

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2024 OAL Determination NUMBER 2

(OAL MATTER number CTU2024-0206-01)

REQUESTED BY: Cory Hoch

CONCERNING: Administrative Directive No. 558, dated September 20, 2022, Hospital Access System, 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 a “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 a “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).¹ Nothing in this analysis evaluates the advisability or wisdom of the underlying action or enactment.

¹ “‘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. 558 (A.D. 558), dated September 20, 2022, issued by the Department of State Hospitals - Coalinga (DSH-C), regarding Hospital Access System, contains underground regulations. A.D. 558 is attached hereto as Exhibit A.

DETERMINATION

OAL determines A.D. 558 contains rules meeting the definition of a "regulation" that the Department of State Hospitals (Department) should have adopted pursuant to the APA but did not.

FACTUAL BACKGROUND

On February 6, 2024, OAL received the petition from Cory Hoch (Petitioner).

On April 8, 2024, OAL accepted the petition for consideration.

OAL published a summary of the petition in the California Regulatory Notice Register on April 19, 2024, and solicited comments from the public until May 20, 2024. OAL received one timely public comment during the comment period that asserted A.D. 558 is an underground regulation "which needs to be properly promulgated pursuant to the APA."²

On June 3, 2024, OAL received the Department's response to the petition, which was due no later than June 3, 2024.³ The Department's timely response indicates the Department provided a copy of the response to Petitioner on June 3, 2024.

On June 17, 2024, OAL received a rebuttal from Petitioner, which was due no later than June 18, 2024.

THE DEPARTMENT'S RESPONSE TO THE PETITION

In its response, the Department asserts A.D. 558 does not meet the definition of a regulation because it does not meet the elements set forth in *Tidewater*

² Comment from Allan Fletcher, dated April 25, 2024.

³ Please note, the Department's response references A.D. 558, dated May 27, 2020, as opposed to A.D. 558, dated September 20, 2022, which is the version of A.D. 558 that was attached to Petitioner's petition. OAL's determination is based on A.D. 558, dated September 20, 2022.

Marine Western, Inc. v. Bradshaw.⁴ The Department also asserts A.D. 558 is not a regulation because "it restates various regulations to clarify points and emphasize main ideas into more manageable concepts to comprehend."⁵

Also relevant to the analysis in this determination, the Department asserts A.D. 558 is exempt from the APA for the following reasons:

1. It contains rules that only apply to DSH-C employees and does not apply generally to the population throughout the State of California;⁶
2. It relates only to the internal management of DSH-C;⁷ and
3. It embodies the only legally tenable interpretation of law and is a restatement of existing law.⁸

EXISTING STATUTES AND REGULATIONS RELATING TO THE CHALLENGED RULE

The following statutes and regulations relate to A.D. 558.

1. [The Department] ... may adopt and enforce rules and regulations necessary to carry out [its] ... duties under this division [regarding the care and treatment of persons with mental health disorders under the custody of the Department].⁹
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].¹⁰
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.¹¹

⁴ *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.

⁵ Department Response to the Petition, p. 13.

⁶ Department Response to the Petition, p. 9; Gov. Code, § 11340.9, subd. (i).

⁷ Department Response to the Petition, pp. 9-10; Gov. Code, § 11340.9, subd. (d).

⁸ Department Response to the Petition, pp. 10-12; Gov. Code, § 11340.9, subd. (f).

⁹ Welf. & Inst. Code, § 4005.1.

¹⁰ Welf. & Inst. Code, § 4011, subd. (a).

¹¹ Welf. & Inst. Code, § 4027.

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.¹²
5. The hospital director may establish rules and regulations not inconsistent with law or departmental regulations, concerning the care and treatment of patients, research, clinical training, and for the government of the hospital buildings and grounds. Any person who knowingly or willfully violates such rules and regulations may, upon the order of either of the hospital officers, be ejected from the buildings and premises of the hospital.¹³
6. [The Department] Hospital Access System provides two levels of patient access to move about on state hospital grounds.¹⁴
7. Escorted Access. (1) Upon arrival at a state hospital, a patient's access level shall be immediately set to Escorted Access. (2) Upon admission to a state hospital, a patient's access level shall be immediately set to Escorted Access. (3) Upon transfer from one state hospital to another state hospital, a patient's access level shall be immediately set to Escorted Access.¹⁵
8. Unescorted Access. (1) Before or at the first post-admission Treatment Team Conference, the Treatment Team shall evaluate the factors listed in section 4359 ... and determine whether a patient's access level shall be set to Unescorted Access. (2) If at the first post-admission Treatment Team Conference, the Treatment Team determines that the patient's access level shall remain set to Escorted Access, it shall discuss with the patient any impediments to setting their access level to Unescorted Access and assist them with overcoming those impediments. The Treatment Team shall reevaluate the factors listed in section 4359 ... and determine whether a patient's access level shall remain set to Escorted Access or change to Unescorted Access at the regularly

¹² Welf. & Inst. Code, § 4109.

