

**State of California
Office of Administrative Law**

In re:
**Department of Corrections and
Rehabilitation**

**NOTICE OF APPROVAL OF REGULATORY
ACTION**

Regulatory Action:

Government Code Section 11349.3

Title 15, California Code of Regulations

OAL File No. 2014-1219-04 S

Adopt sections: 3364.1, 3364.2

Amend sections: 3351, 3364

Repeal sections:

The Department of Corrections and Rehabilitation proposed this action to amend sections 3351 and 3364 and to adopt sections 3364.1 and 3364.2 of title 15 of the California Code of Regulations, and to adopt six forms, governing the administration of involuntary psychiatric medications. This action implements Penal Code section 2602, enacted in AB 1114 (2011) and subsequently amended in several other bills. This action establishes statewide procedures for all institutions to follow pertaining to form usage, inmate rights, service of documents, hearing procedures, and documentation for the involuntary psychiatric medication process in order to ensure inmates receive the same procedural and substantive due process regardless of housing assignment or institution when use of involuntary psychiatric medication is determined necessary.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 1/28/2015.

Date: 1/28/2015



Richard L. Smith
Senior Attorney

For: DEBRA M. CORNEZ
Director

Original: Jeffrey Beard
Copy: Diane Hawkins

REGULAR

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2014-0625-01	REGULATORY ACTION NUMBER 2014-1219-045	EMERGENCY NUMBER
------------------	--------------------------------------	---	------------------

ENDORSED - FILED
in the office of the Secretary of State
of the State of California

JAN 28 2015

2:14 PM

For use by Office of Administrative Law (OAL) only	DEC 22 PM 2:26
NOTICE	REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
California Department of Corrections & Rehabilitation

AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER 2014, 29Z		PUBLICATION DATE 7-18-2014

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Involuntary Psychiatric Medication	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
--	--

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT 3351, 3364 , 3364.1 and 3364.2
	AMEND 3351 and 3364 per agency request
TITLE(S) 15	REPEAL

3. TYPE OF FILING

<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §511349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))	<input type="checkbox"/> Other (Specify) _____		

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
1st 15-Day Renotice (November 20, 2014 through December 8, 2014)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
---	---	--	--

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON Diane Hawkins	TELEPHONE NUMBER (916) 445-2314	FAX NUMBER (Optional) (916) 324-6075	E-MAIL ADDRESS (Optional) diane.hawkins@cdcr.ca.gov
------------------------------------	------------------------------------	---	--

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 12/15/2014
TYPED NAME AND TITLE OF SIGNATORY DIANA TOCHE, Undersecretary (A), Administration and Offender Services	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JAN 28 2015

Office of Administrative Law

**State of California
Office of Administrative Law**

In re:
**Department of Corrections and
Rehabilitation**

**NOTICE OF APPROVAL OF REGULATORY
ACTION**

Regulatory Action:

Government Code Section 11349.3

Title 15, California Code of Regulations

OAL File No. 2014-1219-04 S

Adopt sections: 3364.1, 3364.2

Amend sections: 3351, 3364

Repeal sections:

The Department of Corrections and Rehabilitation proposed this action to amend sections 3351 and 3364 and to adopt sections 3364.1 and 3364.2 of title 15 of the California Code of Regulations, and to adopt six forms, governing the administration of involuntary psychiatric medications. This action implements Penal Code section 2602, enacted in AB 1114 (2011) and subsequently amended in several other bills. This action establishes statewide procedures for all institutions to follow pertaining to form usage, inmate rights, service of documents, hearing procedures, and documentation for the involuntary psychiatric medication process in order to ensure inmates receive the same procedural and substantive due process regardless of housing assignment or institution when use of involuntary psychiatric medication is determined necessary.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 1/28/2015.

Date: 1/28/2015



Richard L. Smith
Senior Attorney

For: DEBRA M. CORNEZ
Director

Original: Jeffrey Beard
Copy: Diane Hawkins

REGULAR

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2014-0625-01	REGULATORY ACTION NUMBER 2014-1219-045	EMERGENCY NUMBER
------------------	--------------------------------------	---	------------------

ENDORSED - FILED
in the office of the Secretary of State
of the State of California

JAN 28 2015

2:14 PM

For use by Office of Administrative Law (OAL) only	DEC 22 PM 2:26
NOTICE	REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
California Department of Corrections & Rehabilitation

AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER 2014, 29Z	PUBLICATION DATE 7-18-2014

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Involuntary Psychiatric Medication	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
--	--

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)
ADOPT 3351, 3364 , 3364.1 and 3364.2
AMEND 3351 and 3364 per agency request
REPEAL
TITLE(S) 15

3. TYPE OF FILING
<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4) <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b)) <input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1) <input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input type="checkbox"/> Other (Specify) _____ <input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
1st 15-Day Renotice (November 20, 2014 through December 8, 2014)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) <input checked="" type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> \$100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) <input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal <input type="checkbox"/> Other (Specify) _____

7. CONTACT PERSON Diane Hawkins	TELEPHONE NUMBER (916) 445-2314	FAX NUMBER (Optional) (916) 324-6075	E-MAIL ADDRESS (Optional) diane.hawkins@cdcr.ca.gov
------------------------------------	------------------------------------	---	--

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 12/15/2014
TYPED NAME AND TITLE OF SIGNATORY DIANA TOCHE, Undersecretary (A), Administration and Offender Services	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JAN 28 2015

Office of Administrative Law

TEXT OF ADOPTED REGULATIONS

In the following, underline indicates additional text and ~~strikethrough~~ indicates deleted text.

California Code of Regulations, Title 15, Division 3, Adult Institutions, Programs and Parole

Chapter 1. Rules and Regulations of Adult Operations and Programs

Subchapter 4. General Institution Regulations

Article 8. Medical and Dental Services

3351. Inmate Refusal of Treatment.

Subsection 3351(a) is amended to read:

~~(a) Health care treatment, including medication, shall not be forced over the objections of: a mentally competent inmate; the guardian of a mentally incompetent inmate; or a responsible relative of a minor inmate, except in an emergency, or as required to complete the examination or tests for tuberculosis infection, or to implement the treatment for tuberculosis disease, or unless the provisions of Probate Code sections 3200 et seq. or the procedures set forth in Keyhea v. Rushen, Solano County Superior Court No. 67432, Order Granting Plaintiffs' Motion for Clarification and Modification of Injunction and Permanent Injunction, filed October 31, 1986, hereby incorporated by reference, are followed. Healthcare treatment may be given without the inmate's consent when an emergency exists. An emergency exists when there is a sudden, marked change in an inmate's condition so that action is immediately necessary for the preservation of life or the prevention of serious bodily harm to the inmate or others, and it is impracticable to first obtain consent. When an inmate has executed an advance directive, pursuant to Probate Code sections 4600-4779 relating to the Durable Power of Attorney for Health Care, and Health and Safety Code sections 7185-7194.5 relating to the Natural Death Act, health care staff shall act in accordance with the provisions of that advance directive, as provided by law.~~

Subsection 3351(b) is unchanged.

