



Department of Corrections and Rehabilitation

**NOTICE OF CHANGE TO
REGULATIONS**

Section(s): 3084.9, 3323, 3335, 3401.5 and
3401.6

Number:

15-07

Publication Date:

September 11, 2015

Effective Date:

To Be Announced

INSTITUTION POSTING REQUIRED

This Notice announces the proposed amendments to Section(s) 3084.9, 3323, 3335, 3401.5 and adoption of 3401.6 of the California Code of Regulations (CCR), Title 15, Crime Prevention and Corrections, concerning changes to the federal guidelines to the Prison Rape Elimination Act.

IMPLEMENTATION: To be announced

PUBLIC COMMENT PERIOD

Any person may submit written comments about the proposed regulations to the California Department of Corrections and Rehabilitation, Regulation and Policy Management Branch (RPMB), P.O. Box 942883, Sacramento, CA 94283-0001, or by fax to (916) 324-6075, or by e-mail to RPMB@cdcr.ca.gov. All written comments must be received by the close of the public comment period November 4, 2015, at 5:00 p.m.

PUBLIC HEARING INFORMATION

A public hearing regarding these proposed regulations will be held November 4, 2015, from 10:00 a.m. to 11:00 a.m. in the Kern Room, located at 1515 S St. Sacramento, CA 95811. The purpose of the hearing is to receive oral comments about this action. It is not a forum to debate the proposed regulations. No decision regarding the permanent adoption of these regulations will be rendered at this hearing. Written or facsimile comments submitted during the prescribed comment period are given the same significance and weight as oral comments presented at the hearing. This hearing site is accessible to the mobility impaired.

POSTING

This Notice shall be posted immediately upon receipt at locations accessible to inmates, parolees, and employees in each Department facility and field office not later than five calendar days after receipt. Also, facilities shall make this Notice available for review by inmates in segregated housing who do not have access to the posted copies, and shall distribute it to inmate law libraries and advisory councils. CDCR Form 621-A (Rev. 09/14), Certification of Posting, shall be returned to the RPMB electronically, by fax, or by mail. See Department Operations Manual Sections 12010.12.1 and 12010.12.2 for posting and certification of posting procedures.

CONTACT PERSON

Inquiries regarding this Notice should be directed to: Timothy M. Lockwood, Chief, RPMB, California Department of Corrections and Rehabilitation, P.O. Box 942883, Sacramento, CA 94283-0001, by telephone at (916) 445-2269 or e-mail RPMB@cdcr.ca.gov. Inquiries regarding the subject matter of these regulations may be directed to Mathew Rustad, Division of Adult Institutions at (916) 324-0788.

/ Original Signed By /

SCOTT KERNAN
Undersecretary, Operations
California Department of Corrections and Rehabilitation

Attachments

NOTICE OF PROPOSED REGULATIONS
California Code of Regulations
Title 15, Crime Prevention and Corrections
Department of Corrections and Rehabilitation

NOTICE IS HEREBY GIVEN that the Secretary of the California Department of Corrections and Rehabilitation (CDCR), pursuant to the authority granted by Government Code (GC) Section 12838.5 and Penal Code (PC) Section 5055, and the rulemaking authority granted by PC Section 5058 and 5058.3, in order to implement, interpret and make specific PC section 5054, proposes to amend Sections 3084.9, 3323, 3335, and 3401.5 of the California Code of Regulations (CCR), Title 15, Division 3, concerning changes to the Federal guidelines to the Prison Rape Elimination Act.

PUBLIC HEARING:

Date and Time: November 4, 2015 from 10:00 a.m. to 11:00 a.m.
Place: Department of Corrections and Rehabilitation
Kern Room
1515 S Street – North Building
Sacramento, CA 95811

Purpose: To receive comments about this action.

INFORMATIVE DIGEST

In 2003, the federal Prison Rape Elimination Act (PREA) was enacted and established the National Prison Rape Elimination Commission (NPREC), whose purpose was to develop, national standards for the detection, prevention, reduction, and punishment of prison rape. The California Department of Corrections and Rehabilitation (CDCR) established the Prison Rape Elimination Program in 2006, as a first step to achieve compliance with the statute (see Department Operations Manual Chapter 5, Article 44). In 2012, the Federal Department of Justice (DOJ) issued a final rule adopting additional national standards as recommended by NPRC, which required further action by states to achieve compliance. In 2014, the California Governor submitted an assurance to the Federal DOJ that the CDCR would continue its work on developing and implementing policy to ensure compliance with national standards. This proposed rulemaking is associated with that process.

