

**State of California  
Office of Administrative Law**

In re:  
Department of Corrections and  
Rehabilitation

Regulatory Action:

Title 15, California Code of Regulations

Adopt sections:

Amend sections: 3000, 3335, 3336, 3338,  
3340

Repeal sections:

NOTICE OF APPROVAL OF REGULATORY  
ACTION

Government Code Section 11349.3

OAL Matter Number: 2020-0428-01

OAL Matter Type: Regular Resubmittal (SR)

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This action by the Department of Corrections and Rehabilitation amends the definition of effective communication and incorporates automated Classification Committee Chrono (05/19) and Administrative Segregation Unit Placement Notice (05/19) automated forms.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 10/1/2020.

Date: June 9, 2020



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Kevin D. Hull  
Senior Attorney

For: Kenneth J. Pogue  
Director

Original: Ralph Diaz, Secretary

Copy: Josh Jugum

# RESUBMITTAL

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER <b>Z_2019-0528-04</b>	REGULATORY ACTION NUMBER <b>2020-0428-01SR</b>	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

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

**JUN 09 2020**

1:50PM

2020 APR 28 P 12:43

OFFICE OF  
ADMINISTRATIVE LAW

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY  
California Department of Corrections and Rehabilitation

AGENCY FILE NUMBER (if any)  
18-0668

### 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 <input type="checkbox"/> Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON		TELEPHONE NUMBER	FAX NUMBER (Optional)
<b>OAL USE ONLY</b>	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER <b>2019.23-2</b>	PUBLICATION DATE <b>6/7/2019</b>	

### B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Effective Communication	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2019-1031-055
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
<b>SECTION(S) AFFECTED</b> (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT AMEND 3000, 3335, 3336, 3338, 3340 REPEAL
TITLE(S) 15	

3. TYPE OF FILING			
<input 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 checked="" type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 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)  
February 26, 2020 through March 13, 2020

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"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON Joshua Jugum	TELEPHONE NUMBER (916) 445-2266	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) joshua.jugum@cdr.ca.gov
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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 4-20-20
TYPED NAME AND TITLE OF SIGNATORY Jeffrey Macomber, Undersecretary, Administration	

For use by Office of Administrative Law (OAL) only

**ENDORSED APPROVED**

**JUN 09 2020**

**Office of Administrative Law**

## TEXT OF ADOPTED REGULATIONS

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

### Title 15, Crime Prevention and Corrections, Division 3, Adult Institutions, Programs and Parole

#### Chapter 1. Rules and Regulations of Adult Operations and Programs.

##### Article 1. Behavior

##### Section 3000. Definitions.

Section 3000 is amended to alphabetically merge the definition below with existing definitions in this section.

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\*

Effective communication means providing the inmates, to the extent possible or as required by federal law, the ~~means~~ communication assistance necessary to allow them to understand and participate in the disciplinary process to the best of their ability programs, services and activities. For inmates with disabilities, staff may provide assistive devices or other methods of accommodation. For inmates with other communications needs (including Limited English Proficiency (LEP)), staff are responsible for providing other forms of assistance. This may be accomplished through reasonable accommodation or assignment of a staff assistant. If the inmate's Test of Adult Basic Education (TABE) score is 4.0 or lower, employees are required to query the inmate to determine whether or not assistance is needed to achieve effective communication. For due process events, staff are subject to additional requirements: If the inmate is LEP, has a verified disability or has a Test of Adult Basic Education (TABE) reading score of 4.0 or lower, ~~the~~ employee is also required to accurately identify the communication need, to document the provision of any assistance provided that is consistent with the inmate's communication need, and to document the method staff used to determine the inmate understood. on appropriate CDCR forms his/her determination of whether the inmate appeared to understand, the basis for that determination and how it was made. For contacts involving due process, employees shall give priority to the inmate's primary means of communication, which may include but is not limited to; auxiliary communication aids, sign language interpreter, and bilingual interpreter. In instances where a staff member cannot achieve effective communication, despite the provision of relevant accommodations or assistance, staff shall document their efforts and their inability to achieve effective communication and shall notify the facility's ADA/LEP Coordinator.

