

**STATE OF CALIFORNIA**

**OFFICE OF ADMINISTRATIVE LAW**

**2024 OAL DETERMINATION NUMBER 1**

**(OAL MATTER number CTU2023-1027-01)**

**REQUESTED BY: Christian Williams**

**CONCERNING: Administrative Directive No. 738, dated July 31, 2023,  
Patient Visiting Guidelines, issued by the Department of  
State Hospitals - Coalinga**

**DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE  
SECTION 11340.5.**

**SCOPE OF REVIEW**

A determination by the Office of Administrative Law (OAL) evaluates whether an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. OAL review is limited to the sole issue of whether the challenged rule meets the definition of “regulation” as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA).

If a rule meets the definition of “regulation” but was not adopted pursuant to the APA and should have been, it is an underground regulation as defined in section 250 of title 1 of the California Code of Regulations (CCR).<sup>1</sup> Nothing in this analysis evaluates the advisability or wisdom of the underlying action or enactment.

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<sup>1</sup> “Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA. (Cal. Code Regs., tit. 1, § 250, sub. (a)(1).)

## CHALLENGED RULE

At issue is whether Administrative Directive No. 738 (A.D. 738), issued by the Department of State Hospitals - Coalinga (DSH-C), regarding Patient Visiting Guidelines, contains underground regulations. A.D. 738 is attached hereto as Exhibit A.<sup>2</sup>

## DETERMINATION

OAL determines A.D. 738 contains rules meeting the definition of “regulation” that the Department of State Hospitals (Department) should have adopted pursuant to the APA but did not.

## FACTUAL BACKGROUND

On October 27, 2023, OAL received the petition from Christian Williams (Petitioner).

On December 26, 2023, OAL accepted the petition for consideration.

OAL published a summary of the petition in the California Regulatory Notice Register on January 5, 2024, and solicited comments from the public until February 5, 2024. OAL received twelve timely public comments during the comment period. Commenters asserted that A.D. 738 is an underground regulation, that DSH-C amends A.D. 738 without notice to patients, and that DSH-C only makes A.D. 738 available to patients in binders in the library, among hundreds of other Administrative Directives.

OAL also received numerous phone calls and voicemails from commenters asserting that A.D. 738 imposes unnecessary burdens on family and friends seeking to visit patients at DSH-C. There was no indication these oral comments were also transmitted to the Department for consideration.

On February 20, 2024, OAL received a response to the petition from the Department, which was due no later than February 20, 2024. The Department's timely response indicates the Department provided a copy of the response to Petitioner on February 20, 2024.

On February 29, 2024, OAL received a rebuttal from Petitioner, which was due no later than March 6, 2024.

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<sup>2</sup> Although the petition includes A.D. 738 (dated July 31, 2023), Petitioner also submitted A.D. 738 (dated March 15, 2023) and A.D. 738 (dated April 10, 2018, and revised June 4, 2018) for this matter. This determination is based upon the most recent version of A.D. 738, which replaced prior versions.

## THE DEPARTMENT'S RESPONSE TO THE PETITION

In its response, the Department asserts A.D. 738 does not meet the definition of a regulation because it does not meet the elements set forth in *Tidewater Marine Western, Inc. v. Bradshaw*.<sup>3</sup> The Department also asserts A.D. 738 is not a regulation because it is merely “a guide for DSH-C staff regarding hospital safety and security.”<sup>4</sup>

Also relevant to the analysis in this determination, the Department asserts A.D. 738 is exempt from the APA for the following seven reasons:

1. It relates only to the internal management of DSH-C;<sup>5</sup>
2. It relates to DSH-C audits;<sup>6</sup>
3. It embodies the only legally tenable interpretation of law and is a restatement of existing law;<sup>7</sup>
4. It governs the general control and direction of the property and concerns of each facility, and the duty to maintain an effective inspection of the hospital;<sup>8</sup>
5. It governs hospital contraband;<sup>9</sup>
6. It falls under the California Department of Corrections and Rehabilitation's local rule exemption;<sup>10</sup> and
7. It relates to a form utilized only by DSH-C staff.<sup>11</sup>

## EXISTING STATUTES AND REGULATIONS RELATING TO THE CHALLENGED RULE RELATING TO THE CHALLENGED RULE

The following statutes and regulations relate to A.D. 738.

