

SUPPLEMENT TO THE INITIAL STATEMENT OF REASONS

BOARD OF STATE AND COMMUNITY CORRECTIONS MINIMUM STANDARDS FOR LOCAL DETENTION FACILITIES TITLE 15, DIVISION 1, CHAPTER 1, SUBCHAPTER 4

Information that has been added to the original Initial Statement of Reasons appears in italics.

At its September 22, 2016 meeting, the Board directed staff to convene a working group of subject-matter experts to consider each standard of the federal Prison Rape Elimination Act of 2003 (PREA) and its relationship to existing regulations for local adult detention facilities. The Board of State and Community Corrections (BSCC) is not required to comply with provisions of PREA; however, current regulation language does not include any reference to sexual *abuse*, sexual harassment, or policies regarding zero tolerance or retaliation. *The Board chose not to adopt or incorporate PREA, in its entirety, because it is not required to comply with its provisions and is not the appointed authority to conduct PREA inspections; the state adoption of PREA requirements would also cause undue hardship on local facilities that simply do not possess an adequate amount of funds or staff that could be dedicated to the compliance of PREA requirements.* Workgroups included individuals with professional experience in the administration of local detention facilities and PREA; and included three Sheriff's Department Captains, three Lieutenants, two Sergeants, one Police Department Facility Administrator, one Captain with the California Department of Corrections and Rehabilitation, and two Attorneys with the American Civil Liberties Union. PREA sections that were found to be helpful in creating state regulation on sexual *abuse*, sexual harassment, zero tolerance and retaliation are listed below.

§ 1006. DEFINITIONS.

This section defines terms used throughout Title 15, Division 1, Chapter 1, Subchapter 4 and has been modified by inserting two newly proposed definitions for the terms "sexual abuse" and "sexual harassment." The terms are necessary because they had not been previously defined and are used throughout the proposed language outlined below. The BSCC is not attempting to duplicate PREA language in this rulemaking; however, the proposed terms are defined by providing a reference to, and incorporation of, the definitions of 28 C.F.R., Part 115, Section 115.6 to remain consistent with federal definitions. There is no anticipated fiscal or operational impact as a result of these changes.

§ 1029. POLICY AND PROCEDURES MANUAL.

This section outlines requirements for facility administrators to develop and publish a manual of policies and procedures.

The following language is proposed to create necessary safety measures in the prevention, review, and response regarding sexual assault and sexual harassment in Temporary Holding, Type I, II, and III facilities. Amendments will bring state regulation into alignment with federal laws, but will not duplicate federal law language. Such amendments will improve the safety of facility staff, visitors, and inmates.

Section 1029(a)(6): The language “including security measures specific to prevention of sexual assault and sexual harassment” is proposed to require facility administrators to review and evaluate internal and external security measures as they relate to sexual assault and harassment. Security and control is an important part of the safety and security of staff, inmates, and visitors inside of a local detention facility. The creation of a requirement to review and evaluate security measures as they relate to sexual assault and harassment will ensure that administrators are considering those risks and reviewing them at least annually where as there are no reviews or evaluations required at this time. This requirement may also reduce the number of sexual assault and harassment incidents.

In Section 1029(a)(6), the use of the term sexual “assault” has been replaced with sexual “abuse.” The term sexual abuse is defined in PREA; sexual assault is not. The BSCC is not attempting to duplicate the language of PREA; however, it does intend to remain consistent with the intent and definition of terms.

“Section 1029(a)(10) Zero Tolerance in the Prevention of Sexual Assault.” This newly proposed language will require that facilities develop and publish zero tolerance policies and procedures. The proposed requirement is intended to increase safety in local detention facilities and prevent sexual assault by requiring that each facility have a policy for zero tolerance and a procedure for how to address it.

The term “Zero Tolerance in the Prevention of Sexual Assault” has been modified for grammar by changing the words “Tolerance, Prevention, and Sexual” to lowercase. The term “Assault” was replaced with “abuse” for consistency with the defined terms of these regulations and those defined in PREA language. The language “and sexual harassment” has been inserted for consistency with the language proposed throughout these regulations and to ensure that policies and procedure manuals address zero tolerance for harassment as well as the physical act of abuse.

