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Date: 18 January 2011

To: Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Attention: Chapter 2 Compliance Unit

Dear Sirs:

Please find enclosed for filing with the Office of Administrative Law the following Petition and attached exhibits alleging the Department of Mental Health is using an underground regulation:

- (1) **PETITION TO THE OFFICE OF ADMINISTRATIVE LAW
RE: ALLEGED UNDERGROUND REGULATION**
- (2) The alleged underground regulation: *Internal Management Directive IMD-624*, is attached hereto as EXHIBIT A.
- (3) *2008 OAL Determination No. 24* is attached hereto as EXHIBIT B.
- (4) Department of Mental Health *Special Orders 248.01 and 249.01* are attached hereto as EXHIBIT C.

Thank you
Sincerely,

PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

RE: **ALLEGED UNDERGROUND REGULATION**
Department of Mental Health, Coalinga State Hospital

INTERNAL MANAGEMENT DIRECTIVE NO. 624,
INDIVIDUALS' MAIL AND PACKAGES

FROM: MICHAEL GEORGE ST.MARTIN, Petitioner

DATE: January 18, 2011

This is a computer generated petition based on the optional OAL form supplying the information required by Title 1, California Code of Regulations, §280, for a petition challenging an alleged underground regulation.

1. Identifying Information: Petitioner

Your Name: **MICHAEL GEORGE ST.MARTIN**
Your Address: **CO-000414-3, RRU-10
P.O. Box 5003, Coalinga, CA 93210**
Your Telephone Number: **(559) 934-1634 or (559) 934-1946**
Your E-Mail (if you have one): **michaelst.martin@hotmail.com**

2. State Agency or Department being challenged:

California Department of Mental Health ("DMH")
Coalinga State Hospital ("CSH")

3. Provide a complete description of the purported underground regulation. Attach a written copy of it. If the purported underground regulation is found in an agency manual, identify the specific provision of the manual alleged to comprise the underground regulation. Please be as precise as possible.

Description of alleged Underground Regulation

By this action, Petitioner specifically alleges the section of the CSH Operation Manual known as ***Internal Management Directive No. 624 (hereinafter also known as “Internal Management Directive-624” or “IMD-624”)*** is an underground regulation, as there is no evidence that this administrative directive has been promulgated pursuant to the Administrative Procedures Act.

The ***Internal Management Directive-624*** purpose is described as: "To insure the guidelines and procedures regarding the responsibilities, procedures, and limitations which govern an Individual's incoming and outgoing mail and packages."

A true and correct copy of
Internal Management Directive-624
is attached hereto as EXHIBIT A.

4. Provide a description of the agency actions you believe demonstrate that it has issued, used, enforced, or attempted to enforce the purported underground regulation.

Internal Management Directive-624 is applied to all persons, no matter what their classification who are detained at Coalinga State Hospital, and this includes, but is not limited to, all persons proposed or adjudicated to be SVPs in California who are detained by the Department of Mental Health.

Each hospital has some version of ***IMD-624*** that is applied statewide to all persons detained in Department of Mental Health facilities.

The DMH has previously taken the position that none of its Administrative Directives are regulations subject to the provisions of the APA. Petitioner and others then challenged and had several Administrative Directives declared “Underground Regulations” by the AOL.

On April 28, 2008, the OAL accepted a Petition from the Petitioner herein that challenged ***Administrative Directive AD-624***.

In its response to the OAL regarding the ***AD-624*** challenge, the DMH claimed that ***AD-624*** was exempt from the Administrative Procedures Act (“APA”) “because it falls under the „internal management exception“.”

On September 8, 2008, the OAL issued ***2008 OAL Determination No. 24*** which declared ***Administrative Directive AD-624*** an Underground Regulation.

Within ***2008 OAL Determination No. 24***, the OAL rejected the DMH claim of an “internal management exception,” stating:

“The internal management exemption has been judicially determined to be narrow in scope.¹¹ The courts apply the internal management exemption if the „regulation“ at issue (1) affects only the employees of the issuing agency,¹² and (2) does not address a matter of serious consequence involving an important public interest.¹³ In order for a rule or procedure to fall within the internal management exemption, it must meet both of these two prongs.”

“AD 624 fails to meet the first prong. AD 624 does not affect only the employees of the Department. It also affects the individuals committed to CSH and the people with whom they correspond.¹⁴ Therefore AD 624 does not fall within the internal management exemption.”

A true and correct copy of
2008 OAL Determination No. 24
is attached hereto as EXHIBIT B.

Nevertheless, on October 12, 2010, ***Internal Management Directive-624*** was issued, and then subsequently revised to its present form on November 10, 2010.

On its face on page one, line two, ***Internal Management Directive-624*** states:
“Replaces A.D. No. 624 dated 8/9/07”

Internal Management Directive-624 is nearly identical to ***Administrative Directive AD-624***, with the exception of inconsequential changes in wording.

Petitioner alleges that ***Internal Management Directive-624*** is a regulation within the meaning of the APA.

5. State the legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code that no express statutory exemption to the requirements of the APA is applicable.

**INTERNAL MANAGEMENT DIRECTIVE-624
IS A REGULATION WITHIN THE MEANING OF THE APA**

Prior to implementation, or revision thereof, the Department was required to adopt ***Internal Management Directive-624***, or any revision thereof, but failed to do so, and thus, pursuant to the law the current version now being utilized is invalid and an "Underground Regulation."

Though the Director may prescribe rules and regulations such as ***Internal Management Directive-624***, they must be promulgated and filed per Chapter 3.5 of art. 1 of Division 3 of Title 2 of the Administrative Procedures Act, Government Code, section 11340, et seq. There is no evidence that DMH has ever promulgated any version of ***Internal Management Directive-624*** pursuant to the APA. In fact, just the opposite is true: the DMH has simply reissued an Administrative Directive that was previously declared an Underground Regulation. The DMH simply changed the title to Internal Management Directive.

The DMH Officials that perpetrated this attempted slight-of-hand on the public they serve, did so flagrantly. They were informed in **2008 OAL Determination No. 24** that this very same regulation under a different name **DID NOT MEET** the internal management exemption. Nevertheless, the DMH Officials reissued it anyway.

Internal Management Directive-624 is a regulation. Chapter 3.5, article 5, of the Administrative Procedure Act, Govt. Code sections 11346 et seq., governs adoption, amendment and repeal of regulations by administrative agencies known as rulemaking. Govt. Code section 11342.600 provides that:

"[A regulation is] every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it or to govern its procedure."

Syngenta Crop Protection, Inc. V. Helliker (2d Dist. 2006) 138 Cal.App. 4th 1135, 1175-77, 42 Cal.Rptr.3d 191, 221-222, quotes Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 59 Cal.Rptr.2d 186, which explains:

"[The APA] establishes 'minimum procedural requirements' for rulemaking. ([Govt. C.] § 11346(a).) The agency must provide notice of the proposed action (*Id.* §§ 11346.4, 11346.5), the complete text of the proposal (§ 11346.2(a)), and an initial

statement of reasons for the proposal (§ 11346.2(b)), and a final statement of reasons (§ 11346.9(a)). The agency must provide a public hearing if an interested person timely requests a hearing (§ 11346.8(a)), provide an opportunity for interested persons to submit written comments if no hearing is held (*ibid.*), and respond in writing to comments in the final statement of reasons (§ 11346.9(a)(3)). The agency must submit the entire rulemaking file to the Office of Administrative Law (§§ 11347.3(c), 11342.550), which reviews the regulation for compliance with the law and other criteria and approves or disapproves the regulatory action. (§§ 11349.1, 11349.3 . . . " (14 Cal. 4th 557, 59 Cal.Rptr.2d 186.))

"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Govt. Code § 11340.5(a).)

"A substantial failure to comply with chapter 3.5 of the APA renders the regulation invalid. § 11350(a); *Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal. 4th at 576, 59 Cal.Rptr.2d 186.)"

"A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided . . . Second, the rule must 'implement, interpret, or make specific, the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.' ([Former] Govt. Code § 11342(g) [now § 11342.601].) Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases . . . Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. ([Former] Govt. Code § 11343(a)(3), 11346.1(a) [now § 11340.9(I)].) Thus, if an agency prepares a policy manual that is no more than a summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations . . . A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes." (Emphasis added.) (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)"

Morning Star Co. v. State Bd. Of Equalization (2006), 38 Cal. 4th 324, 333-334, 42 Cal.Rptr.3d 47, 53-54, confirms the Syngenta/Tidewater analysis, especially that a regulation must be intended to apply generally, and that it must implement, interpret or make specific the law administered by the agency, or govern the agency's procedure.

**INTERNAL MANAGEMENT DIRECTIVE-624 APPLIES GENERALLY TO ALL
PERSONS DETAINED AT COALINGA STATE HOSPITAL**

Modesto City Schools v. Education Audits Appeal Panel, (3d Dist. 2004) 123 Cal.App. 4th 1365, 1381, 20 Cal.Rptr.3d 831, 842, holds that to be deemed an underground regulation, which would be invalid because it was not adopted in substantial compliance with the procedures of the APA, the agency must intend it to apply generally rather than in a specific case, and the agency must adopt it to implement, interpret, or make specific the law enforced by the agency.

Internal Management Directive-624 is neither intended nor utilized to make specific determinations but is utilized generally when determining the incoming and outgoing mail and packages rights of all persons, no matter what commitment, who are detained at Coalinga State Hospital. Thus, **IMD-624** is a regulation that must be promulgated as a regulation but otherwise is a null and void underground regulation.

Kings Rehabilitation Center, Inc. V. Premo, (3rd Dist. 1999) 69 Cal.App. 4th 215, 217, 81 Cal.Rptr.2d 406, notes:

"The APA is partly designed to eliminate the use of 'underground' regulations; rules which only the government knows about. If a policy or procedure falls within the definition of a regulation within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulations, which include public notice and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule. (Govt. Code § 11350(a); *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 4") (Emphasis added.)

Even though **Administrative Directive AD-624** was declared and underground regulation on September 8, 2008, **Administrative Directive AD-624** was, in practice, still being enforced continuously from September 8, 2008, until the present. On October 12, 2010, **Internal Management Directive-624** was officially issued as a stated replacement for **AD-624**, however, it wasn't until January of 2011 that copies were made available to those affected. This 28 month scenario of secret enforcement is a classic example of "the use of 'underground' regulations; rules which only the government knows about." (*Id.*)

Internal Management Directive-624 is a regulation. **IMD-624** establishes limitations and requirements on the mail that patients at CSH may send and receive. It affects all aspects of the sending and receipt of patients' mail including the addressing of the mail, the size of packages, the labeling of legal mail, the receipt and distribution of patients' mail and packages, etc. It declares what type of incoming and outgoing mail and packages may be received by those detained at Coalinga State Hospital, and how these items are handled and distributed. Its use is mandatory. Thus the mandate of **IMD-624** implements, enforces or otherwise makes specific the language of the Welfare and Institutions Code, §§ 4027, 4100, 4101, 5325, 5325.1, and Title 9, California Code of Regulations ("CCR"), § 884(b)(6)).

