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Office of Administrative Law
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Re: **CTU2008-0129-01**

The Department of Mental Health submits the following response to petition from Michael St. Martin.

ISSUE

On January 29, 2008, the Office of Administrative Law (OAL) received a petition from Michael St. Martin alleging that the Department of Mental Health (DMH) has issued, used, enforced, or attempted to enforce underground regulations. The alleged underground regulations are provisions from the *Clinical Evaluator Handbook and Standardized Assessment Protocol* (2007) (*Protocol*).

PROPOSED DETERMINATION

The Protocol as a whole and the specified provisions of the Protocol are not regulations subject to the Administrative Procedure Act (APA).

BACKGROUND

California's Sexually Violent Predators Act (SVP Act), Welfare and Institutions Code section 6600 et seq., defines a Sexually Violent Predator (SVP) as a person "convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code, § 6600, subd. (a)(1).) The SVP Act took effect on January 1, 1996. (Stats. 1995, ch. 763, § 3, p. 5922.) It provides for the involuntary civil commitment of certain offenders, following the completion of their prison terms, who are found to be SVPs.

The process for determining whether a convicted sex offender meets the SVP requirements takes place in several stages, both administrative and judicial. The California Department of Corrections and Rehabilitation screens inmates in its custody who are serving determinate prison sentence or whose parole has been revoked, at least six months before their schedule release dates. (Welf. & Inst. Code § 6601, subds. (a)(1),

(b.) If officials find that the inmate is likely to be a SVP, he is referred to DMH for a “full evaluation” as to whether he “has a diagnosed mental disorder that makes [him] a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent behavior.” (Welf. & Inst. Code, § 6601 subd. (b).)

Upon referral, the DMH evaluates the person in accordance with a standardized assessment protocol developed by DMH to determine whether the person is a SVP. (Welf. & Inst. Code § 6601(c).) (See Petition ¶¶ 1, 2, 3, 6, 8) The standardized assessment protocol describes assessments of diagnosable mental disorders, as well as various factors known to be associated with the risk of re-offense among sex offenders, including criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder. (Welf. & Inst. Code, § 6601 subd. (c).) (See Petition ¶¶ 5,7) In addition, “the evaluators may consider any factor which, in their professional judgment is relevant to the ultimate issue whether the person is a substantial danger to re-offend if free in the community without any conditions, supervision, monitoring, or mandatory treatment in the Director’s custody.” (*People v. Superior Court (Ghilotti)*, 27 Cal.4th, 888, 927 (2002).) (See Petition ¶¶ 4, 5, 7 10).

The person is evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designed by the Director of DMH. (Welf. & Inst. Code § 6601, subd. (d).) If both evaluators conclude that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director forwards a request for a commitment petition to the county where the offender was convicted of the crime for which he is currently imprisoned. (Welf. & Inst. Code § 6601, subd. (d).)

If one such evaluator finds that the person meets the criteria set forth in section 6601(d) of the Welfares and Institutions Code, and the other evaluator disagrees, “the Director . . . shall arrange for further examination of the person by two independent professionals. . . (Welf. & Inst. Code § 6601, subd. (e).) If an examination by independent professionals pursuant to subdivision (e) is conducted, a petition for commitment shall only be filed if both independent professionals concur that the person meets the criteria for commitment specified in subdivision (d). (Welf. & Inst. Code § 6601, subd. (f).)

If the evaluators determine that the person is a SVP, the Director forwards a request for a commitment petition to the county where the offender was convicted. When the Director forwards the petition and the county’s legal counsel agrees with the request, a petition for commitment is filed in the superior court. The Superior Court first holds a hearing to determine whether there is “probable cause” to believe that the person named in the petition is likely to engage in sexually violent predatory criminal behavior upon release. (Welf. & Inst. Code § 6602, subd. (d).) If no probable cause is found, the petition is dismissed. If the court finds probable cause, the court then orders a trial to determine whether the person is a SVP.

Once civilly committed, a SVP undergoes a five-phase treatment program. (*Hydrick v. Hunter* (9th Cr. 2006) 449 F.3d 978, 986.) Phase One comprises group sessions that

educate the SVP about California's SVP Act. Phases Two through Five of the treatment plan involve cognitive treatment. (*Id.* At pp. 986-987). Upon completion of Phase Five, the SVP is conditionally released under the supervision of the DMH. (*Id.* at p. 987; see Welf. & Inst. Code, §§ 6607,6608). (See Petition ¶ 9).

ANALYSIS

THE *PROTOCOL* IS NOT A REGULATION

The *Protocol* is not a regulation. Instead, it is a guide and a uniform format to be used by clinical evaluators, psychologists and psychiatrists, to make case-specific determinations using their education, experience, and expertise to form and report their opinion, in the exercise of their independent professional clinical judgment.