1. [The Department] ... may adopt and enforce rules and regulations necessary to carry out [its] ... duties under this division [regarding the

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<sup>3</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.

<sup>4</sup> Department Response to the Petition, p. 2.

<sup>5</sup> Gov. Code, § 11340.9, subd. (d).

<sup>6</sup> Gov. Code, § 11340.9, subd. (e).

<sup>7</sup> Gov. Code, § 11340.9, subd. (f).

<sup>8</sup> Welf. & Inst. Code, § 4109.

<sup>9</sup> Welf. & Inst. Code, § 7295.

<sup>10</sup> Pen. Code, § 5058, subd. (c)(1).

<sup>11</sup> Gov. Code, § 11340.9, subd. (c).

care and treatment of persons with mental health disorders under the custody of the Department].<sup>12</sup>

2. [The Department] shall have jurisdiction over the execution of the laws relating to care and treatment of persons with mental health disorders under the custody of [the Department].<sup>13</sup>
3. [The Department] may adopt regulations concerning patients' rights and related procedures applicable to the inpatient treatment of mentally ill offenders ... persons receiving treatment as mentally disordered sex offenders, and inmates of jail psychiatric units.<sup>14</sup>
4. [The Department] has general control and direction of the property and concerns of each state hospital ... The [D]epartment shall ... [t]ake care of the interests of the hospital, and see that its purpose and its bylaws, rules, and regulations are carried into effect, according to law ... [e]stablish such bylaws, rules, and regulations ... for regulating the duties of officers and employees of the hospital, and for its internal government ... and management ... [m]aintain an effective inspection of the hospital.<sup>15</sup>
5. To ensure its safety and security, a state hospital that is under the jurisdiction of [the Department] ... may develop a list of items that are deemed contraband and prohibited on hospital grounds and control and eliminate contraband on hospital grounds ... [The Department] shall develop a list of items that shall be deemed contraband at every state hospital ... Notwithstanding [the APA], the hospital and the [D]epartment may implement, interpret, or make specific this section without taking regulatory action.<sup>16</sup>
6. The mental health rehabilitation center, including the grounds, shall be maintained in a clean and sanitary condition and in good condition at all times to ensure safety and well-being of clients, staff and visitors.<sup>17</sup>
7. [A non-Lanterman-Petris-Short Act patient has a] right to personal visits during regularly scheduled visiting days and hours. The right to have visits shall not be denied except as is necessary for reasonable security of the facility and the safety of persons. The length and frequency of

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<sup>12</sup> Welf. & Inst. Code, § 4005.1.

<sup>13</sup> Welf. & Inst. Code, § 4011, subd. (a).

<sup>14</sup> Welf. & Inst. Code, § 4027.

<sup>15</sup> Welf. & Inst. Code, § 4109.

<sup>16</sup> Welf. & Inst. Code, § 7295, subds. (a)-(b), (j).

<sup>17</sup> Cal. Code Regs., tit. 9, § 787.15, sub. (a).

visits and the number of persons permitted to visit a patient at the same time may be limited consistent with safety, security, and to ensure that all patients have a fair opportunity to have visitors.<sup>18</sup>

8. Facility visiting hours shall be scheduled seven days a week for a minimum of five hours each day.<sup>19</sup>
9. [A non-Lanterman-Petris-Short Act patient who] is being treated at an offsite hospital for longer than one week may be allowed to have visitors, subject to the visiting limitations of the hospital facility where the individual patient is being treated ... An individual patient who is being treated at an offsite hospital and is either in critical condition or is being treated for a terminal illness may be allowed to have visitors each day beginning on the first day of offsite treatment, subject to the visiting limitations of the hospital facility where the individual patient is being treated.<sup>20</sup>
10. All persons entering ... visiting centers ... are subject to searches of their person using tools and methods including, but not limited to, metal detectors or metal detector wands, canine-sniffs, x-ray devices, cell phone detecting devices, devices to detect controlled substances, and pat-down searches.<sup>21</sup>
11. The property of all persons entering ... visiting centers ... are subject to searches, both visually and physically, using tools and methods including, but not limited to, the removal of hats, shoes, jewelry, jackets or coats for inspection; inspection of purses, bags, lunch boxes, and containers; the use of canine-sniffs, x-ray devices, cell phone detecting devices, devices to detect controlled substances, and metal detectors or metal detector wands.<sup>22</sup>
12. Persons found with contraband listed on [the Department's] ... statewide contraband list, or the specific state hospital's contraband list, must be instructed to return the contraband to their vehicle, if the person arrived in a vehicle, or to remove the contraband from the hospital grounds. Failure to comply may result in a confiscation of the item or the person may be removed from the hospital grounds for failure to comply.<sup>23</sup>