NO EXCEPTION EXCLUDES INTERNAL MANAGEMENT DIRECTIVE-624 FROM THE APA PROCEDURES.

Clearly inapplicable are the provisions of Govt. Code § 11340.9 excluding:
"(d) A regulation that relates only to the internal management of the state agency..."

"(f) A regulation that embodies the only legally tenable interpretation of a provision of law..."

"(I) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

Armistead v. State Personnel Bd. (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 4, quoting from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature, documents the necessity for strict adherence to the APA. The court found this necessary so as to prevent state agencies from avoiding obedience to the APA by denominating rules as "'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like," and by containing them "in internal organs of the agency such as manuals, memoranda, bulletins, or [directing them] to the public in the form of circulars or bulletins."

Armistead underlined that "[R]ules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA" (emphasis added), thus provision of state personnel transactions manual governing withdrawal of resignation by state employee merited no weight as agency interpretation where such provision had not been duly promulgated and published.

The Internal Management Directive in question here fits the above description perfectly. Although it is referred to as "guidelines and procedures regarding the responsibilities, procedures, and limitations which govern an individual's incoming and outgoing mail and packages," it is called an "Internal Management Directive," and is replete with mandatory words such as "must," "shall" and "will" in regard to actions to be taken. It contains mandatory language thus making it much more than simple "guidelines and procedures," policies, interpretations, instructions, guides, standards, or the like. Instead, it is a forbidden underground regulation which has not been adopted pursuant to the Administrative Procedures Act.

The authority for issuing **IMD-624** is stated in that document as, "Department of Mental Health (DMH), Special Order Number 248.01 and 249.01; California Welfare & Institutions Code Section 4136; and California Code of Regulations, Title 9, Section 4414 and 4420." **Special Orders 248.01 and 249.01** apply statewide to all DMH facilities. These **Special Orders** mandate what each facility must mandate in its own version of an **Administrative Directive**. Having each DMH facility issue its own mandated version of **Special Orders 248.01 and 249.01** under the label of **Administrative Directive** or **Internal Management Directive** is just the sort of "avoiding obedience to the APA" that is discussed in *Armistead v. State Personnel Bd.*

**True and correct copies of *Special Orders 248.01 and 249.01*
are attached hereto as EXHIBIT C.**

6. Provide information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

Internal Management Directive-624 is at odds with the rights to mail conveyed by the California and United States Constitutions, and with the statutory rights provided in Welfare and Institutions Code Sections 5325 and 5325.1. **Internal Management Directive-624** is overbroad and not narrowly tailored to accomplish the goal stated in the least restrictive manner as is required by statutory and constitutional law. Since **Internal Management Directive-624** is

replete with mandates that are in direct violation of statutory law and both the California and United States Constitution, OAL regulatory oversight and public comments are needed.

The state authorized enforcement by state employees of the numerous statutory and constitutional violations contained in each and every un-promulgated, underground, **Administrative Directive** has resulted in a great deal of litigation at great expense to the taxpayers of California. The OAL, pursuant to its regulatory duties under the OAL, is in a position to bring these underground regulations into the oversight process, and has a duty to the taxpayers to do so.

Public comment and OAL oversight is needed in order to halt the “bureaucratic tyranny” warned of in *Tidewater and Morning Star*. This is particularly true in a case such as **Internal Management Directive-624**, where the bureaucrats involved keep issuing and enforcing previously declared underground regulations under new names.

Morningstar reiterates, "[2] These requirements promote the APA's goals of bureaucratic responsiveness and public engagement in agency rulemaking. 'One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly [citation]. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.]' [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)" (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

7. (Optional) Please attach any additional relevant information that will assist OAL in evaluating your petition.

Internal Management Directive-624 cross references **Administrative Directive AD-818**, Contraband. On August 27, 2008, the OAL declared **AD-818** an Underground Regulation in **2008 OAL Determination No. 23**. Thus, through the use and enforcement of **Internal Management Directive-624**, the DMH also continues to enforce the provisions of **Administrative Directive AD-818**.

It should also be noted that from the time it was declared an underground regulation to the present, every housing unit at CSH continued to post **Administrative Directive AD-624** within a behind the glass bulletin board only accessible to staff members. The Package Room Staff, and Unit Staff handling Individual's mail, continually cited **AD-624**, and now **IMD-624**. Thus, the DMH has continued to enforce this underground regulation, and is now replacing **AD-624** with **IMD-624**. All of this is being done in flagrant disregard for the Administrative Procedures Act.

CONCLUSION

The Department of Mental Health is not, and has not been, responsive to the public they serve. Nor has the DMH been responsible to the taxpayers who must pay the bills that result from the failure of the DMH to follow the law and serve the public who pays their salaries. The California Supreme Court directed attention to this problem by stating:

"Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.]' [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296)." (*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

Such bureaucratic tyranny has been a problem throughout the history of this country. Now, it must be stopped once again. The tyrannical bureaucrats in the Department of Mental Health must be directed to follow the law.

The DMH, part of the Executive Branch, lacks Constitutional authority to enact legislation. The Legislature has granted state agencies and departments quasi-legislative powers through the APA providing they follow specific promulgation procedures. However, until and unless the DMH does follow the provisions of the APA to properly promulgate ***Internal Management Directive-624***, it is an underground regulation which has been implemented in violation of the Separation of Powers Clause, Article III, Section 3, of the California Constitution.

To allow the DMH to continue to utilize a controversial Administrative Directive, such as ***Internal Management Directive-624***, would be to allow the sort of unfettered power in the Executive Branch that is a step toward a totalitarian concentration of power in the executive; a power to be exercised with inadequate legislative standard, and capable of avoiding judicial review, particularly when done through sleight-of-hand tactics designed to avoid review, has been prohibited from the earliest times. See *Hayburn's Case*, (1792) 2 U.S. (Dall.) 408, 1 L.Ed. 436, and its progeny.

Based on the foregoing, it is clear that there is a need for public participation in the regulatory process which directs the attention of agency policymakers within the Department of Mental Health to the public they serve, and to ensure that those persons or entities whom a regulation will affect have a voice in its creation.

8. Certifications:

I certify that I have submitted a copy of this petition and all attachments to:

Cliff Allenby, Interim Director
California Department of Mental Health
1600 9th St., Suite 151
Sacramento, CA 95814
(916) 654-2413 / (916) 654-2309

Pam Ahlin, Executive Director
Coalinga State Hospital
PO Box 5000
Coalinga, CA 93210
(559) 935-4302

I certify that all the above information is true and correct to the best of my knowledge.

MICHAEL GEORGE ST.MARTIN
PETITIONER

January 18, 2011

Date

INTERNAL MANAGEMENT DIRECTIVE
IMD-624

EXHIBIT A.

Effective Date: October 12, 2010
Revised Date: November 10, 2010

SUBJECT: INDIVIDUALS' MAIL AND PACKAGES

I. **PURPOSE**

To ensure the guidelines and procedures regarding the responsibilities, procedures, and limitations which govern an Individual's incoming and outgoing mail and packages.

II. **AUTHORITY**

Department of Mental Health (DMH), Special Order No. 248.01 and 249.01; California Welfare & Institutions Code, Section 4136; and California Code of Regulations, Title 9, Section 4415 and 4420.

III. **POLICY**

Individuals have the right to have access to letter writing materials, including stamps, and to send and receive mail and packages. The hospital has detailed processes in place to ensure Individuals and staff understand how incoming and outgoing mail and packages will be handled.

IV. **METHOD**

A. Definitions:

1. "Mail" is defined as paper documents sent in a standard sized envelope, manila envelope, or special handling envelope (Priority mail, Express mail, etc.) with a weight under 16 ounces and less than $\frac{1}{2}$ " thick. All other materials falling outside this description will be deemed as a package and will be forwarded to Mail Services for processing, then to Police Services Package Center (PSPC) for issuance according to established procedures.
2. "Package" is defined as any items(s) delivered in a box, large manila envelope with bubble wrap, or other container that is not standard envelope size or is more than 16 ounces or $\frac{1}{2}$ " thick. Exceptions are periodicals, catalogs, or literature search from Federal and/or State agencies.
3. "Third-Party Mail" is defined as mail addressed to hospital staff or volunteers for delivery to an Individual, or mail given to an employee by an Individual to mail outside normal hospital mailing procedures. Approved vendor packages with the purchaser's name located in the shipping address along with identifiable Individual's full name and correct address will not be considered third-party mail or package.
4. "Letter" is defined as one-ounce first class mail.

5. “Periodical” is defined as any published material at regular intervals of more than one day; of or relating to a publication issued at such intervals (e.g. magazines or news letters). Exception note: Regardless of size not to be counted as a package and will be subject to contraband review by staff.
6. “Catalog” is defined as a systematized list, often featuring descriptions of listed items; a publication containing such a list (mail-order catalog). Exception note: regardless of size not to be counted as a package and will be subject to contraband review by staff.
7. “Literature Search” is defined as a systematic search for investigation of published material relating to a given subject (published material from Federal, State Agencies or by a Recognized Charitable Organization). Exception note: regardless of size not to be counted as a package and will be subject to contraband review by staff.
8. “Educational Materials” are defined as those from an accredited college or university, which have been approved by Central Program Services Education Staff and the Wellness and Recovery Team. This may include educational materials in CD or DVD format, and which normally would be considered contraband if purchased from an unapproved vendor. Authorization does not include items that are considered contraband regardless of source, such as firearm or drug-related.
9. “Approved Vendor” is defined as an established Coalinga State Hospital (CSH) approved mail-order business, individual and/or organization. Allowable items can only be ordered from those listed as approved vendors. Packages from vendors not on the Approved Vendor List will be refused and returned. Individuals may submit requests for the addition of new vendors to the Contraband Committee during the month of July.

V. GENERAL PROCEDURES FOR MAIL AND PACKAGE PROCESSING

A. Addressing and Labeling of Individuals’ Mail and Packages:

1. All incoming/outgoing mail and packages must be addressed properly including the Individual’s full name, unit number and identification number to ensure proper and timely delivery. Incoming/outgoing mail and/or packages with “Coalinga State Hospital” in the address line may be subject to opening by receiving staff as an unknown vendor purchase.

Example: John J. Doe
Unit 00, Identification CO-000000-0
P.O. Box 5003
Coalinga, CA 93210-5003

2. All incoming/outgoing mail and packages should have a return address, in the event that the mail and/or package(s) are unable to be delivered.

3. Every effort shall be made to deliver mail and/or packages without a proper address. If multiple Individuals with the same name are located, an attempt will be made to confirm that the sender is known to one of the Individuals. If it cannot be confirmed that the sender is known to one of the Individuals, the mail or packages shall be returned unopened, to the sender, the post office of origin, or other shipping agent.
4. Individuals have the right to decline acceptance of mail and/or packages from one or more Individuals and/or vendors. Mail and/or packages that are declined by an Individual shall be sent back to Mail Services with instructions to return, unopened, to the sender. Mail or packages that are opened at the Individual's request may require the Individual to pay for return shipping costs.
5. Delivery or mailing of third-party mail is prohibited, and such mail shall be returned to the sender, unopened, via the Mail Services and the Individual's Wellness and Recovery team shall be notified.
6. Third class mail (junk mail) without an Individual's Coalinga State Hospital Identification No. (CO #) is not allowed and will be disposed of by the Mail Services.

