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Office of Administrative Law  
300 Capitol Mall, Suite 1250  
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Re: CYU2008-01-0129-01

June 16, 2008

I, Michael St. Martin, submit the following response to The California Department of Mental Health's submission to the petition I filed on the Clinical Evaluators Handbook and Standardized Assessment Protocol (2004 & 2007) (Protocol).

### ISSUE

On January 29, 2008, the Office of Administrative Law received a petition by me, Michael St. Martin, alleging that the Department of Mental Health (DMH) has issued, used, enforced, or attempted to enforce underground regulations. The alleged underground regulations are from the **Clinical Evaluators Handbook and Standardized Assessment Protocol** (2004 & 2007) (Protocol).

### PROPOSED DETERMINATION

The protocol as a whole and specified provisions within are regulations subject to the Administrative Procedures Act (APA).

### BACKGROUND

The SVP Act took effect on January 1, 1996. (Stats. 1995, ch. 763, §3, p. 5922) Upon referral, the DMH evaluates the person in accordance with the standardized assessment protocol developed by the DMH to determine whether the person is a SVP. (Welf. & Inst. Code §6601(c).)

The first "Protocol" (entitled Evaluators Handbook) was published in 1996. It was revised in 1997 and again in 1998, and each time carrying the title 'Evaluator Handbook'. The Handbook (protocol) was again revised in 2000. However, this time the title was changed to: 'Clinical Evaluators Handbook and Standard Assessment Protocol'. Further, page two of the 2000 Protocol added the following paragraph:

## STANDARDIZED ASSESSMENT PROTOCOL

WIC 6601(c) requires that a person referred from CDC be evaluated in accordance with the standardized assessment protocol, developed and updated by the DMH. This clinical evaluators handbook is the centerpiece of that protocol. This handbook may be supplemented by additional instructions to clinical evaluators as necessary. This handbook and all supplemental instructions to DMH staff and contractors in the implementation of the SVP law is the required standardized assessment protocol.

The 2002, 2004, and the most recent 2007 revisions all contain the same language. Additionally, page two of each of the revisions contains the language: "Evaluators are required to interview and evaluate persons in accordance with the protocol contained within this handbook."

The Handbook has been in use in one form or another since the inception of the SVP law in 1996. Since the 'PROTOCOLS' inception, and subsequent revisions, the Department has steadfastly refused to submit it to the OAL to promulgate, which would produced a valid regulation. When asked in Klint Pheneger's letter, dated January 17, 2006, (enclosed in original submission) why the Department had not followed the APA, the Department's Deputy Director responded, "it is not necessary, appropriate, or practicable for DMH to promulgate regulations." The department's standard response is to delay, deny, and divert any effort to promulgate the 'protocol'.

The Department still refuses to promulgate any of it's policies or procedures. When AD 626 fell under the APA, the department decided to withdraw the regulations, as of this date, DMH have not submitted the regulation to the OAL for promulgation. Even after withdrawing AD 626, the Department continues to enforce the AD, in direct violation of the agreement struck with OAL.

The department has hundreds of rules and regulations that govern the daily lives of it's patients. None have ever been submitted to the AOL for promulgation. Left to it's own accord the department will **NEVER** follow the law.

Since the 1920's, the Department of Mental Health has a long history of treating sex offenders. In one form or another they have treated, done research work, and produced untold studies. In that time there have been close to ten different programs, most just recycled versions with minimal success.

We have been the best thing, and the worst thing that has happened to the Department of Mental Health since the inception of the current SVP law. We have been the best thing because, before we came along they were an emaciated department that was shutting down hospitals, and having their budget slashed. Since the inception of the current SVP law, the SVP program has consumed over two billion dollars in taxpayers money to operate.



We are the worst thing that has happened to the department, because we really aren't mental patients, but rather political prisoners who are in control of our facilities. After spending several years in DMH, and forced to challenge many of the policies of the Department, we have been forced to become litigious.

