



# CALIFORNIA DEPARTMENT OF State Hospitals

## INITIAL STATEMENT OF REASONS Proposed Amendments to the Regulations for Patient Electronic Property

### INTRODUCTION:

#### The Department of State Hospitals

The Department of State Hospitals (DSH) houses and treats forensic and civilly committed persons with mental disorders, including sexually violent predators (SVPs)<sup>1</sup>, persons found not guilty by reason of insanity (NGIs)<sup>2</sup>, persons found incompetent to stand trial (ISTs)<sup>3</sup>, and mentally disordered offenders (MDOs)<sup>4</sup>. Additionally, DSH houses and treats California Department of Corrections and Rehabilitation (CDCR) inmate patients in need of inpatient mental health treatment, and Lanterman-Petris-Short (LPS) patients for the counties of California. These patients are committed to DSH due to the danger they pose to the public and require treatment in secure facilities due to their mental disorder.<sup>5</sup>

To properly treat and provide security for these patients, each hospital is a secured facility with a hospital police department. DSH's hospital police department employs approximately 700 peace officers, 30 dispatchers, and 40 investigators. DSH is mandated to house SVPs at DSH-Coalinga<sup>6</sup>, which is on CDCR grounds, or to place an SVP at another site determined by CDCR<sup>7</sup>. CDCR provides external security at DSH-Patton to secure NGIs, and hospital police provide internal security.<sup>8</sup> DSH-Napa and DSH-Metropolitan permit only low to moderate risk patients and cannot accept SVPs or high escape-risk patients.<sup>9</sup> The hospitals house the following patient populations:

- DSH-Atascadero: MDOs, CDCR patients, ISTs, NGIs, LPS
- DSH-Coalinga: SVPs, MDOs, CDCR patients
- DSH-Metropolitan: IST, MDO, NGI, LPS, patients in need of a special nursing facility
- DSH-Napa: IST, MDO, NGI, LPS, patients in need of a special nursing facility
- DSH-Patton: IST, MDO, NGI, LPS, one 30 bed unit of female CDCR patients

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<sup>1</sup> Welf. & Inst. Code § 6600, et seq.

<sup>2</sup> Pen. Code, §1026, et seq.

<sup>3</sup> Pen. Code, §1368, et seq.

<sup>4</sup> Pen. Code, § 2960, et seq.

<sup>5</sup> See Pen. Code, §§ 1026.2, 2684, 2685, 2960, 2972; and Welf. & Inst. Code §§ 5001(c), 6604.

<sup>6</sup> Welf. & Inst. Code § 6600.05.

<sup>7</sup> Welf. & Inst. Code § 6604.

<sup>8</sup> Welf. & Inst. Code §§ 4107 and 4107.1.

<sup>9</sup> Welf. & Inst. Code §§ 6600.5 and 7230.

Thus, each hospital is a secure facility that provides care for multiple and overlapping commitment types, with differing security needs to address their specific patient populations.

## **BACKGROUND**

In 2009, DSH (known as the Department of Mental Health at that time) filed emergency regulations to adopt section 4350, California Code of Regulations (CCR). 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 seeking 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 section 891, CCR, 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 that are now being submitted as these proposed amendments. 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 section 4350, CCR, 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.

Now, most DSH hospitals struggle with controlling USB devices not included in the current regulation. However, all but DSH-Coalinga are close to or already in compliance with the regulations as they would be amended in this proposal. This proposed amendment would clarify section 4350, CCR, to allow DSH to universally enforce section 4350, CCR, and would allow for the inclusion of USB devices.

## I. Emergency Regulation Implementation

Due to the dangers posed to the health, safety, and general welfare of the public, DSH enacted emergency regulatory amendments to the current regulation. Pursuant to the procedures outlined in the 2018 emergency regulation, a total of 160 patients out of approximately 1300 total patients at DSH-Coalinga submitted 196 devices for search, claiming that the items contained Sex Offender Treatment Program (SOTP) documents and legal information. The devices consisted of 3.39 terabytes of information. On February 20, 2018, 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.

