

**DEPARTMENT OF STATE HOSPITALS
FINDING OF EMERGENCY AND EMERGENCY NOTICE OF PROPOSED ACTION
ENHANCED TREATMENT PROGRAM REGULATIONS**

READOPTON 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 23, 2020 (OAL Matter Number: 2020-0413-03). This same emergency was approved by OAL and readopted on March 29, 2021 (OAL Matter Number: 2021-0317-01). The proposed adoption to California Code of Regulations, title 9, sections 4800, 4900, 4901, 4902, 4903, 4904, 4905, 5000, 5100, and 5200, remain 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.

FINDING OF EMERGENCY

The proposed regulations have been determined to address an emergency necessitating compliance with the provisions of Government Code sections 11346.1 and 11349.6.

Pursuant to Welfare and Institutions Code section 4144(m), the Department may seek the adoption of emergency regulations, following the requirement of the Administrative Procedure Act, to define and implement the treatment components of the Enhanced treatment Program (ETP), allowing the program to be operationalized within the intended scope of the program per Welfare and Institutions Code section 4144. The Department, in adopting these regulations, is granted exemption from the requirements of Government Code section 11346.1(b) per section 4144(m) of the Welfare and Institutions Code.

The Department finds that the adoption of emergency regulations to the California Code of Regulations, title 9, new chapter 17, new article 1, section 4800; new article 2, sections 4900, 4901, 4902, 4903, 4904, 4905; new article 3, section 5000; new article 4, section 5100; and new article 5, section 5200, is sufficient in the implementation of the specific treatment components necessary to operationalize the ETP. The procedural aspects of these proposed regulations are intricately related to the treatment components provided in the statute and are therefore being implemented as emergency regulations.

NOTICE OF PROPOSED EMERGENCY ACTION

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 OAL, it shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed emergency action to OAL. The Department plans to file the emergency rulemaking package with OAL at the end of 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:

Department of State Hospitals
Regulations and Policy Unit
RE: Enhanced Treatment Program
1215 O Street, MS-20
Sacramento, CA 95814
Fax: (916) 651-3090
Email: DSH.Regulations@dsh.ca.gov

and

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

AUTHORITY AND REFERENCE CITATIONS

The Department adopts these regulations under the authority granted in sections 4005.1, 4027, 4101, and 4144 of the Welfare and Institutions Code. These regulations implement and make specific Welfare and Institutions Code section 4144 and Health and Safety Code section 1265.9.

PROGRESS TOWARDS THE COMPLETION OF THIS REGULATION

The Department continues to fulfill its mission of caring for individuals committed to care while procedurally and administratively adapting to the circumstances brought about by COVID-19. Since the readoption of this emergency regulation, significant progress has been made towards the completion of the regulation. The public comment period for this regulation package concluded on September 20, 2021. The Department, exercising caution, waited one additional week for written comments arriving via ground mail. Receiving no additional comments, the Department made the determination that no additional changes were necessary to the regulatory text, initial statement of reasons, or other documents submitted to the public for review during the designated public comment period. As such, the required documents necessary for the submittal of the Certificate of Compliance to OAL are currently being prepared for final reviews and approval through the Director of the Department. Upon approval, the Certificate of Compliance will be submitted to OAL for their review. The Department anticipates the submittal of this Certificate of Compliance to OAL for review in approximately 2-3 weeks or earlier.

Although the submittal of the Certificate of Compliance is anticipated to occur prior to the expiration deadline of the emergency regulations of October 27, 2021, the OAL review and potential certification of the compliance with the requirements of the Administrative Procedure Act will likely not be completed in that time, potentially causing the expiration of the emergency regulations. A lapse in the regulations would leave the Department with the inability to operate its enhanced treatment programs, falling out of compliance with the requirements of Welfare and Institutions Code section 4144, and leaving the Department without the means to treat patients at high risk of most dangerous behavior and safe treatment is not possible in the standard treatment environment.

Approval of this readoption gives the Department not only the additional time necessary to ensure the Certificate of Compliance submitted to OAL meets all necessary standards but provides the time necessary to ensure any issues found during the review of the rulemaking file by OAL can be fully addressed by the Department. Approval of this readoption will also allow the Department to continue operating its treatment program through existing emergency regulations, ensuring it does not fail to meet its statutory obligations.

INFORMATIVE DIGEST AND POLICY OVERVIEW STATEMENT

Policy Statement:

It is the policy of the Department to expand the continuum of care by establishing the Enhanced Treatment Program (ETP) to provide safe treatment to patients who are at high risk of most dangerous behavior and who are able to benefit from concentrated, evidence-based clinical therapy and structured milieu therapy or treatment aimed at reducing the risk of violent behavior, with the goal of returning the patient to a standard treatment environment. The Department is committed to providing treatment in the least restrictive environment.