B. Legal Mail and Packages:

1. All incoming/outgoing legal mail and/or packages should be marked "Legal Correspondence" on the outside. Legal mail that is not identified may be subject to processing in accordance with non-legal mail/package procedures.
2. Individuals have the right to mail legal documents to the courts. The State provides free mail for the first 30 days after initial admission. Thereafter, the cost of postage for mailing documents to the courts or attorneys will be charged against funds in, or later deposited in, the Individual's Trust Account.
3. Indigent Individuals' legal documents will be mailed to the courts using first class postage, at State expense, as determined by the Trust Office.
4. Unit staff shall maintain a log of all outgoing legal correspondence, to include Individual's name, date, recipient, and staff's signature.

C. Writing Materials and Postage:

1. Newly admitted Individuals shall be allotted sufficient writing materials, including postage for first-class mail, for up to two one-ounce letters per week for the first thirty (30) days after initial admission. Thereafter, Individuals are required to purchase writing and mailing materials, and pay regular postage and special mail services fees out of their personal funds.
2. For the purpose of this section, "Indigent Individuals" means any Individual whose income is not more than twelve dollars and fifty cents (\$12.50) per month.

3. After the initial 30 days from admission, Indigent Individuals shall be allotted sufficient materials for one letter each week, including postage in an amount not to exceed the cost of one stamp for first-class mail for one-ounce letter, at no cost to the Individual.
4. Additional writing materials and postage shall be available for purchase at the stores or canteens on hospital grounds.

D. Mail and Package Receipt and Distribution:

1. Upon receipt of the mail; Mail Services staff identifies, sorts and delivers in accordance with established mail/package processing procedures. Unit staff shall provide a confidential area for Individuals to receive mail during mail call. Individuals who receive mail and are off the Unit shall be notified. Unit staff will deliver the mail to the Individual to whom it is addressed and in accordance with the hospital's rules open and inspect incoming mail for contraband without reading written material in the presence of the Individual. If contraband is found, it shall be removed and a "Receipt for Confiscated/Destroyed Property" form (CSH-102) will be provided to the Individual as soon as practical. The Unit Supervisor shall be notified and contraband procedures will be followed.
2. All pictures, periodicals, catalogs and/or literature search materials received by Individuals in the mail will be reviewed by the Unit Staff for illegal or inappropriate content and are subject to review and approval by Wellness and Recovery Team before being given to the Individual.
3. An exception to the above procedures will occur if it is determined by Unit staff that the mail is considered suspicious. This would include suspecting an explosive device, drugs, weapons, or any other contraband items. In these cases, the mail will be opened before delivery to an Individual. These procedures would occur to ensure the safety and security of staff, Individuals, and the public.
4. All cash, checks, money orders or other instruments of payment received by the Individual through the mail will be placed in the Individual's trust account.
5. Mail may be declared undeliverable and un-returnable when the addressee and the return address are insufficient for delivery or return. Should any mail or package possess a biohazard or health risk, it will be declared undeliverable.
 - a. Undeliverable mail will be disposed of in a manner prescribed by the law.
 - b. Should there be no applicable law covering a given situation, the issue of disposal will be determined by the Executive Director.
 - c. If known, the Individual recipient will be advised in writing of the name and address of the party sending the mail or package and the circumstances surrounding its disposal.

6. Certified and/or Return Receipt mail for Individuals require signature of receipt by receiving Unit staff upon delivery from Mail Services.

E. Transferred Individual Mail:

1. Mail received for an Individual who is no longer on the Unit should be forwarded to the Individual or returned to the Mail Services with a note attached to it (use paper clip) stating the present location of the Individual. This information should not be written on the envelope.
2. It is suggested that Individuals leaving the hospital authorize forwarding address for first class mail which will remain in effect for sixty days using the "Individual Mail Forwarding Form" (34-100), submitted to Mail Services by Unit Staff via mail process bag procedure. No envelope required, as mail bag suffices for confidentially purposes.
 - a. Individuals agree that only First Class Mail will be forwarded for up to sixty (60) days from start date.
 - b. Periodicals, Non Profit, Bulk Rate, Standard, and all other mail types will not be forwarded by the United States Postal Service (USPS) and will be returned to sender by CSH Mail Services.
 - c. Individual is responsible to notify any publishers and other correspondences of change of address.
 - d. Individual is responsible to notify Mail Services staff upon return to CSH, to discontinue any previous mail forwarding requests.

F. Incoming Mail and Packages:

1. All incoming packages must be received through the USPS, common carrier, authorized shipping agents, approved vendor or other institution. No packages will be accepted from visitors. The main point of receipt for packages will be the Mail Services. Upon receipt of patient packages, the PSPC staff will verify in accordance with this policy:
 - a. Individuals' correctly labeled ship to address.
 - b. Senders' correctly labeled return address.
 - c. Individual Mail Forwarding Form (34-100). (Note: Packages will be returned to sender, only first class mail will be forwarded.)
 - d. "Authorization for Use of Unapproved Vendor for the Purchase of Education Materials Only" form (CSH-099).

- e. "Authorization for Shipping and/or Replacement Exchange of Warranty and Non-Warranty Repair Items to Approved or Non-Approved Vendors and Manufacturers" form (34-101).
- f. Approved Vendor.
- g. Third-Party Mail/Package.
- h. Allowable Weight.
- i. Allowable Size.

G. Package Distribution and Search:

- 1. Packages addressed to Individuals at CSH are delivered to PSPC, who in turn will deliver the packages to the addressee in accordance with this policy.
 - a. All incoming packages shall be inspected for contraband and processed by PSPC on a first come – first served basis except that those packages intended for Individuals with a signed "Waiver Form for Patients Packages" (CSH-30) on file may take priority.
 - b. When determined to be contraband, the receiving Individual will have seven (7) days from date of receipt to decide either to donate, mail out or destroy the item(s) of contraband at their own expense or, place Class 3, 4 or 5 contraband items into Property Storage (excluding corrosive or perishable items). After seven (7) days, items of this nature will be destroyed.
 - c. Once the Individual's Property Storage containers exceed the 50 pound limit, the determination of disposition may be made by the Individual if within the rules and regulations of CSH. Any costs involved with the disposition will be the responsibility of the Individual.
- 2. Periodicals, catalogs and/or Literature Search materials are not considered vendor or quarterly packages. All printed material determined to not be mail will be received and processed by PSPC for contraband and/or approval.
 - a. All incoming periodicals, catalogs and/or Literature Search materials will be scanned to prevent the introduction of contraband into the facility. Any contraband found will be taped to the received material and the Individual will decide on the disposition of the contraband items in the prescribed manner.
 - b. Periodicals, catalogs and/or Literature Search materials will be subject to review by the package officer. If determined to be inappropriate they will be held for secondary review and final determination within 10 days by the Property Room/Supervisor with a recommendation to the Unit Supervisor for possible disposition of the item.

- c. If upon opening the package, the material is found to be a non-periodical/catalog it will be handled as one of the following:
 - i. Package;
 - ii. Mail; or
 - iii. Contraband will be handled in the prescribed manner.
- d. If it is determined by appropriate staff that the package is considered suspicious including:
 - i. Suspecting an explosive device;
 - ii. Drugs;
 - iii. Weapon; or
 - iv. Other contraband item.

Note: The package will be opened before delivery to the Individual. These procedures will occur to ensure the safety and security of the staff, Individuals and the public, if suspicious contraband is found the contraband will be handled according to procedure.

3. Package Limitations:

- a. Incoming (non-Vendor) packages are limited to three (3) packages per Individual per calendar quarter for the first three quarters (January – March, April – June, July – September) and will be tracked by PSPC.
- b. Incoming (non-Vendor) packages are limited to four (4) packages per Individual during the fourth calendar quarter (October – December), due to the holidays, and will be tracked by PSPC.
- c. Non-Vendor packages in excess of the quarterly limit will be returned to the sender, originating post office or shipping agent.
- d. There is no limit on approved vendor packages.
- e. All packages must be received through the USPS, common carrier, parcel carrier, shipping agent or other institution. Packages will not be accepted from visitors.
- f. Packages will not exceed 30 pounds in weight or the size limit of 24" length x 19" width x 12" height. Packages exceeding the weight or size limitations will not be accepted and will be returned to the post office or shipping agent.

g. Items not in factory sealed containers or determined to be contraband will be disposed of in a prescribed manner.

h. Any undeliverable package will be returned to sender, USPS, Common Carrier, Shipping Agent, other institution or will be disposed of in a prescribed manner.

4. Non-Contraband Items:

a. Only those items and the amounts not listed on the facility's Contraband list will be allowed. Items deemed to be contraband will be handled in the prescribed manner.

b. A copy of the most current or updated list will be posted on units and the patient's library for Individuals to review.

5. Package Pick-Up:

a. Incoming packages will be distributed to the Individual according to procedures established by the PSPC.

b. These procedures will be posted on the units, library and at the PSPC.

6. Searching of Packages:

a. The PSPC Staff will be responsible for opening packages; searching contents, inventorying, and if necessary disposing of unauthorized package contents.

b. All items received from sources other than an Approved Vendor (e.g. guardian, family, friends or loved ones) will be opened, contents searched and placed in packaging approved by the hospital.

c. Package contents will be placed in paper bags for transport to the units by the Individual or staff. An inventory sheet will be included with the contents and a copy will be sent to the unit through the inter-hospital mail.

7. Package and Property Waiver Forms:

a. Individuals will be present when packages addressed to them are opened unless they have a signed waiver on file Waiver Form for Individuals Packages (CSH-030).

b. The waiver allows the package to be inventoried without the Individual's presence.

i. There will be at all times; a patient representative present to observe the process.

- ii. Waivers will remain in effect from the date signed until the Individual is discharged, transferred to another facility or withdraws the waiver.
- c. Individuals may withdraw their waiver at any time by signing the Cancel Package Waiver Form (CSH-031) and submitting it to the PSPC.
- d. As packages intended for Individuals with Waiver Form for Patients Packages (CSH-30) forms on file can be handled in a much more expeditious manner and do not require the Individual's presence, such packages may be handled earlier than those addressed to Individuals without waiver forms on file.

