

OFFICE OF ADMINISTRATIVE LAW

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DEBRA M. CORNEZ
Director

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

APR 16 2018

3:48 PM



Date: April 16, 2018
To: John Williams
From: Chapter Two Compliance Unit
Subject: **2018 OAL DETERMINATION NO. 1 (S)**
(CTU2018-0220-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as underground regulations the Indecent Exposure Pilot Program at California State Prison, Corcoran, and a Memorandum dated January 19, 2018, titled "Housing Unit 4B4R Daily Activity Schedule," issued by the California Department of Corrections and Rehabilitation.

On February 20, 2018, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the Indecent Exposure Pilot Program (IEX Pilot Program) at California State Prison, Corcoran, constitutes an underground regulation. The challenged rule is attached as Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,¹ which should have been, but was not, adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, **but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA** and is not subject to an express statutory exemption from adoption pursuant to the APA. [Emphasis added.]

¹ "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

Generally, a rule which meets the definition of a "regulation" in Government Code section 11342.600 is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. The Legislature has enacted an exemption with respect to Pilot Programs adopted by the Secretary of the California Department of Corrections and Rehabilitation (Department). A Pilot Program certified by the Secretary of the Department as complying with Penal Code section 5058.1 (b)(1)-(4) is exempt from the rulemaking provisions of the APA.² The IEX Pilot Program was certified as a Pilot Program pursuant to Penal Code section 5058.1 and was filed with the Secretary of State on February 7, 2018, operative February 7, 2018 (Register 2018, No. 6).

The IEX Pilot Program was duly adopted by the Department and is, therefore, not an underground regulation. Pursuant to Penal Code section 5058.1 (d), the IEX Pilot Program shall lapse by operation of law on February 7, 2020, unless it is formally adopted as a regulation pursuant to the APA.

Your petition also challenged as an underground regulation, a Memorandum dated January 19, 2018, titled "Housing Unit 4B4R Daily Activity Schedule." It is attached as Exhibit B.

In addition to the Pilot Program exemption mentioned above, the Legislature has also enacted an exemption in Penal Code section 5058, subdivision (c), which provides for another express APA exemption to the Department for rules affecting only one prison:

² Penal Code, Section 5058.1 states:

- (a) For the purposes of this section, "pilot program" means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information.
- (b) The adoption, amendment, or repeal of a regulation by the director to implement a legislatively mandated or authorized pilot program or a departmentally authorized pilot program, is exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, if the following conditions are met:
 - (1) A pilot program affecting male inmates affects no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates affects no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates affects no more than 10 percent of the total state inmate population.
 - (2) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this section. The certification shall include a description of the pilot program and of the methods the department will use to evaluate the results of the pilot program.
 - (3) The certification and regulations are filed with the Office of Administrative Law and the regulations are made available to the public by publication pursuant to subparagraph (F) of paragraph (3) of subdivision (b) of Section 6 of Title 1 of the California Code of Regulations.
 - (4) An estimate of fiscal impact is completed pursuant to Sections 6650 to 6670, inclusive, of the State Administrative Manual.
- (c) The adoption, amendment, or repeal of a regulation pursuant to this section becomes effective immediately upon filing with the Secretary of State.
- (d) A regulation adopted pursuant to this section is repealed by operation of law, and the amendment or repeal of a regulation pursuant to this section is reversed by operation of law, two years after the commencement of the pilot program being implemented, unless the adoption, amendment, or repeal of the regulation is promulgated by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. For the purpose of this subdivision, a pilot program commences on the date the first regulatory change implementing the program is filed with the Secretary of State.

(c) The following are deemed not to be "regulations" as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director applying solely to a particular prison or other correctional facility....

This exemption is called the "local rule" exemption. It applies only when a rule is established for a single correctional institution.

In *In re Garcia* (67 Cal.App.4th 841, 845), the court discussed the nature of a "local rule" adopted by the warden for the Richard J. Donovan Correctional Facility (Donovan) which dealt with correspondence between inmates at Donovan:

The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances.

...

