

EMERGENCY NOTICE OF PROPOSED ACTION AND FINDING OF EMERGENCY

Emergency Regulations for Contraband Search and Confiscation

REQUEST FOR THE READOPTION OF EMERGENCY REGULATIONS

The Department of State Hospitals (Department) finds that an emergency continues to exist regarding the emergency regulations originally approved by the Office of Administrative Law (OAL) on April 13, 2020 (OAL Matter Number: 2020-0413-03) 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 the Department proposes to adopt the regulations on an emergency basis as described below. Government Code section 11346.1(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 OAL, OAL 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. The Department plans to file the emergency rulemaking package with OAL within five working days from the date of this notice. If you would like to make comments on the Finding of Emergency or the proposed emergency regulations, the comments must be received by both the Department and OAL within five calendar days of the Department's filing of the emergency regulations with OAL. Please check the OAL website at www.oal.ca.gov to find out when the emergency regulations are filed with OAL.

Comments should be sent simultaneously to:

California Department of State Hospitals
Regulations and Policy Unit
RE: Contraband Search and Confiscation
1600 9th Street, Room 410
Sacramento, CA 95814
Fax: (916) 651-3157

and

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

NECESSITY FOR THE PROPOSED EMERGENCY REGULATORY ACTION

The proposed regulations are needed to create universal procedures 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 hospital grounds.

FACTS

Searches are necessary in secured institutions such as state hospitals to eliminate contraband and maintain the safety and security of the facility. Through frequent and thorough searches, the Department attempts to locate contraband so it can maintain a safe environment for the patients, staff, vendors, contractors, and the public. The Department houses civil commitments and forensic populations deemed dangerous to the public by law. Welfare and Institutions Code (WIC) section 4011 states the Department shall have jurisdiction over the execution of the laws related to the care and treatment of persons with mental disorders under the custody of the Department. WIC section 4109 provides that the Department 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. WIC section 7295 provides that the Department may control and eliminate items deemed contraband.

The Department 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.

Most Department patients are civil committees. Pursuant to WIC section 4132, those committed to the Department are to be considered patients rather than inmates for the purposes of public safety, therefore patients are generally permitted freely move within the facility.

To ensure the security of the facility, the Department maintains a police department at each facility. The CDCR also protects the perimeter of two Department hospitals as mandated by WIC sections 4107 and 6604. Department hospital police officers, sworn investigators of the Department's Office of Special Investigation, and CDCR correctional officers have search and seizure authority granted by Penal Code section 830 et seq. However, as Department committees are patients, 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 are items such as 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. The Department 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 secure other items, such as a patient about to use a chair, other items as weapons, or a sheet found in the bathroom of a suicidal patient.

Finally, the ability for all persons employed at the Department 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 privacy¹ within a secured mental health treatment facility, supported by the above law. Additionally, WIC 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

The Department has seen the number of contraband cases involving patient-made alcohol (pruno) increase from 34 in 2015 to 136 in 2018. The Department has also seen the number of contraband cases 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 the Coalinga hospital were drug related. The Department 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

¹ 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

influence of a controlled substance than documented above. The Department 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, and sharpened toothbrushes.

The Department also consistently finds patients in possession of prohibited electronic devices. Patients sometimes use these devices 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, the Department seeks regulatory authority to clarify the ability of non-peace officer staff to also ensure the security of the facility through participating in search and seizure of contraband. Patients are primarily observed by non-peace officer staff, so it is critical to immediately clarify this ability to protect the public, staff, patients, and contractors.

Government Code section 11342.545 defines emergency as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare.” The existence of contraband in any state hospital facility poses a serious risk to the safety of both the patient population and the staff. The Department operates five state hospitals that treat acutely psychiatric patients. Items deemed contraband by the Department and each individual facility have been reviewed and included on the contraband list due to the risk posed by the presence of these items in the facility. Although the Department has published lists of what is considered contraband, and therefore not allowed in the facilities, contraband items continue to make their way into the facility. These items put the patient population and staff at risk for serious injury or harm, as contraband items have been used as weapons. In addition, the Department has found drugs in its facilities, which poses a very serious risk to any patient using these items, as well as their peers and staff, if the drugs alter the behavior of the user in a negative way. These drugs are not regulated, and many patients are on prescribed medication that could have an adverse effect if drugs are combined.

