

EMERGENCY

See instructions on reverse

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER	EMERGENCY NUMBER 2016-0906-03E
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For use by Office of Administrative Law (OAL) only

2016 SEP -6 A 11: 57
OFFICE OF ADMINISTRATIVE LAW

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Department of State Hospitals

AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

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 Disapproved/Withdrawn		NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Incompetent to Stand Trial Admissions Process	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT 4700, 4710, 4711, 4712, 4713, 4714, 4715, 4716, 4717
TITLE(S) 9	AMEND
	REPEAL

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 Resubmittal of disapproved or withdrawn nonemergency filing (Gov.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 Resubmittal of disapproved or withdrawn emergency filing (Gov.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

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

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____

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

7. CONTACT PERSON Dennalee Folks	TELEPHONE NUMBER 916-651-8544	FAX NUMBER (Optional) 916-651-3090	E-MAIL ADDRESS (Optional) dennalee.folks@dsh.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 8-12-16
TYPED NAME AND TITLE OF SIGNATORY Pam Ahlin, Director	

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INCOMPETENT TO STAND TRIAL ADMISSIONS PROCESS

TITLE 9. REHABILITATIVE AND DEVELOPMENTAL SERVICES DIVISION 1. DEPARTMENT OF MENTAL HEALTH CHAPTER 16. STATE HOSPITAL OPERATIONS ARTICLE 7. ADMISSIONS

Add Sections 4700

4700. Definitions

- (a) "Low/Moderate security risk" means any individual who has no escape/escape attempt(s) history from a locked facility, state hospital, locked psychiatric, or correctional facility.
- (b) "High security risk" means an individual with a history of escape/escape attempt(s) from a locked facility or a successful escape from a state hospital, locked psychiatric, or correctional facility.
- (c) "Psychiatric Acuity" means an individual's condition that is evidenced by the fact that an individual's mental illness is leading to complications which put the individual at risk of death or serious injury while awaiting admission. For purposes of assessing psychiatric acuity, the individual would need to exhibit more than aggressive behavior alone.

Note: Authority Cited: Welfare and Institutions Code sections 4005.1 and 4027.
Reference: Penal Code section 1370, Welfare and Institutions Code sections 7228 and 7230.

4710. Admission of Individuals Found Incompetent to Stand Trial

(a) When scheduling admission of individuals committed pursuant to Penal Code section 1370 by the courts to the Department of State Hospitals, the Department will admit such individuals in relation to the individuals' respective commitment date, such that the order of admission will be determined by the earlier of the individuals' respective commitment dates. This order of admission by commitment date may be changed by the Department under any of the following circumstances:

- (1) Bed availability at the facility under consideration for the individual's placement;
- (2) Whether the psychiatric acuity of the individual indicates the need for a priority admission to a facility;

- (3) Whether the medical needs of the individual can presently be clinically accommodated by the facility under consideration for the individual's placement;
- (4) The transportation ability or timing of the committing county to the facility under consideration for the individual's placement; or the committing county's inability to transport the committed individual for any other reason.

(b) For individuals committed and/or admitted pursuant to Penal Code section 1370 by the courts to the Department of State Hospitals who are placed in a jail-based competency program, if that jail-based competency program determines that it cannot appropriately serve the individual, the individual shall be admitted to a state hospital in the order of admission that reflects the individual's original commitment date to the Department of State Hospitals.

Note: Authority Cited: Welfare and Institutions Code sections 4005.1 and 4027.
Reference: Penal Code section 1370, subdivisions (a)(2)(A) and (a)(3)(G);
Welfare and Institutions Code sections 7228 and 7230.

4711. Admissions Documentation for Individuals Found Incompetent to Stand Trial

(a) A county committing an individual to the Department of State Hospitals under Penal Code section 1370 shall submit a commitment packet to the Department for review and approval prior to the admission of the individual.

(b) The commitment packet shall include:

- (1) The commitment order, including a specification of the charges.
- (2) A computation or statement setting forth the maximum term of commitment.
- (3) A computation or statement setting forth the amount of credit for time served, if any, to be deducted from the maximum term of commitment.
- (4) The state summary criminal history information.
- (5) Any arrest report(s) from police departments or other law enforcement agencies.
- (6) Any court-ordered psychiatric examination or evaluation reports.

- (7) The placement recommendation report prepared by the Community Program Director of the Forensic Conditional Release Program.
- (8) Records of any finding of mental incompetence pursuant to this chapter arising out of a complaint charging a felony offense specified in Penal Code section 290 or any pending Penal Code section 1368 proceeding arising out of a charge of a Penal Code section 290 offense.
- (9) Any medical records as described in Title 9 of the California Code of Regulations, Section 4712.