The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the Memorandum challenged by your petition was issued by the Warden of California State Prison – Corcoran and applies solely to the inmates of the California State Prison – Corcoran. Inmates housed at other institutions are governed by those other institutions' schedules for daily activities. Therefore, the rule is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). It is not an underground regulation.³

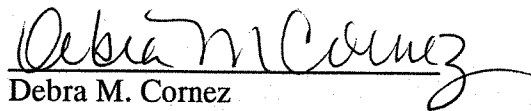
For the reasons discussed above, we find that the rules challenged by your petition are not underground regulations.

³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:


- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
- (A) The challenged rule has been superseded.
 - (B) The challenged rule is contained in a California statute.
 - (C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.
 - (D) The challenged rule has expired by its own terms.
 - (E) **An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.** [Emphasis added.]

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Dated: April 16, 2018



Debra M. Cornez
Director



Elizabeth A. Heidig
Assistant Chief Counsel

Copy: Scott Kernan, CDCR Secretary
Timothy Lockwood, A.D., RPMB

Exhibit A

THOMSON REUTERS

WESTLAW California Code of Regulations

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§ 3999.24. Indecent Exposure Pilot Program at California State Prison, Corcoran.

15 CA ADC § 3999.24

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

Barclays Official California Code of Regulations Currentness

Title 15. Crime Prevention and Corrections

Division 3. Adult Institutions, Programs and Parole

Chapter 1. Rules and Regulations of Adult Operations and Programs

Subchapter 8. Pilot Programs

Article 1. Pilot Programs (Refs & Annos)

15 CCR § 3999.24

§ 3999.24. Indecent Exposure Pilot Program at California State Prison, Corcoran.

Memorandum

Date: December 20, 2017

To: Associate Directors, Division of Adult Institutions Wardens

INSTRUCTIONAL MEMORANDUM

Subject: **INDECENT EXPOSURE PILOT PROGRAM AT CALIFORNIA STATE PRISON, CORCORAN**

The purpose of this instructional memorandum is to announce the Indecent Exposure (IEX) Pilot Program at California State Prison, Corcoran (COR). The goal of the pilot will be to determine if modification of some of the sanctions for these offenses leads to a reduction in IEX behavior in a non-segregated environment. Under existing regulations, inmates found guilty of IEX or two or more Sexual Disorderly Conduct offenses in a 12-month period are subject to sanctions, as detailed in California Code of Regulations (CCR), Title 15, Section 3315(f)(5)(K), and are required to be assessed a Security Housing Unit (SHU) term per CCR, Title 15, Section 3341.9(e)(12)(A).

Inmates that are part of the pilot program would still be subject to CCR, Title 15 sanctions as noted above, but would not be subject to a SHU term solely based on an IEX offense. In lieu of serving a SHU term, any Division "D" IEX offense credit loss would become non-restorable, and inmates would be clustered in a 180-design housing unit at COR.

Pilot Program Location and Duration

The pilot program at COR, Facility 4B, Building 4R, will be in effect for 24 months, following approval by the Office of Administrative Law, and will expire by operation of law at the end of this period unless it is promulgated through the Administrative Procedure Act prior to expiration. The pilot will apply to Enhanced Outpatient Program (EOP), Correctional Clinical Case Management System (CCCMS), and General Population (GP) inmates. The pilot will accept inmates from all classification levels and will be considered a non-designated programming facility for housing purposes. EOP inmates will be housed in a separate section of the 180-design housing unit from the CCCMS/GP inmates.

Pilot Program Operation

GP inmates charged with committing the offense of IEX (or two or more Sexual Disorderly Conduct offenses in a 12-month period) shall immediately be remanded to Administrative Segregation and separated from the victim staff member. If the IEX occurs within a segregated housing unit, the inmate shall remain in segregated housing. The Institutional Classification Committee (ICC) shall conduct classification committee for inmates charged with an IEX offense within ten days, and recommend expedited transfer to COR. Prior to ICC occurring, institution staff shall request a COR bus seat (including the inmate's name, CDCR number, and "IEX") in anticipation of the inmate transferring to COR, to ensure expeditious transfer.