New subsections 3351(c) through 3351(e) are adopted to read:

(c) When an inmate has a valid advance health care directive or a valid executed Physicians Orders for Life Sustaining Treatment (POLST), health care staff shall act in accordance with the provisions of the advance health care directive, or POLST, as provided by law.

(d) Each institution shall establish procedures to implement the provisions of the Health Care Decisions Law, codified in the Probate Code at Division 4.7, Section 4600 et seq.

(e) Health care treatment, including medication, shall not be forced over the objections of a mentally competent inmate; the guardian of a mentally incompetent inmate; or a responsible relative of a minor inmate, except in an emergency, or as required to complete the examination or tests for tuberculosis infection, or to implement the treatment for tuberculosis disease, or unless the provisions of Probate Code Sections 3200 et seq. or the procedures set forth in Penal Code (PC) Section 2602 are followed.

Note: Authority cited: Sections 2602 and 5058, Penal Code. Reference: Sections 2600, 2602, 5054, and 7570 et seq., Penal Code; Sections 3200 et seq., Probate Code; Thor v. Superior Court (Andrews) (1993) 21 Cal. Rptr.2d 357; ~~Keyhea v. Rushen, Solano County Superior Court No. 67432, Order~~

~~Granting Plaintiffs' Motion for Clarification and Modification of Injunction and Permanent Injunction, filed October 31, 1986; Sections 4600-4779 and 4781.2, Probate Code Sections 7185-7194.5, Health and Safety Code.~~

Article 9. Mental Health Services

3364. Involuntary Medication.

Subsections 3364(a) through 3364(d) are amended to read:

(a) If medication used in the treatment of mental disease, disorder or defect is administered in an emergency, as that term is defined in section 3351, such medication shall only be that which is required to treat the emergency condition ~~and shall be provided in ways that are least restrictive of the personal liberty of the inmate.~~ If a psychiatrist determines it is determined that further administration of such medication involuntarily is necessary for a period of longer than 72 hours and the inmate does not consent to take the medication voluntarily, the following provisions set forth in sections 3364.1 and 3364.2 shall be followed:

~~(1) The administration of involuntary medication to inmates in excess of three days shall be in compliance with those procedures required in Keyhea v. Rushen, Solano County Superior Court No. 67432, Order Granting Plaintiffs' Motion for Clarification and Modification of Injunction and Permanent Injunction, filed October 31, 1986.~~

~~(2) The administration of involuntary medication to inmates in excess of ten days shall be in compliance with those procedures required in Keyhea v. Rushen, supra.~~

~~(3) The administration of involuntary medication to inmates in excess of 24 days shall be in compliance with those procedures required in Keyhea v. Rushen, supra. The judicial hearing for the authorization for the involuntary administration of psychotropic medication provided for in part III of Keyhea v. Rushen, supra, shall be conducted by an administrative law judge. The hearing may, at the direction of the director, be conducted at the facility where the inmate is located.~~

(b) ~~Involuntary antipsychotic~~ Psychiatric medication shall not normally be involuntarily administered to an inmate in his or her housing unit. An inmate shall normally be transferred to the hospital, clinic, emergency room, or infirmary room at the institution prior to the administration of the medication. If a psychiatrist determines that the prior transfer of the inmate to such a setting would pose a greater risk to the inmate and staff than the risk involved to the inmate in receiving the medication in a non-medical setting, the ~~involuntary~~ medication may be involuntarily administered in the inmate's cell, ~~provided that~~ as follows:

~~(1) Medical staff shall alert security staff, orally and in writing, of the fact that such medication has been administered, of the date and time of administration, of possible side effects, if any, which could develop, and shall provide security staff with instructions for contacting medical staff immediately upon the development of any such side effects. On-call medical staff shall make periodic observations of the inmate and shall respond to any emergency request for medical aid. Nursing/Psychiatric Technician (PT) staff shall alert custody staff verbally that an order for involuntary medication is being implemented (either as an involuntary medication order that was ordered on an emergency basis by a psychiatrist or as a PC 2602 order for involuntary medication that was previously ordered and is now being implemented). Nursing/PT staff shall alert custody staff verbally where the involuntary medication will be administered (either in the inmate-patient's cell or in a different location). In the event the inmate-patient develops side effects from the medication, Nursing/PT staff shall contact a psychiatrist or psychiatric nurse practitioner immediately. In the event that the inmate-patient develops~~

emergent or life-threatening side effects, Nursing/PT staff shall immediately initiate the emergency response system.

(2) In all cases where it is both feasible and medically desirable, a fast-acting medication shall be utilized to facilitate the inmate's rapid transfer to a medical setting.

(3) ~~The inmate shall be considered for transfer from his or her cell to a medical setting at least once a day after the injection by a staff psychiatrist, or if a psychiatrist is not available by a staff physician, for the effective duration of the medication. After being given involuntary psychiatric medication, and if the inmate is not already housed in a medical setting such as a Correctional Treatment Center (CTC), Acute Psychiatric Program (APP), Intermediate Care Facility (ICF), Outpatient Housing Unit (OHU), or General Acute Care Hospital (GACH), the inmate shall be observed at least twice per day by mental health clinicians. If a significant adverse reaction to the medication is apparent, the inmate shall be transferred from his or her cell to a licensed medical or mental health setting for the effective duration of the medication. The staff psychiatrist or physician shall note his or her observations and decision in writing. The inmate shall be transferred to a licensed medical or mental health setting no later than 72 hours after the injection involuntary medication if the effective duration of the drug medication administered exceeds that time period.~~

(c) Each institution's ~~eChief pPsychiatrist~~, or in his or her absence, ~~eChief mMedical officer~~ Executive or designee, shall ensure that a log is maintained in which is recorded each occasion of involuntary ~~treatment medication~~ of given to any inmate. The log entries shall identify the inmate by name and number, and shall include ~~the name of the ordering physician~~, the reason for medication, and the time and date of medication. This information shall be maintained as part of an electronic medical record system. In institutions with a designated psychiatric treatment unit, a separate log shall be maintained for recording involuntary treatment and medication administered to inmates in that unit. The log shall be reviewed by the institution's chief psychiatrist, or in his or her absence, the chief medical officer at least monthly. Such logs shall be made available for review by the departmental ~~medical director~~ medical and mental health executives, upon request.