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\*

Note: Authority cited: Sections 243(f)(4), 2717.3, 3000.03, 5058, 5058.3 and 1170.05, Penal Code; Section 10115.3(b), Public Contract Code; and Sections 4525(a), 4526

and 14837, Government Code. Reference: Sections 186.22, 243, 314, 530, 532, 600, 646.9, 653m, 832.5, 1170.05, 1203.8, 1389, 2080, 2081.5, 2600, 2601, 2700, 2717.1, 2717.6, 2932.5, 3003.5(a), 3020, 3450, 3550, 4570, 4576, 5009, 5050, 5054, 5068, 7000 et seq., 11180 and 11191, Penal Code; Sections 1132.4, 1132.8, and 1203(b)(1), Labor Code; Sections 10106, 10108, 10108.5, 10115, 10115.1, 10115.2, 10115.3 and 10127, Public Contract Code; Section 999, Military and Veterans Code; Section 391, Code of Civil Procedure; Section 297.5, Family Code; Sections 8550, 8567, 12838 and 12838.7, Government Code; Governor's Prison Overcrowding State of Emergency Proclamation dated October 4, 2006; *In re Bittaker*, 55 Cal.App. 4th 1004, 64 Cal. Rptr. 2d 679; Section 11007, Health and Safety Code; *Madrid v. Cate* (U.S.D.C. N.D. Cal. C90-3094 TEH); *Sassman v. Brown* (E.D. Cal. 2015) 99 F.Supp.3d 1223; *Mitchell v. Cate*, USDC ED 2:08-CV-01196-TLN-EFB; *In re Garcia* (2012) 202 Cal.App.4th 892; and *Quine v. Beard*, No. C 14-02726 JST.

## **Subchapter 4. General Institution Regulations**

### **Article 7. Segregated Housing**

#### **Section 3335. Administrative Segregation.**

**Section 3335 initial paragraph is unchanged.**

**Subsections 3335(a) and 3335(a)(1) are unchanged but are shown for reference.**

(a) Non Disciplinary Segregation.

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

**Subsection 3335(a)(1)(D)2. is amended.**

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 an CDC Form 128-G (Rev. 10/89), automated Classification Committee Chrono (05/19), which is incorporated by reference.

**Subsections 3335(a)(1)(D)3. through 3335(a)(2)(A) are unchanged.**

**Subsections 3335(b) and 3335(b)(1) are amended.**

(b) The reasons for ordering an inmate's placement in administrative segregation shall be clearly articulated on an CDC Form 114-D (Order and Hearing on Segregated Housing), automated Administrative Segregation Unit Placement Notice (05/19), which is incorporated by reference, by the initial segregating authority.

(1) The ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice shall include sufficient information and detail to allow the inmate to present a written or verbal defense to the stated reason(s) and circumstances for segregation during the classification hearing.

**Subsection 3335(b)(2) is unchanged.**

**Subsection 3335(b)(3) through 3335(c) are amended.**

(3) A printed copy of the ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice shall be issued to the inmate at the time of placement in administrative segregation by the official ordering placement or by staff at the level of Correctional Lieutenant, CCII or higher.

(A) When necessary, the official ordering administrative segregation placement shall accurately document whether the inmate has Limited English Proficiency (LEP), or has a disability or communication need requiring effective communication, whether there is a need for an accommodation or assistance to ensure effective communication as defined in Section 3000, and if necessary, how it was provided, how it was achieved, and how they were satisfied effective communication was accomplished. document the provision of any assistance provided that is consistent with the inmate's communication need, and document the method staff used to determine the inmate understood.

(4) Administratively segregated inmate's returning to their endorsed institution from out-to-court or out-to-medical shall not require an updated ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice unless the inmate's next scheduled ICC hearing was missed or the circumstances for segregation have changed.

(c) In addition to the ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice, the initial segregation authority or designee shall prepare a CDCR Form 114-A1 (Rev. 10/98), Inmate Segregation Profile, which is hereby incorporated by reference, for each inmate being placed on administrative segregation status.

**Subsections 3335(d) and (e) are unchanged.**

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 5054 and 5068, Penal Code; 28 CFR Sections 115.42 and 115.43; *Wright v. Enomoto*, (1976) 462 F.Supp. 397; and *Toussaint v. McCarthy* (9th Cir. 1986) 801 F.2d 1080, cert. denied, 481 U.S. 1069.