For an agency's action to constitute a regulation, it must have two identifying characteristics established in *Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal.4th 557, 571. 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. (*Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [167 Cal.Rptr. 552].) 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(g).

Under the first characteristic, a rule does not apply generally where it relates to practices for which there is a need for flexible and individual approaches. For example, a policy regarding the use of Medi-Cal auditing procedure used in some, but not all audits fails to constitute a rule of general application. (*Taye v. Coye* (1994) 29 Cal.App.4th 1339, 1345.) Under the second characteristic, the rule must be quasi-legislative by establishing a policy, guideline, or set of rules. (See *Sherwin-Williams Co. v. South Coast Air Quality Management District* (2001) 86 Ca.App.4th 1258, 1284).

The *Protocol* is not a regulation because it does not apply generally and does not "implement, interpret, or make specific" the SVP Act.

THE *PROTOCOL* IS NOT APPLIED GENERALLY

First, the *Protocol* does not declare how a certain class of cases will be decided. While the *Protocol* provide elements for evaluators to follow or look for, evaluators are asked to make a determination based on their own unique knowledge, experience, and personal assessment – in essence, to exercise their own independent professional judgment. Two evaluators could evaluate the same patient, following the same elements set forth in the *Protocol*, and still reach different conclusions. In fact, the SVP Act expressly anticipates that possibility. (Welf. & Inst. Code § 6601 subd. (e).)

While DMH intends for the format of court reports to apply to all SVP reports, the test for generality requires a declaration of "how a certain class of cases must be decided."

(*Tidewater Marine Western, Inc. v. Bradshaw* at p. 571.) Nothing in the Protocol dictates how a certain class of cases must be decided. It simply provides the format for the report and certain factors, which under existing law, must be considered. Evaluators are free to exercise their discretion in reaching a clinical opinion based upon a number of factors, including some that are specifically identified. The enumeration of factors however, is neither an exhaustive list, nor does it obviate the need for clinical expertise and judgment in reaching an opinion about whether someone meets the criteria for a SVP.

For example, in *Taye v. Coxe* (1995) 29 Cal.App.4th 1339, 1345, the court held that a policy regarding a Medi-cal auditing procedure used in some, but not all, audited failed to constitute a rule of general application. In *Taye*, the court found that the auditing method was not a standard of general application because: (1) the audit procedures were designed to fit the particular conditions that were encountered upon arrival at the audit site; and (2) the principles were not intended to be steadfast rules from which deviation is prohibited. (*Id.* at p. 1345.)

Like *Taye*, in *Modesto City Schools v. Education Audits App. Panel* (2004) 123 Cal.App.4th 1365, the court found that the state audit guide did not constitute an underground regulation. (*Id.* at pp. 1381-1382). The audit guide was not applied generally (the first requirement of the *Tidewater Marine Western, Inc. v. Bradshaw* regulation characteristic test) because it left to the auditor's discretion which procedures to utilize in conducting an audit. Education Code section 14503 states the audit guide serve as a suggested resource, for performing compliance audits. The auditor possesses the discretion to follow alternative procedures. The court was persuaded that section 14503 clearly established that the audit guide was an optional source, not the only acceptable method for performing audits. Thus, the audit guide was not a rule of general application, but a tool that an auditor may or may not utilize in performing an audit. (*Id.* at p. 1382.)

Similarly here, the *Protocol* does not declare how a certain class of cases will be decided. While the *Protocol* does provide elements for evaluators to follow or look for, evaluators are asked to make a determination based on their own unique knowledge, experience, and personal assessment- their independent professional judgment. Two evaluators could evaluate the same patient, following the elements set forth in the *Protocol*, and still reach different conclusions. Welfare and Institutions Code section 6601, subdivision (e), expressly anticipates that possibility. Section 6601 states that if one of the professionals performing the evaluation pursuant to subdivisions (d) does not concur that the person meets the criteria, the Director of Mental Health must arrange for further examination of the person by two independent professionals selected in accordance with subdivision (g). (Welf. & Inst. Code § 6601 subd. (e).)

In fact, doctors who used the *Protocol* often come to different conclusions. For example, in *In re Wright* (2005) 128 Cal.App.4th 663, two doctors evaluated Wright under the standardized assessment protocol to determine whether, as the result of a diagnosed mental disorder, Wright was likely to commit new acts of criminal sexual violence unless confined and treated. (*Id.* at pp. 667-668). Two doctors evaluated Wright and disagreed

about whether he met the SVP criteria. Because the initial evaluators disagreed, the Director was required to arrange for further evaluation of the person by two independent professionals selected in accordance with subdivision (g). (*Ibid*).