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<sup>18</sup> Cal. Code Regs., tit. 9, § 884, sub. (b)(4).

<sup>19</sup> Cal. Code Regs., tit. 9, § 4300, sub. (a).

<sup>20</sup> Cal. Code Regs., tit. 9, § 4310, subs. (a)-(b).

<sup>21</sup> Cal. Code Regs., tit. 9, § 4353, sub. (b).

<sup>22</sup> Cal. Code Regs., tit. 9, § 4353, sub. (c).

<sup>23</sup> Cal. Code Regs., tit. 9, § 4353, sub. (d).

13. [The Department] shall conform to the regulations adopted by the State Fire Marshal establishing minimum standards for the prevention of fire and for the protection of life and property against fire and panic.<sup>24</sup>
14. Patients have the right ... [t]o have daily visiting hours established [and] [t]o have visits from persons of the patient's choosing at any time if the patient is critically ill, unless medically contraindicated.<sup>25</sup>

### **UNDERGROUND REGULATIONS**

Government Code section 11340.5, subdivision (a), provides:

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 [Government Code] 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 [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5, it creates an underground regulation as defined in section 250 of title 1 of the CCR.

OAL may issue a determination as to whether an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA.<sup>26</sup> An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to due deference in any subsequent litigation of the issue.<sup>27</sup>

### **ANALYSIS**

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a regulation subject to the APA. This analysis will determine (1) whether the challenged rule is a regulation within the meaning of Government Code section 11342.600; and (2) whether the challenged rule falls within any recognized APA exemption.

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<sup>24</sup> Cal. Code Regs., tit. 22, § 73507.

<sup>25</sup> Cal. Code Regs., tit. 22, § 73523, subs. (a)(18) and (a)(20).

<sup>26</sup> Gov. Code, § 11340.5, subd. (b).

<sup>27</sup> *Grier v. Kizer* (1990) 219 Cal.App.3d 422.

### 1. A.D. 738 satisfies the elements of a regulation.

“Regulation” is defined in Government Code section 11342.600 as:

. . . 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.

In *Tidewater Marine Western, Inc. v. Bradshaw*, the California Supreme Court expanded on this definition:

A regulation subject to the [APA] 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.<sup>28</sup>

As stated in *Tidewater*, the first element used to identify a regulation is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the State of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.<sup>29</sup> By its own terms, A.D. 738 applies to all staff, patients, and visitors at DSH-C and, therefore, applies to a class of persons. Moreover, each class of persons impacted by A.D. 738 is an open class with individuals regularly hired at, leaving from, committed to, discharged from, or visiting the facility. As such, the Department's assertion that A.D. 738 does not apply generally because it applies only to DSH-C staff is without merit.

Also without merit is the Department's argument that A.D. 738 is not a regulation because it “does not declare how a certain class of cases will be decided, nor does it provide restrictions to DSH-C's patient population.”<sup>30</sup> However, by its own terms, A.D. 738 accomplishes both of those things.

For example, all persons under the age of 18 seeking to visit with a patient must comply with the requirements described in Section VI.D. These requirements include, but are not limited to, completion of a “Minor Visitation

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<sup>28</sup> *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

<sup>29</sup> *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630.

<sup>30</sup> Department Response to Petition, p. 3.