Although the Department has peace officers on staff, these officers are not always immediately available to assist in contraband searches within the secured treatment areas of the facility. At the Department facilities, non-peace officer staff are the personnel that spend the most time with the patients and are in direct contact with the patients. Patients in the hospital are housed in units with non-peace officer staff; these staff are typically the first responders to any incident in the facility. As contraband poses such a serious risk to both the patients and staff, prompt removal of any contraband is necessary and essential.

Although the Department has been aware of contraband within its facility for years, the

need to regulate the ability of non-peace officer staff to conduct searches for contraband is new. Non-peace officer staff have historically called on peace officers when they suspect or know of contraband in the facility. It has become apparent to the Department that this is not sufficient in order to timely remove contraband from the facility to ensure contraband does not harm anyone within the facility. Timeliness has become an emergent need within our facilities as the Department strives to make its facilities safer for both the patient population and staff. In addition, during the COVID-19 pandemic and to date, to increase social distancing, staff schedules are being staggered to allow for operation of the facility and to continue providing treatment in a safe manner. As a result, it is important to allow non-peace officer staff to also remove contraband when they are aware of it. The immediate confiscation and removal of contraband in the facilities is necessary and the Department needs to rely on its non-peace officer staff, our first responders, to handle immediate removal.

The COVID-19 pandemic has had many impacts on the Department, including preparation for potential treatment of infected patients. Part of this preparation includes designating space at each facility to house and treat infected patients. Due to the risk of spreading the virus, and in conjunction with orders from the Governor and public health entities, the Department established a protocol for operating the COVID-19 units that includes limiting the number of non-essential personnel from entering a designated COVID-19 treatment area. In the event the Department must activate a COVID-19 treatment area, peace officer accessibility to that unit would be reserved for emergency situations. The Department's ability to utilize peace officers to conduct contraband searches in the COVID-19 treatment areas will be hindered by the hospital limiting the personnel in these treatment areas. It is essential for these regulations to be readopted for non-peace officer staff are able to conduct any necessary contraband searches of the COVID-19 treatment areas and other secured areas of the hospital. If non-peace officer staff are unable to conduct these searches, the safety of patients and staff on these units will be at risk due to the inability of staff to search for and remove contraband.

EVIDENCE FOR THE CONTINUED EMERGENCY

Since the initial adoption of the emergency regulation in April 23, 2020, there has been a continued need for this emergency regulation. The Department is responsible for ensuring the safety and security of its patients, as well as its staff, vendors, contractors, visitors, and the public.

As mandated by WIC 7295, the Department must control and eliminate contraband in its facilities. As vendors, contractors, and visitors enter and exit the facility, and as new patients are admitted and new staff hired, these create unique instances in which contraband, whether intentionally or inadvertently, may enter the facility. Contraband pose a serious risk to the safety of those in the facility, and in some instances, may be life threatening. As such, each facility and its staff must remain diligent in monitoring for contraband. The Department continuously seeks ways to improve its monitoring and removal of threats. The Department monitors for contraband by ensuring individuals

seeking to enter the facility are searched and their property is inspected. Patients are also searched for contraband when there is a reasonable suspicion the patient is either in possession of contraband or contraband is suspected to be in the area. Non-peace officer staff continue to be the personnel most frequently in contact with patients due to their duty to monitor and care for the patients. As a result of the COVID-19 pandemic, to minimize the potential spread of the virus, hospital police officers conduct telephone checks at least twice a shift to ensure the units do not have issues, and do not come in contact with patients except when necessary for security purposes. During necessary contact, the officer must use an N-95 respirator and gloves as a minimum form of Personal Protective Equipment to mitigate the spread of COVID-19 throughout the hospital. As such, a greater emphasis falls upon non-peace officer staff to monitor patients, increasing the need for these staff to have the ability to isolate and confiscate contraband. The ability of these non-peace officer staff to immediately perform searches and secure contraband keeps the facility safe and minimizes the issues that may occur as a result of a delay between the time hospital police officers are notified for assistance, and the time they are able to respond. A non-peace officer staff, who is trained and capable of identifying and confiscating contraband, is essential as their action may minimize the amount of escalation necessary to resolve the issue and confiscate the contraband. As an example, at the Patton facility, officer contact and interaction with patients and staff have decreased and officers are not conducting standard foot patrol on units considered "quarantined." The number of officers responding to calls have been limited unless necessary for the safety of the patients, staffs, and officers. Sally Port searches, an area of the hospital outside of the secured treatment area, have been suspended due to the pandemic.