H. Approved Vendor Purchases:

- 1. The Hospital has established a list of approved mail-order businesses, individuals and organizations referred to as approved vendors. Items can only be ordered from those listed as approved vendors.
 - 2. This listing is intended to enhance compliance with contraband policies, eliminate returns of unacceptable purchases, and expedite the package-screening process.
 - 3. Certain items must be purchased and received from approved vendors only. Not all items offered by an approved vendor are permitted.
 - 4. Individuals may submit requests for the addition of new vendors to the Contraband Committee during the month of July via the Contraband Committee.
 - 5. Mail Services will notify Individuals upon receipt/return of refused packages via the "Notification of Refused Package Card". No information will be given out over the telephone to anyone; an Individual, their guardian, family, friends, or loved ones and/or CSH staff. Information regarding returned/refused packages will only be issued to the level of Program Manager by designated staff.
 - 6. Approved Vendor purchases ordered by the Individual and received through the Mail Services that are then refused by the Individual at the time of issuance by the PSPC will require the Individual to pay for return shipping costs.
 - 7. Disposition and return of unopened packages to the Mail Services must be made within three (3) days of the date of package receipt to avoid additional return to sender shipping costs.
- I. For the purpose of this directive, admission property is not considered to be a "package".

Note: All admissions property will be searched for contraband prior to be released for patient possession, normally within 72 hours after admission.

J. Mail Services for Outgoing Individuals' Mail and/or Packages – Appointment Scheduling:

1. To set up appointments for Individuals to send out mail and/or packages, Unit staff must call the Mail Services help line between the hours of 9:00 a.m. – 11:00 a.m., Monday through Friday. Appointments will be set up at 5 minute intervals, Monday through Friday, as per posted schedule of hours. One appointment must be made per Individual. Additional appointments must be made per: package in excess of five pounds, per five envelopes, or per item requiring special services; Netflix envelopes will not require an appointment and should be deposited in the provided drop-box in a manner that does not disrupt appointments in progress. Mail Services staff will log all appointments into an appointment book. Mailing services will be closed on all State and Federal holidays.
2. Unit staff must ensure, prior to sending the Individual to the Mail Services scheduled appointment, that the packages are properly and legibly addressed and labeled.
3. Unit staff will be responsible for checking the mail and/or packages for contraband or other possible violation in the presence of the Individual. The Individual will then seal the package in the presence of the Unit staff prior to the appointment time. The Unit staff will then be responsible for the package and will retain it until the appointment time at the Mail Services to ensure the package is not tampered with. At approximately fifteen minutes prior to the Individual's appointment, the Unit staff will be responsible to legibly sign the package in the upper right hand corner of the package (where postage will be placed) and then call the Mail Services staff in the Mail Services to let them know that the Individual is on his way with the secured and verified sealed package. Individuals with a Hospital Access System (HAS) level one must be escorted to their appointment by Unit staff.
4. Mail Services staff will be responsible to notify the Unit Supervisor of all no show Individuals for their pre-scheduled appointment time.
5. Mail Services staff will weigh the package and inform the Individual of postage due. If the Individual is in agreement to the amount, Mail Services staff will then verify via the Gift Tran Individual "Cash Card" System that the Individual has adequate funds. If the funds are available, the Individual's transaction will be completed at the register and the postage will be placed on the package.
6. If the Individual has insufficient funds or refuses to mail the package, the transaction will be cancelled. The unit will be called and the Individual will return to his unit with the package. Unit staff will open the package and give the Individual back his property. Unless the property is contraband, in which case it will be held in a secure area of the unit and the Individual will decide on the disposition of the contraband items in the prescribed manner. The copy of the property slip will go into the Individual's property envelop and his property will be checked off as returned on the master list.
7. Packages may not exceed thirty (30) pounds.

8. The Mail Services staff will receive the individual packages for delivery to the United States Post Office.

Signature on File w/ A.D. Coordinator

PAM AHLIN
Executive Director

Cross Reference(s):

A.D. No. 608 Individuals' Access to Courts
A.D. No. 644 Trust Office Functions
A.D. No. 651 Processing of Departmental & United States Postal Services Mail
A.D. No. 818 Contraband

34-100 Individual Mail Forwarding Form (Departmental, GS)
34-101 Authorization for Shipping and/or Replacement Exchange of Warranty and Non-Warranty Repair Items to Approved or Non-Approved Vendors and Manufacturers (Departmental, GS)
CSH-030 Waiver Form for Individuals Packages (Warehouse)
CSH-031 Cancel Package Waiver Form (Warehouse)
CSH-099 Authorization for Use of Unapproved Vendor for the Purchase of Education Materials Only (Departmental, CPS)
CSH-102 Receipt for Confiscated/Destroyed Property (Departmental, DPS)

2008 OAL Determination No. 24

EXHIBIT B

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

**2008 OAL DETERMINATION NO. 24
(OAL FILE # CTU 2008-0321-01)**

REQUESTED BY: Michael St. Martin

CONCERNING: Administrative Directive 624 concerning individuals' mail and packages issued by Coalinga State Hospital, Department of Mental Health.

Determination Issued Pursuant to Government Code Section 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600¹ and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.² OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

¹ Government Code section 11342.600 states:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

² California Code of Regulations, title 1, section 250, subdivision (a) defines "underground regulation:"

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

CHALLENGED RULE

On March 21, 2008, Mr. St. Martin (Petitioner) submitted a petition to OAL challenging Administrative Directive 624 (AD 624) issued by Coalinga State Hospital (CSH), a state hospital under the jurisdiction of the Department of Mental Health (Department). AD 624 is titled "Individuals' Mail and Packages." It was issued by the Acting Executive Director and went into effect on August 9, 2007. The Petitioner alleges that AD 624 meets the definition of a "regulation" that should have been adopted pursuant to the APA.

DETERMINATION

OAL determines that AD 624 meets the definition of a "regulation" as defined in Government Code section 11342.600 that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

On August 9, 2007, the Acting Executive Director of CSH issued AD 624.³ AD 624 states that the purpose of the directive is to:

...ensure a coordinated set of guidelines and procedures regarding the responsibilities, procedures, and limitations which govern an individual's incoming and outgoing mail and packages. It provides for the right of individuals to send and receive mail and packages, and it ensures that the hospital operates according to its security needs, fire regulations, and physical space limitations.

Following are examples of the provisions in AD 624:

- Definitions of "Mail," "Package," and limitations on the weight and size of mail and packages, and requirements for special handling of items falling outside the size or weight limitations.
- Proper addressing of an individual's incoming and outgoing mail.
- Prohibition on the receipt or mailing of third-party mail.
- Requirement for legally related mail to be identified as such.
- Requirement that unit staff maintain a log of all outgoing legally related correspondence.
- Limitation on the amount of writing materials for newly admitted individuals.
- Procedures to be used for mail and package receipt and distribution.
- Requirement that all pictures, periodicals, catalogs and/or literature be reviewed by staff.
- Requirement that all cash, checks, money orders, etc., be placed in the individual's trust account.

³ A copy of AD 624 is included as Exhibit 1.

- Procedures for forwarding mail if an individual is no longer in the unit or has left the hospital.
- Requirement that all incoming packages be inspected for contraband.
- Limitations on the number of incoming packages for each individual.
- Requirement that the individual be present when the individual's packages are opened unless a waiver has been signed.
- Requirement that the individual may order items only from approved vendors.

On June 23, 2008, OAL received a response from the Department. The Department argues that AD 624 does not meet the definition of a regulation for the following reasons:

1. AD 624 is not a regulation. Instead, the AD is a guide to the staff at CSH of how to handle the mail and what mailing material the individuals are permitted to have.
2. AD 624 does not apply generally and does not "implement, interpret, or make specific" any statute. It is not quasi-legislative.
3. AD 624 restates state law and regulation.
4. AD 624 is exempt from the APA because it falls under the "internal management" exception.
5. CSH is allowed to create policy based on the situation of the facility, and AD 624 is a safety and security issue.
6. The issuance of AD 624 is similar to a "local rule" issued by a state prison and exempted from the APA by Penal Code section 5058.
7. AD 624 is constitutionally permitted.

OAL received no comments from the public.

OAL received the Petitioner's rebuttal to the Department's response. The rebuttal expanded upon the arguments made in the petition, but did not raise any new, relevant issues.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in California Code of Regulations, title 1, section 250.

OAL may issue a determination as to whether or not an agency issued, utilized, enforced, or attempted to enforce a rule that meets the definition of a "regulation" as defined in section Government Code 11342.600 that should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means,⁴ but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

To determine whether an agency issued, utilized, enforced, or attempted to enforce an underground regulation in violation of Government Code section 11340.5, it must be demonstrated that the agency rule is a "regulation" and not exempt from the APA.

ANALYSIS

CSH is a state mental health hospital, under the jurisdiction of the Department.⁵ CSH, like other state mental hospitals, has limited authority to act as an independent entity. The responsibility of governing all state mental hospitals lies with the Department. Welfare and Institutions Code section 4101 provides that:

... all of the institutions under the jurisdiction of the State Department of Mental Health shall be governed by uniform rule and regulation of the State Department of Mental Health....

The individuals⁶ committed to CSH are "non-LPS" patients, that is, patients who are placed in or committed to CSH pursuant to legal authority *other than* the Lanterman-Petris-Short LPS Act,⁷ commencing with Section 5000, of Part 1, Division 5 of the

⁴ We note that the Department's response included a request that, if OAL finds that AD 624 does meet the definition of a regulation, that OAL allow the Department to continue use of AD 624 until regulations can be promulgated to avoid significant disruptions at CHS and to ensure the safety and security of the patients and staff at CSH. OAL has no power to compel the Department to discontinue use of AD 624. Such an order must be made by a court of competent jurisdiction.

⁵ Welfare and Institutions Code section 4100 states:

The department [of Mental Health] has jurisdiction over the following institutions: ... (b)
Coalinga State Hospital....

⁶ A person who has been referred by the California Department of Corrections and Rehabilitation (CDCR) to the Department for evaluation as a sexually violent predator (SVP) is an "inmate" of CDCR. If that person is determined to be an SVP, he or she is transferred to a state hospital under the jurisdiction of the Department and is no longer an inmate of a CDCR prison. The SVP is then referred to as a "patient" or "individual."

⁷ Pursuant to Welfare and Institutions Code section 5001, the Lanterman-Petris-Short Act provides for care for mentally disordered persons, developmentally disabled persons, and persons impaired by chronic

Welfare and Institutions Code. For example, Welfare and Institutions Code section 6600 and following, the Sexually Violent Predator Law, provides that inmates of the Department of Corrections and Rehabilitation who are found by a court to be sexually violent predators are committed as a patient of the Department. The Department places the patient in an appropriate facility.⁸

A determination of whether the challenged rule is a “regulation” subject to the APA depends on (1) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

. . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. AD 624 applies to all individuals committed to CSH, any person who sends mail to individuals committed to CSH, and the employees of CSH. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. Individuals committed to CSH, their correspondents and

alcoholism. CSH does not have an LPS population. According to the Department's website (http://www.dmh.ca.gov/Services_and_Programs/State_Hospitals/Coalinga/Director.asp, viewed on September 3, 2008), CSH is described as a maximum-secured forensic facility that holds both sexually violent predators and mentally ill inmates from the California Department of Corrections and Rehabilitation.

⁸ Welfare and Institutions Code section 6604 states:

...If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health.

employees of CSH are clearly defined classes of persons. The first element is, therefore, met.

The second element established in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure.

