

State of California
DEPARTMENT OF STATE HOSPITALS

**Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Department Responses**

**THE PROPOSED ADOPTION TO THE HOSPITAL ACCESS SYSTEM (HAS)
REGULATIONS**

I. GENERAL

A. ACTION TAKEN DURING THIS RULEMAKING

The Department of State Hospitals (DSH) released the Initial Statement of Reasons for Rulemaking (ISOR) for the proposed Hospital Access System Regulations on March 29, 2019. The ISOR contains a description of the rationale for the proposed adoption of title 9, sections 4355, 4356, 4357, 4358, 4359, and 4360 of the California Code of Regulations (CCR). All documents associated with this rulemaking were made available to the public and continue to be available on the DSH Internet Website at: <https://www.dsh.ca.gov/Publications/Regulations.html>

The Notice, published on March 29, 2019, explained that no public hearing was scheduled, but instructions on how to request a hearing were provided. There were no requests for a public hearing as outlined in the Notice. The 45-day comment period to consider the proposed rulemaking for the HAS regulations closed on May 13, 2019. No comments were received for the 45-day comment period.

The Department made modifications (with the changes clearly indicated) which are sufficiently related to the originally proposed text and made them available for a supplemental 15-day comment period through a “Notice of Public Availability of Modified Text.”

The notice and modified text were mailed on November 6, 2019 to all interested parties. The 15-day notice listed the DSH Internet Web site where interested parties could obtain the complete modified regulation text, with the modifications clearly indicated. These documents were also published on the DSH Internet Web site. The 15-day notice and modified regulatory text are incorporated by reference herein. No comments were received during the first 15-day public comment period.

The Department made subsequent modifications (with the changes clearly indicated) which are sufficiently related to the originally proposed text and made them available for a second supplemental 15-day comment period through a “Notice of Public Availability of Modified Text.”

The Second 15-day notice and modified text were mailed on November 22, 2019 to all interested parties. These documents were also published on the DSH Internet Web site. The second 15-day notice and modified regulatory text are incorporated by reference herein. Two comments were received during the second 15-day public comment period.

B. MANDATES AND FISCAL IMPACTS TO LOCAL GOVERNMENTS AND SCHOOL DISTRICTS

DSH has determined that this regulatory action does not result in a mandate to any local agency or school district, the costs of which are reimbursable by the State pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

C. CONSIDERATION OF ALTERNATIVES

DSH has determined there are no reasonable alternatives considered by the Department that would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

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

II. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL

The originally proposed regulatory language is shown in plain text. The modifications proposed as part of the first 15-day changes are shown in single underline to indicate addition, and ~~single strikethrough~~ to show deletion.

The following 15-day modification was made to the Regulation Text:

In original section 4356.

TEXT: “Monitoring” was added to the heading of this section.

RATIONALE: This proposed modification is necessary to briefly describe the further modifications made to this section.

In original section 4356, subdivision (c).

TEXT: Add “A patient’s access level shall also be indicated on an identification card, to be worn by each patient when off unit.”

RATIONALE: This proposed modification is necessary to ensure the safety and security of DSH staff and patients. Wearing the access level allows staff to easily identify which patients have which access level and whether unescorted patients are appropriately unescorted for the safety and security of the hospital.

In original section 4356, add new subdivision (d).

TEXT: Unit Staff shall keep a log, noting a patient's access level and destination and location while off the unit.

RATIONALE: This proposed modification is necessary to ensure the safety and security of DSH staff and patients. A log of patients' access levels allows staff to easily identify which patients have which access level and whether unescorted patients are appropriately unescorted for the safety and security of the hospital.

In original section 4356, add new subdivisions (e)(1)(A) through (e)(1)(B).

TEXT: (1) Routine.

(A) All units shall be locked during a state hospital's respective curfew hours, with the exception of units requiring enhanced security which shall be locked at all times for safety and security.

(B) All units shall be locked during count and meal times.

