

RECEIVED DEC 30 2019

State of California
Office of Administrative Law

In re:
Department of Corrections and
Rehabilitation

Regulatory Action:

Title 15, California Code of Regulations

Amend sections: 3375, 3375.3

NOTICE OF APPROVAL OF REGULATORY
ACTION

Government Code Section 11349.3

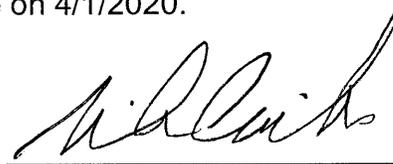
OAL Matter Number: 2019-1106-01

OAL Matter Type: Regular (S)

This action amends regulations concerning the calculation of unfavorable behavior points to establish a 10-year limitation period on the length of time a prior serious disciplinary offense, as specified, may count toward an inmate's preliminary classification score.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 4/1/2020.

Date: December 18, 2019



Nicole C. Carrillo
Attorney

For: Kenneth J. Pogue
Director

Original: Ralph Diaz, Secretary
Copy: Jon Struckmann

REGULAR

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2019-0730-07	REGULATORY ACTION NUMBER 2019-1106-015	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	

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

DEC 18 2019

3:19 pm

2019 NOV -6 P 4: 12
OFFICE OF
ADMINISTRATIVE LAW

AGENCY WITH RULEMAKING AUTHORITY California Department of Corrections and Rehabilitation	AGENCY FILE NUMBER (if any) 18-0929
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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 checked="" 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 Disapproved/Withdrawn	NOTICE REGISTER NUMBER 2019 32-Z	PUBLICATION DATE 8/9/2019	

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Unfavorable Behavior Points	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
TITLE(S) 15	AMEND 3375 and 3375.3
	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"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
	<input type="checkbox"/> File & Print
	<input type="checkbox"/> Print Only
	<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)	
5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)	
<input checked="" type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input 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"/> Other (Specify)	<input type="checkbox"/> State Fire Marshal
7. CONTACT PERSON Jon Struckmann	TELEPHONE NUMBER (916) 445-2314
	FAX NUMBER (Optional)
	E-MAIL ADDRESS (Optional) jonathan.stuckmann@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 <i>K. Allison</i>	DATE 12/18/2019
TYPED NAME AND TITLE OF SIGNATORY Kathleen Allison, Undersecretary of Operations	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

DEC 18 2019

Office of Administrative Law

TEXT OF PROPOSED REGULATIONS

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

California Code of Regulations, Title 15, Division 3, Adult Institutions, Programs and Parole Subchapter 4. General Institution Regulations

Article 10. Classification

3375. Classification Process.

Subsections 3375(a) through (b) are unchanged.

New Subsection 3375(b)(1) is adopted to read:

(b)(1) An automated needs assessment tool that identifies an inmate's criminogenic needs shall be administered pursuant to Section 3375.6.

Subsections 3375(c) through 3375(k)(1)(C)(2) are unchanged.

Subsection 3375(l) is amended to read:

~~(l) An automated needs assessment tool that identifies an inmate's criminogenic needs shall be administered pursuant to Section 3375.6.~~ The readmission process shall include review of the inmate's CDCR Form 839 to determine if unfavorable behavior points were previously assessed for a guilty finding of one or more of the six serious disciplinary offenses set forth in subsections 3375.3(b)(4)(C) through (H). If the offense(s) occurred 10 or more years prior to the date of the inmate's initial reception to CDCR, the previously assessed points shall be removed from the inmate's electronic CDCR Form 839, and shall no longer be counted toward the inmate's preliminary classification score.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Sections 1203.8, 3020, 5054, 5068 and 11191, Penal Code; Sections 8550 and 8567, Government Code; and Governor's Prison Overcrowding State of Emergency Proclamation dated October 4, 2006; *Wright v. Enomoto* (1976) 462 F.Supp. 397; *Stoneham v. Rushen* (1984) 156 Cal.App.3d 302; and *Castillo v. Alameida, et al.*, (N.D. Cal., No. C94-2847).