Consistent with existing regulations, each institution shall continue to generate a Crime Incident Report (CDCR-837), Administrative Segregation Unit Placement Notice (CDCR-114D), Rules Violation Report (RVR), and District Attorney referral. Based on the expeditious transfer of inmates to COR, COR will typically be responsible for hearing RVRs for the inmates transferred from other institutions.

Upon arrival at COR, inmates will be placed in the designated IEX housing unit for the following periods of time:

- For the first offense in a 12-month period - 90 days from arrival date.

- For the second offense in a 12-month period - 180 days from the latest offense. This shall run concurrently.

While in the designated IEX housing unit, inmates shall not be restrained and will be eligible to participate in Mental Health groups, Exhibitionism Treatment Groups, Voluntary Education Programs, Yard/Dayroom, and other programming. All inmate programming shall be facilitated in the housing unit or adjacent treatment areas. All yard activities will be facilitated via the Concrete Yard.

Once the 90 or 180 days has been reached and the inmate has not engaged in additional IEX behavior, the inmate will be taken back to the Unit Classification Committee (UCC) for transfer to an institution consistent with the inmate's current case factors. The UCC hearing shall be held within 10 days of the inmate reaching the 90 or 180 day mark, and inmates will be transferred within 30 days of the UCC hearing.

The following inmates will be ineligible for the pilot program:

- Inmates with enemy concerns within the COR IEX unit that cannot be resolved shall follow existing processes (i.e., subject to SHU term upon guilty finding of an RVR). The inmates shall not be subject to zero credit restoration for IEX offenses.
- Inmates with an active SHU term or housed in segregated housing for a potentially SHUable offense (other than IEX) shall not be immediately referred to COR.
- Inmates who commit a SHUable RVR other than IEX while in the IEX program shall be immediately placed in segregated housing, pending completion of the disciplinary process.
- Inmates with case factors precluding placement at COR will be ineligible for the program.

For all institutions, inmates currently in segregated housing solely for IEX RVRs shall be reviewed at their next scheduled classification committee for eligibility and placement into the COR IEX program. Inmates who are already past their pre-Minimum Eligible Release Date from SHU for IEX offenses shall not be transferred to COR.

Pilot Implementation Plan

All staff involved in the disciplinary and classification process shall receive a copy of this memorandum. COR staff will be responsible for developing an operational procedure relative to implementation of this pilot program utilizing the parameters discussed in this memorandum. COR will also be responsible for submitting any labor tools associated with the pilot program.

Pilot Program Evaluation

The pilot will be evaluated based on tracking RVRs for inmates prior to placement in the program, while in the program, and upon release from the program, to determine whether the program is successful in reducing IEX behavior.

Please disseminate this information as appropriate to ensure awareness. If you have any questions, please contact Dawn Lorey, Associate Warden, Mental Health Compliance Team, at (916) 323-2450, or Shad Pulley, Correctional Captain, Facility Support, Division of Adult Institutions, at (916) 323-4092.

/s/

KATHLEEN ALLISON

Director

Division of Adult Institutions

Attachments

cc: Connie Gipson

Jeff Macomber

Kelly Mitchell

Dawn Lorey

Shad Pulley

HISTORY

1. New section filed 2-7-2018; operative 2-7-2018 pursuant to Penal Code section 5058.1(c). Submitted to OAL for filing with the Secretary of State and printing only pursuant to Penal Code section 5058.1(b). (Register 2018, No. 6). Section shall lapse by operation of law on 2-7-2020 pursuant to Penal Code section 5058.1(d) unless formally adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

This database is current through 3/23/18 Register 2018, No. 12

15 CCR § 3999.24, 15 CA ADC § 3999.24

Exhibit B

Memorandum

Date : January 19, 2018

To : ALL CONCERNED
Facility 4B
California State Prison - Corcoran

Subject: **HOUSING UNIT 4B4R DAILY ACTIVITY SCHEDULE**

The following Daily Activity Schedule (DAS) is for the Housing Unit 4B4R IEX Pilot Program, precluded only by inclement weather conditions and/or emergency situations. Any variation from the below schedule must be approved by the Facility Captain and noted on the Daily Activity Report (DAR) by the Facility Lieutenant. The DAR(s) for both Second and Third watch will be submitted to the Facility Captain daily.