RATIONALE: This proposed modification is necessary to specify when the patients' access on hospital grounds is restricted, regardless of HAS level. Locking units during curfew hours is necessary to ensure that each patient is accounted for at the end of the day, for the safety and security of the hospital. Locking units during count and meal times is also necessary to ensure that each patient is accounted for throughout the day, for the safety and security of the hospital.

In original section 4356, add new subdivisions (e)(2)(A) through (e)(2)(C).

TEXT: (2) Unit-Wide or Hospital-Wide Lockdown.

(A) In cases of emergency or to ensure the safety and security of the hospital, the patients, and staff, a unit or a state hospital may be placed on lockdown.

(B) A unit or a state hospital may be locked for no more than 48 continuous hours, unless with the approval of the particular state hospital's Executive Director or designee.

(C) Regardless of patient access level, all patients are prohibited from leaving a unit during a unit-wide or hospital-wide lockdown, unless escorted.

RATIONALE: This proposed modification is necessary to specify when the patients' access on hospital grounds is restricted, regardless of HAS level. If there is an emergency, it is necessary that DSH has the ability to lock down a unit, for the safety and security of the hospital. It is also necessary that a lockdown not be more than 48 continuous hours, unless approved by a state hospital's executive director – because (1) an initial 48-hour upper limit may be enough to deal with the emergency or otherwise secure the safety and security of the hospital and (2) a state hospital's executive director needs to have the ability to extend a lockdown depending on the emergency or other safety and security risk. Also to ensure the safety and security of all persons in the hospital, it is necessary that during a lockdown, patient movement be restricted, unless escorted, regardless of each patient's actual access level.

The following second 15-day modifications were made to the Regulation Text:

The text of the modified regulatory language is shown below. The originally proposed regulatory language is shown in plain text. The modifications proposed as part of the second 15-day changes are shown in double underline to indicate addition, and ~~double strikethrough~~ to show deletion.

In original section 4356, add new subdivisions (e)(2)(A) through (e)(2)(C).

TEXT: (2) Unit-Wide or Hospital-Wide Lockdown.

(A) In cases of emergency or to ensure the safety and security of the hospital, the patients, and staff, a unit or a state hospital may be placed on lockdown.

(B) A unit or a state hospital may be locked for no more than 48 continuous hours, unless with the approval of without the approval of the particular state hospital's Executive Director or designee.

(C) Regardless of patient access level, all patients are prohibited from leaving a unit during a unit-wide or hospital-wide lockdown, unless escorted.

RATIONALE: This proposed modification is necessary to specify when the patients' access on hospital grounds is restricted, regardless of HAS level. If there is an emergency, it is necessary that DSH has the ability to lock down a unit, for the safety and security of the hospital. It is also necessary that a lockdown not be more than 4 continuous hours, unless approved by a state hospital's executive director – because (1) an initial 4-hour upper limit may be enough to deal with the emergency or otherwise secure the safety and security of the hospital and (2) a state hospital's executive director needs to have the ability to extend a lockdown depending on the emergency or other safety and security risk. Also, to ensure the safety and security of all persons in the hospital, it is necessary that during a lockdown, patient movement be restricted, unless escorted, regardless of each patient's actual access level.

In section 4356, add new subdivisions (e)(3)(A) through (e)(3)(C).

TEXT: (3) Hospital-Wide Lockdown.

(A) In cases of emergency or to ensure the safety and security of the hospital, the patients, and staff, a state hospital may be placed on lockdown.

(B) A hospital-wide lockdown must be approved by the Executive Director, or designee. A hospital-wide lockdown of more than 48 continuous hours, must be approved by the state hospital's Executive Director or designee in consultation with the Director or Chief Deputy Director of the Department.

(C) Regardless of patient access level, all patients are prohibited from leaving a unit during a hospital-wide lockdown, unless escorted.