DSH hospital police also discovered 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.<sup>10</sup>

DSH granted a period of amnesty to patients to turn in items in violation of the current regulation or the emergency amendment without risk of prosecution. Patients submitted approximately 1500-2000 pounds of material, about 60% of which consisted of DVDs, CDs, and various 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, DSH 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.

The above items represent a very small portion of the overall number of devices received during the periods of amnesty and voluntary compliance as well as a hospital-wide search. DSH's implementation of the emergency regulations and device searches remain on-going.

## II. DSH Litigation

Patients have continuously litigated section 4350, CCR, since its adoption. DSH successfully defended this regulation but is awaiting precedential ruling from the Ninth Circuit Court of Appeals. The Ninth Circuit remanded back to the District Court for further analysis its dismissal of a claim that the regulation was punitive. The Ninth Circuit stated, "[i]t may well be that the defendants can prove reasonable justifications for section 4350's, CCR, ban on the relevant devices."<sup>11</sup>

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<sup>10</sup> Further descriptions of child pornography and child erotica images can be found in *People v. Mahoney* (2013) 220 Cal.App.4th 781 and *United States v. Edwards* (10th Cir. 2015) 813 F.3d 953.

<sup>11</sup> *Allen v. Mayberg* (9th Cir. 2014) 577 Fed. Appx 728, 732.

This year, the District Court twice ruled that there is no constitutionally protected right to possess electronic devices, and that reasonable restrictions on electronic devices for civilly committed persons can be instituted for a legitimate government purpose, as discussed in more detail below.

On May 19, 2016, in *Telucci v Withrow*<sup>12</sup>, 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*<sup>13</sup>, (the hearing of the above remanded case Ninth Circuit Court of Appeals case), granted Defendants' motion to dismiss claims challenging section 4350, CCR. The court found 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*, 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.")).

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<sup>12</sup> *Telucci v Withrow* (E.D. Cal. 2016) U.S. District LEXIS 66334.

<sup>13</sup> *Allen v. King*, (E.D. Cal. 2016) U.S. Dist. LEXIS 108748.

While civilly committed persons have a substantive due process right to be free from restrictions that amount to punishment, “[t]here is no constitutional infringement, however, if restrictions are but an incident of some other legitimate government purpose.”<sup>14</sup>

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 Appeals, Fifth District also affirmed the constitutionality of DSH-Coalinga’s confiscation of items that were contraband and were not permitted pursuant to section 4350, CCR, and DSH-Coalinga’s contraband list.<sup>15</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. The California Supreme Court who declined to review the matter. The Appellate Court’s ruling stands.

### III. Litigation from Other Jurisdictions

DSH does not face a unique or unprecedented situation. All states have IST patients, and all but four states recognize NGI. SVP commitment laws began to be adopted in the 1990s and are currently active in 20 states, the District of Columbia, and the federal government. The Seventh Circuit upheld a ban on gaming devices, including those believed to be disabled from internet access, on the evidence that the devices can be manipulated to gain access to the internet.<sup>16</sup> Courts have found that “without appropriate precautions the Treatment Center would place the safety of patients and staff in jeopardy, thus imperiling the setting and mission of the entire institution. Almost by definition, an unsafe environment would be one in which the ability to deliver effective therapeutic services would be drastically reduced.”<sup>17</sup>

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<sup>14</sup> *U.S. v. Salerno*, (1987) 481 U.S. 739, 746–47 [107 S.Ct., 95 L. Ed. 2d 697]; *Bell v. Wolfish*, (1979) 441 U.S. 520, 535 [99 S. Ct. 1861, 60 L. Ed. 2d 447]; *Valdez v. Rosenbaum*, (9th Cir. 2002) 302 F.3d 1039, 1045.

