



CALIFORNIA DEPARTMENT OF State Hospitals

NOTICE OF EMERGENCY AMENDMENTS AND FINDING OF EMERGENCY Emergency Regulations for Electronic Patient Property

FINDING OF EMERGENCY REGULATORY ACTION IS NECESSARY

The Department of State Hospitals (Department/DSH) finds that the proposed amendments to California Code of Regulations, title 9, section 4350 (section 4350), 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 amend the regulations on an emergency basis as described below. 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 amended 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 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 regulation is filed with OAL.

Comments should be sent simultaneously to:

Department of State Hospitals
Attn: Amy Whiting
1600 9th Street, Rm 410
Sacramento, CA 95814

and

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

FINDING OF EMERGENCY

The Necessity for the Proposed Emergency Regulations

FACTS

In 2009, DSH (known as the Department of Mental Health at that time) adopted emergency regulations to adopt Section 4350, and the regulations were made permanent in 2010. DSH found that all DSH state hospitals reported increasing numbers of contraband wireless communication devices among the patient population and their use to import illegal pornographic materials, facilitate contraband exchanges, and communicate with external and internal individuals for victimization purposes. The regulation was adopted to support the elimination of the significant safety and security risks.

In response to multiple DSH-Coalinga patients filing an injunction on the regulation, DSH-Coalinga created a moratorium on enforcement of the regulation for patients currently possessing prohibited items, provided that the devices could not access the internet pursuant to California Code of Regulations section 891 and DSH could search the item at any time for illegal or illicit items.

In the years since the regulation was adopted, the regulation was continuously challenged, and technological changes and further information on patient electronic abilities noted a need to control data storage not addressed in the original regulation. Specifically, digital memory devices became a large issue, escalating from 850MB as the average amount of data on a USB device to a terabyte or five terabytes being common. Without limit, patients obtained massive amounts of data, unnecessary for patients confined to an inpatient facility and making effective enforcement of both the current Section 4350 and the items under the moratorium impossible. Gaming devices

became more advanced, able to play outside media including burned discs and able to access the internet. It was discovered that these gaming devices and memory devices could have software that would override disabling features and permit access to the internet. The ability for patients to purchase televisions or non-“smart” devices became more difficult and expensive.

Digital data storage and internet communication obtained by downloaded software has permitted patients to access, exchange, and/or profit from illegal material and communications, including child pornography, finding and harassing old victims, finding and creating new victims, accessing visuals of the hospitals for escape or other illicit purposes, obtaining information with which to harass or victimize staff, etc. With recent court rulings supporting the restriction of electronic devices and recent arrests demonstrating actual dangers, DSH has the statutes, case law, and facts to assert the regulatory amendments to address technological advances. Failure to address these issues will result in endangering the patients, staff, and the public through access to the internet; the coordination of harmful activities; the allowance of burning, downloading, and exchanging illegal materials; and the revictimization of children in pornographic images.

DSH has determined that these amendments to Section 4350 are necessary to protect the public, specifically victims of child pornography. Child pornography is a unique crime since the victim is revictimized each time an image of the victim is viewed. In the *United States v. Kearny*, (2012) 672 F.3d 81 [2012 U.S. App. LEXIS 4146, 2012 WL 639168], the Court summarized the findings of child revictimization each time child pornography is viewed:

Congress has also since repeatedly emphasized, in legislation amending the laws governing child pornography, the continuing harm the distribution and possession of child pornography inflicts. See Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, Tit. I, § 102(3), 122 Stat. 4001, 4001 ("Child pornography is a permanent record of a child's abuse and the distribution of child pornography images revictimizes the child each time the image is viewed."); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 ("Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1)(2), 110 Stat. 3009, 3009-26 ("[C]hild pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years . . .").