In this regulatory action, the Secretary proposes to amend regulatory provisions to ensure compliance with the National PREA Standards and ensure funding received from the Department of Justice is not jeopardized.

This action provides the following:

- The addition of language to the Inmate Appeals Process to address the standard of timeframes and specific criteria for Departmental response to emergency appeals concerning allegations of staff sexual harassment or staff sexual misconduct.

- The revision of text within Title 15, Article 5 Inmate Discipline incorporating clarifying references to Sexual Assault or Battery to ensure identification of the appropriate charge to be used in the disciplinary process with incidents that include a sexual component.
- The addition of criteria determining an inmate’s eligibility for non-disciplinary segregation if investigation related to being a victim of a PREA incident exists.
- The addition of language to provide clarity by adding staff sexual harassment toward an inmate as a component of the Employee Sexual Misconduct policy.

POLICY STATEMENT OVERVIEW

The anticipated benefits of the proposed regulations are based upon the Department of Justice’s Initial Regulatory Impact Analysis that was conducted during the federal rulemaking process in 2011. The Department of Justice believes it is reasonable to expect that the federal standards, if fully adopted and complied with, would achieve a level of reduction in the prevalence of sexual abuse. By making prisons safer there is an anticipated increase in the general well-being and morale of staff and inmates alike. Non-quantifiable benefits will accrue to society at large by ensuring that inmates re-entering the community are less traumatized and better equipped to support their community.

EVALUATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING STATE REGULATIONS

Pursuant to Government Code 11346.5(a)(3)(D), the Department must evaluate whether the proposed regulations are inconsistent or incompatible with existing State regulations. Pursuant to this evaluation, the Department has reviewed existing regulations pertaining to the Prison Rape Elimination Act and determined that these proposed regulations are not inconsistent or incompatible.

LOCAL MANDATES:

The Department has determined that these regulations do not impose a mandate on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

FISCAL IMPACT STATEMENT

- Cost to any local agency or school district that is required to be reimbursed: none
- Cost or savings to any state agency: none
- Other nondiscretionary cost or savings imposed on local agencies: none
- Cost or savings in federal funding to the State: Loss of 5% of federal DOJ grant funds if states do not comply.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT AFFECTING BUSINESSES:

The Department has initially determined that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF ECONOMIC IMPACT ASSESSMENT:

These regulations are directed at the internal management of State prisons and do not impose any obligations, duties, fees, costs, responsibilities, reporting requirements, etc. on California businesses, large or small. No economic impacts have been brought to the attention of the Department. The Department has therefore concluded that these regulations will have no impact on the creation of new, or the elimination of existing jobs or businesses within California, or affect the expansion of businesses currently doing business in California. Regarding benefits, these regulations will protect the health and safety of California residents, worker safety, and the State's environment by providing a safe environment that will encourage visitation for families, which will have a positive impact on inmates, and increase worker safety.

EFFECT ON SMALL BUSINESSES

The Department has determined that the proposed regulations may not affect small businesses. It is determined that this action has no significant adverse economic impact on small business because they are not affected by the internal management of state prisons.

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed action will have no significant effect on housing costs.

CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternative considered by the Department, or that has otherwise been identified and brought to the attention of the Department, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the proposed regulatory action. Interested persons are accordingly invited to present statements or arguments with respect to any alternatives to the changes proposed at the scheduled hearing or during the written comment period.

CONTACT PERSON:

Please direct any inquiries regarding this action to:
Timothy M. Lockwood, Chief
Regulation and Policy Management Branch
Department of Corrections and Rehabilitation
P.O. Box 942883, Sacramento, CA 94283-0001
Telephone (916) 445-2269

In the event the contact person is unavailable, inquiries should be directed to the following back-up person:

Anthony Carter
Regulation and Policy Management Branch
Telephone (916) 445-2220

Questions regarding the substance of the proposed regulatory action should be directed to:

Lt. Matthew Rustad
Division of Adult Institutions
California Department of Corrections and Rehabilitation
(916) 324-0788

WRITTEN COMMENT PERIOD:

The public comment period will close November 4, 2015 at 5:00 p.m. Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action (by mail, by fax, or by e-mail) to CDCR, Regulation and Policy Management Branch, P.O. Box 942883, Sacramento, CA 94283-0001; by fax at (916) 324-6075; or by e-mail at RPMB@cdcr.ca.gov before the close of the comment period.

