

**FINAL STATEMENT OF REASONS
AMENDMENT, ADOPTION AND REPEAL OF REGULATIONS OF THE
BOARD OF STATE AND COMMUNITY CORRECTIONS**

**MINIMUM STANDARDS FOR LOCAL DETENTION FACILITIES
TITLE 15, DIVISION 1, CHAPTER 1, SUBCHAPTER 4**

LOCAL MANDATE DETERMINATION

As required by Government Code Section 11346.9(a)(2), the Board of State and Community Corrections (BSCC) has determined that there will be no mandates imposed on local agencies or school districts through the adoption of these Title 15 regulations as proposed.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.9(a)(4), the BSCC must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The BSCC has determined that there is no alternatives that would be more effective or as effective, less burdensome, and more cost effective, to affected persons. The 45-day public comment period began March 10, 2017 and ended April 24, 2017, all comments received during that time are summarized and addressed below. Two public hearings were held: April 19, 2017 at the BSCC offices in Sacramento and May 2, 2017 at the Ontario City Library in Ontario. While members of the public were in attendance at both hearings, only one public comment was received and is addressed below.

UPDATES TO INITIAL STATEMENT OF REASONS

No updates have been made to the Initial Statement of Reasons.

THE CREATION OR ELIMINATION OF JOBS WITHIN THE STATE OF CALIFORNIA

The proposed amendments require local detention facilities to provide a minimum amount of in-person visits that may be supplemented but not replaced by video visitation. Facilities shall not charge for visitation that occurs onsite whether it is in-person or via video terminal. The proposed amendments may have a nominal impact in creating local corrections jobs and limiting video vendor contracts and/or jobs within the state of California as facilities will not be able to wholly replace existing in-person visitation with video terminals.

SUMMARY AND RESPONSE TO COMMENTS

COMMENTER #1
Bernadette Rabuy, Senior Policy Analyst
Prison Policy Initiative
April 23, 2017 (Letter)

Summary of Comment

The regulations do not provide any incentive for sheriffs to provide in-person visits, even when it would be relatively easy for them to do so. For example, a recent Valley Public Radio piece interviewed Captain Tim Fosnaugh from the Tulare County Sheriff's Office about a video visitation system the office implemented in January 2017. Fosnaugh said that the technology "is the future" and that he doesn't see it going away anytime soon. Tulare County is building two new jail facilities that will only provide video visitation in addition to the system implemented in January.

By grandfathering Tulare County's planned facilities, the Board of State and Community Corrections is not giving the Tulare County Sheriff's Office any reason to reconsider its decision to protect essential in-person visits. The quote also shows that sometimes sheriff's offices are basing crucial decisions about whether to allow human contact between incarcerated people and their families on fads. Moreover, it is arguable that video visitation "is the future" as Fosnaugh suggested. Approximately 15% of local jails across the country provide video visitation. Thus, in-person visitation is still the national standard, and some of those jails provide video as a supplement to in-person visits.

The regulations allow sheriffs to resist the will of their county governments. The Board of State and Community Corrections' decision to protect in-person visits yet grandfather counties and facilities that are in the early stages of construction is making it harder for counties to protect in-person visits. Monterey County is a great example of a county that should not be grandfathered. While the County released a bid for a planned facility that would only provide video visitation, the sheriff's office failed to even communicate this plan with the Monterey County Board of Supervisors.

There is a strong and growing national consensus that a video visit is not the same as a real, in-person visit and that this is a harmful trend that needs to be stopped. For example, last August, the American Correctional Association, unanimously ratified a policy that states that correctional agencies should "use emerging technologies as *supplements* to existing in-person visitation" (emphasis added). The Board of State and Community Corrections' approved regulations would allow jails in California to violate existing correctional best practices.

There is no excuse for the expansive grandfathering that these approved regulations would allow. We ask that, at the very least, the Board of State and Community Corrections reduce the list of counties it is grandfathering by requiring in-person visits from the counties that already have the existing space to provide in-person visits and the counties that are in early stages of construction and could relatively easily change their plans to eliminate in-person visits like Tulare and Monterey counties.

