DEPARTMENT OF STATE HOSPITALS
SUPPLEMENT TO THE INITIAL STATEMENT OF REASONS

California Code of Regulations
Title 9. Rehabilitative and Developmental Services
Division 1. Department of Mental Health
Chapter 16. State Hospital Operations
Article 2. Treatment

The Department of State Hospitals (Department) is submitting this supplement to the Initial Statement of Reasons to provide the specific purpose, problem and rationale of each amendment to Section 4210.

§ 4210

Subsection (a)
Purpose: This subsection is amended to provide non-substantive changes to the department's name; specify each commitment category of patients affected by these regulations; and remove text related to the hearing procedures which is addressed in a later subsection.

Problem: Patients committed under Penal Code (PC) sections 1026 et al. and 2972 et al., and Welfare and Institutions Code (WIC) section 6316 et al. were not included in the original regulations.

Rationale: The Department provides mental health treatment and care to over 7,000 patients annually. The California Code of Regulations (CCR), Title 9, Division 1, Chapter 16, Section 4210 currently allows the Department to conduct administrative hearings to determine the necessity to administer non-emergency interim involuntary antipsychotic medication to Mentally Disordered Offenders (MDOs) and Sexually Violent Predators (SVPs) patients. The Court of Appeal, Second Appellate District, *In re Greenshields,* San Luis Obispo County on July 14, 2014, ruled that persons found Not Guilty by Reason of Insanity (NGI) have the same constitutional rights as MDOs and SVPs to refuse antipsychotic medication. The court directed the Department to refrain from administering antipsychotic medication to Mr. Greenshields against his will in a non-emergency situation unless a trial court determines he is competent to refuse the treatment or is a danger to others within the meaning of WIC section 5300. The recent court decision now -provides NGIs with the same right to refuse antipsychotic medication already provided to MDOs and SVPs. This subsection is necessary to effectuate the court decision.

The Department is also including in this subsection PC section 2972, MDOs, to include all MDO classes and WIC section 6316, Mentally Disordered Sex Offenders (MDSO), the pre-SVP legal class, to effectuate the intention of the court cases *In Re Qawi* and *In Re Calhoun* related to these two commitment types.

Subsection (b)
Purpose: This subsection is amended to clarify the beginning process of the involuntary medication hearing procedures regulations and eliminate multiple actions within one

subsection. This subsection is now limited to determining the need for a hearing. This subsection adds that a state hospital psychiatrist shall first determine that involuntary antipsychotic medication is medically and psychiatrically appropriate for a patient. Formatting Section 4210 in this manner provides clarity through a sequential order of events.

Problem: The prior text grouped several actions into subsection b. This made it difficult for the public to fully understand the specific requirements of the subsection. The prior text did not clarify the determination of “medically and psychiatrically” appropriate, it only stated “is appropriate.”

Rationale: The Department has determined that limiting one action to a subsection would provide clarity to Section 4210. The addition of medically and psychiatrically implements provisions of the *In Re Qawi*, *In Re Calhoun,* and *In Re Greenshields* court cases. This subsection promotes fairness and increases transparency in government.

Subsection (c)
Purpose: This subsection is amended to clarify the process for the treating psychiatrist to inform the patient of his/her diagnosis, explain why antipsychotic medication is necessary, and explain the anticipated benefits and possible side effects. Prior subsection c identified the criteria for holding an administrative hearing. That subsection is deleted and the criteria are now enumerated under new subsections.

Problem: The prior text grouped this subsection into subsection b with other provisions which made it difficult for the public to fully understand the purpose of the subsection. The former subsection (c) was a header for the hearing criteria which is no longer necessary.

Rationale: The Department has determined that limiting one action to a subsection would provide clarity to Section 4210. The actual text for informing the patient was not substantively changed.

Subsection (d)
Purpose: This subsection is a continuation of the pre-administrative hearing process and is the last action in the former subsection (b). This subsection is amended to clarify the process for the treating psychiatrist to ascertain either that the patient refuses to give informed consent; or is incompetent or lacks capacity to give informed consent to the medication; and/or poses a danger to others. This subsection also adds the criteria for “lacks capacity” and/or “poses a danger to others”.

