

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

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of the State of California

DEC 17 2018

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2018 OAL DETERMINATION NO. 7
(OAL MATTER NO. CTU2018-0601-01)

REQUESTED BY: Andrea Cardosa

CONCERNING: Memorandum dated January 2, 2018; Milestone Completion Credits and Education Credits, issued by the California Department of Corrections and Rehabilitation

**DETERMINATION ISSUED PURSUANT TO GOVERNMENT
CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.¹ OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

The challenged rule was issued by the Department of Corrections and Rehabilitation (Department) and is contained in a memorandum dated January 2, 2018, with the subject "Milestone Completion Credits and Education Merit Credits." The January 2, 2018, "Milestone Completion Credits and Education Merit Credits" memorandum details policies and procedures for the awarding of Milestone Completion and Education Credits to inmates who participate in approved rehabilitative programs. It is attached as Exhibit A, and hereafter referred to as the "Memorandum."

¹ As defined by title 1, section 250(a), an

"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.

DETERMINATION

OAL determines that the Memorandum meets the definition of “regulation” that should have been adopted pursuant to the APA, but was not. The Memorandum is, therefore, an underground regulation.

FACTUAL BACKGROUND

On June 1, 2018, Andrea Cardosa (Petitioner) submitted a petition to OAL challenging the Memorandum as an underground regulation. The Memorandum was issued by Shannon M. Swain, Superintendent, Office of Correctional Education for the Department. It was issued on January 2, 2018, directed to “Principals,” and copied to many others in the Department.

OAL accepted the petition for consideration on July 31, 2018. The petition was published in the California Regulatory Notice Register on August 17, 2018. Comments from the public were solicited until September 17, 2018. OAL received three comments from the public, all supportive of Ms. Cardosa’s petition. A response to the petition from the Department was due no later than October 1, 2018. No response was received from the Department.

The Memorandum is directed to facility Principals and the staff of the Department and contains instructions on how “inmates may be eligible to receive credit for satisfactory attendance and participation in approved rehabilitative programs.” It is a seven page memo that is to be used by education supervisors to evaluate whether an inmate may be awarded Milestone Completion Credit. OAL’s review and analysis is limited to the criteria specifically challenged by Petitioner under the subject “College” on page four of the Memorandum, which lists the following:

For MCC [Milestone Completion Credit], the college must be accredited by an agency recognized by the United States Department of Education (USDOE) at the time of course completion. EMC [Education Merit Credit] may only be issued for regionally accredited colleges and universities.

- One MCC may be awarded per qualifying course
- Inmate-students must have a verified HSD/HSE [High School Diploma/High School Equivalency] to enroll in college courses for MCC
- Each qualifying course must be transferable to an AA/AS or BA/BS degree and provide a minimum of three (3) semester units or four (4)/five (5) quarter units
- Units earned above or below these amounts may not be “banked” or combined with other units
- Career (e.g., Paralegal) and certificate programs (e.g. Servsafe) do not qualify for College MCC
- College courses approved for MCC must lead to a degree

- OCE CTE [Office of Correctional Education Career Technical Education] courses which are articulated with a college are not eligible for college MCC
- College courses that replicate OCE curriculum are not eligible for college MCC, in accordance with the Memorandum of Understanding between the Community College Chancellors Office and the California Department of Corrections and Rehabilitation and amendment of Education Code Section 84810.5, which states: *The courses for inmates (provided by community college) in a state correctional facility developed as a result of this agreement will serve to supplement, but not duplicate or supplant, any adult education course opportunities at that facility by the Office of Correctional Education of the Department of Corrections and Rehabilitation.*

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA (Gov. Code sec.11340(b)). An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a "regulation" subject to the APA. This analysis will determine (1) whether the challenged rule is a "regulation" within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

... 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).²

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.³

The Memorandum indicates that it is directed to “Principals” and “Department staff” throughout the state and applies to all inmates who seek to obtain Milestone Completion Credit. As such, the rule applies generally to all inmates.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure.

Penal Code section 5054 specifically provides that the care and custody of inmates, as well as the management and control of state prisons, is vested in the Secretary of the Department. It states:

Commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

² Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

³ See also *Roth v. Department Of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

Penal Code section 2933.05(b) provides that inmates “shall have a reasonable opportunity to participate in program credit qualifying assignments in a manner consistent with institutional security and available resources.”