**Section 3336. Administrative Review of Administrative Segregation Unit Placement.**

**Subsections 3336(a) through 3336(b)(2) are unchanged.**

**Subsection 3336(b)(3) is amended.**

(3) When required, the Administrative Reviewer shall document the need for effective communication accommodation or assistance, the provision of any assistance provided that is consistent with the inmate's disability or communication need, the method staff used to determine the inmate understood, and documentation of the presence of a Staff Assistant (SA) when required. ~~how it was provided, how it was achieved, and how they were satisfied effective communication was accomplished.~~

**Subsections 3336(b)(4) and 3336(b)(5) are unchanged.**

**Subsection 3336(b)(6) is amended.**

(6) The decision rendered shall be documented on the ~~CDC Form 114-D~~ automated Administrative Segregation Unit Placement Notice (05/19), which is incorporated by reference.

**Subsection 3336(c) is unchanged.**

**Subsections 3336(c)(1), (c)(2), and (c)(3) are amended.**

(1) Staff Assistance. The Administrative Reviewer shall determine the need for a Staff Assistant (SA) in accordance with Section 3340 and document on the ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice.

(2) Investigative Employee (IE). If an inmate requests witnesses and/or the assistance of an IE, the Administrative Reviewer may assign an IE in accordance with Section 3340 and document on the ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice.

(3) Inmate Waiver. An inmate may waive their right to the 72-hour preparation time in writing by signing and acknowledging the waiver on the ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice, pursuant to subsection 3337(a)(2).

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code.

**Section 3338. Amendment to Reasons for Segregation.**

**Subsections 3338(a) and 3338(a)(1) are amended.**

(a) When the initial reason(s) for segregation has been resolved, but additional circumstances exist warranting continued administrative segregation placement, a new ~~CDC Form 114-D~~ automated Administrative Segregation Unit Placement Notice (05/19), which is incorporated by reference, shall be immediately prepared and issued, clearly articulating the reasons for continued retention, in accordance with Section 3335.

(1) An ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice, which is incorporated by reference, issued for purposes of retaining an inmate in segregated housing (ASU/SHU/Psychiatric Services Unit (PSU)) shall not require an Administrative Review.

**Subsections 3338(a)(2) and 3338(a)(3) are unchanged.**

**Subsection 3338(b) is amended.**

(b) For retention purposes, the ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice shall include:

**Subsections 3338(b)(1) and 3338(b)(2) are unchanged.**

**Subsections 3338(b)(3) and 3338(c) are amended.**

(3) When necessary, the official issuing the ~~CDC Form 114-D~~ Administrative Segregation Unit Placement Notice for administrative segregation retention shall document the need for effective communication accommodation if any, as defined in Section 3000, the provision of any assistance provided that is consistent with the inmate's disability or communication need, and the method staff used to determine the inmate understood. ~~how it was provided, how it was achieved and how they were satisfied effective communication was accomplished.~~

(c) ICC hearings on ~~CDC Form 114-D's~~ Administrative Segregation Unit Placement Notices, retaining inmates in ASU/SHU/PSU shall be in accordance with Section 3337.

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code; and *Taylor v. Rushen* (N.D. Cal.) L-80-0139 SAW.

**Section 3340. Assistance to Inmates for Administrative Segregation Classification Hearings.**

**Section 3340 initial paragraph is amended.**

The Administrative Reviewer of the ~~CDC Form 114-D~~ automated Administrative Segregation Unit Placement Notice (05/19), which is incorporated by reference, or official ordering an inmate retained in administrative segregation, shall determine the need for providing assistance to inmates placed or retained in administrative segregation. Such assistance may be in the form of a Staff Assistant (SA) or an Investigative Employee (IE). Only staff trained in the role and responsibilities of a SA or IE may be assigned. The duties and functions of a staff member assigned to assist an inmate in a classification hearing based upon ~~CDC Form 114-D~~ an Administrative

Segregation Unit Placement Notice will be separate from those described in Section 3318 for a disciplinary hearing.

**Subsections 3340(a) through 3340(d)(1) are unchanged.**

**Subsection 3340(d)(2) is amended.**

(2) Address the need for effective communication; The provision of any assistance provided that is consistent with the inmate's disability or communication need and the method the SA used to determine the inmate understood shall be documented in the how it was provided, how it was achieved and how the SA was satisfied effective communication was accomplished, which shall be documented within the CDC Form 128-G (Rev. 10/89) automated Classification Committee Chrono (05/19), which is incorporated by reference, in accordance to subsection 3375(g)(1)(E).