¹³ Welf. & Inst. Code, § 4312.

¹⁴ Cal. Code Regs., tit. 9, §§ 4355, sub. (a)(1), and 4356, sub. (a).

¹⁵ Cal. Code Regs., tit. 9, § 4357, sub. (a).

scheduled Treatment Team Conferences or at any time the Treatment Team deems appropriate.¹⁶

9. (1) Upon transfer from one unit to another unit in the same state hospital, a patient's access level remains set to the same access level that they had on the previous unit. If the Treatment Team deems it appropriate, it may evaluate the factors listed in section 4359 ... and determine whether a newly transferred patient's access level shall remain as set or change. (2) The Treatment Team may reevaluate the factors listed in section 4359 ... and determine whether a patient's access level shall remain as set or change, at each Treatment Team Conference or at any time the Treatment Team deems appropriate. (3) Program Staff or Executive Staff may conduct its own review of the factors listed in section 4359 ... and determine whether a patient's access level shall remain as set or change. Any Program Staff review, or Executive Staff review shall be in collaboration with the Treatment Team.¹⁷
10. A patient's Treatment Team shall evaluate the factors listed in section 4359 ... and determine a patient's access level. Program Staff or Executive Staff may also review the factors listed in section 4359 ... and determine a patient's access level. Any Program Staff review, or any Executive Staff review shall be in collaboration with the Treatment Team.¹⁸
11. To determine a patient's access level, the Treatment Team, Program Staff, or Executive Staff shall consider the following factors: (1) Hospital grounds, physical structure of the hospital, or layout of the hospital and units; (2) Staffing ratios or other licensing requirements; (3) Patient's Commitment Type; (4) Patient's participation in treatment; (5) Patient input; (6) History of verbal or physical aggression toward self or others while at DSH; (7) History or allegations of criminal activity while at DSH; (8) History of possession of contraband while at DSH; (9) History of escape attempts or otherwise unauthorized movement while at DSH; (10) History of exploiting, strong-arming, or inciting others or being exploited, strong-armed, or incited by others while at DSH; (11) History of destroying property while at DSH; (12) History of suicide ideation, threats, or attempts while at DSH; (13) Medical condition; (14) History of unauthorized possession or use of prescribed medication, drugs, or illicit

¹⁶ Cal. Code Regs., tit. 9, § 4357, sub. (b).

¹⁷ Cal. Code Regs., tit. 9, § 4357, sub. (c).

¹⁸ Cal. Code Regs., tit. 9, § 4358.

substances or refusal to comply with a drug screen while at DSH; and
(15) Other relevant information.¹⁹

12. Unit staff may place a patient's access level immediately on hold if clinically indicated, in cases of emergency, or when there has been significant change in any of the factors listed in section 4359 ... A patient's access level, on hold ... shall be reviewed before or at the next Treatment Team Conference. In this review, the Treatment Team shall evaluate the factors listed in section 4359 ... identify the impediments, if any, to the patient receiving back their access level, and assist them with overcoming those impediments. If there are no impediments, the Treatment Team may return the patient's access level to them. This review and any subsequent review of the patient's access level shall be conducted pursuant to subsection (c) of section 4357....²⁰

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 that is not exempt from the APA, 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 a "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA.²¹ An OAL determination is not

¹⁹ Cal. Code Regs., tit. 9, § 4359, sub. (a).

²⁰ Cal. Code Regs., tit. 9, § 4360.

²¹ Gov. Code, § 11340.5, subd. (b).

enforceable against the agency through any formal administrative means, but it is entitled to due deference in any subsequent litigation of the issue.²²

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.

1. A.D. 558 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.²³

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.²⁴ By its own terms, A.D. 558 applies to all patients and staff at DSH-C and, therefore, applies to a class of persons. Moreover, each class of persons impacted by A.D. 558 is an open class with individuals regularly hired at, leaving from, committed to, or

²² *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 428.