It is this revictimization that DSH seeks to prevent as quickly as possible through the adoption of emergency regulations. DSH has been actively working with the Fresno County District Attorney's (DA) office in investigating and prosecuting cases involving child pornography. This is a long and tedious process in completing the investigation

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and making sure that the DA's office had the proper resources to vigorously prosecute the child pornography. In the summer of 2017, DSH made eleven simultaneous arrests in regard to child pornography. In the past couple of years there have been five convictions of patients with child pornography and more are awaiting trial. DSH has discovered that nearly all of the child pornography is being distributed through various electronic devices.

In addition to preventing minors from being re-victimized, these emergency regulations are necessary to protect staff and patient safety and the therapeutic environment of DSH's secured inpatient facilities. In *Brown v. Phillips*, 2015, 801 F.3d 849, the Seventh Circuit concurred with the restriction of gaming devices believed to be disabled from internet access as evidence was presented that the internet could still be accessed. In 2016, the Federal District Court in *Allen v. King*, U.S. Dist. LEXIS 108748, accepted evidence presented by DSH regarding the ability to use electronic devices to access the internet to access victims, create new victims, receive maps of the hospital for escape plans, and track staff members and their families.

These emergency regulations would expand current regulation to address the possession, viewing, and distribution of child pornography and other illicit materials by removing digital memory storage, other means of memory storage, specified digital media players, and digital media burners from the personal possession of the patients. Commercially produced CDs and DVDs and players without access to the internet will be permitted under these amendments. Finally, the option for hospitals to provide digital media on a supervised basis, such as a check-out or temporary basis, would address patients' preference for maintaining appropriate materials in digital format, including legal research and therapeutic writings.

EVIDENCE

I. Nexus Between DSH's Patient Population and Electronic Restrictions
DSH is responsible for the housing and treatment of judicially committed persons with mental disorders. Commitment types include sexually violent predators, not guilty by reason of insanity, incompetent to stand trial, and mentally disordered offenders. Additionally, DSH houses and treats CDCR inmates in need of inpatient mental health treatment and Lanterman-Petris-Short (LPS) patients for the counties of California. Each of the five DSH hospitals are secured facilities with hospital police departments to aid in security. DSH is mandated by Welfare and Institutions Code section 6600.05 to house sexually violent predators at DSH-Coalinga, which is on CDCR grounds pursuant to Welfare and Institutions Code section 6604, or at another site determined by CDCR. In no case can a sexually violent predator be placed at DSH-Napa or DSH-Metropolitan pursuant to Welfare and Institutions Code section 6600.05 and Welfare and Institutions Code section 7230 provides that only low to moderate risk patients be placed at those two hospitals. DSH-Coalinga also houses mentally disordered offenders. Thus, almost all of our commitments require the security as well as the treatment of our patients to protect the public.

Pursuant to Welfare and Institutions code section 6600 et. seq., sexually violent predators must have a mental disorder, and many are diagnosed pedophiles. Courts have recognized a strong nexus between pedophilia and child pornography. (See *People v. Memro* (1995) 11 Cal.4th 786, 864-865 [possession of child pornography was evidence of defendant's intent to molest young boy]; *United States v. Brand* (2d Cir. 2006) 467 F.3d 179, 197, 198, fn. 18 [child pornography on defendant's computer was relevant to prove he intended to meet minor for sex "because [of] direct connection . . . between child pornography and pedophilia"; "Congress has found that child pornography has a connection to an abnormal sexual interest in children and pedophilia"]; *United States v. Byrd* (5th Cir. 1994) 31 F.3d 1329, 1336, fn. 9, 1336; "[i]n addition to . . . the case law and expert testimony that links pedophilia to child pornography, we also note that common sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography"; *United States v. Bentley* (2007 N.D. Iowa) 475 F.Supp.2d 852, 858 [difference between prior sexual assaults of children, and current prosecution for possessing child pornography, "are not as great as they might seem at first glance" because "[t]he child pornographer, like the child rapist, displays a sexual interest in children "].)