“Section 1029(a)(11) Policy and procedure to detect, prevent and respond to retaliation against any staff or inmate after reporting abuse.” This newly proposed language will require that facilities develop and publish policies and procedures that aid in the detection, prevention and response to retaliation against anyone who reports abuse.

Section 1029(a)(11) has been proposed to ensure that facilities have policies and procedures that detect, prevent and respond to retaliation. The protection against retaliatory actions is necessary in correctional settings and a matter of best practice. This section has been modified by inserting a comma following the word “prevent” for grammar, and by inserting the word “any” prior to “abuse.” This language is similar to that

of PREA; however, the BSCC is not attempting to duplicate PREA. The intent is to require that policies and procedures address the detection, prevention, and response to any type of abuse, not just sexual abuse.

Further modifications have been made for clarity and consistency by moving the existing language “The policies and procedures required in subsections (6) and (7) may be placed in a separate manual to ensure confidentiality” from the proposed section 1029(a)(12) to 1029(b) and updating the references to subsections (6) and (7) to read “(a)(6) and (a)(7).” The subsequent sections 1029(b), (c), and (d) have been modified for consistency to 1029(c), (d), and (e).

Section 1029(d), (d)(1) and (d)(2) are proposed to require Temporary Holding, Court Holding, Type I, II, III and IV facilities to publish a manual that outlines ways for inmates, staff, or other parties to report sexual abuse, harassment, and retaliation. This addition will provide a safe and private method for reporting issues related to sexual abuse, harassment and retaliation without risking further reprisal.

Section 1029(d) was numbered to 1029(e) as discussed above, further modifications have been made for language consistency, clarity, and grammar by inserting a comma following the number “III” and the word “be” following “not.”

Subsection 1029(e)(2) has been modified by inserting a comma following the word “members” and a period following the word “harassment” for grammar and clarity. Further modifications were made by replacing the language “and shall distribute publicly how to report on behalf of the inmate” with “The method for reporting shall be publicly posted at the facility.” This change was made because it would be difficult for facilities to distribute reporting information to each and every person who may have contact with an inmate. Facilities commonly post information in public areas to ensure that important information is readily available to inmates, staff, and the public.

There are no anticipated fiscal impacts due to these changes; operationally, facilities will need to update their policy and procedure manuals which is already required by regulation.

§ 1041. INMATE RECORDS.

This section outlines requirements for facility administrators to develop and publish written policies and procedures on the maintenance of individual inmate records.

The existing text of this regulation has been reorganized into Section 1041(a), and a new Section 1041(b) is proposed.

Section 1041(b) is proposed to require agencies to collect data on each allegation of sexual abuse that occurs in a facility that they have direct control over, as well as those that are contracted for the confinement of inmates. This data will be used to report incidents to the federal Department of Justice on the Survey of Sexual Violence. The Survey of Sexual Violence has collected data from jail facilities since 2004. Collecting

data will provide agencies with a better view of sexual incidents occurring in their facilities and may aid in future prevention efforts.

There are no anticipated fiscal impacts due to these changes; operationally, facilities will need to update their policy and procedure manuals which is already required in regulation. Data for the Survey of Sexual Violence has been collected from local detention facilities since 2004 and will require no change in normal operation.

The language in section (b) has been amended to replace “The agency” with “Each facility administrator” because the use of “agency” does not provide clear direction as to who is responsible and “agency” is not a defined term. Facility administrators are individuals who oversee the operations of a specific facility and therefore have the authority to collect and report the data required by 43 U.S.C. section 30303(a)(1). Further modifications have been made to provide proper reference citation by replacing the language “answer all questions from the most recent version of the Survey of Sexual Violence conducted by the Department of Justice” with “satisfy the reporting requirements of 34 U.S.C. section 30303(a)(1).” Although separate from the requirements of PREA, the Survey of Sexual Victimization is mandated on the incidence and prevalence of sexual assault in correctional facilities under the Prison Rape Elimination Act of 2003 (PREA; P.L. 108-79). The BSCC is not attempting to duplicate PREA language but rather provide an important reference to a reporting requirement related to inmate records.