²³ *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

²⁴ *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630.

discharged from, the facility. As such, the Department's assertion that A.D. 558 does not apply generally because it applies only to DSH-C staff²⁵ is without merit.

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. 558 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 section 4005.1 and subdivision (a) of section 4011 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.
4. They implement, interpret, and make specific section 4312 of the Welfare and Institutions Code because they concern the care and treatment of patients and govern hospital buildings and grounds.

The rules contained in A.D. 558 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. Section V.A.2. implements, interprets, and makes specific subsection (b) of section 4357 of title 9 of the CCR by establishing a specific number of days within which newly admitted patients will be assigned unescorted hospital access.

²⁵ Department Response to the Petition, p. 2.

2. Section V.B.3.a. and e. implement, interpret, and make specific subsection (c) of section 4356 of title 9 of the CCR by specifying how patient identification badges must be worn and indicating that failure to follow this rule “will lead to the hospital access being reviewed by the [Treatment Team] for appropriateness.”
3. Section V.C.1. and 4. implement, interpret, and make specific sections 4356, 4357, and 4358 of title 9 of the CCR by establishing a specific number of days within which a patient’s hospital access will be reviewed and a specific number of days within which the Unit Supervisor must discuss the return of a patient’s hospital access with the Treatment Team, if access was returned prior to Treatment Team review.
4. Section V.C.5. implements, interprets, and makes specific subsection (a) of section 4359 of title 9 of the CCR by establishing a “Medical Restriction” for patients who need their access restricted for “medical reasons.”

These examples illustrate how A.D. 558 meets the definition of a “regulation” under *Tidewater*.

Although the Department’s response repeatedly identifies A.D. 558 as “rules” for DSH-C staff, A.D. 558 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.”²⁶ Additionally, Government Code section 11340.5, subdivision (a), specifically prohibits the issuance of a “rule” unless it is adopted pursuant to the APA.

2. All of A.D. 558 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 its response, the Department asserts that A.D. 558 is not “considered a rule that needs to be promulgated by the APA because it is specific to DSH-C and

²⁶ *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697.

not to the entire DSH, state agency."²⁷ To support this argument, the Department relies upon the use of the word "rule" in Welfare and Institutions Code section 4312.²⁸ The Department concludes:

The authority given to the hospital director is to either establish a rule or establish a regulation. The statute differentiates a rule and a regulation by separating their distinction with the word "and." A.D. No. 558 is not inconsistent with the intent of this statute because the rules are an extension of the staff's duties and are not inconsistent with departmental regulations Thus, the hospital director can establish rules concerning the care and treatment of patients, research, clinical training, and for the government of the hospital buildings and grounds that do not need to be promulgated by the APA.²⁹

Contrary to the Department's assertion, Welfare and Institutions Code section 4312 does not exempt hospital rules from adoption pursuant to the APA. If the Legislature intended to provide the Department with an exemption to the APA, the Legislature knows how to draft the statutory language expressly.³⁰ Additionally, Government Code section 11340.5, subdivision (a), specifically refers to a "rule" in its definition of a "regulation," further undermining the Department's argument.

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."³¹ In the absence of an express statutory exemption, "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA."³²

²⁷ Department Response to the Petition, p. 3.

²⁸ "The hospital director may establish rules and regulations not inconsistent with law or departmental regulations, concerning the care and treatment of patients, research, clinical training, and for the government of the hospital buildings and grounds. Any person who knowingly or willfully violates such rules and regulations may, upon the order of either of the hospital officers, be ejected from the buildings and premises of the hospital." (Welf. & Inst. Code, § 4312.)

²⁹ Department Response to the Petition, p. 3.

³⁰ See, e.g., Pen. Code, § 5058, subd. (c)(1).

³¹ Gov. Code, § 11346.

³² *California School Boards Assn. v. State Board of Education* (2010) 186 Cal.App.4th 1298, 1328.

A. A.D. 558 is not directed to a specifically named person or to a group of persons.

A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state is exempt from the APA.³³ The Department asserts that A.D. 558 is exempt from the APA pursuant to subdivision (i) of section 11340.9 of the Government Code because “A.D. 558 specifically applies only to DSH-C employees and does not apply generally to the population throughout the State of California.”³⁴ With respect to the Department’s first point, the assertion that A.D. 558 applies only to DSH-C employees is without merit. A.D. 558 contains numerous provisions that directly affect a DSH-C patient’s access to the facility and off-unit destinations. With respect to the Department’s second point, a rule need not apply to all persons in the State of California.³⁵ It is sufficient if the rule applies to a clearly defined class of persons or situations.³⁶ By its own terms, A.D. 558 applies to all patients and staff at DSH-C now and in the future and, therefore, applies to an open class of persons, not a specifically named person or group of persons.