Problem: The prior text grouped this subsection into subsection b with other provisions which made it difficult for the public to understand the purpose of the subsection. The prior text did not include “lacks capacity” and “poses a danger to others” statements.

Rationale: The Department has determined that limiting one action to a subsection would provide clarity to Section 4210. The addition of “lacks capacity” and/or” poses a danger to others” implements provisions of the *In Re Qawi, In Re Calhoun,* and *In Re Greenshields* court cases.

Subsection (e)
Purpose: This subsection was added to state that a state hospital shall hold the administrative hearing pursuant to the applicable legal standard for each commitment category.

Problem: This subsection was added to inform the patient of the legal standard by which the administrative hearing would be held.

Rationale: This subsection provides clarity and transparency in government to the patients regarding the administrative hearing proceedings and implements the applicable legal standard for each commitment category as found in the *In Re Qawi, In Re Calhoun,* and *In Re Greenshields* court cases.

Subsection (f)
Purpose: This subsection has been renumbered from former subsection (c)(1). The writing style has been changed to reflect the format per the Office of Administrative Law's (OAL) guidelines. This subsection introduces form DSH 9164, Notice of Involuntary Psychotropic Medication Hearing, to provide a written notice to the patient of the administrative hearing. This subsection also adds that the Office of Patients' Rights (OPR) will be notified when the state hospital serves the Notice to the patient.

Problem: The former subsection did not include the Department form, DSH 9164, which was created for the patient to document the notice of the involuntary psychotropic medication hearing. The former subsection also did not indicate that the state hospital would notify the OPR that the patient was served a Notice for an administrative hearing.

Rationale: This subsection was renumbered to provide clarity to Section 4210. This subsection was amended to include a departmental form for notifying the patient. This is pursuant to the Administrative Procedures Act (APA) requirements. It also provides transparency in government by notifying the OPR of the state hospital's intention of conducting an involuntary medication administrative hearing so they can prepare to assist the patient. These changes are in accordance with WIC sections 4005.1 and 4027.

Subsection (g)
Purpose: This subsection was has been renumbered from former subsection (c)(5). It was amended to include that a patient may be represented by a Patients' Rights Advocate, or a designee, in addition to a disinterested lay adviser, during the hearing procedures. The Department removed the provision that the above individuals would serve the written hearing notice on the patient.

Problem: This subsection was expanded to allow for a Patient's Rights Advocate or designee to also represent a patient at the hearing proceedings. The subsection also eliminates that any of these individuals would be responsible for serving the written hearing notice on the patient.

Rationale: The subsection was renumbered to provide clarity to Section 4210. Patient representation by a Patients' Rights Advocate or designee provides the patient with more options for representation at the hearings. The state hospital has assumed responsibility for serving the notice on the patients. These changes promote fairness

and transparency in government. These changes are in accordance with WIC sections 4005.1 and 4027.

Subsection (h)
Purpose: This subsection was renumbered from former subsection (c)(2). No other changes were made.

Problem: This subsection was renumbered in accordance with the new format of Section 4210.

Rationale: This subsection was renumbered to provide clarity to Section 4210 and is not a substantive change.

Subsection (i)
Purpose: This subsection was renumbered from former subsection (c)(3). The Department added that a state hospital “psychiatrist” shall present evidence at the administrative hearing and that current medical “and/or mental health condition” shall be presented. The Department is adding “and/or mental health” to the evidence that shall be presented at the hearing.

Problem: This subsection clarifies that a state hospital psychiatrist shall present evidence and the evidence shall include the patient’s mental health condition. These qualifiers were not included in the original text.

Rationale: The subsection was renumbered to provide clarity to Section 4210. Only psychiatrists are qualified to determine the medication needs of a patient, so a psychiatrist must present the case at the hearing. A patient’s mental health condition must also be considered in the determination of medication necessity. This subsection provides improved due process for the patient and transparency in government. These changes implement provisions of the *In Re Qawi, In Re Calhoun,* and *In Re Greenshields* court cases.

Subsection (j)
Purpose: This subsection was renumbered from former subsection (c)(4). The Department has added that the patient may present evidence and question witnesses in person and/or via the patient’s adviser, advocate, or designee.

Problem: The Department wanted to provide patients with the option of having an advocate present his or her case for them.