AVAILABILITY OF PROPOSED TEXT AND INITIAL STATEMENT OF REASONS:

The Department has prepared, and will make available, the text, any documents incorporated by reference, and the Initial Statement of Reasons (ISOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains those items and all information on which the proposal is based (i.e., rulemaking file) is available to the public upon request directed to the Department's contact person. The proposed text, ISOR, documents incorporated by reference, and Notice of Proposed Regulations will also be made available on the Department's website <http://www.cdcr.ca.gov>.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this Notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Requests for copies of any modified regulation text should be directed to the contact person indicated in this Notice. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons will be available on the Department's website at <http://www.cdcr.ca.gov>, and may also be obtained from the Department's contact person.

INITIAL STATEMENT OF REASONS:

The California Department of Corrections and Rehabilitation (CDCR or the Department) proposes to amend the California Code of Regulations, Title 15, Division 3, Sections 3084.9, 3323, 3335, and 3401.5 concerning changes to the Department's Prison Rape Elimination Act policy.

The federal Prison Rape Elimination Act (PREA) of 2003 drives all CDCR efforts to combat sexual abuse and sexual misconduct within our institutions. The vision of the CDCR is to end the causes and tragic effects of crime, violence, and victimization in our communities through a collaborative effort that provides intervention to at-risk populations and quality services from the time of arrest that will assist our offender population in achieving successful reintegration into society. CDCR has an overarching mission to improve public safety through evidence-based crime prevention and recidivism reduction strategies.

Offender and staff safety is paramount to the mission of rehabilitation. CDCR has identified the provision of safe living and working environments as an overarching strategy within the organization. We recognize that offenders must feel safe in our facilities in order for any rehabilitation and treatment to take place. PREA compliance is a significant factor in providing the necessary safety and security for successful rehabilitation.

Background

CDCR was very aggressive in implementing PREA. The first step was the creation of the Prison Rape Elimination Program to address allegations of sexual assault by both offenders and staff, and to ensure compliance with Public Law 108-79, the Prison Rape Elimination Act. In 2005, the California Legislature passed the Sexual Abuse in Detention Elimination Act (AB 550), Chapter 303.

In 2006, CDCR developed the Prison Rape Elimination Policy. Review of the policy and procedures prior to approval was conducted by both internal and external stakeholders including: State Assemblyperson Goldberg's Office, staff from Stop Prisoner Rape (now known as Just Detention International), a consultant from the University of California – Irvine, and CDCR staff from the Division of Adult Institutions (DAI), Division of Juvenile Justice, Office of Legal Affairs, Office of Internal Affairs, Office of Labor Relations, Office of Victim and Survivor Services, the Office of Financial Services and staff from various institutions.

CDCR's response to sexual violence in prisons included policies, procedures, and training. This program:

- Established a zero tolerance policy
- Required training of staff that consisted of a classroom presentation which was mandatory for all staff, and

- Provided education for offenders which consisted of literature related to prevention and reporting, posters, showing of a video regarding PREA, voluntary classes on PREA and information for inmates related to the issue of sexual abuse/rape.

The procedures outline detailed steps to be taken by staff when an incidence of sexual violence is reported and provided checklist tools for staff use. The procedures also provided guidance on evidence collection, investigation, transportation procedures, and requirements for community re-entry. The procedures and training tools were designed to provide staff assistance in identifying characteristics of victims and perpetrators, including identifying specific circumstances that may place an inmate in jeopardy.

