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To: 'staff@oal.ca.gov'
Subject: Comments reference to CTU2008-0129-01

Please accept this e-mail as a public comment relating to the above case. This is in regards to the SVP protocol adopted and implemented by the Department of Mental Health. Mr. St. Martin has done an excellent job in outlining the pertinent law (both statutory and case) in regards to the APA and the requirements for promulgation of regulations.

I am a Deputy Public Defender and as such, have defended SVP cases for several years. Since its inception in 1996, Welfare & Institutions Code § 6601(c) (one of the provisions of the SVP law) has mandated that the Department of Mental Health shall evaluate persons referred by the CDC "in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health" to determine whether that person meets the criteria of the statute.

The first 'protocol' (entitled Evaluator Handbook) was published in 1996. It was revised in 1997 and then again in 1998, each time carrying the title 'Evaluator Handbook'. Each of those versions instructed evaluators what they were to consider and how to approach each evaluation. The Handbook (protocol) was again revised in 2000. However, this time the title was changed to: 'Clinical Evaluator Handbook and Standardized Assessment Protocol'. Further, page two of the 2000 Protocol added the following paragraph:

STANDARDIZED ASSESSMENT PROTOCOL

WIC Section 6601(c) requires that a person referred from CDC be evaluated in accordance with a standardized assessment protocol, developed and updated by the DMH. This clinical evaluator handbook is the centerpiece of that protocol. This handbook may be supplemented by additional instructions to clinical evaluators as necessary.

This handbook and all supplemental instructions to DMH staff and contractors in the implementation of the SVP law

is the required standardized assessment protocol.

The 2002, 2004 and the most recent, 2007 revisions all contain the same language. Additionally, page two of each of the revisions contains the language: "Evaluators are required to interview and evaluate persons in accordance with the protocol contained within this handbook."

I have taken testimony from many state evaluators in deposition, probable cause and trial. All testify, under oath, that they are required to follow the protocol when performing evaluations and writing reports. They acknowledge they are mandated by the protocol and DMH on how to approach each of the criteria in the statute in every evaluation they perform.

The protocol/handbook is a regulation. As the Supreme Court explained in *Tidewater Marine W v. Bradshaw* (1996) 14 Cal.4th 557, a regulation subject to the APA thus has two principal identifying characteristics. (See *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal. App. 3d 490, 497 [272 Cal. Rptr. 886] [describing two-part test of the Office of Administrative Law].) 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, subd. (g)*.) Both these criteria apply to the DMH protocol.

And it is undisputed that the protocol has never been subjected to the appropriate rules and provisions of the APA.

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A copy of this e-mail is faxed to DMH in Sacramento and sent to Mr. St. Martin at Coalinga State Hospital.