As noted above, Welfare and Institutions Code section 4100 states that the Department has jurisdiction over CSH. Welfare and Institutions Code section 4101 requires all of the institutions under the jurisdiction of the Department be governed by uniform rule and regulation of the Department. In addition, Welfare and Institutions Code section 4027, which applies to non-LPS patients, states:

The State Department of Mental Health may adopt regulations concerning patients' rights and related procedures applicable to the inpatient treatment of mentally ill offenders receiving treatment ..., persons receiving treatment as mentally disordered sex offenders, and inmates of jail psychiatric units.

AD 624 establishes limitations and requirements on the mail that patients at CSH may send and receive. AD 624 affects all aspects of the sending and receipt of patients' mail including the addressing of the mail, the size of packages, the labeling of legal mail, the receipt and distribution of patients' mail and packages, etc. AD 624, therefore, implements Welfare and Institutions Code sections 4100 and 4101 which deal with the Department's responsibilities to adopt regulations to govern state hospitals. In addition AD 624 implements Welfare and Institutions Code section 4027 which permits the Department to adopt regulations concerning patients' rights and related procedures. The second element in *Tidewater* is, therefore, met.

Having met both elements of *Tidewater*, OAL determines that AD 624 meets the definition of "regulation" in Government Code section 11342.600.

The final issue to examine is whether AD 624 falls within an exemption from the APA. Government Code section 11346 requires that an exemption from the APA must be an express statutory exemption. We can find no express APA exemptions that would apply to AD 624.

AGENCY RESPONSE

In its response, the Department makes several arguments for finding that AD 624 does not meet the definition of a regulation. We will address each argument in turn.

1. AD 624 is not a regulation. Instead, the AD is a guide to the staff at CSH of how to handle the mail and what mailing material the individuals are permitted to have.

Government Code section 11340.5 specifically prohibits guidelines that meet the definition of “regulation.” Government Code section 11340.5 states:

- (a) No state agency shall issue, utilize, enforce, or attempt to enforce any *guideline*, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. (Emphasis added.)

AD 624, as determined above, meets both the elements of *Tidewater* and, therefore, meets the definition of “regulation.”

Furthermore, the designation of a challenged rule as a “guide” is not dispositive of the challenged rule’s true nature. In *State Water Resources Control Board v. OAL* (1993) 12 Cal.App.4th 697, 702, the Court held:

The Legislature established the OAL as a central office with the power and duty to review administrative regulations. The Legislature expressed its reasons in no uncertain terms stating, in essence, that it was concerned with the confusion and uncertainty generated by the proliferation of regulations by various state agencies, and that it sought to alleviate these problems by establishing a central agency with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Gov. Code, §§ 11340, subd. (e), and 11340.1.) In order to further that function, the relevant Government Code sections are careful to provide OAL authority over regulatory measures whether or not they are designated “regulations” by the relevant agency. *In other words, if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* (Emphasis added.)

Thus, the fact that the Department asserts that the challenged AD is a “guide” does not keep it from being found to be a “regulation,” and subsequently subject to the APA, as OAL concluded above.

2. AD 624 does not apply generally and does not “implement, interpret, or make specific” any statute. It is not quasi-legislative.

As noted above, the *Tidewater* case does not require that all persons in the state be affected by the rule. Rather, it is enough that the rule apply to a clearly defined class of persons. AD 624 is a rule that applies generally because it declares how a certain open class of cases, those involving patients and their correspondents will be decided.

Furthermore, as discussed above, AD 624 implements, interprets or makes specific Welfare and Institutions Code sections 4100, 4101 and 4027 which give authority to the Department to adopt regulations to govern state hospitals and which concern patients' rights.

Finally, AD 624 is "quasi-legislative." *Tidewater* states:

A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law.⁹

Among other requirements, AD 624 limits the weight and content of mail, and requires that all mail be screened and logged. The Department intends AD 624 to apply generally to patients and their families and friends. AD 624 states how the Department will decide all future handling of mail received or sent by patients. Therefore, it is quasi-legislative action on the part of the Department and is subject to the APA.

3. AD 624 restates state law and regulation.

The response lists the following three sections of the Welfare and Institutions Code and title 9 of the California Code of Regulations that the Department believes are restated in AD 624: Welfare and Institutions Code sections 4136 and 5325(e) and California Code of Regulations, title 9, section 884(b)(6).

a. Welfare and Institutions Code section 4136

Welfare and Institutions Code section 4136 states:

- (a) Each patient in a state hospital for the mentally disordered who has resided in the state hospital for a period of at least 30 days shall be paid an amount of aid for his or her personal and incidental needs that, when added to his or her income, equals twelve dollars and fifty cents (\$12.50) per month. If a patient elects to do so, a patient may save all or any portion of his or her monthly amount of aid provided for personal and incidental needs for expenditure in subsequent months.
- (b) Each indigent patient in a state hospital for the mentally disordered shall be allotted sufficient materials for one letter each week, including postage in an amount not to exceed the cost of one stamp for first-class mail for a one-ounce letter, at no cost to the patient.
- (c) Each newly admitted patient, for the first 30 days after his or her initial admission, shall be allotted sufficient materials for two letters each week, including postage for first-class mail for up to two one-ounce letters per week. The hospital administrator shall ensure that additional writing

⁹ *Tidewater, supra*, at 574-575.

materials and postage are available for purchase by patients at the store or canteen on hospital grounds.

(d) For purposes of this section, "indigent patient" means any patient whose income is no more than twelve dollars and fifty cents (\$12.50) per month.

We agree that some provisions of section V.C. of AD 624 restate Welfare and Institutions Code section 4136. Restatements of existing law do not meet the definition of "regulation" in Government Code section 11342.600 because a restatement does not further interpret, implement or make specific the law enforced by the agency. Those sections of AD 624 which are solely restatements do not need to be adopted pursuant to the APA.

b. Welfare and Institutions Code section 5325(e)

Welfare and Institutions Code section 5325 is a list of rights for individuals in state hospitals. Subsection (e) states that individuals have the right:

(e) To have ready access to letterwriting materials, including stamps, and to mail and receive unopened correspondence.

The definition of a "regulation" in Government Code section 11342.600 states:

... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

If a general rule issued by a state agency further implements, interprets or makes specific the existing law, it must be adopted as a regulation pursuant to the procedures in the APA. As noted above in the list of examples of provisions in AD 624, the AD includes requirements that implement, interpret or make specific the general right granted in Welfare and Institutions Code section 5325 to individuals in state hospitals. For example, AD 624 imposes limits on the size of mail and packages, it limits the receipt of third class mail, it requires the inspection of all photographs, etc. These and other similar provisions in AD 624 are not mere restatements of Welfare and Institutions Code section 5325 or any other provisions of law. These provisions meet the definition of "regulation" and should have been adopted pursuant to the procedures in the APA.

c. California Code of Regulations, title 9, section 884(b)(6).

California Code of Regulations, title 9, section 884(b)(6) states:

(b) Non-LPS Patients have the following rights, subject to denial for good cause:

(6) A right to have access to letter writing materials and to mail and receive correspondence. Designated facility employees shall open and inspect all incoming and outgoing mail addressed to and from patients for contraband. Confidential mail, as defined in Section 881(c), shall not be read. Limitations on size, weight and volume of mail shall be specified by formal facility policy.

AD 624 further implements, interprets and makes specific section 884(b)(6) by establishing the process the staff must use to open and inspect all incoming and outgoing mail. For example, section V.D. of AD 624 requires that the staff identify, sort and deliver “in accordance with established mail/package processing procedures.” Unit staff must provide a confidential area for individuals to receive mail during mail call. Individuals who receive mail and are off the unit must be notified. Unit staff will deliver the mail to the individual to whom it is addressed and in accordance with the hospital’s rules open and inspect it for contraband without reading it. If contraband is found, it must be removed and a receipt provided to the individual as soon as practical. The Unit Supervisor shall be notified and contraband procedures followed. The section continues with additional procedures to be followed when mail is received.

The procedures set forth throughout AD 624 are not mere restatements of California Code of Regulations, title 9, section 884(b)(6). They meet the definition of “regulation” and should have been adopted pursuant to the procedures in the APA.

4. AD 624 is exempt from the APA because it falls under the “internal management” exception.

Government Code section 11340.9 (d) exempts from compliance with the APA any rule that “relates only to the internal management of the state agency.” This exemption from the APA has been construed very narrowly. The California Court of Appeal in *Grier v. Kizer* summarizes case law on internal management, stating:

Armistead v. State Personnel Board [citation] determined that an agency rule relating to an employee’s withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was ‘designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board’s internal affairs. [Citation.] “Respondents have confused the internal rules which may govern the department’s procedure . . . and the rules necessary to properly consider the interests of all . . . under the . . . statutes” [Fn. omitted.] . . . [Citation; emphasis added by *Grier* court.]

Armistead cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The

Poschman court held: “Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.” . . . [Citation.]

Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections’ adoption of a numerical classification system to determine an inmate’s proper level of security and place of confinement ‘extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself [,]’ and embodied ‘a rule of general application significantly affecting the male prison population’ in its custody.

By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead*’s holding that an agency’s personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception . . .¹⁰

The internal management exemption has been judicially determined to be narrow in scope.¹¹ The courts apply the internal management exemption if the “regulation” at issue (1) affects only the employees of the issuing agency,¹² and (2) does not address a matter of serious consequence involving an important public interest.¹³ In order for a rule or procedure to fall within the internal management exemption, it must meet both of these two prongs.

AD 624 fails to meet the first prong. AD 624 does not affect only the employees of the Department. It also affects the individuals committed to CSH and the people with whom they correspond.¹⁴ Therefore AD 624 does not fall within the internal management exemption.

¹⁰ *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 436, 268 Cal.Rptr. 244, 252-253.

¹¹ *Id.*

¹² See *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; *Stoneham v. Rushen (Stoneham I)* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596.

¹³ See *Poschman, supra*, 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and *Armistead, supra*, 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4.

¹⁴ Because AD 624 does not meet the first prong of the “internal management” exemption, there is no need to discuss or analyze the second prong.

5. CSH is allowed to create policy based on the situation of the facility and AD 624 is a safety and security issue.

OAL sympathizes with the need to ensure the safety and security of the state hospitals and the people who live and work there. However, this determination is limited to the single issue of whether AD 624 meets the definition of a regulation. We have no authority to create an exemption from the APA based upon the situation found in state hospitals. That is the purview of the Legislature.

6. The issuance of AD 624 is similar to a "local rule" issued by a state prison and exempted from the APA by Penal Code section 5058.

In Penal Code section 5058, the Legislature recognized that each prison under the jurisdiction of CDCR may have conditions unique to that prison. In such cases, the individual prison may adopt rules to address those conditions without following the requirements of the APA. The situation that the Department faces is very similar to that of CDCR; however, OAL does not have the authority to apply to the Department a statute that specifically applies only to CDCR. This is a decision which must be made by the Legislature.

