18-16427

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD ASHKER, et al.,

Plaintiffs-Appellees,

v.

EDMUND BROWN, JR., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

No. 4:09-cv-05796 CW (RMI)
The Honorable Claudia Wilken, Judge

DEFENDANTS-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

CDCR has four security levels (Levels I through IV), and each level has a general population. Some general-population facilities, especially at Level IV, have cells arranged in a 180-degree semi-circle around a control booth, maximizing officers' ability to watch all cells at the same time (a 180-design). Other facilities have more cells per control booth, requiring officers to watch a 270-degree field of view to see all cells (a 270-design).

Paragraph 25 of the Settlement Agreement required CDCR to transfer eligible class members from segregated housing to "General Population level IV 180-design facilit[ies]"—words with well-established meaning in the context of California prisons. Plaintiffs do not dispute that eligible class members were moved to such facilities, or that the conditions they now experience are the same as other inmates housed in these facilities. But Plaintiffs take issue with the periodic restrictions that come with living in a Level IV, 180-design general-population facility, and convinced the district court to interpret paragraph 25 in a way that allows them to dictate conditions in the facilities.

This Court should hold each side to what it bargained for: settling Plaintiffs' claims against CDCR in exchange for CDCR transferring eligible class members to a "General Population level IV 180-design facility," and

nothing more. Whatever may be said about the conditions in the general population, they are not part of this lawsuit. Paragraph 25 requires release to a particular type of facility, not to particular conditions. Plaintiffs' heavy reliance on *Parsons v. Ryan* is misplaced because the opinion emphasizes the importance of hewing closely to the plain text of a settlement agreement.

As for paragraph 28, Plaintiffs' interpretation is not just wrong; it is dangerous. Paragraph 28 created the Restricted Custody General Population (RCGP) housing unit to protect class members with unique safety concerns. Some of these members are so violent, vulnerable, or hostile that they are difficult to safely place in inmate groups. Paragraph 28 states that the programs and services provided to RCGP inmates must "be designed to provide increased opportunities for positive social interaction," but does not require that all RCGP inmates be placed in groups regardless of risk. Yet Plaintiffs convinced the district court to adopt this problematic interpretation of paragraph 28. The Court should reject that interpretation and conclude that paragraph 28 gives Defendants leeway to provide RCGP inmates with alternative programming that does not require placing them in "groups" when doing so would be too dangerous.

ARGUMENT

This appeal arises from a ten-year-old class action regarding conditions in SHU housing units and CDCR's prior policy of indefinitely housing gang members and associates in SHU units based on evidence of their association with a gang, rather than on gang-related misconduct. (Opening Brief (Br.) 6–8.) The parties reached a settlement under which CDCR agreed to make certain reforms, such as ending its policy of SHU housing based on gang status alone, reviewing the files of approximately 1,600 gang-associated class members, moving eligible ones into suitable general-population facilities, and creating the RCGP housing unit. (Br. 8–15.)

Shortly before the Agreement was set to automatically terminate (*see* Agreement ¶ 41), Plaintiffs filed several enforcement motions alleging that Defendants breached the Agreement. Relevant here are the General-Population Motion, which alleged breach of paragraph 25 (CD 930, ER 190–91), and the Walk-Alone Motion, which alleged breach of paragraph 28 (CD 844, ER 383–84).[1] The magistrate judge denied both motions (CD 986, 987); but, on de novo review, the district court granted them (CD 1028, ER

[1] Plaintiffs also filed one motion seeking extension of the Agreement under paragraph 41, though not on any of the grounds raised in the General-Population or Walk-Alone Motions. (*See* CD 898-3, ER 380). The district court granted that motion (CD 1122), and Defendants appealed (CD 1130).

21–22 (the General-Population Order), CD 1029, ER 19–20 (the Walk-Alone Order)). The district court also adopted remedial plans that, in its view, would remedy the purported breaches. (CD 1113, ER 12–18; CD 1114 (the General-Population Remedial Plan), 1115 (the Walk-Alone Remedial Plan).) Defendants appeal each order.

I. PLAINTIFFS' CONSTRUCTION OF PARAGRAPH 25 WOULD IMPROPERLY EXPAND THE SCOPE OF THIS CLASS ACTION, AND THEIR CONSTRUCTION OF PARAGRAPH 28 WOULD ENDANGER THE LIVES OF INMATES AND STAFF.

Plaintiffs urge the Court to construe a contract term that has a settled meaning in California's prison system in a way that it has never been used in that context, and in a way that would effectively add over 100,000 general-population inmates to the class. They also urge the Court to construe another term in a way that would force CDCR to put inmates and staff alike at serious risk of physical injury or death. The Court should review both constructions de novo. *See Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865–66 (1965); *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir. 1995).

If the Court gives any deference to the district court's interpretations, it should be minimal. (*Cf.* Ans. 21 (citing *Gates*, 60 F.3d at 530).) As the Court stated in *Nehmer v. Veterans' Administration of the United States*, 284 F.3d 1158, 1160 (9th Cir. 2002), to warrant any deference, a court's interpretation

must be "reasonable." Moreover, the basis for applying deference here is questionable because, unlike the district and magistrate judges in *Gates*, who agreed about the consent-decree term in that case, 60 F.3d at 530, the judges in this case reached different conclusions about the meaning of paragraphs 25 and 28 (*see* Br. at 18–20). And the district court had no unique insight into the parties' intent because it did not participate in the Agreement's drafting. The parties produced it on their own after "five months of tough, arms'-length … negotiations." (CD 424, ER 432–33.) The district judge was not in a significantly better position to construe the Agreement than the magistrate judge, or this Court. *Cf. Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371 (6th Cir. 1998) (explaining "deferential de novo" standard by noting "[i]t is only sensible to give the court that wrote the consent judgment greater deference when it is parsing its own work").

A. Plaintiffs Seek to Construe "General Population Level IV 180-Design Facility" Contrary to Its Common Usage.

The Court should construe "General Population level IV 180-design facility" in paragraph 25 to mean the level IV, 180-design facilities that existed in California when the parties entered into the Agreement. (Br. 29–34.) Under that construction, there is no evidence that Defendants breached paragraph 25, and the Court should reverse the General-Population Order.

California contract law favors such a construction. In California, "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Cal. Civ. Code § 1647. Here, the Agreement relates to the operation of California prisons, and it was made to settle a lawsuit challenging California prison conditions. (*See* Agreement ¶¶ 1–12.) Similarly, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or . . . the place where it is made." Cal. Civ. Code § 1646. Here, the Agreement was made and would be performed in California, where the disputed term's meaning was well known. *See* Cal. Code Regs. tit. 15 (2014) (Title 15) §§ 3334(g)(1)(U), 3341.5(c)(5), 3375.1(a)(4), 3377, 3377.1(a) (referencing "level IV" and "180-design")[2]; *see also Hayes v. Dovey*, 914 F. Supp. 2d 1125, 1134 n.7 (S.D. Cal. 2012) (noting distinction between 180-design and 270-design facilities); *Smith v. Davis*, No. 07-cv-1632-AWI-GSA, 2009 WL 578611, at *1 n.1 (E.D. Cal. Mar. 5, 2009), *R&R adopted*, 2009 WL 1097506 (Apr. 20, 2009) ("A 180–design is more restrictive than a 270–design, and is used to

[2] The "180-design" language also appears in paragraph 28, describing the RCGP unit, further undermining any suggestion that Plaintiffs did not understand it or intend it to be meaningful. (Agreement ¶ 28 ("The RCGP is a Level IV 180-design facility commensurate with similarly designed high security general population facilities.").)

house the more dangerous inmates."). The term should be given its ordinary and common meaning in the context of California's prison system.

Defendants' evidence shows that they complied with that construction of paragraph 25. The evidence shows that eligible class members—who are the overwhelming majority of the class—were "released from indeterminate SHU and housed in the general population," that they "are subject to the same rules that govern the rest of CDCR's inmate population," and that they "are housed alongside other general-population inmates who have no connection to this case." (CD 985-4[3] ¶¶ 2–4, 7.) Plaintiffs have done nothing to undermine that evidence, or otherwise show that Defendants did not satisfy their contractual obligation to move eligible class members out of the SHU and into "General Population level IV 180-design facilit[ies]," as they promised. (*Cf.* Ans. 26 (acknowledging class members have been moved to general-population units).) Plaintiffs have not presented evidence that conditions in CDCR's general-population facilities changed after they

[3] Plaintiffs incorrectly refer to this as "defense counsel's declaration" and say it is "not evidence." (Ans. 33–34.) But the declarant is S. Alfaro, "Associate Director, High Security Mission, Division of Adult Institutions," and she is "one of the primary CDCR officials responsible for ensuring CDCR's compliance with the terms of the" Agreement. (CD 985-4 ¶ 1.)

entered the Agreement, or that class members are treated differently than everyone else in the general population.

Even if "General Population level IV 180-design facility" were ambiguous, California law would favor Defendants. Ambiguous terms must "be interpreted in the sense in which the promisor believed … that the promisee understood" them. Cal. Civ. Code § 1649. Plaintiffs do not dispute that "General Population level IV 180-design" described a type of facility existing in California when the parties executed the Agreement. So Plaintiffs could not reasonably have believed that Defendants understood the term to have a different meaning—one defined by out-of-cell time—when executing the Agreement. The only meaning that Plaintiffs could reasonably have believed Defendants intended the term to hold is the one it held in that context at that time—*i.e.*, CDCR's existing general-population, level IV, 180-design facilities. *See* Cal. Civ. Code § 1649.