RATIONALE: This proposed modification is necessary to specify when the patients' access on hospital grounds is restricted, regardless of HAS level. If there is an emergency, it is necessary that DSH has the ability to lock down hospital-wide, for the safety and security of the hospital. It is also necessary that a lockdown over 48 hours is approved by the Executive Director with consultation with Director/Chief Deputy Director of the Department because (1) an initial 48-hour upper limit may be enough to deal with the emergency or otherwise secure the safety and security of the hospital and (2) a state hospital's executive director needs to have the ability to extend a lockdown depending on the emergency or other safety and security risk. Also, to ensure the safety and security of all persons in the hospital, it is necessary that during a lockdown, patient movement be restricted, unless escorted, regardless of each patient's actual access level.

NON-SUBSTANTIAL MODIFICATIONS

Any modification correcting grammar and changes in numbering and formatting may have been made to improve clarity. These modifications are non-substantive changes made to the regulatory text for clarity and to more accurately reflect the numbering of sections, correct spelling, and correct grammar, but they do not materially alter the requirements, conditions, rights, or responsibilities in the originally proposed text.

III. SUMMARY OF COMMENTS AND AGENCY RESPONSE

DSH received two written comments during the second 15-day comment period in response to the Notice published on November 22, 2019.

Listed below are the organizations and individuals that provided comments during the Second 15-day comment period:

No.	Commenter	Affiliation	Date received
1 (1A-1I)	Cory Hoch	DSH Patient	12/2/19

1. **Comment Received 12/2/19; Dated 11/19/19**

Commenter 1: Cory Hoch

9 CCR § 4356(c)

1-A Summary of Comment:

Forcing a patient to wear an identification card does not afford the least restrictive alternative to what is being proposed. Example of a proposed alternative: patient could have the identification card in their pocket and relinquish it upon request by a staff member.

Response:

Thank you for your comment and proposed alternative. This comment references language that was amended and made available for public comment during the first 15-day comment period, from November 6 to November 21, 2019; therefore, this comment is not responsive to changes made to the regulatory package and made available for public comment during the second 15-day comment period, from November 22 to December 9, 2019. However, the Department provides the following response:

Section 4356, subdivision (c), of the proposed regulatory text requires patients to wear their identification badges when they are off unit. Requiring patients to wear their identification badges when off unit comports with the purpose of this regulatory package, to maintain the safety and security of patients, staff, and the public. The Department has considered the proposed alternative and concludes that this proposed alternative does not provide for a less burdensome alternative for the stated purpose of this regulatory package. The Department is not amending this regulatory package based on this comment and proposed alternative.

1-B Summary of Comment:

Patients have the right to be treated with consideration, dignity and humane care.

Response:

Thank you for your comment. The Department agrees that these are important principles of patient care. This comment is not relevant to the substance of the proposed regulatory package.

9 CCR § 4356(e)(1)(B)

1-C Summary of Comment:

Requiring locked units during meal times creates a requirement that staff be made available for movement in and out of the unit. At the Department of State Hospitals - Coalinga, there is not enough staff to monitor the unit and the dining

rooms during meal times. This may create a more significant safety and security concern by enacting this regulation.

Response:

Thank you for your comment. This comment is not relevant to the proposed regulatory package as this regulatory package does not discuss staff requirements during meal times. The Department is not amending this regulatory package based on this comment. However, the Department commends this commenter's concern for the safety and security of the Department's facility; the Department considered the safety and security concerns of each of its facilities for this regulatory package.

1-D Summary of Comment:

Patients have the right to be free from physical restraint. Conditions at Department facilities are to be the least restrictive and promote independence and personal liberty interests of the patients.

Response:

Thank you for your comment. The Department agrees that promoting independence and personal liberty interests of the patients is important; these values were balanced in this regulatory package with the Department's interest in maintaining the safety and security of patients, staff and the public. This comment is not relevant to the substance of the proposed regulatory package.