The Department consistently finds patients in possession of prohibited electronic devices. These devices, which are deemed contraband by regulation when they are able to store digital information, have been found in many locations in the facilities since January of 2018. Many of these devices contain additional contraband such as child pornography. This material, when viewed, victimizes children with each view and has been deemed harmful by law. Patients are using these devices to do things such as access, exchange, or profit from illegal material including, but not limited to, child pornography, locating victims, finding new victims, accessing visuals of the hospitals for escape or other illicit purposes, and obtaining information with which to harass or victimize staff or others.

Through July 2019, the Department had 23 narcotic incidents, nine narcotic paraphernalia incidents, one patient-made alcohol (pruno) incident, 10 weapon incidents, and 14 incidents of another nature. The Department has seen the frequency of contraband cases involving patient-made alcohol (pruno) increase from 2015 to 2019, with a peak of 136 patient-made alcohol (pruno) cases in 2018. The Department has also seen the number of contraband cases involving drugs increase from 26 in 2009 to 47 cases in 2018 and 30 cases through the first half of 2019. The peak was 50 reported instances of contraband cases involving drugs in 2012. There are patients who either, by their actions, statements from the patient or from other patients, vital signs, and evaluation by trained personnel, are believed to be under the influence of a controlled

substance or patient-made alcohol (pruno), yet refuse to submit to a confirmatory chemical test. This indicates a higher number of patients under the influence of a controlled substance than documented. The removal of contraband such as controlled substances will improve the treatment of patients because doctors and mental health professionals are hindered from treating a patient who is under the influence of a controlled substance.

The Department continues to monitor, find, and confiscate contraband in its facilities. In the Atascadero facility, from January of 2020 through January of 2021, the facility found contraband including, but not limited to, pills such as Phenytoin, Depakote, Metformin, and Lipitor, a piece of glass, Leatherman's tool, two pieces of wire, two bags of patient-made alcohol (pruno), a partially smoked cigarette, a sharpened patient pen, nail, one piece of concrete, a needle-nosed plier, and one disposable knife. In the Metropolitan facility, there have been 19 contraband incidents involving patients. The rate of miscellaneous contraband found on patients increased from five incidents in 2020 to 11 from January of 2021 through April of 2021. From January through May of 2021, the Metropolitan facility generated one report involving a patient in possession of a possible controlled substance and three reports involving patients in possession of a weapon. At the Patton facility, from June of 2020 through December of 2020, 12 reports were generated due to mail testing positive for methamphetamine, and searches of units resulted in three positive alerts for narcotics. In that same time span, K-9 units had 45 service calls related to narcotics. Currently, the Metropolitan K-9 unit is involved daily in the detection of narcotics in mail and packages in the mail room.

From January of 2020 through May of 2021, the Coalinga facility has reported 531 cases of contraband. Some of the 531 contraband cases contain more than one type of contraband. Sixty reports were due to non-prescribed medication or illicit drugs being discovered, 135 cases are due to alcohol or patient-manufactured alcohol (pruno), 128 cases were electronic devices found that violate law, 13 cases involve the discovery of currency in the form of cash or credit cards, 20 cases were regarding weapons, tattoo equipment, or other tools, and three cases were involving tobacco. Department staff have found weapons during searches including, but not limited to, shanks (items made into a sharp object 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, and sharpened toothbrushes. Any of these tools, which can be used to harm others, pose an immediate safety and security risk and must be controlled.