Other departmental activities in creating and implementing CDCR PREA policy and procedures have included the following:

- 1) A research project entitled “Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault” was conducted by the University of California – Irvine. The research project focused on the problem of sexual assault in particular and violence more generally in adult and juvenile male institutions. The research team developed a survey instrument and obtained approval to conduct face-to-face interviews. The survey was conducted at seven adult, male institutions and included 361 offenders being interviewed; the information obtained was used to complete the research study.
- 2) A research project entitled “Gendered Violence and Safety: A contextual approach to improving security in women’s facilities” was completed by the California State University – Fresno. This project developed empirical definitions of physical and sexual assault among women and developed ways safety and prevention policies and practices may be expanded in women’s correctional facilities.
- 3) Collaboration with Just Detention International (formerly Stop Prisoner Rape), a prisoner’s rights organization, resulted in:
 - An offender outreach program implemented at prisons throughout California, through which prison rape survivors could access crisis counseling services;
 - An in depth pilot project called “Paths to Recovery” implemented at two adult institutions, through which survivors of sexual violence were offered longer-term mental health counseling; and
 - A poster initiative thorough which offenders and CDCR staff were sensitized about the seriousness of prisoner rape.
 - Development of MOUs with local providers of Rape Crisis Counseling, Victim Advocacy, and hospitals with trained Sexual Assault Response Teams.
- 4) Collaboration with JDI and the Department of Health Services led to a pilot of the PREA Peer Educator program at two adult institutions. Subsequently, the curriculum was expanded to include a more in-depth presentation of inmate’s rights and responsibilities under the Prison Rape Elimination Act and CDCR Prison Rape Elimination Policy in an

interactive setting. Currently this program is delivered by trained inmate peer educators with supervision by a staff sponsor at six adult reception center institutions and two adult general population institutions.

- 5) The draft policy and procedures were reviewed by the Moss Group through a technical assistance grant from the National Institute of Corrections. The current policy reflects the analysis and feedback of the Moss Group.

These activities led to successful implementation of CDCR's initial policy on sexual violence detection and prevention.

The Federal Department of Justice issued a final rule adopting national standards to prevent, detect, and respond to prison rape, as required by the Prison Rape Elimination Act of 2003. The goal of this rulemaking was to prevent, detect, and respond to sexual abuse in confinement facilities. For too long, incidents of sexual abuse against incarcerated persons have not been taken as seriously as sexual abuse outside prison walls. In popular culture, prison rape is often the subject of jokes; in public discourse, it has been at times dismissed by some as an inevitable – or even deserved – consequence of criminality.

Sexual abuse should never be a laughing matter, nor is it a punishment for a crime. Rather, it is a crime, and it is no more tolerable when its victims have committed crimes of their own. Prison rape can have severe consequences for victims, for the security of correctional facilities, and for the safety and well-being of the communities to which nearly all incarcerated persons will eventually return.

In passing PREA, Congress noted that the nation was “largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates”. The legislature established a National Prison Rape Elimination Commission (NPREC) to “carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States” and to recommend to the Attorney General “national standards for enhancing the detection, prevention, reduction, and punishment of prison rape”.

After over four years of work, the NPREC released its recommended national standards in June 2009 and subsequently disbanded, pursuant to the statute.

The statute directs the Attorney General of the United States to publish a final rule adopting “national standards for the detection, prevention, reduction, and punishment of prison rape”. The statute states that the standards may not “impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities”.

A state whose Governor does not certify full compliance with the standards is subject to the loss of 5% of any Department of Justice grant funds that it would otherwise receive for prison purposes, unless the Governor submits an assurance that such 5% will be used only for the

purpose of enabling the State to achieve and certify full compliance with the standards in future years. The final rules specifies that the Governor's certification applies to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch.

In the current fiscal climate, governments at all levels face budgetary constraints. The Department of Justice aimed to craft standards that would yield the maximum desired effect while minimizing the financial impact on jurisdictions. In addition, recognizing the unique characteristics of individual facilities, agencies and inmate population the Department of Justice endeavored to afford discretion and flexibility to agencies to the extent feasible.

In May, 2014, California's Governor submitted an assurance to the Department of Justice that the CDCR would continue to work on developing and implementing policy to ensure compliance with the standards. This rule making package is associated with that process.

Litigation

At the present time, there has been no significant litigation related to compliance with the PREA standards.

Anticipated Benefits

During the federal rule making process, the Department of Justice conducted a Regulatory Impact Assessment and with respect to benefits, an additional analysis which is known as a "break-even analysis. This is done by first estimating the monetary value of preventing various types of prison sexual abuse and then using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of full nationwide compliance.

