

EMERGENCY

STATE OF CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER	EMERGENCY NUMBER 2009-1015-04E
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For use by Office of Administrative Law (OAL) only	
2009 OCT 15 PM 2:56	
OFFICE OF ADMINISTRATIVE LAW	
NOTICE	REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY Dept. of Mental Health	AGENCY FILE NUMBER (If any)
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A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) State Hospital Operations	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT Sections 4100, 4105, 4205, 4210, 4300, 4310, 4315, 4320, 4325, 4330, 4340, 4350, 4400, 4415, & 4420.
	AMEND Section 864
TITLE(S) Title 9	REPEAL

3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input checked="" type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> Other (Specify) _____	

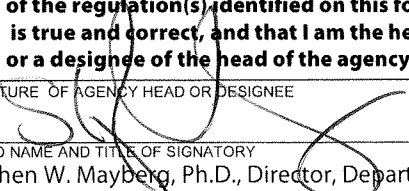
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective 30th day after filing with Secretary of State	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> §100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal	
<input type="checkbox"/> Other (Specify) _____			

7. CONTACT PERSON Jon Cordova	TELEPHONE NUMBER (916) 651-1446	FAX NUMBER (Optional) (916) 651-3852	E-MAIL ADDRESS (Optional) DMH.Regulations@dmh.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 8/11/09
TYPED NAME AND TITLE OF SIGNATORY Stephen W. Mayberg, Ph.D., Director, Department of Mental Health	

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TITLE 9. REHABILITATIVE AND DEVELOPMENTAL SERVICES

DIVISION 1. DEPARTMENT OF MENTAL HEALTH

CHAPTER 16. STATE HOSPITAL OPERATIONS

ARTICLE 1. GENERAL PROVISIONS

§ 4100. Application of Chapter

The regulations set forth in Chapter 16 are applicable to all facilities owned and operated by the Department of Mental Health.

Authority: Welfare & Institutions Code Sections 4005.1, 4027 and 4101

Reference: Welfare and Institutions Code Sections 4027 and 4101

§ 4105. Definitions

(a) The terms, "state hospital," or "facility," as used in this chapter shall mean "any hospital owned and operated by the Department of Mental Health."

(b) The terms, "individual patient," or "patient," as used in this chapter shall mean "any state hospital patient who is committed to and/or receiving treatment in a state hospital."

Authority: Welfare & Institutions Code Sections 4005.1, 4027 and 4101

Reference: Welfare and Institutions Code Sections 4027 and 4101

ARTICLE 2. TREATMENT

Section 4210. Interim Involuntary Medication Hearing Procedures Regarding Individual Patients at State Hospitals

(a) State hospitals may conduct administrative hearings on hospital grounds to determine the necessity to administer non emergency interim involuntary antipsychotic medication to an individual patient pursuant to the applicable legal standard for each category of individual patient. The appropriate court hearing as required by applicable law shall be requested as soon as possible by the state hospitals concurrent with, or subsequent to, the administrative hearing.

(b) Before initiating the administrative hearing process, the individual patient's treating physician must first determine that involuntary medication is appropriate, inform the individual patient of such diagnosis, explain why medication is

necessary along with the anticipated benefits and possible side effects, and ascertain that the individual patient either refuses to give informed consent to accept or is incompetent to give informed consent to receive the medication.

(c) The administrative hearing shall be held according to the following criteria:

- (1) The individual patient must be given at least 24 hours' written notice of the state hospital's intention to convene an involuntary medication hearing.
- (2) The hearing shall be conducted by a panel of two psychiatrists and one psychologist, or three psychiatrists, none of whom have been directly involved in the individual patient's treatment.
- (3) The state hospital shall present evidence of the individual patient's treatment history, current medical condition, and of the information enumerated in subsection (b) above.
- (4) The individual patient may be present at the hearing, present evidence, and cross examine witnesses.
- (5) The individual patient may be represented by a disinterested lay adviser versed in the applicable psychological issues, and who will explain the hearing procedures to, and serve the written hearing notice on, the individual patient.
- (6) The decision of the hearing panel shall be by majority vote, and be in writing and include information as to the participants at the hearing, and whether the legal standard for involuntary medication applicable to the individual patient is met.
- (7) The written decision shall be given to the individual patient wherein the individual patient has 24 hours from the time of receipt of the written decision to appeal to the medical director of the state hospital or his or her designee. The state hospital medical director or his or her designee shall decide any appeal within 24 hours after its receipt.
- (8) The hearing panel's decision to allow involuntary medication may direct such treatment for up to 14 days, unless superseded by a court decision pursuant to the court hearing that follow the interim administrative hearing process set forth in these regulations. After the 14-day treatment period, further treatment could be authorized only after the same panel conducts a second hearing pursuant to these same elements wherein the hearing panel may then direct that treatment may continue for the sooner of up to an additional 180 days or when a decision is made by a court pursuant to the court hearing that follow the interim administrative hearing process set forth in these regulations.