(d) When deemed necessary and clinically indicated by the treating psychiatrist, inmates subject to an involuntary medication order are also subject to monitoring of his or her medication levels to ensure presence in the bloodstream. Inmates who are subject to involuntary medication may also be required, when clinically indicated, to provide a blood or electrocardiogram test for side-effect monitoring. Laboratory tests may include, but are not limited to electrolytes, liver functions, white blood cell count, cholesterol and glucose monitoring. Each institution shall maintain a local operating procedure that logs inmates who are involuntarily required to provide blood for these purposes.

Note: Authority cited: Sections 2602 and 5058, Penal Code. Reference: Sections 2600, 2602 and 5054, Penal Code; ~~Whitaker v. Rushen, et al., USDC No. C-81-3284 SAW (N.D. Cal.); and Keyhea v. Rushen, Solano County Superior Court No. 67432, Order Granting Plaintiffs' Motion for Clarification and Modification of Injunction and Permanent Injunction, filed October 31, 1986.~~

3364.1 Involuntary Medication Definitions and Criteria

New section 3364.1 is adopted to read:

(a) Definitions:

(1) **Serious Mental Disorder** means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or grossly impairs behavior; or demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely.

(2) **Danger to Others** means the inmate has inflicted, attempted to inflict, or made a credible threat of inflicting physical harm upon the person of another and, as a result of a serious mental disorder, the inmate presents a demonstrated danger of inflicting physical harm upon others. Demonstrated danger may be based on an assessment of the inmate's present mental condition, including consideration of the inmate's historical course of a serious mental disorder, to determine if the inmate currently presents an elevated chronic risk or an imminent risk of harming another person.

(3) **Danger to Self** means the inmate has made a credible threat or has attempted to engage in an act of self-harm and the threat is ongoing; or has threatened, attempted, or inflicted serious physical injury to self, and, as a result of a serious mental disorder, the inmate presents as a demonstrated danger to self. Demonstrated danger to self may be based on an assessment of the inmate's present mental condition, including consideration of the inmate's historical course of a serious mental disorder, to determine if the inmate currently presents an elevated chronic risk or an imminent risk to his or her own safety.

(4) **Gravely Disabled** means that there is a substantial probability, due to a serious mental disorder and incapacity to accept or refuse psychiatric medication, that serious harm to the physical or mental health of the inmate will result. Serious harm means significant psychiatric deterioration, debilitation or serious illness as a consequence of his or her inability to function in a correctional setting without the supervision or assistance of others, inability to satisfy his or her need for nourishment, and/or inability to attend to needed personal or medical care, seek shelter, and/or attend to self-protection or personal safety. The probability of harm to the physical or mental health of the inmate requires evidence that the inmate is presently suffering adverse effects to his or her physical or mental health, or evidence that the inmate has previously suffered these effects in the historical course of his or her mental disorder and that his or her psychiatric condition is again deteriorating. The fact that an inmate has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the inmate.

(5) **Informed Consent** means that the inmate, without duress or coercion, is able to clearly give consent for the proposed psychiatric medication to the treating psychiatrist. In order to demonstrate that an inmate has given informed consent, the following criteria shall apply:

A. The inmate has been advised by the psychiatrist or a psychologist regarding the nature and seriousness of his or her mental illness or disorder, and has communicated a willingness to pursue a recommended course of treatment.

B. A psychiatrist has explained the nature of the medication to be used in the proposed treatment, including its probable frequency and duration, and the inmate, using a rational thought process, has communicated his or her understanding of the fundamental meaning of the information provided.

C. The psychiatrist has stated the probable degree and duration (temporary or permanent) of improvement or remission of the inmate's condition to be expected, with or without medication, and the inmate has communicated a choice.

D. The inmate has been advised by a psychiatrist of how the medication is thought to work and the nature, degree, duration, and probability of risk and/or side effects commonly associated with the medication. In addition, this would include advising the inmate of how the medication acts to prevent, reduce, or address a particular mental health condition. The inmate has communicated a basic understanding of the information provided.

E. The inmate has been advised by a psychiatrist if there is a difference of opinion within community standards as to the effectiveness of the proposed medication and the inmate has communicated a basic understanding of the information.

F. The inmate has been advised of reasonable alternative treatments, if any, and why the psychiatrist is recommending a particular medication, and the inmate has communicated a basic understanding of the information.

G. The inmate has been advised by a psychiatrist of his or her right to accept or refuse the proposed medication, and of their right to revoke consent for any reason, at any time, prior to or between medications, and is able to articulate by means of a rational thought process the basis for accepting or rejecting the recommended course of treatment.

H. The inmate exhibits a reasonable understanding of his or her current condition and symptoms.

I. The inmate demonstrates capacity to consent to treatment, as defined in Subsection (a)(7).

(6) **Informed Refusal** occurs when an inmate who has documented capacity to give informed consent and elects to knowingly refuse to consent to a given medication or recommended course of treatment.

(7) **Capacity or Lack of Capacity** is to be determined by evaluating the person's: (a) ability to communicate a choice; (b) ability to understand relevant information; (c) ability to appreciate the nature of the situation and its likely consequences; and (d) ability to manipulate information rationally.

(8) **Involuntary Medication** means the administration of any psychiatric medication or drug to an inmate by the use of force, discipline, or restraint, including administration upon an inmate who lacks capacity to accept or refuse medication. Involuntary psychiatric medications may be utilized after less restrictive non-pharmaceutical alternatives have been deemed unavailable or clinically inappropriate, or in a medical emergency. If psychiatric medication is administered during an emergency, the medication shall only be that which is required to treat the emergency condition and shall be administered for only so long as the emergency exists.

(9) **Psychiatric Medication** means drugs or medications used in the treatment of a serious mental disorder, mental disease, or mental defect, or utilized to treat side effects caused by these medications or any medications used to augment or temper the effects of psychiatric medications. The drugs include, but are not limited to, antipsychotics, antidepressants, sedatives, or mood stabilizers, in both their short-acting and long-acting formulations.

(10) **Elevated Chronic Risk** means the serious and persistent presentation of clinical factors that suggests an inability to adequately navigate within society or inability to effectively navigate within a structured environment such that, based on historical course of mental disorder, there is a reasonably foreseeable elevated risk of self-harm, violence, or grave disability.

(11) **Imminent Risk** means the presence of clinical and situational factors that suggest a significant risk of violence toward others, self, or grave disability and requires immediate intervention.

Note: Authority cited: Sections 2602 and 5058, Penal Code. Reference: Sections 2600 and 2602, Penal Code.

