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Advancing the rights of Californians with disabilities

May 19, 2008

SENT VIA FACSIMILE AND U.S. MAIL

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

**RE: Comment on Petition to Review Alleged Underground
Regulations--CTU2008-0129-01**

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. We are concerned about the subject of the above referenced Petition and its apparent violation of the California Administrative Procedure Act. By way of background, 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 106-310i; and the Help America Vote Act of 2002, 42 U.S.C. § 15461-62, PL 107-252.

PAI submits these comments on the January 9, 2008 petition by Michael George St. Martin (CTU2008-0129-01). PAI agrees with Mr. St. Martin that the Clinical Evaluator Handbook and Standardized Assessment Protocol (Protocol) is an underground regulation which is subject to the APA. PAI believes that since the Protocol has not gone through the process required under the APA, DMH is in violation of the APA and thus the Protocol should be deemed invalid and its use should be ceased immediately.

The APA prescribes a series of requirements which a state agency must fulfill prior to adopting or amending an administrative regulation. Cal. Gov. Code § 11346.00 *et seq.* The APA defines “regulation” as “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision [thereof] . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” Cal. Gov. Code § 11342.600. The APA further characterizes a regulation as intended to “implement, interpret, make specific or otherwise carry out the provisions of the statute.” Cal. Gov. Code § 11342.2. Any agency regulation adopted without fulfilling the requirements of the APA will be deemed invalid. Cal. Gov. Code § 11340.5(a).

The California Supreme Court has stated a two-part test used to determine whether or not an agency action constitutes a regulation subject to the APA. *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324 (2006). The rule must: (1) be intended to apply generally in that it determines how a class of cases, rather than a specific case, will be decided, and (2) “implement, interpret, or make specific” either the law that the agency is charged with administering or the law governing the agency’s procedures. *Id.* at 334.

In *Stoneham v. Rushen*, the Department of Correction’s use of a score sheet to determine the level of custody and place of confinement for prisoners at admission and after reclassification sessions embodied a rule of general application. *Stoneham v. Rushen*, 137 Cal. App. 3d 729, at 736 (1982). The Stoneham court held the classification scheme to be a standard of general application because its use by the entire corrections system would significantly affect an entire class of cases—the male prisoner population. *Id.*

The Protocol states that it is the standardized assessment protocol required by Welfare and Institutions Code § 6601(c)¹. It sets out the procedures used when an individual is referred by the California Department of Corrections and Rehabilitation (CDCR) to the California Department of Mental Health (DMH) to be evaluated as a possible Sexually Violent Predator (SVP). It contains detailed instructions for everything from setting up an interview, drawing clinical conclusions, and writing up a report, to how to perform the risk assessment

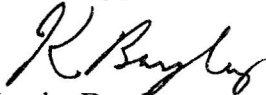
¹ Welfare and Institutions Code § 6601(c): “The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.”

necessary in order to determine if an individual meets the criteria as a SVP. Thus, the Protocol is an instrument of general application, pertaining as it does to the entire class of people who are evaluated to determine SVP status. In addition, Welfare and Institutions Code § 6601(c) gives DMH the authority to create the Protocol and in fact mandates the creation of such a document. As a result, it is a document which is intended to implement, interpret or make specific the law the DMH is charged with administering.

Therefore, PAI believes that the Protocol may not be used until it can be reviewed by OAL and undergo a period of public commenting in order to comply with California law.

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

Sincerely,


Kevin Bayley
Staff Attorney

Cc: Michael George St. Martin, CO-000414-3/RRU-7, Coalinga State Hospital
Anne Nguyen, Department of Mental Health