



CALIFORNIA DEPARTMENT OF STATE HOSPITALS

NOTICE OF PROPOSED EMERGENCY ACTION AND FINDING OF EMERGENCY

Emergency Regulations for Contraband Search and Confiscation

FINDING OF EMERGENCY REGULATORY ACTION IS NECESSARY

The Department of State Hospitals (DSH) finds that the proposed adoption to California Code of Regulations, title 9, sections 4351, 4352, and 4353, are necessary 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.

NOTICE AND INTRODUCTION

NOTICE IS HEREBY GIVEN that DSH proposes to adopt the regulations on an emergency basis as described below. Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to the submission of the proposed emergency action to the Office of Administrative Law (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 to permanently adopt these regulations via the regular rulemaking process, which will be completed within 180 days of OAL's approval 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. DSH 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 DSH and OAL within five calendar days of DSH filing the emergency regulations with OAL. Please check the OAL website at 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
Attn: Regulations Unit
“Contraband Search and Confiscation”
1600 9th Street, Rm 410
Sacramento, CA 95814
Facsimile: (916) 651-3157

and

Office of Administrative Law
Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Facsimile: (916) 323-6826

NECESSITY FOR THE PROPOSED EMERGENCY REGULATORY ACTION

The proposed regulations are needed to create a universal procedure across hospitals for safety and security searches. These regulations are designed to provide guidance for the state hospitals regarding searches of patients and the importance of monitoring patient living areas, patient common areas, staff areas and grounds.

FACTS

Searches are necessary in secured institutions such as state hospitals to eliminate contraband and maintain the safety and security of the hospital grounds. Through frequent and thorough searches, DSH can locate contraband so that it can maintain a safe environment for the patients, staff, vendors, contractors, and the public. DSH houses civil commitments and forensic populations deemed dangerous to the public by law. Welfare and Institutions Code 4011 states DSH shall have jurisdiction over the execution of the laws related to the care and treatment of persons with mental disorders under the custody 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; shall take care of the interests of the hospital; shall establish rules and regulations to regulate the duties of officers and employees of the hospital for internal government, discipline, and management, and shall maintain an effective inspection of the hospital. Welfare and Institutions Code section 7295 provides that DSH may control and eliminate items deemed contraband for the hospitals' safety and security.

DSH treats several commitment types, both civil and forensic. Among the populations are Sexually Violent Predators, Offenders with Mental Health Disorders, Not Guilty by Reason of Insanity, prisoners from the California Department of Corrections and Rehabilitation (CDCR) under Penal Code section 2684, Incompetent to Stand Trial, and

Lanterman-Petris-Short conservatees unable to be placed at a lesser restrictive environment.

A majority of DSH patients are civil committees, and therefore are generally permitted to walk the hospital secured areas. Pursuant to Welfare and Institutions Code section 4132, those committed to DSH are to be considered patients rather than inmates for the purposes of public safety.

To secure the public and the facility, DSH maintains police departments at each state hospital. The California Department of Corrections and Rehabilitation (CDCR) also protects the perimeter of two DSH hospitals.¹ DSH Hospital Police Officers (HPO), sworn investigators of DSH's Office of Special Investigation, and CDCR correctional officers have search and seizure authority granted by Penal Code section 830 et seq. However, as DSH committees are patients, DSH clinical staff continuously observe the patients during their stay. Therefore, non-peace officer staff serve a vital and immediate role in inspecting the hospital environment to ensure it is safe.

Contraband items include drugs, needles, patient-made alcohol (pruno), weapons, or seemingly innocent items that have been modified for illegal purposes such as weaponry, lighting fires, or hiding contraband. DSH has found contraband behind bulletin boards, in dome mirrors, in electric outlets, in holes made in the walls, in chairs, in toilets, on the top of doors, in an amplifier, in books, in guitars, in curtain rods, in a toy car, and in walkers and wheelchairs to name a few examples. Contraband in electrical outlets or casings and holes made in the wall create additional fire hazards for the facility as well as security issues. In addition to contraband, dangerous situations may require hospital staff to seize other items, such as a patient about to use a chair or other innocent item as a weapon or a sheet found in the bathroom of a suicidal patient.