The Department strives to find ways to keep contraband from entering its facilities. Increasing the number and presence of non-peace officer staff capable of identifying and removing contraband serve as a deterrent to patients acquiring or developing contraband. During the COVID-19 pandemic, non-peace officer staff performing searches for contraband is a necessity for the Department to deter patients and others from possessing contraband, but after the pandemic, the ability of non-peace officers staff to perform searches remains a necessity as it provides the Department the ability to act quickly to identify and remove the threat of contraband. This increased presence

of those with the ability to confiscate contraband is anticipated to be pivotal in ensuring the safety and security of the patient population, staff, vendors, contractors, and visitors to the facility. Every action taken towards preventing contraband from entering the facility or being in the possession of patients is an action that minimizes or mitigates harm to an individual or a potential loss of life.

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 would implement, clarify, and make more specific WIC section 4109 by specifying that non-peace officer Department staff have the authority to conduct searches to ensure the safety and security of the facility and its patients, staff, and others within the facility. This regulation would also ensure the provision of WIC section 7295, which permits the Department to control and eliminate contraband, are enforced optimally by developing standards which allows for contraband to be confiscated as soon as detected, when safe to do so, by the non-peace officer staff who primarily monitor the patients and have been identified by the Department as able to do so. This section of the regulation would specify that Department staff may search all areas within the facility at any time to locate and confiscate contraband. Types of searches include, but are not limited to, visual searches, room, common areas, bathroom searches, and pat-down searches if the non-peace officer staff has a reasonable suspicion that contraband is in the area or in the possession of a patient. 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 WIC sections 4109 and 7295 by providing that when non-peace officer Department staff have a reasonable belief that a patient possesses contraband on their person, they may perform a physical pat-down search of the patient. The regulations in this section are necessary to not only enforce the identification and removal of contraband from the facility, but to ensure the safety of the patients, staff, vendors, contractors, and the public. Contraband, especially those that are hidden, pose a risk to the health and safety of those in the facility.

While it is the function of Hospital Police Officers to maintain safety and security, non-peace officers are the first line of defense and the personnel most likely to initially identify contraband either in the possession of a patient or within a specific area in the facility.

It is necessary to allow for non-peace officer staff, as identified by the Department, to conduct contraband searches as each facility operated by the Department is uniquely situated and requires different staff classifications to conduct these searches.

Section 4352 is in place for clarity in the regulations. Section 4352(a) notifies readers that all Hospital Police Officers and sworn investigators are peace officers pursuant to the laws specified in Penal Code section 830.3. Using this broad authority for Hospital Police

and sworn investigator to conduct peace officer activities, the regulations identifies the specific duties of these peace officers within the context of the regulations, which is the effective control and elimination of contraband. This regulation clarifies that the role of the peace officer, specifically a Hospital Police Officer or sworn investigator, is not expanded, diminished, or modified while serving the capacity identified in these regulations.

Section 4353 specifies that contraband, unless authorized by the Department, shall not enter the premise unless identified as a tool for use in completing work authorized by the Department and defines the authority of each facility to search those entering the facility. 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 the Department to perform thorough person and property searches, and that the Department may confiscate contraband if illegal or instruct the owner to remove the contraband. Hospital Police Officers or officers from the CDCR, who may be present at the facility performing security duties, may agree to hold the item for return upon the exit of the person from the facility. This section is necessary because the control of contraband entering the facility is of the utmost importance. Given the population served by the Department, items which may not otherwise be dangerous can be used in ways that may jeopardize the safety and security of others. The Department recognizes that some items determined to be contraband are tools used by vendors and contractors in the execution of approved work. As such, all contraband within the facility are to be logged and monitored by the Department. Any such contraband not logged is deemed to be a health and safety risk which must be removed from the facility. To prevent the entry of contraband, all persons entering the facility must submit to a search for contraband. This search is performed using various tools such as K-9, x-ray, cell phone detecting devices, controlled substance detecting devices, metal detectors, and wand searches.