Therefore, DSH must maintain security measures in the form of preventing patient contact with victims or finding new victims via the internet, eliminate the ability to satellite-view the hospital facilities and surrounding areas, and eliminate not only the downloading but dissemination of child pornography.

II. Digital Memory Storage Devices

Digital memory storage devices, even as small as 1GB, have the capability to store downloadable software to override a disabled device and access the internet, as well as allow copying of materials through other electronic devices. Electronic devices such as "Raspberry Pi," modern gaming devices, and even smart TVs permit access to the internet on internet-capable devices thought to be disabled from the internet. This results in a violation of both Section 4350 as well as California Code of Regulations, title 9, section 891, which prohibits access to the internet for all non-LPS patients. This access to the internet provides full access to illegal materials, aerial views of the DSH facilities, communication with victims, communication to create additional victims, and the ability to download illicit images for sale or sharing with other patients. However, because the ability is in software format within currently authorized memory devices, it is not detectible as contraband through standard room searches. Moreover, even all internet access was terminated, digital memory storage devices permit the dissemination of child porn and other illicit material from just transferring or sharing the stored data.

Penal Code section 1546.1, adopted in 2015, mandates that a search of electronic devices is not permitted without permission by the possessor or a search warrant, further frustrating the ability to enforce facility and public safety enforcement. This internet access creates danger for the public, the staff, and patients, as well as

interferes with treatment by creating exposures, triggers, and temptations that are intended to be controlled in a secured inpatient mental health setting. Therefore, digital memory devices need to be prohibited from personal possession by DSH patients.

III. Gaming Devices

Gaming devices with the ability to access the internet are currently prohibited, but gaming devices with internet disabled are permitted. However, many recent gaming devices contain accessible data storage capabilities, permitting patients to download illegal material and software into the device and prevent the items from being discovered in a standard room search. Therefore, a previously acceptable device under the current Section 4350 becomes contraband, but the hospital police must have enough probable cause to issue a search warrant for the device. These gaming devices also permit non-proprietary CDs and DVDs for transfer and then distribution of the images, or receipt and download of the images. This evidence was also present and accepted by the Seventh Circuit in *Brown v. Phillips*, 2015, 801 F.3d 849. Patients would have the ability to purchase devices, such as gaming devices from vendors such as Walkenhorst, that provide one-time downloads of games and movies issued from the vendor, or provide for the tablet to be sent to the vendor for download of the purchased game or movie. This provides controlled access to games and movies through an approved vendor to prevent illegal materials or exchanges to occur. Again, as this possession is virtual, current enforcement of safety and the child pornography law, as well as other illicit information on victims or the hospital, is nearly impossible. Therefore, these amendments would clarify the current regulation to specify gaming devices with accessible data and the ability to play non-proprietary inserts are prohibited from personal possession by DSH patients.

IV. CD and DVD Burners

The ability to burn DVDs and CDs permits the ability to distribute illegal images and communication. Patients also burn and sell or exchange legal movies and music for profit. In addition to creating the same issues with illegal and illicit information storage as digital memory devices and gaming devices, these activities are in violation of United States Code, title 17, section 501, et seq. Moreover, enforcement becomes impossible. DSH does not have the staff needed to get warrants and then review and re-review blank disks or disks with printed labels to determine what has appropriate material, such as patient documentation, what has child pornography, illicit material, or copyright violations, or what has illegal or illicit material downloaded after the last search. Therefore, CD/DVD burners and blank CD/DVDs would be prohibited from personal possession by DSH patients. At this time, DSH will permit patients to personally own CDs and DVDs provided by a manufacturer.

V. Litigation

Section 4350 has been continuously litigated since its adoption. DSH has successfully defended the regulation, but is awaiting definitive judicial support from the Ninth Circuit. This year, the Federal District Court twice upheld that electronic devices are not a constitutionally protected right, and that restrictions on electronic devices for civilly committed persons is appropriate to meet a legitimate government purpose.