The Secretary, through the Department’s Superintendent, Office of Correctional Education, is implementing, interpreting and making specific the duties delegated to the Secretary pursuant to sections 2933.05(b) and 5054 of the Penal Code when deciding how and when inmates will receive Milestone Completion Credit in the Memorandum.

The Memorandum specifically states that its purpose is to provide Principals and “Department staff with information regarding the new Milestone Completion Credits (MCC) and Education Merit Credits (EMC).” It further states: “Proposition 57 regulations stipulate that inmates may be eligible to receive credit for satisfactory attendance and participation in approved rehabilitative programs.” The Proposition 57 regulations the Memorandum is referring to are, among others, sections 3043 and 3043.3 of the California Code of Regulations (CCR). The Memorandum indicates that section 3043 of title 15, of the CCR “identifies the criteria necessary for a program to qualify for MCC” and then sets forth further requirements implementing sections 3043 and 3043.3, which specifically addresses Milestone Completion Credit.

Two examples of where the Memorandum goes beyond what is in Title 15, section 3043.3, of the CCR are as follows:

First, the Memorandum states that “[u]nits earned above or below [a minimum of three (3) semester units or four (4)/five (5) quarter units] may not be ‘banked’ or combined with other units.” However, Title 15 of the CCR, subdivision 3043.3(c) seems to state the contrary. It states, in relevant part, that “Milestone Completion Credit shall be awarded in increments of not less than one week, but no more than twelve weeks in a twelve-month period. Milestone Completion Credit earned in excess of this limit shall be awarded to the inmate on his or her next credit anniversary, defined as one year after the inmate completes his or her first Milestone Completion Credit program, and each year thereafter.” In other words, the regulation seems to allow credits earned to be “banked” and used the following year, while the Memorandum prohibits this.

Second, the Memorandum states that “[c]ollege courses approved for MCC must lead to a degree.” However, Title 15 of the CCR, subdivision 3043.3(d), does not impose such a requirement. It states, in relevant part:

(d) A Milestone Completion Credit Schedule (REV 07/18) is hereby incorporated by reference. The schedule identifies all of the approved Milestone Completion Credit programs, the corresponding credit reduction for successful completion of each program, and whether credit for repeating the program is authorized. The department may authorize a program be repeated for credit if there are significant rehabilitative benefits to be gained by those inmates who retake the program.

Page 2 of the Milestone Completion Credit Schedule shows that a college course of 3 semester units or 4-5 quarter units provides a credit of 3 weeks, but it does not specify that the

college course must lead to a degree. The Memorandum further interprets and makes specific the regulation by requiring the college course to lead to a degree.

The Memorandum does not merely restate section 3043.3 of title 15, but goes beyond what is in section 3043.3 of title 15 of the CCR by further implementing, interpreting and making it more specific.

The Memorandum contains generally applicable rules that further implement, interpret and make more specific sections 3043 and 3043.3 of title 15 of the CCR, as well as Penal Code sections 5054 and 2933.05(b) and Proposition 57. It therefore meets the definition of "regulation" in Government Code section 11342.600.

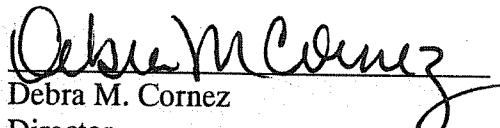
The final issue to examine is whether the Memorandum falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*" (Emphasis added.)

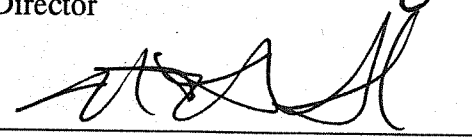
The Department has not identified an express statutory exemption from the APA that would apply to the Memorandum, nor did OAL find such an exemption.

CONCLUSION

In accordance with the above analysis, OAL determines that the Memorandum meets the definition of "regulation" that should have been adopted pursuant to the APA, but was not. The Memorandum, therefore, is an underground regulation.

