



CALIFORNIA DEPARTMENT OF
State Hospitals

Regulations Unit
1600 Ninth Street, Room 410
Sacramento, CA 95814

July 7, 2017

The Department of State Hospitals (DSH) is required to post this emergency regulation notification and documents which address the “Sexually Violent Predator (SVP) Evaluation Processes.”

Government Code section 11346.2, subdivision (a)(2), requires that, at least five working days prior to the submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

In addition to the five-day comment period for the emergency filing indicated above, there will be the routine 45-day public comment period when these regulations are permanently adopted via the regular rulemaking process which will be completed within 180 days of OAL’s adoption of this emergency package.

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the Department of State Hospitals is proposing to take the action described in the Finding of Emergency after considering all comments, objections, and recommendations regarding the proposed action.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Office of Administrative Law (OAL). Comments may also be submitted to OAL by facsimile (FAX) at 916-323-6826. The written comment period will close five (5) days following the posting of the Notice by OAL on their website at www.oal.ca.gov.

OAL will consider only comments received at OAL offices by that time. Comments should be sent simultaneously to:

Department of State Hospitals
Attn: Dennalee Folks
1600 9th Street, Rm 400
Sacramento, CA 95814

and

Office of Administrative Law
Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

AUTHORITY AND REFERENCES

Authority: Welfare and Institutions Code sections 4005.1, 4027 and 4101 allow the Department to adopt and enforce rules and regulations necessary to carry out the duties of the Department.

References: Sections 6601, 6603, 6604, and 6605, Welfare and Institutions Code; and *Albertson v. Superior Court* (2001) 25 Cal.4th 796.

FINDING OF EMERGENCY

A. Department of State Hospital's (DSH) Finding of Emergency Regulatory Action Is Necessary

These regulations are being implemented 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.

B. Description of Specific Facts Which Constitute the Emergency

The Necessity for the Proposed Regulations

DSH is facing current and existing legal challenges to the current SVP evaluations update process, on the grounds that current guidance is unclear, potentially *ultravires*, and potentially does not abide by the Administrative Procedure Act. These policy and legal challenges are being raised in a variety of pending SVP civil commitment proceedings. The proposed regulations provide clarity and extinguish any legal doubts as to the validity of the department's interpretation of the Sexually Violent Predator Act (SVPA). It is critical, therefore, to immediately promulgate these emergency regulations in order to provide guidance and clarification on Welfare and Institutions Code section 6600 et. seq.

The applicable statute does not provide a time limit for a case filed under the Sexually Violent Predator Act (SVPA) to proceed to trial. Further, the statute did not anticipate that the cases pursued under Welfare and Institutions Code section 6600 et. seq. to last for many years. Currently, DSH has housed many patients for many years while they are pending trial under Welfare and Institutions Code section 6602. In some, cases have been pending for 10-15 years as largely to delays sought by the individual's respective public defenders. As a result, individuals committed under Welfare and Institutions Code section 6602 have had a variety of evaluators assigned to their cases over multiple years, providing update and replacement evaluations, which has created confusion in the update evaluation process due to multiple evaluations that have been completed.

As a result, DSH is implementing these emergency regulations to provide immediate and clear direction as to when an SVP evaluation can and should be updated, and the frequency for update requests to comply with *Albertson v. Superior Court* (2001) 25 Cal. 4th 796 (holding an evaluation is stale after one year). By these emergency regulations, DSH is also providing immediate clarification as to how many evaluators should be assigned when there is a difference of opinion between concurrently assigned evaluators providing update evaluations, and which evaluations may be updated for use in pending (and upcoming) SVP civil commitment proceedings.

The Finding of Emergency

DSH finds that the proposed regulatory amendment is necessary to address an emergency. An emergency is "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code, § 11342.545.) DSH is facing current and existing legal challenges to the current SVP evaluations update process, on the grounds that current guidance is unclear, potentially *ultravires*, and potentially does not abide by the Administrative Procedure Act. These policy and legal challenges are being raised in a variety of pending SVP civil commitment proceedings. As a result, the department wants to ensure that all parties of the SVPA commitment process are aware of the process and ensure that the department is able to provide proper evaluations for all pending matters. These regulations would provide immediate clarity and extinguish any legal doubts as to the validity of the department's interpretation of the SVPA. It is critical, therefore, to immediately promulgate these emergency regulations in order to provide guidance and clarification on Welfare and Institutions Code section 6600 et. seq.

Emergency regulatory action is also necessary in this instance because the District Attorney of Los Angeles filed an underground regulation challenge against the department's policy on update evaluations, and the department has been made aware that both the District Attorney and the Public Defender in Los Angeles County may challenge future policies of the department as underground regulations, unless the Department promulgates its policy through the Administrative Procedures Act. The proposed emergency regulations will allow for an orderly and understandable process, that will be able to be implemented immediately to pending SVP cases, when it comes to updating the evaluations that are to be completed on individuals who are facing trial under the SVPA.

DSH HAS MADE THE FOLLOWING INITIAL DETERMINATIONS:

Substantial Difference from Existing Comparable Federal Regulations or Statute: None.

Incompatibility with Existing Laws and Regulations: None

Mandates on Local Agencies or School Districts: None.

Mandate Requires State Reimbursement Pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None.

Costs to Any Local Agency or School District that Requires Reimbursement Pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code: DSH anticipates that there will be no fiscal impact in the current State Fiscal Year to Local Agencies.

Non-discretionary Costs or Savings Imposed on Local Agencies: None

Costs or Savings to Any State Agency: DSH anticipates that there may be some cost savings to the State as this will allow the Department to be clear on what evaluations should be updated, potentially decreasing the amount of staff time to complete evaluations.

Costs or Savings in Federal Funding to the State: None.

Costs or Savings to Individuals or Businesses: DSH is not aware of any cost impacts that an individual or business would necessarily incur in reasonable compliance with the proposed action.

MATERIAL INCORPORATED BY REFERENCE

None

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), DSH has determined that no reasonable alternative, which it will consider or that will otherwise be identified and brought to its attention, will be more effective in carrying out the purpose for which this action is proposed or will be as effective and less burdensome to affect private persons than the proposed action described in this Notice.

DSH invites interested persons to present statements or arguments with respect to alternatives to the proposed regulation amendment a during the written comment period.

AVAILABILITY OF FINDING OF EMERGENCY, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The rulemaking file is available for inspection and copying at the Department of State Hospitals, Regulations Unit, 1600 9th Street, Room 410, Sacramento, CA 95814. As of the date this Notice is published, the rulemaking file consists of a copy of the exact language of the proposed regulations and the Finding of Emergency. These documents may also be viewed and downloaded from DSH's website at www.dsh.ca.gov.