Finally, the ability for all persons employed at DSH to ensure the safety of the public, staff, contractors and patients is consistent with the Fourth Amendment of the United States Constitution. The Fourth Amendment prohibits unreasonable search and seizures. Where there is no expectation of privacy, searches are not unreasonable. There is no reasonable expectation of privacy² within a secured mental health treatment facility, supported by the above law. Additionally, Welfare and Institutions Code section 5325 identifies patient rights but does not include any right to be free from property or person searches, and section 5325.1 permits patient rights to be specifically limited by regulation.

EVIDENCE

DSH has seen the number of contraband cases involving pruno/alcohol increase from 34 in 2015 to 136 in 2018. DSH has also seen the number of contraband cases

¹ Welfare and Institutions code section 4107; Welfare and Institutions Code section 6604

² Smith v. Maryland (1979) 442 U.S. 735; Bell v. Wolfish (1979) 441 U.S. 520; Andrews v. Neer (2001, 8 Cir.) 253 F.3d 1052

involving drugs increase from 26 in 2009 to 47 in 2018 with a peak of 50 reported instances in 2012. In 2016, 19% of the arrests at DSH-Coalinga were drug related. DSH also has patients who exhibit symptoms of being under the influence of a controlled substance or pruno but refuse to submit to drug testing. As such, there may be a much higher number of patients under the influence of a controlled substance than documented above.

DSH staff also find weapons during searches, including shanks (items made sharp for stabbing or cutting) and tools. The shanks take many forms, including metal binder clips sharpened to create a slicing weapon, sharpened eye glass arms, sharpened pens or pens with sharp metal attached, headphone wires to start fires, and sharpened toothbrushes.

DSH also consistently finds patients in possession of prohibited electronic devices. Patients are using these devices using to access, exchange, and/or profit from illegal material, including child pornography, locating victims, finding and creating new victims, accessing visuals of the hospitals for escape or other illicit purposes, and obtaining information with which to harass or victimize staff, etc.

EVIDENCE FOR THE EMERGENCY

While peace officers have statutory authority to perform contraband searches, DSH seeks regulatory authority to clarify the ability of non-peace officer DSH staff to also ensure the security of the facility through participating in searches and seizures of contraband. DSH patients are primarily observed by non-peace officer staff, such that it is critical to immediately clarify this ability to protect the public, staff, patients, and contractors.

CONSEQUENCES OF FAILURE TO ADDRESS THE SITUATION THROUGH EMERGENCY REGULATIONS

If DSH does not adopt these regulations, patients will be able to engage in illegal activities throughout DSH facilities as DSH staff will be unable to control the introduction and use of contraband items. Additionally, it is challenging for the treatment teams to treat patients for mental disorders if the patient is under the influence of a controlled substance, and treatment is stalled if the patients possess contraband contrary to their treatment, including child pornography or an ability to communicate to their victims. Finally, if DSH fails to adopt these regulations, the ineffective control of contraband it will adversely impact the treatment milieu.

AUTHORITY AND REFERENCE

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 has jurisdiction over the execution of 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 4100 lists the facilities under the jurisdictions of DSH.

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; shall take care of the interests of the hospital; shall establish rules and regulations to regulate the duties of officers and employees of the hospital for internal government, discipline, and management, and shall maintain an effective inspection of the hospital.

Welfare and Institutions Code section 4139 states a search for contraband of those entering the secured area is expected and imposes a misdemeanor charge on those found with contraband with an intent to deliver contraband to patients.

Welfare and Institutions Code section 7295 provides that DSH may develop a list of items considered to be contraband and prohibited on hospital grounds and to control and eliminate contraband to ensure facility safety and security.

Penal Code section 830.3 states that the Office of Protective Services and investigators with the primary duty of enforcement of the law relating to the duties of DSH are peace officers, whose authority extends to any place in the state for the purpose of performing their primary duty.

Penal Code section 830.38 provides that the officers of a DSH state hospital are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty.