Rationale: This subsection was renumbered to provide clarity to Section 4210. This subsection prevents discrimination, promotes fairness, and increases transparency in government. This change implements provisions of the *In Re Qawi, In Re Calhoun,* and *In re Greenshields* court cases.

Subsection (k)
Purpose: This subsection has been renumbered from the former subsection (c)(6). Non-substantive changes to the writing style were also made.

Problem: This subsection was renumbered in accordance with the new format of Section 4210.

Rationale: The Department has determined that reformatting Section 4210 in sequential order of events provided more clarity for the public. This changes is non-substantive.

Subsection (l)
Purpose: This subsection was renumbered from the former subsection (c)(7). This subsection adds a provision that the hearing panel shall give the patient their decision verbally immediately following the hearing. In addition, this subsection introduces form DSH 9165, Involuntary Psychotropic Medication Review Hearing, which documents the decision of the hearing panel. This subsection adds that a completed DSH 9165 shall be given to the patient within 24 hours.

Problem: This subsection as written did not clarify who would give the written hearing decision to the patient, how and when.

Rationale: This subsection was renumbered to provide clarity to Section 4210. This subsection now provides verbal and written notification of the hearing panel's decision to the patient. It reassigns the responsibility of notifying the patient from the patient's advisor (former subsection (c)(5)), to the hearing panel and identifies the DSH 9165 as the form in which the written decision will be provided. The form is required in this subsection pursuant to the APA. These changes implement provisions of the *In Re Qawi, In Re Calhoun,* and *In Re Greenshields* court cases. These changes are in accordance with WIC sections 4005.1 and 4027.

Subsection (m)
Purpose: This subsection was renumbered from the former subsection (c)(8). The timeframe for the patient to appeal the hearing panel's decision was increased from 24 hours to three business days.

Problem: 24 hours was unreasonable for a patient, or their designee, to prepare and submit an appeal to the hearing panel's decision.

Rationale: This subsection was renumbered to provide clarity to Section 4210. The Department, in collaboration with patient advocacy groups, has agreed that three business days was more reasonable for a patient to appeal and the state hospital to review and respond to the appeal. Both parties were given the same amount of time. This subsection promotes fairness and increases government transparency. These changes are in accordance with WIC sections 4005.1 and 4027.

Subsection (n)
Purpose: This subsection was renumbered from former subsection (c)(8). The timeframe for the state hospital's medical director or designee to review and respond to a patient's appeal was increased from 24 hours to three business days.

Problem: 24 hours to respond to a patient's appeal to the hearing panel's decision was unreasonable based on the workload at the state hospitals.

Rationale: This subsection was renumbered to provide clarity to Section 4210. The Department, in collaboration with patient advocacy groups, has agreed that three business days was more reasonable for a patient to appeal and the state hospital to review and respond to the appeal. Both parties were given the same amount of time. This subsection promotes fairness and increases government transparency. These changes are in accordance with WIC sections 4005.1 and 4027.

Subsection (o)
Purpose: This subsection was renumbered from the former subsection (c)(8) which was reformatted into two new subsections (o) and (p). The changes in this subsection are nom- substantive.

Rationale: The Department has determined that reformatting Section 4210 in sequential order of events provided more clarity for the public. The changes in this subsection are non-substantive.

Subsection (p)
Purpose: This subsection was renumbered from the former subsection (c)(8). The Department removed “after the same panel conducts a second hearing” criteria.

Problem: The subsection was too restrictive on state hospitals by requiring the same panel to conduct a second hearing. The same staff may not be available due to vacations, illness, workload, or no longer with the Department.

Rationale: This subsection was renumbered to provide clarity to Section 4210. The same panel members may not be available to conduct the second hearing so this criterion was removed from the regulation text. This subsection allows for due process for the patient and increases transparency in government. These changes are in accordance with WIC sections 4005.1 and 4027.

Subsection (q)
Purpose: This subsection was renumbered from the former subsection (c)(8). This subsection clarifies that the state hospital shall request a court hearing as required by law, concurrently or subsequently to the administrative hearing.

Problem: This subsection was previously vague and did not specify the timeframe for the state hospital to request a court hearing.