On May 19, 2016, in *Telucci v Withrow*, (2016) U.S. District LEXIS 66334, the Eastern District Court reasserted the analysis that internet and electronic devices are not constitutionally protected rights. Then on October 16, 2016, the District Court in *Allen v. King*, (2016) U.S. Dist. LEXIS 108748 granted the motion to dismiss the claims against Section 4350 with a full analysis of the facts, testimony and law, finding that there is no Constitutional right to possess and use personal computers and electronic devices, and that the restrictions are not punitive and do serve a legitimate government purpose. In *Allen v. King*, the Court stated:

To this Court's knowledge, no court has ever held that a civil detainee such as an SVP has a constitutionally protected right to possess and use personal laptops and other similar electronic devices. See *Telucci v. Withrow*, 2016 WL 2930629 at 5 (E.D. Cal May 19, 2016 (unpub.) (listing the following cases for the same proposition: see *Endsley v. Luna*, 2008 WL 3890382 at 3 (C.D.Cal. May 23, 2008) (unpub.) (citing *Sands v. Lewis*, 886 F.2d 1166, 1172 (9th Cir.1989)) (prisoners do not have a constitutional right to have memory typewriters in cells), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343, 350-55 (1996); *Taylor v. Coughlin*, 29 F.3d 39, 40 (2nd Cir.1994) ("If prison inmates do not enjoy a constitutional right to typewriters as implements of access to the courts, it would be illogical for us to rule that there is a constitutional right to typewriters of a specific memory capacity."); *State ex rel. Anstey v. Davis*, 203 W.Va. 538, 545, 509 S.E.2d 579 (1998) ("We are persuaded by the uniformity of opinion on this issue and therefore hold that prison inmates have no constitutional right to possess personal computers in their cells."); *Endsley v. Luna*, 2009 WL 3806266 (C.D.Cal. Nov.12, 2009) (unpub.) at 16 (citing *Fogle v. Blake*, 227 Fed. Appx. 542, 542 (8th Cir.2007)) (finding civil committee failed to state a constitutional claim regarding denial of a computer or typewriter); *Spicer v. Richards*, 2008 WL 3540182 at 7 (W.D.Wash. Aug.11, 2008) (unpub.) (finding no authority to show that SVP had a 14th Amendment right to possess a "cell phone, pager, computer, [or] color ink cartridge printer."); *Carmony v. County of Sacramento*, 2008 WL 435343 at 18 (E.D.Cal. Feb.14, 2008) (finding civil detainee had no "free-standing First Amendment right to access computers and/or the internet."); *White v. Monahan*, 2009 WL 499121 at 2 (C.D. Ill. Feb 24, 2009) (acknowledging that while civil detainees enjoy more liberties than convicted prisoners, "[t]he inability to possess a computer does not implicate a property interest that might be protected by procedural due process protections or an interest that might be classified as a substantive due process interest.")).

While civilly committed persons have a substantive due process right to be free from restrictions that amount to punishment, (*U.S. v. Salerno*, 481 U.S. 739, 746–47 (1987); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979),) "There is no constitutional infringement,

however, if restrictions are but an incident of some other legitimate government purpose.” (*Valdez v. Rosenbaum*, (9th Cir. 2002) 302 F.3d 1039, 1045.)

The *Allen v. King* Court made multiple findings of fact supporting these amendments, including the facts set forth above that internet access to patients permits communicating for the purposes of victimization with external and internal persons and accessing material that endangers the facilities in addition to child pornography. The Court found, “DSH-Coalinga’s Sgt. DuVall’s declaration provides that at least 200 individuals at DSH-Coalinga have been involved with the possession or transmission of child pornography and there are typically 2–3 new child pornography cases reported each month which require investigation. These include cases where patients have solicited child pornography via text messages, internet searches, and downloads from torrent sites or peer to peer file sharing. The financial costs associated with investigating child pornography cases are substantial, requiring labor-intensive forensic examinations of cell phones, memory cards, hard drives or laptops to detect child pornography.” The Court found that even patient plaintiffs admitted there is a “porn epidemic” at DSH-Coalinga.