Clearance Request" (DSH-C 088) form by the minor's parent(s), legal guardian(s), or a patient,<sup>31</sup> submission of the completed DSH-C 088 form to External Affairs,<sup>32</sup> referral of the DSH-C 088 form to the treatment team "for review and recommendations and/or restrictions,"<sup>33</sup> forwarding of the DSH-C 088 form and "Minor Visitation Request Supplement A" (DSH-C 092) form to the "Social Worker, Program Director, Clinical Administrator, and the Chief of Police Services who shall provide a recommendation to the Executive Director,"<sup>34</sup> and issuance of a final determination by the Executive Director.<sup>35</sup> The aforementioned requirements clearly specify the process by which minor visitation must be requested. Additionally, the procedure contained in Section VI.D. specifically refers to the potential imposition of restrictions on patient visitation, further undermining the Department's argument.

The second element of a regulation under *Tidewater* is that the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure.

The rules contained in A.D. 738 implement, interpret, and make specific the Welfare and Institutions Code sections enforced or administered by the Department and govern the Department's procedure in at least the following ways:

1. They implement, interpret, and make specific sections 4005.1 and 4011(a) of the Welfare and Institutions Code in order to carry out the Department's duty to execute the laws relating to care and treatment of persons under the Department's custody.
2. They implement, interpret, and make specific section 4027 of the Welfare and Institutions Code because they concern patients' rights and related procedures applicable to their treatment.
3. They implement, interpret, and make specific section 4109 of the Welfare and Institutions Code because they provide for the general control and direction of DSH-C. They also seek to ensure the purpose, rules, and regulations of the Department are carried into effect according to law, govern the duties of DSH-C staff, and establish DSH-C procedures.

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<sup>31</sup> A.D. 738, Section VI.D.1.a.

<sup>32</sup> *Ibid.*

<sup>33</sup> A.D. 738, Section VI.D.1.c.

<sup>34</sup> A.D. 738, Section VI.D.1.d.

<sup>35</sup> A.D. 738, Section VI.D.1.e.



The rules contained in A.D. 738 also implement, interpret, and make specific the CCR sections enforced or administered by the Department and govern the Department's procedure in at least the following ways:

1. Sections IV.A. through F., and VI.A.4. through 7., of A.D. 738 implement, interpret, and make specific sections 884(b)(4), 4300(a) and (c), and 4310 of title 9 of the CCR, and section 73523(a)(18) and (a)(20) of title 22 of the CCR by establishing DSH-C visiting hours, notice requirements regarding changes to visiting hours, provisions regarding visits at irregular hours, provisions regarding visits at offsite hospitals, and a procedure regarding the imposition of limitations and/or conditions on patient visits, which impacts a patient's right to schedule visitors and limits visitor access to patients.
2. Sections IV.A. and VII.B. through C., of A.D. 738 implement, interpret, and make specific sections 884(b)(4), and 4300(a) and (c), of title 9 of the CCR, and section 73523(a)(18) and (a)(20) of title 22 of the CCR by establishing a required, electronic process to request to visit a patient, which impacts a patient's right to schedule visitors and limits visitor access to patients.
3. Section VI.B.1. of A.D. 738 implements, interprets, and makes specific sections 884(b)(4) and 4353 of title 9 of the CCR by imposing specific limitations on allowable visitor attire, which may impact visitor access to patients.
4. Section VI.D. of A.D. 738 implements, interprets, and makes specific section 884(b)(4) of title 9 of the CCR by establishing a process to request minor visitation with a patient, including completion of specific forms, before a request for minor visitation will be reviewed and potentially approved, which impacts a patient's right to schedule visitors and limits visitor access to patients.
5. Section VIII.C. of A.D. 738 implements, interprets, and makes specific section 884(b)(4) of title 9 of the CCR by establishing a process to restrict or terminate a visitor's privilege to visit, which limits visitor access to patients.
6. Sections VIII.E. through F. of A.D. 738 implement, interpret, and make specific section 884(b)(4) of title 9 of the CCR by specifying a process for current and former Department of Corrections and Rehabilitation (CDCR) employees, current and former Department employees, former CDCR inmates, and former Department patients to request to visit a patient, which impacts a patient's right to schedule visitors and limits visitor access to patients.