9 CCR § 4356(e)(2)(A)

1-E Summary of Comment:

Section 4356, subdivision (e)(2)(A), does not define "emergency" as it pertains to this subdivision. Proposed example of a definition for "emergency:" a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare, such as fire, flood, riot, earthquake, etc.

Response:

Thank you for your comment and proposed addition to the regulatory language. This comment references language that was amended and made available for public comment during the first 15-day comment period, from November 6 to November 21, 2019; therefore, this comment is not responsive to changes made to the regulatory package and made available for public comment during the second 15-day comment period, from November 22 to December 9, 2019. However, as the word "emergency" is utilized in Section 4356, subdivision (e)(3)(A) as well, and this language was amended and made available for public comment during the second 15-day comment period, the Department provides the following response:

The definition of the term "emergency" as it is used in this regulatory package is not necessary as this word follows the common dictionary definition of the word and does not require a specific definition for this regulatory package. The

commenter's proposed definition of "emergency" is the definition provided in Government Code section 11342.545. The Department has considered the proposed addition to the regulatory language and concludes that this proposed language is not necessary and does not provide clarification consistent with the stated purpose of this regulatory package. The Department is not amending this regulatory package based on this comment.

Statutory Authority for This Regulatory Action is Void

1-F Summary of Comment:

This regulatory package cites Welfare and Institutions Code section 4027 as authority that authorizes these regulations. DSH has no authority to create or limit the rights of individuals confined under Welfare and Institutions Code section 6600, et seq.

DSH states it has authority under Welfare and Institutions Code sections 4005.1 and 4027 to adopt regulations for all Non-LPS patients. Welfare & Institutions Code section 4027 only grants DSH authority to adopt regulations for a specified list of commitment types. For regulations to be valid, they must be within the scope of the authority conferred by the statute. Individuals committed to the Department pursuant to Welfare and Institutions Code section 6600, et seq. are not included on this list.

Welfare and Institutions Code section 4005.1 grants the Department authority to adopt and enforce regulations; however, there is no provision in Division 4 granting the Department or the Department of State Hospitals – Coalinga legal authority to create or limit the due process rights on individuals committed to the Department under Welfare and Institutions Code section 6600, et seq., included in Division 6.

Response:

Thank you for your comment. This comment references cited authority that was made available for public comment during the initial 45-day comment period, which commenced on May 13, 2019; therefore, this comment is not responsive to changes made to the regulatory package and made available for public comment during the second 15-day comment period, from November 22 to December 9, 2019. The Department is not amending this regulatory package based on this comment. The Department disagrees with this commentator's interpretation of the cited authority in this regulatory package and will continue with this regulatory package under its proper authority.

1-G Summary of Comment:

Even if authority exists for the Department, it does not include the ability of the Department or the Department of State Hospitals – Coalinga to create or limit the constitutional rights of civilly committed patients housed at the Department of State Hospitals – Coalinga.

Response:

Thank you for your comment. The Department disagrees with this commentator's interpretation of the cited authority in this regulatory package and will continue with this regulatory package under its proper authority.

Additional Information Pertinent to Regulatory Action

1-H Summary of Comment:

Conditions of confinement generally shall be equal across the board for all involuntary civil commitments. Persons with mental illness have the same legal rights and responsibilities guaranteed all other person by Federal and State law unless specifically limited by Federal or State law or regulation. Persons with mental health disorders are to be provided care and treatment and not as inmates of institutions. Statutes shall be liberally construed as far as possible and with the rights of person subject to commitment treated as sick person and not criminals.

Sexually Violent Predators, Mentally Disordered Offenders, and persons committed to the Department as Not Guilty by Reason of Insanity, and those committed under the Lanterman-Petris-Short Act are all similarly situated for the purpose of conditions of confinement.

Those held at the Department of State Hospitals – Coalinga, are to be held in a nonpunitive environment that does not lead to elements of punishment.