Thus, A.D. 558 is not exempt from the APA pursuant to subdivision (i) of Government Code section 11340.9.

B. A.D. 558 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.³⁷ However, this exemption applies only if the rule satisfies two conditions:

1. The rule affects only the employees of the issuing agency;³⁸ and
2. The rule does not involve a matter of serious consequence involving an important public interest.³⁹

³³ Gov. Code, § 11340.9, subd. (i).

³⁴ Department Response to the Petition, p. 9.

³⁵ *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

³⁶ *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630.

³⁷ Gov. Code, § 11340.9, subd. (d).

³⁸ See *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736; *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204.

³⁹ 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.⁴⁰

In its response, the Department asserts that Sections III, IV, and V of A.D. 558 are exempt from the APA pursuant to the internal management exemption.⁴¹ However, these sections contain a number of provisions that directly affect a DSH-C patient's access to the facility and off-unit destinations.

For example, Section V.B.3. states, in relevant part:

Patients with hospital access will adhere to the following while off the units: a. Patient identification badge will be displayed at all times when off unit and will be attached to their outermost garment above the waist. ... e. Failure to follow these rules and the other rules listed under in [sic] this A.D. will lead to the hospital access being reviewed by the [Treatment Team] for appropriateness.

While this provision may be necessary for general hospital security, it clearly impacts DSH-C patients, in addition to Department staff.

Another example, Section V.D.5. states:

When it is necessary or desirable for a patient to remain at an off-unit destination beyond his recorded departure time, it is the responsibility of the patient to request that staff supervising the off-unit destination notify Unit Staff and obtain permission for the patient to remain at the off-unit destination.

While this provision "outlines the staff's job duties"⁴² by clarifying Unit Staff must provide permission for a patient to remain at an off-unit destination, this provision clearly affects DSH-C patients by placing the burden on patients to request that staff supervising the off-unit destination notify Unit Staff and obtain permission for a patient's late return.

⁴⁰ *California School Boards Assn. v. State Board of Education* (2010) 186 Cal.App.4th 1298, 1334.

⁴¹ Department Response to the Petition, pp. 9-10.

⁴² Department Response to the Petition, p. 10.

To the extent the Department believes that a patient's hospital access level, which necessarily involves an assessment of any safety and security concerns posed by the patient, does not involve a matter of serious consequence involving an important public interest, OAL disagrees.

Thus, A.D. 558 is not exempt from the APA based upon the internal management exemption.

C. A.D. 558 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."⁴³

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.⁴⁴

A.D. 558 includes numerous provisions which are neither the only legally tenable interpretation of law nor a restatement of existing law.

For example, in Section V.A.2, the Department states that "[n]ewly admitted patients ... will be assigned unescorted hospital access within seven days after the [Treatment Team] determines that there are no safety or security concerns regarding the patient." The Department asserts that this requirement "clarifies to the staff when to re-evaluate the patient to change their access level," which is the only legally tenable interpretation of subsections (a)(2) and (b)(1) of section 4357 of title 9 of the CCR.⁴⁵ There are no specific time frames included in subsections (a)(2) and (b)(1) of section 4357 of title 9 of the CCR and, contrary to the Department's assertion, Section V.A.2. further interprets these subsections by establishing a specific time period for assignment of unescorted hospital access. The Department has discretion to establish a specific time frame but chose to adopt a seven-day

⁴³ *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 336-337 (internal citations omitted).

⁴⁴ *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62.

⁴⁵ Department Response to the Petition, pp. 7, 11.

time period. Thus, the seven-day time period is not the only legally tenable interpretation of subsections (a)(2) and (b)(1) of section 4357 of title 9 of the CCR.