7. AD 624 is constitutionally permissive.

The Department argues that, pursuant to *Martyr v. Mazur-Hart* (1992) 789 F. Supp. 1081, forensic patients at state mental hospitals do not have a right for their mail not to be searched, nor do they have a right to receive uncensored mail.

The constitutionality of the provisions of AD 624 and whether the patients do or do not have specific rights is not an issue that OAL can address. In issuing a determination pursuant to Government Code section 11340.5, OAL is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act.

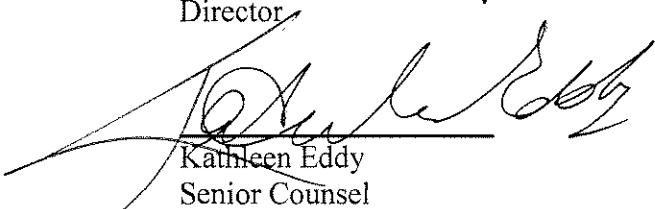
CONCLUSION

OAL finds that AD 624 is a "regulation" as defined in section 11342.600, does not fall within any express statutory APA exemption, and therefore, it should have been adopted pursuant to the APA.

Date: September 8, 2008


Susan Lapsley

Director


Kathleen Eddy
Senior Counsel

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

**EXHIBIT 1
AD 624**

Coalinga State Hospital

OPERATING MANUAL

SECTION - SUPPORTIVE SERVICES
ADMINISTRATIVE DIRECTIVE NO. 624
(Replaces A.D. No. 624 dated 4/12/07)

Effective Date: August 9, 2007

SUBJECT: INDIVIDUALS' MAIL AND PACKAGES

I. PURPOSE

To ensure a coordinated set of guidelines and procedures regarding the responsibilities, procedures, and limitations which govern an individual's incoming and outgoing mail and packages. It provides for the right of individuals to send and receive mail and packages, and it ensures that the hospital operates according to its security needs, fire regulations, and physical space limitations.

II. AUTHORITY

Department of Mental Health (DMH) Special Order No. 248.01 and 249.01; California Welfare & Institutions Code, Section 4136; and California Code of Regulations, Title 9.

III. POLICY

Individuals have the right to have access to letter writing materials, including stamps, and to send and receive mail and packages. The hospital has detailed processes in place to ensure individuals and staff understand how incoming and outgoing mail and packages will be handled.

IV. METHOD

A. Definitions:

1. "Mail" is defined as paper documents sent in a standard sized envelope, manila envelope, or special handling envelope (Priority mail, Express mail, etc.) with a weight under 16 ounces and less than $\frac{1}{2}$ " thick. All other materials falling outside this description will be deemed as a package and will be forwarded to Mail Services for processing, then to Police Services Package Center (PSPC) for issuance according to established procedures.
2. "Package" is defined as any items(s) delivered in a box, large manila envelope with bubble wrap, or other container that is not standard envelope size or is more than 16 ounces or $\frac{1}{2}$ " thick. Exceptions are Periodicals, Catalogs, or Literature Search Materials from Federal and/or State agencies.

V. GENERAL PROCEDURES FOR MAIL AND PACKAGE PROCESSING

A. Addressing and Labeling of Individuals' Mail and Packages:

1. All incoming/outgoing mail and packages must be addressed properly including the Individual's full name, unit number and identification number to ensure proper and timely delivery. Incoming/outgoing mail and/or packages with "Coalinga State Hospital" in the address line may be subject to opening by receiving staff as an unknown vendor purchase.

Example: John J. Doe
Unit 00, Identification CO-000000-0
P.O. Box 5003
Coalinga, CA 93210-5003

2. All incoming/outgoing mail and packages should have a return address, in the event that the mail and/or package(s) are unable to be delivered.
3. Every effort shall be made to deliver mail and/or packages without a proper address. If multiple Individuals with the same name are located, an attempt will be made to confirm that the sender is known to one of the Individuals. If it cannot be confirmed that the sender is known to one of the Individuals, the mail or packages shall be returned unopened, to the sender, the post office of origin, or other shipping agent.
4. Individuals have the right to decline acceptance of mail and/or packages from one or more Individuals and/or vendors. Mail and/or packages that are declined by an Individual shall be sent back to Mail Services with instructions to return, unopened, to the sender. Mail or packages that are opened at the Individual's request may require the Individual to pay for return shipping costs.
5. Delivery or mailing of third-party mail is prohibited, and such mail shall be returned to the sender, unopened, via the Mail Services and the Individual's Wellness and Recovery team shall be notified.
6. Third class mail (junk mail) without an Individual's Coalinga State Hospital Identification No. (CO #) is not allowed and will be disposed of by the Mail Services.

B. Legal Mail and Packages:

1. All incoming/outgoing legal mail and/or packages should be marked "Legal Correspondence" on the outside. Legal mail that is not identified may be subject to processing in accordance with non-legal mail/package procedures.

2. Individuals have the right to mail legal documents to the courts. The state provides free mail for the first 30 days after initial admission. Thereafter, the cost of postage for mailing documents to the courts or attorneys will be charged against funds in, or later deposited in, the Individual's Trust Account.
3. Indigent Individuals' legal documents will be mailed to the courts using first class postage, at State expense.
4. Unit staff shall maintain a log of all outgoing legal correspondence, to include Individual's name, date, recipient, and staff's signature.

C. Writing Materials and Postage:

1. Newly admitted Individuals shall be allotted sufficient writing materials, including postage for first-class mail, for up to two one-ounce letters per week for the first thirty (30) days after initial admission. Thereafter, Individuals are required to purchase writing and mailing materials, and pay regular postage and special mail services fees out of their personal funds.
2. For the purpose of this section, "Indigent Individuals" means any Individual whose income is not more than twelve dollars and fifty cents (\$12.50) per month.
3. After the initial 30 days from admission, Indigent Individuals shall be allotted sufficient materials for one letter each week, including postage in an amount not to exceed the cost of one stamp for first-class mail for one-ounce letter, at no cost to the Individual.
4. Additional writing materials and postage shall be available for purchase at the stores or canteens on hospital grounds.

D. Mail and Package Receipt and Distribution:

1. Upon receipt of the mail; Mail Services staff identifies, sorts and delivers in accordance with established mail/package processing procedures. Unit staff shall provide a confidential area for Individuals to receive mail during mail call. Individuals who receive mail and are off the Unit shall be notified. Unit staff will deliver the mail to the Individual to whom it is addressed and in accordance with the hospital's rules open and inspect incoming mail for contraband without reading written material in the presence of the Individual. If contraband is found, it shall be removed and a "Receipt of the contraband/ Confiscated Items" will be provided to the Individual as soon as practical. The Unit Supervisor shall be notified and contraband procedures will be followed.

2. All pictures, periodicals, catalogs and/or literature search materials received by Individuals in the mail will be reviewed by the Unit Staff for illegal or inappropriate content and are subject to review and approval by Wellness and Recovery Team before being given to the Individual.
3. An exception to the above procedures will occur if it is determined by Unit staff that the mail is considered suspicious. This would include suspecting an explosive device, drugs, weapons, or any other contraband items. In these cases, the mail will be opened before delivery to an Individual. These procedures would occur to ensure the safety and security of staff, Individuals, and the public.
4. All cash, checks, money orders or other instruments of payment received by the Individual through the mail will be placed in the Individual's trust account.
5. Mail may be declared undeliverable and un-returnable when the addressee and the return address are insufficient for delivery or return. Should any mail or package possess a biohazard or health risk, it will be declared undeliverable.
 - a. Undeliverable mail will be disposed of in a manner prescribed by the law.
 - b. Should there be no applicable law covering a given situation, the issue of disposal will be determined by the Executive Director.
 - c. If known, the Individual recipient will be advised in writing of the name and address of the party sending the mail or package and the circumstances surrounding its disposal.

E. Transferred Individual Mail:

1. Mail received for an Individual who is no longer on the Unit should be forwarded to the Individual or returned to the Mail Center with a note attached to it (use paper clip) stating the present location of the Individual. This information should not be written on the envelope.
2. It is suggested that Individuals leaving the hospital authorize forwarding address for first class mail which will remain in effect for sixty days using the "Individual Mail Forwarding Form" #34-100, submitted to Mail Services by Unit Staff via mail process bag procedure. No envelope required, as mail bag suffices for confidentially purposes.
 - a. Individuals agree that only First Class Mail will be forwarded for up to sixty (60) days from start date.

- b. Periodicals, Non Profit, Bulk Rate, Standard, and all other mail types will not be forwarded by the United States Postal Service (USPS) and will be returned to sender by CSH Mail Center.
- c. Individual is responsible to notify any publishers and other correspondences of change of address.
- d. Individual is responsible to notify Mail Center staff upon return to CSH, to discontinue any previous mail forwarding requests.

F. Incoming Mail and Packages:

- 1. All incoming packages must be received through the USPO, common carrier, authorized shipping agents, approved vendor or other institution. No packages will be accepted from visitors. The main point of receipt for packages will be the Mail Services. Upon receipt of patient packages, the Mail Services' staff will verify in accordance with this policy:
 - a. Individuals' correctly labeled ship to address.
 - b. Senders' correctly labeled return address.
 - c. Individual Mail Forwarding Form 34-100. (Note: Packages will be returned to sender, only first class mail will be forwarded.)
 - d. Approved Educational Materials Form CSH-099.
 - e. Authorization to Ship Items Warranty/Non-Warranty Repair Return (Form 34-101 Pending Forms Committee Review).
 - f. Approved Vendor.
 - g. Third-Party Mail/Package.
 - h. Allowable Weight.
 - i. Allowable Size.

G. Package Distribution and Search:

- 1. Packages addressed to Individuals at CSH are delivered to PSPC, who in turn will deliver the packages to the addressee in accordance with this policy.
 - a. All incoming packages shall be inspected for contraband and processed by PSPC on a first come – first served basis except that those packages intended for individuals with a signed waiver form on file may take priority.

- b. Upon determination of contraband, the receiving Individual will decide to destroy the contraband item and/or place Class 3, 4 or 5 contraband items into Property Storage, excluding corrosive or perishable items.
 - c. Once the Individual's Property Storage containers exceed the fifty pound limit, the determination of disposition may be made by the Individual if within the rules and regulations of CSH. Any costs involved with the disposition will be the responsibility of the Individual.
2. Periodicals, catalogs and/or Literature Search materials are not considered vendor or quarterly packages. All printed material determined to not be mail will be received and processed by PSPC for contraband and/or approval.
- a. All incoming periodicals, catalogs and/or Literature Search materials will be scanned to prevent the introduction of contraband into the facility. Any contraband found will be taped to the received material and the Individual will decide on the disposition of the contraband items in the prescribed manner.
 - b. Periodicals, catalogs and/or Literature Search materials will be subject to review by the package officer. If determined to be inappropriate they will be held for secondary review and final determination within 10 days by the Package Review Panel or treatment staff, depending on question of inappropriateness.
 - c. If upon opening the package, the material is found to be a non-periodical/catalog it will be handled as one of the following:
 - i. Package;
 - ii. Mail; or
 - iii. Contraband will be handled in the prescribed manner.
 - d. If it is determined by appropriate staff that the package is considered suspicious including:
 - i. Suspecting an explosive device;
 - ii. Drugs;
 - iii. Weapon; or
 - iv. Other contraband item.