Date: December 17, 2018


Debra M. Cornez
Director


Thanh Huynh
Senior Attorney

Cc: Ralph Diaz, Secretary (A)
Ying Sun, Acting Chief RPMB

EXHIBIT A

Memorandum

Date : January 2, 2018

To : Principals

Subject: **MILESTONE COMPLETION CREDITS AND EDUCATION MERIT CREDITS**

As a result of the passage of the Public Safety Act of 2016 (Proposition 57), this memorandum provides Department staff with information regarding the new Milestone Completion Credits (MCC) and Education Merit Credits (EMC). Proposition 57 regulations stipulate that inmates may be eligible to receive credit for satisfactory attendance and participation in approved rehabilitative programs.

California Code of Regulations, Title 15, subsection 3043 identifies the criteria necessary for a program to qualify for MCC. The Department requires that the award of MCC be for the mastery of certain performance measures that demonstrate an understanding of course curriculum (standards, competencies, modules, etc.) through completion of assignments, instructor evaluations, and standardized testing. Each MCC is weighted based on classroom attendance and coursework completions, thus not all programs may qualify for credit. No credit will be awarded for diplomas, degrees, or certificates that cannot be verified after due diligence by Department staff. The Department has filed a proposed amendment to the regulatory schedule for education programs that qualify for MCC which will take effect when the final rulemaking package for Proposition 57 is adopted in the spring of 2018.

The Division of Rehabilitative Programs and Division of Adult Institutions will continue to collaborate and maintain revisions of the MCC Schedule, as needed. This is necessary based on programmatic changes as Academic and Career Technical Education (CTE) practices fluctuate over time due to adopted standards and availability of Departmental resources.

Under the current MCC Schedule effective August 1, 2017, student-inmates must positively participate in and attend all required classroom activities for the duration of the program to receive MCC. Passing an exam alone does not qualify a student-inmate for the award of any MCC.

The Office of Correctional Education (OCE) is committed to maintaining the validity of MCC issued to inmate-students participating in education programs. As such, all education supervisors are required to ensure:

- MCC are awarded only when attendance and performance criteria (mastery or understanding of course curriculum as demonstrated by completion of assignments, instructor evaluations, and assessments) are met
- A minimum rate of 80 percent shall be the basis for verifying attendance and passing of assignments/coursework prior to awarding an MCC
- Competency, standard, and coursework completion is noted/completed on the Curriculum Progress Record in Strategic Offender Management System (SOMS)
- Education Progress Reports are comprehensive and completed quarterly
- MCC are only awarded to inmates who are currently assigned/enrolled in Education Programs
- The MCC code entered corresponds with the inmate-student's achievement
- Education staff shall only issue MCC associated with OCE-approved Education Programs per the current MCC Schedule
- Academic MCC for Adult Basic Education (ABE) I, II, III, and Literacy shall not be awarded to student-inmates when:
 1. A HSD/HSE is noted in offender demographics (Institutional Staff Recommendation Summary [ISRS], Probation Officer Report [POR], etc.) in SOMS; and
 2. No evidence is noted in SOMS that the HSD/HSE is false.
- Academic MCC (ABE I, II, III, and Literacy) shall not be awarded to student-inmates who have a verified HSE/HSD (i.e. Test of Adult Basic Education (TABE) / Comprehensive Adult Student Assessment System (CASAS))
- Academic MCC are awarded using the highest score achieved as the base-line, regardless of the original test date
- Education Records, Special Education Records, and Transcripts are requested, recorded, and attached to the inmate's profile in the Strategic Offender Management System (SOMS)
- College and HSD course information is noted in the Education Transcript section of SOMS and in the comments section of the MCC prior to MCC approval
- College and HSD MCC are not issued for duplicate courses
- The MCC is dated to reflect the date of the assessment, course completion, and/or program completion, not the date results were received

- "X-Time Modified Programming" is to be used to verify programming hours for inmates assigned to the Voluntary Education Programs (VEP) when awarding MCCs. VEP instructional packets are to include a start and stop time in the header; that the student-inmates will fill in to justify the X-Time Modified Programming hours.
- Instructors input MCC into SOMS within ten business days, and Education Supervisors verify and approve/reject the MCC within an additional ten business days
- MCC may not be both recommended and approved by the same staff, and staff must be credentialed and certificated