On December 19, 2017, the California Court of Appeal, Fifth District also affirmed in an unpublished decision, DSH-Coalinga was able to confiscate items that were contraband and were not permitted pursuant to California Code of Regulations, title 9, section 4350 and DSH-Coalinga’s contraband list. (*In re Jackie Robinson* (Dec. 19, 2017, F071466) [nonpub. Opn.].) The items in question in the case, included a laptop and storage devices. The court went to also state that Mr. Robinson was not entitled to the return of his confiscated property.

EVIDENCE FOR EMERGENCY

As set forth above, January 2016 through summer 2017 brought forth changes that both made amendments to the current regulation necessary and possible. Litigation against the current regulation alleged that the existing regulation is unconstitutional and punitive. DSH has waited for definitive support of this regulation as constitutional and non-punitive from the courts. Finally, in October 2016, the District Court provided the above in-depth analysis upholding the regulation as constitutional and serving a legitimate state interest at the request of the Ninth Circuit.

In anticipation of the Ninth Circuit affirming the lower court in light of the recent cases affirming the regulation, stricter enforcement of the current regulation was reviewed, specifically the lifting of the moratorium. It became clear, however, that technology had advanced beyond the reach of the current regulation. Even lifting the moratorium would not address digital storage devices, clarify which gaming devices were approved and which were not, permit devices designed for confined individuals like Walkenhorst, or permit devices to be used for therapeutic purposes.

In 2017, eleven arrests of patients possessing child pornography on electronic devices took place at DSH-Coalinga. While investigations, arrests, and convictions occur every

year, this was the largest grouping of arrests to date. At this point, and no sooner than this point, did DSH confidently have the statutory law of Welfare and Institutions Code sections 4005.1 and 4101 combined with supportive case law and a multitude of actual facts to defend amendments to the current regulation against claims of the amendments being unconstitutional or punitive without waiting for a ruling from the Ninth Circuit. While the proposed regulatory amendment was being drafted, the Fifth Circuit California Court of Appeals upheld the ability to confiscate items prohibited by the current regulation, further supporting this action. As the amendments seek to immediately protect the health, safety, and general welfare of the public, as well as patients and the facility, emergency regulations are necessary.

CONSEQUENCES OF FAILING TO ADDRESS THE SITUATION THROUGH EMERGENCY REGULATIONS

Child pornography and other illegal materials exist within the hospitals, but without the proposed amendments to current regulation, DSH cannot address and remove this issue to the greatest extent possible as quickly as possible. Permitting unsupervised digital storage, viewing, and transfer is now recognized as feeding illegal activities. While Welfare and Institutions Code section 7295 permits items to be listed as contraband, the items are subject to review and objection every six months, adding to excessive and unnecessary workloads. Moreover, Welfare and Institutions Code section 7295 is for facility protection, and the current and amended regulation are further reaching than that, and necessitate a codified process. Failure to adopt these regulations will permit illegal activities to continue. Additionally, children already victimized by involvement in sexual acts and poses are revictimized with each view permitted while the regulation is not expanded to address possession, viewing, and transfer. (*U.S. v. Kearney* (2012) 672 F.3d 81.)

AUTHORITY AND REFERENCE

The Department is proposing to amend proposed emergency regulations in section 4350, title 9, California Code of Regulations under the authority provided in sections 4005.1, 4027 and 4101 of the Welfare and Institutions Code. The Department makes reference to specific statutory provisions in order to implement, interpret, or make specific the emergency changes to California Code of Regulations, title 9, section 4350 in sections 4005.1, 4027, and 7295 of the Welfare and Institutions Code.

EFFECT OF THE PROPOSED EMERGENCY REGULATIONS

Existing Law

Welfare and Institutions Code section 4005.1 provides that DSH may adopt and enforce rules and regulations necessary to carry out their respective duties.