BSCC Response

The proposed regulations are a direct response to Senate Bill (SB) 1157, which was vetoed by Governor Edmund G. Brown on September 27, 2016. SB 1157 aimed to require local detention facilities that use video or other types of electronic visitation methods to also provide in-person visitation that met or exceeded the minimum number of visits currently required in Title 15. In the Governor's veto message he stated that the bill did not provide adequate flexibility, created a strict mandate, and directed the BSCC to address the issue.

The BSCC, following the Governor's direction, has proposed regulations that provide flexibility to facilities that are able to provide both video and in-person visitation, eliminated the prospect of facilities charging families or inmates for on-site visitation, and allowed for facilities without visitation space to have the ability to remain in compliance with the regulations.

The proposed regulations include a provision for grandfathering because the BSCC cannot fund local agencies to retrofit facilities that are in construction, or have been constructed, and do not have space for video visitation. Additionally, since minimum standards are not compulsory, there is provision for allowing those agencies that provide video visitation by policy.

The commenter notes that this proposed regulation would cause BSCC to allow agencies to violate "best practices;" the BSCC cannot inspect local detention facilities for compliance with such practices. However, the grandfathering of facilities avoids promulgating a regulation that would be unduly burdensome for counties to come into compliance. Moreover, facilities that were designed without in-person visitation space will be grandfathered due to the significant cost of changes to construction plans, delays in project timelines, prospective escalation costs, and county and state approval processes for lease revenue bond processes. Finally, Title 24 building standards are not adopted by the BSCC, but rather the Building Standards Commission, which do not allow for the retroactive application of building standards. (See Health & Saf. Code, § 18938.5; Cal. Code Regs., tit. 24, §§ 13-102 & 2-1013.)

The commenter notes that this regulation allows the county to resist the will of their county governments; the BSCC respectfully disagrees with this statement.

COMMENTER #2

Azadeh Zohrabi, National Campaigner

Ella Baker Center for Human Rights

April 24, 2017 (Letter)

Summary of Comment

California families with incarcerated loved ones deserve the right to maintain meaningful relationships with their loved ones through in person visitation while they are incarcerated in county jails. When a person is incarcerated, even for a short period of time, family contact and in-person visits are crucial to maintaining family stability, reducing recidivism, increasing the chances of obtaining employment post-release, and facilitating successful reentry. The regulations under consideration by the BSCC would have a severe impact

on the ability of families to maintain this meaningful connection and could have a detrimental impact on public safety.

We are concerned about the number of counties that would be excluded from the requirement to offer in-person visitation space under§ 1062 (f). This section grandfathers in facilities that were exclusively video only as of February 2017, even if they have space available for in person visits. This includes nine jails, based on the information provided by BSCC, that have space for in person visitation but do not offer in-person visitation. Allowing these county facilities that have space for in person visits to be excluded from the requirement to provide in person visits is excessive and creates inconsistent visiting privileges based on geography rather than sound public policy or available space. All facilities that have space for in person visitation should be required to offer in person visitation.

The proposed language under§ 1062 (d) allows county jail facilities to only offer video visitation unless in person visits are requested by a person who is incarcerated there. Putting the onus on the incarcerated person to request in person visitation is not sound policy, especially in facilities that have existing space for in person visits. Questions remains as to how this policy would be implemented- what channels of communication exist for incarcerated people to request in person visits, how will they be notified that they can request an in person visit, how will these requests be recorded and processed, and by whom? These unnecessary complications can be avoided by simplifying this section to read, "Video visitation may be used to supplement existing visitation programs, but shall not be used to fulfill the requirements of this section."

Section 1062 (f) also grandfathers in facilities that are planned and in construction. Facilities that are in the planning phases still have the flexibility and opportunity to provide in-person visitation space. In order to create consistency in providing access to in person visits, planned facilities should be required to re-submit plans to the BSCC that include space for in person visits. For facilities that are already under construction or have facilities that do not have in-person visitation space, all future jail funding should be conditioned on their commitment to use a portion of those funds to create space for in person visits.

BSCC Response

The proposed regulations are a direct response to Senate Bill (SB) 1157, which was vetoed by Governor Edmund G. Brown on September 27, 2016. SB 1157 aimed to require local detention facilities that use video or other types of electronic visitation methods to also provide in-person visitation that met or exceeded the minimum number of visits currently required in Title 15. In the Governor's veto message he stated that the bill did not provide adequate flexibility, created a strict mandate, and directed the BSCC to address the issue.