Note: Authority Cited: Welfare and Institutions Code sections 4005.1 and 4027. Reference: Penal Code sections 1370, 1370.01; Welfare and Institutions Code section 7228; Code of Federal Regulations, title 45, section 164.508, and *In re Loveton* (2016) 244 Cal.App.4th 1025.

4712. Medical Records Documentation

- (a) The following medical documentation of the individual shall be supplied in the individual's commitment packet, if available;
 - (1) Any progress notes by a nurse, psychiatrist, medical doctor, or that pertain to behavioral incidents, within the last 10 days;
 - (2) Current medications and dosages;
 - (3) Medication compliance documentation;
 - (4) Lab results/work and consultations;
 - (5) Recent admission psychiatric evaluation;
 - (6) Safety cell usage or suicide watch records or incidences of self-injurious behavior;
 - (7) Any recent physical exams or medical history notes;
 - (8) Any Advance Health Care Directive;
 - (9) Any consent forms for treatment; and
 - (10) Any other court-ordered medical treatment.

- (b) Other medical documentation, including treatment plans, will be required for the following conditions, if available:
- (1) Renal dialysis (hemodialysis or peritoneal dialysis);
 - (2) Non-ambulation, or where the individual needs prosthetics, walkers, or assistance to ambulate;
 - (3) Pregnancy, near term (last two months), or any prenatal care information or complications;
 - (4) Continuous Oxygen, continuous respiratory monitoring such as pulse oximetry, ventilator devices such as CPAP for sleep apnea, or nebulizer for airway treatment;
 - (5) Cancer;
 - (6) Congestive heart failure;
 - (7) Blood or spinal fluid shunt in place, such as Prot-o-cath, or shunt for hydrocephalus;
 - (8) Any required injections;
 - (9) Any open wound not yet healed or untreated;
 - (10) Ostomy;
 - (11) Cirrhosis of the liver;
 - (12) Active inflammatory bowel diseases, complications by intestinal obstruction, subocclusion, severe fistulas, or active rectal bleeding;
 - (13) Inability to provide basic self-care or any other condition requiring skilled nursing level of care;
 - (14) HIV/AIDS;
 - (15) Tuberculosis; and
 - (16) Any other significant medical condition.

Note: Authority Cited: Welfare and Institutions Code sections 4005.1 and 4027.

Reference: Penal Code section 1370, subdivision (a)(3)(I); Welfare and Institutions Code section 7228; Code of Federal Regulations, title 45, section 164.508, and *In re Loveton* (2016) 244 Cal.App.4th 1025.

4713. Medical Records Review

- (a) The Department of State Hospitals shall use the medical records provided in the commitment packet to determine the medical needs of an individual.
- (b) A Department Admissions Unit's Triage Nurse shall review all documents related to an individual's medical condition(s).
- (c) The Department's Admissions Unit's Triage Nurse shall consult with the Department's Admissions Unit's Physician or the Chief Physician and Surgeon to address whether the particular facility, proposed for the individual's placement, is able to provide the necessary care or services needed by the patient's medical condition(s).

Note: Authority Cited: Welfare and Institutions Code sections 4005.1 and 4027.
Reference: Penal Code section 1370, subdivision (a)(3)(I); Welfare and Institutions Code sections 7228 and 7230.

4714. Security Risk Assessment for Placement of Individuals Found Incompetent to Stand Trial

- (a) The Department of State Hospitals shall conduct a Security Risk Assessment of each individual committed to the Department pursuant to Penal Code section 1370 prior to admission.
- (b) The Security Risk Assessment shall include:
 - (1) The individual's prior history of escape or attempted escapes at any locked facility;
 - (2) Whether, within 30 days prior to the completion of the Department's assessment, the Department receives new information about the individual, such as a change in commitment status, divorce by spouse, death of a family member, or birth of a child;
 - (3) The individual's age;
 - (4) Whether the individual has a DSM 5 diagnosis of antisocial, borderline, and/or narcissistic personality disorder;
 - (5) The number of the individual's prior felony convictions;

- (6) The individual's current length of sentence at the time of assessment; and
- (7) The individual's current medical condition.

Note: Authority Cited: Welfare and Institutions Code sections 4005.1 and 4027.
Reference: Welfare and Institutions Code sections 7228 and 7230.

4715. Placement of Individuals Found Incompetent to Stand Trial

The Department of State Hospitals may not admit an individual under Penal Code section 1370 until the commitment packet specified in Section 4711 is received, reviewed, and approved by the Department in order to determine the proper placement within the Department. The Department may admit a committed individual whose commitment packet is incomplete when the Department determines, pursuant to Section 4716, that the individual's psychiatric acuity indicates the need for an immediate admission to a state facility.

Note: Authority Cited: Welfare and Institutions Code sections 4005.1 and 4027.
Reference: Penal Code section, 1370, subdivisions (a)(3)(A-H) and (a)(2)(B)(i-iii);
Welfare and Institutions Code Section 7228.