Rationale: This subsection was renumbered to provide clarity to Section 4210. The Department is also providing clarity that the court hearing shall be requested as required by law, concurrently or subsequently to the administrative hearing. This subsection allows the state hospital to request a court hearing as soon as possible, based on the specific case. This subsection promotes due process and increases transparency in government. These changes are in accordance with WIC sections 4005.1 and 4027.

BENEFITS

Amending CCR 9, Section 4210, will allow the Department to provide the same interim hearing processes and procedures to the NGI patients as are afforded to MDO and SVP

patients. Efficacy of most psychotropic medications requires long term administration for optimal benefit. Emergency medication, as allowed by WIC section 5008(m), must be ceased once the emergent situation ends. To limit medication administration to only emergency situations would hinder successful long-term treatment. The hearing panels in the proposed regulations provide due process to a patient, while providing the state hospitals with a means to consistently medicate a patient who has shown that he or she poses a danger to others, or lacks capacity to make decisions regarding psychotropic medications. The amendments to Section 4210 also promote fairness, protect public health and safety, and increase transparency in government.

NECESSITY

On July 14, 2014, the Court of Appeal of the State of California, Second Appellate District, *In re Greenshield*s, decided that persons who are found not guilty by reason of insanity have the same constitutional right as MDOs and SVPs to refuse psychotropic medication. A defendant found to be NGI requires a finding beyond a reasonable doubt that at the time of the offense, he or she had a mental disorder that rendered them dangerous to others. A defendant found to be NGI is presumed to be insane during their confinement. Like the MDOs and the SVPs in prior court cases, NGIs have not yet been adjudicated to be incompetent to refuse psychotropic medication or dangerous within the meaning of WIC section 5300.

The court directed the Department to refrain from administering psychotropic medication to Mr. Greenshields against his will in a non-emergency situation unless a trial court determines he is incompetent to refuse the treatment or a danger to others within the meaning of WIC section 5300, i.e., whether he committed the types of violent or threatening acts specified in section 5300 within the year prior to his recommitment.

This court decision sets precedence for the involuntary medication of the approximately 1,400 NGI patients currently under the care and treatment of the Department. In order implement the court decisions, to provide clarity to the regulations, to preserve public safety, and to protect the other 7,000 patients and 10,000 employees, as well as public visitors, the Department is filing this regulatory action to amend Section 4210, Interim Involuntary Medication Hearing Procedures at State Hospitals.

The forms incorporated by this regulation are necessary to notify a patient of the interim involuntary medication hearing and to document the decision reached by the panel.

TECHNICAL, THEORETICAL AND/OR EMPIRICAL STUDY, REPORTS OR DOCUMENTS

These regulations are similar to the regulatory authority for patients committed through Section 4210 to conduct interim hearings for MDOs committed under PC section 2962 and SVPs committed under WIC section 6600 et al.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

These regulations will allow the Department to conduct internal, interim hearings for which the economic impact is limited to the Department and patient advocates.

The Creation or Elimination of Jobs within the State of California

The services performed as a result of the amendments to Section 4210 will only create a few new jobs within the Department and within the California Office of Patients' Rights (COPR). The Department is requesting authority to hire three clinicians to serve on the hearing panel and perform related administrative functions and the Department will increase the contract funding with COPR to allow them to hire two more patients' rights advocates.

The Creation of New Businesses or the Elimination of Existing Businesses within the State of California

The services performed as a result of the amendments will be provided by state employees and COPR. These regulations will neither create nor eliminate businesses within the State of California.

The Expansion of Businesses Currently Doing Business within the State

The Department will increase the contract funding with COPR to allow them to hire two more patients' rights advocates.

Benefits of the Regulation

These regulations will help improve the benefits to health, safety and welfare of California residents, and worker safety by allowing the Department to conduct interim involuntary medication hearings for the proper treatment and care of patients committed to state hospitals. They will promote fairness and provide additional patients with legal rights to refuse antipsychotic medications. Finally, these regulations will increase transparency in government.

EVIDENCE SUPPORTING FINDINGS OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

These regulatory amendments are similar to statutory and regulatory authority for three other patient types which have been successfully implemented and have caused no significant statewide adverse economic impact directly affecting businesses.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Department has determined that no reasonable alternative considered by the Department, 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 this action is proposed, would be as effective 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.

DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS

There is no duplication or conflict with Federal Regulations.