<sup>15</sup> *In re Jackie Robinson* (2017) 19 Cal.App.5th 247.

<sup>16</sup> *Brown v. Phillips* (7th Cir. 2015) 801 F.3d 849.

<sup>17</sup> *Langton v. Johnston* (1st Cir. 1991) 928 F.2d 1206.

In the unpublished but frequently cited decision *Belton v. Singer*<sup>18</sup>, the court found that the Defendants had a legitimate governmental interest in prohibiting delineated electronic devices to ensure the security and orderly running of a treatment facility for civilly committed persons. The facility had a security interest in preventing residents from using the computers to engage in fraud, extortion and other criminal activity and preventing discord that could occur between residents owning electronic devices targeted with those who did not. The court also found that allowing residents to own digital storage devices, video game systems and other electronic devices would be a security, treatment, and administrative nightmare due to the frequent need to scan the electronic equipment. This would interfere with the efforts to treat the patients and operate the facility effectively. Finally, the court found no constitutionally-protected property interest for electronic devices in a treatment facility because the restrictions on electronic devices are neither arbitrary or capricious to address legitimate concerns.

#### IV. Treatment

DSH practices patient-centered care to the extent possible in a secured facility. Patient-centered care centers around shared decision-making between the treatment team and the patients. DSH hospitals treat all mental disorders, as any disorder can be present with the underlying commitment, but certain diagnoses and symptoms are common for our facilities. Symptoms include psychosis (when a patient is unable to differentiate between what is real and what is not), delusions, (when a patient has fixed, false beliefs bizarre behavior exhibited to the point of interference with an ability to function; intrusive or obsessive thoughts; and hallucinations, or seeing or hearing what is not there). Delusions can include paranoid delusions, or beliefs that someone or some group like the CIA is after the patient; delusions of persecution, or false beliefs that harm is occurring or is imminent; and delusions of grandeur, which include patient beliefs of fame, wealth, omnipotence, and/or powers. Hallucinations can include hearing voices that belittle the patient, order the patient to commit self-harm, or order the patient to harm others. Hallucinations can also include visions of demonic or religious images or occurrences, morbid visions of self-harm, death or the harm or death of others, and visions of being under violent attack.

Patients may or may not have any or all of these symptoms, and so DSH individualizes the treatment provided to each patient. Further, an inpatient setting maximizes treatment through therapeutic staff access, prompting, and interaction 24 hours a day, 7 days a week. Electronic devices can harm an individual patient or the treatment milieu. A device, with and without access to the internet, can have games, images, videos, etc. that trigger and/or escalate the above symptoms. With unmonitored access to information, it is harder for the treatment team to assess what is triggering the patient or how to work with the patient to decrease the triggers. Gaming devices, with and without access to the internet, can be excessively used to escape reality to the point of harming treatment, interfering with human interactions, crippling problem-solving skills, dehumanizing or desensitizing beliefs, or creating addictions. Devices with access to

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<sup>18</sup> *Belton v. Singer, supra*, U.S. Dist. LEXIS 74550, most relevantly cited in *Allen v. King*, (2016) U.S. Dist. LEXIS 108748.

the internet can motivate patients to engage in behavior contrary to their treatment plan, including accessing videos and information that promote harmful delusions, hallucinations, or violence. The important distinction is that for DSH-provided media, the treatment team can address with the patients triggering news stories, games, or movies. For contraband electronic devices, the treatment team is unaware that a patient's symptoms may be escalating due to a patient watching or reading about demon possessions, conspiracy theories, murders, suicides, etc. on YouTube or various locations on the internet. Finally, access to the internet to download images of the hospital, staff personal information, etc., especially while the patient is experiencing escalating symptoms, can intensify the facility's risks of danger.

In addition to other treatments, DSH teaches its patients coping skills to encourage them to deal with escalating symptoms, a need for distraction, or a chance to re-engage with reality through soothing activities. These can, of course, include non-electronic options. Electronic devices can also be useful, specifically individual music and gaming devices used in group therapy. For this reason, the proposed regulatory amendments seek to permit appropriate access and use of electronic devices.