**Subsections 3340(d)(3) through 3340(g)(1) are unchanged.**

**Subsection 3340(g)(1)(A) is amended.**

(A) When an inmate's administrative segregation placement is for non-disciplinary reasons, the Administrative Reviewer will consider all available evidence or information relating to the validity of the reasons documented for administrative segregation placement. Denial of an IE, witnesses or evidence requested by the inmate shall be on the basis of legitimate penological interest and documented on the CDC Form 114-D Administrative Segregation Unit Placement Notice.

**Subsections 3340(g)(1)(B) through 3340(i) are unchanged.**

**Subsection 3340(j) is amended.**

(j) The inmate may not select the investigative employee, but may object to the one assigned and provide, in writing to the Administrative Reviewer, the reasons for the objection. The Administrative Reviewer shall evaluate the inmate's objection(s) and, if determined to be reasonable, assign an alternate investigative employee to complete the investigation. If the Administrative Reviewer determines that the inmate's objections are not reasonable, the original investigative employee shall complete the investigation. The inmate's objection must be provided prior to the beginning of the investigation. The Administrative Reviewer shall note on the CDC Form 114-D Administrative Segregation Unit Placement Notice the decision to deny or approve a request, and if denied, explain the reason(s) for denial.

**Subsections 3340(k) through 3340(k)(1) are unchanged.**

**Subsection 3340(k)(2) is amended.**



(2) Document all effective communication efforts, as necessary; including the assistance provided consistent with the inmate's disability or communication need, and the method the SA used to determine the inmate understood. ~~need for effective communication, how it was provided, how it was achieved and how they were satisfied effective communication was accomplished.~~

**Subsections 3340(k)(3) through 3340(k)(8) are unchanged.**

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code; *Coleman v. Wilson* 912 F. Supp. 1282 (E.D. Cal. 1995); and *Clark v. California* 123 F. 3d 1267 (9th Cir. 1997).

## **FINAL STATEMENT OF REASONS**

The Initial Statement of Reasons (ISOR) is incorporated by reference. The rulemaking file for Regulatory Action Number 2019-1031-05S, withdrawn at the Department's request on December 16, 2019, is also incorporated by reference.

### **UPDATES TO THE INITIAL STATEMENT OF REASONS**

Notice of Change to Regulations 19-03 was published and distributed on June 7, 2019. Public comments were accepted through July 26, 2019. The Department received four comments during this period. A public hearing was held on this date, at which no comments were received.

During the rulemaking process, the Department determined that revisions to the proposed rulemaking action were necessary. The amendments to the originally proposed text and the reasons for these revisions are explained below under the heading "Changes to the Proposed Regulations Initially Noticed to the Public - Renotice."

The *Notice of Change to Rulemaking Action as Originally Proposed* (Renotice) was distributed on February 26, 2020, to the people/organizations who provided comments during the initial public comment period, and was posted on the Department's website the same day. The Department accepted public comments from this date through March 13, 2020. No comments were received during this period.

### **DETERMINATIONS, ASSESSMENTS, MANDATES, AND FISCAL IMPACT:**

The Department has determined that no alternative considered would be more effective in carrying out the purpose for which this regulation is proposed, or would be as effective and less burdensome to affected private persons, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law, than the action proposed. No such alternatives were proposed or brought to the Department's attention during the adoption of this rulemaking action. The Department determined that taking no action would mean the Department could fail to achieve effective communication with inmates.

The Department has made an initial determination that 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 CDCR's initial determination.

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

The Department has determined that no reasonable alternatives to the regulation have been identified or brought to the attention of the Department that would lessen any adverse impact on affected private persons or small business than the action planned.

The Department, in proposing the adoption of these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document. The Department has relied upon the results of the Economic Impact Assessment, which can be found in the Notice of Proposed Regulations and is available for review as part of the rulemaking file.

### **CHANGES TO THE PROPOSED REGULATIONS INITIALLY NOTICED TO THE PUBLIC - RENOTICE**

The proposed regulatory text was not amended as part of the renotice. The ISOR was amended to include additional explanatory and necessity statements regarding two forms that were adopted as part of this rulemaking action.

## Administrative Segregation Unit Placement Notice

The CDC Form 114-D (Order and Hearing on Segregated Housing) is being repealed. As described in the ISOR, this form is being replaced by an automated form (the Administrative Segregation Unit Placement Notice) in the Department's Strategic Offender Management System (SOMS). As required by the Administrative Procedure Act, the Department included a copy of the repealed form and an example of the newly adopted form with Notice of Change to Regulations (NCR) 19-03. The form included with the NCR has a revision date of 10/98 and has been in use by the Department since that date. The form currently in the text of the CCR has no revision date. The Department is unable to locate a copy of this original form and therefore included a copy of the form currently in use.