The following requirements for issuing/documenting MCC are identified below for various education program areas:

High School Diploma (HSD) and High School Equivalency (HSE)

OCE currently approves two HSE exam series, the General Educational Development (GED) and the High School Equivalency Test (HiSET) as noted within the MCC Schedule. HSE/HSD EMCs shall be awarded to eligible student-inmates once mastery of requisites is exhibited. The following guidelines for HSE/HSD shall be followed:

- Education staff shall review the student-inmate's Demographic Profile, Education Records and file, for any indication the student-inmate does or does not have a HSD or HSE, and request transcripts, as appropriate, for verification
- If HSD or HSE documents cannot be located and Education staff are unable to verify the HSD or HSE, staff shall indicate as such under Education Case Notes in SOMS via a CDCR 128-B. The student-inmate shall then be permitted to work toward the HSD or take a HSE examination
- The Principal or designee's approval must be obtained and documented in SOMS when a HSD or HSE cannot be verified, and the student-inmate will be allowed to continue with his/her HSD program or take the HSE examination
- HSD MCC are only issued for OCE-approved courses taken while enrolled in the HSD program and in accordance with the current MCC Schedule
- HSD courses that require less than 10 units to complete, are not eligible for MCC
- Student-inmates may not receive more than one MCC for the same course of study. For example, an inmate-student may not earn MCC in a CTE class and as an elective under the HSD program, even though the credits from the CTE class may count as an elective in the HSD program
- With the exception of Electives, MCC for HSD coursework may only be issued once

- MCC for HSD shall not be awarded to student-inmates when:
 1. A HSD/HSE is noted in offender demographics (Institutional Staff Recommendation Summary [ISRS], Probation Officer Report [POR]; and
 2. No evidence is noted in SOMS that the HSD/HSE is false.

Standardized Assessments

For standardized assessments, education staff members are to refer to the CASAS Reference and TABE Reference Tables (both attached) for specific guidelines regarding the administration and analysis of results prior to awarding MCC for ABE I, II, III and Literacy.

College

The VEP teacher verifies the eligibility of the college and course(s) for each student-inmate prior to approving the MCC. VEP teachers may only enroll student-inmates who meet the college eligibility requirements. Upon approval, the VEP teacher enters the course information in SOMS under Course Transcripts.

For MCC, the college must be accredited by an agency recognized by the United States Department of Education (USDOE) at the time of course completion. EMC may only be issued for regionally accredited colleges and universities.

- One MCC may be awarded per qualifying course
- Inmate-students must have a verified HSD/HSE to enroll in college courses for MCC
- Each qualifying course must be transferable to an AA/AS or BA/BS degree and provide a minimum of three (3) semester units or four (4)/five (5) quarter units
- Units earned above or below these amounts may not be "banked" or combined with other units
- Career (e.g., Paralegal) and certificate programs (e.g. Servsafe) do not qualify for College MCC
- College courses approved for MCC must lead to a degree
- OCE CTE courses which are articulated with a college are not eligible for college MCC
- College courses that replicate OCE curriculum are not eligible for college MCC, in accordance with the Memorandum of Understanding between the Community College Chancellors Office and the California Department of Corrections and Rehabilitation and amendment of Education Code Section 84810.5, which states: *The courses for inmates (provided by community college) in a state correctional facility developed as a result of this agreement will serve to supplement, but not duplicate or supplant, any adult education course opportunities at that facility by the Office of Correctional Education of the California Department of Corrections and Rehabilitation.*

Verification of college unit(s) issued must be provided directly from the college to the Education Department staff at the Institutional school in order for MCC to be awarded. Proof of completion received directly from the student-inmate will not be accepted.

- The teacher will provide the name of the college, course number, course name, and semester/quarter date in the comments section of the MCC. The teacher will update the Education Course Transcript in SOMS
- College MCC (C010110) is approved to be issued more than once, but not for duplicate courses
- College units issued, not a letter grade, will determine eligibility for issuing MCC
- Student-inmates already in possession of a college degree are eligible to earn additional college MCC, but not for the same course
- Official Course transcripts will be scanned in SOMS
- Teachers will enter college course information into Education Case Notes for those colleges authorized to send official grade reports to meet MCC requirements. An official transcript will be required to earn an EMC.