Because Plaintiffs cannot justify interpreting "General Population level IV 180-design facility" based on out-of-cell time, they focus on the first two words (and add a new one), arguing that paragraph 25 guaranteed "General Population conditions." (Ans. 28, 29.) And, because some class members received less out-of-cell time than they believe they were entitled to during

March 2017, Defendants did not provide "General Population conditions," and thus breached paragraph 25. (*See id.*)

Paragraph 25 does not, however, promise "general population conditions." And, as Plaintiffs' counsel conceded, the parties did not discuss general-population conditions during settlement negotiations. (*See* CD 981, ER 160.) Rather, paragraph 25 promises release from the SHU and transfer to a "General Population level IV 180-design facility"—a particular type of facility, not particular conditions. The Court should not rewrite the contract to make a promise it does not contain. *See Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 892–93 (9th Cir. 1982) (rejecting an argument directed to a consent judgment's "purpose," noting the Court will not "rewrite the parties' 'contract' by holding, in light of the purpose of only one of the parties …, that language which does not explicitly prohibit" certain conduct "does in fact do so"); *Reingold v. New York Life Ins. Co.*, 85 F.2d 776, 782 (9th Cir. 1936) ("We cannot rewrite the contract which the parties made, merely because, as it now turns out, one party would have been better off had they made a different contract.").

Plaintiffs appear surprised to learn that circumstances, such as modified programs or "lockdowns," may sometimes limit out-of-cell time for some general-population inmates, or that Level IV inmates are disproportionately

affected because, by definition, "Level IV" classification applies to the most dangerous and unruly inmates. *See* Title 15, §§ 3375.1(a), 3377, 3377.1. But Plaintiffs' counsel are litigators and constitutional-law scholars who describe themselves as "experienced and knowledgeable" in prison litigation. (CD 424, ER 432–33.) They admit the Agreement was achieved through "five months of tough, arms'-length settlement negotiations," and was "approved by the named Plaintiffs after a full and fair opportunity to consider its terms and to discuss those terms with their counsel." (*Id.*) Plaintiffs' suggestion that they were unaware of the conditions in "General Population level IV 180-design facilit[ies]"—a term Plaintiffs agreed would govern CDCR's obligations under the Agreement—is dubious.

Moreover, about one year before this case settled, CDCR settled *Mitchell v. Cate, et al.*, No. 08-CV-01196-TLN-EFB (E.D. Cal.), a statewide class action regarding CDCR's use of lockdowns and their impact on out-of-cell time for general-population inmates. The *Mitchell* settlement, which is publicly available, discusses how CDCR will use lockdowns going forward, and notes that they sometimes span multiple weeks. *See Mitchell v. Cate*, *supra*, Stipulated Settlement, ECF No. 332-1 (executed 10/22/2014), ¶¶ 15–21. If Plaintiffs' counsel did not investigate the deal they were striking, the mistake is theirs and does not justify revising the Agreement or expanding

the scope of this aging class action. *See Donovan v. RRL Corp.*, 26 Cal. 4th 261, 280–82 (2001), *as modified* (Sept. 12, 2001) (contract is voidable based on unilateral mistake only where enforcement would be unconscionable).

It appears that what Plaintiffs truly seek is to challenge the conditions in CDCR's general-population facilities (*e.g.*, Ans. 27–28), but that has never been the subject of this ten-year-old class action (*see* CD 617, ER 420–21). If this narrow class action expands to include general-population conditions, its will reach far beyond its 1,600 class members and potentially affect all inmates in the general population, which is the vast majority of CDCR's 130,000 inmates.[4] The Court should reject Plaintiffs' attempt to so expand this action, and require Plaintiffs raise these issues, if at all, in a separate lawsuit.

B. Contrary to Their Insistence, *Parsons v. Ryan* Undermines Plaintiffs' Case.

Plaintiffs spent over a quarter of their answering brief discussing or referencing *Parsons v. Ryan*, 912 F.3d 486 (9th Cir. 2018) (*see* Ans. Br. at 1–2, 21–22, 26, 28–29, 37, 43–46, 54, 56–58), yet they fail to recognize that

[4] *See* Spring 2019 Population Projection at 12 (May 2019), *available at* https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2019/06/Spring-2019-Population-Projections.pdf (last visited August 21, 2019). The Court may take judicial notice of this government publication. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1224 n.2 (9th Cir. 2004).

the facts in *Parsons* readily distinguish it from this case. And the reasoning in *Parsons* actually undermines Plaintiffs' arguments.

Plaintiffs argue that "General Population" must be defined by out-of-cell time because, in *Parsons*, the Court said that "the amount of isolation" was the "touchstone" of its analysis. (Ans. 26.) But *Parsons* involved a settlement subclass that was explicitly defined by how many hours inmates got out of their cells. *See* 912 F.3d at 503. This Court reviewed whether the district court had erred in expanding the subclass to include inmates whose out-of-cell time was outside the definition. *See id.* (the "touchstone for inclusion in the subclass" was out-of-cell time because the subclass was "defined as inmates who are confined in a cell for 22 hours or more each day"). The Court found that the subclass definition's language controlled, and the district court had no authority to unilaterally expand it. *Id.*

This case is different. Unlike the subclass definition in *Parsons*, paragraph 25 does not define the plaintiff class or CDCR's obligations by reference to out-of-cell time. It instead provides that inmates previously in the SHU will be transferred to a "General Population level IV 180-design facility." Under the terms the parties agreed to, and unlike *Parsons*, the number of hours inmates spend out of their cells cannot be the "touchstone" for determining compliance.

Ironically, *Parsons* emphasizes the importance of hewing close to a legal document's plain language, *see* 912 F.3d at 503–04, yet Plaintiffs use it to advocate deviating from the Agreement's language. And *Parsons* rejected a district court's decision to expand a class action to include inmates that the class definition excluded, *see id.*, yet Plaintiffs rely on it to argue the Court should expand the scope of this case to include conditions in the general population of CDCR's prisons, which would effectively expand the scope of this case to include over 100,000 inmates who the class definition would otherwise exclude. The Court should reject Plaintiffs' *Parsons*-based arguments.

C. Defendants' Construction of Paragraph 28 Comports with Their Constitutional Duties and the Agreement's Language.

As explained in Defendants' Opening Brief, paragraph 28 created the RCGP housing unit, where CDCR houses roughly 60 inmates. (Br. 10–11.)[5] To maximize RCGP inmates' opportunities for positive social interaction, as paragraph 28 directs, CDCR carefully assesses all RCGP inmates and tries to assign them to groups of inmates with which they can safely interact. (*Id.* 11–15.) But some inmates pose such pervasive safety issues that CDCR

[5] The population figures are as of March 2018. (CD 985-5, ER 115.)

cannot readily identify a group into which to place them. (*Id.*) Those inmates remain on "walk-alone" status until CDCR can identify a suitable group. (*Id.*) Even inmates on walk-alone status, however, receive substantial opportunities for social interaction. (*Id.*)

Paragraph 28 states that programs and services provided to RCGP inmates will be:

> designed to provide increased opportunities for positive social interaction with other prisoners and staff, including but not limited to: Alternative Education Program and/or small group education opportunities; yard/out of cell time commensurate with Level IV GP in small group yards, in groups as determined by the Institution Classification Committee; access to religious services; support services job assignments for eligible inmates as they become available; and leisure time activity groups.

(*See also* Br. 34–40.)

The focus of paragraph 28's statement about RCGP programming is that the programming will "provide increased opportunities for positive social interaction." (Agreement ¶ 28.) The clause and list that follow it are ambiguous as to whether the list is mandatory, such that all prisoners must receive all of the items, regardless of other circumstances, or whether it is illustrative of the types of programming that can provide the promised opportunities for positive social interaction. (Br. 34–36.)

The district court's orders appear to recognize this ambiguity. Initially, the court construed paragraph 28 to bar any use of walk-alone status. (*See* CD 1029, ER 19–20; *see also* Ans. 42.) Then, in formulating a remedial plan, the court changed its construction, finding that walk-alone status was acceptable provided CDCR comply with new onerous procedures. (CD 1115, ER 1.) The latter interpretation, which gives Defendants discretion to use walk-alone status to avoid risk of harm to inmates and staff, is the correct one. (And, under that interpretation, there was no breach to begin with, and thus no basis to issue the Walk-Alone Remedial Plan.)

Plaintiffs wrongly insist there is no ambiguity, mischaracterizing Defendants' position as asking to be excused from an obligation to put RCGP inmates in "groups." (Ans. 49–55.) But paragraph 28 is ambiguous in several ways and, under a proper construction, Defendants have no such obligation. (Br. 35.) For example, the clause "[p]rogramming for … inmates … in the RCGP will be designed to provide increased opportunities for positive social interaction" (Agreement ¶ 28) could be a directive to re-design the listed programs to provide more social interaction, and not as a list of what programs RCGP inmates must receive. Or it could describe a suite of programs and services that Defendants will provide to the RCGP population broadly, but not a mandate that every inmate must have access to

every single one, since individual circumstances may make some programs or services inappropriate for some inmates. And, given CDCR's position as the government entity operating all of California's prisons, it is unlikely that the parties intended paragraph 28 to be an unqualified promise to put all inmates in this uniquely problematic subset of class members into groups.

