



**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.**

*Administrative Directive Number 446 (AD-446)* 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. Its existence and use are not in controversy

Each hospital has some version of *AD-446* that is applied statewide to all persons detained in Department of Mental Health facilities.

The DMH has taken the firm position that none of its Manuals, Instructions, Administrative Directives, or Special Orders are regulations subject to the provisions of the APA.

Petitioner alleges that *Administrative Directive Number 446 (AD-446)* is a regulation within the meaning of the APA.

"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.... (Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal. 4<sup>th</sup> at 571, 59 Cal.Rptr.2d 186.)" (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4<sup>th</sup> 324, 333, 42 Cal.Rptr.3d 47, 55)

**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.**

#### ***ADMINISTRATIVE DIRECTIVE NUMBER 446 (AD-446)* IS A REGULATION WITHIN THE MEANING OF THE APA**

Prior to implementation, or revision thereof, the Department was required to adopt *Administrative Directive Number 446 (AD-446)*, 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 *Administrative Directive Number 446 (AD-446)*, 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 *Administrative Directive Number 446 (AD-446)*.

*Administrative Directive Number 446 (AD-446)* 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. 4<sup>th</sup> 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. 4<sup>th</sup> 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. 4<sup>th</sup> at 571, 59 Cal.Rptr.2d 186.)"

*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4<sup>th</sup> 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.

***Administrative Directive Number 446 (AD-446)*** is a regulation. It is applied to all persons proposed or adjudicated to be SVPs in California who are detained at Coalinga State Hospital. It defines the organization, functions and responsibilities of each and every Wellness and Recovery Team (WRT) at CSH, and based on these definitions, determines the treatment to be provided for each and every person detained at CSH. Wellness and Recovery Team use is mandatory. Patient participation in this process is mandatory. Thus the mandate of ***AD-446*** implements, enforces or otherwise makes specific the language of the Welfare and Institutions Code, §§ 6600, et seq., in respect to those persons detained pursuant to the Sexually Violent Predator Act, and pursuant to other provisions of the Welfare and Institutions Code and Penal Codes for persons detained pursuant to those other provisions.

**NO EXCEPTION EXCLUDES *Administrative Directive Number 446 (AD-446)*  
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 ***Administrative Directive*** in question here fits the above description perfectly. Although it is referred to as a document "to define the organization, functions and responsibilities of the Wellness and Recovery Team (WRT)," it is called an "Administrative Directive."

**AD-446** is mandatory. The definitions set forth therein are concrete in nature, and are set forth with words such as "is" and "are," leaving no room for discretion, and leaving no doubt that this is the way it is. For all intents and purposes the language is mandatory, thus making it much more than a simple definition of "the organization, functions and responsibilities of the Wellness and Recovery Team (WRT)." It is a forbidden underground regulation which has not been adopted pursuant to the Administrative Procedures Act.

The justification for issuing **AD-446** is stated in that document as, "California Welfare and Institutions Code, Section 4312; California Administrative Code, California Code of Regulations, Title 22, Division 5; Joint Commission on Accreditation of Healthcare Organizations (JCAHO); and the Wellness and Recovery Manual (WRM), V.2, March 2007."

Welfare and Institutions Code Section 4312 simply grants the Hospital Administrator the authority to establish rules and regulations. However it does not contain any exemption to the Administrative Procedures Act.

The citation of California Administrative Code, California Code of Regulations, Title 22, Division 5, without a specific section number is too broad for Petitioner to locate and make a response. An electronic search for "Joint Commission on Accreditation of Healthcare Organizations," and for "JCAHO" performed on the PDF version of Title 22 returned no results.

Petitioner alleges neither the DMH, nor CSH, can justify the use of one **Administrative Directive** which has not been legally promulgated pursuant to the Administrative Procedures Act by citing as its authority some other Rule, Regulation, Manual, Instructions, Administrative Directive, or Special Order, which itself is also an underground regulation which has not been legally promulgated pursuant to the Administrative Procedures Act.