Response:

Thank you for your comment. This comment is not relevant to the substance of the proposed regulatory package. The Department is promulgating this regulatory package to standardize assessment of patient movement within the Department for all commitment types within the Department.

1-I Summary of Comment:

Any law or regulation not specifically delineated herein, but specifically related to the issue being addressed, shall be statutorily provided.

Response:

Thank you for your comment. The Department lists all cited authority for this regulatory package within the regulation text. The Department is not aware of any other authority that needs to be provided in regard to this regulatory package. The Department is not amending this regulatory package based on this comment.

**2. Comment Received 12/9/19; Dated 12/9/19
Commenter 2: Thomas Nolan via Jessica Winter**

2-A Summary of Comment:

The introductory paragraphs of the letter submitted by this commenter discuss some history of the *Coleman v. Newsom*, Case No. 2:90-CV-00520 KJM-DB,

case and provides some context for the relationship between this case and the hospital access system policy developed by the Department. The commenter mentions that they did not receive notice of the first 15-day notice period for this regulatory package, issued on November 6, 2019. The commenter references a letter dated December 6, 2019, stating it is attached to the comment letter as “Exhibit A.”

Response:

Thank you for your comment. This comment is not relevant to the proposed regulatory package, as it does not address the documents contained in the package, or the package’s contents. Notice of the first 15-day comment period for this regulatory package was properly provided by the Department to all parties who have expressed interest in receiving Department regulations by signing up for notice. The Department cannot address any concerns provided in the referenced December 6, 2019, letter, as this letter was not attached to the letter received from the commenter and is not considered part of the comment to be included in the regulatory package. The Department is not amending this regulatory package based on this comment.

I. Specific Objections to the Language in Proposed Sub-Section (e)(1)(A) Regarding “units requiring enhanced security which shall be locked at all times for safety and security”:

2-B Summary of Comment:

Objects to the new proposed language found in Section 4356, subdivision (e)(1)(A); specifically, the language that states, “units requiring enhanced security which shall be locked at all times for safety and security.”

Response:

Thank you for your comment. This comment references cited authority that was made available for public comment during the first 15-day comment period, from November 6 through November 21, 2019; therefore, this comment is not responsive to changes made to the regulatory package and made available for public comment during the second 15-day comment period, from November 22 to December 9, 2019. Although no response is required, DSH provides the following response. These regulations do not change the limitations imposed on seclusion and restraint under Title 22. The regulatory language referring to enhanced security units are referring to units like those developed pursuant to the Enhanced Treatment Program under authority granted to the Department by Welfare and Institutions Code section 4143, et seq. Such units remain subject to Title 22 regulations. The Department is not amending this regulatory package based on this comment.

II. Specific Objections to Provisions Authorizing “Lockdowns” of DSH Hospital Units and of Entire DSH Hospitals:

2-C Summary of Comment:

Objects to the new proposed language found in Section 4356, subdivisions (e)(2) and (e)(3); the portions of the regulatory text that discuss “Unit-Wide Lockdown” and “Hospital-Wide Lockdown.” There is no authority for such “lockdowns.”

Response:

Thank you for your comment. The Department lists all cited authority for this regulatory package within the regulation text. The Department is not aware of any other authority that needs to be provided in regard to this regulatory package. The unit wide lockdown procedure is used only in situations such as outbreaks of infectious diseases, the discovery of illegal substances, or patient disturbances, and for only so long as necessary to resolve the emergency. The Department is not amending this regulatory package based on this comment.

2-D Summary of Comment:

Title 22 of the California Code of Regulations already covers “disruption of services” for immediate care facilities (see Section 73553). The proposed regulations, to the extent they concern emergencies, are duplicative of the regulations issued by the California Department of Public Health in title 22.

Response:

Thank you for your comment. California Code of Regulations, title 22, section 73553, governs what to do when there is a disruption of services provided to patients. The proposed regulatory text does not contradict or duplicate this regulation; rather, the proposed regulatory text discusses physical access and movement within the hospital. The proposed regulatory text does not discuss disruption of services. The Department is not amending this regulatory package based on this comment.