In a secured inpatient facility with forensic and civilly committed patients, patient-centered treatment must be balanced with the facility's safety and security needs. Sometimes the patient's treatment preferences to use electronic devices must come second to the facility's need to maintain the necessary security for the patient population and the statutory requirements of the commitments.

### **PROBLEMS ADDRESSED:**

Patients using downloaded software to store digital data and access the internet permits the access, exchange, and/or profit from illegal material and communications, including child pornography; the ability to find and harass old victims or create new victims; access visuals of the hospitals for escape or other illicit purposes; and obtain information with which to harass or victimize staff, etc. DSH's inability to address these issues will endanger the patients, staff, and the public. The following are specific problems the amendments address:

#### I. Child Pornography

DSH determined that these amendments to section 4350, CCR, are 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*<sup>19</sup>, the Court summarized the findings of child revictimization 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-

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<sup>19</sup> *United States v. Kearny* (1st Cir. 2012) 672 F.3d 81.

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 actively works with the Fresno County District Attorney's (DA) office to investigate and prosecute cases involving child pornography. This is a long and tedious process to complete the investigation and make sure that the DA's office has proper resources to vigorously prosecute patients in possession of child pornography. In the summer of 2017, DSH simultaneously arrested eleven patients for possession of child pornography. In the past couple of years, five patients were convicted of possessing child pornography and more are awaiting trial. DSH discovered patients are distributing child pornography almost exclusively through various electronic devices.

## II. Nexus Between DSH's Patient Population and Electronic Device 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 have found that the possession of child pornography was evidence of defendant's intent to molest young boys; child pornography on defendant's computer was relevant to prove he intended to meet minor for sex "because [of] direct connection . . . between child pornography and pedophilia"; "Congress has found that child pornography has a connection to an abnormal sexual interest in children and pedophilia"; "[i]n addition to the case law and expert testimony that links pedophilia to child pornography, we also note that common sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography"; and 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 "[t]he child pornographer, like the child rapist, displays a sexual interest in children."<sup>20</sup>

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<sup>20</sup> See *People v. Memro* (1995) 11 Cal.4th 786, 864-865; *United States v. Brand* (2d Cir. 2006) 467 F.3d 179, 197, 198, fn. 18; *United States v. Byrd* (5th Cir. 1994) 31 F.3d 1329, 1336, fn. 9, 1336; *United States v. Bentley* (2007 N.D. Iowa) 475 F.Supp.2d 852, 858.



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.

### III. Other Dangers

DSH must take appropriate precautions to maintain a safe treatment environment. Permitting items that jeopardize patients and staff, including illegal or illicit use of electronic devices, endangers the therapeutic setting and the mission of the DSH hospitals.<sup>21</sup> Thus, DSH must be cognizant of other dangers in addition to preventing victims of child pornography from being re-victimized.

The proposed regulatory amendments are necessary to protect staff and patient safety and the therapeutic environment of DSH's secured inpatient facilities to protect against multiple dangers that arise from access to the internet and the digital transfer of illicit information. These dangers include contacting old victims, creating new victims, downloading satellite maps, tracking staff members and their families, committing fraud and extortion, and, (discussed above in section IV) harm to therapy. Other jurisdictions have also recognized the potential danger in allowing patient access to electronic devices.

In *Brown v. Phillips*<sup>22</sup>, the Seventh Circuit Court of Appeals upheld the Defendants' restriction of gaming devices incorrectly believed to be disabled from internet access. In 2016, the District Court in *Allen v. King*<sup>23</sup>, accepted evidence presented by DSH 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.