The most reasonable construction of paragraph 28 is that it requires RCGP programming to provide "increased opportunities for positive social interaction," but allows CDCR leeway to deviate from the listed programs if the individual inmate's circumstances—such as a transitory inability to safely place the inmate in a group—make some of the listed programs impracticable. (Br. 39–40.) That construction would also be consistent with the district court's apparent construction in the Walk-Alone Remedial Plan. (CD 1115, ER 1; Br. 35–36.)

Defendants' interpretation also comports with the deference that state and federal courts have said they should give to prison officials, and avoids forcing CDCR to violate its duty to protect inmates from known risks of serious harm. (*See* Br. 36–38, 42–44.) CDCR provides walk-alone inmates with the requisite "increased opportunities," while upholding its duty to keep the inmates safe. (*See id.* 14–15, 34–40.) Plaintiffs try to escape the import of these risks by arguing Defendants must have known, before the RCGP

existed, what complications they would face, and that Defendants' evidence of violent incidents in the RCGP is insufficient. (*See* Ans. 52–54.) It is not clear how many stabbings and other violent incidents it would take to satisfy Plaintiffs that security is a serious issue within the RCGP, but the evidence speaks for itself. (Br. 12–14.) And it is specious for Plaintiffs to insist that Defendants could anticipate which inmates would end up in the RCGP and how they would interact, even if Defendants broadly understood the endeavor would be challenging.

Under Defendants' construction, Plaintiffs have shown no breach of paragraph 28. The Court should therefore reverse the Walk-Alone Order.

II. PLAINTIFFS HAVE NOT SHOWN MATERIAL BREACH OR SUBSTANTIAL NONCOMPLIANCE.

If the Court adopts either of the district court's interpretations of the Agreement, it must analyze whether Plaintiffs met their burden to prove that Defendants materially breached paragraph 25, or substantially failed to comply with paragraphs 25 and 28. (*See* Br. 40–55.) The Court should hold that Plaintiffs' evidence did not carry their burden.

Plaintiffs appear to accept Defendants' interpretation of California contract law, and devote little analysis to the material-breach or substantial-noncompliance legal standards. (Ans. 34–35.) And they do not deny that,

outside of the roughly 30 people affected by each of the general-population and RCGP walk-alone issues, Defendants have fully performed under the Agreement. (Ans. 35.)

As Defendants' Opening Brief notes, California uses a seven-factor test to determine whether a contract breach is "material." (Br. 41–42 (citing *Sackett v. Spindler*, 248 Cal. App. 2d 220, 229 (1967), and *Whitney Inv. Co. v. Westview Dev. Co.*, 273 Cal. App. 2d 594, 602 (1969)).) And, in analyzing substantial compliance, California courts focus on whether the complaining party "realized the contemplated benefit" of the contract. (*Id.* at 41 (citing *Cline v. Yamaga*, 97 Cal. App. 3d 239, 247 (1979)).)

A. California's Multifactor Material-Breach Standard Favors Defendants.

The district court found that Defendants materially breached paragraph 25. (CD 1113, ER 11.) Defendants' Opening Brief presents arguments and evidence addressing each of California's seven material-breach factors. (Br. 48–51.) Plaintiffs respond by insisting the alleged breach is material by its very nature. (Ans. 34–36.) They address only two factors, one explicitly (the timing of the purported breach) and one implicitly (whether Plaintiffs obtained the substantial benefit they could have anticipated). (*Id.*)

As to timing, Plaintiffs insist they raised the alleged breach of paragraph 25 "very soon after" monitoring began. (Ans. 35.) For support, they cite a transcript showing that, about one year after the Agreement's preliminary approval, they asked for documents about general-population conditions, only to have the magistrate judge tell them such conditions were outside the scope of the Agreement. (Ans. 35 (citing CD 617, ER 420–21).) That is not the same as informing Defendants of an alleged breach. And the magistrate judge's response supports the reasonableness of Defendants' belief that the Agreement does not cover general-population conditions.

As to the substantial-benefit factor, Plaintiffs ask the Court to infer that the out-of-cell-time issue is pervasive and far-reaching. (Ans. 36–37.) They do this in part by misleadingly noting that the Court reviews a district court's factual findings for clear error (which is true), then discussing their evidence, rather than the district court's factual findings. (Ans. 38–43.) The Court does not give deference to a party's description of its evidence. *See Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1371 (9th Cir. 1990) (in reversing stay order, noting the lack of factual findings on an issue made it unclear whether a particular factor weighed in favor of a stay).

Plaintiffs try to limit the Court's review by incorrectly asserting that Defendants did not challenge their evidence, invoking waiver. (Ans. 38.)

Plaintiffs first argue that Defendants waived objections to the surveys' biased results and inadequate sample size. (Ans. 39–41.) But Defendants objected to the surveys on many grounds, including their veracity, sample size, and anonymous nature (CD 961, Further Excerpts of Record (FER) 2–4), and Plaintiffs conceded the bias issue before the magistrate judge (CD 981, ER 178). Plaintiffs then insist that Defendants did not object to their expert's opinions. (*E.g.*, Ans. 40–42.) But Defendants did object to the expert's opinions, arguing they were irrelevant, and that the methodology he used to formulate them was problematic, unreliable, and flawed. (CD 961, FER 2–4 & n.3; CD 998, ER 106–07.) The district court did not resolve Defendants' objections, as noted in the Opening Brief. (Br. 45 n.8.)

On substance, Plaintiffs' evidence does not meet their burden to prove material breach. Plaintiffs do not deny that the General Population Motion relies on about 30 anonymous survey responses, an expert declaration analyzing those responses, and eight declarations. Nor do they deny their counsel's admission that the survey responses have a self-selection bias in favor of inmates who claim to be aggrieved. (Ans. 39–40.) The expert's opinion that the surveys are representative of the class was undermined by the admission of bias, which it does not appear he considered. (Br. 45–46.) And Plaintiffs do not deny that the surveys provide data as to a single

month—March 2017. The eight declarations purport to describe a broader time period, but there is no competent evidence that these anecdotal experiences were representative of the class. (CD 930-2, ER 312–50.)

Moreover, as noted in the Opening Brief, Plaintiffs' own evidence indicates that the restrictions on the survey respondents' out-of-cell time were usually for legitimate institutional reasons. Plaintiffs misleadingly point to a handful of survey responses with notations indicating reasons that, as characterized by the inmates, seem less justified by safety and security concerns. (Ans. 37–38 (citing, *e.g.*, "pizza day," "'down' day," "holiday," etc.) But those notations are not explained, and the Court is left to guess what they mean. The overwhelming majority of reasons given, even as characterized by the inmates, are institutional concerns, such as modified programs/lockdowns, missing pieces of metal (which inmates use to create weapons), threats on staff, violent incidents and riots, cell searches, staff shortages, broken alarms, and training. (CD 993-2, ER 195–304.)

Finally, the Court should reject Plaintiffs' attempt to blame Defendants for Plaintiffs' decision to withhold the identities of the survey responders. (*See* CD 1080, ER 168.) Defendants argued that the surveys' anonymity stopped them from investigating the responses' accuracy and whether the inmates were offered out-of-cell opportunities that they declined. (Br. 46–

47.) In response, Plaintiffs blame Defendants and insist Defendants should have done more to get the information that Plaintiffs withheld, but cite no authority saddling Defendants with that burden. (Ans. 42–43.) Defendants' concern is not "hypothetical" because, contrary to Plaintiffs' misstatement of the record (Ans. 43 n.3), several inmates noted out-of-cell opportunities that they declined, even though Plaintiffs' survey instrument did not ask them to do so. (*See* CD 930-2, ER 205 ("* I do not attend any of the regular religious services"), ER 210 ("refused showers," as opposed to "no shower day"), ER 221 ("didn't use the phone by choice"), ER 266 ("escort showers only (I declined)"), ER 290 ("* refused religious service due to illness," and noting refusal of showers during a "lockdown").)

B. Defendants Substantially Complied with Paragraphs 25 and 28.

Plaintiffs received the contemplated benefits of paragraphs 25 and 28, so this Court should find that Defendants substantially complied with those paragraphs. The contemplated benefit of paragraph 25 was that eligible inmates being held indefinitely in the SHU based on gang status would be released to CDCR's general-population facilities and, more broadly, that CDCR would end the policy that led to such confinement. (Agreement ¶ 25; Br. 48–51.) Plaintiffs received that benefit. (CD 985-4 ¶¶ 4, 7.)

Plaintiffs' argument directed to the unwritten out-of-cell time aspect of paragraph 25 (Ans. 34–35) proves too much. CDCR has released the class members from the SHU, and the vast majority now live in the general population and have no known issues with their out-of-cell time. (CD 985-4 ¶¶ 4, 7.) Even the roughly 2% of class members who complained about their out-of-cell time during March 2017 did so from general-population facilities, not the SHU. And the inverse of that percentage is 98% percent compliance with the unwritten out-of-cell-time term, which is substantial. If failure to perfectly comply with any contract obligation—even an implicit one—was a substantial breach, there would be no such thing as substantial compliance.

That Defendants allegedly failed to comply with an unwritten aspect of one sentence in one contract term that affected only 2% of class members distinguishes it from *Rouser v. White*, 825 F.3d 1076 (9th Cir. 2016), on which Plaintiffs rely. In *Rouser*, the Court rejected the argument that the defendants substantially complied with a consent-decree provision, primarily because they had been found noncompliant with several other provisions and had not provided evidence showing they cured those deficiencies. *See id.* at 1082–83. Here, other than the orders challenged in this appeal, Defendants have not been found noncompliant with the Agreement. And even the alleged breach of paragraph 25 is not a wholesale failure to perform a

contract term, but rather a purported failure to provide one implicit benefit of a contract term to a small subset of class members during a single month. Even under this Court's stringent standard, that is substantial compliance.