§ 1050. CLASSIFICATION PLAN.

This section outlines the responsibility of each administrator to develop and implement a written classification plan that assists in properly assigning housing and activities suitable to an inmate’s needs.

In Section 1050(a) the language “, risk of being sexually assaulted / sexually victimized..., including the risk of sexual assault” is proposed to ensure that an inmates risk of sexual victimization is considered when assigning housing and activities.

Section 1050(c) is proposed to address the issue of assigning an inmate to a male or female housing area and other activities that are divided based on gender. The workgroup and Board understand the importance of housing placement and therefore propose that an inmate’s housing and programming assignments be made on a case-by-case basis, with the input from the inmate, and in consideration of the inmate’s health and safety; gender should not be the primary determinant of housing or activities.

There are no anticipated fiscal impacts due to these changes; operationally, facilities will need to update their policy and procedure manuals which is already a requirement set forth in regulation.

Section 1050(a) has been modified to replace the language “assaulted /” with “abused, or” and “victimized” with “harassed.” The terms “assaulted” and “victimized” are not defined in these regulations or in PREA like “sexual abuse” and “sexual harassment” are.

The language “, including the risk of sexual assault” has been removed because it is duplicative and unnecessary.

§ 1069. INMATE ORIENTATION.

This section outlines the requirement that each administrator develop written policies and procedures on inmate orientation.

Section 1069(a)(9) “agency’s Zero Tolerance policy against sexual abuse and harassment.” is proposed to include Zero Tolerance as an item discussed during inmate orientation. The addition of Zero Tolerance in the orientation may reduce acts of sexual abuse and harassment.

Section 1069(a)(9) has been modified for clarity to remove the word “agency’s” because it does not provide a clear direction and is not a defined term in these regulations. The section has been further modified for grammar by changing “Zero Tolerance” to lower case and inserting the word “sexual” prior to “harassment” for consistency with the terms used throughout these regulations.

There are no anticipated fiscal impacts due to these changes; operationally, facilities will need to update their policy and procedure manuals which is already required by regulation.

The incorrect reference to Penal Code section 6024 was removed.

§ 1206. HEALTH CARE PROCEDURES MANUAL.

This section outlines the requirements for health authorities to develop and maintain written policies and procedures that pertain to in-custody health care.

Section 1206(r) is proposed to include direction on health care for inmates who report sexual assault or abuse. The purpose of adding this section is to ensure that inmates who have been victimized will receive proper medical and mental health screening, as well as access to other essential treatment and services.

There are no anticipated fiscal impacts due to these changes; operationally, facilities will need to update their policy and procedure manuals which is already required by regulation.

Sections 1206(n), (o), and (p) have been modified for grammar and formatting by replacing the period at the end of each final sentence with a semicolon. Section 1206(q) was modified for grammar, and consistency in regulation format, by replacing the period with “; and,.”

For clarity and consistency of terms, Section 1206(r) was modified by removing the language “for inmates reporting being victimized by sexual assault or abuse,” “concerning sexual abuse or assault (regardless of location of the incident),” and inserting “, for

inmates who have reported sexual abuse or sexual harassment, regardless of the location where the incident(s) occurred.”

The incorrect reference to Penal Code section 6024 was removed.

PURPOSE

The Board is authorized to develop regulations for the operation of local detention facilities, pursuant to Penal Code Section 6030. Regulations are reviewed on a biennial basis, or as directed.

At its September 22, 2016 meeting, the Board directed staff to convene a working group of subject-matter experts to consider each standard of the federal Prison Rape Elimination Act of 2003 (PREA) and its relationship to existing regulations for local adult detention facilities.

Current regulation language does not include any reference to sexual assault, sexual harassment, or policies regarding zero tolerance or retaliation. To aid in the prevention and response of sexual assault, sexual harassment and retaliation, the Board intends to adopt the proposed language outlined above.