In *Belton v. Singer*<sup>24</sup>, the court found a security interest in preventing residents from using the computers to engage in fraud, extortion and other criminal activity, and preventing discord that could occur between residents owning electronic devices targeted with those who did not. The court also found a security and therapeutic interest in preventing patients from contacting their victims, viewing movies that may reinforce cognitive distortions or sexual deviance and playing video games that may encourage antisocial or obsessive behavior.

### IV. Specific Issues of 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.

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<sup>21</sup> *Langton v. Johnston*, *supra*, 928 F.2d 1206, fn. 17, "without appropriate precautions the Treatment Center would place the safety of patients and staff in jeopardy, thus imperiling the setting and mission of the entire institution. Almost by definition, an unsafe environment would be one in which the ability to deliver effective therapeutic services would be drastically reduced."

<sup>22</sup> *Brown v. Phillips*, *supra*, 801 F.3d 849.

<sup>23</sup> *Allen v. King*, *supra*, U.S. Dist. LEXIS 108748.

<sup>24</sup> *Belton v. Singer*, *supra*, U.S. Dist. LEXIS 74550.

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 title 9, section 891, and 4350, CCR, 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 detectible 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 complicating 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.

#### V. Specific Issues of 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 section 4350, CCR, would be 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 can be 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 vender, 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.

## VI. Specific Issues of 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.

### **SPECIFIC PURPOSE:**

Section 4350, CCR, would be amended to include language clarifying that the contraband list applies to patient's personal possessions, and better clarifies what electronic devices are contraband and which are not, and in what quantity. This amendment would create a universal list and enforcement of what constitutes contraband electronic devices across all the Department's hospitals for uniformity, simplicity, and clarity. The amendment would also permit hospitals to best serve their individual patient populations by permitting supervised use of electronics or further restricting electronics as appropriate. This will clarify the ability of a hospital to enforce public, patient, and facility safety.

### **ANTICIPATED BENEFITS OF PROPOSED REGULATION:**

By amending section 4350, CCR, DSH can better serve the public by enforcing child pornography laws, 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.

DSH has a legitimate governmental duty in protecting the public, patients, and the functions of the facility while providing treatment to the type of patient populations entrusted to DSH. This interest includes protecting victims of child pornography from possession and distribution of the images depicting their victimization by our patient population. This interest also includes protecting members of the public and staff from victimization over the internet by our patients, protecting the facility by preventing aerial maps and other information about the facility from being downloaded and distributed, and creating the most therapeutic and secure inpatient hospital setting possible.

Inappropriate and illegal use of electronic items by our patient population is dangerous. For both of our forensic and civilly committed patients, DSH must balance safety and patient rights to property. The dangers to the public, other patients, the staff, and facility outweigh a patient's desire to unlimited access to electronic devices. The ability to

enforce safety over patient property access is supported by law (See Welf. & Inst. Code, §§ 4011, 4027, 4101, 4109, 7295; Cal. Code Regs., tit. 9, § 884) as well as the above-discussed case law.

Restrictions on electronic devices do not interfere with patient's constitutional rights to communicate as communication can still take place by phone, writing, typing and printing without internet. There is no constitutional right to possess or access an electronic device. Therefore, restrictions on electronic devices are an appropriate response to the present issues and dangers.

### **PROPOSED ACTION:**

The proposed action will make changes within Division 1 of title 9 of the California Code of Regulations, as follows:

#### **Amend section 4350, CCR. Contraband Electronic Devices with Communication and Internet Capabilities.**

- **Title:** The title of the regulation is amended to better match the content of the amended regulatory language for simplicity and clarity.
- **Subsection (a):**

**Purpose:** This provision would reorganize the current regulatory language to group information into subsections and paragraphs for clarity. Subsection (a) is adopted pursuant to providing that, except as provided in subsection (d), patients are prohibited from personal possession, access, or on-site storage of electronic devices.