The evaluations performed with the Protocol and resulting reports are clinical evaluations, necessarily requiring the exercise of specialized, professional clinical judgment. Only psychologists and psychiatrists with specified evaluation, training, and experience are allowed by the statute to conduct the SVP evaluations. (Welf. & Inst. Code § 6601, subds. (d), (g).) In addition to meeting the minimum qualifications of the SVP statute, SVP evaluators are informed that they must remain current, be familiar with, and knowledgeable about existing and currently published studies, articles, and papers pertinent to evaluation of sex offenders, consistent with the standards of their profession.

Since the available studies and literature are constantly being augmented, the clinical standards of the professions of psychology and psychiatry evolve over time, the DMH does not have authority to dictate or control the standards or the clinical professions of psychology or psychiatry.

Given that the evaluations are clinical evaluations, requiring exercise of professional clinical judgment by licensed and qualified psychologists and psychiatrists, it is neither necessary nor appropriate for the DMH to attempt to promulgate the Protocol as a regulation in relation to the SVP evaluations.

***The Clinical Evaluator Handbook
and Standardized Assessment Protocol***

The *Protocol* does not prescribe a certain outcome of the clinical evaluations performed by the doctors under the SVP Act. Welfare & Institutions Code section 6601(c) provides that the DMH evaluate the person with a standardized assessment protocol, developed and updated by the DMH. (See Petition ¶¶ 3, 4, 5, 6, 7, 8, 9) The standardized assessment protocol requires assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of re-offense among sex offenders. Section 6601, subdivision (c), states the protocol “shall include” enumerated risk factors, but does not limit the factors considered by the evaluators. (See Petition ¶¶ 3, 4, 5, 8, 10)

To the contrary, the *Protocol* is only a guide or aspect of the process used to evaluate the prospective SVP. The evaluators may consider any factor that, in their professional judgment, is relevant to the ultimate issue of whether the person is a substantial danger to re-offend if free in the community without any conditions, supervision, monitoring or mandatory treatment in the Director’s custody. (*People v. Superior Court* (Ghilotti)(2002) 27 Cal.4th 888, 927.)

In addition to consideration of any factor deemed relevant by the evaluator, when an updated or replacement evaluation is required, the evaluator must also review available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by

court order. (Welf. & Inst. Code §6603, subd. (c)(1).) Thus each evaluation will necessarily be individualized.

The *Protocol* does not declare how a certain class of cases will be decided. The *Protocol* lists the findings to be made, but does not tell the evaluator what conclusion to reach. It merely provides the evaluators with an overview of the SVP Act and the evaluation process. (Protocol, pp. 16-28; also see ¶¶ 6, 7, 8) For example, it tells evaluators how to gain access to prisons, state hospitals, and summarizes relevant portions of the SVP Act. The Protocol states that the evaluator must keep a neutral position.

In addition, the *Protocol* leaves the professional evaluation process in the hands of the evaluator. For example, it does not limit the factors the evaluator may consider in reaching an evaluation outcome. The Protocol does not form the sole basis of the evaluation; additional instructions may be provided to the evaluators. (Protocol, p. 2). Also, the determination of how to approach and structure of the interview is made by the evaluator. (See Protocol, p. 10; also see Petition ¶¶ 4, 10). The *Protocol* “does not address everything an evaluator needs to consider” in conducting the interview.” (Protocol, p. 10) And each evaluator has the discretion to determine which, if any, psychological tests to administer. (Protocol, p. 15, 19).

Finally, the *Protocol* expressly states that the evaluator, not the *Protocol*, will determine the evaluation’s outcome. “It is the nature of clinical evaluation that qualified professional will sometimes draw different conclusions from the same data or emphasize some data over another data in formulating their opinions. Each evaluator should produce a report that represents his or her best judgment.” (Protocol, p. 10; also see Petition ¶ 4, 10).

THE PROTOCOL IS NOT QUASI-LEGISLATIVE

As for the second requirement, the challenged action must be quasi-legislative. The agency must take action to implement, interpret, or make specific the law enforced by the agency. (*Tidewater Marine Western, Inc. v. Bradshaw* 14 Cal.4th 557, 571.)

Nothing in the Protocol “implement[s], interpret[s], or make[s] specific the law enforced by the agency.” Rather, it sets forth a format for the professionals to use for court reports. While the Protocol includes and identifies existing statutory and case law requirements for determining when a person meets the criteria for a SVP finding, it does not tell the evaluator what determination to make. That determination is based upon the evaluator’s independent professional clinical judgment, not any “regulation” contained in the handbook. While the format for court report is intended to apply generally to all SVP reports, the format of the report in no way dictates the opinion of the evaluator. (See *Sherwin-Williams Co. v. South Coast Air Quality Management District* (2001) 86 Cal.App.4th 1258, 1284.)

