

OFFICE OF LABOR RELATIONS

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April 20, 2015

VIA CERTIFIED MAIL #7014-1200-0000-7188-7743

Mr. Rocco Paternoster
Association of California State Supervisors
1108 O Street, Suite 317
Sacramento, CA 95814

RE: **NOTICE REGARDING MODIFICATIONS TO THE DIVISION OF ADULT INSTITUTIONS PRISON RAPE ELIMINATION POLICY (CDCR Log No. 15-029-3)**

Dear Mr. Paternoster:

Effective June 1, 2015 the California Department of Corrections and Rehabilitation's (CDCR), Division of Adult Institutions (DAI), will modify existing policy and procedures to the Prison Rape Elimination Act (PREA).

The Departmental Operations Manual (DOM); Section 54040, Prison Rape Elimination Policy, along with other sections, have been recently revised to comply with the US Department of Justice Final Rule; National Standards of 2012, please see and review Attachment A.

The forms associated with this policy are listed in Attachment B. The forms are currently in draft, so they have not been assigned form numbers at this time. Copies of each form will be provided to you upon completion.

There will be an initial one-time requirement to train all staff, including volunteers and contractors, on the updated PREA policy. After training of staff is completed, the perceived ongoing impact to staff workload is believed to be minimal. Additional responsibilities have been identified affecting the PREA Compliance Manager and some supervisory classifications.

If you believe the implementation of this program creates impact to ACSS members please have your assigned staff person contact Padma Linker, Labor Relations Representative, by phone at (916) 323-3710 or by email at Padma.Linker@cdcr.ca.gov.

Mr. Paternoster
15-029-3
Page 2

Respectfully yours,



DEVIN FONG
Chief

Enclosures: Proposed PREA Regulations, Attachment A, Attachment B

cc: Nancy Hardy, Chief Deputy Warden, DAI
Padma Linker, Labor Relations Representative, OLR
Stephen Booth, Labor Relations Officer, CalHR

ATTACHMENT A

California Code of Regulations (CCR) Section 3084.9(a)(5) has been added to address the emergency appeal timeframes associated with PREA related emergency appeals. These timeframes are shorter than other types of emergency appeals.

CCR Section 3323 has been modified to include references to sexual assault and/or battery to Division A-1 and Division D offenses.

CCR Section 3335(b)(4) has been added to establish that inmates who are the victim of a PREA incident and placed in segregated housing will be identified as Non-Disciplinary Segregation status.

CCR Section 3401.5 has been modified to define staff sexual harassment against an inmate, as an incident of Staff Sexual Misconduct. In addition, it includes language required per the PREA standards related to protective measures.

Departmental Operations Manual (DOM) Section 31060.3 has been modified to address the requirement of Code of Federal Regulations (CFR), Part 115, Standard 115.17 which hiring authorities shall not hire or promote anyone who may have contact with inmates who: 1) has engaged in sexual violence, staff sexual misconduct, or sexual harassment of an inmate in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution; 2) has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or has been civilly or administratively adjudicated to have engaged in the activity described within this section.

These changes will be facilitated by modifications to the CDCR Form 1951, Supplemental Application for all CDCR Employees, in which they will be required to certify they have not engaged in any of these behaviors.

In addition, requirements were added related to reference checks and hiring decisions for all current and prospective employees.

DOM Section 52050.16.4 has been modified to require completion of a Notice of Unusual Occurrence when a male correctional staff conducts a pat down search of a female inmate.

DOM Section 52050.16.5 has been modified to include that routine unclothed body searches shall not be completed by staff of the opposite biological sex, except in extreme emergencies and shall be documented on a Notice of Unusual Occurrence.

DOM Section 52050.16.6 has been added to establish the process to be used when conducting clothed and unclothed body searches for Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) offenders.

DOM Sections 54040.1 and 54040.2 have been modified to include the expanded definitions in accordance with CFR, Part 115, Prison Rape Elimination Act.

DOM Section 54040.3 has been modified to provide new definitions that are used within the revised policy and procedures.