4716. Psychiatric Acuity Review

- (a) If an individual committed to the Department pursuant to Penal Code section 1370 is psychiatrically acute, the individual may be prioritized in the order of commitment in the admission process.
- (b) The committing county's clinician responsible for the individual's clinical assessment shall contact the Department of State Hospitals' Medical Director, or designee, about an individual's psychiatric acuity and the psychiatric acuity needs of the individual.
- (c) The committing county shall provide the Medical Director, or designee, the medical information and documentation that supports the psychiatric acuity. Such documentation may include, but is not limited to:
 - (1) Safety cell notes;
 - (2) Current medications or lack of medication;
 - (3) Medical lab work; or
 - (4) Any additional treatment records from local health care providers.

(d) The Medical Director of the Department of State Hospitals, or designee, is the final authority for determining psychiatric acuity of an individual for purposes of expediting admission to a state facility.

(e) The Medical Director of the Department of State Hospitals, or designee, will make a decision on whether to expedite admission of an individual due to his or her psychiatric acuity within 72 hours of contact by the committing county's clinician and when the Department receives sufficient documentation.

Note: Authority Cited: Welfare and Institutions Code sections 4005.1, 4027, and 7225. Reference: Penal Code sections 1370, and 1370.01; Welfare and Institutions Code sections 7228 and 7230.

4717. State Hospital Placements of Individuals Found Incompetent to Stand Trial for Security Risks

(a) The Department of State Hospitals shall consider an individual, committed to the Department pursuant to Penal Code section 1370, and who the Department determines is a low or moderate security risk, only for admission to Department of State Hospitals – Napa, or to Department of State Hospitals – Metropolitan.

(b) The Department of State Hospitals shall consider an individual committed pursuant to Penal Code section 1370, and who the Department determines is a high security risk, only for admission to Department of State Hospitals – Atascadero, or to Department of State Hospitals - Patton.

Note: Authority Cited: Welfare and Institutions Code sections 4005.1, 4027, and 7225. Reference: Welfare and Institutions Code sections 7228 and 7230.

FINDING OF EMERGENCY

A. Department of State Hospital's (DSH) Finding of Emergency Regulatory Action Is Necessary

These regulations are being implemented on an emergency basis for the immediate preservation of the public peace, health and safety, or general welfare, within the meaning of Government Code section 11346.1.

B. Description of Specific Facts Which Constitute the Emergency

The Necessity for the Proposed Regulations

In a recent published decision, the Court of Appeal for the First Appellate District upheld the Contra Costa County Superior Court's standing order to admit patients to DSH within 60 days of commitment. (*In re Loveton*, (2016) 244 Cal.App.4th 1025.) This decision became final on April 12, 2016.

This decision, however, has pushed many other counties to pursue standing orders for their counties as well, because this decision has given some courts the impression that in order to ensure that their patients are admitted to a DSH hospital as soon as possible and ahead of IST referrals from other counties, a standing order will help expedite the admission. In *In re Loveton*, the Court also discussed the need for the superior courts to provide complete commitment referral packets to DSH. In the past, DSH has received numerous incomplete commitment packets from various counties, and in recent months, these incomplete packets have contributed to some delays in admitting patients for treatment to DSH. DSH proposes these emergency regulations in an effort to create a uniform admissions criteria and process for all patients committed to DSH statewide, to implement and conform statewide IST referral and admission processes to the *Loveton* decision. The proposed emergency regulations would also help ensure that all the necessary documents are provided to an individual DSH hospital for a smooth admission and continuity of care.

Benefits of the Proposed Emergency Regulations

By implementing the *In re Loveton* appellate decision, the proposed emergency regulations will provide a uniform admissions criteria and help all the counties understand the admission process and allow uniformity within the various counties. The proposed emergency regulations will help DSH better serve those IST defendants committed to DSH and provide clarification as to what documents are needed and what will be reviewed.

Effect of the Proposed Emergency Regulations

- (1) These proposed regulations are consistent with existing regulations and will implement and comply with *In re Loveton*.
- (2) There are no federal regulations previously adopted or amended that prohibit the proposed regulations.
- (3) These regulations will provide uniform rules to all counties and will provide clarification in the admission process for all counties and individuals being admitted to DSH pursuant to Penal Code section 1370.

