimize the children in the pornographic images.

DSH has determined that readoption of these amendments to Section 4350, continues to be necessary to protect the public, specifically victims of child pornography. Child pornography is a unique crime since the victim is revictimized each time an image of the victim is viewed. In the *United States v. Kearny*, (1st Cir. 2012) 672 F.3d 81 [2012 U.S. App. LEXIS 4146, 2012 WL 639168], the Court summarized how children are revictimized each time child pornography is viewed:

Congress has also since repeatedly emphasized, in legislation amending the laws governing child pornography, the continuing harm the distribution and possession of child pornography inflicts. See Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, Tit. I, § 102(3), 122 Stat. 4001, 4001 ("Child pornography is a

permanent record of a child's abuse and the distribution of child pornography images revictimizes the child each time the image is viewed."); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 ("Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1)(2), 110 Stat. 3009, 3009-26 ("[C]hild pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years . . .").

DSH seeks to continue to prevent this revictimization through the readoption of emergency regulations while regular rulemaking proceeds.

In addition to preventing minors from being re-victimized, these emergency regulations are necessary to protect staff and patient safety and the therapeutic environment of DSH's secured inpatient facilities. In *Brown v. Phillips*, 2015, 801 F.3d 849, the Seventh Circuit concurred with the restriction of gaming devices believed to be disabled from internet access as evidence was presented that the devices could be modified so that the internet could still be accessed. In 2016, the Federal District Court in *Allen v. King*, U.S. Dist. LEXIS 108748, accepted DSH's evidence regarding the ability to use electronic devices to access the internet to access victims, create new victims, receive maps of the hospital for escape plans, and track staff members and their families.

Readoption of these emergency regulations would continue to address patients' possession, viewing, and distribution of child pornography and other illicit materials by preventing digital memory storage, other means of memory storage, specified digital media players, and digital media burners from patients' personal possession. DSH will permit commercially produced CDs and DVDs and players without access to the internet under these readopted amendments. Finally, the option for hospitals to provide digital media on a supervised basis, such as a check-out or temporary basis, would address patients' preference for maintaining appropriate materials in digital format, including legal research and therapeutic writings.

## EVIDENCE

### I. Nexus Between DSH's Patient Population and Electronic Restrictions

Pursuant to Welfare and Institutions code section 6600, et. seq., sexually violent predators must have a mental disorder, and many are diagnosed pedophiles. Courts have recognized a strong nexus between pedophilia and child pornography. Courts and the United State Congress have found that the possession of child pornography was evidence of defendant's intent to molest young boys; that child pornography on defendant's computer was relevant to prove he intended to meet minor for sex because of the direct connection between child pornography and pedophilia; that child

pornography has a connection to an abnormal sexual interest in children and pedophilia; that common sense would indicate that a person who is sexually interested in children is likely to also be inclined, or predisposed, to order and receive child pornography; and that the difference between prior sexual assaults of children and current prosecution for possessing child pornography are not as great as they might seem at first glance because the child pornographer, like the child rapist, displays a sexual interest in children.

Therefore, DSH must maintain security measures to eliminate the downloading and dissemination of child pornography. The proposed regulatory amendment is necessary to accomplish these security measures.

## II. Digital Memory Storage Devices

Digital memory storage devices, even as small as 1GB, have the capability to store downloadable software that may be used to override a disabled device and access the internet, as well as allow copying of materials through other electronic devices. Electronic devices such as “Raspberry Pi,” which is a mini-computer with exposed components; modern gaming devices; and even smart TVs permit access to the internet on internet-capable devices thought to be disabled from the internet. Internet access software and modifications violates both the current CCR section 4350 and CCR, title 9, section 891, which prohibits access to the internet for all non-LPS patients. This access to the internet provides full access to illegal materials, aerial views of the DSH facilities, communication with victims, communication to create additional victims, and the ability to download illicit images for sale or sharing with other patients. However, these capabilities are not detectable as standard room searches for contraband, because these capabilities are in the software, not hardware. Moreover, even if all internet access was disabled, digital memory storage devices permit the dissemination of child porn and other illicit material through transferring or sharing the stored data.

Penal Code section 1546.1, adopted in 2015, mandates that a search of electronic devices is not permitted without permission by the possessor or a search warrant, further frustrating public safety enforcement. Internet access endangers the public, the staff, and patients, as well as interferes with treatment by creating exposures, triggers, and temptations that are intended to be controlled in a secured inpatient mental health setting. Therefore, DSH must prohibit patients from personally possessing digital memory devices.