The analysis is similar for paragraph 28. As explained in Defendants' Opening Brief, the "contemplated benefit" of paragraph 28 was to move those inmates with special security needs out of the SHU and into a less restrictive environment, more akin to the general population, with programs and services "designed to provide increased opportunities for positive social interaction." (Br. 52–55; Agreement ¶ 28.) Defendants provided that benefit by moving eligible inmates out of the SHU and into the RCGP.

There is a subset of RCGP inmates that CDCR is unable to place in groups because it cannot presently find a group into which the inmates can safely be placed. (Br. 52–53.) But even the inmates not assigned to groups receive increased opportunities for positive social interaction, including a bevy of programs and services not available in the SHU. (*See* CD 927-8, ¶¶ 5–10; Br. 14–15, 53.) This is substantial compliance with paragraph 28.

The Court should reject Plaintiffs' argument to the contrary, which myopically zooms in on two items in a list of programs, and Defendants' alleged failure to provide them to roughly 2% of class members due to serious safety concerns. (Ans. 50–51.) This, again, is not a wholesale failure

to comply with a contract term, but rather a purported failure to provide one disputed benefit of one contract term to a small subset of class members.

If the Court adopts the district court's construction of paragraphs 25 or 28, it should still find Defendants in substantial compliance, and thus reverse the district court's orders finding breach.

III. PLAINTIFFS IGNORE CONTRACT TERMS AND LEGAL PRINCIPLES TO DEFEND THE DISTRICT COURT'S REMEDIAL PLANS.

Even if the Court finds for Plaintiffs on both contract construction and breach, it should reverse because the district court's remedial orders are fundamentally flawed. (Br. 55–65.) Defendants admit the district court had jurisdiction to resolve Plaintiffs' motions. But, as the law permits, the Agreement limited that jurisdiction in time and manner. *See Parsons*, 912 F.3d at 498; *K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 967–68 (9th Cir. 2014). Moreover, the Prison Litigation Reform Act (PLRA) and Federal Rules of Civil Procedure further limited the district court's authority to issue the challenged remedial orders.

The Agreement has two mechanisms for seeking judicial enforcement: paragraphs 52 and 53. Paragraph 52 allows Plaintiffs to seek relief for serious breaches of the Agreement that they contend are systemic constitutional violations. (Agreement ¶ 52.) If they satisfy their burden under

paragraph 52, the breach is treated as "a violation of a federal right" and the court can order enforcement under 18 U.S.C. § 3626(a)(1)(A). (*Id.*) Paragraph 53 is directed to less significant issues that Plaintiffs admit are not constitutional violations. (*See id.* ¶ 53.) If successful under paragraph 53, Plaintiffs may obtain "an order to achieve substantial compliance with the Agreement's terms." (*Id.*)

A. The District Court Cannot Grant Extensive Injunctive Relief Based on Paragraph 53.

The Walk-Alone Remedial Plan, which the district court explicitly issued based on a finding of substantial noncompliance under paragraph 53 (CD 1113, ER 11), violates the PLRA and exceeds the court's authority under the Agreement. That is because the PLRA forbids prospective relief in prisoner civil rights cases unless the plaintiff proves a violation of his or her federal rights, *see Gilmore v. California*, 220 F.3d 987, 999 (9th Cir. 2000), and a finding of substantial noncompliance under paragraph 53 does not establish a violation of an inmate's federal rights. (*See* Br. 56–60.)

Plaintiffs raise two arguments in response, both specious. First, they contend that, because paragraph 28 forbids walk-alone status and the Walk-Alone Remedial Plan permits it, the Plan "does not go beyond substantial compliance, [so] the terms of the PLRA are irrelevant." (Ans. 56–57.) But

the Plan goes well beyond the Agreement's terms by imposing new criteria for walk-alone status, increasing monitoring and documentation requirements, and extending judicial supervision over the matter for at least a year. (CD 1115, ER 1–3.) And Plaintiffs cite no authority for the novel position that the PLRA is irrelevant where a district court issues an injunction in lieu of perfect contract compliance. (*Cf.* Ans. 56–57.)

Second, Plaintiffs argue that paragraph 9, which states the Agreement "meets the requirements of 18 U.S.C. § 3626(a)(1)," is an admission that there was a violation of a federal right. (Ans. 57–58.) But § 3626(a)(1)'s "requirements" relate to the narrowness of an injunction, *i.e.*, that it be "narrowly drawn," "extend[] no further than necessary," and be "the least intrusive means." The statute speaks in terms of a hypothetical "violation of the Federal right" because Congress wrote it to describe a remedy, which—outside the settlement context—would only become relevant after finding a violation. And a reference to § 3626(a)(1)'s "requirements" cannot override the Agreement's express language, which states it is entered into "without any admission or concession by Defendants of any current and ongoing

violations of a federal right." (Agreement, ER 446.)[6] Finally, unlike in *Parsons*, which Plaintiffs again try to bend to fit this case (Ans. 57–58), the district court here did not find a violation of a federal right (*see* Br. 56–60).

Even if the PLRA would not bar far-reaching injunctive relief in response to a motion brought under paragraph 53, the parties did not intend paragraph 53 to give the district court that authority. While paragraphs 52 and 53 have a similar structure, paragraph 52 states that, if Plaintiffs prove a breach under that provision, "the parties agree Plaintiff will have also demonstrated a violation of a federal right and that [the magistrate judge] may order enforcement consistent with the requirements of 18 U.S.C. § 3626(a)(1)(A)." In other words, the parties agreed to deem a breach under paragraph 52 to be a violation of a federal right, and thus to satisfy the PLRA prerequisite to granting injunctive relief. Paragraph 53, by contrast, contains no such language. Breaches under paragraph 53 are not deemed a violation of a federal right, and authorize the magistrate judge only to "issue an order to achieve substantial compliance with the Agreement's terms." This shows the parties intended to limit injunctive relief under paragraph 53.

[6] Plaintiffs try to downplay the significance of this statement by stating, without support, that its purpose was to "protect[] Defendants from … non-parties in other proceedings." (Ans. 7.) Even if non-parties were a consideration, that would not undermine the import of the statement itself.

B. The District Court Cannot Extend the Agreement Without a Finding of Constitutional Violation.

Both of the district court's remedial plans grant Plaintiffs a full year of burdensome monitoring, and implicitly extend the court's jurisdiction over the Agreement for that time period. (CD 1115, ER 2–3; CD 1116, ER 5–6.) They further provide for perpetual extensions of the remedial plans "and the [district court's] jurisdiction over this matter" if Plaintiffs can show that Defendants have not achieved "substantial compliance with the Settlement Agreement's terms." (CD 1115, ER 2–3; CD 1116, ER 5–6.)

As Defendants' Opening Brief explained (Br. 60–61), the remedial plans exceed the district court's authority by extending the Agreement, and its own jurisdiction, beyond what the Agreement permits. By its own terms, the Agreement automatically terminates after 24 months, unless Plaintiffs make a specific showing of an ongoing, systemic constitutional violation. (Agreement ¶ 41.) If there is a pending enforcement motion, the district court retains "limited jurisdiction to resolve the motion." (*Id.* ¶ 46.) As Plaintiffs did not seek to prove a constitutional violation in their General-Population and Walk-Alone Motions, and the district court did not find one in its orders, paragraph 41 was not satisfied and no extension of the Agreement was authorized. (Br. 60–61.)

The Agreement's enforcement scheme is straightforward: Plaintiffs must use paragraphs 52 and 53 to raise claims that Defendants breached the Agreement, and must use paragraph 41 to justify extending it. Plaintiffs elected not to seek an extension on the grounds raised in the General-Population and Walk-Alone Motions. That was their choice. The Agreement does not authorize the district court to grant an extension in response to an enforcement motion under paragraphs 52 or 53.

The Court should reject Plaintiffs' attempt to justify the district court's one-year extension of the Agreement based on a narrow provision permitting "limited jurisdiction" to "resolve" pending enforcement motions. (Ans. 44–45.) The Court should not interpret "resolv[ing]" a "motion" broadly enough to include an elaborate injunction and year-long (potentially indefinite) extension of the court's jurisdiction—the same extension that paragraph 41 would permit only upon proof of a systemic constitutional violation. *See, e.g.*, Definition of Resolve, Merriam-Webster Dictionary Online, *available at* https://www.merriam-webster.com/dictionary/resolve (last visited Aug. 1, 2019) ("to find an answer to" or "to deal with successfully").

And, contrary to Plaintiffs' final argument (Ans. 58), a court's authority to enforce a settlement agreement does not give it authority to rewrite that agreement. *See Capital Growth Inv'rs v. Am. Sav. & Loan Ass'n*, 860 F.2d

1088 (9th Cir. 1988) ("Neither a trial nor appellate court has the power to rewrite a contract.") (quoting *Leiter v. Handelsman*, 125 Cal. App. 2d 243, 251 (1954)); *Vertex Distrib., Inc.*, 689 F.2d at 893 (refusing to "rewrite the parties' 'contract' by holding … that language which does not explicitly prohibit" certain conduct "does in fact do so"). The cases Plaintiffs cite, which discuss when courts retain jurisdiction to enforce a settlement after dismissal, are irrelevant. (Ans. 58 (citing *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016), and *Torlakson*, 762 F.3d at 967).)