Welfare and Institutions Code section 4027 provides that DSH may adopt regulations concerning patients' rights and related procedures applicable to the inpatient treatment of mentally ill offenders and mentally disordered sex offenders.

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

Welfare and Institutions Code section 7295 provides that DSH shall develop a list of items deemed contraband at every state hospital subject to review by the Contraband Committee and Director of State Hospitals every six months. This section defines "contraband" as defined as materials, articles, or goods that a patient is prohibited from having in his or her possession because the materials, articles, or goods present a risk to the safety and security of the facility. This section provides that inclusion on a contraband list does not necessitate regulations, but does not address harm to public or ensure a permanent solution.

California Code of Regulations, title 9, section 891 provides that patients not committed pursuant to the Laterman-Petris-Short Act (LPS) shall not have access to the internet.

Policy Statement

The objective of the proposed amendments is to implement, interpret, or make specific Welfare and Institutions Code sections 4005.1, 4027, 4101, and 7295 by expanding prohibitions against the possession of digital memory devices and certain electronic devices by DSH patients. The regulation would specify what items are prohibited from patient possession. The regulation will provide for uniform prohibitions statewide, at each DSH state hospital for the welfare of the public, DSH staff, and every DSH patient.

Benefits of the Proposed Emergency Regulations

By amending Section 4350, DSH can better serve the public by enforcing child pornography prohibitions, better serve DSH staff and patients by minimizing threats to safety and security, and better serve the patients of DSH by providing a more therapeutic inpatient environment by better controlling triggers, stimulants, and temptations.

COMPATABILITY WITH EXISTING REGULATIONS

The proposed emergency amendments are compatible with current regulations. The proposed emergency amendments compliment California Code of Regulations, title 9, section 981 by addressing not only electronic devices that access the internet, but devices that store software to access the internet.

COMPATABILITY WITH FEDERAL LAW

The proposed emergency amendments comply with federal law, including the following:

United States Code, title 18, section 2251, et seq. prohibits sexual images of children and other forms of the exploitation of children.

United States Code, title 17, section 501 et seq. prohibits the infringement of copyright materials, including movies and music.

Summary of Proposed Amendments

The proposed amendments to California Code of Regulations, title 9, section 4350, are summarized as follows:

- Subsection (a): Subsection (a) would reorganize the current regulatory language to group information into subsections and paragraphs for clarity. Subsection (a) would also make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by providing that, except as provided in subsection (d), the electronic devices are prohibited from patient personal possession, access, or on-site storage. This amendment is necessary to clarify that patients may not personally possess or have access to the items, while still permitting hospital use of these items.
- Subsection (a), paragraph (1): Paragraph (1) would utilize the language of the current regulation, and permit the delineation of examples of prohibited electronic devices with the actual or potential capability to connect to the internet. The current provisions remain necessary to clarify that access to the internet by internet-accessible devices, software, or wired connections to hospital internet are prohibited. The delineations are necessary to better clarify what items and types of items are prohibited.
- Subsection (a), paragraph (2): This paragraph would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by prohibiting digital media recording devices, including but not limited to CD, DVD and Blu-Ray burners from personal patient possession. This provision is necessary to prevent the storage and distribution or the sale of materials that violate federal and state laws against child pornography and federal copyright infringement, or are otherwise dangerous to the safety of the facility.

- Subsection (a), paragraph (3): This paragraph would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by voice or visual recording devices from personal patient possession. This provision is necessary to fully address the safety of staff, patients, and the public, ensuring that patients do not record voices and images for illicit materials or violations of patient privacy, as well as not recording the facility to ensure that the security of the facility remains intact.
- Subsection (a), paragraph (4): This paragraph would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by prohibiting any items capable of memory storage from personal patient possession. This provision is necessary to fully address the issue of illicit software that permits access to the internet and the issue of illicit materials stored, viewed and transferred.
- Subsection (b): Subsection (b) would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by delineating electronic items permitted for patient access. The commercial indications would assist enforcement of federal and state laws against child pornography and other illicit materials by eliminating copied or burned material.