(d) Nothing in these regulations shall affect any existing legal rights of the individual patient to seek a judicial review of the hearing panel's determination for involuntary medication.

(e) Nothing in these regulations shall affect any existing legal authority of the state hospital to involuntarily medicate the individual patient in emergency situations.

Authority: Welfare and Institutions Code Sections 4005.1, 4027 and 4101

Reference: *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526; *In Re Qawi* (2004) 32 Cal.4th 1; *In Re Locks* (2000) 79 Cal.App.4th 890; *In Re Calhoun* (2004) 121 Cal.App.4th 1315; Penal Code Sections 2600, 2684, 2962, 2972, 1026, 1367 and 1370; Welfare and Institutions Code Sections 5008, 5300, 5332, 5333, and Sections 6600, et seq.

ARTICLE 3. SAFETY AND SECURITY

§ 4300. Visits for Individual Patients

(a) Facility visiting hours shall be scheduled seven days a week for a minimum of five hours each day.

(b) The facility shall provide private areas for individual patients to consult with an attorney for confidential communications.

(c) The facility may modify the visiting hours or suspend visiting days when necessary for safety and security concerns and staffing limitations.

(d) No conjugal visits shall be allowed.

Authority: Welfare & Institutions Code Sections 4005.1, 4027, and 4101

Reference: Welfare & Institutions Code Sections 4027, 5325 (c)

§ 4310. Offsite Visits of Individual Patients

(a) An individual patient who is committed pursuant to legal authority other than the Lanterman-Petris-Short Act and is being treated at an offsite hospital for longer than one week may be allowed to have visitors, subject to the visiting limitations of the hospital facility where the individual patient is being treated.

(b) An individual patient who is being treated at an offsite hospital and is either in critical condition or is being treated for a terminal illness may be allowed to have visitors each day beginning on the first day of offsite treatment, subject to the visiting limitations of the hospital facility where the individual patient is being treated.

Authority: Welfare & Institutions Code Sections 4005.1, 4027 and 4101

Reference: Welfare & Institutions Code Section 4027

§ 4315. Department of Police Services.

(a) The department of police services at each state hospital is the local authority for the investigation of criminal activity and criminal violations upon the grounds of the state hospital. The department of police services shall be responsible for the following:

- (1) the enforcement of the law on hospital grounds;
- (2) maintaining peace and security on hospital grounds;
- (3) ensuring the security of all persons on hospital grounds;
- (4) protecting and preserving the property on hospital grounds; and
- (5) directing traffic, conducting traffic investigations and enforcement on the hospital grounds.

(b) The department of police services may work with, or obtain assistance from other local law enforcement agencies and/or the California Department of Corrections and Rehabilitation.

(c) The Hospital Administrator is the senior law enforcement official of a state hospital.

Authority: Welfare & Institutions Code Sections 4005.1, 4027 and 4101

Reference: Welfare & Institutions Code Sections 4109, 4311-4313

§ 4320. Offsite Transportation.

The facility may coordinate with any law enforcement agency, including but not limited to the state hospital's department of police services or the California Department of Corrections and Rehabilitation, to arrange for the transportation of an individual patient to and from an offsite location and supervision of the individual patient while at that location.

Authority: Welfare & Institutions Code Sections 4005.1, 4027 and 4101

Reference: Welfare & Institutions Code Sections 4109, 4311-4313

§ 4325. Complaints Against Police Officers.