For a department that has had it's way for 100 years with people who could not defend themselves, we are a nightmare. When we first came under the control of the DMH, they forced medicated anyone that challenged them or their program. Before the advent of psychotropic medication, the department would perform surgery (lobotomies), or administer electroshock therapy to those patients who dared challenge their authority. These policies did not inspire independent thought. With our self litigation, the policy of forced medication has been stopped in all state hospitals. We are well able to read and reason, and when faced with a department whose policies and procedures are abusive, arbitrary, and capricious, we research and attempt to correct flagrant violations of the law. In all these years, the department has steadfastly refused to change and correct their deficiencies and have had to be forced, kicking and screaming, into court.

Since the inception in 1996 of the SVP law, 33 men have died in custody. On page 27 of the 'Protocol' it states: "In particular, it is important to consider how age and health may impact an individuals opportunity, ability, or motivation to re-offend".

Under WIC §6605 (b) it states: "if the Department of Mental Health determines that: (1) the persons condition has so changed that the person no longer meets the definition of a sexually violent predator or (2) conditional release to a less restrictive alternative is in the best interest to the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to the least restrictive alternative or for unconditional discharge".

Yet "33" men have died while in custody, and the department never recommended their release. Currently two people are in a coma in medical unit two and will never recover, and still the department have not recommended their release. Several men are diagnosed with terminal cancer, or other afflictions that has brought them to the end of their life and still the director has not followed this provision of the law. In the twelve years the 6600 law has been in effect, the DMH has never recommended anyone's release. The DMH goes out of their way to make the lives of the dying and their loved ones as uncomfortable as possible, by not allowing them to visit within the hospital, or contract hospitals. The Department has gone so far as to have the police change the patient's name on hospital admission registries, to prevent family members from receiving information on their loved ones. DMH also does not allow family members to be with their dying loved ones, during on their final moments on earth.

## ANALYSIS

### SMOKE AND MIRRORS

The Department of Mental Health (DMH) through Ms. Nguyen, attempts to mislead us into believing that the **CLINICAL EVALUATORS HANDBOOK AND STANDARDIZED ASSESSMENT PROTOCOL** is not a Regulation, but merely a **"GUIDE AND UNIFORM FORMAT."** The Department of Mental Health's purposely placing **"PROTOCOL"** in the title is very telling in what the Department of mental Health's intent of the handbook is.

To walk DMH and Ms. Nguyen down the path to understand the meaning of **"PROTOCOL"**, one must reference the dictionary, if one is to find the truth:

**Regulation: 2a:** an authoritative rule dealing with details or procedure.

**Procedure: 3a:** a tradition or established way of doing things.  
**3b:** Protocol.

**Protocol: 3a:** A code prescribing strict adherence to correct etiquette and precedence (as in diplomatic exchange and in the military Services).

**3b:** a set of conventions governing the treatment and esp. the formatting of data in an electronic communications system.

**4:** a detailed plan of Scientific or medical experiment, treatment or procedure.

Now that the **TRUTH** of the word Protocol has been discovered, one now must discover what the Legislative Intent of the Law regarding the Clinical Evaluators Handbook and Standardized Assessment Protocol is.

### THE PROTOCOL IS A REGULATION

The response by the Department of Mental Health ("D.M.H.") to the petition I filed to the Office of Administrative Law concerning the validity of the underground regulation entitled, "*Clinical Evaluator Handbook and Standardized Assessment Protocol (2007) (Protocol)*", claims that the Protocol as a whole and the specified provisions of the Protocol are not regulations subject to the Administrative Procedure Act (APA). Once again DMH is wrong , and knows it!!!!

The Department of Mental Health has acknowledged to the Office of Administrative Law ("O.A.L.") in its statement that it has a manual which guides evaluators in their duties, they also acknowledged this fact in the California Supreme Court's case *People v. Superior Court (Ghilotti)* (Cal. 2002) 27 Cal. 4<sup>th</sup>888, 909-910, 119 Cal. Rptr. 2d 1, 18



“the statute does not allow the evaluators utter free reign. Instead, it imposes certain specific standards on assessment. They must examine the person ‘in accordance with a standardized assessment protocol’ .... The evaluators’ professional judgment is therefore to be exercised within a specific legal framework, and their legally accurate understanding of the statutory criteria is crucial to the Act’s proper operation.” And when the Court questioned if the evaluator’s conclusions were legally “incompetent”, the response to the Court’s questions, counsel for the Department confirmed that, “the Department trains the evaluators, and gives them “a protocol handbook.” Ghilotti, 27 Cal. 4<sup>th</sup> at 909-910, 119 Cal. Rptr. 2d at 39.