Additionally, for example, in Sections IV.C, V.B., and V.C., the Department lists a number of factors to be considered when determining whether to grant a patient unescorted or escorted hospital access, some of which are not found in section 4359 of title 9 of the CCR.⁴⁶ The Department relies upon the catchall language in subsection (a)(15) of section 4359 of title 9 of the CCR to justify the adoption of this language. Subsection (a)(15) of section 4359 states, "To determine a patient's access level, the Treatment Team, Program Staff, or Executive Staff shall consider the following factors: ... (15) Other relevant information." According to the Department, "[t]he above are additional factors as part of other relevant information that the staff needs to consider in determining a patient's access within the hospital. Not all factors can be listed because behaviors, risk level and treatment change dependent on the patient."⁴⁷ The Department further asserts these sections "should be exempt by the only tenable interpretation exemption because staff can evaluate the access level based on other relevant information."⁴⁸ While additional factors may need to be evaluated by the Department on a case-by-case basis, the Department is further implementing subsection (a)(15) of section 4359 of title 9 of the CCR in Sections IV.C, V.B., and V.C. by *requiring consideration of these factors for every patient*. The Department has discretion to enumerate factors for consideration but chose to adopt the specific factors enumerated in Sections IV.C., V.B., and V.C. Thus, the specific factors adopted in Sections IV.C., V.B, and V.C. are not the only legally tenable interpretation of subsection (a)(15) of section 4359 of title 9 of the CCR. Rather, they are standards of general application imposed upon DSH-C patients and staff.

The Department also asserts that A.D. 558 does not "implement, interpret, or make specific the [Hospital Access System] regulations [sections 4355 through 4360 of article 3.5 of chapter 16 of division 1 of title 9 of the CCR]"⁴⁹ and instead merely "restates various regulations to clarify points and emphasize main ideas into more manageable concepts to comprehend."⁵⁰

⁴⁶ See, e.g., "practice of pro-social unit norms." (A.D. 558, Section IV.C.)

⁴⁷ Department Response to the Petition, p. 12.

⁴⁸ *Ibid.*

⁴⁹ Department Response to the Petition, p. 3.

⁵⁰ Department Response to the Petition, p. 13.

The Department further argues:

Restatement can be used to clarify points or emphasize main ideas. Restatement can help break down complex, dense ideas into more manageable concepts. Restatement also helps with comprehension ... A.D. No. 558 is a restatement to clarify the regulations. It does not change the content, the meaning or concept of the regulation. Restatement is not a cut and paste of the regulation or the rewriting of the regulation verbatim, but words to make clear and to break down the complexity of ideas.⁵¹

This statement is expressly inconsistent with caselaw. In *Armistead v. State Personnel Board*, the court held that “rules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA.”⁵² While A.D. 558 includes a number of accurate restatements of existing law, some of the examples of restatements identified by the Department actually interpret or further implement existing law. For example, in Section V.D.2.d., the Department requires a patient’s identification badge to be displayed “at all times when off the unit” and requires the patient’s identification badge to be “attached to their outermost garment above the waist.” The requirement regarding display of a patient’s identification badge at all times when off the unit is a restatement of subsection (d) of section 4356 of title 9 of the CCR. However, the requirement to attach an identification badge to the patient’s outermost garment above the waist is not a restatement of section 4356 of title 9 of the CCR and serves to impose an additional requirement upon patients that has not been adopted pursuant to the APA.

Whether the contents of A.D. 558 “maintain the integrity and intended meaning of the regulations and [are] not inconsistent with the regulations,”⁵³ is irrelevant to the evaluation of whether the contents of A.D. 558 are the only legally tenable interpretation of a provision of law or a restatement of existing law. Implementation, interpretation, or clarification of existing regulations by the Department in a manner that is not patently compelled by or repetitive of existing law necessitates the adoption of regulations.

Thus, A.D. 558 is not exempt from the APA as the only legally tenable interpretation of law and is not a restatement of existing law.

⁵¹ Department Response to the Petition, p. 4.

⁵² *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204.

⁵³ Department Response to the Petition, p. 12.

CONCLUSION

In accordance with the above analysis, OAL determines that A.D. 558 contains rules meeting the definition of "regulation" that the Department should have adopted pursuant to the APA. For example, the adoption of time periods pertaining to the assignment or reassignment of unescorted hospital access, additional criteria to evaluate in connection with patient access determinations, and a requirement regarding how to wear a patient identification badge, are all rules meeting the definition of a regulation that the Department should have adopted pursuant to the APA. Thus, A.D. 558 contains underground regulations.

Date: August 19, 2024

Lindsey S. McNeill

Lindsey S. McNeill
Attorney IV

For: Kenneth J. Pogue
Director

Copy: Stephanie Clendenin, Director, Department of State Hospitals
Loretta Davila, Attorney