It should be noted that the **Wellness and Recovery Manual (WRM)** is presently the subject of a separate Petition to the OAL which alleges the **Wellness and Recovery Manual (WRM)** is an underground regulation that has not been promulgated pursuant to the Administrative Procedures Act.

Petitioner alleges that the use of some form of **AD-446** is mandated in each hospital within the DMH system. Having each DMH facility issue its own mandated version of an **Administrative Directive** is just the sort of "avoiding obedience to the APA" that is discussed in *Armistead v. State Personnel Bd.*

**ADMINISTRATIVE DIRECTIVE NUMBER 446 (AD-446) APPLIES GENERALLY TO ALL PERSONS DETAINED PURSUANT TO THE SVPA (WIC §§ 6600 et seq.)**

*Modesto City Schools v. Education Audits Appeal Panel*, (3d Dist. 2004) 123 Cal.App. 4<sup>th</sup> 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.

*Kings Rehabilitation Center, Inc. V. Premo*, (3<sup>rd</sup> Dist. 1999) 69 Cal.App. 4<sup>th</sup> 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.)

***Administrative Directive Number 446 (AD-446)*** is neither intended nor utilized to make specific determinations but is utilized generally when defining the organization, functions and responsibilities of the Wellness and Recovery Team (WRT) with respect to all persons detained under the SVPA. Thus, ***AD-446*** is a regulation that must be promulgated as a regulation but otherwise is a null and void underground regulation.

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

***Administrative Directive Number 446 (AD-446)*** is at odds with the due process rights, conveyed by the California and United States Constitutions, to all persons detained by the DMH because it mandates actions that affect their liberty but has never been legally promulgated.

The state authorized enforcement by state employees of the numerous statutory and constitutional violations contained in each and every un-promulgated, underground," Manual, Instructions, Administrative Directive, or Special Order has resulted in a great deal of litigation at great expense to the taxpayers of California. The OAL, pursuant to its regulatory duties, 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*.

*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. 4<sup>th</sup> 324, 333, 42 Cal.Rptr.3d 47, 53.)

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

Notwithstanding numerous requests, grievances, complaints to the DMH, and even petitions submitted to the OAL, the Department of Mental Health has steadfastly refused and failed to follow the law as set forth in the Administrative Procedures Act and promulgate its guidelines, criteria, bulletins, manuals, instructions, orders, standards of general application, or other rules.

This type of obdurate opposition to correcting illegal and unconstitutional contents in its Administrative Directives perfectly illustrates why the Legislature established the procedures set forth in the Administrative Procedures Act. This clearly demonstrates the absolute need for oversight and public input to halt the type of bureaucratic tyranny exhibited by the Department of Mental Health by issuing, using, enforcing, or attempting to enforce this type of underground regulation.

## 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. 4<sup>th</sup> 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 **Administrative Directive Number 446 (AD-446)**, 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 **Administrative Directive Number 446 (AD-446)**, 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.

Throughout the negotiation and complaint process prior to filing this petition, the Department of Mental Health has consistently cited "safety and security of the institution" as the justification for implementing the rules and regulations that Petitioner alleges are underground rules.

Petitioner takes the position that the justification for using underground rules and regulations is not relevant to the question presented in this Petition. The questions before the OAL are: (1) Is *Administrative Directive Number 446 (AD-446)* a regulation within the meaning of the Administrative Procedures Act; and, (2) Did the Department of Mental Health promulgate *Administrative Directive Number 446 (AD-446)* pursuant to the Administrative Procedures Act.

Petitioner submits that *Administrative Directive Number 446 (AD-446)* is a regulation within the meaning of the Administrative Procedures Act, and that the Department of Mental Health has not promulgated *Administrative Directive Number 446 (AD-446)* pursuant to the Administrative Procedures Act, and it is therefore an underground regulation that must be declared null and void.

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:

Stephen W. Mayberg, Ph.D., Director  
California Department of Metal Health  
1600 9<sup>th</sup> St., Suite 151  
Sacramento, CA 95814  
(916) 654-2413 / (916) 654-2309

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

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MICHAEL GEORGE ST.MARTIN  
PETITIONER

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Date