**Necessity:** This amendment is necessary to clarify that patients may not personally possess or have access to the items, while still permitting hospital use of these items.
- **Subsection (a), paragraph (1):**

**Purpose:** This provision would utilize the language of the current regulation, and permit the delineation of examples of prohibited electronic devices with the actual or potential capability to connect to the internet. The current provisions remain necessary to clarify that access to the internet by internet-accessible devices, software, or wired connections to hospital internet are prohibited.

**Necessity:** The delineations are necessary to better clarify what items and types of items are prohibited.
- **Subsection (a), paragraph (1), subparagraph (A):**

**Purpose:** This provision would maintain the electronic devices delineated in current regulation, adding tablets, single-board computers and motherboards as devices meeting the same criteria, but not known to be an issue at the adoption of the current regulation.

**Necessity:** This amendment is necessary to specify that patients are prohibited from possessing tablets, single-board computers, and exposed motherboard computers.

- **Subsection (a), paragraph (1), subparagraph (B):**

**Purpose:** This provision maintains the device modification language of the current regulation.

**Necessity:** This provision continues to be relevant and critical to specify that modifications to devices continue to be prohibited.

- **Subsection (a), paragraph (2):**

**Purpose:** This provision would prohibit patients from personally possessing digital media recording devices, including but not limited to CD, DVD and Blu-Ray burners.

**Necessity:** This provision is necessary to prevent the storage and distribution or the sale of materials that violate federal and state laws against child pornography and federal copyright infringement, or are otherwise dangerous to the safety of the facility.

- **Subsection (a), paragraph (3):**

**Purpose:** This provision would prohibit patient personal possession of voice or visual recording devices.

**Necessity:** This provision is necessary to clarify that patients are prohibited from accessing any method of recording, from the older technology of tape to digital to some format not currently known to DSH. This provision is necessary to fully address the safety of staff, patients, and the public, ensuring that patients do not record voices and images for illicit materials or violate patient privacy, as well as not recording the facility, to ensure facility security.

- **Subsection (a), paragraph (4):**

**Purpose:** This provision would prohibit patient possession of any items capable of patient-accessible memory storage. Most electronics have some memory capability to allow the electronic device to function properly, but it is memory available to store information for the user or to allow the user to alter the functions of the device that creates the ability for a patient to store illegal and illicit material.

**Necessity:** This provision is necessary to fully address the issue of illicit software that permits access to the internet and the issue of illegal and illicit materials stored, viewed and transferred.

- **Subsection (a), paragraph (4), subparagraph (A):**

**Purpose:** This provision provides that patients are prohibited from possessing any device capable of patient-accessible digital memory or remote memory access. This amendment would prohibit devices that allow patients to store illegal or illicit materials, but still permit devices that can be altered only by the

manufacturer or by controlled methods. This would include devices that can only play proprietary items or have pre-loaded music, books, etc.

**Necessity:** This amendment is necessary to clarify that devices with patient-accessible data are prohibited. This provision is necessary to permit certain devices designed for confined individuals that would otherwise be excluded.

- **Subsection (a), paragraph (4), subparagraph (B):**

**Purpose:** This provision provides that patients are prohibited from possessing recordable disks. These disks can be used for potential storage and distribution of illicit and illegal material as well as software to access the internet in violation of CCR section 891.

**Necessity:** This provision is necessary to clearly and uniformly prohibit the personal possession of recordable disks by the patients.

- **Subsection (a), paragraph (4), subparagraph (C):**

**Purpose:** This provision prohibits patient personal possession of USB devices, which is the most common source of illegal and illicit material stored, distributed, and downloaded in the facilities. These devices can also provide storage for software that can be used to access the internet in violation of section 891, CCR.

**Necessity:** This provision is necessary to clearly and uniformly prohibit the personal possession of USB devices by the patients.

- **Subsection (a), paragraph (4), subparagraph (D):**

**Purpose:** This provision prohibits patient personal possession of various data storage devices and cover future devices of similar purpose. Like the USB devices, these digital storage devices can be used for storage, distribution, and downloading of illicit and illegal material as well as software to access the internet in violation of section 891, CCR.

