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July 29, 2016

2nd NOTICE OF CHANGE TO TEXT AS ORIGINALLY PROPOSED

The California Department of Corrections and Rehabilitation (CDCR) is making further amendments to the regulations concerning the Prison Rape Elimination Act (PREA).

The full text of the original proposed amendments to the California Code of Regulations is provided in its original single underline and ~~strikethrough~~ format.

Changes that were provided in the 1st Notice of Change to Text are indicated by bold **double underlining** for additional added text, and bold ~~**double strikethrough**~~ for deleted text to the originally proposed text. The comment period on the 1st 15-Day Re-Notice text changes is closed.

The changes provided in this 2nd Notice of Change to Text are indicated by **dotted bold underline** for additional added text and ~~**dotted bold strikethrough**~~ for additional deleted text to the originally proposed text. In addition, any changes to the 1st 15-Day Re-Notice text which originally appeared in **bold double underline** and ~~**bold double strikethrough**~~, will now be indicated by ***dotted bold underline in italics*** for additional added text, and ~~***dotted bold strikethrough in italics***~~ for additional deleted text to the 1st 15-Day Re-Notice text changes. Only those comments relating directly to these 2nd Notice of Change amendments that are indicated by the **dotted bold underline**, ~~**dotted bold strikethrough**~~, ***dotted bold underline in italics***, or ~~***dotted bold strikethrough in italics***~~ will be considered.

As determined by the California Department of Corrections and Rehabilitation (CDCR), the attached text contains the following changes:

Section 3084.2 is being amended to allow inmates to file an appeal on behalf of another inmate when the appeal contains an allegation of sexual violence, staff sexual misconduct, or sexual harassment. This addition is being made based on findings in the first formal PREA audit and is necessary in order for the Department to comply with Federal PREA standards that permit third parties to file appeals alleging PREA violations. All confinement facilities covered under PREA standards must be audited at least every three years to be considered compliant with the PREA standards. Audits are conducted using an instrument developed by the PREA Resource Center in conjunction with the Department of Justice.

Section 3084.6 is being amended to ensure that appeals containing allegations of sexual violence, staff sexual misconduct, or sexual harassment which are submitted on behalf of another inmate will not be automatically cancelled without being addressed. Under existing CDCR regulations, third parties are not generally permitted to appeal issues on behalf of an inmate. This exception for PREA appeals is being made based on findings in the first formal PREA audit and to continue to address the department's commitment to complying with the Federal standards. The PREA permits appeals of PREA related issues by third parties.

Section 3084.9(a)(5): for the purpose of this article, the term "sexual violence" is identified specifically, as inmate on inmate. Although sexual violence on inmates by staff could occur, such violence is intended to be incorporated under the definition of "staff sexual misconduct".

Section 3084.9(a)(5)(A)(4): "staff sexual violence" is replaced by the term "staff sexual misconduct" to clarify that "sexual violence" refers to inmate on inmate, sexual misconduct while staff sexual misconduct refers to staff sexual misbehavior towards inmates.

Section 3084.9(a)(5)(A)(7): the acronym SLR is spelled out to correctly refer to Second Level Review of appeals.

Section 3084.9(a)(5)(B)(7): the acronym SLR is spelled out to correctly refer to Second Level Review of appeals.

Section 3335(a)(1)(D)(1): language is changed to clarify the reference to existing regulations governing non disciplinary segregation to include PREA victimization. This is necessary to make clear that inmates alleging victimization under PREA shall be placed in a non-disciplinary form of segregated housing for their safety and will not be subject to the restrictions associated with a segregated housing status for disciplinary reasons. Additionally, proposed language submitted regarding expedited transfers is being deleted as confusing and repetitious to (a)(2)(A).

Section 3401.5: "Employee" is changed to "Staff" to remain consistent and encompass not only departmental employees, but volunteers, agents, or other individuals working on behalf of the department.

Section 3401.6: "Employee" is changed to "Staff" to remain consistent and encompass not only departmental employees, but volunteers, agents, or other individuals working on behalf of the department.

3401.6(b): Text was revised for clarity to ensure all allegations of staff sexual harassment will be reviewed and investigated. The original proposed text was permissive in the possible results of the review and investigation.
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Only those comments relating directly to the enclosed post-hearing changes that are indicated by **dotted bold underline**, ~~**dotted bold strikethrough**~~, ***dotted bold underline in italics***, or ~~***dotted bold strikethrough in italics***~~ will be considered.

