

ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAW
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September 5, 2018

Via U.S. Mail and E-mail (DSH.Regulations@dsh.ca.gov)

California Department of State Hospitals
Regulations Unit
Electronic Property
1600 9th Street, Room 410
Sacramento, CA 95814

Re: Comments to Proposed Amendment to Patient Electronic Property Regulation, 9 C.C.R. § 4350 (“Contraband Electronic Devices with Communication and Internet Capabilities”)
Notice File No. Z-2018-0724-04; Hearing date: Sept. 20, 2018

Dear Sir or Madame:

The Alliance for Constitutional Sex Offense Laws (ACSOL) submits these comments to the proposed regulatory amendments to California Code of Regulations, Title 9, section 4350 (the “Regulation”), which will prohibit the possession of numerous electronic devices by patients at California State Hospitals.

As acknowledged in DHS’s Initial Statement of Reasons (ISR), dated August 3, 2018, there are numerous “therapeutic uses of electronics.” (ISR, at 18.) The use of electronic devices is supportive of and necessary for the treatment programs provided by DSH-Coalinga, as well as to secure the legal rights of patients. For example, patients use computers and electronic storage devices to complete the work required of their treatment plans, to print documents used in treatment, and to create therapeutic writings. Patients also use these tools in connection with protected First Amendment activity, such as legal research and correspondence, the preparation of court briefs, and political activity. This is especially true at DSH-Coalinga where, in connection with the recent November 7, 2017 election, patients engaged in lawful, high-profile, and effective advocacy concerning a local sales tax initiative of concern to Coalinga residents. DSH-Coalinga patients specifically relied upon computers and electronic storage devices to prepare and organize voter information, and other First Amendment activity. Finally, patients also rely upon electronic devices for passive entertainment, which is necessary and beneficial for recreation and to relieve the tedium of commitment. The absence of these recreational opportunities can increase tension among patients and staff, and contribute to a negative treatment environment.

In light of these realities, the ISR concedes that a “total prohibition” on electronic devices would not strike “a proper balance at this time, creating more burdensome restrictions than

necessary on patients and treatment staff.” (ISR, at 18.) While ACSOL agrees with this sentiment, the reality is that the proposed amendments to the Regulation are practically equivalent to a total prohibition on electronic devices, which will needlessly burden patients and interfere with the therapeutic and other important activities listed above.

First and foremost, the ISR fails to discuss the legitimate needs of patients to maintain access to computers and electronic storage devices. Many DSH-Coalinga patients have lawfully possessed and used these devices without incident for over ten years. The proposed Regulation simply eliminates patients’ right to possess these important tools, without ensuring that patients will be able to access them at appropriate times. The provision that gives individual hospitals the “discretion to permit [contraband] items to be accessible to patients on a supervised basis only” (9 C.C.R. § 4350(e)) is essentially meaningless because hospitals and individual staff members are free to disregard this provision in their “discretion.” At a minimum, the Regulation should be amended to identify occasions on which patients are authorized to access computers and electronic storage devices so that hospital staff cannot deny them in an arbitrary or punitive fashion.

Second, the Constitution requires that restrictions on patients’ property be “reasonable” and “narrowly tailored” to treatment goals. Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005); Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985). A restriction violates this constitutional mandate when it is punitive in nature, which occurs when “a [civil] detainee is confined in conditions identical to, similar to, or more restrictive than those in which his criminal counterparts are held.” Jones, 393 F.3d at 932. This is because “civil detainees retain greater liberty protections than individuals detained under criminal process.” Id. See also Youngberg v. Romeo, 457 U.S. 302, 321-22 (1982) (“[P]ersons who have been involuntarily committed are entitled to *more considerate treatment* and conditions of confinement than criminals whose conditions of confinement are designed to punish.” [emphasis added]). The fact that the Regulation will permit a small number of electronic possessions (*i.e.*, television, CD player, and radio) reveals its punitive nature because identical restrictions are imposed upon prison inmates. Specifically, California prison inmates are permitted to possess a “television set,” a “tv/cd/radio combination,” “CDs,” “audio cassettes,” and an “audio entertainment appliance.” 15 C.C.R. § 3190 (incorporating “Inmate Property Matrix,” pp. 11, 13-14).¹ DSH-Coalinga patients have owned and used personal computers and electronic storage devices for many years, making significant investments of time, money, intellectual property in their contents. These devices are integral to the patients’ daily lives, and their sudden elimination relegates patients to a status similar to, if not identical to, prison inmates.

¹ CDCR’s Inmate Property Matrix is available at http://www.cdcr.ca.gov/regulations/Adult_Operations/docs/DOM/DOM%202016/Authorized%20Personal%20Property%20Schedule%20-%20AAPP%20-%20Rev%20%204-1-14.pdf

Finally, a “regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.” Turner v. Safley, 482 U.S. 78, 89-90 (1987). The justifications offered in support of the Regulation are tenuous and often merely conclusory. For example, the ISR implicitly alleges that every patient’s electronic device is being used to possess child pornography, even though this notion defies common sense as well as DSH’s own reports regarding the contents of the devices it has seized and searched. The ISR also alleges that the Regulation is necessary to eliminate the risk that patients will communicate with prohibited persons, obtain information about staff, or obtain maps of the hospital grounds. Yet, these rationales do not apply to many of the devices prohibited by the Regulation, such as DVDs and USB drives, which do not facilitate searches or communications.

For these reasons, the Regulation is unnecessarily overbroad, fails to protect patients’ legitimate access to electronic devices, and fails to protect patients’ from the arbitrary refusal of hospital staff to allow devices for legitimate uses. ACSOL therefore requests that DSH amend the Regulation to, at a minimum, provide an entitlement or patients to access electronic storage devices such as USB drives and CDs/DVDs for lawful purposes.

Sincerely,


Janice M. Bellucci