## III. Gaming Devices

Gaming devices with the ability to access the internet are currently prohibited, but gaming devices with the internet disabled are permitted. However, many recent gaming devices contain accessible data storage capabilities, permitting patients to download illegal material and software into the device which prevents the illegal material from being discovered in a standard room search. Therefore, a previously acceptable device under the current CCR section 4350, becomes contraband, but the hospital police must

have enough probable cause to issue a search warrant for the device. These gaming devices also permit non-proprietary (owned by another vendor other than the device) CDs and DVDs, which are enabled with software that can download internet access as well as transfer and distribute images. Under these regulatory amendments, patients would have the ability to purchase devices, such as gaming devices from vendors such as Walkenhorst, that provide controlled downloads of games and movies issued from the vendor, or provide for the tablet to be sent to the vendor for download of the purchased game or movie. This provides controlled access to games and movies through an approved vendor to prevent illegal materials or exchanges to occur. Child pornography is stored digitally, rather than in a paper format. As such, current enforcement of the prohibition on possession of child pornography is nearly impossible without the proposed limitations on digital formats. Therefore, these amendments would clarify the current regulation to specify that patients are prohibited from possessing gaming devices with accessible data and the ability to play non-proprietary inserts.

#### IV. CD and DVD Burners

Burning DVDs and CDs permits patients to distribute illegal images and communication. Patients also burn and sell or exchange legal movies and music for profit. In addition to being used to store illegal and illicit material, these activities are in violation of copyright laws, including United States Code, title 17, section 501, et seq. Because these pirated materials are also stored digitally, rather than physically, it makes enforcement impossible. DSH does not have the staff needed to obtain search warrants and then review and re-review blank disks or disks with printed labels to determine if the disk contains appropriate material, such as patient documentation, or illegal or illicit material, and whether any additional data has been added to the disk since it was last searched. Therefore, DSH seeks to prohibit patients from possessing CD/DVD burners and blank CD/DVDs. At this time, DSH will permit patients to personally own CDs and DVDs provided by a manufacturer.

#### V. Litigation

Section 4350, has been continuously litigated since its adoption. DSH has successfully defended the regulation but is awaiting a precedential ruling from the Ninth Circuit. This year, the Federal District Court twice upheld that there is no constitutionally protected right to possess electronic devices, and that restrictions on electronic devices for civilly committed persons is appropriate to meet a legitimate government purpose.

On May 19, 2016, in *Telucci v Withrow*, (E.D. Cal. 2016) U.S. District LEXIS 66334, the United States District Court for the Eastern District of California held that there is no constitutional right to possess internet-accessible devices or electronic devices. Then on October 16, 2016, the same District Court in *Allen v. King*, (E.D. Cal. 2016) U.S. Dist. LEXIS 108748, (the hearing of the above remanded Ninth Circuit case), granted Defendants' motion to dismiss the claims challenging CCR section 4350. The Court found that that there is no Constitutional right to possess and use personal computers

and electronic devices, that the regulation's restrictions are not punitive, and that they serve a legitimate government purpose. In *Allen v. King*, the Court stated:

To this Court's knowledge, no court has ever held that a civil detainee such as an SVP has a constitutionally protected right to possess and use personal laptops and other similar electronic devices. See *Telucci v. Withrow*, 2016 WL 2930629 at 5 (E.D. Cal May 19, 2016 (unpub.) (listing the following cases for the same proposition: see *Endsley v. Luna*, 2008 WL 3890382 at 3 (C.D.Cal. May 23, 2008) (unpub.) (citing *Sands v. Lewis*, 886 F.2d 1166, 1172 (9th Cir.1989)) (prisoners do not have a constitutional right to have memory typewriters in cells), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343, 350-55 (1996); *Taylor v. Coughlin*, 29 F.3d 39, 40 (2nd Cir.1994) ("If prison inmates do not enjoy a constitutional right to typewriters as implements of access to the courts, it would be illogical for us to rule that there is a constitutional right to typewriters of a specific memory capacity."); *State ex rel. Anstey v. Davis*, 203 W.Va. 538, 545, 509 S.E.2d 579 (1998) ("We are persuaded by the uniformity of opinion on this issue and therefore hold that prison inmates have no constitutional right to possess personal computers in their cells."); *Endsley v. Luna*, 2009 WL 3806266 (C.D.Cal. Nov.12, 2009) (unpub.) at 16 (citing *Fogle v. Blake*, 227 Fed. Appx. 542, 542 (8th Cir.2007)) (finding civil committee failed to state a constitutional claim regarding denial of a computer or typewriter); *Spicer v. Richards*, 2008 WL 3540182 at 7 (W.D.Wash. Aug.11, 2008) (unpub.) (finding no authority to show that SVP had a 14th Amendment right to possess a "cell phone, pager, computer, [or] color ink cartridge printer."); *Carmony v. County of Sacramento*, 2008 WL 435343 at 18 (E.D.Cal. Feb.14, 2008) (finding civil detainee had no "free-standing First Amendment right to access computers and/or the internet."); *White v. Monahan*, 2009 WL 499121 at 2 (C.D. Ill. Feb 24, 2009) (acknowledging that while civil detainees enjoy more liberties than convicted prisoners, "[t]he inability to possess a computer does not implicate a property interest that might be protected by procedural due process protections or an interest that might be classified as a substantive due process interest.")).