This form is used to inform inmates that they are being placed in Administrative Segregation. Part A of the form includes a checklist of reasons for the placement, a space to describe the circumstances which support the placement, and signature blocks for staff and the inmate. These provisions are necessary to document and provide to the inmate the reasons for their placement in Administrative Segregation.

Another checklist is used to document any disability the inmate may have, the method used to confirm communication with the inmate, and any assistance provided to the inmate. This is necessary to ensure effective communication, particularly because in this instance a matter regarding due process is involved.

Part B includes a checklist that allows staff to document any communication needs the inmate may have prior to the administrative review and whether a staff assignment will be assigned, and a checklist to document whether an investigative employee will be assigned. This is necessary to ensure the inmate has the resources needed for the administrative review available to him/her prior to the review. Another checklist allows the inmate to choose to waive preparation time before the administrative review, waive or decline an interview with the administrative reviewer, and/or waive a request for witnesses, all of which the inmate may elect to do. If the inmate would like to request witnesses, the form has space to list the witnesses requested. The next section of the form includes a checklist of the decisions available to the administrative reviewer and space to document the reason for the decision, along with space for the administrative reviewer's signature. This is necessary to document this information and provide it to the inmate.

The next section of the form repeats the checklist used to document any disability the inmate may have, the method used to confirm communication with the inmate, and any assistance provided to the inmate. This is necessary to ensure effective communication with the inmate during the administrative review of the Administrative Segregation placement.

The last section of the form has space for the correctional administrator's signature following his/her review.

## Classification Committee Chrono

In subsections 3335(a)(1)(D)2. and 3340(d)(2), CDC Form 128-G (10/89), Classification Chrono, is being repealed. In its place, a new automated Classification Committee Chrono (05/19) is being adopted. The Department erroneously included a copy of the wrong form with the original NCR. A Classification Review form was included rather than the correct Classification Committee Chrono. The correct form is included with this Notice of Change to Rulemaking Action as originally proposed.

The repealed Form 128-G is a largely blank form used to document classification-related and case factor information about specific inmates, as well as information regarding decisions made by classification committees. The new automated form will be used for the same purposes as the repealed form but includes specific headings that will be used as necessary, including: Static Case Factors, which may include unchanging factors such as when the inmate arrived at prison, commitment offense, and criminal

history; and Critical Case Factors, which may include information subject to change such as the inmate's security level, custody designation, and housing placement. The form also has space for comments from a clinician and the classification committee, and a summary of the committee action taken. This is necessary to document the wide variety of classification-related statuses that may apply to an inmate, or classification-related actions that may have been taken in regard to an inmate.

## **SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS RECEIVED DURING THE INITIAL PUBLIC COMMENT PERIOD:**

### **Commenter #1**

**Comment 1:** Commenter states that there are two classes of people incarcerated within CDCR: inmates and "People of the United States" who are also held captive unlawfully, and that "it is important that the distinction between the two classes be considered when determining 'effective communication'." Commenter states "CDC presumes that 'All' of its levels of custody whom deal directly with the population are professionals whom have the ability to set aside their personal biases (and in some cases outright contempt) against prisoners."

**Response:** Although this comment does address an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 11346.9(a)(3), it 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 or accommodation of the comment.

**Comment 2:** Commenter states "The true remedy would be to have a NON CDCR Witness present (if requested) for any interaction whatsoever between CDCR staff/employees/etc. and one of the imprisoned."

**Response:** The ability to provide all CDCR inmates timely 24-hour access to non-CDCR persons throughout the statewide prison system for all encounters with CDCR staff would be impractical, unreasonable, and cost prohibitive. Introducing non-CDCR staff into the prisons would also pose significant safety and security concerns for both the Department and the public. It is the policy of the CDCR that no qualified inmate with a disability shall, because of that disability, be excluded from participation or denied the benefits of programs, services, or activities of the Department or be subjected to discrimination. Every CDCR staff member has an obligation to communicate effectively during all inmate interactions. Being able to effectively communicate is of paramount importance to ensure equal access. Based upon the identification of an inmate's individualized effective communication needs, staff shall identify and provide the appropriate assistance or accommodation(s) to achieve effective communication. Assistive devices vary, depending on the needs of the inmate, and may include, but are not limited to: Assistive listening devices, magnifiers, large printed material, captioned television and video, video relay services and video remote interpreting, qualified Sign Language interpreters, Limited English Proficiency interpretation services, reading documents aloud, speaking slowly, using simple language, and allowing additional time to respond or complete a task. Staff assistants and investigative employees may also be assigned to assist an inmate when liberty interests are involved. The commenter has failed to demonstrate how the aforementioned accommodations are insufficient, or how a "non CDCR Witness" would contribute to effective communication.