These examples illustrate how A.D. 738 meets the definition of “regulation” under *Tidewater*.

Although the Department’s Response repeatedly identifies A.D. 738 as “guidelines” for DSH-C staff, A.D. 738 satisfies the requirements necessary to be considered a regulation. The type of document is not an item of consideration in the underground regulations analysis. Rather, “if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.”<sup>36</sup> Additionally, Government Code section 11340.5, subdivision (a), specifically prohibits the issuance of a “guideline” unless it is adopted pursuant to the APA.

## **2. All of A.D. 738 is not APA exempt.**

The final issue to examine is whether an express statutory exemption applies to the challenged rule. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. In any event, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.”<sup>37</sup>

### **A. A.D. 738 does not relate only to the internal management of DSH-C.**

A regulation that relates only to the internal management of the state agency is exempt from the APA.<sup>38</sup> However, this exemption applies only if the rule satisfies two conditions:

1. The rule affects only the employees of the issuing agency;<sup>39</sup> and
2. The rule does not involve a matter of serious consequence involving an important public interest.<sup>40</sup>

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<sup>36</sup> *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697.

<sup>37</sup> Gov. Code, § 11346.

<sup>38</sup> Gov. Code, § 11340.9, subd. (d).

<sup>39</sup> See *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736; *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204.

<sup>40</sup> See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943; *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 436.

Courts have interpreted the internal management exemption narrowly:

The internal management exception ... is a narrow one, as demonstrated by a line of cases consistently rejecting its application - even where the policies govern internal administrative matters - if the policies or procedures affect the interests of persons other than the agency itself.<sup>41</sup>

A.D. 738 contains numerous provisions that directly affect a DSH-C patient's right to schedule visitors. For example, Section IV.A. states:

Visitors must submit a request utilizing the DSH website. Visiting Center Officers will send a confirmation email once the visit request has been cleared. Unscheduled visitors will not be permitted to visit without approval from the Chief of Police and/or Executive Director.

Another example, Section IV.F. states:

The Chief of Police or the Executive Director may modify the immediate visiting hours, limit the number of patients or visitors, assign tables or otherwise establish conditions based upon need. If changes are made by the Chief of Police, they are to relay their reason(s) for doing so to the Executive Director as soon as possible.

While these provisions may assist with the scheduling of Department staff to "ensur[e] there is enough staff present and working during visitation hours,"<sup>42</sup> these provisions clearly affect DSH-C patients and visitors, in addition to Department staff.

A.D. 738 also imposes limitations on allowable visitor attire. Section VI.B.1. contains numerous limitations on allowable attire, including, for example, a prohibition on tank tops, underwire garments, skirts or dresses longer than knee length with slits extending above the knees, and exercise clothing. While these provisions may be necessary for general hospital security, these provisions clearly impact DSH-C visitors, in addition to Department staff.

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<sup>41</sup> *California School Boards Assn. v. State Board of Education* (2010) 186 Cal.App.4th 1298, 1334.

<sup>42</sup> Department Response to Petition, p. 4.

A.D. 738 also imposes limitations on minor visitation with DSH-C patients. For example, Section VI.D1.c. states:

After the parents/legal guardians of the minor have signed and submitted the [Minor Visitation Clearance Request (DSH-C 088)] to the External Affairs Unit, the request will be referred to the TxT for review and recommendations and/or restrictions.

While this provision may be necessary for general hospital security, this provision clearly affects DSH-C patients, visitors, and the parent/legal guardian of the minor, in addition to Department staff.

In its response to the petition, the Department asserts that “the state hospitals must ensure the safety of patients housed within its facilities and the staff that work within the hospital” and that “DSH-C must evaluate the safety and security not only for each individual patient, but for its staff as well.”<sup>43</sup> Consistent with its duties to ensure safety and security for DSH-C patients and staff, the Department acknowledges:

A.D. 738 provides instruction to DSH-C staff on general hospital security including but not limited to contraband and controlled items, patient visitation, security protocols, patient privacy, as well as other procedures related to its patients. This guidance serves to ensure the safety of DSH-C’s patients and staff at its facility.<sup>44</sup>

Despite this acknowledgement, the Department also states in its response to the petition that A.D. 738 “does not address a matter of serious consequence involving an important public interest.”<sup>45</sup> To the extent the Department believes that ensuring the safety and security of patients, staff, and visitors does not involve a matter of serious consequence involving an important public interest, OAL disagrees.