3375.3. CDCR Classification Score Sheet, CDCR Form 839, Calculation.

Subsections 3375.3 through 3375.3(b)(4)(A) are unchanged.

Subsection 3375.3(b)(4)(B) is amended to read:

(b)(4)(B) Serious Disciplinary History (Boxes 53-64).

A single serious disciplinary offense for which an inmate was found guilty may result in the assessment of points on the classification score sheet for more than one factor listed in subsections 3375.3(b)(4)(C) through (H) of this section. ~~Assess points for behavior for which the inmate was found guilty~~ Unfavorable behavior points shall be assessed for offenses that occurred while the inmate was incarcerated with any correctional agency. Points shall not be assessed for serious disciplinary offenses and for behavior that occurred during any prior incarceration, 10 or more years prior to the date of the inmate's initial reception on the current term of incarceration. ~~if the behavior meets the definitions below even if it occurred beyond the last 12 months of incarceration.~~

Subsections 3375.3(b)(4)(C) through 3375.3(g)(2) are unchanged.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Sections 3540, 5054 and 5068, Penal Code; *Wright v. Enomoto* (1976) 462 F Supp. 397; *Stoneham v. Rushen* (1984) 156 Cal. App. 3d 302; and *Castillo v. Alameida, et al.* (N.D. Cal., No. C94-2847).

FINAL STATEMENT OF REASONS:

The Initial Statement of Reasons (ISOR) is incorporated by reference.

UPDATES TO THE INITIAL STATEMENT OF REASONS

The Notice of Proposed Regulations was published in the California Regulatory Notice Register on August 9, 2019, which began the public comment period. The Notice of Change to Regulations #19-05, including the text of the proposed regulations and initial statement of reasons, was mailed on August 9, 2019 to persons who requested to be placed on the Department's mailing list to receive notifications of rulemaking actions, and posted on the Department's website.

The public hearing was held on September 30, 2019. No comments were received at the public hearing. During the 45-day comment period, five written comments were received. These comments are discussed below under the heading, "*Summaries and Responses to the Written Public Comments.*"

ALTERNATIVES DETERMINATION

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

LOCAL MANDATES

The Department has determined this regulatory action will not result in a mandate to any local agency or school district, the cost of which is reimbursable by the State, pursuant to Part 7, commencing with Section 17500, Division 4, Title 2 of the Government Code.

Non-substantive formatting changes and typographical errors and/or omissions are corrected throughout the document to ensure clarity and consistency.

PUBLIC HEARING COMMENTS

A public hearing was held on September 30, 2019, at 10:00 a.m. No one provided comments at the public hearing.

SUMMARIES AND RESPONSES TO THE WRITTEN PUBLIC COMMENTS

COMMENTER #1

Comment A: Commenter wishes to include amendments to subsections 3375.2(a)(2) and 3377.1(b)(5)(B)(10), pertaining to sex offenders, to the proposed rulemaking action.

Response A: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to Government Code Section 11346.9(a)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

COMMENTERS #2 and #3

Comment A: Commenters provide individual incarceration case factors and history of prior institutional misconduct. Commenters believe this rulemaking action will help many, if not all, inmates be placed in a lower security level where they are more likely to avoid serious misconduct.

Response A: The Department appreciates the support for this rulemaking action.

Comment B: Commenters ask if the proposed regulations in this rulemaking action will be retroactive.

Response B: The proposed regulations are retroactive. For current incarcerated offenders, the offender's correctional counselor shall evaluate the offender's Initial Classification Scoresheet during his/her Annual Review to determine if the inmate received points associated with one or more of the six serious disciplinary violations listed in CCR, Title 15, subsections 3375.3(b)(4)(C) through (H). If the counselor determines a serious disciplinary violation occurred 10 years prior to the date of reception, the offender's classification score shall be recalculated.

COMMENTER #4

Comment A: Commenter states the proposed regulations shall protect the Adult Disability Act (ADA), Disability Development Program (DDP), and Enhanced Outpatient Program (EOP) inmates from being targets from those with lengthy histories of violence.

Response A: See Commenter #1, Response A.