3364.2 Involuntary Medication Hearing Procedures

New section 3364.2 is adopted to read:

(a) Initial involuntary medication proceedings shall be legibly documented and noticed by CDCR MH-7363 (Rev. 01/15), Involuntary Medication Notice and CDCR MH-7366 (Rev. 01/15), Inmate Rights Notice-Involuntary Medication, which are incorporated by reference. Any information that will not fit on the initial Involuntary Medication Notice form (CDCR MH-7363) should be put on the CDCR MH-7363-B, Involuntary Medication Notice: ADD-A-PAGE (01/15), which is incorporated

by reference. These forms may be either dictated, filled out by hand or by computer, and served to the inmate, the inmate's appointed or retained attorney, and the state's attorney. The inmate shall be personally served. A copy shall be filed with the Office of Administrative Hearings the same day the inmate is served with CDCR MH-7363 and CDCR MH-7366.

(b) Renewal involuntary medication proceedings shall be legibly documented and noticed by CDCR MH-7368 (Rev. 01/15), Renewal of Involuntary Medication Notice, which is incorporated by reference, and CDCR MH-7366. Any information that will not fit on the Renewal of Involuntary Medication Notice form (CDCR MH-7368) should be put on the CDCR MH-7368-B, Renewal of Involuntary Medication Notice: ADD-A-PAGE (01/15), which is incorporated by reference. These forms may be either dictated, filled out by hand or by computer, and served on the inmate, the inmate's appointed or retained attorney, and the state's attorney. The inmate shall be personally served. A copy shall be filed with the Office of Administrative Hearings the same day the inmate is served with CDCR MH-7366 and CDCR MH-7368.

(c) The CDCR MH-7363 and CDCR MH-7368 forms shall be reviewed and signed under penalty of perjury by a psychiatrist prior to filing with the Office of Administrative Hearings. Declarations signed under penalty of perjury may utilize digital authentication and verification by a psychiatrist to facilitate electronic transmission. Staff such as psychologists, nurses, psychiatric technicians, and licensed clinical social workers who work with a psychiatrist may be used to record observations or help gather necessary data to complete portions of the CDCR MH-7363 or CDCR MH-7368.

(d) Pleadings that affect the substantial rights of the inmate, such as the addition of a new factual basis, or the dismissal of a case, shall be served on the inmate and the inmate's attorney. Supplemental petitions, notices from the Office of Administrative Hearings, and orders setting a matter for hearing do not need to be served on the inmate, but must be served on the inmate's attorney.

(e) Next of kin are not notified unless the inmate requests they be notified.

(f) The institution's Medication Court Administrator (MCA) shall collect and securely transmit appropriate supporting documentation of any filed petition by electronic means to both state and inmate attorneys within three (3) business days from the date of service on the inmate. In the unlikely event this is not possible, the institution should attempt to allow the inmate's attorney access to view the pertinent records on site prior to the hearing.

(g) In any proceeding involving a condemned inmate, a digital version of any petition initiating or renewing the involuntary medication order shall be sent by the institution's MCA to the California Appellate Project via email to keyhea@capsf.org, who will act as a distribution point for involved capital attorneys, and to the Department of Justice, Capital Unit. This is a courtesy notice, and the Office of Administrative Hearings shall continue to appoint an attorney for the inmate unless an outside retained attorney enters an appearance. Administrative Law Judges (ALJ) shall retain the discretion to manage all aspects of the hearing and courtroom process on the day of the hearing.

(h) On or before the day of hearing, the institution shall provide a space for inmate counsel and each inmate-client to meet confidentially.

(i) On the day of the hearing, the inmate shall again be given the advisements listed in PC Section 2602(c)(7)(B) and further advised that he or she may attend the hearing and, if mentally capable, may elect to personally agree to the petition in the presence of the ALJ, or may contest the petition with the assistance of counsel. In the event the inmate refuses to meet with his/her attorney, the advisements may be given to the inmate by a sworn correctional officer or by a sworn MCA.

(j) The judicial hearing for an order authorizing the involuntary administration of psychiatric medication to an inmate shall be conducted by an ALJ. The hearing shall be conducted at the institution or facility designated in the petition that has been served on the inmate.

(k) The inmate shall be brought to the hearing unless one of the following exceptions has occurred:

(1) Where the inmate is unable to attend the hearing by reason of a medical inability. CDCR shall establish the inmate's medical inability by declaration or testimony of a medical doctor, psychiatrist or psychologist. Emotional or psychological instability is not good cause for the absence of the inmate from the hearing unless, by reason of such instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the inmate. The ALJ and the attorneys may conduct a hearing in a Mental Health Crisis Bed or other medical setting as long as safety precautions are in place.

(2) If a sworn correctional officer or other CDCR employee indicates that the inmate is not willing to attend the hearing or that the inmate expressly chooses not to attend the hearing, or that the inmate does not wish to contest the petition, the ALJ presiding over the hearing shall appoint the MCA, the inmate's attorney, or other sworn person to do the following:

(A) Interview the inmate personally and provide enough facts to allow the judge to determine whether the inmate is competent to knowingly and intelligently waive his or her attendance at the hearing;

(B) Inform inmate of the contents of the petition, of the nature, purpose and effect of the proceeding, the right of the inmate to attend the hearing, to oppose the request for involuntary medication, to be represented by legal counsel, to confront the witnesses, to have his or her attorney cross-examine witnesses, and to testify on his or her own behalf;

(C) Determine whether the inmate is able to attend and participate in the hearing and, if able to attend, whether the inmate wishes to attend the hearing;

(D) Determine whether the inmate wants to contest the petition;

(E) Determine whether the inmate wishes to speak to his or her appointed attorney or, if the inmate has retained private counsel, obtain the name or any other identifying information about private counsel so that the petition and supporting documentation can be served by the MCA on privately retained counsel and a new hearing date can be set within a reasonable time for the appearance of private counsel.

(l) The ALJ shall take sworn testimony from the person who contacted the inmate to establish that the inmate had capacity to enter into a waiver of appearance and that the waiver was knowing and voluntary.

(m) After receiving this information, the ALJ must make an express finding that the inmate's presence at the hearing is excused and/or find that the inmate has made a knowing and intelligent waiver of his or her right to be present at the hearing. If any party raises a question as to the inmate's competency to waive presence at the hearing, the judge should order the inmate brought to the hearing, or conduct the hearing at the inmate's cell.

(n) If the inmate is unable to attend the hearing due to a medical condition, the ALJ may continue the hearing if it appears that the inmate will be able to attend the hearing within a reasonable time, order that involuntary medication of the inmate may be administered until the new hearing date, or proceed with the hearing in the absence of the inmate if it appears that the inmate's medical condition will preclude his or her appearance within a reasonable time period.

(o) Where feasible, renewal interviews shall be conducted in person with the inmate by a psychiatrist. When it is not possible to conduct the interview in person, the use of telepsychiatry (video conference) is acceptable.

