



## CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW

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April 4, 2014

California Department of Corrections and Rehabilitation  
Regulation and Policy Management Branch (RPMB)  
P.O. Box 942883, Sacramento  
CA 94283-0001

*Via email to [m\\_STGRegulation@cdcr.ca.gov](mailto:m_STGRegulation@cdcr.ca.gov) and fax to (916) 324-6075*

Re: Notice of Change to Regulations, No. 14-02, January 31, 2014.

To Whom It May Concern:

The Center for Human Rights and Constitutional Law (Center) submits the following comments regarding the above referenced notice of change to regulations, which proposes to amend, *inter alia*, the Department's STG (gang) management policy, and procedures and standards used to validate an offender as an affiliate of an STG.

The Center is a non-profit, public interest legal services organization dedicated to furthering the constitutional and human rights of the indigent. The Center is broadly recognized for its expertise in constitutional law and international law of human rights. From time to time, the Center comments on proposed rulemaking where a governmental agency's proposed rules raise a substantial likelihood that indigent persons' rights under international law or domestic constitutions will be violated.

### Statement of general concern.

The Center acknowledges the Department's interest in institutional security. However, we see no irreconcilable conflict between this interest and inmates' rights under the U.S. and California constitutions and international law to accurate and reliable classification decisions, terms in solitary confinement proportional to their violations of reasonable prison rules, and humane treatment and conditions during isolated segregation.

We have carefully reviewed the Department's proposal and have concluded that the proposed STG regulations would fall far short of bringing California's policies and practices regarding solitary confinement into line with international law or generally recognized correctional standards. Foremost among the shortcomings of the proposed regulations is that they would continue the Department's much-criticized practice of placing inmates into segregated isolation for unconscionably long periods. In addition, the language of the proposed regulations is often so

vague as to confer upon prison personnel virtually unbridled discretion to impose prolonged solitary confinement for little or no objectively verifiable cause.

Absent substantial revision, CDCR's proposed regulations will likely result in more lawsuits, hunger strikes, mental and physical deterioration of California prisoners, and increased danger to the public when prisoners are eventually released.

Comments to specific provisions:

- 1) **T e e d e a e e e d e e d f a c f e e f e e STD aff a .**

The most troubling aspect of the Department's current practices concerning prolonged solitary confinement is that inmates are placed in isolated segregation for many months or years for mere gang membership: that is, without their having committed any new crime during imprisonment. The proposed regulations would continue this practice.

Proposed subsection 3315(a)(3)(Z)<sup>1</sup> classifies as a "serious rule violation" an inmate's "[d]emonstrating activity, behavior or status as a recognized member and/or leader of an STG, which jeopardizes the safety of the public, staff or other inmate(s), and/or the security and orderly operation of the institution."

Proposed § 3000 defines STG "behavior" as "any documented behavior that promotes, furthers, or assists a STG. This includes, but is not limited to conduct of any person that leads to and includes the commission of an unlawful act and/or violation of policy demonstrating a nexus to a STG."

Pursuant to proposed subsection 3341.5(c)(2)(A), "a validated STG affiliate is deemed to be a severe threat to the safety of others or the security of the institution and will be placed in a SHU for an administrative term ..." solely because, inter alia, she or he is validated as a STG-1, "traditional prison gang" member.

It is the indefinite nature of SHU sentences and the vagueness of sources for validation that is prompting the call for increased transparency of the validation system as well as accountability of guards who validate. Currently, there is no means to ensure that a guard is validating an individual for a serious reason, rather than retribution or dislike.

The proposed regulations fail to guarantee inmates objective and independent oversight of the Department's imposing indeterminate solitary confinement and to conduct regular reviews of the procedures and methods used for gang validation. The regulations grant nearly unchecked discretion to the classification committee and its officers tasked with STG validation. The validation system is not reformed, but simply reorganized. It remains just as faulty and subjective to the personal discretions of correctional officers.

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<sup>1</sup> Unless otherwise indicated, all references at to Title 15, California Code of Regulations.

Inmates who have already served an incredibly long sentence in SHU, often discipline free, are not treated any differently than incoming SHU inmates. Inmates, who have been held in SHU for an extended period of time, will not receive any expedited services. In fact, the proposed regulations completely fail to address long-term validations and fail to propose a method of preventing overly long validations.