Thus, A.D. 738 is not exempt from the APA based upon the internal management exemption.

**B. A.D. 738 is not APA exempt as audit criteria or guidelines.**

The APA contains a limited exemption regarding agency audits and material to be used in defense, prosecution, or settlement of a case.

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<sup>43</sup> Department Response to Petition, pp. 1-2.

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Ibid.*

[The APA] does not apply to ... [a] regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, ... or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

- (1) Enable a law violator to avoid detection.
- (2) Facilitate disregard of requirements imposed by law.
- (3) Give clearly improper advantage to a person who is in an adverse position to the state.<sup>46</sup>

The Department asserts that “DSH-C has regular audits and inspections for licensing requirements,”<sup>47</sup> which includes “ensuring that the facility has order and is safe.”<sup>48</sup> While this may be true, A.D. 738 has been distributed to patients and the public. Therefore, it is clear that “disclosure of the criteria or guidelines” was acceptable or necessary. Additionally, the Department has not established that disclosure of A.D. 738 would result in any of the outcomes enumerated in subdivisions (e)(1) through (e)(3) of Government Code section 11340.9.

Thus, A.D. 738 is not exempt from the APA based upon the audit exemption.

**C. A.D. 738 does not embody the only legally tenable interpretation of law and is not a restatement of existing law.**

Generally, a rule is excepted from the APA if it is the only legally tenable interpretation of a provision of law.

The exception for the lone “legally tenable” reading of the law applies only in situations where the law “can reasonably be read only one way [citation omitted], such that the agency’s actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute’s plain language.”<sup>49</sup>

But to the extent any of the contents of the [statement of policy or procedure] depart from, or embellish upon, express statutory authorization, the [agency] will need to promulgate regulations.<sup>50</sup>

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<sup>46</sup> Gov. Code, § 11340.9, subd. (e).

<sup>47</sup> Department Response to Petition, p. 4.

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 336-337 (internal citations omitted).

<sup>50</sup> *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62.

A.D. 738 includes numerous provisions which are neither the only legally tenable interpretation of law nor a restatement of existing law. The specific requirements, procedures, and limitations pertaining to patient visitation are not the only legally tenable interpretations of Welfare and Institutions Code section 4109, sections 884, 4300, 4310, or 4353 of title 9 of the CCR, or section 73523 of title 22 of the CCR. For example, in Section IV.A., the Department's establishment of a specific procedure to request visitation further interprets the aforementioned laws and is not the only legally tenable interpretation of those laws. Another example, in Section VI.A., the visitor protocol, including the limitations on allowable visitor attire, further interpret the aforementioned laws and are not the only legally tenable interpretations of those laws. The Department could have adopted any number of other requirements, procedures, and limitations to implement, interpret, and make specific the laws listed above in order to ensure DSH-C patient and visitor safety during visitation.

The provisions governing facility safety and maintenance are not the only legally tenable interpretations of Welfare and Institutions Code section 4109, section 787.15 of title 9 of the CCR, or sections 71543 and 73507 of title 22 of the CCR. The Department could have adopted any number of other rules, procedures, or limitations to ensure "the safety of patients housed within its facilities and the staff that work within the hospital"<sup>51</sup> and that the facilities are "maintained in a clean and sanitary condition."<sup>52</sup>

Additionally, with respect to Sections V.D. and VI.C.5., the Department asserts the contraband exemption contained in Welfare and Institutions Code section 7295 but does not allege that the Department or DSH-C formally added the items to the contraband list pursuant to the statutory procedures in Welfare and Institutions Code section 7295.

Thus, A.D. 738 is not exempt from the APA as the only legally tenable interpretation of existing law or a restatement of existing law.