DOM Section 54040.4 has been modified to include the requirement for gender specific and specialized PREA training.

In addition, this section establishes the process to be used to document inmate participation in PREA training.

Subsections for Preventative Measures and Security Rounds have added to address the requirement in the PREA standards for privacy while performing bodily functions and/or changing clothes, and unannounced rounds by supervisors to deter sexual misconduct.

DOM Section 54040.6 has been added and establishes the requirement for completion of a new CDCR Form entitled PREA: Initial Intake Screening Tool to evaluate the offenders risk for sexual victimization or predatory behavior.

DOM Section 54040.7 has been modified to clarify options for reporting incidents of sexual misconduct.

DOM Section 54040.7.1 has been modified to refer to new CCR Section 3084.9 or 3086.

DOM Section 54040.7.2 and 54040.7.3 have been added to establish a third party reporting process which is required per the PREA standards. This process required the development of new forms which will be completed by supervisory staff.

DOM Section 54040.7.4 has been added to establish the process to be utilized when notifying other confinement facilities of PREA allegations.

DOM Section 54040.8.1 has been modified to assign institutional LDI to conduct inquiry work until sufficient investigatory work has been completed to either warrant an OIG investigation or refute the allegation. In addition, a subsection was added to address response should reporting be within a parole or other community based location.

DOM Section 54040.8.2 has been added to define the requirements necessary to provide a victim advocate and victim support person when allegations of PREA made.

DOM Section 54040.8.3 has been modified based on information from CCHCS and transition of PREA policies/procedures into the medical and mental health policies within that division. As these are finalized, they will be provided.

In addition, Chief Medical Executive's responsibility of determining serious injury is defined.

DOM Section 54040.9 has been modified to clarify that responsibility for completing the SART exam will be assigned to the community SART contract staff.

DOM Section 54040.10 has been modified to define the responsibilities of medical and mental health staff upon return of the inmate from a SART/SANE examination.

DOM Section 54040.11 has been modified to more clearly articulate staff responsibility during suspect processing.

DOM Section 54040.12 has been modified to more clearly define the process of a PREA investigation to include assignment of the LDI, use of inmate interpreters, and establishes emergency reporting criteria.

DOM Section 54040.12.1 has been added to identify when an inmate is to be transported for a SART exam for incidents reported less than 72 hours from occurrence versus when a call to the SART nurse is required.

DOM Section 54040.12.3 has been added to require CDCR to report all terminations of staff for violations of agency sexual misconduct or harassment policies to the relevant licensing body by the hiring authority or designee.

DOM Section 54040.12.4 has been added to require CDCR to report all terminations of contractors or volunteers for violations of agency sexual misconduct or harassment policies to the relevant licensing body by the hiring authority or designee.

DOM Section 54040.12.5 has been added to require CDCR to inform the offender of the results of finalized investigations whenever the alleged abuser has been indicted on the alleged sexual misconduct; or convicted of the alleged sexual misconduct.

DOM Section 54040.13 has been added to establish a process for allegation follow-up by the institutional PREA Compliance Manager. This follow-up is required for 90 days following the report of the incident.

DOM Section 54040.14 has been modified to require documentation of the housing decision on the CDC Form 128-G, Classification Chrono.

DOM Section 54040.14.1 has been added to define the supervisory responsibilities for NDS placement and review of the need for continued segregation.

DOM Section 54040.15.1 has been modified to clarify the circumstances when a false allegation may subject the inmate to disciplinary action.

DOM Section 54040.17 has been added to establish an institutional PREA review committee and identify the functions to be performed by that committee. This section also describes the responsibilities of the Departmental PREA Coordinator and defines the record retention requirements.

DOM Section 54040.17.1 has been added to establish the requirement for an annual review of staffing and video monitoring systems within the institutions.

DOM Sections 54040.19 and 54040.20 have been added to establish the requirement for data collection and monitoring.

The revision includes the use of newly developed forms including: Third Party Reporting of Sexual Violence, PREA Initial Intake Screening Tool, and Protection Against Retaliation.