Limitations on the number of electronic items permitted is to codify limits set by individual contraband authority currently enforced at a majority of DSH's hospitals for patient space, fire code, and Section 4350 enforcement purposes. At least one hospital utilizes this limit to discourage the use of excess items as weapons. This provision is necessary to allow patients access to legal movies, music, and players while still enforcing the needs of public and facility safety.

Subsection (b) also permits tablets or other devices designed for confined individuals through authorized vendors of DSH or CDCR, which would include Walkenhorst and other similar vendors. This provision is based on the presumption that what a prisoner can have, a patient should have unless, pursuant to subsection (c), the item is deemed unsafe for the hospital population. Further, the items designed for confined individuals are altered with illegal overriding attempts to access the internet in mind to prevent such action. These items are acceptable at this time to both DSH and the patients for personal electronic entertainment.

- Subsection (c): Subsection (c) would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific and reiterate Welfare and Institutions Code section 7295 by permitting the hospitals create a more comprehensive contraband list as appropriate for the safety of the patient population or the hospital that may be unique to the hospital based upon the structure or patient population, including the elimination of any permitted item of subsection (b). This provision is necessary to clarify that this regulation does not contradict Welfare and Institutions Code section 7295.
- Subsection (d): Subsection (d) would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by permitting hospitals to make items prohibited from patient possession available on a supervised basis. This

provision would allow electronic items to be utilized for therapeutic purposes, as well as permit a method by which patients may maintain legal and therapeutic paperwork or other lawful materials in virtual formats. Nothing in this provision would require a hospital to permit even supervised access of electronic items to patients. This provision is necessary to allow the hospitals to take advantage of therapeutic treatments that may use electronic items as appropriate for the population of the hospital, and eliminate the costs and storage of hardcopy legal items for the patients. Subsection (d) also limits any data storage device within access of a patient to be no greater than eight gigabytes (8GB). This provision is necessary to permit data storage while still maintaining an appropriate data limit for legal materials and the man-hours necessary to search the device and continue to enforce facility and public safety.

- Subsection (e): Pursuant to Welfare and Institutions Code section 7295, contraband is subject to control and elimination by the hospitals. Subsection (e) would make Welfare and Institutions Code sections 4005.1, 4027, and 4101 more specific by providing an option at the initiation of this amendment for the patients to either grant permission for the item to be searched for illicit material prior to sending it to a different location or the item will be destroyed. After initiation, any contraband will be fully subject to Welfare and Institutions Code section 7295. The option provision is necessary to aid in the enforcement of this amendment in a manner as safe as possible for the facility and patients. The provision is to clarify the reversion to Welfare and Institutions Code section 7295 to the security of the facility as delineated in that section.

Technical, Theoretical, and Empirical Study or Report

None.

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: DSH anticipates there will be no fiscal impact to Local Agencies. This proposed regulation would only affect the state hospitals and the patients. The local government would not have an additional role on the enforcement of the regulation.

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

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

Non-discretionary Costs or Savings Imposed on Local Agencies: DSH anticipates there will be no fiscal impact to Local Agencies. This proposed regulation would only affect the state hospitals and the patients. The local government would not have an additional role on the enforcement of the regulation.

Costs or Savings to Any State Agency: DSH anticipates increased costs of hospital security, including overtime, while the regulation is implemented and legal costs to respond to litigation in response to the regulation. Further, DSH anticipates costs of USB devices and other equipment to be used on a supervised check-out basis for patients. DSH may continue to find more illegal content in the existing electronic devices of the patients, completing this search will take more staff time and may require more storage space at the facility to properly search these items. After the regulations have been promulgated, the Department would incur savings as it would be easier to enforce the contraband policy within the facilities and would decrease the need for searches of illegal activities.

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 EMERGENCY REGULATIONS, AND RULEMAKING FILE

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