The analysis identified that in 2008 more than 209,400 persons were victims of sexual abuse in prisons, jails, and juvenile facilities, of which at least 78,500 prison and jail inmates and 4,300 youth in juvenile facilities were victims of the most serious forms of sexual abuse, including forcible rape and other nonconsensual sexual acts involving injury, force, or high incidence.

The analysis concluded that the break-even point would be reached if the standards reduced the annual number of victims of prison rape by 1,671 from the baseline levels, which is less than 1% of the total number of victims in prisons, jails and juvenile facilities. The Department of Justice believes it is reasonable to expect that the standards, if fully adopted and complied with, would achieve at least this level of reduction in the prevalence of sexual abuse, and thus the benefits of the rule justify the costs of full nationwide compliance.

This analysis excludes benefits that are not monetizable, but still must be included in the cost-benefit analysis. These include the values of equity, human dignity, and fairness. Such non-quantifiable benefits will be received by victims who receive proper treatment after an assault,

such treatment will in turn enhance their ability to re-integrate into the community and maintain stable employment upon their release from prison. Furthermore, making prisons safer will increase the general well-being and morale of staff and inmates alike. Finally, non-quantifiable benefits will accrue to society at large, by ensuring that inmates re-entering the community are less traumatized and better equipped to support their community.

Determinations of Impact on Business and Small Business

The Department has made an initial determination no reasonable alternatives to the regulations have been identified or brought to the attention of the Department which would lessen any adverse impact on small business.

The Department has made an initial determination the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination. The proposed regulations affect the internal management of prisons only, and place no requirements or restrictions on businesses.

ECONOMIC IMPACT ASSESSMENT

The Department has determined the proposed regulations will have no impact on the creation or elimination of jobs within the state. The proposed regulations affect the internal management of prisons only.

The Department has determined the proposed regulations will have no impact on the creation of new businesses or the elimination of existing businesses within California. The proposed regulations affect the internal management of prisons only, and place no requirements or restrictions upon businesses.

The Department has determined the proposed regulations will have no impact on the expansion of businesses currently doing business in California. The proposed regulations affect the internal management of prisons only, and place no requirements or restrictions on businesses.

The Department has determined the proposed regulations may benefit the health and welfare of California residents by reducing the number of victims of sexual assault/violence who will eventually return to the community. The Department has determined the proposed regulations will have no impact on worker safety or the state's environment as they affect the internal management of prisons only.

REPORTS, STUDIES, AND DOCUMENTS RELIED UPON

The policy changes that form the basis for these proposed regulations are founded on adoption of 28 Code of Federal Regulations (CFR), Part 15, National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule.

ALTERNATIVES CONSIDERED

1. Take No Action

CDCR remains committed to its mission of rehabilitation of offenders without sacrificing the safety of inmates, staff, its institutions, or the community. Taking no action and retaining existing regulations would cause the Department to be out of compliance with the Federal PREA Standards. The impact of this would subject the Department to loss of five percent of any Department of Justice grant funds that it would otherwise receive for prison purposes.

2. Adopt the Proposed Regulations

By adopting the proposed regulations, the CDCR ensure compliance with the National PREA Standards and ensure funding received from the Federal Department of Justice is not jeopardized.

SPECIFIC PURPOSE OF EACH SECTION PER GOVERNMENT CODE 11346.2(B)(1)

3084.9. Exception to Regular Appeals Process.

Section 3084.9 is being amended to add language to address the standard which sets specific timeframes and criteria for the Department to respond to allegations of staff sexual misconduct or staff sexual harassment. These timeframes and criteria are different than what currently exists in policy for emergency appeals.

3323. Disciplinary Credit Forfeiture Schedule.

Section 3323 is being amended to incorporate a reference to Sexual Battery in Division “A-1” offenses and Sexual Assault or Battery in Division “D” offenses. This amended language is needed to provide clarification for staff, it will ensure they are able to identify the appropriate charge to be used in the disciplinary process on incidents which include a sexual component.

3335. Administrative Segregation.

Section 3335 is being amended to modify the criterion which determines an inmate’s eligibility for non-disciplinary segregation. The criteria being added states “Investigation related to being the victim of a PREA incident”. This amended language is necessary to conform to the PREA standards.