Original signed by:

TIMOTHY M. LOCKWOOD, Chief
Regulation and Policy Management Branch
Department of Corrections and Rehabilitation

Attachment

TEXT OF PROPOSED REGULATIONS – 2nd 15–DAY RENOTICE

In the following, 2nd 15-Day changes will appear in dotted bold underline which indicates additional added text, and ~~dotted bold strikethrough~~ which indicates additional deleted text to the originally proposed text which appears or appeared in single underline and ~~strikethrough~~ format. Changes will also appear in ~~*dotted bold strikethrough in italics*~~ for deleted text to the 1st 15-Day Re-Notice text which appears or appeared in bold double underline and bold ~~double strikethrough.~~

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.

3084.2 Appeal Preparation and Submittal

Subsection 3084.2(a) through 3084.2(f) remains unchanged.

Subsection 3084.2(g) is amended to read:
(g) An inmate or parolee shall not submit an appeal on behalf of another person**, unless the appeal contains an allegation of sexual violence, staff sexual misconduct, or sexual harassment**.

Subsections 3084.2(h) through 3084.2(i)(2) remains unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 832.5(a) and 5054, Penal Code; Civil Rights of Institutionalized Persons Act; Title 42 U.S.C. Section 1997 et seq., Public Law 96-247, 94 Stat. 349; and Section 35.107, Title 28, Code of Federal Regulations.

3084.6. Rejection, Cancellation, and Withdrawal Criteria.
Subsection 3084.6(a) through 3084.6(c)(4) remain unchanged.

Subsection 3084.6(c)(5) is amended to read:
(c) An appeal may be cancelled for any of the following reasons, which include, but are not limited to:
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(5) The appeal is submitted on behalf of another person**, unless it contains allegations of sexual violence, staff sexual misconduct or sexual harassment of another inmate**.

Subsection 3084.6(c)(6) through 3084.6 remains unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 832.5 and 5054, Penal Code; Sections 19570, 19575.5, 19583.5 and 19635, Government Code.

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 amended to read:
(5) ~~**Exception to Regular Appeal Proces**~~ **Prison Rape Elimination Act (PREA) Sexual Violence (Inmate on Inmate) and Staff Sexual Misconduct Appeals**.
A grievance in whole or part containing allegations of **sexual violence or** 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. **When the appeal alleges or indicates that the inmate may be in substantial risk of imminent sexual violence or imminent staff sexual misconduct, a risk assessment shall be undertaken.**

Subsection 3084.9(a)(5)(A) through (a)(5)(A)(3) remains unchanged.

(A) **Staff Complaints:** 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:

Subsections 3084.9(a)(5)(A)(4) is amended to read:

4) An initial risk assessment shall be documented within 48 hours and t~~**T**~~he 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 **staff** sexual ~~***violence***~~ **misconduct** and the action(s) taken in response to the appeal.

Subsections 3084.9(a)(5)(A)(5) through (A)(6) remain unchanged.

Subsection 3084.9(a)(5)(A)(7) is amended to read:
7) The appellant is required to respond to the ~~**SLR**~~**Second Level Review** within 30 calendar days in accordance with 3084.8(b)(3).

Subsections 3084.9(a)(5)(B) through 3084.9(a)(5)(B)(4) remain unchanged:

(B) PREA Allegations Against Another Offender: A time limit shall not be imposed upon when an appellant may file a grievance alleging inmate on inmate sexual violence. The time limits for processing an emergency sexual violence appeal are as follows:
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Subsection 3084.9(a)5(B)(5) through 3084.9(a)(5)(B)(7) are amended to read:
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~~at that level.
7. The appellant is required to respond to the ~~*SLR*~~*Second Level Review* 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.

Article 7.
3335. Administrative Segregation.

Subsection 3335(a) through 3335(a)(1)(C) remains unchanged.
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.
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Subsection 3335(a)(1)(D)(1) thtrough 3335(a)(1)(D)(3) is amended to read:
(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~~ 3044 and 3190 subdivision (b)(5)(C), of Title 15 of the CCR 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 **(Rev. 10/89)**, 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 **General Chrono (Rev. 4/74)**. 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.

Subsection 3335(a)(2)(A) 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

Subsection 3401.5 is amended to read:
§ 3401.5. ~~*Employee*~~ *Staff* 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 3401.6 is amended to read:
3401.6 ~~***Employee***~~ **Staff** Sexual Harrassment
(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 **investigation, and** when appropriate to ~~***investigation, which may lead to***~~ disciplinary action and/or criminal prosecution.

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