The proposed regulations requiring in-person visitation will not apply to facilities which, prior to February 16, 2017, exclusively used video visitation. In addressing the issue of video visitation, the BSCC was tasked with protecting in-person visitation while not creating a strict mandate. Allowing facilities to operate as they are on or before February

16, 2017 provides the necessary flexibility that is needed by local-level detention facilities. The possession of adequate visitation spaces was not the only aspect considered in the creation of the proposed language. Facilities must also have adequate resources, funds, and staffing to conduct in-person visits. For some facilities, moving to video and in-person visitation would cause an undue hardship in allocating the resources, funds, staff and support to comply with such strict regulations.

The Board of State and Community Corrects aims to provide performance-based standards through the adoption of its regulations. A performance standard allows the BSCC to provide a specific objective while giving the needed flexibility to comply in a way that is best for a facility's size, population, and specific needs. Not all incarcerated persons will utilize in-person visits; in an effort to provide some predictability in necessary staffing levels and costs inmates will need to request in-person visitation. Facilities will address this as they do many other performance-based regulations, by creating a facility-specific policy and procedure that BSCC inspectors will review during inspections.

Facilities that are under construction or planned will be grandfathered due to the significant cost of changes to construction plans, delays in project timelines, prospective escalation costs, and county and state approval processes related to lease-revenue bond financing. Changes to the architectural aspects of a jail construction project does not occur by creating a new set of plans. Construction project modifications must go through a series of local approvals, budget reviews, cost analysis, etc. that escalate the cost of the project and significantly delay construction timelines. Construction projects funded by a BSCC construction program would require extra layers of approval, review, and analysis not only by BSCC staff for compliance with Title 24 and program specific requirements, but also with the BSCC Board, Department of Finance, State Fire Marshal, State Public Works Board, Department of General Services, and if necessary the Department of Corrections and Rehabilitation. Such a significant change to the planning of a facility would cause undue hardship on a county's budget, delay project timelines, and possibly cause the project to cease entirely.

COMMENT #3

**Lynn Wu, Staff Attorney
Prison Law Office**

(Please see attached letter for full list of signatories)

February 14, 2017 (Letter resubmitted March 24, 2017)

Summary of Comment

The importance of in-person visitation cannot be overstated. The U.S. Department of Justice has stated that incarcerated people who get in-person visits have fewer discipline problems, are more likely to get a job when released, and are less likely to commit other crimes. In-person visits have been shown to significantly reduce the likelihood a person reoffends or commits technical violations after being released. Visitation is an integral part of strengthening family connections and support systems between incarcerated people and their loved ones, especially children. Video calls, with their tiny cameras positioned so that no eye contact can be made, that regularly malfunction, freeze, or show grainy images do not have the same ability as in-person visits to maintain family connections.

The definition of “in-person visit” is unnecessarily complicated. It could be clarified in the following way: “In-person visit means an on-site visit during which an incarcerated person is able to see a visitor through glass, has physical contact with a visitor, or is otherwise in an open room without physical contact with a visitor. In-person visit does not include an interaction between an incarcerated person and a visitor through the use of an on-site two-way audio/video terminal.”

15 CCR § 1062(d) should not place the burden on the incarcerated person to request in-person visits. In-person visits should be the default. A facility should only be allowed to provide less than the minimum amount of in-person visits if they can document that the incarcerated person consented to that that week. Furthermore, the terms “video visit” and “video visitation” are inaccurate; the technology marketed by the same companies that provide phone call access in jails and detention facilities are more accurately described as video calls. Thus, (d) should read “Video call technology may be used to supplement existing visitation programs, but shall not be used to fulfill the requirements of this section.”

15 CCR § 1062(e) is a good start to address accessibility, but does not go far enough. Many family members, particularly elderly people or people whose first language is not English, have difficulty accessing video calls because they do not understand how to set up an account. Jails, particularly those that the BSCC proposes to allow to ban in-person visits, must develop policies to provide meaningful assistance with this and certify that these policies are resulting in access to in-person visits and video calls. They also cannot require a credit card to access the free hour of remote video call since that is often a barrier for impacted families. We and additional community stakeholders hope to further collaborate with BSCC to develop concrete language for this section to ensure greater access to visitation. At the very least, (e) should make clear that “If remote or off-site video calls are available, the first hour each week must be provided free of charge and facility policies must include procedures to assist visitors in accessing video calls.”