3401.5. Employee Sexual Misconduct.

Section 3401.5 is being amended to establish protection measures. In addition, wording is being changed to provide clarity. This amended language is necessary to conform to the PREA standards.

3401.6. Employee Sexual Harassment.

Section 3401.6 is being amended to add staff sexual harassment toward an inmate as a component of the Prison Rape Elimination policy and establish protection measures. This language is necessary to conform to the PREA standards.

TEXT OF PROPOSED REGULATIONS

In the following text, ~~strikethrough~~ indicates deleted text; underline indicates added or amended text.

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

Chapter 1. Rules and Regulations of Adult Operations and Programs

Article 8

3084. Appeals.

3084.9. Exceptions to the Regular Appeal Process.

Subsections 3084.9(a) through 3084.9(a)(4) remain unchanged.

(a) Emergency appeals. Emergency appeals should not be used by inmates or parolees as a substitute for verbally or otherwise informing staff of an emergency situation requiring immediate response.

Subsections 3084.9(a)(5) through 3084.9(a)(5)(A)(7) are adopted to read:

(5) Exception to Regular Appeal Process.

A grievance in whole or part containing allegations of staff sexual misconduct or staff sexual harassment shall be processed as an emergency Staff Complaint appeal. The appeal shall be immediately reviewed by the Hiring Authority or designee and processed directly at the Second Level of Review.

(A) While the department maintains the right to defend against an inmate lawsuit on the grounds of the applicable statute of limitations, a time limit shall not be imposed upon when an appellant may file such a grievance. The time limits for processing an emergency Staff Complaint is as follows:

- (1) There shall be no time limit for allegations of staff sexual misconduct or staff sexual harassment, but once received by the appeals coordinator, the appeal shall be screened in accordance with 3084.5(b)(4).
- (2) A risk assessment determination of all PREA related appeals shall be immediately completed by the Hiring Authority to determine if the appellant is in substantial risk of imminent sexual violence. If the assessment results in a determination of the appellant being in substantial risk of imminent sexual violence, the Hiring Authority shall take immediate corrective action.
- (3) The appeals coordinator shall provide an initial response to the appellant within 48 hours which shall include notice that the appeal is being processed as an emergency Staff Complaint.
- (4) The completed risk assessment determination by the Hiring Authority shall be documented within 5 calendar days describing whether the appellant was determined to be in substantial risk of imminent sexual violence and the action(s) taken in response to the appeal.
- (5) If the conditions of exceptional delay exist as described in 3084.8(d), the time constraints of Second Level of Review or Third Level of Review may be extended in increments of 30 days, but shall not to exceed 160 days from the date the appeal was received by the appeals coordinator. Any extension shall require written notification to the appellant and shall include the estimated completion date. The

time consumed by the appellant in preparing the appeal shall not count in the calculation of a timely response.

- (6) The appellant may consider an absence of a timely response at any level, including that of any properly noticed extension, a denial of that level.
- (7) The appellant is required to respond to the SLR within 30 calendar days in accordance with 3084.8(b)(3).

Subsections 3084.9(b) through 3084.9(i)(6) remain unchanged.

Note: Authority cited: Section 5058, Penal Code; and Section 6304.3, Labor Code. Reference: Sections 148.6, 832.5, 832.7, 832.8, 5054 and 5058.4, Penal Code; Sections 935.6, 965, 3300-3313, 19570-19575.5, 19583.5 and 19635, Government Code; Sections 98.7 and 6304.3, Labor Code; Sections 337, 338 and 339, Code of Civil Procedure; Sections 344.40, 344.41, 344.42 and 344.43, Title 8, Industrial Relations, California Code of Regulations; Americans With Disabilities Act, Public Law 101-336, July 26, 1990, 104 Stat. 328; Civil Rights of Institutionalized Persons Act; Title 42 U.S.C. Section 1997 et seq., Public Law 96-247, 94 Stat. 349; Section 35.107, Title 28, Code of Federal Regulations; *Wolff v. McDonnell* (1974) 418 U. S. 539, 558-560; and *Vasquez v. State of California*, 105 Cal.App.4th 849 (2003) as implemented by the Stipulated Injunction and Order entered by the Superior Court of San Diego County in Case No.GIC-740832.

Subchapter 4. General Institution Regulations

Article 5.

3323. Disciplinary Credit Forfeiture Schedule.

Subsections 3323(a) through 3323(b)(2) remain unchanged.