(p) Inmate-patients subject to involuntary medication who wish to seek reconsideration pursuant to PC 2602(c)(10) shall be provided a form CDCR MH-7369 (01/15), Penal Code Section 2602 Reconsideration, which is incorporated by reference. The inmate-patient shall be responsible for sending the form as legal mail to the Office of Administrative Hearings within one year of the decision for which review is sought. The Office of Administrative Hearings shall notice all involved parties of its decision on the inmate's reconsideration application.

(q) Termination of Psychiatric Medication and Re-Initiation, if Warranted: In any situation where the prescribing physician or an ALJ orders termination of psychiatric medication, regardless of the reason, the inmate shall be withdrawn from the medication in a medically appropriate manner consistent with standards of professional practice. In the event the inmate then begins to show signs or symptoms that would warrant re-initiation of involuntary medication, clinicians must allow 72 hours between the termination of the earlier medication event before starting a new medication event. Under no circumstances does this section prohibit a physician from acting in a medical emergency.

Note: Authority cited: Section 2602, Section 5058, Penal Code. Reference: Sections 2600 and 2602, Penal Code.

FINAL STATEMENT OF REASONS

The Initial Statement of Reasons is incorporated by reference.

The California Department of Corrections and Rehabilitation (CDCR) proposes to amend Sections 3351 and 3364 and to adopt new sections 3364.1 and 3364.2 of the California Code of Regulations, Title 15, Division 3, concerning Involuntary Psychiatric Medication.

UPDATES TO THE INITIAL STATEMENT OF REASONS

On July 18, 2014 the Notice of Proposed Regulations (NCR) for Involuntary Psychiatric Medication was published, which began the public comment period. The Department's NCR# 14-07 was mailed the same day, in addition to being posted on the Department's internet and intranet websites. The public hearing was held on September 8, 2014. No individuals provided verbal comments. During the 45-day public comment period, five written comments were received.

A Notice of Change to Text as Originally Adopted (15-Day Renotice), which included revisions to the text and forms, was distributed on November 20, 2014 to all persons whose comments were received during the public comment period and all persons who requested notification of the availability of such changes. These documents were also posted on the Department's Internet and Intranet websites. The changes and reasons for them are found under the heading "*Changes to Proposed Text that was Originally Noticed to the Public.*"

During the 15-day renotice comment period, no comments were received.

CDCR FORMS IN THE CALIFORNIA CODE OF REGULATIONS (CCR)

This note explains the Department's justification for incorporating forms by reference rather than printing them in the CCR text itself. The CDCR uses over 1,500 forms, most of which are regulatory. It would be unduly cumbersome, expensive and impractical to print all these forms in the Title 15, therefore the CDCR has always incorporated forms by reference, except in specific circumstances which no longer apply in the case of these regulations.

DOCUMENTS AVAILABLE TO THE PUBLIC

All of the forms relating to this proposed regulation, which were incorporated by reference, were available upon request, and were made available on the CDCR website.

DETERMINATION

The Department has determined that no alternative considered would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulations, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Except as set forth and discussed in the summary and responses to comments, no other alternatives have been proposed or otherwise brought to the Department's attention that will alter the Department's decision.

ASSESSMENTS, MANDATES, AND FISCAL IMPACT

The Department has determined that this action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The Department, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

The Department has determined that this action imposes no mandates on local agencies or school districts or a mandate which requires reimbursement pursuant to Government Code Sections 17500 - 17630, and no fiscal impact on State or local government, or Federal funding to the State, or private persons.

The Department has determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of State prisons.

The Department has determined that the proposed action will have no significant effect on housing costs. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

CHANGES TO PROPOSED TEXT THAT WAS ORIGINALLY NOTICED TO THE PUBLIC (FIRST 15-DAY RENOTICE):

Subsection 3351(e) is amended to establish the acronym for Penal Code (PC) as the first occurrence throughout the proposed text.

Subsection 3364(a) is amended to delete the phrase, “and shall be provided in ways that are least restrictive of the personal liberty of the inmate.” New language regarding the use of less restrictive alternatives is added under subsection 3364.1(a)(8). These changes are made as a result of public comment.

Subsection 3364(b) is amended to remove the words “provided that” and replace them with the words “as follows.” This change is intended to make the sentence read clearly and correctly.

Subsection 3364(b)(1) is amended to delete the entire portion of text which was originally noticed to the public. New language is added to clarify who should alert custody staff that an order for involuntary medication is being implemented. In addition, the new language provides clarification on the process to be followed in the event that an inmate-patient develops side effects from the medication. This subsection has been scrutinized by the California Department of Corrections and Rehabilitation (CDCR) Mental Health Division as well as California Correctional Healthcare Services, and represents an operational procedure that reflects how their respective management structures would like the two units to work together at the institutional level.

Subsection 3364(b)(3) is amended to delete the reference to “Triage and Treatment Area (TTA)” in response to public comment on portions of this subsection. This subsection has been scrutinized by CDCR Mental Health Division and California Correctional Healthcare Services, and represents an operational procedure that reflects how their respective management structures would like the two units to work together at the institutional level.

Subsection 3364(c) is amended to restore language which refers to the requirement that clinicians record the reason for administration of medication. This is in response to public comment and was reviewed with California Correctional Healthcare Services, including nursing executives, who supported the language to include the reason for administration of medication as good clinical practice. In addition, “medical and mental health executives” is added to replace the named executive titles, as those are

subject to change over time. These changes are made as a result of public comment.

Subsection 3364.1(a)(2) is amended to delete references to “substantial” before the words “physical harm.” This was a drafting error in the text which was originally noticed to the public.

Subsections 3364.1(a)(5)(A), 3364.1(a)(5)(E) and 3364.1(a)(5)(H) related to “informed consent” are amended to delete language in subsections 3364.1(a)(5)(A) and 3364.1(a)(5)(E) which pertains to “an inmate’s rational thought process,” since this language points towards the definition of capacity. Also, deleted from subsection 3364.1(a)(5)(H) was language pertaining to “consistency of choice,” since this language points towards the definition of capacity. These changes are made as a result of public comment.

Subsection 3364.1(a)(5)(I) is adopted to include language to clarify that one component of the definition of “informed consent” is capacity to consent to treatment.

Subsection 3364.1(a)(7) is amended to change the heading from “Incapacity to Refuse Medication” to “Capacity or Lack of Capacity.” In addition, the language has been revised to provide clarification as to the four elements needed for capacity, in response to public comment received. The four elements comprising capacity are taken directly from an American Psychological Association research study, as cited below. That study reports on a project designed to develop reliable and valid information with which to address clinical and policy questions regarding mentally ill persons' abilities to make decisions about psychiatric treatment.