The package will be opened before delivery to the individual. These procedures will occur to ensure the safety and security of the staff, individuals and the public, if suspicious contraband is found the contraband will be handled according to procedure.

3. Package Limitations:

- a. Incoming (non-Vendor) packages are limited to three (3) packages per individual per calendar quarter for the first three quarters (January – March, April – June, July – September) and will be tracked by PSPC.
- b. Incoming (non-Vendor) packages are limited to four (4) packages per individual during the fourth calendar quarter (October – December), due to the holidays, and will be tracked by PSPC.
- c. Non-Vendor packages in excess of the quarterly limit will be returned to the sender, originating post office or shipping agent.
- d. There is no limit on approved vendor packages.
- e. All packages must be received through the USPS, common carrier, parcel carrier, shipping agent or other institution. Packages will not be accepted from visitors.
- f. Packages will not exceed 30 pounds in weight or the size limit of 24" length x 19" width x 16" height. Packages exceeding the weight or size limitations will not be accepted and will be returned to the post office or shipping agent.
- g. Items not in factory sealed containers or determined to be contraband will be disposed of in a prescribed manner.
- h. Any undeliverable package will be returned to sender, USPS, Common Carrier, Shipping Agent, other institution or will be disposed of in a prescribed manner.

4. Allowable Items:

- a. Only those items and the amounts listed on the Acceptable Incoming Items (Allowables List per A.D. No. 626) will be allowed. Items not on the list will be handled in the prescribed manner.
- b. The hospital will provide a list of acceptable incoming items (Allowables List) to the individuals and this list will also be available at the Front Lobby Desk for visitors.
- c. A copy of the most current or updated list will be posted on units and the patient's library for individuals to access.

- d. It is the Program's responsibility to ensure that all units have the most current lists.
- 5. Package Pick-Up:
 - a. Incoming packages will be distributed to the Individual according to procedures established by the PSPC.
 - b. These procedures will be posted on the units, library and at the PSPC.
- 6. Searching of Packages:
 - a. The PSPC Staff *will* be responsible for opening packages; searching contents, inventorying, and if necessary disposing of unauthorized package contents. Approved Vendor Packagings are subject to random searches.
 - b. All items received from sources other than an Approved Vendor (e.g. guardian, family, friends or loved ones) *will* be opened, contents searched and placed in packaging approved by the hospital.
 - c. Package contents *will* be placed in paper bags for transport to the units by the Individual or staff. An inventory sheet *will* be included with the contents and a copy *will* be sent to the unit through the inter-hospital mail.
- 7. Package and Property Waiver Forms:
 - a. Individuals *will* be present when packages addressed to them are opened unless they have a signed waiver on file.
 - b. The waiver allows the package to be inventoried without the Individual's presence.
 - i. There *will* be at all times; a patient representative present to observe the process.
 - ii. *Waivers will remain in effect from the date signed until the Individual is discharged, transferred to another facility or withdraws the waiver.*
 - c. Individuals may withdraw their waiver at any time by signing the Cancel Waiver form and submitting it to the PSPC.

- d. As packages intended for Individuals with waiver forms on file can be handled in a much more expeditious manner and do not require the Individual's presence, such packages may be handled earlier than those addressed to Individuals without waiver forms on file.

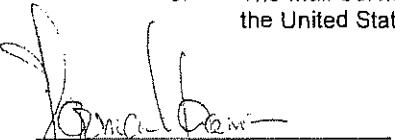
H. Approved Vendor Purchases:

1. The Hospital has established a list of approved mail-order businesses, individuals and organizations referred to as approved vendors. Items can only be ordered from those listed as approved vendors.
2. This listing is intended to enhance compliance with contraband policies, eliminate returns of unacceptable purchases, and expedite the package-screening process.
3. Certain items must be purchased and received from approved vendors only. Not all items offered by an approved vendor are permitted and Individuals are advised to refer to the Acceptable Incoming Items List (Allowables List) and Contraband List for specifics.
4. Individuals may submit requests for the addition of new vendors to the contraband committee during the month of July via the Contraband Committee.
5. Mail Services will notify Individuals upon receipt/return of refused package via the "Notification of Refused Package Card". No information will be given out over the telephone to anyone; an individual, their guardian, family, friends, or loved ones and/or CSH staff. Information regarding returned/refused packages will only be issued to the level of Program Manager by designated staff.
6. Upon delivery of Individuals' packages to PSPC any Contraband that is discovered will be documented and handled in accordance with A.D. No. 818 and/or A.D. No. 626. Certain approved vendor packagings are subject to random opening and search.
7. Approved Vendor purchases ordered by the Individual and received through the Mail Services that are then refused by the Individual at the time of issuance by the PSPC will require the Individual to pay for return shipping costs.
8. Disposition and return of unopened packages to the Mail Services must be made within three (3) days of the date of package receipt to avoid additional return to sender shipping costs.

I. Incoming Admission Property:

1. For the purpose of this directive, admission property is not considered to be a "package".

6. If the individual has insufficient funds or refuses to mail the package, the transaction will be cancelled. The unit will be called and the individual will return to his unit with the package. Unit staff will open the package and give the individual back his property. Unless the property is contraband, in which case it will be held in a secure area of the unit and the individual will decide on the disposition of the contraband items in the prescribed manner. The copy of the property slip will go into the individual's property envelop and his property will be checked off as returned on the master list.
7. Packages may not exceed thirty (30) pounds.
8. The Mail Services staff will receive the individual packages for delivery to the United States Post Office.



NORMAN T. KRAMER
(Acting) Executive Director

Cross Reference(s):

- A.D. No. 608 Individuals' Access to Courts
- A.D. No. 626 Individuals' Property and Storage
- A.D. No. 644 Trust Office Functions
- A.D. No. 651 Processing of Departmental and United States Postal Services Mail
- A.D. No. 818 Contraband

Department of Mental Health
Special Orders 248.01 and 249.01

EXHIBIT C.

CALIFORNIA DEPARTMENT OF MENTAL HEALTH
SPECIAL ORDER

Section: 200-299-Administrative

Special Order Number: **248.01**

Effective Date: November 15, 2004

Replaces: 248

Subject: **PATIENT ACCESS TO THE COURTS**

Special Order: Patients have a constitutional right to have access to the courts, including the right to solicit and procure legal assistance, availability of and access to legal reference materials, and the opportunity to duplicate and mail necessary legal documents that pertain to their legal status. Indigent patients acting In Pro Per (on their own behalf) shall not have these rights restricted for lack of funds.

Authority: By authority of the Deputy Director, Long Term Care Services.

Purpose: To ensure that patients are provided with access to the courts.

Method:

GENERAL

- A. DMH state hospital staff shall provide patients with requested information concerning their legal commitment (i.e., committing court, determinate sentencing data, commitment order data, and any relevant information regarding legal guardian or conservator). If patients are unable to obtain assistance from hospital staff, they may request assistance from the Patients' Rights Advocate or ask the Advocate to intervene. The Advocate will take the necessary steps to ensure that appropriate assistance is provided to the patient.
- B. DMH state hospital staff are not authorized to advise patients in their legal affairs, except to provide general assistance to those who are illiterate, who are non-English speakers, or who are physically incapable of completing forms adopted by the Judicial Council of California.
- C. The Trust Officer shall assist patients in all matters regarding their financial status, legal document service, protection, preservation, and administration of patients' assets.
- D. Non-English speaking patients will have the necessary translation services arranged by the hospital.

- E. Patients do not have an absolute right to duplicate or have in their possession copies of case law or legal documents that do not pertain to their legal status.
- F. Motions, briefs, suits or writs filed or in the process of preparation by or on behalf of the patient, as well as correspondence with the courts and officers of the courts shall not be read by staff.
- G. A patient's personal law books and legal reference materials may be limited pursuant to hospital regulations and the availability of storage space for personal property.

ACCESS TO THE LEGAL REFERENCE LIBRARY

- A. Patients have a right to access legal reference material. Each hospital will be required to maintain or provide access to a minimum amount of legal reference material (see Attachment 1).
- B. State hospitals shall also include the following procedures in facility policy:
 - 1) Limitations on the time, duration, frequency, and method of access to legal reference materials.
 - 2) The process to order specific legal reference material relevant to the patients legal commitment if it is unavailable at the hospital, to include necessary forms, approvals, costs and final disposition of new material. Indigent patients will not be responsible for the cost of ordering legal materials or forms required by the courts.
 - 3) Special conditions and process for granting "enhanced" or extended hours of access to legal reference materials.
 - 4) Process and special conditions for Indigent Patients.

LEGAL FORMS

- A. Patients have the right to access the courts through applicable writ procedures. State hospital staff and/or the advocate shall, upon request, provide patients with assistance in completing writ forms.
- B. The printed forms required by the state and federal courts that are supplied to the hospital by the courts shall be provided to patients without charge. Patients shall be required to pay for duplication of printed forms and other written or typed materials, unless the patient is indigent.

ACCESS TO DUPLICATION SERVICE

- A. Patients may have access to duplication of certain legal material. Each state hospital shall develop and maintain a policy that specifies the following:

Special Order Number: 248.01

- 1) The type of legal material that may or may not be duplicated.
- 2) The cost for duplicating material.
- 3) The procedures for requesting access to perform duplication.
- 4) Special procedures for indigent patients. Attachment #2 provides reference tables for:
 - a.) legal documents that may be duplicated at no charge, b.) documents for which there will be a charge, and c.) guidelines for duplicating only the number of copies required by the court.
- 5) Restrictions or limitations for duplicating copyrighted material, case law, textbooks or other legal reference material readily available in the law library. Hospital policies shall also include the restrictions and limitations for duplicating non-legal or non-court related material such as medical records belonging to other patients, pornographic, "hate" or gang related material.

LEGAL MAIL

- A. Patients have the right to mail legal documents to the courts. Hospital policies shall specify the following:
 - 1) The process and cost for mailing documents to the courts or attorneys.
 - 2) Process for mailing legal documents (with limitations) for Indigent Patients.
 - 3) For hospitals with limited space or special storage needs, the policy shall outline the process and timeframes for patients requesting access to, and confidentiality of, stored legal documents and privileged correspondence pursuant to a current action and/or their current legal status.

NOTARIZATION OF LEGAL DOCUMENTS

Upon written request by a patient, notary service will be arranged by the hospital Trust Officer to notarize legal documents. The courts do not require notarized copies of legal material. The patient will be responsible for the cost of notary service, whether indigent or not.