(a) Upon a finding of guilt of a serious rule violation, a credit forfeiture against any determinate term of imprisonment or any minimum eligible parole date for an inmate sentenced to an indeterminate sentence, as defined in section 3000 Indeterminate Sentence Law (ISL), shall be assessed within the ranges specified in (b) through (h) below:

(b) Division "A-1" offenses; credit forfeiture of 181-360 days.

Subsection 3323(b)(3) is amended to read:

(3) Battery including sexual battery causing serious injury.

Subsections 3323(b)(4) through 3323(f)(8) remain unchanged.

(f) Division "D" offenses; credit forfeiture of 61-90 days.

Subsection 3323(f)(9) is amended to read:

(9) Assault or battery, including sexual assault or battery, on a prisoner with no serious injury.

Subsections 3323(f)(10) through 3323(k)(4) remain unchanged.

Note: Authority cited: Sections 5058, 5058.3 and 1170.05, Penal Code. Reference: Sections 148, 241, 243, 295-300.3, 314, 647, 1170.05, 2932, 2933, 4500, 4501, 4501.1, 4573.6, 4576, 4600, 5054 and 12020, Penal Code.

Article 7.

3335. Administrative Segregation.

Subsection 3335 is amended to read:

3335. Administrative Segregation.

When an inmate's presence in an institution's General Population (GP) presents an immediate threat to the safety of the inmate or others, endangers institution security or jeopardizes the integrity of an investigation of an alleged serious misconduct, criminal activity, or the safety of any person, the inmate shall be immediately removed from the GP and placed in administrative segregation. Administrative segregation may be accomplished by confinement in a designated Administrative Segregation Unit (ASU) or, in an emergency, to any single cell unit capable of providing secure segregation.

(a) Non Disciplinary Segregation.

(1) Non Disciplinary Segregation (NDS) means segregated housing placement for administrative reasons to include but are not limited to:

(A) ASU placement for safety concerns not resulting from misconduct warranting a Rules Violation Report.

(B) Investigation not related to misconduct or criminal activity.

(C) Being a relative or an associate of a prison staff member.

(D) Investigation related to being the victim of a Prison Rape Elimination Act (PREA) incident

1. If the placement in NDS is related to being the victim of a PREA incident, the inmate will be afforded all programs, privileges, and education in accordance with the NDS policy. If these are restricted, assigned staff shall document 1) the opportunities that have been limited; 2) the duration of the limitation; and 3) the reasons for such limitations on the CDC Form 114-A, Inmate Isolation Segregation Record. The PREA victim will not be subject to the expedited transfer requirements, unless he/she meets the requirements associated with participation in the MHSDS.
2. The facility shall assign such inmates to NDS only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days. If the period of segregation exceeds 30 days, reasoning shall be documented on a CDC Form 128-G, Classification Chrono.
3. Every 30 days, the facility shall afford each such inmate with a review, by the assigned custody supervisor, to determine whether there is a continuing need for segregation from the general population. The review shall be documented on the CDC Form 128-B. If the custody supervisor determines the need for continued segregation no longer exists, the inmate shall be referred to the Institution Classification Committee for a program review.

(2) Designation as NDS shall be made by ICC.

(A) Any case designated as NDS, and included in the MHSDS, shall be transferred to an appropriate institution within 72 hours of initial designation.

Subsection 3335 (b) through 3335 (e) remains unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 5054 and 5068, Penal Code; *Wright v. Enomoto*, (1976) 462 F Supp 397; and *Toussaint v. McCarthy* (9th Cir. 1986) 801 F2d 1080, cert. denied, 481 U.S. 1069

Subchapter 5. Personnel

Article 2

§ 3401.5. Employee Sexual Misconduct.

(a) For the purposes of this section, staff sexual misconduct means any sexual behavior by a departmental employee, volunteer, agent or individual working on behalf of the Department of Corrections and Rehabilitation, which involves or is directed toward an inmate or parolee. The legal concept of “consent” does not exist between departmental staff and inmates/parolees; any sexual behavior between them constitutes sexual misconduct and shall subject the employee to disciplinary action and/or to prosecution under the law. Sexual misconduct includes, but is not limited to:

Subsection 3401.5(a)(1) through 3401.5(a)(3)(F) remain unchanged.