C. The General-Population Remedial Plan Is Unenforceably Vague.

Finally, the General-Population Remedial Plan must be vacated because it is unenforceably vague under Federal Rule of Civil Procedure 65(d). The Plan's chief mandate is that CDCR must provide class members out-of-cell time that is "meaningfully greater" than what they received in the SHU. (CD 1114, ER 4.) Defendants provided legal authority finding that "meaningful" is generally too vague to be enforced, and identified a plethora of practical problems with enforcing such a vague mandate in this case. (Br. 62–65.) In response, Plaintiffs argue that, because the Plan includes a floor for out-of-cell time (*i.e.*, more than "what prisoners experienced in SHU"), it is "reasonably specific" and satisfies Rule 65(d). (Ans. 45–47.) But Plaintiffs

fail to address the practical problems Defendants raised, and the one fact that they claim provides "reasonabl[e] specific[ity]" does no such thing. Even if all prisoners received the same amount of out-of-cell time while they were in the SHU—which the record does not show—such a "floor" adds no helpful clarity to "meaningfully greater" in the context of this case.

CONCLUSION

Plaintiffs' Answering Brief failed to raise any substantial arguments supporting affirmance of the district court's orders. The Court should reverse and instruct the district court to deny Plaintiffs' General-Population and Walk-Alone Motions because Defendants have fully complied with paragraphs 25 and 28. If the Court accepts the district court's interpretation of those paragraphs, it should reverse because any breach was insubstantial.

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Finally, even if the Court accepts the district court's interpretations and findings of breach, it should reverse and vacate the district court's remedial plans due to the flaws discussed above.

Dated: August 21, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 18-16427

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

○ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

◉ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Related Cases
Ashker, et al. v. Newsom, et al., 19-15224; and its cross-appeal, Ashker, et al., v. Newsom, et al., 19-15359

Signature s/ Jeffrey T. Fisher **Date** Aug 21, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

18-16427

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD ASHKER, et al.,

Plaintiffs-Appellees,

v.

EDMUND BROWN, JR., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

No. 4:09-cv-05796 CW (RMI)
The Honorable Claudia Wilken, Judge

DEFENDANTS-APPELLANTS' SUPPLEMENTAL ADDENDUM PER NINTH CIRCUIT RULE 28-2.7

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18-16427

DEFENDANTS-APPELLANTS' SUPPLEMENTAL ADDENDUM

TABLE OF CONTENTS

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State of California

California Code of Regulations

Title 15. Crime Prevention and Corrections

Division 3

Rules and Regulations of

Adult Institutions, Programs, and Parole

Department of Corrections and Rehabilitation

Updated through January 1, 2014

SAD 1

matter will be reported to the warden, superintendent, chief disciplinary officer or administrative officer of the day, one of whom will review management cell resident status daily. An inmate who requires management cell placement for longer than 24 hours will be considered for transfer to a psychiatric management unit or other housing appropriate to the inmate's disturbed state.

(g) Disciplinary Detention Records.

(1) A Disciplinary Detention Log, CDC Form 114, will be maintained in each designated disciplinary detention unit. Specific information required in this log will be kept current on a daily and shift or watch basis. A completed log book will be retained in the unit for as long as any inmate recorded on the last page of that log remains in the unit. Storage and purging of log books will be in accordance with department schedules. One disciplinary detention/segregation log may serve a disciplinary detention unit and other special purpose segregation units, which are combined and are administered and supervised by the same staff members.

(2) A separate record will be maintained on each inmate undergoing disciplinary detention. This record will be compiled on CDC Form 114-A, Detention/Segregation Record. In addition to the identifying information required on the form, all significant information relating to the inmate during the course of detention, from reception to release, will be entered on the form in chronological order.

NOTE: Authority cited: section 5058, Penal Code. Reference: Section 5054, Penal Code.

3333. Confinement to Quarters.

(a) Confinement to quarters may be ordered as a continuous period of confinement or as intermittent confinement on holidays, weekends or days off from assigned work and classified program activities. When ordered as intermittent confinement, confinement may not exceed 10 ten days during a 35-day period.

(b) Confinement to quarters may extend from the first full day of confinement to the beginning of the day following the last full day of confinement. Such partial days will not reduce the total number of full days of ordered confinement.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code.

HISTORY:

1. Change without regulatory effect amending section filed 10-29-90 pursuant to section 100, title 1, California Code of Regulations (Register 91, No. 6).

Article 6.5. Behavior Management Unit

3334. Behavior Management Unit.

(a) An inmate may not be assigned to a Behavior Management Unit (BMU), as defined in section 3000, except on the order of a Classification Committee.

(b) Inmates may be referred to a Classification Committee for placement into the BMU for one or more of the following reasons:

(1) Program Failure. The inmate is deemed a Program failure as defined by section 3000.

(2) Security Housing Unit (SHU) Offense as defined in section 3341.5(c)(9).

(A) If an inmate has been found guilty of an offense for which a determinate term of confinement has been assessed, whether imposed or suspended, and whose in-custody behavior reflects a propensity towards disruptive behavior, the inmate may be referred to a classification committee for placement in the BMU.

(B) Inmates currently serving a determinate SHU term whose in-custody behavior reflects a propensity towards disruptive behavior, which otherwise would not be eligible for additional SHU term assessment, shall be considered by the Institutional Classification Committee (ICC) for placement in a BMU upon completion or suspension of the SHU term.

(C) Inmates that have reached the Minimum Eligible Release Date (MERD) and have demonstrated an unwillingness to program in the general population may be reviewed by the Classification Committee for BMU placement consideration.

(3) Gang Related Activity

(A) Any pattern, which consists of two or more documented behaviors which indicates an individual's participation in gang related activity may be grounds for placement in the BMU. Gang related activity is defined as behavior which indicates an inmate's participation in a gang, prison gang, street gang or disruptive group as defined in section 3000.

(c) Inmates who meet the criteria for placement in the BMU program per section 3334(b) shall be reviewed by a Classification Committee after initial placement in the BMU program as outlined in section 3334(c)(3) below. The Classification Committee shall review, determine and assess the appropriate step, and if applicable approve a step change as outlined in section 3334(e) for each BMU inmate as recommended by BMU staff not less than every 30 days.

(1) Initial placement into the BMU shall be for a minimum of 90 days beginning on the date of reception into the BMU.

(2) Subsequent BMU placements shall be for a minimum of 180 days beginning on the date of reception into the BMU. Inmates who require subsequent placement will be monitored by BMU staff to ensure program compliance. If an inmate refuses to participate as required, the Classification Committee will review for possible program rejection.

(3) The Classification Committee will complete an initial assessment and develop an Individualized Training Plan (ITP) within 14 days of placement into BMU. The ITP will be based on each inmate's reason(s) for placement as outlined in section 3334(b).

(4) Inmates shall be expected to meet the requirements established by the Classification Committee as outlined in the ITP.

(5) Inmates must remain disciplinary free and complete the ITP as directed by the Classification Committee before being released from the BMU. The ITP may include, but is not limited to, participation in departmentally approved cognitive behavior programs, and/or participation in self help groups.

(6) The Classification Committee shall be responsible for providing the inmate with notification of the rules and intent of the BMU program. The CDC 128-G, Classification Chrono (Rev. 10/89), shall clearly state that the inmate was informed of the reason for placement, the length of placement, and any additional action the inmate must take to successfully complete the BMU program.

(d) In each case of BMU placement, release from the BMU is based upon completion of the ITP established by the Classification Committee.

(1) The Classification Committee will determine if the inmate has successfully completed their ITP requirements or failed to meet their requirements. Inmates who have met their ITP requirements shall be eligible to advance to the next step of the BMU program. Inmates who have not met their ITP requirements shall be reviewed for appropriate step placement.

(e) BMU Step Process: Work Group/Privilege Group designations

(1) All inmates placed into the BMU will be designated a Work Group (WG), consistent with section 3044, and as determined by the Classification Committee effective the date of placement. Regardless of the WG, the designated Privilege Group (PG), consistent with section 3044, for Step 1 and Step 2 shall be C. The designated PG for Step 3 shall be B. All Work/Program assignments for BMU inmates shall be restricted to and located in the BMU.

SAD 2

(A) Step 1: Initial Placement—WG A1, A2, B or C and PG C. If the inmate meets the goals of the ITP, he will advance to Step 2.

(B) Step 2: WG A1, A2, B, or C and PG C. If the inmate meets the goals of the ITP, he will advance to Step 3.

(C) Step 3: WG A1, A2, B and PG B. If the inmate meets the goals of the ITP, he will advance to Step 4.

(D) Step 4: Upon completion of the ITP, inmates will be returned to traditional general population housing.

(f) Failure to progress in the stepped process shall be grounds for rejection from the BMU program and a review by the Classification Committee for placement on WG C PG C status. Inmates who have been rejected from the program shall not be placed in any other general population work or program assignment until they have successfully completed their ITP in the BMU. Inmates who have been rejected from the BMU program must submit a written request to their Correctional Counselor I for readmission to the program and shall be reviewed by the Classification Committee.

(g) Authorized BMU Property

(1) Inmates shall possess only the listed items of personal property while assigned to the BMU:

(A) Ring (Wedding band, yellow or white metal only. Not to exceed $100 maximum declared value, and may not contain a set or stone), one.

(B) Religious Medal and Chain, as identified within the Religious Personal Property Matrix.