(a) Each facility may require individuals and the public that complain against a police officer employed by the hospital to set forth such complaint in writing. The facility may offer an optional complaint form. The optional complaint form and the written complaint shall include the following information:

1. The written complaint shall include at least the following information:

- a. Name and contact information of the complainant
- b. Name and contact information of witnesses to the event
- c. Information about the location of the incident
- d. Information about the officer or officers involved
- e. A description of the event or incident that led the complainant to file the form
- f. Relevant time or date information which relates to the incident.
- g. Signature of the complainant and date of signature
- h. Any other relevant information about the event or incident that led the complainant to file the form

(b) An investigation of each complaint shall be initiated within a reasonable time after receipt based on and subject to staffing limitations and workloads, and the complexity of the complaint. The investigation shall consist of the following procedures:

1. Examination of relevant documents
2. Interviewing relevant witnesses
3. Interviewing the complaining party and the peace officer who was implicated in the complaint
4. Examining other relevant evidence

(c) The disposition of the investigation shall be one of the following four findings based on the outcome of the investigation:

1. Unfounded -- The action complained of did not occur, or the employee accused was not involved.
2. Exonerated -- The action complained of did occur, but was justified, lawful and/or proper.
3. Not Sustained -- The investigation failed to confirm the validity of the allegation.

4. Sustained -- The action complained of occurred, and it was improper, unlawful, or unacceptable.

Authority: Welfare & Institutions Code Sections 4005.1, 4027 and 4101

Reference: California Penal Code, Sections 832.5 and 832.7

§ 4330. Counting of Individual Patients

In order to maintain the security and safety of individual patients, staff and visitors at state hospitals, each such state hospital may implement a system of counting individual patients that will include following:

(a) A counting of individual patients shall be conducted a minimum of three times per day or once per shift, whichever is more frequent.

(b) The scope of the counting activities may be facility wide or focused on specific areas, subject to the discretion of the hospital staff based on safety and security concerns.

Authority: Welfare and Institutions Code Sections 4005.1, 4027 and 4101

Reference: Title 9, California Code of Regulations Section 4027

§ 4340. Protocol for Interment of Unclaimed Deceased Individuals.

If an individual patient dies and the individual patient's body is not claimed by any of the individual patient's family members within a reasonable time period, then the following procedures shall be adhered to:

(a) If the individual patient has a valid advance directive concerning interment, then that advance directive should be adhered to.

(b) If the individual patient does not have a valid advance directive concerning interment, and the duty of interment does not devolve upon any other person residing in the state or if such person can not after reasonable diligence be found within the state, then custody of the individual patient's remains shall be turned over to the local coroner to inter the remains in the manner provided for the interment of indigent dead.

Authority: Welfare & Institutions Code Sections 4005.1, 4015, 4027 and 4101

Reference: California Health & Safety Code, Section 7104

§ 4350. Contraband Electronic Devices With Communication and Internet Capabilities

Electronic devices with the capability to connect to a wired (for example, Ethernet, POTS, Fiber Optic) and/or a wireless (for example, Bluetooth, Cellular, Wi-Fi [802.11a/b/g/n], WiMAX) communications network to send and/or receive information are prohibited, including devices without native capabilities that can be modified for network communication. The modification may or may not be supported by the product vendor and may be a hardware and/or software configuration change. Some examples of the prohibited devices include desktop computers, laptop computers, cellular phones, electronic gaming devices, personal digital assistant (PDA), graphing calculators, and radios (satellite, shortwave, CB and GPS).

Authority: Welfare and Institutions Code Sections 4005.1, 4027 and 4101

Reference: Title 9, California Code of Regulations Section 884 (b)(1)

ARTICLE 4. SUPPORT SERVICES

§ 4415. Definition of Mail

Mail is defined as paper documents sent in a standard sized, legal sized, or special handling envelope (Priority mail, express mail, etc.) with a weight of 16 ounces or less, and thickness of ½ inches or less.

Authority: Welfare and Institutions Code Sections 4005.1, 4027 and 4101

Reference: Welfare and Institutions Code Section 5326 and Title 9, California Code of Regulations Section 884 (b)(6)

§ 4420. Limitations on Size, Weight, Volume and Frequency/Number of Packages Allowed

This section constitutes the formal facility policy on the size, weight, volume and frequency/number of packages allowed.

(a) All send or received items that do not fall under the definition of “Mail” in Section 4415 of these regulations constitute packages.