YARD RELEASE:

Staff will utilize the housing unit's unlock report in conjunction with a current Loss of Privileges/Confined to Quarters (LOP/CTQ) roster when conducting yard release. This will ensure only those inmates eligible for yard activities are released from their assigned cell.

At least one (1) Housing Unit Officer will be present in the section in order to identify the inmate(s) being released, ensuring the inmate(s) meet the appropriate privilege requirement for Yard. The yard release will be controlled and will not exceed five (5) cells being released at any time (*example: Cells 1-5 will be released and once the inmates have been processed by staff, cells 5-10 will be released*). Inmates will be released from their cells and will be dressed in their state t-shirt, boxers, socks, and shoes. Additional clothing will be carried by the inmate in their hands. The inmates will exit the section and additional staff will remain in the housing unit rotunda area and perform clothed body searches of ALL inmates going to the concrete yard. The Housing Unit Officers will utilize a hand held metal detector to scan ALL inmates going to yard for contraband. After each inmate is cleared they will exit the rotunda area and proceed to the concrete yard area. Each yard group will not exceed sixteen (16) inmates.

During the hot weather months, all inmates listed on the weekly, non-detailed heat-risk inmates list, will be afforded the opportunity to attend the morning session of yard. This shall be done to allow adequate time and opportunity for recreation before the Uniform Heat Trigger (UHT) is activated.

The following schedule will be in effect seven (7) days per week regardless if the last day of the month is an odd day:

YARD ROTATION:

	Odd Days	
Morning:		Lower Tier-0830-1130
Afternoon:		Upper Tier-1200-1530
	Even Days	
Morning:		Upper Tier-0830-1130
Afternoon:		Lower Tier-1200-1530

YARD RECALL:

Prior to yard recall, the Yard Officer will announce a five (5) minute warning. The yard recall will be controlled and will not exceed five (5) cells being recalled at any time (example: Cells 1-5 will be recalled and once they are secured within their cells, cells 6-10 will be recalled). This will be repeated in a controlled and organized manner until all inmates are secured in their cells. During yard recall, two Officers will position themselves in the housing unit rotunda area and perform clothed body searches of inmates returning from yard. Meanwhile, at least one (1) Officers will be positioned in the section being recalled in order to ensure inmates return to their assigned cells. **There will NOT be a voluntary inline.**

All heat-risk inmates who are participating in yard activities will be afforded dayroom in their assigned section upon the UHT being activated.

C-Status Inmates/Privilege Group C/Orientation: Inmates designated as C-Status/Orientation status or assessed no yard/dayroom via disciplinary action will be provided yard access the for two (2) hour of morning yard. If a C-status or Orientation inmate is designated as CCCMS or EOP LOC and the temperature reaches 90 degree they will be afforded an alternative program such as dayroom.

Attendance at religious services will be allowed for C-Status inmates as long as they are on an approved religious services list signed by the Facility Captain and Chaplain. They are also afforded in-cell worship.

DAYROOM SCHEDULE:

Dayroom will be conducted seven (7) days per week, regardless if the last day of the month is an odd day. Dayrooms will be conducted on Second and Third Watch. Second watch dayroom will be on a tier rotation in conjunction with the yard program. The tier which does not have yard will have access to the dayroom. Inmates will only attend dayroom in their assigned sections.

Inmates attending dayroom will be properly dressed and will only be allowed to exit their cells with allowable items. The tables in the dayroom are provided for approved recreational activities such as board games, card games, etc. The tables are not to be used for legal work, food shares, or other non-recreational activities.

DAYROOM ROTATION:

Odd Days

Morning Upper Tier:	0845-1115
Afternoon Lower Tier:	1215-1515
Evening Upper Tier:	1800-2030

Even Days

Morning Lower Tier:	0845-1115
Afternoon Upper Tier:	1215-1515
Evening Lower Tier:	1800-2030

A1A INMATES:

Access to yard and dayroom will be based on an inmate's assigned housing coupled with the DAS. All A1A inmates returning from their assignments early and/or at the end of their shift will be granted access to dayroom or yard in accordance with this DAS. A1A inmates who are dismissed/released from the assignment area by their supervisor for adverse reasons will NOT be allowed recreation yard/dayroom and will be required to report directly to their assigned cells for the remainder of their work/assignments hours.