**D. A.D. 738 is not APA exempt because it governs the general control and direction of the property and concerns of each facility, and the duty to maintain an effective inspection of the hospital.**

The Department asserts that A.D. 738 is exempt from the APA because existing statute provides that the Department has general control and direction of the property and concerns of each facility and the duty to maintain an effective inspection of the hospital.<sup>53</sup> Although the statute may

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<sup>51</sup> Department Response to Petition, p. 1.

<sup>52</sup> Cal. Code Regs., tit. 1, § 787.15, sub. (a).

<sup>53</sup> Welf. & Inst. Code, § 4109.

delegate authority to the Department to implement the statutes the Department cites, the granting of authority does not confer an exemption from following the APA.

As discussed above, the procedural requirements established in the APA shall not be superseded or modified by any legislation except to the extent that the legislation shall do so expressly.<sup>54</sup> The statute the Department relies upon to support its assertion provides no express APA exemption. The Department must adopt regulations pursuant to the APA to implement, interpret, or make specific this statute unless an express statutory exemption applies.

**E. It is unclear whether A.D. 738 contains items that have been adopted as contraband.**

Welfare and Institutions Code section 7295 provides an APA exemption for the Department to develop a list of contraband items prohibited statewide on hospital grounds and for individual hospitals to develop hospital-specific contraband lists, using statutorily enumerated procedures.<sup>55</sup> The Department asserts that Section V. and Section VI. of A.D. 738 “provide guidance to staff responsible for ensuring the facility is safe and orderly.”<sup>56</sup> The contraband lists, which are exempt from the APA pursuant to Welfare and Institutions Code section 7295, will be utilized by DSH-C staff to search for contraband.<sup>57</sup> Accordingly, the Department asserts A.D. 738 falls within the contraband exemption with respect to its patient protocol and visitor protocol restrictions.<sup>58</sup>

For purposes of the exemption, “contraband” means materials, articles, or goods that a patient is prohibited from having in their possession because the materials, articles, or goods present a risk to the safety and security of the facility.<sup>59</sup> To qualify for the contraband exemption, the Department or individual hospital must have added the item to the applicable contraband list pursuant to the enumerated statutory procedures. Development of the list must occur through a duly formed contraband committee with the participation of patient representatives and the Office of Patient’s Rights. A contraband list must be subject to timely review and approval of the Department’s Director. A hospital must post a contraband list prominently in every unit of the hospital, throughout the hospital, and online.<sup>60</sup>

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<sup>54</sup> Gov. Code, § 11346.

<sup>55</sup> Welf. & Inst. Code, § 7295.

<sup>56</sup> Department Response to Petition, p. 9.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> Welf. & Inst. Code, § 7295, subd. (i).

<sup>60</sup> Welf. & Inst. Code, § 7295, subds. (c)-(h).

The Department's response contains no evidence that the Department or DSH-C adopted the items sought to be characterized as prohibited contraband pursuant to these requirements. For example, Section V.C.1. prohibits patients from wearing "hats, caps, beanies, skull caps, bandanas or hairnets" during visitation. Another example, Section VI.B.1. contains numerous limitations on allowable attire for visitors, including a prohibition on tank tops, underwire garments, skirts or dresses longer than knee length with slits extending above the knees, and exercise clothing. The Department did not furnish the statewide or DSH-C contraband list in response to the petition. In addition, commenters objected to how DSH-C developed A.D. 738 and stated that A.D. 738 has not been posted prominently in every unit of the hospital, throughout the hospital, and online. Therefore, it is unclear if DSH-C adopted the purported contraband elements of A.D. 738 pursuant to the requirements of Welfare and Institutions Code section 7295 or whether the contraband exemption applies to those elements.

Also of note, in its response, the Department limits the intended application of the contraband exemption by stating, "Section V.D. and VI.C. of A.D. 738 (Contraband Search) specifically will be covered by the contraband search regulation currently being promulgated by DSH." This statement acknowledges that at least several of the requirements contained in the patient protocol and visitor protocol sections of A.D. 738 fall outside the scope of the contraband exemption. In the absence of another applicable exemption, these requirements must be adopted pursuant to the APA.