Comment B: Commenter states the new proposed regulations will revive the Sensitive Needs Yard (SNY), where inmates would reconnect with their gangs once in the SNY and continue their violent behavior. Commenter, however, explains this rulemaking action will have more appropriate screening and would stop others from becoming victims.

Response B: See Commenter #1, Response A.

Comment C: Commenter states the transgender and homosexuals should be considered for selective special needs because homosexual activity in prison is the nucleus for many acts of violence in prison. Commenter states those identified as homosexuals and transgender should be selected to live with others who have chosen that way of life.

Response C: See Commenter #1, Response A.

Comment D: Commenter states many inmates use the EOP and DDP programs to cover up their violent behaviors and believes this rulemaking action will help change that.

Response D: See Commenter #1, Response A.

Comment E: Commenter states the proposed regulations will train CDCR personnel to stop utilizing the Rules Violation Reports as an underground policy to punish inmates with false violations so to place the inmates in violent environments. Commenter states CDCR employees with deceptive practices shall be automatically considered for voluntary retirement or be disqualified from CDCR employment.

Response E: See Commenter #1, Response A.

Comment F: Commenter states that not only should CDCR categorize the level of points for inmates, but also for prison personnel. Commenter believes CDCR staff with lengthy records of bad behavior should be assigned to work in violent levels of an institution. Commenter explains if a prison guard has numerous complaints on his or her record, the guard should work on Level 4 or Level 3.

Response F: See Commenter #1, Response A.

COMMENTS #5

Comment A: Commenter identifies themselves as a member of the legal team that represents the class of individuals with serious mental illness confined to CDCR institutions and is writing to express their appreciation for the revisions to the regulations.

Response A: See Commenter #2, Response A.

Comment B: Commenter states that 10 years is far too long a period to look back at disciplinary history of an inmate. Commenter states looking back that far will increase an inmate's classification score and place them in a higher security setting, which affects their ability to participate in rehabilitative and other positive programming opportunities, which in turn affects their ability to earn credits towards early release and/or qualify for parole.

Response B: The Department considers 10 years to be a sufficient length of time to temper prior misconduct and decrease an offender's risk of future serious institutional misconduct.

Comment C: Commenter states the more punitive and restrictive the security setting, and the fewer positive behavioral outlets, the more likely it is for inmates to decompensate and/or act out, requiring more mental health and custodial resources from CDCR, and prolonging their incarceration. Commenter states mentally ill individuals are even more likely to struggle and decompensate in higher security settings.

Response C: The Department recognizes the challenges of decompensation of mentally ill individuals in relation to incarceration. As a result, the Department will continue

collaborating with the offender's clinician and Interdisciplinary Treatment Team when considering the offender's placement in higher security settings.

Comment D: Commenter states causing prisoners to have to answer for old disciplinary infractions creates a disincentive for positive behavioral changes, as prisoners will not be able to mitigate the consequences of old mistakes through improved behavior.

Response D: Prior to these proposed revisions to regulations, there was no limit to how far back the Department would look into an inmate's disciplinary history for the purposes of classification and placement scoring. The proposed regulations prioritizes safety of inmates and institution staff while allowing inmates, whose tendency for disciplinary infractions has been tempered by time, the opportunity to qualify for lower security levels and potentially increase their access to rehabilitative services and programs.

Comment E: Commenter sites multiple *Coleman* cases and states although CDCR has developed policies to incorporate mental health input into its disciplinary process, the process has not always worked well and has been found to punish prisoners with serious mental illnesses.

Response E: See Commenter #1, Response A.

Comment F: Commenter states, as attorneys for the *Coleman* class, they have advocated against the reinstatement of Security Housing Unit (SHU) terms for class members who return to CDCR custody.

Response F: See Commenter #1, Response A.

Comment G: Commenter recommends prior disciplinary history not be factored into inmates' current terms of incarceration at all, or at the very least, only disciplinary history from the previous three years be taken into consideration.

Response G: See Commenter #5, Response B.

Comment H: Commenter suggests to require past disciplinary actions against individuals with mental health issues who have shown improvement in behavioral stability and functioning not be counted against them.

Response H: See Commenter #5, Response D.