(b) Each package sent and each package received shall not be more than 24 inches long by 19 inches in length by 12 inches high, and shall weigh no more than 30 pounds.

(c) A state hospital may limit an individual patient's maximum number of incoming packages based on staffing and hospital ground limitations to the following: three packages per individual patient per calendar quarter for the first three quarters of the year (January - March, April - June, July - September) and four packages per individual patient during the fourth quarter of the year (October - December).

(d) Packages sent to the facility that are not within the limits set forth in subsection (b) and (c) above shall be returned to the sender.

(e) The limitations set forth in the section shall not apply to Confidential Mail as such term is defined in Section 881(c) of these regulations.

Authority: Welfare and Institutions Code Sections 4005.1, 4027 and 4101

Reference: Welfare and Institutions Code Section 5326 and Title 9, California Code of Regulations Section 884 (b)(7)

Title 9, California Code of Regulations Section 864 shall be amended to read as follows:

§ 864. Complaint Procedure.

(a) The list of rights that shall be posted, provided, or explained to the patient/resident pursuant to Section 862 shall contain:

(1) Notification that any patient/resident who believes a right of his/hers has been abused, punitively withheld, or unreasonably denied may file a complaint with the Patients'/Residents' Advocate.

(2) The name of the Patients'/Residents' Advocate who has been assigned to handle such complaints, his telephone number, and the times during which he may be contacted.

(b) When a complaint is received by the Patients'/Residents' Advocate he shall, within two working days, take action to investigate and resolve it.

(c) If the complainant expresses dissatisfaction with the action taken, the matter shall be referred, within five working days, to the local mental health director if the complaint originated in the mental disabilities program or to the regional center director if the complaint originated in the developmental disabilities program.

(d) If the complaint cannot be satisfactorily resolved by the local mental health director or by the regional center director within ten working days, it shall be referred to the Patients' Rights Specialist, Department of Health, whose

responsibility it shall be to make a decision in the case. Appeal from the decision of the Patients' Rights Specialist may be made to the Director of State Department of Health, or his designee.

(e) This section shall not apply to state mental health hospitals. The complaint procedures for Lanterman-Petris-Short individual patients in state mental health hospitals shall be the same as those that apply to Non-LPS patients as set forth in Title 9, California Code of Regulations Section 885.

Authority: Welfare and Institutions Code Sections 4005.1, 4027 and 4101

Reference: Title 9, California Code of Regulations Section 4027

FINDING OF EMERGENCY

A. Department of Mental Health Finding That 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 Department of Mental Health (DMH) and the Office of Administrative Law (OAL) Have Been Inundated with Petitions Challenging DMH's Rules and Procedures as Underground Regulations

Since August 2007, DMH and its state mental hospitals have received 34 underground regulations challenges to their special orders, administrative directives, manuals and memoranda, and one motion for a temporary restraining order filed with the California Supreme Court challenging a version of the standardized assessment protocol that was being used to assess whether a person is a sexually violent predator.

To date, the OAL has denied a dozen or so of these underground regulations challenge petitions. These petitions have challenged hospital administrative directives on the topics of: the wellness and recovery planning team and manual; the clinical outcome evaluation system; research; treatment intervention; facility plan for services; computer moratorium; transfer to the California Department of Corrections and Rehabilitation Pursuant to Welfare and Institutions Code Section 7301; individual's mail and incoming packages; access to court and legal research materials; physical restraint; behavioral seclusion or restraint; the psychiatric physician manual, spending limit, trust office, search policies and procedures, and cost of care implementation.

However, OAL has made eight determinations of underground regulations. The eight OAL determinations of underground regulations involve hospital administrative directives and DMH's special order on matters dealing with individual patients' property and storage, contraband, individual patients' mail and packages, necessary involuntary administration of antipsychotic medication, the standardized assessment protocol used in evaluating whether a person is a sexually violent predator, and the "By Choice" incentive system.

In response to three other petitions, DMH has withdrawn from use one hospital administrative directive regarding rights of individuals served, one special order regarding research proposal review policy, and a version of the standardized assessment protocol used to evaluate whether a person is a sexually violent predator.

Other petitions are pending OAL's review or consideration. These petitions challenge DMH's policy against contraband, mail and packages, search policies and procedures, and generally on all subjects covered by the special orders and administrative directives. The number of underground regulations petition challenges is anticipated to continue to increase.