Not all contraband identified must be confiscated. Some contraband, while prohibited from the facility, may not be illegal. This regulation specifies that each facility, upon detecting contraband, may instruct the person in possession of the contraband to either remove it from the facility. If the contraband is illegal in general pursuant to any provisions of the Penal Code or other applicable law, that contraband shall be confiscated. This section ensures that dangerous contraband, which would be unsafe whether inside the facility or in the general public, are confiscated. This protects the safety of all Californians by confiscating an illegal item which may otherwise be able to harm a member of the public.

SUBSTANTIAL PROGRESS TO ADOPT THE EMERGENCY THROUGH REGULAR REGULATIONS

Since the adoption of emergency regulations on April 23, 2020, the Department has worked towards the development of the regulations. However, due to several factors, the adoption of the emergency through regular development process progressed slower than anticipated.

In March of 2020, the manager responsible for oversight of the development of regulations for the Department vacated the position, creating a void in leadership and oversight within the organizational unit responsible for facilitating and coordinating regulations development. In addition, the Regulations Coordinator for the Department, a central figure in the day-to-day development activities for regulations, officially retired from the Department in June of 2020. The Regulations Coordinator position was filled in the middle of February 2020, but the management position was not filled until July of 2020. This transition period and its coordination created both a knowledge vacuum and a break in the flow of the development process. Transition was further complicated by COVID-19 as the Department, specifically the Sacramento office, shifted from a predominantly office work environment to telework. As a result of this shift, several technology issues emerged which had to be addressed, creating additional delays of varying lengths. These new regulatory personnel were required to either learn or continue learning the processes of the Department remotely. Training for new staff occurred, but the efficient coordination of duties, the passing of knowledge between the previous personnel and new personnel, and management involvement all took time to implement.

As a result of the transition in staffing and leadership oversight in the organizational unit responsible for coordination of regulations development, the need to train new staff members on the regulations development process, COVID-19 changing the work and training environment from predominantly in office to remote, and a slower than anticipated development process, the Department's emergency regulation for contraband lapsed, but the necessity of this emergency regulation and the emergency due to the presence of contraband still remains.

However, with the issues described above, the Department was able to train its new staff, onboard its new manager, and work towards the development of the emergency regulations through the rulemaking process, though at a slower pace than anticipated. On March 25, 2021, the Department completed development of the regulatory documents required and electronically submitted a file consisting of the public notice, regulations text, Initial Statement of Reasons, Economic and Fiscal Impact Statement form, and the Notice Publication/Regulations Submission form to the Office of Administrative Law (OAL) for review and publication, as appropriate, in the California Regulatory Notice Register (CRNR). The public notice was published in the CRNR by OAL on Friday, April 9, 2021, beginning the 45-day public comment period. The public comment period ends on May 24, 2021, and a public hearing will be scheduled. If there is no need for substantive changes to the regulation, which would require a 15-day notice to the public, the Department anticipates submitting a Certificate of Compliance for the review of the OAL within the readoption timeframe to be provided by the readoption of this emergency regulation.

CONSEQUENCES OF FAILURE TO ADDRESS THE SITUATION THROUGH EMERGENCY REGULATIONS

If non-peace officer staff are unable to conduct searches per these regulations in order to remove dangerous contraband from the facilities, removal of contraband from the facility is delayed. Peace officer staff is not always available and present where contraband is suspected. Non-peace officer staff are constantly in contact with the patient population and have the ability to immediately search and remove contraband from patients and their living spaces. Any delay in removal of contraband within the facility poses a risk of serious harm to the patient population and staff. In addition, non-peace officer staff have established congenial relationships with the patient population that they work with, and their relationship with the patient may be a calming factor to assist in patient cooperation during non-peace officer staff searches. Patients can become hostile toward peace officer staff. If peace officers are the only staff members allowed to search for contraband within the facility, patients may become defensive and aggressive, causing a safety concern for the patient being searched, other patients, and staff.

Finally, if the Department fails to adopt these regulations, the ineffective control of contraband will adversely impact the treatment milieu. In addition, contraband in isolation or quarantine units will remain largely uncontrolled, due to the absence of non-peace officer staff with the ability to search and secure contraband, which creates a higher risk of danger to the patients, staff, and the public.