Four legal standards for determining decision-making competence are described in the relied-upon study: 1) the abilities to communicate a choice, 2) understand relevant information, 3) appreciate the nature of the situation and its likely consequences, and 4) rationally manipulate information. Research related to mentally ill persons' capacities regarding these matters is reviewed. Principles underlying the design of the MacArthur Treatment Competence Study are described. The MacArthur Treatment Competence Study I: Mental illness and competence to consent to treatment. *Law and Human Behavior*, 19(2), 105-126. doi:10.1007/BF01499321. Copyright © 1995 by the American Psychological Association. Reproduced with permission. (<http://dx.doi.org/10.1007/BF01499321>). These factors have been recognized in *Riese v. St. Mary's Hospital and Medical Center* (1987) 209 Cal.App.3d 1303 and *In re Conservatorship of Burton* (2009) 170 Cal.App.4th 1016. This study will be incorporated into the proposed regulations as a report relied upon.

Subsection 3364.1(a)(8) is amended to delete the words “is incompetent” and replace with “lacks capacity.” Also deleted is the portion of the sentence that reads, “or lacks the capacity to accept or refuse medication as defined herein.” These changes are made for added clarity. In addition, language was added in response to comments received, to clarify that involuntary medication should be used after less restrictive alternatives have been evaluated and found clinically inappropriate.

Subsection 3364.1(a)(10) is adopted to add language to provide a definition for “elevated chronic risk” in response to public comment which stated that the definitions for “danger to others” and “danger to self,” as defined in subsections 3364.1(a)(2) and (3), should apply only in the event of immediate danger. The Department has determined that the Legislature intended to create a two-track process (emergency and non-emergency petitions) that differs from the precedent stated by the commenter. As such, the Department needs to identify, with as much specificity as possible, the criteria for identifying and

routing a case for immediate intervention (emergency petition), or for more measured intervention (non-emergency petition) which considers the level of risk presented by the patient.

Subsection 3364.1(a)(11) is adopted to add language to provide a definition for “imminent risk” in response to public comment which stated that the definitions for “danger to others” and “danger to self,” as defined in subsections 3364.1(a)(2) and (3), should apply only in the event of immediate danger. The Department has determined that the Legislature intended to create a two-track process (emergency and non-emergency petitions) that differs from the precedent stated by the commenter. As such, the Department needs to identify, with as much specificity as possible, the criteria for identifying and routing a case for immediate intervention (emergency petition), or for more measured intervention (non-emergency petition) which considers the level of risk presented by the patient.

Subsections 3364.2(a) and (b) are amended to update revision dates on forms used by the involuntary medication program. In addition, reference is made to two newly-created forms: Involuntary Medication Notice: ADD-A-PAGE, CDCR MH-7363-B (01/15) and Renewal of Involuntary Medication Notice: ADD-A-PAGE, CDCR MH-7368-B (01/15). These forms are being incorporated by reference into these regulations. This is a clerical change to reflect that these new forms have been created after the proposed regulations were originally published, and were created due to limitations on space on the existing form and the way that PDF forms accept typed input.

Subsection 3364.2(g) is amended to add language to clarify the role of the Office of Administrative Hearings and management of appointed and retained counsel. This language was also added to provide clarification of the role of the appointed ALJ in the involuntary medication hearing process.

Subsection 3364.2(i) is amended to remove the term “Administrative Law Judge” and replace it with “ALJ,” as this acronym has been defined in previous text. Language was added to the day-of-hearing procedures for inmates. The Department is adding language to this subsection based upon input from ALJs and inmate attorneys. This is necessary in order to ensure a uniform practice statewide to have the ALJ deputize a suitable person under oath to interview an inmate for a knowing and intelligent waiver of presence at a hearing.

Subsection 3364.2(j) is amended to remove the portion of language that reads, “where the inmate is located” and replace it with “or facility designated in the petition that has been served on the inmate.” The Department received feedback from ALJs and inmate attorneys indicating that some inmates may have a hearing held at a local community hospital or a county jail, and that the proposed language was too restrictive. Accordingly, the subsection was changed to note that the hearing will be held at the facility noticed in the petition.

Subsection 3364.2(k)(1) is amended to revise language to insert the phrase “medical doctor” which was inadvertently left out of the original text due to a drafting error. The Department received feedback from a variety of sources that inmates may go out to the hospital for any medical reason, and in the event the Department needs to establish the reason for the inmate’s non-appearance at a hearing, a medical internist (as opposed to a mental health specialist) may be best suited to provide that information. Accordingly, the subsection was changed to broaden the type of witness who can attest to the reason for an inmate’s medical absence.

Subsection 3364.2(k)(2) is amended to revise the portion of text which makes reference to use of a “neutral” CDCR employee and replaces it with the use of a “sworn” person, as delegated by the ALJ. In

addition, the word “impartial” is removed. The Department received feedback from ALJs and inmate attorneys that the use of a sworn person was a better practice to use when making an inquiry into an inmate’s competence or taking a knowing or intelligent waiver in regard to attending a hearing.

Subsection 3364.2(l) is adopted to add language directing the ALJ to put testimony on the record from the person who contacted the inmate at their cell regarding any refusal or inability to attend a hearing. This language and procedure was inadvertently omitted from the original draft, but critically important after creating all the other procedural due process protections in order to make a record of what has transpired.

Existing subsection 3364.2(o) is amended to renumber existing text language and to relocate it under 3364.2(q), in order to accommodate the new text language under 3364.2(o) and 3364.2(p).

New subsection 3364.2(o) is adopted to add language addressing the desired protocol for renewal interviews between the patient and the doctor. This subsection is added to address the issue of how and when telepsychiatry (video conference) might be used in the renewal process for involuntary medication. The Department has received feedback from ALJs and inmate attorneys indicating a general disfavor for the use of telepsychiatry to interview a patient, thus this subsection suggests that renewal interviews be conducted in person, but allows for use of telepsychiatry if not feasible to interview in person.

New subsection 3364.2(p) is adopted to add language which includes the creation of new form CDCR MH-7369 (01/15), Penal Code 2602 Reconsideration, which is incorporated by reference into the regulation text. This new form is necessary for use as an inmate’s application for the reconsideration process, under PC 2602(c)(10). In addition, instructions are included on how to process the form, and the timeframe for submittal. This subsection is added in response to a public comment.

PUBLIC HEARING COMMENTS

Public Hearing: September 8, 2014

No verbal comments were received at the public hearing.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:

COMMENTS #1

Comment 1: Commenter provides several pieces of information regarding their own individual commitment and sentence calculation circumstances that are unrelated to the proposed regulations. Commenter states their belief that inmates have no say regarding forced medication once they have submitted to it. Commenter suggests that there is a deceptive part to being medicated, as this does not provide the necessary help. Commenter states their belief that the medical process has obstructed their intelligence and right to due process.