**F. The Penal Code section 5058(c)(1) ("local rule") exemption for rules issued by the Secretary of CDCR applying to a particular prison or other facility does not apply to the Department.**

Penal Code section 5058 contains a limited APA exemption applicable to rules issued by the Secretary of CDCR that apply to a particular prison or correctional facility.<sup>61</sup> The Department asserts:

[Department] facilities must establish rules that apply to its particular hospital as each hospital has unique safety and security issues as the level of security differs based on the facility ... Each [Department] hospital must examine their facilities and its patients and make determinations as to how to ensure the security of its units. Furthermore, because DSH-C receives patients from CDCR, the CDCR's [Penal Code section 5058(c)(1) ("local rule")] exemption should apply.<sup>62</sup>

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<sup>61</sup> Pen. Code, § 5058, subd. (c)(1).

<sup>62</sup> Department Response to Petition, p. 10.



Penal Code section 5058, subdivision (c)(1), only applies to rules issued by the Secretary of CDCR for individual correctional facilities. The Department does not assert that A.D. 738 was issued by the Secretary of CDCR nor that state hospitals are correctional facilities.

A.D. 738 was not issued by the Secretary of CDCR. Rather, it was issued by the Department, which is a state agency with independent rulemaking authority. The fact that DSH-C "receives patients from CDCR" has no bearing on the application of the exemption contained in subdivision (c)(1) of Penal Code section 5058. Although the Department receives patients from CDCR, Department hospitals also house other patients.

**G. A.D. 738 is not APA exempt solely because it references forms utilized by DSH-C staff.**

The APA contains a limited APA exemption applicable to state agency forms.

*The [APA] does not apply to ... [a] form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to [the APA] when one is needed to implement the law under which the form is issued.<sup>63</sup> [Emphasis added.]*

The Department asserts A.D. 738 is exempt from the APA because "Request for Facility Entrance" (DSH-C 156) and "Minor Visitation Clearance Request" (DSH-C 088) are forms utilized by DSH-C staff. The Department goes on to state that "[t]he forms are required ... and there are no substitutes."<sup>64</sup>

The statutory exemption is clear on its face that it does not apply to a form containing a rule the APA requires to be adopted as a regulation. To the extent these forms contain regulations where no other exemption applies, the agency must adopt the forms pursuant to the APA. The lone fact that a form may be used by agency staff is of no import if the content of the form is regulatory and does not satisfy the internal management exemption or some other APA exemption.

Additionally, although not identified in the Department's response, A.D. 738 also refers to a "Minor Visitation Request Supplement A" (DSH-C 092) form, "Denial of Rights" (MH-1763) form, and "Patient Photo Receipt" (DSH-C 101) form. In addition to the two forms specifically identified in the Department's response, none of these forms are referenced in the CCR.

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<sup>63</sup> Gov. Code, § 11340.9, subd. (c).

<sup>64</sup> Department Response to Petition, p. 11.

Without knowing the content of the forms, OAL cannot analyze them. Regardless, the assertion that the forms are APA exempt solely because Department staff utilize them is incorrect.

### CONCLUSION

In accordance with the above analysis, OAL determines that A.D. 738 contains rules meeting the definition of “regulation” that the Department should have adopted pursuant to the APA. For example, the establishment of a required, electronic process to request to visit a patient, the imposition of limitations on allowable visitor attire, the establishment of a process to request minor visitation with a patient, the establishment of a process to restrict or terminate a visitor’s privilege to visit, and the specification of a process for current and former CDCR employees, current and former Department employees, former CDCR inmates, and former Department patients to request to visit a patient, are all rules meeting the definition of a regulation that the Department should have adopted pursuant to the APA. Thus, A.D. 738 contains underground regulations.<sup>65</sup>

Date: May 6, 2024

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<sup>65</sup> Please note, OAL's review of A.D. 738 is limited to the sole issue of whether the challenged rule meets the definition of “regulation” as defined in Government Code section 11342.600 and is subject to the APA. As such, the Department’s request in its Response that OAL “allow DSH-C to continue to use of A.D. 738 until valid regulations can be promulgated” exceeds the scope of Government Code section 11340.5 and OAL’s authority.