**Necessity:** This provision is necessary to clearly and uniformly prohibit patients' personal possession of digital storage devices.

- **Subsection (a), paragraph (4), subparagraph (E):**

**Purpose:** This provision prohibits patient possession of gaming devices with personally-accessible digital memory, the ability to access the internet, or the ability to play games or other media not proprietary to the device. This provision would restrict gaming devices that can utilize digital memory storage, CDs, USBs, etc. to store, distribute, or download illegal or illicit material; play non-proprietary media; and/or access the internet in violation of section 891, CCR. This provision would not prohibit gaming devices without digital memory storage beyond what is needed to store the game that is not accessible to the patient or that have digital memory accessible only to the manufacturer or manufacturer methods or products.

**Necessity:** This provision is necessary to clearly and uniformly prohibit patient personal possession of gaming devices with patient-accessible digital memory.

- **Subsection (a), paragraph (4), subparagraph (F):**

**Purpose:** This provision would prohibit patient possession of memory storage on audio/visual items that can be used to record, store, or distribute illegal or illicit material.

**Necessity:** This provision is necessary to clearly and uniformly prohibit patient personal possession of privately recorded audio/visual memory storage.

- **Subsection (b):**

**Purpose:** This provision would delineate electronic items permitted for patient access when they do not conflict with subsection (a).

**Necessity:** This provision is necessary to assist the enforcement of federal and state laws against child pornography and other illicit materials by utilizing existing safety provisions, commercially manufactured items, and items designed for confined individuals to permit the patients to possess some electronics that do not conflict with subsection (a).

- **Subsection (b), paragraph (1):**

**Purpose:** This provision limits how many electronic items patients are permitted, to codify limits for patient space, fire codes, and section 4350, CCR, enforcement purposes.

**Necessity:** This provision is necessary to allow patients access to legal movies, music, and players while uniformly enforcing the needs of patient and facility safety.

- **Subsection (b), paragraph (2):**

**Purpose:** This provision would limit patients to access 30 commercially manufactured and unmodified disks. This limitation is currently in place at four of the five hospitals, and at least one hospital utilizes this limit to discourage the use of excess items as weapons. The limit is set to minimize the amount of media and physical property to be monitored by staff and hospital police as well as limit the amount of media available that could be used to store illegal and illicit material. This limit is designed to codify limits set by a majority of the hospitals pursuant to their individual contraband authority.

**Necessity:** This provision is necessary to codify and uniformly apply an established limit pursuant to Welfare and Institutions Code, section 4101, for the security of the public, the patients, and the facility.

- **Subsection (b), paragraph (3):**

**Purpose:** This provision would permit tablets or other devices designed for confined individuals through authorized vendors of DSH or CDCR. This provision is based on the presumption that what a prisoner can have, a patient should have, unless, pursuant to subsection (c), the item is deemed unsafe for the hospital population. Further, the items for confined individuals are designed to prevent illegal overriding attempts to store data or access the internet.

**Necessity:** Devices designed for confined individuals are acceptable at this time to both DSH and the patients for personal electronic entertainment. This provision is necessary to allow patients access to some electronic devices for entertainment and therapeutic purposes in a way that is specifically designed to meet the needs of a secured facility.

- **Subsection (c):**

**Purpose:** This provision would permit the hospitals to create a more comprehensive contraband list as appropriate for the safety of the patient population or the hospital that may be unique to the hospital based upon the structure or patient population, including the elimination of any permitted item of subsection (b).

**Necessity:** This provision is necessary to assert that this regulation is not a comprehensive list or interpretation of Welfare and Institutions Code section 7295. Further, this regulation is designed to provide universal contraband requirements. However, this provision is necessary to provide the flexibility to the hospitals to utilize Welfare and Institutions Code section 7295 to create even greater restrictions than this proposed regulation if necessary for safety, treatment, or other unique hospital population situations.