Signature on File

JOHN RODRIGUEZ, Deputy Director
Long Term Care Services
Department of Mental Health

October 29, 2004

Date

ATTACHMENT 1

LAW COLLECTION AND DESCRIPTION¹

CODES:

1. Deering's California Code Annotated or West's Annotated California Code.
2. U.S. Code Service or U.S. Code Annotated.

DIGESTS:

1. West's California Digest 1st and West's California Digest 2nd, or (McKinney's California Digest Official Reports 3rd Series, 1983.
2. Modern Federal Practice Digest.
3. West's Federal Practice Digest 2nd
4. West's Federal Practice Digest 3rd
5. West's Federal Practice Digest 4th

REPORTERS:

1. West's California Reporters, or California Official Reports 2nd Series, Vol. 53-71, and California Official Reports, 3rd Series, Vol. 1 – Continuing, and California Appellate 2nd, Vols. 175-276, and California Appellate 3rd, Vol. 180, Continuing.
2. Federal Reporters Vol 176, Continuing
3. Federal Supplement, Vol. 180, Continuing
4. U.S. Reports Vol. 269 Continuing, or U.S. Supreme Court Reports, Lawyers Edition Vol. – Continuing or Supreme Court Reporter, Vol. 70 continuing.

SHEPARDS

1. U.S. Citations
2. Federal Citations
3. California Citations

SECONDARY SOURCES

1. Appeals and Writs in Criminal Cases 1982 with newest update, or Ballentine's Law Dictionary, or Black's Law Dictionary, 6th Edition.
2. California Criminal Law Procedures and Practices, 1986, Dec., with newest update.
3. Harvard Law Review Developments on Habeas Corpus 1970 Ed.
4. Sokol, Handbook on Federal Habeas Corpus 2nd Ed.
5. U.S. Law Week (newspaper) 1 year backfile.
6. Witkin California Criminal Law, 2nd Ed.

¹ Each hospital's collection of law books shall consist of, but not necessarily be limited to, one complete and current set of the materials listed in Attachment 1.

ATTACHMENT 2**DUPLICATION OF LEGAL DOCUMENTS BY INDIGENT PATIENTS****TABLE 1. List of Legal and Non-Legal Documents**

LEGAL DOCUMENTS THAT MAY BE DUPLICATED AT <u>NO COST</u> TO INDIGENT PATIENTS	NON-LEGAL DOCUMENTS THAT PATIENTS WILL BE <u>CHARGED FOR</u> DUPLICATING
Wrists: Habeas corpus, mandate, etc.	Law book pages
Civil rights complaints	Law review articles
Civil complaints or answers	Court transcripts
Petitions for hearings in appellate courts	Correspondence with attorneys or public officials
Exhibits, including slip opinions of the California Court of Appeals, when attached to petitions for hearing in the State Supreme Court	Slip opinions, except as noted.
Pleadings, proof of service documents	
Motions to proceed "in forma pauperis" (without funds to hire counsel).	

TABLE 2. Number of Copies Required by the Courts.

COURT	WRITS OF HABEAS CORPUS	APPEALS AND CERTIORARI PETITIONS	HEARINGS AND OTHER WRITS	EXHIBITS /EXCERPTS
U.S. Supreme Court	Original and Appendix ² +40	Original and 40 Copies	---	Original + 40 Copies
U.S. Court of Appeals	Original and 4 copies	Original and 15 copies ³	---	Original +5 excerpts of record
U.S. District Courts	Original and 3 copies	---	---	Original and 3 copies
California State Supreme Court	Original and 13 copies	Original and 13 copies	Original and 13 copies	Original and 1 copy Motions – Orig +8
California Court of Appeal	Original and 4 copies	Original and 4 copies	Original and 3 copies	Original and 1 copy Letter Brief – Orig +4
State Superior Court	Original	---	---	Original

- Paper size for all courts is 8 1/2" x 11".
- Indigent patient will also receive 1 personal copy of all legal materials duplicated at State expense.
- Indigent patients may not duplicate copyrighted legal material, textbooks, case law, or other legal reference materials that are provided and readily available for their use in the law library (See Table 1). The courts do not require copies of the cases cited.

² Indigent patients -- original and forma pauperis affidavit.

³ Indigent patients -- original and four copies

CALIFORNIA DEPARTMENT OF MENTAL HEALTH

SPECIAL ORDER

Section: 200-299-Administrative

Special Order Number: **249.01**

Effective Date: January 1, 2003

Replaces: 249

Subject: **PATIENT MAIL AND PACKAGES**

Special Order: Patients have a right to have access to letter writing materials, including stamps, and to send and receive mail. State Hospitals shall have a detailed process in place to ensure patients and staff understand how incoming and outgoing mail and packages will be handled.

Authority: By authority of the Deputy Director, Long Term Care Services and pursuant to Section 4136 of the Welfare and Institutions Code.

Purpose: To ensure that patients are provided with the ability to send and receive mail.

Method:

DEFINITIONS

- A. **“Mail”** is defined as paper documents sent in a standard sized envelope, manila envelope, or special handling envelope (Priority Mail, Express Mail, etc.) with a weight of under 16 ounces and less than $\frac{1}{2}$ ” thick.
- B. **“Package”** is defined as any item(s) delivered in a box, large manila envelope with bubble wrap, or other container that is not standard envelope size or is more than 16 ounces or $\frac{1}{2}$ ” thick.
- C. **“Third-Party Mail”** is defined as mail addressed to hospital staff or volunteers for delivery to a patient, or mail given to an employee by a patient to mail outside normal hospital mailing procedures.
- D. **“Letter”** is defined as one-ounce first class mail.

GENERAL PROCEDURES FOR MAIL PROCESSING

- A. Mail addressed to patients in a State Hospital shall be delivered from the U.S. Post Office to hospital authorities. Upon receipt of mail, Hospital staff will deliver the mail to the patient to whom it is addressed in accordance with the hospital’s rules.

- B. Patients have the right to access letter writing materials and to mail and receive correspondence. Designated facility employees shall open and inspect all incoming mail addressed to patients for contraband without reading documents.
- C. State Hospitals will develop and maintain internal policies that specify detailed procedures for the following activities or circumstances:
 - 1. Approvals, receipt and handling of mail-order or vendor purchases;
 - 2. Receipt and handling of patient funds or valuables and the process for out-of-hospital fund disbursements requested by patients;
 - 3. Limitations for an individual patient's right to send mail in order to protect the public from receiving mail from a patient that is threatening, harassing, offensive, or meant to facilitate current or future victimization. A Denial of Rights form documenting the nature of the public threat must be completed and placed in the patient's record;
 - 4. Limitations on size, weight and volume of mail and packages;
 - 5. Rare emergencies (a possible mail bomb, bio-terrorist threat, hazardous material, etc.) that may require a piece of mail or a package to be disposed of for the safety and protection of staff and patients. A decision regarding the emergency disposal of mail or package will be forwarded to the Executive Director or designee for review and approval.

MAIL AND PACKAGE DISTRIBUTION PROCEDURE

A. Incoming Patient Mail

- 1) All incoming mail shall be correctly addressed and should have the patient's full name, unit number and hospital number to ensure proper and timely delivery. All incoming mail should have a return address, in the event that the mail is unable to be delivered.
- 2) Every effort shall be made to deliver mail without a proper address. If multiple patients with the same name are located, an attempt will be made to confirm that the sender is known to one of the patients. If it can not be confirmed that the sender is known to one of the patients, the mail shall be returned, unopened, to the sender or the post office of origin.
- 3) Each hospital shall develop a procedure for mail distribution to the patients that includes inspection for contraband without reading written material.

- 4) Patients shall have the right to decline acceptance of mail from one or more individuals. Mail that is declined by a patient shall be sent back to the mailroom with instructions to return, unopened, to the sender.
- 5) Delivery or mailing of third-party mail is prohibited, and such mail shall be returned to the sender, unopened, via the mail center and the patient's treatment team shall be notified.
- 6) Third class mail (junk mail) that can not be delivered or returned to the U.S. Post Office will be disposed of by the Mail Center.

B. Outgoing Patient Mail

- 1) Outgoing patient mail includes all correspondence and letters in standard size envelopes being delivered inside the hospital or going to addresses outside the institution.
- 2) All outgoing patient mail must have a correct return address. All outgoing patient mail must be processed by unit staff to verify a correct return address before forwarding to the Mail Center for processing.

WRITING MATERIALS AND POSTAGE

- A. Newly admitted patients shall be allotted sufficient writing materials, including postage for first-class mail, for up to two one-ounce letters per week for the first thirty (30) days after initial admission. Thereafter, patients are required to purchase writing and mailing materials, and pay regular postage and special mail service fees out of their personal funds. Indigent patients, as defined below, shall be allowed limited free writing materials and postage each week.
- B. For the purpose of this section, "indigent patient" means any patient whose income is no more than twelve dollars and fifty cents (\$12.50) per month.
- C. After the initial 30 days upon admission, indigent patients shall be allotted sufficient materials for one letter each week, including postage in an amount not to exceed the cost of one stamp for first-class mail for a one-ounce letter, at no cost to the patient.
- D. Additional writing materials and postage shall be available for purchase at the stores or canteens on hospital grounds.

LEGAL MAIL

- A. Patients have the right to mail legal documents to the courts (See Special Order 248 Patient Access To Court). The state provides free mail for the first 30 days after initial admission. Thereafter, the cost of postage for mailing documents to the courts or attorneys will be charged against funds in, or later deposited in, the patient's Trust Account.

- B. Indigent patients' legal documents will be mailed to the courts using first class postage, at State expense.
- C. Unit staff shall maintain a log of all outgoing legal correspondence, to include patient name, date, recipient, and staff's signature.

PATIENT PACKAGES

- A. All incoming packages must be received through the U.S. Postal Service, common carrier or other institution. No packages will be accepted from visitors.
- B. All incoming packages must be addressed properly including the patient's name, patient identification number and Unit number to ensure proper and timely delivery. All incoming packages should have a return address in the event the package is unable to be delivered.
- C. Patients have the right to receive packages. Designated facility employees shall open and inspect all incoming and outgoing packages addressed to and received from patients for contraband, without reading written material.
- D. Limitations on the size, weight, and volume of incoming and outgoing packages shall be specified by formal facility policy.

CONTRABAND ITEMS

- A. Each state hospital shall develop a list of contraband items that may not be received by a patient in mail or package form. The hospital will provide a list of contraband items to all patients upon admission. This list shall also be made available to the patient family and visitors.
- B. Sealed items not allowed, that the patient wishes to keep, will be inventoried, boxed and mailed at the patient's expense. It is the patient's responsibility to acquire the funds necessary to mail out the package. The patient will notify the officer that the funds are available. The officer will then take the item(s) to the mail center for processing. If the patient does not make funds available at the end of 30 days, the property will be disposed of.
- C. Items identified as contraband will be disposed of as defined in the hospital's Administrative Directives.
 - 1) When items of a criminal nature (controlled substances, alcohol, weapons) are discovered in a package, they will be disposed of as defined in the Penal Code. The remaining items in the package will be disposed of to prevent the possible introduction of contaminated goods.

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- 2) Any package containing items that have been altered or tampered with will result in the disposal of the entire package. The hospital shall inform the patient of the reason the package was disposed of.

JOHN RODRIGUEZ, Deputy Director
Long Term Care Services
Department of Mental Health

Date