While civilly committed persons have a substantive due process right to be free from restrictions that amount to punishment, (*U.S. v. Salerno*, 481 U.S. 739, 746–47 (1987); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)) "[t]here is no constitutional infringement, however, if restrictions are but an incident of some other legitimate government purpose." (*Valdez v. Rosenbaum*, (9th Cir. 2002) 302 F.3d 1039, 1045.)

The *Allen* Court's findings of fact support the constitutionality of DSH's regulatory amendments, including the facts that providing internet access to patients permits communicating for the purposes of victimization with external and internal persons and accessing material that endangers the facilities in addition to child pornography. The Court found, "DSH-Coalinga's Sgt. DuVall's declaration provides that at least 200

individuals at DSH-Coalinga have been involved with the possession or transmission of child pornography and there are typically 2–3 new child pornography cases reported each month which require investigation. These include cases where patients have solicited child pornography via text messages, internet searches, and downloads from torrent sites or peer to peer file sharing. The financial costs associated with investigating child pornography cases are substantial, requiring labor-intensive forensic examinations of cell phones, memory cards, hard drives or laptops to detect child pornography.” The Court found that even patients admitted there is a “porn epidemic” at DSH-Coalinga.

On December 19, 2017, the California Court of Appeal, Fifth District also affirmed the constitutionality of DSH-Coalinga’s confiscation of items that were contraband and were not permitted pursuant to CCR section 4350 and DSH-Coalinga’s contraband list.<sup>1</sup> The items in question in that case included a laptop and storage devices. The court also stated that Mr. Robinson was not entitled to the return of his confiscated property. This case was appealed to the California Supreme Court, who declined to review the matter. The Appellate Court’s ruling stands.

### **EVIDENCE FOR CONTINUED EMERGENCY**

Since the adoption of the emergency regulations, the dangers of possession and transfer of child pornography and the volume of electronic data have not diminished. DSH continues to need these regulatory amendments in place until they can be formally adopted through the regular rulemaking process.

As soon as the emergency amendments were adopted, patients were granted an amnesty program to turn in electronic devices without risk of prosecution. Patients at a single hospital voluntarily turned in 1500-2000 pounds of material, about 60% of which consisted of DVDs, CDs, and USB devices. After a period to turn in devices not compliant with the current regulation or the emergency amendments without risk of prosecution, DSH-Coalinga staff conducted a hospital-wide search for additional contraband. During the search staff found, and continue to find, digital memory devices hidden throughout the hospital. At one point, a staff member noticed a piece of the floor by the wall in a day room was not flat. Staff discovered a hollowed-out section of the wall containing approximately 50 memory devices. If DSH-Coalinga staff can determine who owns these devices, they will be searched for child pornography for which patients could potentially be prosecuted.

Patients were also offered the opportunity to submit electronic devices for search and for transfer of legal and treatment materials to a state-issued USB device. At DSH-Coalinga, 160 out of a population of 1300 patients submitted 196 devices for this purpose, consisting of 3.39 terabytes of information. DSH hospital police completed the search of these items and found that three of the devices contained deleted videos and images identified as child pornography.

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<sup>1</sup> *In re Jackie Robinson* (2017) 19 Cal.App.5th 247.



DSH hospital police also discovered that some of the submitted devices contained child erotica and videos of boys that did not meet the legal definition of child pornography. Child pornography contains images of underage persons conducting or simulating sexual acts or the exposure of genitalia. Child erotica are sexual images of children that do not specifically contain either of these criteria. This includes children in sexual or minimal clothing, in sexual poses, or in sadist/masochistic poses, such as being tied up or chained.