Penal code 830.5 provides that CDCR correctional officers assigned to DSH are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty and may carry firearms while on duty.

EFFECT OF THE PROPOSED EMERGENCY REGULATIONS

The objective of the proposed amendments is to implement, interpret, or make specific Welfare and Institutions Code sections 4109 and 7295 under the regulatory and jurisdictional authority of 4005.1, 4011, 4027, 4100, and 4101 by clarifying the ability of

all DSH staff within the secured patient area to remain vigilant and actively maintain the safety of the facility through the search for and confiscation of contraband. The regulation will provide for uniform clarification of authority statewide, at each DSH state hospital for the welfare of the public, DSH staff, and every DSH patient.

BENEFIT OF THE PROPOSED EMERGENCY REGULATIONS

The emergency regulations would immediately clarify and implement safety precautions and ensure DSH's ability to comply with Welfare and Institutions Code section 4109 to take care of the interests of the hospital, carry out the necessary duties of employees of the hospital, and maintain effective inspection of the hospital. Further, the emergency regulations are necessary to clarify and implement the ability to comply with Welfare and Institutions Code section 7295 to control and eliminate contraband.

SUMMARY OF PROPOSED EMERGENCY REGULATIONS

Existing Law

Existing law mandates DSH maintain management and effective inspection of DSH hospitals and provides DSH may control and eliminate items it deems to be contraband. Existing law also provides that DSH shall regulate the duties of employees of the hospital to provide for internal government, discipline, and management. Existing law provides peace officers search and confiscation authority.

Summary of Proposed Amendments

The proposed adoptions to California Code of Regulations, title 9, sections 4351, 4352, and 4353, are summarized as follows:

- Section 4351: This regulation would implement, clarify, and make more specific Welfare and Institutions Code section 4109 by specifying that non-peace officer DSH staff members have the authority to conduct searches for the management, effective inspection of the hospital. This regulation would also clarify and make more specific the provision of Welfare and Institutions Code section 7295 that hospitals may control and eliminate contraband. This regulation would specify that DSH staff may visually and physically search all areas within the secured facility at any time. This regulation would codify that patients that become intrusive or aggressive during the search may be removed from the area during the search for the safety of the staff and other patients in the area. This regulation would implement, clarify, and make more specific Welfare and Institutions Code sections 4109 and 7295 by providing that when non-peace officer DSH staff have a reasonable belief that a patient possesses contraband on their person, they may perform a physical pat-down search of the patient.

- Section 4352: This regulation would summarize the authority of peace officers to conduct searches in accordance with peace officer authority granted by statute and accepted procedures. This regulation is for clarity purposes only and is not intended to limit or expand any existing authority for peace officers to search and confiscate.
- Section 4353: This regulation would summarize the authority to search those entering the secured patient area. As there are times contractors must bring in items considered to be contraband to perform their contracted duties, this regulation would require such items be logged. This regulation would also permit DSH to perform thorough person and property searches, and that DSH may confiscate contraband if illegal or instruct the owner to remove the contraband. HPO or CDCR officers may agree to hold the item for return upon the exit of the person from the secured patient area.

DETERMINATIONS

Compatibility with Existing Regulations: DSH finds that these regulations are compatible with existing regulations listing contraband and the need to discover and control contraband throughout the hospitals.

Compatibility with Federal Law: DSH finds that these regulations are compatible with federal law.

Technical, Theoretical, and Empirical Studies or Reports: 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 or School Districts.

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 no costs or savings to any state agency.

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.

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 action 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 9th 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.

NON-SUBSTANTIAL MODIFICATIONS

DSH has made non-substantial changes to the emergency regulation text that was posted on April 6, 2020. The changes do not alter any requirement and reflect the original intent of the regulation.

DSH mistakenly noticed the wrong section numbers in the regulation text. The notice section numbers 4360, 4361, and 4362 have been renumbered to **4351, 4352, and 4353** and grouped as indicated under Title 9, Division 1, Chapter 16, Article 3. The regulation text is available online at: <https://www.dsh.ca.gov/Publications/Regulations.html>