(C) Religious Items, as identified within the Religious Personal Property Matrix.

(D) Books, Magazines, and Newspapers (paperback or hardback with cover removed only. Limit does not apply to legal materials), ten.

(E) Prescription eyeglasses, clear lens only, one (as prescribed by a physician) pair.

(F) Tennis Shoes (no shades of red or blue, low, mid, or high tops are permitted. Must be predominantly white in color. Shoe laces white only. Not to exceed $75.00. No hidden compartments, zippers, or laces that are covered or concealed. No metal components including eyelets), one pair.

(G) Shower shoes (foam or soft rubber, single layer construction, not exceeding 1" in thickness), one pair.

(H) Briefs (white only), ten pairs.

(I) Gloves (cold weather gloves upon approval of Warden, no zippers, pockets, or metal), one pair.

(J) Watch Cap (no black, cold weather watch caps upon approval of Warden), one.

(K) Rain Coat/Poncho (transparent only), one.

(L) Socks (white only, any combination of short to knee-high), seven pairs.

(M) Under Shirts (white only, any combination of crew neck, v-neck, long sleeve or sleeveless athletic tank-top. Turtle neck and mock turtle neck are not permitted), five pairs.

(N) Dental Adhesive (for approved denture wearers only), two.

(O) Dental Flossers/Gliders (no more than 3" in length, amount allowed in possession to be determined by local institutional procedure).

(P) Dental Cleanser, one box.

(Q) Deodorant/Antiperspirant (stick or roll-on, must be clear and in clear container only), four.

(R) Medications, Over-The-Counter (OTC) (only those OTC medications permitted by the Division of Correctional Health Care Services shall be stocked by institution canteens, OTC medications are not approved for inmate packages).

(S) Mouthwash (non-alcoholic only), one.

(T) Palm Brush/Comb (no handle, plastic only), one.

(U) Razor, Disposable (not permitted in Level IV 180 design housing), five.

(V) Shampoo, one.

(W) Shaving Cream (non-aerosol), one.

(X) Soap, Bar, six.

(Y) Soap Dish (non-metal), one.

(Z) Toothbrush (subject to local determination of maximum length, local facility is required to shorten if necessary, to meet local requirements), one.

(AA) Toothbrush Holder (plastic only, may only cover head of toothbrush), one.

(AB) Toothpaste/Powder (toothpaste must be clear and in clear container), one.

(AC) Washcloths (white only), two.

(AD) Address Book (paperback only, 3" x 5" maximum), one.

(AE) Ballpoint Pens (non-metal, clear plastic only), one.

(AF) Bowl (construction material to be approved by Division of Adult Institution (DAI), maximum of 8" in diameter), one.

(AG) Can Opener (restricted from Level IV housing), one.

(AH) Legal Pads/Tablets and Notebooks (no spiral bound), one.

(AI) Envelopes, Blank and/or Pre-Stamped, forty.

(AJ) Envelopes, Metered (indigent inmates only), five.

(AK) Legal material, as authorized per section 3161.

(AL) Photos/Portraits (maximum of 8" x 10"), fifteen.

(AM) Reading Glasses-Non Prescription (magnifying glasses), one pair.

(AN) Stamps (U.S. Postal only), forty.

(AO) Stationary (for written correspondence, may be decorated and have matching envelopes), fifteen sheets.

(AP) Tumbler (construction material to be approved by DAI, 16 ounce or less), one.

(AQ) Health Care Appliance (Dr. Rx. Only. Not subject to the six-cubic foot limit).

(AR) Canteen items, not to exceed one month's draw of assigned privilege group.

(2) Inmates in the BMU shall possess personal property as authorized in section 3190(c) and 3334(g)(1).

(3) Inmates assigned to the BMU upon the initial placement will have their personal property, not identified as authorized BMU property outlined in 3334(g)(1) and 3334(g)(2) stored, provided:

(A) Initial BMU placement is for no more than 90 days.

(B) Inmate participates in the BMU program and progresses to the next step at each 30 day review as outlined in section 3334(e).

(C) Inmate does not receive any property related disciplinary violations while in the BMU program.

(4) Should the inmate fail to comply with the provisions above, all unallowed personal property not identified as authorized BMU property outlined in 3334(g)(1) and 3334(g)(2) shall be disposed of as provided in section 3191(c).

(5) Inmates assigned to the BMU upon the second or subsequent placements shall have all personal property, not outlined in 3334(g)(1) and 3334(g)(2), disposed of as provided in section 3191(c).

(h) Canteen. BMU inmates will be allowed only one (1) draw per month. Canteen privileges shall be established by the Classification Committee as follows:

Step 1—One fourth the maximum monthly canteen draw as authorized in section 3044(f).

Step 2—One fourth the maximum monthly canteen draw as authorized in section 3044(f).

Step 3—One half the maximum monthly canteen draw as authorized in section 3044(e).

(i) Vendor packages are authorized for receipt by inmates housed within the BMU in accordance with their privilege group status as provided in section 3044(c).

(j) Mental Health Services. BMU inmates will be seen by the Mental Health Department in accordance with normal GP treatment expectations as outlined within the Mental Health Services Delivery System (MHSDS). A Mental Health clinician shall attend the Classification Committee for all initial reviews in order to assess the appropriateness of BMU placement for an inmate included in the MHSDS. Inmate's currently at the Enhanced Out Patient (EOP) level of care are not eligible for BMU placement.

(k) Visits. BMU inmates are permitted visits with their approved visitors. All visits for inmates at Step 1 and 2 will be non-contact, this includes attorney visits. Inmates at Step 3 will be afforded contact visits.

NOTE: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Section 5054, Penal Code.

HISTORY:

1. New article 6.5 (section 3334) and section filed 7-8-2008 as an emergency; operative 7-8-2008 (Register 2008, No. 28). Pursuant to Penal Code section 5058.3(a)(1), a Certificate of Compliance must be transmitted to OAL by 12-15-2008 or emergency language will be repealed by operation of law on the following day.
2. New article 6.5 (section 3334) and section refiled 12-15-2008 as an emergency; operative 12-15-2008 (Register 2008, No. 51). Pursuant to Penal Code section 5058.3(a)(1), a Certificate of Compliance must be transmitted to OAL by 3-16-2009 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 12-15-2008 order, including amendment of section, transmitted to OAL 2-23-2009 and filed 4-2-2009 (Register 2009, No. 14).
4. Amendment of subsections (g)(1)(B)–(C) filed 2-21-2013 as an emergency; operative 2-21-2013 (Register 2013, No. 8). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-31-2013 or emergency language will be repealed by operation of law on the following day.
5. Amendment of subsections (g)(1)(B)–(C) refiled 7-29-2013 as an emergency; operative 7-29-2013 (Register 2013, No. 31). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 10-28-2013 or emergency language will be repealed by operation of law on the following day.
6. Certificate of Compliance as to 7-29-2013 order, including further amendment of subsections (g)(1)(B) and (g)(1)(C), transmitted to OAL 10-24-2013 and filed 12-9-2013; amendments operative 12-9-2013 pursuant to Government Code section 11343.4(b)(3) (Register 2013, No. 50).

Article 7. Segregation Housing

3335. Administrative Segregation.

(a) When an inmate's presence in an institution's general inmate population presents an immediate threat to the safety of the inmate or others, endangers institution security or jeopardizes the integrity of an investigation of an alleged serious misconduct or criminal activity, the inmate shall be immediately removed from general population and be placed in administrative segregation. Administrative segregation may be accomplished by confinement in a designated segregation unit or, in an emergency, to any single cell unit capable of providing secure segregation.

(b) Temporary Segregation. Pending a classification committee determination of the inmate's housing assignment, which may include assignment to one of the segregation program units specified in section 3341.5 of these regulations or to the general inmate population, an inmate may be placed in a designated temporary housing unit under provisions of sections 3336–3341 of these regulations.

(c) An inmate's placement in segregation shall be reviewed by the Institutional Classification Committee (ICC) within 10 days of receipt in the unit and under provisions of section 3338(a) of these regulations. Action shall be taken to retain the inmate in segregation or release to general population.

(d) When, pursuant to this section, an ICC retains an inmate on segregation status, the case shall be referred to a Classification Staff Representative (CSR) for review and approval. Unless otherwise directed by the CSR, subsequent ICC reviews shall proceed in accordance with the following timelines until the inmate is removed from segregation status:

(1) At intervals of not more than 90 days until pending Division C, D, E, or F rules violation report is adjudicated. Upon resolution of such matters, an ICC shall review the inmate's case within 14 calendar days. At that time, if no further matters are pending, but continued segregation retention is required pending transfer to a general population, ICC reviews shall be within at least every 90 days until the transfer can be accomplished.

(2) At intervals of not more than 180 days until a pending Division A-1, A-2, or B rules violation report is adjudicated, a court proceeding resulting from a referral to the district attorney for possible prosecution is resolved, or the gang validation investigation process is complete. Upon resolution of such matters, an ICC shall review the inmate's case within 14 calendar days.

(3) At intervals of not more than 90 days until completion of the pending investigation of serious misconduct or criminal activity, excluding gang validation, or pending resolution of safety and security issues, or investigation of non-disciplinary reasons for segregation placement. Should the completed investigation result in the issuance of a Rules Violation Report and/or a referral to the district attorney for criminal prosecution, an ICC shall review the case in accordance with the schedule set forth in subsections (1), (2), or (3) above. Upon resolution of such matters, an ICC shall review the inmate's case within 14 calendar days. At that time, if no further matters are pending, but continued segregation placement is required pending transfer to a general population, ICC reviews shall be at least every 90 days until transfer can be accomplished.