The Finding of Emergency

DSH finds that the proposed regulatory amendment is necessary to address an emergency. An emergency is “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” (Gov. Code, § 11342.545.) DSH currently is attempting to admit patients simultaneously and in a timely manner from all 58 counties, while IST referrals from many of these counties have been increasing substantially week after week. DSH would like to implement these emergency regulations as soon as possible to immediately conform to the process set forth in the recently issued *In re Loveton* decision. *In re Loveton* was decided and published on February 11, 2016, and became final on April 12, 2016. While DSH is also working on system-wide bed expansion, DSH has been sued by the ACLU in Alameda Superior Court as well as being sued in a potential class action lawsuit in federal court from Ventura County patients, where both lawsuits challenge the timelines standards and processes related to IST referrals. Further, when a patient has not been admitted to DSH after a period of time, some courts have released the patient into the community.

Accordingly, these emergency regulations will implement the recent *In re Loveton* decision, and in doing so, provide necessary clarification of the process, timelines, and the order in which patients shall be admitted to DSH by all of the superior courts. The emergency regulations will also help ensure that the counties are aware of all of the necessary requirements and better ensure a smooth transition of patient care. The proposed regulations would provide all the committing courts a clear understanding of how and when the patients will be admitted to DSH. The proposed regulations will also assist in ensuring a better delivery of treatment.

C. Authority and Reference Citations

Authority: Welfare and Institutions Code sections 4005.1, 4027, 4101, and 7225.

References: Penal Code sections 1370, 1370.01; Welfare and Institutions Code sections 7228, 7230; Code of Federal Regulations, title 45, section 164.508, and *In re Loveton*, (2016) 244 Cal.App.4th 1025.

D. Informative Digest and Policy Statement Overview

Policy Statement

The objective of the proposed action is to implement, interpret, or make specific state policy regarding Penal Code section 1370, as set forth in the *In re Loveton* decision. The regulation would clarify what specific documents need to be provided to DSH for admission to a DSH hospital, as well as providing direction on how and when a patient will be admitted. The regulation will provide for a uniform admissions procedure statewide, where counties and IST individuals will be treated uniformly and equally.

Existing Law

Currently, the patients are committed to DSH by the courts and are involuntarily held at the respective county facility. These patients are committed to DSH due to a mental illness. DSH is responsible for providing the care and treatment, and the safety and security of these patients. Penal Code, section 1370, subdivision (a)(3), currently provides as to what documents are needed for a commitment packet in order to be admitted to a DSH hospital. However, the law does not provide or account for how to prioritize admissions of patients from the various committing counties simultaneously.

E. Summary of Proposed New Regulations

Add Section 4700

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4700 to provide definitions of terminology that is used by current statutes and by the proposed regulations.

Add Section 4710

This regulatory action would add Title 9, Division 1, Chapter, 16, Article 7, Section 4710 to provide the factors that DSH will use to determine when a patient will be admitted to a DSH facility.

Add Section 4711

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4711 to clarify the specific documents that are required for the admission of a patient to DSH.

Add Section 4712

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4712 to provide further direction as to what kind of medical documentation and information is required.

Add Section 4713

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4713 to provide direction of how the medical documentation and information will be reviewed and by whom.

Add Section 4714

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4714 to provide what is evaluated in determining the security risk to determine placement at a hospital within the DSH system.

Add Section 4715

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4715 to clarify that a patient cannot be admitted to a hospital within DSH, until a commitment packet as described in section 4712 is received, reviewed, and approved by DSH.

Add Section 4716

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4716 to provide an exception of when a patient may be more rapidly admitted to DSH and the documentation needed to provide the necessary information to determine psychiatric acuity.

Add Section 4717

This regulatory action would add Title 9, Division 1, Chapter 16, Article 7, Section 4717 to provide the different security risk levels at the various DSH hospitals.

F. Technical, Theoretical, and Empirical Study or Report

None

G. Determinations

Substantial Difference from Existing Comparable Federal Regulations or Statute: None.

Mandates on Local Agencies or School Districts: County courts are State funded, and the courts are statutorily required to provide the commitment packet pursuant to Penal Code section 1370.

Mandate Requires State Reimbursement Pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None.

Costs to Any Local Agency or School District that Requires Reimbursement Pursuant to Part 7, commencing with Section 17500, of Division 4 of the Government Code: DSH anticipates that there will be no fiscal impact in the current State Fiscal Year to Local Agencies.

Non-discretionary Costs or Savings Imposed on Local Agencies: While there might be additional county personnel resources involved in implementing a part of these regulations, DSH anticipates there will be no fiscal impact in the current State Fiscal Year to Local Agencies.

Costs or Savings to Any State Agency: DSH anticipates that there may be some increased state legal costs, as DSH may be ordered to appear in court more frequently, until all of the courts become comfortable with the new proposed regulation and the new timeline these emergency regulations will create in admissions for all the Penal Code section 1370 patients throughout the state.

Costs or Savings in Federal Funding to the State: None.

Costs or Savings to Individuals or Businesses: DSH is not aware of any cost impacts that an individual or business would necessarily incur in reasonable compliance with the proposed action.

MATERIAL INCORPORATED BY REFERENCE

None.