Another decision that illustrates the pertinent analysis in determining whether the Handbook implements, interprets or makes specific the law is *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317. In *Faulkner*, the Department of Public Works (DPW) was statutorily charged with determining when it was in the best interests of the public highways that a new toll bridge be constructed and operated. The DPW's recommendation was then submitted to the California Toll Bridge Authority. (Authority.) Pursuant to statute, if the majority of the members of the Authority concur in the recommendation, the Authority adopts a resolution requiring the construction and authorizing the issuance of revenue bonds. The plaintiff/appellants challenged the Authority's resolution, which approved construction of a specific bridge, claiming that the resolution was a regulation within the meaning of the Administrative Procedure Act. The court held that the resolution was not calculated or effective to implement, interpret, or make specific the law enforced or administered by the Authority, but rather was adopted in the course of compliance with the statutory mandate that the Authority act, one way or the other, upon the recommendation of the DPW that the bridge be constructed. (*Id.* at p. 324.) In other words, the resolution merely constituted a step in the performance of a statutory duty. (*Ibid.*)

Here, similar to *Faulkner* and *Modesto City*, the DMH's development of the Protocol as part of the assessment process constitutes a step in the performance of a statutory duty. The SVP Act requires that the DMH evaluate persons in custody with a standardized assessment protocol, developed and updated by the DMH, in order to determine whether the person is a SVP. (Welf. & Inst., §6601(c).) Because the Handbook neither interprets the SVP Act nor attempts to make it specific, but, instead, simply enumerates the factors to be considered by evaluators when conducting a SVP evaluation, the Handbook is not an underground regulation.

In the end, it must be remembered that, significantly, even with two evaluations finding that the person is a Sexually Violent Predator, this is not the final word and does not automatically produce a legal finding or commitment. The person cannot be found to be a SVP until a trial is held and the judge or a unanimous jury finds the person to be an SVP beyond a reasonable doubt. In fact, many trials have resulted in the person not found to be an SVP and therefore released.

EXEMPTIONS

If OAL determines that the selected provisions of the Protocol are regulations, these provisions are exempt from the APA because they merely constitute management directions exempt from the APA. Govt. Code § 11340.9.

Additionally, Paragraph 1 of the Petition, "Evaluator Panel" is a restatement of Welf. & Inst. Code § 6601, subd. (c). It provides, "The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol."

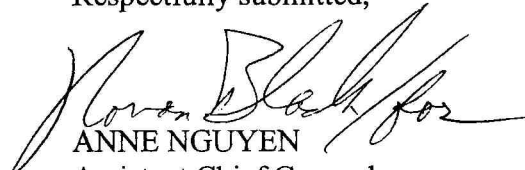
Also, Paragraph 4 of the Petition, "*The Clinical Interview*," is a restatement of Welf. & Inst. Code § 6601.5. It provides, where a judge must review the petition for "sufficient

facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release,” the evaluations must provide the court with those specific facts, not just a summary of professional conclusions.

ALTERNATIVE

In the alternative, DMH respectfully requests OAL allow DMH to continue use of Protocol until valid regulations could be promulgated in order to avoid significant disruptions of the SVP evaluation process.¹ *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 341. As discussed above, the evaluations performed following the Protocol is just one of the steps in the SVP process that includes a trial. (Welf. & Inst. Code § 6603, subds (a),(b).) As noted earlier, the jury finding must be unanimous and by beyond a reasonable doubt, and so is by no means automatic.

Respectfully submitted,


ANNE NGUYEN
Assistant Chief Counsel
Department of Mental Health

¹ In *Morning Star*, respondents argued that a remedy for failing to adopt material as a regulation would be for the court to give the Board time for that process to occur. *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 341. There, the court directed the Board to conduct further administrative proceedings on Morning Star’s request, without reliance upon an invalid regulation. However, to avoid significant disruption of the hazardous waste fee scheme, the court also directed that the proceedings be stayed and the fee system continued in effect until valid regulations could be promulgated. (*Id.* At p. 341.)

PROOF OF SERVICE

Re: Petition Alleging Underground Regulations - Clinical Evaluator Handbook and Standard Assessment Protocol (2007)
Case No: CTU2008-0129-01

I am a citizen of the United States and a resident of the county of Sacramento. I am over the age of eighteen years and not a party to the above referenced action; my business address is Department of Mental Health, Office of Legal Services, 1600 9th Street, Rm. 153, Sacramento, CA 95814. On the below mentioned date I served the foregoing document(s) described as:

Response to Petition Alleging Underground Regulations

on the parties below addressed as follows:

Michael St. Martin
CO-000414-3, RRU-7
P.O. Box 5003
Coalinga, CA 93210

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The parties where served as follows:


XX U.S. Postal Service by placing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail after the close of the days business (St. Martin)

____ Personal Service

____ Facsimile ____ Hard Copy to Follow

XX Overnight mail (OAL)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document is signed at Sacramento, California on: May 30, 2008.



Daniel R. Lapham
Legal Secretary