



C A L I F O R N I A D E P A R T M E N T O F
Mental Health



Office of Regulations
1600 Ninth Street, Room 435
Sacramento, CA 95814
916-651-1446

September 21, 2010

Pursuant to Government Code 11346.1, the Department of Mental Health (DMH) is posting this emergency regulations notification which deals with the "Sexually Violent Predator Structural Screening Instrument".

Government Code section 11346.1(a)(2) reads as follows: At least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provides a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

In addition to the five day comment period for this emergency filing indicated above, there will be the routine 45 day public comment period when these regulations are permanently adopted via the regular process which will be completed within 180 days of OAL's adoption of this emergency package.

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the Department of Mental Health (DMH) is proposing to take the action described in the Finding of Emergency after considering all comments, objections, and recommendations regarding the proposed action.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Office of Administrative Law (OAL). Comments may also be submitted by facsimile (FAX) at 916-323-6826. The written comment period closes at **5:00 p.m. on September 28, 2010**. OAL will consider only comments received at OAL offices by that time. Submit comments to:

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

AUTHORITY AND REFERENCE

Pursuant to the authority vested by Sections 4005.1, and 4101 of the Welfare and Institutions Code, the Department of Mental Health (DMH) is seeking changes to:

Title 9, Division 1, Chapter 15 of the California Code of Regulations as follows: Amend Section 4000, and Adopt Sections 4001, 4011, and 4015.

This proposed action implements, interprets, and makes specific Sections 6600 and 6601 of the Welfare and Institutions Code.

NECESSITY FOR THE PROPOSED REGULATIONS

Welfare and Institutions Code Section 6601 provides for the process under which an individual who is in custody under the jurisdiction of the California Department of Corrections and Rehabilitation (CDCR) may be screened and fully evaluated as a potential sexually violent predator. Pursuant to Section 6601, the individual shall be screened by CDCR and the Board of Parole Hearings based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal and institutional history. Such screening shall be conducted in accordance with a **structured screening instrument developed and updated by the Department of Mental Health (DMH)** in consultation with CDCR. If as a result of this screening it is determined that the individual is likely to be a sexually violent predator, then CDCR shall refer the individual to DMH for a full evaluation in accordance with DMH's standardized assessment protocol.

On or about July 16, 2010, Chris Johnson with the law firm of Shook, Hardy & Bacon filed a petition with the Office of Administrative Law (OAL) challenging as underground regulations DMH's Level II Screening Guidelines (Guidelines). The Guidelines are contained in the structured screening instrument developed and updated by DMH as required by Welfare and Institutions Code Section 6601 (b). On August 9, 2010, the OAL contacted DMH with questions regarding the challenged Guidelines. Although DMH believes that the Guidelines are proper and valid, DMH is seeking to enact proposed emergency regulations to ensure DMH's and CDCR's continued ability to apply the appropriate screening instrument to screen and evaluate potential sexually violent predators, and avoid future potential road-blocks to such important screenings and evaluations. The proposed regulations will implement, interpret, or make specific Welfare and Institutions Code Section 6601 (b) by spelling out in regulations the criteria, terms and provisions of the structured screening instrument referenced therein.

FINDING OF EMERGENCY

DMH finds that the proposed regulations are 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." Government Code Section 11342.545. Any disruption or prevention of the Department's and the California Department of Corrections and Rehabilitation's (CDCR) ability to screen and evaluate potential sexually violent predators will create serious harm to public peace, health, safety, and general welfare. Such disruption and prevention could occur from the OAL finding that the challenged Guidelines constitute underground regulations, resulting in a court enjoining CDCR and the Department from properly applying the Guidelines in the

screening of potential sexually violent predators. Such disruption or prevention would delay the proper screening and evaluation of potential sexually violent predators, and could potentially cause the parole or release into the community of individuals who are potential sexually violent predators. Appropriate regulations must be enacted immediately to ensure the continued ability to apply the appropriate screening instrument to screen and evaluate potential sexually violent predators to protect public peace, health, safety and general welfare.

SUMMARY OF PROPOSED REGULATIONS

Section 4000

Section 4000 is being amended to state that Title 9, Division 1, Chapter 15 applies to screenings or evaluations pursuant to Welfare and Institutions Code Section 6600 et seq.

Section 4001

Section 4001 gives definitions for the terms "Screening," "Evaluation" and "Individual" as used in Title 9, Division 1, Chapter 15.

Section 4010

Section 4010 states that the Department of Mental Health may accept a designation from the Department of Corrections and Rehabilitation to conduct screenings of individuals in accordance with Welfare and Institutions Code Section 6601(b).