15 CCR § 1062(f) should not exempt facilities that have space to provide in-person visits. Since video call technology did not exist at the time § 1062 was promulgated, it is questionable whether the term “visitation” in the current version of § 1062 permits video calls. Video call technology is substantially different from in-person visits. While we can appreciate the potential challenges facilities may face in providing in-person visits after banning them, we believe the challenges to families, especially children, and incarcerated people caused by facilities banning in-person visits are far greater and will also lead to far greater societal costs associated with undermining rehabilitation and reentry, and negatively impacting child development.

Instead of changing § 1062 to allow facilities to continue banning in-person visitation, the BSCC should work with them to develop a timeline to begin providing in-person visits and an accountability structure that ensures adherence to the timeline. Thus, we recommend that (f) reads as follows, “Applicability of subdivision (d) shall be delayed until a date determined by the BSCC for facilities which, prior to February 16, 2017, (1) did not have space for in-person visitation or (2) were designed without in-person visitation space and for which bids for construction have begun and that do not have space for in-person visitation.”

24 CCR § 1231.2.18, fn.1 proposes to exempt, from the requirements of 24 CCR § 1231.2.18, any county that has “submitted a letter of intent” to the BSCC banning in-person visitation based on 24 CCR § 13-102(b). The applicability of 24 CCR § 13-102(b) here is questionable because, similar to § 1062, it is unclear whether facilities that provide space for video calls, but not in-person visits are in compliance with the current version of 24 CCR § 1231.2.18.

Even if the BSCC continues to defend its current interpretation of 15 CCR § 1062 and 24 CCR § 1231.2.18, allowing facilities to meet the minimum visitation requirements by providing video calls instead of in-person visits, 24 CCR § 1231.2.18, fn.1 contradicts itself. In BSCC construction RFPs, “[p]roposals submitted to the BSCC will suffice as a Letter of Intent to build, expand, or remodel a facility as required by CCR Title 24, sec.13-102(c) 1.” In other words, the BSCC proposes to allow any county that has applied for jail construction funding to not provide space for in-person visits. This is a bizarre interpretation of 24 CCR § 13-102(b). For one, it would mean that any county that applied for funding, even those that were not awarded a construction grant would be included in this exemption. The footnote goes on to quote 24 CCR § 13-102(b), “Title 24 of the California Code of Regulations, Sections 13-102 and 2-1013 which pertain to planning and design of detention facilities shall be applicable to facilities for which architectural drawings have been submitted to the Board for review. These requirements shall not be applicable to facilities which were constructed in conformance with the standards of the board in effect at the time of initial architectural planning ...” Thus, the footnote contradicts itself – is the BSCC proposing to allow a ban on in-person visits in facilities where a county “submitted a letter of intent” or “for which architectural drawing have been submitted to the Board”?

“[T]he time of initial architectural planning” cannot reasonably be interpreted as the time when a county submits a response to an RFP. An architect does not become involved in jail construction until the “design” phase” when the county contracts with an architecture and engineering firm to start designing their project. After this phase, the county submits its preliminary plan to the State Public Works Board and once approved, proceeds to the working drawing phase. At this point, there is still time to change the design and include in-person visitation space before the State Public Works Board approves the final construction drawings allowing the county to go to bid for construction.

Instead of changing § 1062 to allow these Counties to spend hundreds of millions of dollars to build facilities that ban in-person visits, the BSCC should support them to develop ways to provide in-person visits. Orange County and San Benito have not submitted their final construction drawings; the BSCC should begin working with them immediately to determine how they can provide space for in-person visits. Riverside County has already indicated they can provide in-person visits at the East County Detention Center even though it is “in construction. It is unclear whether the Imperial County Oren R Fox Medical Security Facility plans to transport people to the other facilities for in-person visits; the BSCC should work with Imperial County to plan for this. The BSCC should also work with county representatives to determine what it would take to provide in-person visitation in Tulare South County Detention Facility and Imperial

County Oren R Fox Medical Security Facility, which are both “in construction”, but only broke ground about 6 months ago.