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 DMH is charged with administering:

"The State Department of Mental Health shall evaluate the person in accordance with the 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 standard assessment protocol shall require assessment of a diagnosable mental disorder, 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 criminal and psychosexual history”.

The California Government Code, section 11340.5(a) reads: “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.”

The California Government Code section 11342.600 reads: “‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, 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.”

The California Court of Appeal for the Third District in Savient Pharmaceuticals, Inc. v. Dept. Health Services (3<sup>rd</sup> Dist. 2007) 146 Cal. App. 4<sup>th</sup> 1457, 53 Cal. Rptr. 3d 689 found (Department of Health Services listing of drugs in formulary for AIDS drug assistance program as well as DHS’s action in delisting certain drugs from formulary were regulations subject to APA.)

The California Court of Appeal for the Second District in *Union of American Physicians & Dentists v. Kizer* (2<sup>nd</sup> Dist. 1990) 223 Cal. App. 3d 490, 272 Cal. Rptr. 886 found (Provider manual issued by Dept. of Health to providers of Medi-Cal which documented six recognized levels of service performed and was used as part of its criteria for evaluating whether providers' progress notes satisfied appropriateness and quality of medical service were regulations and subject to APA guidelines.)

D.M.H. in its 2004 version of their own *Protocol* on page 32, paragraph 1 and reiterated in their 2007 version on page 35, paragraph 1 stated: "Since the person has been committed as an SVP by the court for 'appropriate treatment' (Welfare & Institutions Code § 6604), the department believes that a person must finish the program, including the completion of a period of outpatient supervision. Only under rather unusual circumstances would a patient being evaluated for SVP commitment extension be deemed unlikely to commit future sexually violent acts as a result of a mental disorder, if all five phases of treatment have not been completed. If this is the case, the evaluator is required to consult with the department on their conclusion."

Petitioner reiterates and re-affirms all of the arguments presented in the original petition as referenced and included herein.

The "*Clinical Evaluator Handbook and Standardized Assessment Protocol* (2007) (*Protocol*)" is a regulation because it applies to all persons to be evaluated under the SVPA and it does "implement, interpret, or make specific" the SVP Act. It is subject to the provisions and requirements of the Administrative Procedures Act of the California Government Code. It is an underground regulation, as it was not promulgated in accordance with the provisions of the Administrative Procedures Act.

### **THE CLINICAL EVALUATORS HANDBOOK AND STANDARDIZED ASSESSMENT PROTOCOL**

In the department's response, Ms. Nguyen states: "The protocol is not a regulation. Instead, it is a guide and uniform format to be used by clinical evaluators, psychologists, to make case-specific determinations using their education, experience, and expertise to form and report their opinions, in the exercise of their independent professional clinical judgment".

On page A-8 in the 'Protocol', Under WIC §6603 (c)(1) "If one or more of the original evaluators is no longer available to testify for the petition in the court proceedings, the attorney...may request ...DMH to perform replacement evaluations".

(2) "For purpose of this subdivision, "no longer available to testify for the petitioner in court proceedings" means that the evaluator is no longer authorized by the Director of Mental Health to perform evaluations regarding sexually violent predators as a result of any of the following":

(A) "The evaluator has failed to adhere to the protocol of the State Department of Mental Health".



There is no denying the intent written into WIC §6603 (c)(1). The law spells out clearly that if the 'Protocol' is not adhered to by the evaluator they will be removed by the Director. Such removal would result in Hundreds of thousands of dollars in lost income to the evaluator (some as much as \$2,000,000.00 per year). Hardly the "guide and uniform format", Ms. Nguyen would like us to believe. The 'PROTOCOL' is a regulation and as such it must be promulgated.