2-E Summary of Comment:

The proposed regulatory text is inconsistent with Title 22 of the California Code of Regulations (see Section 73403, subd. (a)), governing and restricting the use of seclusion of patients in intermediate care hospitals. This regulation states that restraint and seclusion shall only be used for emergency measure to protect the patient from injury to himself or others and shall not be used as punishment.

Response:

Thank you for your comment. California Code of Regulation, title 22, section 73403, governs restraint and seclusion as it is physically applied to a particular patient. Specifically, Section 73404 provides examples of what are acceptable forms of restraint, which is defined as any apparatus that interferes with the free movement of the patient. The proposed regulatory text does not contradict this regulation; rather, the proposed regulatory text provides for unit-wide and hospital-wide lockdown, which temporarily locks patients within a unit due to an emergency situation, but does not limit the patients’ free movement within the unit. The proposed regulatory text does not discuss any apparatus to be applied

to patients in order to restrain them. The Department is not amending this regulatory package based on this comment.

2-F Summary of Comment:

The Department has not provided any evidence in the rulemaking record supporting the need for lockdowns or explaining what types of emergencies have occurred in the past to necessitate locking down individual units or entire hospitals. The rationale provided in the Second 15-Day Notice of Public Availability of Modified Text is circular, stating that emergency lockdowns are necessary “if there is an emergency.” There are no “facts, studies [or] expert opinion” to support the need for lockdowns.

Response:

Thank you for your comment. The unit wide lockdown procedure is used only in situations such as outbreaks of infectious diseases, the discovery of illegal substances, or patient disturbances, and for only so long as necessary to resolve the emergency. The Department is not amending this regulatory package based on this comment.

2-G Summary of Comment:

The proposed regulation text does not define what constitutes an “emergency.”

Response:

Thank you for your comment. This comment references language that was amended and made available for public comment during the first 15-day comment period, from November 6 to November 21, 2019; therefore, this comment is not responsive to changes made to the regulatory package and made available for public comment during the second 15-day comment period, from November 22 to December 9, 2019. However, as the word “emergency” is utilized in Section 4356, subdivision (e)(3)(A) as well, and this language was amended and made available for public comment during the second 15-day comment period, the Department provides the following response. The definition of the term “emergency” as it is used in this regulatory package is not necessary as this word follows the common dictionary definition of the word and does not require a specific definition for this regulatory package. The Department is not amending this regulatory package based on this comment.

2-H Summary of Comment:

Lockdowns are routine in the California Department of Corrections and Rehabilitation, and they can be difficult for mentally ill individuals to manage. Isolation tends to exacerbate mental illness. Sometimes prisons are locked down for administrative convenience. Allowing routine lockdowns with no meaningful limitation has the potential to undermine the Department’s therapeutic milieu.

Response:

Thank you for your comment and your concern for the treatment and well-being of the patient population treated by the Department. The Department does not respond to the comments regarding the California Department of Corrections and Rehabilitation, as this is a separate entity from the Department. The proposed regulatory text does not provide for isolation of patients, as any lockdown would be unit-wide, providing for patients to interact with other patients and hospital staff on their unit during the lockdown. Lockdowns at the Department would be for emergencies only, are limited in time, and require specified approvals. The Department is not amending this regulatory package based on this comment.

2-I Summary of Comment:

The proposed changes to the regulatory text that occurred after the initial 45-day notice are major and not sufficiently related to the initial proposed regulation. This requires a new 45-day notice period. The initial proposed text concern patients' ability to move around the hospitals without escort, and any limitation on movement is driven by the patients' treatment team.

Response:

Thank you for your comment. The proposed regulatory text noticed in the original 45-day comment period and the subsequent 15-day notice periods is all substantially-related to the concept of patient movement and access within the hospital. The Department is not amending this regulatory package based on this comment.