### **Commenter #2**

**Comment:** Commenter asks why disciplinary hearings and other interactions involving due process are not recorded so that discrepancies can be addressed. Such recordings would alleviate concerns about an inmate's statements being inadequately expressed or translated, particularly when the inmate could be adversely affected by staff decisions.

**Response:** One important tenant of due process is timely resolution of the issue. Unreasonable delays to the disciplinary process can adversely affect the quality of an investigation, including access to witnesses and evidence. The likely delays encountered by requiring recording equipment to be in place and functioning at all phases of the disciplinary process, including the serving of documents, pre-hearing encounters that may include interviews between a staff assistant or investigative employee and the inmate, would outweigh any potential benefit by having the encounter recorded. Furthermore, significant costs would be incurred to purchase recording devices and storage media, as well as the costs to manage, store, and retrieve the data. The Fourteenth Amendment provides that no citizen may be deprived of life, liberty, or property without due process of law. This Constitutional Amendment applies to inmates as well. The inmate also has a right to be present at any administrative proceeding that may adversely affect his or her liberty interests. Liberty interest encounters include, but are not limited to, the disciplinary process, confinement to segregated housing, and classification committee actions which could result in an adverse effect upon the inmate's confinement. Being able to effectively communicate is of paramount importance to ensure equal access. Based upon the identification of an inmate's individualized effective communication needs, staff shall identify and provide the appropriate assistance or accommodation(s) to achieve effective communication. Accommodations vary, depending on the needs of the inmate, and may include, but are not limited to: Assistive listening devices, magnifiers, large printed material, qualified Sign Language interpreters, Limited English Proficiency interpretation services, reading documents aloud, speaking slowly, using simple language, and allowing additional time to respond or complete a task. Staff assistants and investigative employees may also be assigned to assist an inmate when liberty interests are involved. Effective communication for due process and other liberty interest encounters are especially critical and shall be documented when an inmate has a verified disability that may inhibit effective communication. Inmates with low cognitive functioning and inmates who have a low reading score will also have their liberty interest encounters documented. The documentation shall include any assistance provided that is consistent with the inmate's disability or language barrier, and the method staff used to determine the inmate understood.

### **Committer #3**

**Comment:** Commenter states he is a CDCR inmate and understands the importance of effective communication. Effective communication should start with treatment and rehabilitation to prepare inmates to return to their community. Commenter states he and other inmates have experienced poor communication from staff including harassment and threats to move the inmate to a different yard. Commenter states that staff provoke "impulsive behavior" from inmates through verbal assault, use of force, and depriving inmates of medical treatment. Commenter asks "how can we truly receive this proper treatment?"

**Response:** Although this comment does address an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 11346.9(a)(3), it 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 or accommodation of the comment.

### **Committer #4**

**Comment 1:** Commenter suggests amendments "to reflect the fact that the provision of Effective Communication is required by federal law." Commenter states that the term "or" in the Department's definition of Effective Communication ("Effective communication means providing the inmates, to the extent possible or as required by federal law, communication assistance necessary to allow them to understand and participate in programs, services and activities.") is inconsistent with applicable disability law, which requires that public entities provide effective communication unless doing so would result in a fundamental alteration or undue burden. Commenter suggests deleting the phrase "to the extent possible or as required by federal law."

**Response:** There may be circumstances when effective communication cannot be achieved. It is the policy of the CDCR that no qualified inmate with a disability shall, because of that disability, be excluded from participation or denied the benefits of programs, services, or activities of the Department or be subjected to discrimination. Staff are required to provide accommodations or assistance when necessary to ensure inmates are able to understand and participate in programs, services, and activities. However, there may be instances when effective communication cannot be achieved. These occurrences are more prevalent between staff and inmates in the Mental Health Services Delivery System, and inmates in the Developmental Disability Program. For example, an inmate-patient with advanced stages of dementia may not be able to understand or retain information or instruction, despite staff's best efforts to communicate effectively. For this reason, the Department's definition of "Effective Communication" includes the following statement in Section 3000: "Effective communication means providing the inmates, to the extent possible or as required by federal law, the communication assistance necessary to allow them to understand and participate in programs, services, and activities." The verbiage "to the extent possible" is existing language found in Section 3000's effective communication definition.