AUTHORITY AND REFERENCE

WIC section 4005.1 provides that the Department may adopt and enforce rules and regulations necessary to carry out their respective duties.

WIC section 4011 provides that the Department has jurisdiction over the execution of laws relating to care and treatment of persons with mental health disorders under the custody of the Department. WIC section 4027 provides that the Department may adopt regulations concerning patients' rights and related procedures applicable to the inpatient treatment of mentally ill offenders and mentally disordered sex offenders.

WIC section 4100 lists the facilities under the jurisdictions of the Department.

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

WIC section 4109 provides that the Department 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.

WIC 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.

WIC section 7295 provides that the Department 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 the Department 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 state hospital under the jurisdiction of the Department 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 the Department 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 WIC sections 4109 and 7295 under the regulatory and jurisdictional authority of 4005.1, 4011, 4027, 4100, and 4101 by clarifying the ability of all Department 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 Department hospital for the welfare of the public, staff, and patient committed to the care of the Department.

BENEFIT OF THE PROPOSED EMERGENCY REGULATIONS

The emergency regulations would immediately clarify and implement safety precautions and ensure the ability of the Department to comply with WIC 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 WIC section 7295 to control and eliminate contraband.

SUMMARY OF PROPOSED EMERGENCY REGULATIONS

Existing Law

Existing law mandates the Department maintain management and effective inspection of Department hospitals and provides the Department may control and eliminate items it deems to be contraband. Existing law also provides that the Department 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 would implement, clarify, and make more specific WIC section 4109 by specifying that non-peace officer Department staff members have the authority to conduct searches for the management and effective inspection of the facility when there is a reasonable belief that a patient is in possession of contraband or contraband is in an area that is monitored by the non-peace officer Department staff. This regulation would also clarify and make more specific the provision of WIC section 7295 that hospitals may control and eliminate contraband. This regulation would specify that Department staff may visually monitor all areas within the facility they are responsible for and conduct a search of any area, either announced or unannounced, at any time, especially to locate and confiscate contraband. Types of searches include, but are not limited to, visual searches, room, common area, and bathroom searches, and pat-down searches if the non-peace officer Department staff has a reasonable suspicion that contraband is in the area or in the possession of a patient. 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 removal of patients from the area, if they become intrusive or aggressive, will be made at the discretion of the non-peace officer Department staff or Hospital Police Officer as the circumstances warrant to maintain peace and to ensure the safety and security of all personnel and . This regulation would implement, clarify, and make more specific WIC sections 4109 and 7295 by providing that when non-peace officer Department staff have a reasonable belief that a patient possesses contraband on their person, they may perform a physical pat-down search of the patient.

It is necessary that these regulations allow for all non-peace officer staff to conduct contraband searches as each facility operated by the Department is uniquely situated and requires different staff classifications to conduct these searches. These regulations provide for each facility to designate or limit the staff classifications conducting non-peace officer staff searches for contraband, in order to address the unique needs of each facility.

Section 4352 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 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 the Department to perform thorough person and property searches, and that the Department may confiscate contraband if illegal or instruct the owner to remove the contraband. Hospital police officers 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: The Department 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: The Department finds that these regulations are compatible with federal law.

Technical, Theoretical, and Empirical Studies or Reports: None.

Mandates on Local Agencies or School Districts: The Department 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: The Department anticipates there will be no fiscal impact to Local Agencies or School Districts.

Non-discretionary Costs or Savings Imposed on Local Agencies: The Department 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: The Department 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: The Department is not aware of any cost impacts that an individual or business would necessarily incur in reasonable compliance with the proposed action.

MATERIALS INCORPORATED BY REFERENCE

None.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Department must determine that no reasonable alternative considered or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective as and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Department invites interested persons to submit statements or arguments with respect to alternatives to the proposed regulation during the 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 and Policy 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 are also available online at the [Department's website](http://www.dsh.ca.gov/Publications/Regulations.html) at www.dsh.ca.gov/Publications/Regulations.html.