Finally, during the implementation of the emergency regulations, hospital police discovered a breach in a device designed for confined individuals. This breach permitted the storage of child pornography. This issue does not appear to affect all devices for confined individuals but created another concern for DSH to address. DSH is in communications with the manufacturer to determine if the breach can be prevented or corrected or if the device must be contraband.

### **SUBSTANTIAL PROGRESS TO ADOPT THE AMENDMENTS THROUGH REGULAR RULEMAKING**

DSH anticipates on submitting the notice of regular rulemaking to OAL in June 2018, to formally adopt the regulations. The delay in initiating the regular rulemaking was due to the discovery of complications implementing the emergency regulations. First, the intent of the regulations was always to prevent patient-accessible digital data in electronic devices. However, the term “patient-accessible” was not specified. Since almost all electronic devices require some digital data capability to function, this effectively would have prohibited devices DSH intended to permit. Further, tablets were not delineated along with computers and motherboards, which caused some confusion for patients and staff. Finally, DSH always intended to permit devices designed for confined individuals to meet that necessary balance of allowing electronic devices and enforcing security. Those particular devices were designed to comply with the internet and data-storage accessibility of subsection (a), not override them. Unfortunately, shortly after the adoption of the emergency regulations, CDCR and then DSH discovered a particular type of device for confined individuals was breached and permitted the device to store child pornography.

Therefore, DSH needed to confer with all of the hospitals to discuss how the regulations could better address these issues, and the regulatory text was subsequently internally reviewed prior to submission to OAL to begin the regulatory process.

### **CONSEQUENCES OF FAILING TO ADDRESS THE SITUATION THROUGH EMERGENCY REGULATIONS**

Child pornography and other illegal materials exist within the hospitals, but without maintenance of the emergency amendments to current regulation, DSH cannot continue to address and eliminate this problem. DSH is concerned that permitting unsupervised digital storage, and transfer feeds illegal activities. While Welfare and Institutions Code section 7295, permits items to be listed as contraband, the items are subject to review

and objection every six months, adding to excessive and unnecessary workloads. Moreover, Welfare and Institutions Code section 7295, is for facility protection, and the current and amended regulation are further reaching than that and necessitate a codified process. Failure to readopt these regulations will permit illegal activities to resume. Additionally, children already victimized by involvement in sexual acts and poses are revictimized every time their images are viewed instead of blocked. (*U.S. v. Kearney* (1<sup>st</sup> Cir. 2012) 672 F.3d 81.)

## **AUTHORITY AND REFERENCE**

DSH is proposing to readopt emergency regulations in section 4350, title 9, California Code of Regulations under the authority provided in sections 4005.1, 4011, 4027 and 4101 of the Welfare and Institutions Code. DSH makes reference to specific statutory provisions in order to implement, interpret, or make specific the emergency changes to California Code of Regulations, title 9, section 4350 in sections 4005.1, 4027, and 7295 of the Welfare and Institutions Code.

## **EFFECT OF THE PROPOSED EMERGENCY REGULATIONS**

### Existing Law

Welfare and Institutions Code section 4005.1 provides that DSH may adopt and enforce rules and regulations necessary to carry out their respective duties.

Welfare and Institutions Code section 4011 provides that DSH shall have jurisdiction over the execution of the laws relating to care and treatment of persons with mental health disorders under the custody of DSH.

Welfare and Institutions Code section 4027, provides that DSH may adopt regulations concerning patients' rights and related procedures applicable to the inpatient treatment of mentally ill offenders and mentally disordered sex offenders.

Welfare and Institutions Code section 4101, provides that unless specifically authorized by law, all institutions under the jurisdiction of DSH shall be governed by uniform rule and regulation of DSH.

Welfare and Institutions Code section 4109, provides that DSH has general control and direction of the property and concerns of each state hospital. DSH shall take care of the interests of the hospital according to law, establish bylaws, rules, and regulations as deemed necessary for its internal government, discipline, and management, and maintain effective inspection of the hospital.

Welfare and Institutions Code section 7295 provides that DSH shall develop a list of items deemed contraband at every state hospital subject to review by the Contraband Committee and Director of State Hospitals every six months. This section defines "contraband" as defined as materials, articles, or goods that a patient is prohibited from having in his or her

possession because the materials, articles, or goods present a risk to the safety and security of the facility. This section provides that inclusion on a contraband list does not necessitate regulations but does not address harm to public or ensure a permanent solution.

California Code of Regulations, title 9, section 891 provides that patients not committed pursuant to the Laterman-Petris-Short Act (LPS) shall not have access to the internet.