(A) S1 for Step 1

1. No Family Visits
2. Visiting during non-work/training hours, limited by available space within facility non-contact visiting room
3. Twenty-five percent (25%) of the maximum monthly canteen draw as authorized by the secretary.
4. Telephone calls on an emergency basis only as determined by institution/facility staff. At the 180-day Institution Classification Committee (ICC) review, if the inmate has met program telephone call.
5. Yard access limited by local institution/facility security needs. No access to any other recreational or entertainment activities.
6. The receipt of one personal property package, 30 pounds maximum weight, per year, exclusive of special purchases as provided in Section 3190. Inmates shall be eligible to acquire a personal property package after completion of one year of Privilege Group D or SDP assignment.
7. One photograph – upon completion of 1 year free of serious disciplinary behavior while in SHU.
8. One television or one radio or one television/radio combination unit, clear technology only.

When progressing to Step 2, the above privileges remain nearly identical, except for: an increase in the canteen draw to 35%, and an additional phone call. (see §3044(i)(2)(B)).

When progressing to Step 3, the above privileges remain substantially the same, except for: an increase in the canteen draw to 45%, an additional phone call “upon review and approval of ICC at the 180 day review,” an additional personal package per year, and an additional photograph. It is unclear whether upon reaching Step 3, inmates will have “access to any other recreational or entertainment activities.” (see §3044(i)(2)(C)).

When progressing to Step 4, the above privileges remain substantially the same, except for: an increase in the canteen draw to 50%, an additional phone call, yard activities with interaction with inmates of diverse affiliations after 6 months of programming within Step 4, an additional smaller personal package, and an additional photograph after a 90-day review. see §3044(i)(2)(D)).

Section 3378.3(a)(2) of the proposed regulations states that “Each program step [in the SDP] provides progressive programs and privileges...” to create a more humane approach to SHUs. However, in reality, there is hardly any difference between the privileges available to inmates as they progress through each program step. The most meaningful privilege – contact with family visitors – is prohibited throughout the entire SDP, which can last 4 or more years, depending on the inmate’s progression through each step.

Positive behavior and participation should be richly rewarded. The incentives in the proposed policy are hardly noticeable and do not offer meaningful opportunity for inmates to interact with other people.

Prisoners who complete each step should have the opportunity to earn a family visit, progressively more phone call privileges, and more human interaction. The proposed regulations do not specify the number of hours inmates may exercise or have yard activity. Yard privileges, as provided for in the current regulations, do not increase as the inmates progress through the SDP. CDCR should introduce measures that allow some group interaction for prisoners at all stages of SHU confinement, both to benefit their mental health and wellbeing and to provide incentives and allow their behavior to be measured.

3) The proposed regulations do not address the living conditions of SHUs. A 2013 report by Amnesty International found that prisoners in Pelican Bay SHUs are held in concrete cells facing a wall, with no windows to the outside. The cell doors are constructed of heavy gauge perforated metal, which in the words of a federal judge “significantly blocks vision and light.” (*Madrid v Gomez*, 889 F. Supp.1146 (N.D. Cal 1995)) During their investigations of Pelican Bay SHUs, Amnesty International delegates stood inside a cell with the fluorescent light turned off and found that little natural light entered the cell even on a bright day. Lack of natural light in areas where prisoners live or work is in direct breach of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners (SMR) – standards which apply to all prisoners regardless of their custody status.

Based on these proposed regulations, the CDCR is not making an effort to ensure more humane conditions in SHUs because the regulations fail to modify and improve the living environment so that all prisoners even in the most restrictive custody have better facilities for outdoor exercise, access to natural light and more human contact.

Opportunities should be provided for all prisoners in the SHU or other extended segregation to have access to educational and rehabilitation programs. Further, all prisoners held in segregated units for longer than a few days should have access to occupational materials and contact with the outside world through TV and/or radio to reduce the effects of extreme isolation and sensory deprivation.

4) The proposed regulations do not address the mental health and well-being of inmates in the SDP. For example, the first reference to mental health services occurs in section 3378.3(b)(7)(A) describing the orientation services provided to inmates who reach Step Five of the program. This “Referral to Mental Health” is provided for after an inmate has spent over four years in the SHU in the SDP.

The proposed regulations do not address the mental health and well-being of inmates in the SDP. For example, the first reference to mental health services occurs in section 3378.3(b)(7)(A) describing the orientation services provided to inmates who reach Step Five of the program. This “Referral to Mental Health” is provided for after an inmate has spent over four years in the SHU in the SDP.

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As noted, solitary confinement practices have a detrimental effect on the psychological well-being of inmates. Mentally ill prisoners should not be held in isolation and should receive treatment in an appropriate setting. CDCR should provide frequent and meaningful mental health screenings and psychological counselling at every stage of the SDP, not simply at the orientation for Step 5. This is especially important during the first few steps of the program, which are most restrictive and potentially deleterious to an inmate's psyche.

Additionally, the CDCR should ensure that inmates who graduate from the SDP are well prepared to re-enter the general population. Mental health services and counselling should be made available to SDP graduates as well.