Thus, 24 CCR § 1231.2.18 fn.1 should be deleted and 24 CCR § 1231.2.18 should read “Space shall be provided in all Types I, II, III and IV facilities for in-person visiting unless subject to delay from providing in-person visitation pursuant to 15 CCR § 1062(f).”

Since the BSCC has acknowledged the great benefits to in-person visitation, we urge the BSCC to work with these facilities to move toward providing in-person visits and complying with § 1062. Many questions still remain that must be answered before wholesale changing the regulations to allow these facilities to forever ban in-person visits, leaving thousands of family members with no real contact with their incarcerated loved ones for the foreseeable future.

Furthermore, the BSCC must put in place a process to ensure that facilities they propose to allow to ban in-person visits are compliant with the Americans with Disabilities Act. Not only must those facilities provide ADA accessible options like video phones, which are different from regular video calls and preferable for people with disabilities, but must certify that the video call technology is working the way it is designed to work. We have heard from many families and it is well documented in national research that video call technology has many problems that can disproportionately impact people with disabilities.

We appreciate that the BSCC Board wants to finalize action on video calls and in-person visits, but we urge you to take the extra time to get answers to the questions we have presented above to make sure that the regulations are comprehensive and result in as many people having access to in-person visits. Before adopting these proposed regulations, the BSCC should certify the status of counties that have been awarded construction funding and certify which facilities would be allowed to ban in-person visitation. Though delays in construction or setting up available space for in-person visits may take time and resources now, there is too much at stake to cede dealing with this issue to other policymakers. We urge you to take the lead on this issue.

BSCC Response

The BSCC agrees that in-person visits are important to inmates, families, and communities. The proposed regulations are a direct response to Senate Bill (SB) 1157, which was vetoed by Governor Edmund G. Brown on September 27, 2016. SB 1157 aimed to require local detention facilities that use video or other types of electronic visitation methods to also provide in-person visitation that met or exceeded the minimum number of visits currently required in Title 15. In the Governor’s veto message he stated that the bill did not provide adequate flexibility, created a strict mandate, and directed the BSCC to address the issue.

The proposed language is intended to protect in-person visitation, while following the Governor’s direction to provide flexibility. The definition was written in such a way as to not specifically call out components of a visiting area that may or may not be in a facility (such as separation glass, or open rooms).

Many facilities across the state are still facing budget deficits. The requirement to have inmates request in-person visitation is an effort to relieve facilities of fully staffing visiting areas when those areas may not be used to their full capacity. With the choice of utilizing video visitation as a supplement, facilities may need to divert staff to supervise those areas as well. Requiring that inmates request their in-person visits provides facilities with more predictability in staffing needs.

The majority of facilities utilize video visitation services through a contracted vendor. Many facilities already provide step-by-step instructions that include screen shots of what the end user should click on, and in several different languages. The video visitation vendors also offer assistance.

The “free hour” that was discussed in prior meetings involving these regulations had been removed before the Notice of Proposed Action was published.

While 15 CCR § 1062 was promulgated well before the invention of video visitation, this regulation did not specifically state what type of visiting it spoke of, or explain what type of visiting the required space would be used for. As the regulations stand now (without the proposed language), facilities can be in full compliance if they operate with video or on-site/in-person visitation.

COMMENT #4

**Lynn Wu, Staff Attorney
Prison Law Office**

(Please see attached letter for full list of signatories)

March 24, 2017 (Letter)

Summary of Comment

The BSCC Board and staff has expressed support for in-person visitation and as the state agency tasked with providing oversight of and guidance to local detention facilities, the BSCC should be taking proactive steps to limit the number of facilities that ban in-person visitation and helping facilities that have or plan to ban in-person visitation to reverse course. The American Correctional Association, the oldest association developed specifically for practitioners in the correctional profession, unanimously adopted a policy last year stating that video calls should only be used as a supplement, not a replacement for in-person visitation.

The proposed regulations are expansive and unnecessarily allow local detention facilities that have space to provide in-person visitation and facilities that have not even submitted architectural plans to ban in-person visitation. This will result in thousands of family members being cut off from their incarcerated loved ones and will impact institutional behavior, public safety, and rehabilitation throughout the state.