The Necessity for the Proposed Regulations

DMH and its state hospitals are responsible for the execution of the laws relating to the care and custody of mentally disordered persons. The proposed regulations are necessary to effectuate the statutes relating to such care and custody of mentally disordered persons, as well as to clearly set forth in regulations the necessary legal requirements in order to ensure that DMH will not be hampered in its ability to carry out its responsibilities, and to ensure that the individual patients' and the public's safety and security will not be compromised by underground regulations challenges that have occurred and will continue to occur. The proposed regulations address the important safety and security topics of visitation of individual patients, state mental hospital police services, offsite transportation, complaints against hospital policy officers, counting of individual patients, contraband electronic devices and interment of unclaimed deceased individual patients. These emergency regulations also address the individual patients' well being issues regarding mail and packages, spending limits, patient's rights complaints, and in house hearing procedures regarding medication of mentally disordered offenders.

Regarding the proposed regulations concerning contraband electronic devices, there has been an influx of cell phones and wireless devices into DMH state hospitals. The use of wireless communication devices in DMH state hospitals presents a security risk by circumventing monitoring processes instituted to ensure patient, staff, and public safety. All DMH state hospitals report increasing numbers of contraband wireless communication devices among the patient population which are being inappropriately used to import illegal pornographic materials, facilitate contraband exchanges, communicate with external and internal individuals, and otherwise pose significant safety and security risks. One particular DMH hospital that specifically tracked reports involving wireless communication devices noted 19 incidents in just one month. Additionally, there was an incident at another DMH hospital where a wireless recording device was brought in and used to surreptitiously record confidential staff and patient conversations. These recordings were later smuggled to third parties outside of the state hospital.

The Finding of Emergency

DMH finds that the proposed regulations are 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 Section 11342.545. Any disruption or prevention of DMH's ability to enforce the safety and security requirements, and the provisions regarding the well being of the individual patients in its

facilities, that are set forth in the proposed regulations will create serious harm to the public peace, health, safety, and general welfare.

The non-emergency rulemaking process timetable will not afford DMH with the expediency necessary to adopt regulations should a court, in giving deference to an existing or future determination of underground regulations, prohibit DMH from using the affected administrative directives or special orders that are important to safety and security and to the well being interests of the individual patients. Emergency regulations are necessary to ensure that important safety, security and individual well being interests are addressed quickly and properly through the OAL's rulemaking process once and for all.

Also, the above-described petitions and OAL determinations of underground regulations, and anticipated petitions and possible future OAL determinations of underground regulations, have drawn and will continue to draw time and attention away from, and create barriers to, the carrying out of DMH's and the state hospitals' responsibilities. A non-emergency rulemaking action would not allow DMH and its state hospitals the ability to as quickly as possible remove existing and anticipated barriers to their ability to provide the best mental health care to individual patients, and to hopefully once and for all put to rest the underground regulations petition challenges.

C. Authority and Reference Citations

Authority: Welfare and Institutions Code Sections 4005.1, 4015, 4027, 4101, 5326, and 7225

Reference: Welfare and Institutions Code Sections 4005.1, 4027, 4101, 4109, 4311-4313, 5008, 5300, 5325(a), (e), 5326, 5332, 5333, 7104 and 7232, and 6600 et seq.

Penal Code Sections 832.5, 832.7, 1026, 1367, 1370, 2600, 2684, 2962 and 2972.

Title 9, California Code of Regulations Sections 864, 884(b)(1), (6) and (7), and 885

Keyhea v. Rushen (1986) 178 Cal.App.3d 526; *In re Kanuri Surgury QAWI*, on Habeas Corpus (2004) 32 Cal.4th 1; *In Re Locks* (2000) 79 Cal.App.4th 890; *In Re Calhoun* (2004) 121 Cal.App.4th 1315.

D. Informative Digest and Policy Statement Overview

Policy Statement

The objective of the proposed action is to implement, interpret, or make specific the above-identified sections of the Welfare and Institutions Code, Penal Code, and amend Title 9, California Code of Regulations Sections 884 and 885 to ensure operation efficiency and compliance with all lawful requirements involving areas of safety and security, and individual patient's support services.