Education Merit Credit

EMC are awarded for the participation and completion of HSD, HSE, and college degrees. The student-inmate must request an official, sealed transcript be sent from the educational institution to the attention of the Principal at their institution.

Upon receipt of official, sealed college transcripts, Education Department staff shall verify the student-inmate completed at least 50% of the coursework during his/her current term of incarceration, scan, and input the transcript into SOMS within 30 days of receiving the transcript.

The United States Department of Education (USDOE) maintains a listing of regionally accredited institutions, available at <https://ope.ed.gov/accreditation/Search.aspx>. EMC shall only be awarded once per category (HSE/HSD, AA/AS, BA/BS, MA/MS).

Career Technical Education (CTE)

Student-inmates who are assigned to a CTE program and successfully complete a level within that program may earn a CTE MCC for that level. MCC are based on assignment completions, hands-on training, and various assessments and/or exams, as well as hours of in-class participation. CTE MCC may only be awarded once per student-inmate.

Education staff are to refer to the specific CTE program in the MCC Schedule for the list of CTE MCC. Below are criteria for specific CTE programs:

Computer Literacy / Office Service and Related Technology (OSRT)

Computer Literacy Core and Digital Literacy (Comp Lit MCC Schedule) and Microsoft Level 1 (OSRT MCC Schedule) are the same course. Student-inmates are only eligible to earn one MCC in one of the two MCC sections, depending upon the program in which they are enrolled. Computer Literacy student-inmates who complete the Core or Digital Literacy curricula are able to be unassigned as they have completed this program. The Digital Literacy course is available at institutions utilizing the Imagine Academy system. OSRT student-inmates may continue on to the next Microsoft Level. Student-inmates receive a MCC for curricula completion – there are no additional MCCs awarded for certification.

National Center for Construction Education and Research (NCCER) CORE

OCE CTE programs now list the required Core MCC under Career Core as Career Core Basics on the MCC Schedule. Student-inmates may only receive this MCC once, regardless of the number of NCCER programs to which they are assigned. Student-inmates must pass all modular exams and performance profiles to earn this MCC. Teachers must check-off each module and all performance-based projects within the curriculum in the SOMS Curriculum Progress Record. While the Core MCC requires that the student-inmate earn the certification, there is no additional MCC available for earning this certification. Student-inmates may not earn NCCER Level Certification MCC until the Core Certification has been achieved.

Construction Program Course Levels and NCCER Levels

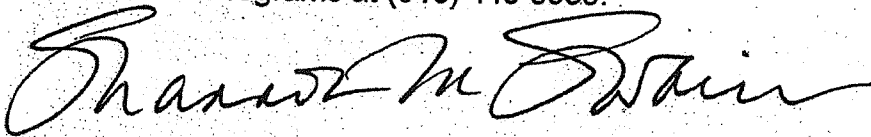
Student-inmates shall earn course level MCC for completing the assignments, performance-based projects, and mastery of modules using the NCCER materials. Once the course level is completed, the student-inmate may earn the NCCER Certification Credential and additional MCC for passing the exams and all of the performance profiles for that level. Per the attached CTE pacing guide, each NCCER Certification Credential requires additional hours of study, practice and assessment in order for the student-inmate to be eligible to receive the NCCER Level MCC.

Other CTE Programs

Within other OCE CTE programs, MCC are earned through completion of the course levels as well as through achieving industry certification. Student-inmates are required to complete coursework and performance-based learning exercises in accordance with the attached CTE Pacing Guide. Student-inmates are to complete additional hours of study and practice in order to be eligible to participate in the industry certification exam. Inmate-students who meet these requirements are eligible for the corresponding MCC.

All teachers and education administrators are to receive this memorandum and receive training on the contents therein. Training shall be documented on a CDC 844 Training Participation Sign-In Sheet.

If you have any questions regarding MCC or EMC, please contact the OCE, Division of Rehabilitative Programs at (916) 445-8035.



SHANNON M. SWAIN
Superintendent
Office of Correctional Education

Attachments

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