5) T e ed e a fa ec e ba c d e ce f ffe de e  
a da ce .

The proposed regulations fail to secure basic due process for offenders. Subsection 3321(b)(1) notes that information from a confidential source may be considered in the validation process as long as at least some "other documentation corroborates information from the source, or unless other circumstantial evidence surrounding the event and the documented reliability of the source satisfies the decision maker(s) that the information is true."

Once again, CDCR decision maker(s) have unfettered discretion in the gang validation process and evidence of gang affiliation may be accepted as long as the source "satisfies" the decision maker. Inmates will still be validated under the three source system and intelligence will continue to be used against them, meaning the word of a biased prison guard and prison informer can land an inmate in solitary confinement indefinitely without an actual incident of gang violence.

The proposed regulations must integrate stronger due process safeguards for inmates in the gang validation process. Inmates who are being validated should have the opportunity to seek assistance of counsel, present testimony, and call upon witnesses. None of these due process provisions are implemented in the proposed regulations.

Furthermore, inmates do not have the opportunity to review their files during the validation process: since inmates cannot see the "information," they cannot know if officials are using new information in the six-year validation and re-validation process or recycled old "information," much of which could be untrue. Prisoners in validation should be given due process rights such as notice of the evidence to be used, a hearing, and an opportunity to appeal to an independent decision maker.

Additionally, there must be an independent evaluation of whether information used by the CDRC has sufficient indicia of reliability. This is essential given the lasting impact of the initial ICC determination, the potential for serious error, and the current lack of any ability to get a substantive review of a validation once the validation is finalized. (*See, e.g., Lira v. Cate*, N.D.Cal. No. 00-0905 (Sept. 30, 2009)).

6) The ed e a Sec T ea G Ce f ca P ce f a ed  
 beca e e a d e f e a a e f a a da a d ace e  
 SHU a ac a c de ce f a e ce ac .

Section 3378.1(a)(1) of the proposed regulations states:

Certification of an STG-I or recognition of an STG-II means the formal designation of a group or gang as a security threat group based upon a STG Threat Assessment conducted by the Office of Correctional Safety (OCS). *Prison gangs, disruptive groups and/or street gangs* may be reviewed, categorized, and certified/recognized as a STG.<sup>2</sup> Initial certification will be based upon the documented severity of the threat to the security of the institution and safety of staff and offenders.

CDCR’s proposed gang validation policy is regressive because it expands the potential pool of inmates who could be held in SHUs. Security Threat Groups (STG) designation should be restricted to violent groups only. No group should be considered a STG absent a documented history of violence or serious illegal acts.

Therefore, delete the criteria in proposed subsections 3378.1(b)(4) that states “Absent a documented history of violence” a group that is a “potential threat[]” to institutional security can be considered an STG. Broadening the STG definition to include political or religious groups weakens the effort to contain gang violence and expands the pool of inmates who may be validated.

7) The ed e a e e e f a c a e SDP a e  
 be a ca d c a e a c a ead f e c a .

In addition to critiquing the SDP’s flawed policy, it is necessary to examine what is required of a prisoner to participate in the SDP. Section 3378.3(a)(1) of the proposed regulations provides:

Participation in each step of the SDP shall require staff to provide the offender with CDCR Form 128B SDP1 (11/13), Step Down Program Notice of Expectations (Step 1); CDCR Form 128B SDP2 (11/13), Step Down Program Notice of Expectations (Step 2); CDCR Form 128B SDP3 (11/13), Step Down Program Notice of Expectations (Step 3); CDCR Form 128B SDP4 (11/13), Step Down Program Notice of Expectations (Step 4); or CDCR Form 128B SDP5 (11/13), Notice of conditions of Monitored Status (Step 5), all of which are incorporated by reference. The expectations shall outline the goals, expectations for successful completion, and potential consequences for failure to fully participate and complete each step.

The proposed section maintains the same insurmountable hurdle that is currently found in the CDCR regulations: A prisoner’s participation in the SDP is completely voluntary, but a prisoner

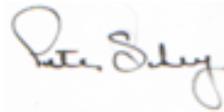
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<sup>2</sup> Emphasis added.

wishing to participate must sign a form. In fact, this CDCR Form 128B SDP1 and other forms incorporated by reference require that an inmate sign a validation determination admitting to being a gang member. Prisoners universally condemned this practice during the hunger strikes. Such a provision would curtail prisoners' participation in the SDP.

The CDRC must be more intentional in rejecting long-term solitary confinement. Thank you for considering our concerns and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Schey".

Peter Schey  
President and Executive Director

A handwritten signature in black ink, appearing to read "Carlos Holguin".

Carlos Holguin  
General Counsel