### Policy Statement

The objective of the proposed amendments is to implement, interpret, or make specific Welfare and Institutions Code sections 4005.1, 4027, 4101, and 7295 by expanding prohibitions against DSH patient possession of digital memory devices and certain electronic devices. The regulation would specify what items patients are prohibited from possessing. The regulation will provide for uniform prohibitions statewide, at each DSH state hospital for the welfare of the public, DSH staff, and every DSH patient.

### Benefits of the Proposed Readoption of Emergency Regulations

By readopting the amendments to Section 4350, DSH can better serve the public by enforcing child pornography prohibitions, better serve DSH staff and patients by minimizing threats to safety and security, and better serve the patients of DSH by providing a more therapeutic inpatient environment by better controlling triggers, stimulants, and temptations.

### **COMPATABILITY WITH EXISTING REGULATIONS**

The proposed emergency amendments are compatible with current regulations. The proposed emergency amendments compliment California Code of Regulations, title 9, section 981 by addressing not only electronic devices that access the internet, but devices that store software to access the internet.

### **COMPATABILITY WITH FEDERAL LAW**

The proposed emergency amendments comply with federal law, including the following:

United States Code, title 18, section 2251, et seq. prohibits sexual images of children and other forms of the exploitation of children.

United States Code, title 17, section 501, et seq. prohibits the infringement of copyright materials, including movies and music.

### Summary of Proposed Amendments

DSH incorporates the Summary of Proposed Amendments of the original Finding of Emergency. The proposed amendments to adopted emergency regulations to California Code of Regulations, title 9, section 4350, are summarized as follows:

- Subsection (a), paragraph (1), subparagraph (A): This subparagraph is amended to include tablets among the delineated examples of devices that are prohibited if they have the capability to connect to wired or wireless communications.
- Subsection (a), paragraph (4): This paragraph would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by prohibiting any items capable of memory storage from patient personal possession. The amended text adds “patient-accessible” to clarify that digital memory that allows the device to function is appropriate but patient-accessible digital memory is prohibited. This provision is necessary to fully address the issue of illicit software that permits access to the internet and the issue of illicit materials stored, viewed and transferred.
- Subsection (b): Subsection (b) would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by delineating electronic items permitted for patient access. This subsection and subsequent paragraphs are amended to reference that the permitted items must not conflict with subsection (a), and if an authorized device is found to be breached, either the individual’s device or the type of device can be prohibited as violating subsection (a).

Technical, Theoretical, and Empirical Study or Report

None.

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: DSH anticipates there will be no fiscal impact to Local Agencies. This proposed regulation would only affect the state hospitals and the patients. The local government would not have an additional role on the enforcement of the regulation.

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 to Local Agencies.

Non-discretionary Costs or Savings Imposed on Local Agencies: DSH anticipates there will be no fiscal impact to Local Agencies. This proposed regulation would only affect the state hospitals and the patients. The local government would not have an additional role on the enforcement of the regulation.

Costs or Savings to Any State Agency: DSH anticipates increased costs of hospital security, including overtime, while the regulation is implemented and legal costs to respond to litigation in response to the regulation. Further, DSH anticipates costs of USB devices and other equipment to be used on a supervised check-out basis for patients. DSH may continue to find more illegal content in the existing electronic devices of the patients, completing this search will take more staff time and may require more storage space at the facility to properly search these items. After the regulations have been promulgated, the Department would incur savings as it would be easier to enforce the contraband policy within the facilities and would decrease the need for searches of illegal activities.

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**

None.

### **CONSIDERATION OF ALTERNATIVES**

In accordance with Government Code section 11346.5, subdivision (a)(13), DSH has determined that no reasonable alternative which it will consider or that will otherwise be identified and brought to its attention will be more effective in carrying out the purpose for which this action is proposed or will be as effective and less burdensome to affect private persons than the proposed action described in this Notice.

DSH invites interested persons to present statements or arguments with respect to alternatives to the proposed regulation amendment a during the written comment period.

### **AVAILABILITY OF FINDING OF EMERGENCY, TEXT OF PROPOSED EMERGENCY REGULATIONS, AND RULEMAKING FILE**

The rulemaking file is available for inspection and copying at the Department of State Hospitals, Regulations Unit, 1600 9<sup>th</sup> Street, Room 410, Sacramento, CA 95814. As of the date this Notice is published, the rulemaking file consists of a copy of the exact language of the proposed regulations and the Finding of Emergency. These documents may also be viewed and downloaded from DSH's website at [www.dsh.ca.gov](http://www.dsh.ca.gov)