Ms. Nguyen further attempts to diminish the impact of the 'Protocol' by stating, "even with two evaluations findings that the person is a Sexually Violent Predator, this is not the final word and does not automatically produce a legal finding or commitment". Through it is true that a person cannot be determined to be a SVP until the court makes a determination, there is still a liberty interest issue, as the person is still in custody, pending the adjudication of the doctors reports. Some have been waiting as long as ten years for a judicial determination. Individuals coming within the purview of the SVP act must contend with communities which are fearful simply because of the label applied to them. We are faced with judges whose political future depends on handing down justice with an iron hand. We also face prosecutors with career ambitions to lock up those who they claim are the most dangerous. Further, the state does not provide adequate funding for the defense of SVP cases. There is no better example of the **STATE** inflicting it's will on the individual. The Scale of Justice becomes more unfairly tipped when the entire premise of the case arises from a procedure and protocol dictated by a government agency which has steadfastly refused to follow the Administrative Procedures Act.

The Department of Mental Health should be forbidden to continue to use, enforce, or attempt to enforce the Protocol, or any of their other underground regulations, even temporarily until valid regulations can be promulgated. To do so would just allow the Department of Mental Health to continue business as usual with impunity.

The Department has had over twelve years to promulgate the Protocol. They have also had several months since this petition has been brought forward, yet the department did not attempt to submit the protocol for consideration to the AOL to avoid significant disruption of the SVP evaluation process.

Ms. Nguyen argues *Morning Star Co v. State Board of Equalization* (2006) 38 Cal.4<sup>th</sup> 341. in which the court ordered the proceedings be stayed to avoid significant disruption. In such, the court was only talking about fees that the state was collecting.

I cannot believe Ms. Nguyen or the Department of Mental Health can compare several hundred dollars in taxes, in *Morning Star* to twelve years of blatantly circumventing the Administrative Procedure Act. One cannot equate the paying of monies, to the liberty issues at stake in this case.

The only way to assure that the Department of Mental health complies with the APA, is to take full action and rule that the Protocol is an **UNDERGROUND REGULATION**, and send a clear message to the department that they are not above the law.

One must give Ms. Nguyen credit, when faced with being the Captain of the Titanic, she did her best to attempt to stem the tide of the on coming ocean. But just like the Titanic, the Evaluator's handbook is leaking faster than the Department of Mental Health or it's attorneys can bail.

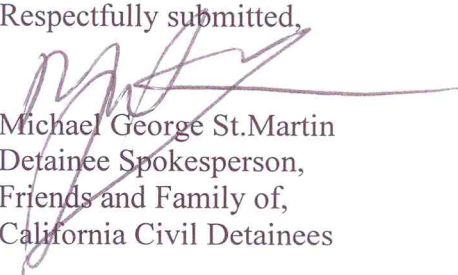
### IN CLOSING

In *Ghilotti*, 27 Cal. 4<sup>th</sup> at 909-910, 119 Cal. Rptr. 2d. Judge Moreno in his dissenting opinion wrote: "What I am concerned about is whether the Department of Mental Health knows what the criteria are, has properly informed the people who are responsible for making the evaluations and whether they have done it appropriately." In response to the courts questions, counsel for the Department confirmed that the Department trains the evaluators and gives them "a protocol handbook." Counsel acknowledges that "regrettable sometimes the evaluations don't comport with that protocol. If it fails to comport, then under those circumstance, as the court suggested, we would not accept that as an evaluation." The court asked whether the protocol addressed the concerns the court had expressed and counsel responded he 'had to plead ignorance."

Without codification, there is nothing to hold the DMH accountable for training the evaluators, or for the evaluators and their reports. The Protocol has received numerous changes without APA review.

State evaluators are not qualified, and cannot testify to "**LEGAL**" standards, thus the Protocol must be codified properly to instruct, and inform, to set a uniform standard.

Respectfully submitted,



Michael George St.Martin  
Detainee Spokesperson,  
Friends and Family of,  
California Civil Detainees

CC: Ms. Anna Nguyen, California Department of Mental Health