Existing Law:

Existing law pursuant to Senate Bill 85 (2015) authorizes the Department to establish and maintain pilot ETPs to treat patients who are at high risk of most dangerous behavior when safe treatment is not possible in a standard treatment environment. (Welfare and Institutions Code section 4143) The statutes do not, however, provide guidance on logistics and patients' rights issues which must necessarily be clarified in these proposed regulations in order to implement the ETP.

The Department includes duplicative language provided by Welfare and Institutions Code section 4414, cited as a "reference" for these proposed regulations, to provide clarity on the enumerated aspects of these regulations. This is necessary to differentiate between the numerous procedural aspects included in the statute that are specified in the Department's regulations.

Anticipated Benefits:

These regulations clarify referral, admission and discharge to the ETP as well as other relevant treatment components necessary to establish the ETP. With these regulations, the Department will be able to implement the ETP, and better treat and serve our unique patient population.

Incompatibility with Existing Laws and Regulations:

The Department surveyed for any other regulations on this subject-matter and found none. The proposed regulations are neither inconsistent nor incompatible with existing state laws and regulations.

SUMMARY OF PROPOSED NEW REGULATIONS

The proposed new regulations sections 4800-5200, are summarized as follows:

Add Section 4800:

This regulatory action would add Title 9, Division 1, Chapter 17, section 4800, to provide definitions of terminology that are used by current statutes and by the proposed regulations, to clarify how these terms are utilized for ETP. It is necessary to define the terminology utilized in the regulations to provide clarity to the statutory language and the regulation language and to provide for equal application of these terms to patients in the ETP. The Department deemed it necessary to include a designee for the medical director of the hospital as a member of the Forensic Needs Assessment Panel (FNAP) under subdivision (c), as the FNAP may not include any member that is involved in an ETP patient's treatment or diagnosis at the time of that patient's placement evaluation meeting. Therefore, the medical director would not be able to participate in the FNAP if they were so involved. The Department deemed it necessary that the panel of psychologists on the Forensic Needs Assessment Team (FNAT) under subdivision (d) not include members of the treatment team in order for the group to remain independent of the treatment. The Department routinely distinguishes between treatment and forensic assessment in order to keep the forensic assessment independent of the treatment being provided. This allows for independent opinion and assessment of risk factors.

Add Section 4900:

This regulatory action would add Title 9, Division 1, Chapter 17, section 4900 to clarify current statute by providing requisite criteria and procedures for patient referral to the ETP, and by submitting the ETP Referral Form for approval by the FNAT Supervising Psychologist for initial evaluation. It is necessary to clarify the process for referral to the ETP in order to make sure everyone follows the same process and that each patient being considered for a referral is treated the same way. It is necessary to include the Standard Treatment Environment treatment team in the decision regarding the patient's risk for dangerous behavior, in subdivision (a)(1), because each member of the treatment team may have different information about the patient that is relevant to this decision. Due to the concentrated therapy and structured milieu of the ETP program, it is necessary to have the FNAT Supervising Psychologist review the ETP referral forms received to ensure that a clinically appropriate referral has been made. If the FNAT Supervising Psychologist is unavailable or involved in the treatment or diagnosis of the individual, the designee of the FNAT Supervising Psychologist shall perform the review to ensure a clinically appropriate was made. Referral initiates ETP treatment; due to the concentrated therapy and structured milieu of the ETP program, it is important to make sure that each individual being considered for ETP treatment is clinically appropriate for referral. The FNAT Supervising Psychologist, or designee, will verify that the referring hospital has notified the patients' rights advocate and conservator, if applicable, of the ETP referral per subdivision (c).

Add Section 4901:

This regulatory action would add Title 9, Division 1, Chapter 17, section 4901 to clarify current statute by providing procedures for the FNAT Supervising Psychologist, or designee, to conduct an initial evaluation of the referred patient to verify the need for treatment in the ETP. It is necessary to clarify the initial evaluation process for a patient being referred to the ETP in order to make sure everyone follows the same process and that each patient evaluated is treated the same way. Initial evaluation by an FNAT Supervising Psychologist, or designee, who has an expertise in forensic and violence risk assessment, is necessary to ensure that each patient referred to the ETP is a clinically appropriate candidate for a referral, consistent with and implementing the requirements for a dedicated forensic evaluation pursuant to Welfare and Institutions Code section 4144, subdivision (b). Referral initiates ETP treatment; due to the concentrated therapy and structured milieu of the ETP program, it is important to make sure that each individual being considered for ETP treatment is clinically appropriate for referral. Upon completion of the initial evaluation, the FNAT will provide the evaluation to the FNAP for a Placement Evaluation Meeting pursuant to Section 4902 of these regulations.