There will be an initial one-time requirement to train all staff, including volunteers and contractors, on the updated PREA policy. After training of staff is completed, the perceived ongoing impact to staff workload is believed to be minimal. Additional responsibilities have been identified affecting the PREA Compliance Manager and some supervisory classifications.

ATTACHMENT B

CDCR Form XXX, Survey of Sexual Violence:

This form has been revised from an existing form to include all of the requirements for reporting to the federal DOJ on an annual basis. The form will be completed by the PREA Incident Commander (usually a custody supervisor).

CDCR Form 1951, Supplemental Application for All CDCR Employees:

This form has been revised from an existing form and will be required to be completed during the hiring interview process. This form will be completed by the individual being interviewed.

CDCR Form XXX, Third Party Reporting of Misconduct against an Inmate:

This form has been developed to meet standard 115.54, Third Party Reporting, and will be completed by the person making the complaint and will be processed by supervisory staff.

CDCR Form XXX, Third Party Reporting of Misconduct Against an Employee, Contractor, or Volunteer:

This form has been developed to meet standard 115.54, Third Party Reporting, and will be completed by the person making the complaint and will be processed by supervisory staff.

CDCR Form XXX, Initial Contact Guide:

This form has been developed to be used by any employee who receives a report of or observes a PREA incident. It was designed as a guide for staff to assist in meeting the requirement of being the initial contact.

CDCR Form XXX, PREA: Sexual Assault/Battery Interview Guidelines:

This form has been developed to assist staff when conducting an interview with the victim of an alleged PREA incident. The form would be used by a custody supervisor, a locally designated investigator, or ISU staff.

CDCR Form XXX, Protection Against Retaliation-Staff:

This form has been developed to meet standard 115.67, Agency protection against retaliation. The form will be completed by the PREA Compliance Manager or a designated managerial or supervisory employee.

CDCR Form XXX, Protection Against Retaliation-Inmate:

This form has been developed to meet standard 115.67, Agency protection against retaliation. The form will be completed by the PREA Compliance Manager or a designated managerial or supervisory employee.

CDCR Form XXX, Custody Supervisor Checklist:

This form has been developed to assist the custody supervisor while responding to an alleged PREA incident. This checklist will be used as a time log for the incident and will be included with the CDCR Form 837 package.

CDCR Form XXX, Transportation Guide:

This form has been developed to be used by designated transportation staff assigned to transport the victim or suspect for the forensic medical exam. It was designed as a guide for staff to assist in meeting the requirements associated with transporting these individuals.

CDCR Form XXX, Watch Commander Notification Checklist:

This form has been developed to provide the watch commander with a list of required contacts when notified of an alleged PREA incident. This checklist will be used as a time log for the incident and will be included with the CDCR Form 837 package.

CDCR Form XXX, Initial Intake Screening Tool:

This form has been developed to ensure compliance with standard 115.41, Screening for risk of victimization and abusiveness. This document will be completed in Receiving and Release by a custody supervisor.

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(a) remains unchanged.

Subsections 3335(b) through 3335(b)(3) remain unchanged but are shown for reference:

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

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

(2) Investigations not related to misconduct or criminal activity

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

Subsections 3335(b)(4) through 3335(b)(4)(C) are adopted to read:

(4) Investigation related to being the victim of a Prison Rape Elimination Act (PREA) Incident

(A) 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.

(B) 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 Classification Committee Chrono.

(C) 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.

Subsections 3335(c) through 3335(j) remain 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.

Subsection 3401.5(a) is amended to read:

(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:

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

Subsection 3401.5(a)(4) is adopted to read:

(4) 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.

Subsections 3401.5(b) through 3401.5(f) are 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, unit supervisor, or highest ranking official on duty,~~ who shall then immediately notify the Office of Internal Affairs Hiring Authority via the Watch Commander. The Hiring Authority will assign a Locally Designated Investigator to conduct an inquiry until sufficient information is obtained to warrant an OIA investigation, or the information collected refutes the allegations, as determined by the Hiring Authority. 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 or 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, 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 or 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 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 sexual harassment or cooperate with staff sexual misconduct or 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 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.