**Comment 2:** Commenter suggests amending the provision which states "staff may provide assistive devices or other methods of accommodation" to replace *may* with *must*, and to add "where necessary to ensure effective communication" at the end of the sentence.

**Response:** The language in question provides staff with the latitude to determine the method(s) used to provide effective communication. There will be times when an assistive device, such as a magnifying glass or amplified hearing device, is required. There may be other times when other forms of assistance are required, such as speaking slowly, using simple English, or involving a Sign Language Interpreter. Based upon the identification of an inmate's individualized effective communication needs, staff shall identify and provide the appropriate assistance or accommodation(s) to achieve effective communication. The current language provides staff with the discretion to determine the appropriate accommodation. It is the policy of the CDCR that no qualified inmate with a disability shall, because of that disability, be excluded from participation or denied the benefits of programs, services, or activities of the Department or be subjected to discrimination. Every CDCR staff member has an obligation to communicate effectively during all inmate interactions. Staff are required to provide accommodations or assistance when necessary to ensure inmates are able to understand and participate in programs, services, and activities.

**Comment 3:** Commenter suggests incorporating additional language "that more accurately reflects the effective communication mandate." Specifically, the law requires CDCR to take appropriate steps to ensure that communications involving people with disabilities are as effective as communication with others, and that assistance be provided where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity. Commenter suggests that, to clarify that the legal standard requires equal opportunity and access, proposed language be amended to direct staff to provide "the communication assistance necessary to ensure communication with [inmates with disabilities] is as effective as communication with inmates without disabilities and allow them to understand and participate in programs, services and activities to the same extent as inmates without disability-related needs."

**Response:** It is the policy of the CDCR that no qualified inmate with a disability shall, because of that disability, be excluded from participation or denied the benefits of programs, services, or activities of the Department or be subjected to discrimination. Every CDCR staff member has an obligation to communicate effectively during all inmate interactions. Staff are required to provide accommodations or assistance when necessary to ensure that all inmates are able to understand and participate in programs, services, and activities. The Department's Effective Communication definition applies to all inmates during all encounters, and makes no distinction between inmates with or without a disability, or any other impairment. The Department's Effective Communication definition incorporates CDCR's commitment to comply with federal law. While it is the Department's goal to ensure that communication

with inmates with disabilities is equally effective as communication with inmates without disabilities, there may be circumstances when effective communication cannot be achieved.

**Comment 4:** Commenter states an agency must give primary consideration to the individual's request in determining what type of auxiliary aid is necessary, which the proposed regulations do not do. Commenter proposes adding a provision to the regulations which states: "In determining what auxiliary aid or service to provide, staff must give primary consideration to the request of the person with effective communication needs."

**Response:** It is the policy of the CDCR that no qualified inmate with a disability shall, because of that disability, be excluded from participation or denied the benefits of programs, services, or activities of the Department or be subjected to discrimination. Every CDCR staff member has an obligation to communicate effectively during all inmate interactions. Being able to effectively communicate is of paramount importance to ensure equal access. Based upon the identification of an inmate's individualized effective communication needs, staff shall identify and provide the appropriate assistance or accommodation(s) to achieve effective communication. In due process events, staff are required to document the provision of any assistance provided that is consistent with the inmate's communication need and the method staff used to determine the inmate understood. The Department's Effective Communication definition incorporates CDCR's commitment to comply with federal law. While current federal law does require consideration be given to the person who has a communication disability, the law does clarify this statement to include various exceptions when this requirement is waived, including providing another equally effective means of accommodation, and a caveat when the accommodation poses an undue burden upon the Department. The Department must also assess whether a requested accommodation would pose a threat to the health or safety of the inmate, or anyone else.

#### **PUBLIC HEARING COMMENTS:**

A public hearing was held on July 26, 2019. There were no attendees.

#### **SUMMARIES AND RESPONSES TO PUBLIC COMMENTS RECEIVED DURING THE RENOTICE PUBLIC COMMENT PERIOD:**

No public comments were received during the renotice comment period.