Add Section 4902:

This regulatory action would add Title 9, Division 1, Chapter 17, section 4902 to specify that upon completion of the initial evaluation under Section 4901, the FNAP shall convene a placement evaluation meeting in accordance with Welfare and Institutions Code section 4144, subdivisions (c) and (d), including the 72-hour notice to the patient and the patients' rights advocate, of this meeting. This section also specifies how the patient and their patients' rights advocate may submit documentation to be considered by the FNAP. It is necessary to clarify the placement evaluation meeting process for a patient being referred to the ETP in order to make sure everyone follows the same process and that each patient evaluated is treated the same way. Participation by the referred patient and their patients' rights advocate is necessary to ensure that the patient is given a voice in this process. Welfare and Institutions Code section 4414, subdivision (c)(1), provides for the patient and their patients' rights advocate to be involved in the FNAP meeting. Referral initiates ETP treatment; due to the concentrated therapy and structured milieu of the ETP program, it is important to make sure that each individual being considered for ETP treatment is clinically appropriate for referral and allowed an opportunity to provide their own information to be reviewed as part of the ETP treatment determination.

Add Section 4903:

This regulatory action would add Title 9, Division 1, Chapter 17, section 4903 to clarify existing statute by providing criteria and procedures for the FNAP to accept a patient for ETP treatment. It is necessary to clarify the required criteria for the FNAP in making their determination that a patient requires ETP treatment to make sure that only those individuals that require concentrated therapy and structured milieu of the ETP are

accepted into the program. Assessment of admission criteria is critical to the patient receiving ETP treatment; due to the concentrated therapy and structured milieu of the ETP program, it is important to make sure that each individual is being considered based on standard criteria.

Add Section 4904:

This regulatory action would add Title 9, Division 1, Chapter 17, section 4904 to clarify existing statute by providing criteria and procedures for immediate admission into the ETP when a patient presents a high risk of dangerous behavior such that placement in the ETP is immediately necessary for the preservation of life or the prevention of serious bodily harm to others. It is necessary to clarify that a patient may be placed in the ETP upon referral under Welfare and Institutions Code section 4144, subdivision (a), without first complying with sections 4901 and 4902 of the regulations, if it would be too dangerous to provide the FNAT initial evaluation and FNAP placement evaluation meeting prior to ETP admission. The Department strives to provide each patient being considered for ETP placement with review and assessment prior to admission to the ETP; however, due to the nature of the behaviors of the patients being referred, it may require the Department to immediately admit the patient upon referral by the psychologist or psychiatrist. Emergency admission to the ETP would only be in cases that require the patient to receive the concentrated therapy and structured milieu of the ETP program immediately. Admission to the ETP prior to the FNAT initial review and the FNAP meeting is contemplated in the statute by allowing the dedicated forensic evaluator specified in Welfare and Institutions Code section 4144, subdivision (b), designated as an FNAT psychologist in the regulations, to complete the initial evaluation within three days of the patient being placed in the ETP.

Add Section 4905:

This regulatory action would add Title 9, Division 1, Chapter 17, section 4905 to clarify existing statute by indicating certification requirements for a patient in the ETP, including use of the ETP Certification Form. It is necessary to clarify how a patient referred to the ETP is certified as requiring the ETP, in order to make sure everyone follows the same process and that each patient being considered for ETP is treated the same way. Certification is how the Department initiates ETP treatment; due to the concentrated therapy and structured milieu of the ETP, it is important to make sure that the certification decision has clinically appropriate documentation.

Add Section 5000:

This regulatory action would add Title 9, Division 1, Chapter 17, section 5000 to clarify existing statute for ensuring that each patient admitted to the ETP has an Individualized Treatment Plan and that it includes clinically indicated determinations regarding the least restrictive treatment environment for the patient. It is necessary to clarify the requirements of the Individualized Treatment Plan in order to ensure that each patient's Individualized Treatment Plan includes necessary information for the least restrictive

housing determinations. Due to the concentrated therapy and structured milieu of the ETP, whether or not a patient requires their room to be locked is a critical decision that affects not only the patient's access while receiving treatment in the ETP, but also the safety and security of staff and other patients at the facility. It is necessary to include the Treatment Team along with the FNAT psychologist in developing the Individual Treatment Plan as the Treatment Team is composed of the treatment providers working with the patient and implementing the treatment plan with the patient.

Add Section 5100:

This regulatory action would add Title 9, Division 1, Chapter 17, section 5100 to clarify existing statute by providing criteria and procedures for discharging or transitioning a patient from the ETP, including the timeline for any transfer out of the ETP. It is necessary to clarify the process for discharge from the ETP in order to make sure everyone follows the same process and that each patient being considered for discharge is treated the same way. Discharge from the ETP and transition to the Standard Treatment Environment is a decision that affects the type of treatment the patient will receive. Aftercare planning for a patient discharging from an ETP unit is essential and provides for the patient's successful transition back to the Standard Treatment Environment, as well as successful integration amongst other patients and staff in the new treatment environment.