Since the Board made no changes to the regulations other than eliminating the free hour of remote video visitation, we still have all the concerns that we submitted in our February

14 letter, which is attached for reference. Of particular concern is the footnote to 24 CCR § 13-102(b), which contradicts itself and will lead to further confusion as local detention facilities proceed in construction.

We deeply regret the direction that the Board and the BSCC staff has chosen to take regarding visitation in California's local detention facilities.

BSCC Response

The BSCC is supportive of in-person visitation and acknowledges the importance of person-to-person contact. The steps taken to create the proposed regulations were thoughtful and included the input of stakeholders. Facilities currently using or possessing approved plans to use video visitation exclusively will be allowed to continue their practice as long as they were using or had plans approved by February 16, 2017. This provision does significantly limit the amount of facilities that may use video visitation exclusively.

In addressing the issue of visitation, the BSCC was tasked with protecting in-person visitation while not creating a strict mandate. Allowing facilities to operate as they are on or before February 16, 2017 provides the necessary flexibility that is needed by local-level detention facilities. The possession of adequate visitation spaces was not the only aspect considered in the creation of the proposed language. Facilities must also have adequate resources, funds, and staffing to conduct in-person visits. For some facilities, moving to video and in-person visitation would cause an undue hardship in coming up with the resources, funds, staff and support to comply with such strict regulations.

The BSCC has addressed the issues presented in the February 14, 2017 letter in Comment #3. Proposed changes to Title 24 are not subject to this rulemaking process and will not be adopted until the next Building Standards Commission Triennial Code Adoption Cycle, tentatively scheduled for 2018.

COMMENT #5

Carole Urie, Director

Returning Home Foundation

May 2, 2017 (Comment made at Public Hearing)

Summary of Comment

Thank you for the review of Title 15 "visitation" and that in person visitation has been identified as a visiting mode that must be included in all new future projects that have not been identified by the BSCC as "in construction" or "planned" at this time.

This was an important step, but things that are on paper sometimes do not necessarily succeed in practice, so I am hoping the following issues will be considered when the regulations are reviewed again in two years.

Costs for video: replacing free in-person jail visits with expensive computer video chats was solved by offering the first hour free.

But in jails where there are both visiting options, off-site video calling is charged.

While the internet is a great tool, it cannot be assumed that everyone has access to this technology or can use it or afford it.

A problem in practice: Poor people have less access to high-speed internet and computers at home.

Similarly, Blacks and Hispanics are less likely than Whites to have computers and high-speed internet access at home.

A problem in practice: Pre-registration for some visitation must be made via the internet.

A problem in practice: according to article (d) an inmate needs to make a “request” for in-person visitation instead of a visit by video-call so that the video call cannot be used to fulfill the requirements of that section. A procedural dilemma.

Perhaps the problem could be solved if “in-person visitation” were identified as the default visitation mode and per the American Correction Association “emerging technologies are to be used as a supplement to it”.

Finally – visitation itself. Research has shown that in-person visitation reduces recidivism. It is a crucial link to family and community. AB109 moved persons closer to their community.

Problem in practice: use of video calls only has shown to reduce the number of visitation due to issues just stated.

I end with the Governor’s comments in his veto of BS1157: He is concerned about the trend of making jail facilities unavailable for in-person visits, that the practice could have an adverse impact on achieving rehabilitative goals and might affect in a negative way the families and loved ones of those incarcerated.

The BSCC has been charged with exploring ways to address these issues.

BSCC Response

The proposed regulations are a direct response to Senate Bill (SB) 1157, which was vetoed by Governor Edmund G. Brown on September 27, 2016. SB 1157 aimed to require local detention facilities that use video or other types of electronic visitation methods to also provide in-person visitation that met or exceeded the minimum number of visits currently required in Title 15. In the Governor’s veto message he stated that the bill did not provide adequate flexibility, created a strict mandate, and directed the BSCC to address the issue.

The proposed language is intended to protect in-person visitation, while following the Governor’s direction to provide flexibility. BSCC staff will revisit the regulations (Title 15, Division 1, Chapter 1, Subchapter 4) at the next regularly scheduled rulemaking review (in approximately two years), at which point the comments made during this rulemaking will also be reviewed.

Attachment J-3