(e) Inmate retention in administrative segregation beyond the initial segregation ICC hearing shall be referred for CSR review and approval within 30 days and then thereafter in accordance with subsection (d) above. In initiating such reviews an ICC shall recommend one of the following possible outcomes:

(1) Transfer to another institution in accordance with section 3379.

(2) Transfer to a Segregated Program Housing Unit in accordance with section 3341.5.

(3) Retention in segregation pending completion of an active investigation into an alleged violation of the rules/disciplinary process, an investigation of other matters, or resolution of criminal prosecution. In such instances an ICC shall offer a reasonable projection of the time remaining for the resolution of such matters.

(f) Subsequent to CSR approval of an extension of segregation retention, an ICC will schedule the case for future CSR review in a time frame consistent with the projection(s) made in accordance with subsection (d) above.

(g) Inmates in segregation who have approved Security Housing Unit (SHU) term status, but are still awaiting other processes (i.e., court proceedings, adjudication of other rule violation reports, gang validation, etc.), shall be reviewed by an ICC in accordance with the SHU classification process noted in subsection 3341.5(c)(9).

(h) The need for a change in housing or yard status of any inmate segregated under the provisions of this article shall be reviewed at the next convened ICC hearing.

SAD 4

(6) Meritorious credit is recommended by an institution classification committee to reduce an inmate's period of confinement pursuant to Penal Code Section 2935.

(7) The inmate's current placement was ordered by the DRB and there is no documentation in the inmate's central file to indicate that the DRB has relinquished responsibility for the inmate's placement.

(e) Decisions of the DRB shall be in writing and implemented within 30 calendar days after the decision is made.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 5054, 5068 and 11191, Penal Code; Sections 8550 and 8567, Government Code; Governor's Prison Overcrowding State of Emergency Proclamation dated October 4, 2006; *Sandin* v. *Connor* (1995) 515 U.S. 472; and *Madrid* v. *Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146.

HISTORY:

1. New section filed 1-16-92; operative 2-17-92 (Register 92, No. 13).
2. Amendment of subsection (d)(3) and Note filed 8-30-99 as an emergency; operative 8-30-99 (Register 99, No. 36). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 2-8-2000 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 8-30-99 order transmitted to OAL 2-7-2000 and filed 3-21-2000 (Register 2000, No. 12).
4. Amendment of subsection (d)(5) and amendment of Note filed 10-30-2008 as an emergency; operative 10-30-2008 (Register 2008, No. 44). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 4-8-2009 or emergency language will be repealed by operation of law on the following day.
5. Amendment of first paragraph and subsections (a)(1)–(2) and (d)(4) filed 12-9-2008; operative 1-8-2009 (Register 2008, No. 50).
6. Certificate of Compliance as to 10-30-2008 order transmitted to OAL 4-1-2009 and filed 5-12-2009 (Register 2009, No. 20).
7. Change without regulatory effect amending subsection (a)(1) filed 1-8-2014 pursuant to section 100, title 1, California Code of Regulations (Register 2014, No. 2).

3377. Facility Security Levels.

Each camp, facility, or area of a facility complex shall be designated at a security level based on its physical security and housing capability. Reception centers are not facilities of assignment and are exempt from the security level designations except for the assignment of permanent work crew inmates. The security levels are:

(a) Level I facilities and camps consist primarily of open dormitories with a low security perimeter.

(b) Level II facilities consist primarily of open dormitories with a secure perimeter, which may include armed coverage.

(c) Level III facilities primarily have a secure perimeter with armed coverage and housing units with cells adjacent to exterior walls.

(d) Level IV facilities have a secure perimeter with internal and external armed coverage and housing units described in section 3377(c), or cell block housing with cells non-adjacent to exterior walls.

NOTE: Authority cited: Section 5058 and 5058.3, Penal Code. Reference: Sections 5054 and 5068, Penal Code.

HISTORY:

1. New section filed 8-7-87 as an emergency; operative 8-7-87 (Register 87, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-7-87.
2. Certificate of Compliance as to 8-7-87 order transmitted to OAL 12-4-87; disapproved by OAL (Register 88, No. 16).
3. New section filed 1-4-88 as an emergency; operative 1-4-88 (Register 88, No. 16). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 5-3-88.
4. Certificate of Compliance as to 1-4-88 order transmitted to OAL 5-3-88; disapproved by OAL (Register 88, No. 24).
5. New section filed 6-2-88 as an emergency; operative 6-2-88 (Register 88, No. 24). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-30-88.
6. Certificate of Compliance including amendment transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
7. Change without regulatory effect amending section filed 10-22-90 pursuant to section 100, Title 1, California Code of Regulations (Register 91, No. 4).
8. Editorial correction of printing errors (Register 91, No. 11).
9. Editorial correction of printing error in subsection (b) (Register 92, No. 5).
10. Amendment of section heading, first paragraph and Note filed 8-27-2002 as an emergency, operative 8-27-2002 (Register 2002, No. 35). Pursuant to Penal Code section 5058.3 a Certificate of Compliance must be transmitted to OAL by 2-4-2003 or emergency language will be repealed by operation of law on the following day.
11. Certificate of Compliance as to 8-27-2002 order transmitted to OAL 1-21-2003 and filed 3-6-2003 (Register 2003, No. 10).

3377.1. Inmate Custody Designations.

(a) Designation of a degree of an inmate's custody shall be reasonably related to legitimate penological interests. The CDCR uses the following inmate custody designations to establish where an inmate shall be housed and assigned, and the level of staff supervision required to ensure institutional security and public safety:

Maximum Custody,
Close A Custody,
Close B Custody,
Medium A Custody,
Medium B Custody,
Minimum A Custody,
Minimum B Custody,

(1) Maximum Custody.

(A) Housing shall be in cells in an approved segregated program housing unit as described in CCR section 3335 and CCR subsections 3341.5(b) and 3341.5(c).

(B) Assignments and activities shall be within the confines of the approved segregated program housing unit.

(C) An inmate designated as Maximum Custody shall be under the direct supervision and control of custody staff.

(2) Close A Custody Male Inmates.

(A) Housing shall be in cells within Level III and Level IV facilities in housing units located within an established facility security perimeter.

(B) Close A Custody inmates shall be permitted to participate in program assignments and activities scheduled within the hours of 0600 hours to 1800 hours unless hours are extended by the Warden to no later than 2000 hours when it is determined that visibility is not compromised in areas located within the facility security perimeter. Bases for the extended hours include operational necessity, daylight savings time, or availability of high mast lighting. Close A Custody inmates are not permitted beyond the work change area.

(C) Custody staff supervision shall be direct and constant. In addition to regular institutional counts, Close A Custody male inmates shall be counted at noon each day.

(3) Close A Custody Female Inmates.

(A) Housing shall be in cells or in a designated Close Custody dormitory.

(B) Close A Custody female inmates shall be permitted to participate in program assignments and activities scheduled within the hours of 0600 hours to 1800 hours unless hours are extended by

the Warden to no later than 2000 hours when it is determined that visibility is not compromised in areas located within the facility security perimeter and the work change area. Bases for the extended hours include operational necessity, daylight savings time, or availability of high mast lighting.

(C) Custody staff supervision shall be direct and constant. In addition to regular institutional counts, Close A Custody female inmates shall be counted at noon each day.

(4) Close B Custody Male Inmates.

(A) Housing shall be in cells within designated institutions in housing units located within an established facility security perimeter.

(B) Close B Custody inmates shall be permitted to participate in program assignments and activities during the hours of 0600 hours to 2000 hours in areas located within the facility security perimeter including beyond the work change area in a designated Level II, Level III or Level IV institution. Close B Custody inmates may participate in designated work program assignments until 2200 hours when the work program is in an assigned housing unit located within the facility security perimeter. Close B Custody inmates may participate in limited evening activities after 2000 hours until the general evening lockup and count when the limited activity is in a designated housing unit located within the facility security perimeter.

(C) The work supervisor shall provide direct and constant supervision of Close B Custody inmates during the inmate's assigned work hours.

(D) Custody staff shall provide direct and constant supervision of Close B Custody inmates at all times.

(5) Close B Custody Female Inmates.

(A) Housing shall be in cells or in a designated Close Custody dormitory located within an established facility security perimeter.

(B) Close B Custody female inmates shall be permitted to participate in program assignments and activities during the hours of 0600 hours to 2000 hours in areas located within the facility security perimeter, including beyond the work change area, in designated Level II, Level III and Level IV institutions.

Close B Custody female inmates may participate in work program assignments until 2200 hours when the work program is in an assigned housing unit located within the facility security perimeter. Close B Custody female inmates may participate in limited evening activities after 2000 hours until the general evening lockup and count when the limited activity is in an assigned housing unity located within the facility security perimeter.

(C) The work supervisor shall provide direct and constant supervision of Close B Custody inmates during the inmates' assigned work hours.

(D) Custody staff shall provide direct and constant supervision of Close B Custody inmates at all times.

(6) Medium A Custody.

(A) Housing shall be in cells or dormitories within the facility security perimeter.

(B) Assignments and activities shall be within the facility security perimeter.

(C) Supervision shall be frequent and direct.

(7) Medium B Custody.

(A) Housing shall be in cells or dormitories within the facility security perimeter.

(B) Assignments and activities shall be within the facility security perimeter. Inmates may be given daytime assignments outside the facility security perimeter but must remain on facility grounds.