Subsection 3401.5(a)(4) and 3401.5(a)(5) are adopted to read:

(4) Display by staff, in the presence of an inmate, of the staff person’s uncovered genitalia, buttocks, or breast;

(5) Voyeurism by a staff person including volunteers or independent contractors. Voyeurism is defined as an invasion of privacy of an offender by staff for reasons unrelated to official duties.

Subsection 3401.5(b) through 3401.5(e) is amended to read:

(b) Penalties. All allegations of staff sexual misconduct shall be subject to investigation, which may lead to disciplinary action and/or criminal prosecution.

(c) Reporting Requirements. Any employee who observes, or who receives information from any source concerning staff sexual misconduct, shall immediately report the information or incident directly to the ~~institution head~~ hiring authority, unit supervisor, or highest-ranking official on duty, ~~who shall then immediately notify the Office of Internal Affairs.~~ Failure to accurately and promptly report any incident, information or facts which would lead a reasonable person to believe sexual misconduct has occurred may subject the employee who failed to report it to disciplinary action.

(d) Confidentiality. Alleged victims who report criminal staff sexual misconduct falling into one of the Penal Code section set forth in Government Code Section 6254(f)(2) shall be advised that their identity may be kept confidential pursuant to Penal Code Section 293.5, upon their request.

(e) Retaliation Against Employees. Retaliatory measures against employees who report incidents of staff sexual misconduct shall not be tolerated and shall result in disciplinary action and/or criminal prosecution. Such retaliatory measures include, but are not limited to, unwarranted denials of promotions, merit salary increases, training opportunities, or requested transfers; involuntary transfer to another location/position as a means of punishment; or unsubstantiated poor performance reports.

(f) Retaliation Against Inmates/Parolees. Retaliatory measures against inmates/parolees who report incidents of staff sexual misconduct shall not be tolerated and shall result in disciplinary action and/or criminal prosecution. Such retaliatory measures include, but are not limited to, coercion, threats of punishment, or any other

activities intended to discourage or prevent an inmate/parolee from reporting sexual misconduct.

Subsection 3401.5(g) is adopted to read:

(g) Protection Measures. Multiple protection measures shall be considered to protect inmate victims who report staff sexual misconduct or cooperate with staff sexual misconduct investigations including but not limited to housing changes or transfers for inmate victims or abusers, removal of alleged staff or inmate abusers from contact with victims, and emotional support services for inmates or staff who fear retaliation for reporting staff sexual misconduct or sexual harassment or for cooperating with investigations.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 289.6, 293.5 and 5054, Penal Code; and Section 6254, Government Code.

Subsection 3401.6 is adopted to read:

3401.6 Employee Sexual Harassment

(a) Staff Sexual Harassment. For the purpose of the Prison Rape Elimination Act policy, staff sexual harassment means repeated verbal comments or gestures of a sexual nature to an offender by a staff member, volunteer, or contractor, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.

(b) Penalties. All allegations of staff sexual harassment shall be subject to review and, when appropriate to investigation, which may lead to disciplinary action and/or criminal prosecution.

(c) Reporting Requirements. Any employee who observes, or who receives information from any source concerning staff sexual harassment shall immediately report the information or incident directly to the hiring authority, unit supervisor, or highest-ranking official on duty. Failure to accurately and promptly report any incident, information or facts which would lead a reasonable person to believe staff sexual harassment has occurred may subject the employee who failed to report it to disciplinary action.

(d) Retaliation Against Inmates/Parolees. Retaliatory measures against inmates/parolees who report incidents of staff sexual harassment shall not be tolerated and shall result in disciplinary action and/or criminal prosecution. Such retaliatory measures include, but are not limited to, coercion, threats of punishment, or any other activities intended to discourage or prevent an inmate/parolee from reporting sexual harassment.

(e) Protection Measures. Multiple protection measures may be considered to protect inmate victims who report staff sexual harassment or cooperate with staff sexual harassment investigations including but not limited to housing changes or transfers for inmate victims or abusers, removal of alleged staff or inmate abusers from contact with victims, and emotional support services for inmates or staff who fear retaliation for reporting staff sexual harassment or for cooperating with investigations.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 289.6, 293.5 and 5054, Penal Code; and Section 6254, Government Code.