Accommodation: None.

Response 1: The proposed regulations deal with establishing appropriate procedural due process procedures to bring inmates to hearing in order to evaluate the necessity for psychiatric medication. Although the commenter alleges specific wrongs tied to involuntary medication, the proposed language

does not have any impact on an inmate's individual release date or sentence calculation, as alleged by the commenter.

COMMENTS #2

Comment 2A: Commenter states their objection to the removal of language from subsection 3364(a) regarding the need to use the “least restrictive alternative.” Commenter is requesting duplication of language that is already set forth in PC Section 2602(c)(8). This language refers to the ALJ finding that the inmate has serious mental illness and that there is no less intrusive alternative to psychiatric medication available. Commenter is also requesting duplication of language already set forth in PC 2602(d) which provides that “if psychiatric medication is administered during an emergency, the medication shall only be that required to treat the emergency condition and shall be administered for only so long as the emergency continues to exist. Previous language found in subsection 3364(a) provided that “if medication used in the treatment of mental disease, disorder or defect is administered in an emergency, such medication shall only be that which is required to treat the emergency condition and shall be provided in ways that are least restrictive of the personal liberty of the inmate.”

Accommodation: Partial accommodation.

Response 2A: The concept set forth in the former version of section 3364(a) was codified as PC 2602(d). The language appears again under the new subsection 3364.1(a)(8). This is consistent with PC Section 2602(c)(8), which requires a judicial finding in every case that there is no less intrusive alternative to involuntary medication. The language under subsection 3364(a)(8) now references both the “least restrictive” component for emergency situations as well as a component of the judicial finding for each case brought to hearing.

Comment 2B: Commenter states that the proposed regulations are inadequate in providing a way for inmate-patients to exercise their right to file a motion for reconsideration of a determination that he or she may receive involuntary medication.

Accommodation: Partial accommodation.

Response 2B: Inmate-patients may seek reconsideration of their case on form CDCR MH-7369 (01/15), Penal Code 2602 Reconsideration, which is incorporated by reference into the regulations, and developed in conjunction between CDCR and the Office of Administrative Hearings. Language and information regarding this new form has been added in subsection 3364.2(p). Inmate-patients are advised of their right to seek reconsideration at the time they are served with either initial or renewal paperwork via this inmate rights form. There is currently a uniform, statewide process in place for reconsideration.

Comment 2C: Commenter states that the definition of “incapacity to refuse medication” is overbroad.

Accommodation: Partial accommodation.

Response 2C: The definition of capacity or lack of capacity has been modified to track verbatim the four sub-components of legal competency in mental health patients as discussed in Law and Human Behavior, American Psychological Association, Vol. 19, No. 2, 1995, The MacArthur Treatment Competence Study, “Mental Illness and Competence to Consent to Treatment,” which factors have been recognized in *Riese v. St. Mary's Hospital and Medical Center* (1987) 209 Cal.App.3d 1303 and *In re Conservatorship of Burton* (2009) 170 Cal.App.4th 1016.). In addition, the definition of “incapacity to refuse medication” was modified, under subsection 3364.1(a)(7).

COMMENTER #3

Comment 3A: Commenter states their objection to the removal of language from subsection 3364(a), regarding the need to use the “least restrictive alternative.” Commenter objects to removal of language under subsection 3364(a) which requires that emergency medication be provided in ways that are least restrictive to the personal liberty of the inmate. Previous language found in subsection 3364(a) provided that “if medication used in the treatment of mental disease, disorder or defect is administered in an emergency, such medication shall only be that which is required to treat the emergency condition and shall be provided in ways that are least restrictive of the personal liberty of the inmate.” Commenter also suggests promulgation of guidelines regarding type, dosage, and duration of medication to prevent improper usage of medication for such purposes as discipline, retaliation, coercion, or convenience, and suggests that these guidelines be incorporated into training materials provided to Departmental staff.

Accommodation: Partial accommodation.

Response 3A: Specifically, in regard to language requiring that emergency medication be provided in ways that are least restrictive to the personal liberty of the inmate, that language was codified into PC Section 2602(d). The concept of “least restrictive alternative” appears again under new subsection 3364.1(a)(8). With regard to what the Department should or should not provide in terms of staff training and guidelines, the comment is irrelevant to this regulatory package.

Comment 3B: Commenter states their objection to removal of language requiring maintenance of a separate log, name of the ordering physician and the reason for medication to be recorded in every instance of involuntary medication, and a review by the institution’s Chief Psychiatrist or Chief Medical Officer at least monthly. The language removed from subsection 3364(c) specified that each institution’s Chief Psychiatrist or Chief Medical Officer shall ensure that a log is maintained in which each occasion of involuntary treatment of any inmate is recorded. The log entries identify the inmate by name and number, and include the name of the ordering physician, the reason for medication, and the time/date of the medication. The log shall be reviewed by the institution’s Chief Psychiatrist, or Chief Medical Officer at least monthly. Logs shall be made available for review by the departmental Medical Director upon request.

Accommodation: Partial accommodation.

Response 3B: Language has been restored to subsection 3364(c) which refers to the requirement that clinicians record the reason for administration of medication. For example, the Medication Administration Record identifies the name of the prescribing doctor, the medication, and the time of administration, and pharmacy databases contain prescriber information. The following information is available electronically: name of the inmate, name of the medication, reason for the medication, date and time of administration, the dose, and the place of administration. Edits to this subsection were intended to reduce duplicative tasks and to reflect current practices and the movement toward electronic charting, and as a regular and ongoing practice, nursing and psychiatry management do reviews of these records.

Comment 3C: The definitions for “danger to self” and “danger to others” should follow precedent by specifying “immediate” danger.

Accommodation: None.

Response 3C: The commenter cites precedent from Title 22 for Federal hospitals and State nursing facilities. These are inappropriate for use in a correctional setting. PC Section 2602 provides for both non-emergency as well as emergent petitions, which represents a change in the law starting January 1,

2012. In response to this comment, the Department has added definitions for “elevated chronic risk” and “imminent risk” shown at subsections 3364.1(a)(10) and 3364.1(a)(11).

Comment 3D: Commenter states that the definition of “incapacity to refuse medication” is overbroad.

Accommodation: Partial accommodation.

Response 3D: See Response 2C.

Comment 4A: The commenter is concerned that many due process procedures are being eroded.

Accommodation: None.

Response 4A: Lacking further clarification as to what the areas of concern are, the Department cannot respond to this.

Comment 4B: The commenter expresses concern that the definition of ‘grave disability’ is too broad and unclear.

Accommodation: None.