Inmates who are unable to work attend vocational/education programs due to the absence of the instructor or work supervisor and/or closure of work area will be allowed to attend yard/dayroom in accordance with this DAS. Should the supervisor/instructor arrive late, the inmate will be required to report to their assignment for the remainder of their work/assignment hours.

A2B DESIGNATED INMATES:

Inmates designated as A2B, will be granted yard/dayroom in accordance with the DAS Monday through Friday only, excluding Holidays.

TELEPHONES:

Telephone sign-ups will be conducted during Third Watch on tier rotation for the following day. Phone calls will coincide with the Yard/Dayroom schedule. Inmate phones will not be used during mass movement (e.g. yard release, recall etc.). Therefore, inmates signing up for telephone calls should consider this when making telephone time slot selections and program preferences.

The telephone list will be kept in the Control Booth in order to verify the inmate using the phone is signed up for a phone call.

A2B designated inmates shall receive one telephone call per month. A2B inmates may sign-up for one phone call any time during the first ten days of the month (weekends and holidays included). Housing unit staff will track the date the inmate was assigned a telephone time slot to ensure he does not receive more than one telephone call per month.

SHOWER PROGRAM:

Inmates will have access to the showers during their assigned dayroom. There will be no segregating of any showers and all showers will be utilized. Inmates will only shower in their assigned section. All inmates will be afforded the opportunity to shower at least three (3) times per week.

A2B designated inmates will shower during their scheduled dayroom periods. Staff will ensure A2B designated inmates are afforded the opportunity to shower three (3) times per week.

LAW LIBRARY/ EDUCATION/ GROUPS:

PLU Inmates will be escorted to the Law library. For all Law Library/Education/ Groups etc. inmates are required to be fully clothed in state issued blues and are required to have their state picture Identification card.

FEEDING:

All inmates in Housing Unit 4B4R IEX Pilot program will walk out from their assigned cell to receive their tray and return to their assigned cells to eat. Housing Staff may utilize assigned workers which are food handling cleared in the preparation and service of morning and evening meals. Upon completion of the meal, inmates will return food trays and staff will account for all trays.

If cell feeding is necessary for Administrative reasons Food trays will be served to the inmates via cell food ports. At no time will an inmate be allowed to feed another inmate through a food port. Access through a food port will only be conducted by Custody staff.

CLOTHING AND LINEN:

Clothing and linen exchange will be conducted on third watch.

REDIRECTIONS:

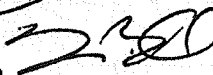
When staff is redirected, staff will make every effort to ensure daily programs are conducted in a safe and efficient manner. Phone and shower program will continue to run as normal. If there is no floor staff in the housing unit, no inmate movement will occur until a floor officer has returned to the housing unit.

MODIFIED, INCLEMENT WEATHER AND / OR EMERGENCY SITUATIONS:

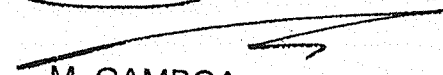
During inclement weather, there will be no recreational yard. However dayroom will be afforded in accordance with the current tier rotation.

This DAS supersedes all previous daily activity schedules and memorandums relative to Facility 4B4R.

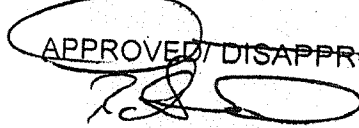
APPROVED/ DISAPPROVED


S. BABB
Facility 4A/4B Captain
California State Prison- Corcoran

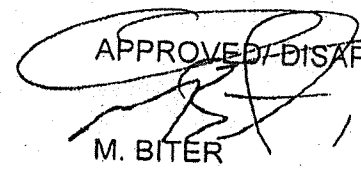
APPROVED/ DISAPPROVED


M. GAMBOA
Associate Warden- SHU
California State Prison- Corcoran

APPROVED/ DISAPPROVED


M. V. SEXTON
Chief Deputy Warden
California State Prison- Corcoran

APPROVED/ DISAPPROVED


M. BITER
Warden (A)
California State Prison- Corcoran
1-31-18