

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

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IN THE OFFICE OF

2011 JUN 16 PM 2:50



Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: June 16, 2011
To: Gregory Mitchell
From: Chapter Two Compliance Unit
Subject: **2011 OAL DETERMINATION NO. 9(S)**
(CTU2011-0421-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Operational Procedure #72-23, titled Comprehensive Accommodation Chrono

On April 21, 2011, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether Operational Procedure #72-23, titled "Comprehensive Accommodation Chrono" (OP #72-23) constitutes an underground regulation. OP #72-23 defines the process for documenting temporary and permanent health accommodation information in a systematic and uniform manner. OP #72-23 is dated October 2011 and issued by the Correctional Training Facility at Soledad and is attached hereto 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).² Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

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.

² Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (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.

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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. Penal Code section 5058, subdivision (c), establishes exemptions expressly for the California Department of Corrections and Rehabilitation (CDCR):

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(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, OP #72-23 issued by the Correctional Training Facility at Soledad applies solely to the inmates of the Correctional Training Facility. Inmates housed at other institutions are governed by those other institutions' criteria for documenting health accommodation information. 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

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.

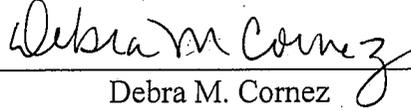
(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

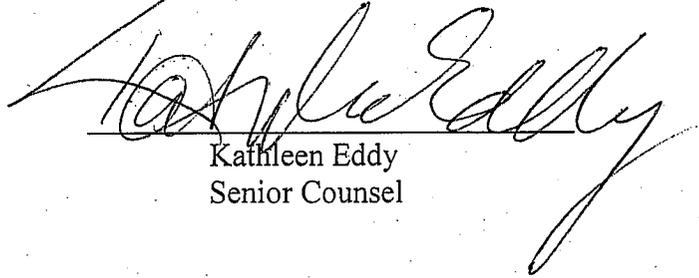
(D) The challenged rule has expired by its own terms.

(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.



Debra M. Cornez
Assistant Chief Counsel/
Acting Director



Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A



PURPOSE

The purpose of this Operational Procedure is to define a process for documenting temporary and permanent health accommodation information in a systematic and uniform manner to minimize the disruption of needed accommodations that could result from inmate/patient movement.

RESPONSIBILITY

The Chief Executive Officer or designee will be responsible for the implementation and annual review/revision of this procedure. All staff are responsible for adhering to this policy

AUTHORITY

Inmate Medical Services Policies and Procedures, Volume IV, Chapter 23

GENERAL REQUIREMENTS / CRITERIA

The Primary Care Provider (PCP) will utilize the following criteria as a *guide* and should consider the inmate/patient's overall condition when requesting a specific accommodation. The following criteria are not all-inclusive:

HOUSING

Bottom Bunk/First Tier housing

- Seizure disorder.
- Disorder or treatment affecting equilibrium.
- Alzheimer's or other dementia.
- Abdominal, chest, or back surgery within the last 6 months.
- Blindness in one or both eyes.
- Amputation or severe weakness of upper or lower extremity.
- Morbid Obesity with Body Mass Index (BMI) greater than 40.
- Severe orthopedic conditions of hips, knees, ankles, feet or upper extremity, which physically prevent the patient from climbing to the upper bunk.
- Due to advanced age, the patient is at risk of injuring him by climbing to the upper bunk.

MEDICAL EQUIPMENT/ SUPPLIES

Canes, Walkers, C-PAP, BIPAP, Oxygen Concentrator, Ice Packs, or Ace Wraps

- Disability that significantly restricts ambulating;
- Severe cardiopulmonary disease.
- Sleep apnea;
- Severe chronic pain condition;
- Severe peripheral vascular disease

- Severe lower extremity edema;
- Acute injury - 6 weeks maximum.

Footwear

- Ulcers secondary to peripheral vascular disease;
- Severe diabetic neuropathy;
- Shoes attached to prosthesis;
- Significant deformity of ankle or foot;
- Limb length discrepancy.

NOTE:

Exceptions to the above criteria shall be clearly documented and submitted for Chief Executive Officer/Chief Medical Officer (CEO/CMO) for approval.

- Insoles may be ordered without a specialty referral.
- Special shoes or orthotics shall be deemed medically necessary by a podiatrist/orthopedist.
- Work boots or other footwear required for work are issued by the job supervisor; Health Care Services will not issue Chronos for special work shoes.
- All other shoe requests shall be referred to clothing room for proper fit of state-issued shoes. Custody regulations govern which shoes are worn on grounds.

COTTON BEDDING (INCLUDING COTTON BLANKETS)

- History of asthma or wool allergy.

EXTRA MATTRESS

- BMI greater than or equal to 40;
- Recent back or neck surgery (and with specific recommendation of the surgeon);
- Severe degenerative joint/disc disease documented radiographically;
- Severe musculoskeletal deformities;
- Presence of hip prosthesis with associated pain.

Wedge Pillows (maximum of 2 extra pillows)

- Symptomatic gastroesophageal reflux;
- Congestive heart failure;
- Chronic obstructive pulmonary disease (COPD);
- Severe cervical degenerative joint;
- Chronic severe lower back pain with severe degenerative joint or disc disease,
- Hip prosthesis;
- Acute injuries - 6 week maximum

Pressure Mattresses