- **Subsection (d):**

**Purpose:** This provision would permit hospitals to allow patients supervised access to items they are prohibited from personally possessing. This provision would allow electronic items to be utilized for therapeutic purposes, as well as permit a method by which patients may maintain legal and therapeutic paperwork or other lawful materials in virtual formats. Nothing in this provision would require a hospital to permit even supervised access of electronic items to patients.

**Necessity:** This provision is necessary to allow the hospitals to take advantage of therapeutic treatments that may use electronic items as appropriate for the population of the hospital, and eliminate the costs and storage of hardcopy legal items for the patients. Subsection (d) also limits any data storage device within access of a patient to be no greater than eight gigabytes (8GB). This provision is necessary to permit data storage while still maintaining an appropriate data limit for legal materials and the person-hours necessary to search the device and continue to enforce facility and public safety.

### **SPECIFIC TECHNOLOGIES OR EQUIPMENT:**

The proposed action does not mandate the use of specific technologies or equipment.

### **ECONOMIC IMPACT ASSESSMENT/ANALYSIS:**

#### **Creation or Elimination of Jobs within the State of California:**

It has been determined that the proposed action will not affect the creation or elimination of jobs. Instead, it better assists current positions by assisting law



enforcement in maintaining a safe environment as well as assisting treatment staff in creating a more therapeutic inpatient setting.

Creation of New Businesses or Elimination of Existing Businesses within the State of California:

It has been determined that the proposed action will not affect the creation of new businesses or the elimination of existing businesses. It only makes adjustments to allowable patient property for safety and therapeutic reasons.

Expansion of Business Currently Doing Business within the State of California:

It has been determined that the proposed action will not affect the expansion of businesses currently doing business in California. It only makes adjustments to allowable patient property for safety and therapeutic reasons.

Health and Welfare of California Residents:

It has been determined that the proposed action will protect the health, safety, and general welfare of California residents by reducing, if not eliminating, dangers to the public, patients, and staff generated by unlimited access to electronic devices by Department of State Hospital patients who are housed in secure inpatient mental health facilities. The dangers posed to California residents include:

- The possession and distribution of child pornography, facility area maps, and harmful information on victims, staff, and other patients;
- Access to previous victims and the ability to create new victims through the internet;
- Harm to therapeutic treatment for the possessing patient; and
- Harm to therapeutic treatment environment for surrounding patients or patients encountering images or discussions on triggering topics.

Worker Safety

It has been determined that the proposed action will positively affect worker safety because it will create a more therapeutic environment, and better control safety concerns and breaches at the hospitals.

State's Environment:

It has been determined that the proposed action will not affect the State's environment because it has nothing to do with environmental issues.

**CONSIDERATION OF ALTERNATIVES:**

No reasonable alternatives to the regulation would be either 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 regulation, or more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Set forth below are the alternatives that were considered and the reasons each alternative was rejected:

Alternative: Fully enforce section 4350, CCR, without amendment.

Reason for Rejection: The current regulation fails to exempt the hospital and staff from the prohibition on the use of electronics. Enforcing the current section 4350 would eliminate the ability for the hospital and staff to utilize computers and electronic personal safety devices, necessary for a safe and efficient secured inpatient hospital.

Alternative: Prohibit patients from possessing all electronic devices.

Reason for Rejection: While prohibiting patients from possessing all electronic items would eliminate harm created by the devices and subsequent illegal access to the internet, it would also eliminate the ability of the devices to be used for healthy purposes as well. The goal of this proposed action was to eliminate harm while maintaining therapeutic uses of electronics. Thus, a total prohibition was not determined to be a proper balance at this time, creating more burdensome restrictions than necessary on patients and treatment staff.

## **EVIDENCE SUPPORTING FINDINGS OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

DSH has determined that there is no significant statewide adverse economic impact directly affecting businesses because the regulations only directly affect the possession of electronics by patients in a DSH hospital.