Add Section 5200:

This regulatory action would add Title 9, Division 1, Chapter 17, section 5200 to define conditions under which audio and video monitoring or recording of patient rooms in the ETP may be conducted, how recordings shall be retained as private and confidential, how access is restricted to such recordings, and the Department's retention policy for such recordings. Audio and video monitoring and recording of the ETP patient rooms and common areas is necessary to ensure patient safety and security. It is necessary to clarify that due to the type of patients receiving treatment in the ETP, those at high risk for the most dangerous behavior, it is important to ensure that the concentrated therapy and structured milieu of the ETP program includes a way to monitor the patients at all times while they are in their room or in common areas available to the ETP patients. In addition, it is necessary to specify that audio and video recordings of the ETP may be provided to other entities for the purpose of investigating abuse or neglect and to specify the length of retention of these recordings at the hospital, so all entities are aware of the potential use and destruction of these records.

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY OR REPORT

1. Department of State Hospital 2010 - 2019 Violence Report
https://www.dsh.ca.gov/Publications/Reports_and_Data/docs/DSH_ViolenceReport_2010-2019.pdf
2. Stephen M. Stahl, Debbi A. Morrissette, Michael Cummings, Allen Azizian, Shannon Bader, Charles Broderick, Laura Dardashti, Darci Delgado, Jonathan Meyer, Jennifer O'Day, George Proctor, Benjamin Rose, Marie Schur, Eric Schwartz, Susan Velasquez and Katherine Warburton (2014). California State Hospital Violence Assessment and Treatment (Cal-VAT) guidelines. CNS Spectrums, 19, pp 449-465 doi:10.1017/S1092852914000376
3. Katherine D. Warburton (2015). A new standard of care for forensic mental health treatment: prioritizing forensic intervention. CNS Spectrums, 20, pp 172176 doi:10.1017/S1092852915000140
4. Katherine Warburton (2014). The new mission of forensic mental health systems managing violence as a medical syndrome in an environment that balances treatment and safety. CNS Spectrums, 19, pp 368-373 doi:10.1017/S109285291400025X

LOCAL MANDATE STATEMENT

The Department has determined that the proposed regulations would not impose a mandate on any local agency or school district that requires reimbursable by the State under Government Code, division 4, part 7 (commencing with section 17500).

FISCAL IMPACTS

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 no fiscal impact to local agencies or school districts.

Costs or savings to any State agency: The Department anticipates no additional costs associated with these regulations, apart from the costs associated with the implementation and operation of the statutes regarding the ETP program.

Other non-discretionary costs or savings imposed on local agencies: The Department has determined that the proposed regulations would not create costs or savings or other nondiscretionary cost or savings to State or local agencies.

Costs or savings in federal funding to the State: The Department has determined that the proposed regulations would not create costs or savings in federal funding to the State.

ECONOMIC AND FISCAL IMPACT STATEMENT (STD 399)

The Economic and Fiscal Impact Statement, as submitted in OAL Matter Number 2020-0413-03, and again in the first readoption of these regulations in OAL Matter Number 2021-0317-01, is also hereby incorporated by reference. The incorporation of this document by reference is done for consistency in the readoption of these regulations and to avoid the unnecessary duplication and print of this document, resulting in an unnecessary cost to the State which can be otherwise be avoided.

INCORPORATED BY REFERENCE

The following documents are incorporated by reference in the regulation:

1. ETP Referral Form DSH-9220, Rev. 9/17
2. ETP Certification Form DSH-9219, Rev. 4/18

It is necessary to incorporate the ETP Referral Form, DSH-9220, and the ETP Certification Form, DSH-9219, by reference as it would be unduly burdensome for the Department to publish these forms in the regulation text due to these forms being electronic forms utilized by the Department and the inability to print these forms as they appear in the electronic health record. These documents are incorporated by reference because it would be cumbersome, unduly expensive, and otherwise impractical to publish them in the California Code of Regulations.

COST IMPACTS TO A REPRESENTATIVE PRIVATE PERSON OR BUSINESS

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS OR STATUTES

The Department finds that these regulations are compatible with federal regulations or statute.

STATEMENT OF ALTERNATIVES CONSIDERED

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 these regulations are proposed, would be as effective and less burdensome to affected private persons than the proposed regulations, would lessen any adverse impact on small businesses, 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 from the Department using the contact information provided in this document. 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 accessed from the [Department website](https://www.dsh.ca.gov/Publications/Regulations.html) at <https://www.dsh.ca.gov/Publications/Regulations.html>.