Section 4015

Section 4015 subpart (a) requires that a screening include a determination of qualifying offenses pursuant to Welfare and Institutions Code Section 6600(b). Subpart (b) requires that screenings be performed by administrative or clinical staff or a clinical staff employee, or a non-state employee contracting either with DMH or CDCR. Subpart (c) sets forth minimum criteria for evaluators to include in their screening. Subpart (d) sets forth the responsibilities of evaluators, according to their professional judgment, to apply tests or instruments, along with other status and dynamic risk factors that are appropriate to the particular patient on a case-by-case basis. Subpart (e) sets forth the requirement that DMH maintain its own records documenting the screenings performed pursuant to this chapter.

REGULATION TEXT

Amend Section 4000 as follows:

§ 4000. Application of Chapter

This chapter applies to ~~evaluators performing an assessment~~ screenings or evaluations used to determine whether a person is a sexually violent predator pursuant to Welfare and Institutions Code § 6600 et. seq.

Adopt Section 4001 as follows:

§ 4001. Definitions

(a) As used in this chapter the term “Screening” shall mean an administrative or clinical screening performed pursuant to Welfare and Institutions Code Section 6601(b).

(b) As used in this chapter the term “Evaluation” shall mean an evaluation performed pursuant to Welfare and Institutions Code Section 6601(c).

(c) As used in this chapter the term “Individual” shall mean a person as defined in Welfare and Institutions Code Section 6601(a)(1).

Adopt Section 4011 as follows:

§ 4011. Screening Designation

The Department of Mental Health may accept designation in whole or in part from the California Department of Corrections and Rehabilitation of the function to conduct screenings of individuals pursuant to Welfare and Institutions Code Section 6601(b).

Adopt Section 4015 as follows:

§ 4015. Screening Procedures

(a) A screening shall include a determination of the existence of a conviction for a sexually violent predatory offense as set forth in Welfare and Institutions Code Section 6600(b).

(b) A screening shall be performed by an administrative or clinical staff member employed by, or a non-state employee contracting with, the California Department of Corrections and Rehabilitation or the California Department of Mental Health.

(c) A screening conducted pursuant to Welfare and Institutions Code Section 6601(b) shall include at a minimum the following criteria:

1. The individual’s social, criminal or institutional history.
2. Whether the individual’s criminal offense has not been adjudicated.
3. Whether the individual’s parole is in revoked status or otherwise revoked.
4. Whether the individual referred for evaluation is located in the state of California.

5. Whether the individual's release date is beyond nine months, including date changes.
6. Whether the individual's parole is likely to expire prior to the completion of the screening process and whether the individual's Controlling Discharge Date allows sufficient time for full evaluation..
7. Whether the individual was released from custody prior to the completion of the screening process.
8. Whether the individual is serving an indeterminate sentence.
9. Whether the individual has a current petition for civil commitment pending.
10. Whether the basis for a prior negative finding or the status of the individual's mental disorder or mental illness has changed since a prior screening or evaluation.
11. In the case of first-time referrals and re-referrals, whether the individual's crime or act is a qualifying offense.
12. In the case of first-time referrals and re-referrals, whether the individual's crime or act supports a likelihood of sexually reoffending in a predatory manner.

(d) When a clinical screen is performed, the screener, according to his or her professional judgment, shall apply the provisions of subdivision (c) of this section where applicable and tests or instruments along with other static and dynamic risk factors when conducting the screening. Such tests, instruments and risk factors must have gained professional recognition or acceptance in the field of diagnosing, evaluating or treating sexual offenders and be appropriate to the particular patient and applied on a case-by-case basis. The term "professional recognition or acceptance" as used in this section means that the test, instrument or risk factor has undergone peer review by a conference, committee or journal of a professional organization in the fields of psychology or psychiatry, including, but not limited to, the American Psychological Association, the American Psychiatric Association, and the Association for the Treatment of Sexual Abusers.

(e) The Department of Mental Health shall maintain its own records documenting the screenings it has performed in accordance with the provisions of this chapter.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (1)(13), DMH must determine that no reasonable alternative which it will consider or that will otherwise be identified and brought to its attention will be more effective in carrying out the purpose for which this action is proposed or will be as effective and less burdensome to affect private persons than the proposed action described in this Notice.

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

DMH has available the rulemaking file for inspection and copying at its office at 1600 9th Street room 435, Sacramento, CA 95814. As of the date this notice is published in the Notice Register, the rulemaking file consists of copies of the exact language of the proposed regulations and the Finding of Emergency. These documents may also be viewed and downloaded from DMH's website at www.dmh.ca.gov.

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