Response 4B: The Department is adopting definitions that lead to constitutionally-adequate mental health care which equates to timely intervention before an inmate with serious mental illness deteriorates to the point of uncontrollable mania, delusions, paranoia, catatonia, or severe depression. As noted in the documentation “Elements of an Ideal Statutory Scheme” (Stetin and Lamb, February 2014), grave disability is applicable to a seriously mentally ill person with a need-for-treatment if he or she suffers profoundly, even if he or she meets basic survival needs and exhibits no violent or suicidal tendencies. (Id. at pg. 3.) Civil definitions requiring clinicians to wait for imminent disaster or actual florid decompensation are inadequate in a correctional setting.

Comment 4C: The commenter is concerned that psychiatric medications have serious side effects.

Accommodation: None.

Response 4C: PC Section 2602 requires the physician to review and evaluate the risk(s) and benefit(s) of each medication with the patient. The statute already has a requirement to utilize least restrictive alternatives.

Comment 4D: The commenter believes that language from the *Keyhea* injunction should be used and that these regulations will lead to lengthy and costly litigation.

Accommodation: None.

Response 4D: The comment is speculative.

Comment 5A: Commenter states their objection to the removal of language under subsection 3364(a) regarding the need to use the “least restrictive alternative.” Specifically, commenter objects to removal of language stating that emergency medication “shall be provided in ways that are least restrictive of the personal liberty of the inmate” and states a concern that medication could be used as a chemical or physical restraint. Previous language found in subsection 3364(a) provided that “if medication used in the treatment of mental disease, disorder or defect is administered in an emergency, such medication

shall only be that which is required to treat the emergency condition and shall be provided in ways that are least restrictive of the personal liberty of the inmate.”

Accommodation: Partial accommodation.

Response 5A: See Response 3A.

Comment 5B: Commenter objects to the term “medically-suitable triage area” under subsection 3364(b) as a permissible location for involuntary medication.

Accommodation: Full accommodation.

Response 5B: The reference to “Triage and Treatment Area” was removed during the 15-day renote for modified text. Subsection 3364(b)(1) has been revised to reflect the institutional operating procedures agreed on by CDCR Mental Health Division and the California Correctional Healthcare Services. The term “medically suitable triage area” was removed during the Office of Administrative Law (OAL) review.

Comment 5C: Commenter notes that 3364(b)(3) changes the observation time of an inmate from once per day to twice per day, but commenter thinks that the observation should be even more frequent.

Accommodation: None.

Response 5C: Commenter fails to note the context of the sentence: “if the inmate is not already housed in a Correctional Treatment Center, Acute Psychiatric Program, Intermediate Care Facility,” etc. These settings offer 24-hour nursing care and there is staff available around the clock. The twice-per-day change noted by commenter represents a doubling of what the Department did previously, and this scenario will be infrequent since most inmate-patients are already housed in inpatient units.

Comment 5D: Commenter states their objection to removal of language in subsection 3364(c) requiring the name of the ordering physician and reason for medication to be recorded and logged in every instance of involuntary medication to ensure that medication is not being used for discipline, coercion. In addition, commenter suggests the language may be used to record whether a specific inmate has previously been involuntarily medicated, and as a tool for finding alternative approaches in the event medication is repeatedly not working with a specific inmate, or as a training tool in general. Commenter suggests documentation be maintained to ensure that medication is not used to educate patients about “socially acceptable behavior,” and/or to prevent the disruption of the therapeutic setting.

Accommodation: Partial accommodation.

Response 5D: See Response 3B. In addition, inmate behavior and/or decompensation are documented on physician and/or nursing notes, all recorded in the normal course of business, and also on the CDCR MH-7363 form. Behavior that aligns with PC 2602 criteria will justify the initiation of involuntary medication. The physician and/or nursing notes show the name of the physician, the time and date of initiation, and the factors that support the basis for initiation.

Comment 5E: Commenter alleges that the Department is creating a “mandatory” monitoring of medication levels that amounts to a new chemical restraint in 3364(d).

Accommodation: None.

Response 5E: As written, the proposed regulations state “when deemed necessary and clinically indicated by the treating psychiatrist [. . .].” This subsection was specifically drafted so that it would be applied to clinical factors based upon the inmate’s entire presentation, which may include age, weight, genetics, and other prescribed medications.

Comment 5F: Commenter states that the definitions for “danger to self” and “danger to others” should follow precedent by specifying that the danger must be “immediate” or “imminent,” based on the inmate’s *present behavior* in order to protect the patient from abuses.

Accommodation: None.

Response 5F: See Response 3C.

Comment 5G: Commenter states that the definition for “informed consent” should not contain the phrase which relates to use of a “rational thought process.”

Accommodation: Full accommodation.

Response 5G: Use of the phrase “by means of a rational thought process” has been removed from 3364.1(a)(5)(A) and 3364.1(a)(5)(E). Subsection 3364.1(a)(5)(H) was edited to remove the last 18 words that dealt with capacity. Subsection 3364.1(a)(5)(I) was added to specify that in order to give informed consent, an inmate must have capacity. Subsection 3364.1(a)(7) was re-titled from “Incapacity to Refuse” to a more general topic detailing how to evaluate “Capacity or Lack of Capacity.”

NON-SUBSTANTIVE CHANGES MADE TO PROPOSED REGULATION TEXT DURING OAL REVIEW:

Subsection 3364(b) is amended to remove the phrase “medically-suitable triage area” in response to comment. This change is considered non-substantive because this was newly-proposed text and the Department made a decision not to go forward with it.

Subsection 3364.1(a)(8) is amended to add language taken from PC 2602(d), and adding it to the end of the paragraph under this subsection. This change is considered a non-substantive because it is a restatement of language under PC 2602(d). This additional language duplicates a provision of statute under PC 2602(d), but such duplication is necessary to satisfy the clarity standard of Government Code Section 11349.1(a)(3) and to accommodate several public comments.

Subsection 3364.2(l) is amended to remove the phrase “at the cell” because the proposed regulations also allow for an inmate to be treated at other locations rather than the inmate’s cell, such as a medical setting. This change is considered non-substantive because it provides consistency in the regulation language.

Subsection 3364.2 is amended to renumber subsections following 3364.2(k)(2)(E). This change was done in order to provide for a more logical sequencing of the provisions and for added clarity, and is considered non-substantive for this purpose.

Non-substantive changes are made to each of the six forms that are a part of this proposed regulation package. For consistency and clarity, the word “court” was replaced with “hearing” or “PC 2602.” This change was made in order to clarify that hearings required under PC Section 2602, which are considered administrative hearings, are different than hearings held in a court of law, which are not required by PC

Section 2602. These changes are considered non-substantive because they make the forms consistent with PC Section 2602.

Additional non-substantive changes have been made throughout the text document during the OAL review. These changes to text are made to ensure clarity, consistency, proper grammar, punctuation and renumbering.