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Advancing the rights of Californians with disabilities  
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May 16, 2008

Kathleen Eddy, Senior Counsel  
Office of Administrative Law  
300 Capitol Mall, Ste. 1250  
Sacramento, CA 95814

**RE: Comment on Petition to Review Alleged Underground Regulation at Coalinga State Hospital**

Dear Ms. Eddy:

Protection & Advocacy, Inc. (PAI) is a non-profit agency that provides legal advice and advocacy services on disability rights issues in California. PAI wishes to submit these comments to raise concerns that Coalinga State Hospital (CSH) is applying an underground regulation with respect to its policies on contraband. PAI provides services pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, PL 106-310; the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, PL 106-402; the Rehabilitation Act, 29 U.S.C. § 794e, PL 106-402; the Assistive Technology Act, 29 U.S.C. § 3011, 3012, PL 105-394; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. § 1320b-20, PL 106-170; the Children's Health Act of 2000, 42 U.S.C. § 300d-53, PL 106-310; and the Help America Vote Act of 2002, 42 U.S.C. § 15461-62, PL 107-252.

PAI is commenting on the Office of Administrative Law (OAL)'s acceptance of petition to review an alleged underground regulation at CSH. CSH is applying an underground regulation with respect to what is considered contraband and thus cannot be possessed by the patient at CSH. Further, CSH is acting outside its authority in violation of existing law and regulations.

The sections of Title 9 of the Code of California Regulations (CCR) that are relevant here are sections 881(e) and 884. Each state hospital operated by the Department of Mental Health (DMH) pursuant to a DMH Special Order can

develop operating procedures known as Administrative Directives (ADs). PAI's comment to the OAL involves CSH AD 818. What types of personal property a patient can have at CSH is outlined in AD 818 (Contraband). All ADs must conform with statutory or regulatory authority otherwise, the application of such ADs can be considered to be an "underground" regulation.

PAI believes that the Administrative Practices Act must be followed in regard to this CSH AD so that public comment can be submitted to the OAL for review and conformance to existing law.

Title 9, CCR § 884(b)(1) provides that a non-LPS patient has a right to keep and use personal possessions as space permits except items that are listed as contraband by the facility. The list of items shall be made available on all treatment units and public areas within the facility. See Title 9 CCR § 884(b)(1). What this means is that patients should be able to keep personal possessions unless CSH has designated the item to be contraband or the item can be denied based on a "good cause" finding that factors exist to deny the right. See Title 9 CCR § 884(c).

A hospital can designate an item as "contraband" and thus a patient cannot keep the item as a personal possession so long as the item fits under the definition of "contraband" found in Title 9, CCR § 881(e). "Contraband" is materials, articles, or goods that patients are prohibited from having in their possession because such materials, articles or goods present a risk to safety and security in the facility. See Title 9 CCR § 881(e).

If a patient's property is taken away from him, and the property is not listed as contraband on the current contraband list, the facility must provide a good cause denial in writing. See Title 9 CCR § 884(c). A facility can only find good cause if exercising a specific right under 884 would cause harm to the patient, others, the facility, or there is a compromise in the safety and security of the facility and/or safety to others. Further, there must also be no less restrictive means of protecting the patient's interest. *Id.* Withholding of rights under 884 cannot be done for punitive measures, nor can the right be viewed as a privilege to be earned. See Title 9 CCR § 884(d). A denial of right cannot exceed thirty days without additional staff review. *Id.* The denial of right must be in writing in the patient's treatment record. See Title 9 CCR § 884(e). Facility staff must disclose the content of the written denial to the patient and inform the patient how he can restore the right. A patient can request and review the denial of right in his treatment record. See Title 9 CCR §§ 884(f) and (i). Rights under section 884



can only be denied for as long as the good cause for denial exists. See Title 9 CCR § 884(h).

**CSH AD 818 Does Not Comply with Title 9 CCR § 881(e) and the Definition of Contraband.**

CSH AD 818 contains a list of controlled items designated as contraband that do not comply with § 881(e)'s definition of contraband. Therefore, CSH's practice of confiscating personal property labeled as contraband is an underground regulation.

To illustrate how CSH AD 818 violates regulations, it divides contraband items into different categories depending on where the item is not allowed or under what supervision the item is allowed. This is hardly a "contraband" list because it provides a blanket list of what items are not allowed as personal property without following the "good cause" careful analysis that is required. Items such as musical instruments, CDs, DVDs, denture cleaner, or personal tennis shoes are not allowed to individuals unknown to the treatment team, if the patient is found not to be able to handle the items responsibly, or if the patient misuses the item.

CSH has not articulated any nexus between listing these items as contraband and the regulatory definition of contraband under § 881(e). By doing this, CSH is circumventing the good cause denial requirement outlined in § 884(c) rather than starting from the place of allowing patients to possess property *unless* it is contraband or a good cause denial is proven. Instead, the AD purports to give CSH the authority to determine what is not allowed first. Pursuant to Title 9 CCR § 884's good cause denial, an item not meeting the regulatory definition of "contraband" can only be confiscated if good cause exists and a written denial is placed into the patient's chart.

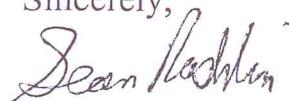
Further, CSH does not recognize that §§ 880 et seq. controls the creation and implementation of its contraband list. Under CSH AD 818, CSH cites Department of Mental Health (DMH) Special Order 239.02 as its authority. DMH Special Order 239.02 is authorized by the Deputy Director of Long Term Care Services.

OAL oversight and a public comment period are needed to ensure that CSH implements a contraband policy that follows California regulation. The CSH contraband list is currently reviewed by the Contraband and Technology Transfer Committee and reviewed by CSH's executive director. See CSH AD 818, section V(B)(1). Furthermore, CSH AD 818 gives the executive director and chief of

police at CSH the authority to declare any item contraband immediately when emergency circumstances are present. This decision is not reviewed until the next scheduled contraband committee meeting. See CSH AD 818, section V(B)(2). CSH does not define what an “emergency circumstance” is that gives rise to the authority of the executive director and chief of police. Having the contraband list reviewed and implemented by CSH staff has resulted in a blank contraband list that is arbitrary and lacking in authority from Title 9 CCR §§ 880 et seq. Therefore OAL oversight and a comment period are needed to ensure a legal contraband policy is implemented at CSH.

If you have any questions, please do not hesitate to contact me. PAI appreciates OAL’s interest in this matter.

Sincerely,



Sean Rashkis  
Staff Attorney

Cc: Michael St. Martin CO#000414-3  
Anne T. Nguyen, Department of Mental Health