PROBLEMS THIS PROPOSED REGULATION SEEKS TO ADDRESS

The proposed changes are intended to address the issue of sexual victimization and retaliation; they will be adopted to prevent, detect and respond to incidents of in-custody sexual assault and sexual harassment.

BENEFITS ANTICIPATED FROM THE PROPOSED REGULATION

The BSCC anticipates several benefits from the proposed regulation adoption and amendment, including: Improved communications between inmates and staff, improved facility operations, safety of facility staff, incarcerated persons, and visitors, and a possible decrease in sexual assaults/ harassment and retaliation within facilities.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS.

The BSCC considered each standard of the federal Prison Rape Elimination Act of 2003 (PREA) and its relationship to existing regulations for local adult detention facilities. Sections of PREA that were found to be useful in creating the proposed language are: 28 Code of Federal Regulations, Sections 115.11 Zero Tolerance, 115.13 Supervision and Monitoring, 115.33 Inmate Education, 115.41 Screening for Risk of Victimization and Abusiveness, 115.42 Use of Screening Information, 115.51 Inmate Reporting, 115.654 Third Party Reporting, 115.67 Agency Protection Against Retaliation, 115.81 Medical and Mental Health Screenings, and 115.87 Data.

DOCUMENTS INCORPORATED BY REFERENCE

- *28 C.F.R., Part 115, Section 115.6, Definitions Related to Sexual Abuse*

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES.

It was presented to the BSCC that the language of the federal Prison Rape Elimination Act of 2003 (PREA) in its entirety, be adopted into Title 15. The Board considered the recommendation, but chose instead to have workgroups review PREA for its applicability in local correctional facilities. The BSCC is not required to comply with any provisions of PREA.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS.

The BSCC has not identified any alternatives that would lessen any adverse impact on small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS.

The proposed amendments only apply to local detention facilities operated by local law enforcement agencies. According to Attorney General Opinion 79-1210, dated March 19, 1980, regulations promulgated by the BSCC are permissive and do not create mandates. The BSCC has determined that the proposed regulations would not have a significant statewide adverse economic impact directly affecting business based on the Economic Impact Assessment, as discussed below.

ECONOMIC IMPACT ASSESSMENT PURPOSE

At its September 22, 2016 meeting, the Board directed staff to convene a working group of subject-matter experts to consider each standard of PREA and its relationship to existing regulations for local adult detention facilities. Current regulation language does not include any reference to sexual assault, sexual harassment, or policies regarding zero tolerance or retaliation. The proposed regulations will address the need for regulations related to sexual assault, harassment, zero tolerance and retaliation.

THE CREATION OR ELIMINATION OF JOBS WITHIN THE STATE OF CALIFORNIA

The BSCC has determined that the proposed amendments will not create or eliminate jobs within the state of California. The proposed requirements for policies and procedures do not necessitate the elimination or creation of new jobs. Regulations promulgated by the BSCC are not mandates on local agencies and only apply to local detention facilities.

THE CREATION OF NEW BUSINESSES OR THE ELIMINATION OF EXISTING BUSINESSES WITHIN THE STATE OF CALIFORNIA

The BSCC has determined that the proposed amendments will not create new businesses or eliminate existing businesses within the state of California, the effected regulations only affect local detention facilities operated by local law enforcement agencies.

THE EXPANSION OF BUSINESSES CURRENTLY DOING BUSINESS WITHIN THE STATE OF CALIFORNIA

The proposed amendments will not expand businesses currently doing business within the state of California.

BENEFITS OF THE REGULATIONS TO THE HEALTH AND WELFARE OF CALIFORNIA RESIDENTS, WORKER SAFETY, AND THE STATE'S ENVIRONMENT

The anticipated benefits from the proposed regulation amendment, include improved communications between inmates and staff, improved facility operations, safety of facility staff, incarcerated persons, and visitors, and a possible decrease in sexual assaults/ harassment and retaliation within facilities.