(C) Custody staff shall provide frequent and direct supervision inside the facility security perimeter. Custody staff shall provide direct and constant supervision outside the facility security perimeter.

(8) Minimum A Custody.

(A) Housing shall be in cells or dormitories within the facility security perimeter.

(B) Assignments and activities may be inside or outside the facility security perimeter.

(C) Staff supervision shall consist of at least hourly observation if assigned outside the facility security perimeter. Sufficient staff supervision of the inmate shall be provided to ensure the inmate is present if assigned inside the facility security perimeter.

(9) Minimum B Custody.

(A) Housing may be in cells or dormitories on facility grounds, in a camp, in a Minimum Support Facility (MSF) or in a community based facility such as a Community Correctional Facility.

(B) Assignments and activities include eligibility for work or program assignments located either on or off institutional grounds.

(C) Sufficient staff supervision shall be provided to ensure the inmate is present.

(b) An "R" suffix shall be affixed to an inmate's custody designation to ensure the safety of inmates, correctional personnel, and the general public by identifying inmates who have a history of specific sex offenses as outlined in Penal Code (PC) Section 290.

(1) The "R" suffix shall be affixed during reception center processing if one of the following four criteria applies:

(A) The inmate is required to register per PC Section 290.

(B) The inmate's parole was revoked by the Board of Parole Hearings (BPH) formerly known as the Board of Prison Terms/ Parole Hearing Division, Good Cause/Probable Cause Finding of an offense that is equivalent to an offense listed in PC Section 290.

(C) The inmate had a BPH formerly known as California Youth Authority/Youth Offender Parole Board sustained adjudication of an offense that is equivalent to an offense listed in PC Section 290.

(D) The inmate had a valid "R" suffix evaluation as defined in this section, resulting in the "R" suffix being affixed.

(2) Inmates with a prior "R" suffix evaluation inconsistent with Section 3377.1(b)(5) shall not have an "R" suffix applied. An "R" suffix evaluation must be completed at the receiving institution.

(3) Within six months of reception or at any time during an incarceration, inmates with records of arrest, detention, or charge of any offenses listed in PC Section 290, shall appear before a classification committee to determine the need to affix an "R" suffix to the inmate's custody designation. The committee shall consider the arrest reports and district attorney's comments related to each arrest.

(A) An inmate found guilty in a disciplinary hearing of a Division A-1, A-2, or B offense that is equivalent to an offense listed in PC Section 290 shall have an "R" suffix evaluation completed by a classification committee.

(4) The receiving institution's initial classification committee shall affix the "R" suffix designation to an inmate's custody during initial classification committee review when it is determined the "R" suffix was not applied at the reception center and the inmate meets one of the criteria listed in Subsection 3377.1(b)(1).

(5) When completing an "R" suffix evaluation, the classification committee shall consider the arrest report(s) and district attorney's comments. However, a classification committee may affix an "R" suffix if the arrest report(s) are available and the district attorney's comments are unavailable. The classification committee shall document in a CDC Form 128-G the attempts/steps taken to obtain the required documentation.

(A) An "R" suffix shall not be affixed when the required documentation is not available for review, unless approved by Departmental Review Board (DRB) decision. If the arrest report is unavailable, the district attorney's comments or any other court or official documents shall be considered if available.

(B) DRB approval is required to affix an "R" suffix to an inmate's degree of custody if the required relevant documents are not available to complete an "R" suffix evaluation.

(6) If a Unit Classification Committee (UCC) finds that an inmate may no longer require an "R" suffix, the committee shall refer the case to the Institution Classification Committee (ICC) for review.

(7) Should a different facility UCC at the same institution disagree with the initial UCC's decision to either affix or not affix the "R" suffix, the committee must refer the case to ICC for review.

(8) ICC can reverse an "R" suffix evaluation by a previous institution's ICC only if new and compelling information is obtained. Otherwise, the case shall be referred for a DRB decision.

(9) An "R" suffix shall not be applied if the inmate was acquitted/found not guilty of the sex related charges in a court of law even if BPH Good Cause/Probable Cause Finding revoked his/her parole for those sex related charges.

(10) Inmates with "R" suffixes shall be housed in accordance with their placement score and shall not be assigned outside the security perimeter.

(11) Inmates who have obtained a valid Certificate of Rehabilitation pursuant to PC Section 4852.01 shall not have an "R" suffix affixed.

(12) An inmate whose "R" suffix has been removed shall be eligible for any housing or assignment for which they otherwise would qualify had the "R" suffix never been designated.

(13) The following terms are defined for the purposes of the "R" suffix custody designation:

(A) Institution means a large facility or complex of subfacilities with a secure (fenced or walled) perimeter headed by a warden.

(B) Facility means a subfacility of an institution headed by a facility captain.

(c) An "S" suffix may be affixed by a classification committee to the inmate's custody designation to alert staff of an inmate's need for single cell housing. The classification committee's decision to affix the "S" suffix shall be based on documented evidence that the inmate may not be safely housed in a double cell or dormitory situation based on a recommendation by custody staff or a health care clinician.

(d) A "D" suffix may be affixed by an Institutional Classification Committee (ICC) to a male inmate's Close Custody designation to indicate the inmate may be housed within a dormitory environment. A mental health clinician or physician shall be present during the ICC classification hearing for placement or removal of a D Suffix to an inmate-patient's custody designation.

(1) A "D" suffix shall only be affixed by ICC if the inmate meets one of the following criteria and the ICC determines the inmate can safely program in dormitory housing based on a review of the inmate's case factors:

(A) Inpatient mental health treatment is deemed clinically necessary and health care staff have determined that required care cannot be provided in a celled environment.

(B) Placement in a specialized medical bed has been deemed clinically necessary and the Health Care Placement Oversight Program staff have determined the required care cannot be provided in a celled environment.

(2) Other security precaution requirements set forth in Section 3377.1 for Close Custody still apply to inmates with a "D" suffix.

(3) The D suffix shall be removed when either of the following occur:

(A) A determination is made by health care staff that the in-patient mental health treatment is no longer necessary and/or can be provided within a celled environment.

(B) A determination is made by health care staff that the in-patient medical care is no longer necessary and/or the Health Care Placement Oversight Program staff have determined appropriate celled housing is available.

NOTE: Authority cited: Section 5058, Penal Code, Reference: Sections 290, 4852.01, 5054 and 5068, Penal Code; Americans With Disability Act (ADA), 42 U.S.C. § 12131, et seq.; and Pennsylvania Department of *Corrections* v. *Yeskey* (1998) 524 U.S. 206.

HISTORY:

1. New section filed 8-7-87 as an emergency; operative 8-7-87 (Register 87, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-7-87.
2. Certificate of Compliance as to 8-7-87 order transmitted to OAL 12-4-87; disapproved by OAL (Register 88, No. 16).
3. New section filed 1-4-88 as an emergency; operative 1-4-88 (Register 88, No. 16). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 5-3-88.
4. Certificate of Compliance as to 1-4-88 order transmitted to OAL 5-3-88; disapproved by OAL (Register 88, No. 24).
5. New section filed 6-2-88 as an emergency; operative 6-2-88 (Register 88, No. 24). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-30-88.
6. Certificate of Compliance transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
7. Change without regulatory effect amend section filed 10-22-90 pursuant to section 100, title 1, California Code of Regulations (Register 91, No. 4).
8. Editorial correction of printing error inadvertently omitting text (Register 91, No. 11).
9. Editorial correction of printing error in subsection (a)(9)(B) (Register 92, No. 5).
10. Amendment filed 3-27-2000 as an emergency; operative 3-27-2000 (Register 2000, No. 13). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 9-5-2000 or emergency language will be repealed by operation of law on the following day.
11. Certificate of Compliance as to 3-27-2000 order transmitted to OAL 9-5-2000; disapproval and order of repeal and deletion reinstating section as it existed prior to emergency amendment by operation of Government Code 11346.1(f) filed 10-18-2000 (Register 2000, No. 42).
12. Amendment filed 10-19-2000 deemed an emergency pursuant to Penal Code section 5058(e); operative 10-19-2000 (Register 2000, No. 42). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 3-27-2001 or emergency language will be repealed by operation of law on the following day.
13. Certificate of Compliance as to 10-19-2000 order, including further amendment of subsections (a), (a)(2)(B) and (a)(3)(B) and amendment of Note, transmitted to OAL 3-27-2001 and filed 5-3-2001 (Register 2001, No. 18).
14. Amendment of subsections (b)–(b)(1)(D), repealer of subsections (b)(1)(E)–(K), amendment of subsections (b)(2)–(3), new subsection (b)(3)(A), amendment of subsections (b)(4)–(5), new subsections (b)(5)(A)–(b)(13)(B) and amendment of Note filed 11-3-2006; operative 12-3-2006 (Register 2006, No. 44).
15. New subsections (d)–(d)(3)(B) filed 11-14-2011 as an emergency; operative 11-14-2011 (Register 2011, No. 46). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 4-23-2012 or emergency language will be repealed by operation of law on the following day.
16. Certificate of Compliance as to 11-14-2011 order transmitted to OAL 2-29-2012 and filed 4-5-2012 (Register 2012, No. 14).
17. Editorial correction of subsection (a)(5)(B) (Register 2013, No. 28).
18. Change without regulatory effect amending subsection (a) filed 1-8-2014 pursuant to section 100, title 1, California Code of Regulations (Register 2014, No. 2).

SAD 7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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