

PETITION TO THE OFFICE OF ADMINISTRATIVE LAW CHALLENGING ALLEGED UNDERGROUND REGULATION

Use of this form is optional. It requests the information required by California Code of Regulations, title 1, section 260, for a petition challenging an alleged underground regulation. Whether you use this form or another format, the mandatory information required by California Code of Regulations, title 1, section 260, including the supporting documentation, must be included in your petition. If you create a separate petition, or if you use this form and need to add extra pages, ensure each page is clearly labeled.

Petitioner Contact Information (Title 1, Section 260(b)(1))

Name: Yaneer Bar-Yam, co-Founder World Health Network

Professor and President, New England Complex Systems Institute

Address: 125 Mt. Auburn St #38031, Cambridge, 02238

Telephone Number: Omitted

E-Mail Address: yaneer@necsi.edu

Name of Challenged Agency (Title 1, Section 260(b)(2))

California Department of Public Health (CDPH)

Complete description of the Challenged Rule (Title 1, Section 260(b)(3))
Attach an original or photocopy of the challenged rule. If the challenged rule is found in an agency manual, identify the specific provision of the manual alleged to comprise the challenged rule.

CDPH Challenged Rule:

Title: Update on January 9, 2024 of COVID-19 Isolation Guidance

Summary of Update: The January 9, 2024 update to the COVID-19 Isolation Guidance involves a shift in the recommended duration of isolation. The previous requirement of five days of isolation has been replaced with a focus on clinical symptoms to determine the appropriate endpoint for isolation.

Challenged Rule Attachment A: Please find attached the original document reflecting the updated COVID-19 Isolation Guidance. The document can also be accessed through the following link:

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Isolation-Guidance.aspx>

Description of the actions of the challenged agency showing that it has issued, used, enforced, or attempted to enforce the challenged rule. (Title 1, Section 260(b)(4))

The following events demonstrate the actions taken by the challenged agency to issue, use, enforce, or attempt to enforce the challenged rule:

1. On January 9th, 2024, the California Department of Public Health updated its website page on COVID-19 Isolation Guidance. The update reflected a change in the recommended isolation period, moving away from a five-day requirement and instead focusing on clinical symptoms to determine when to end isolation.

2. Additionally, on the same date of January 9, 2024, the California Department of Public Health guideline was incorporated into a [regulation by Cal/OSHA](#) (Attachment B), a division of the State of California Department of Public Relations. The regulation explicitly states that it applies to most workers in California who are not covered by the Aerosol Transmissible Diseases standard.

3. Furthermore, the Oakland Schools have adopted the CDPH guidance, which permits COVID positive students to attend class. This adoption can be verified at the following source (Attachment C):

<https://www.msn.com/en-us/health/wellness/oakland-schools-allow-covid-positive-students-to-attend-class/ar-AA1n1JZj>

Legal basis for concluding that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable. (Title 1, Section 260(b)(5)):

[\[https://casetext.com/regulation/california-code-of-regulations/title-1-general-provisions/division-1-office-of-administrative-law/chapter-2-underground-regulations/section-260-submission-of-petitions-regarding-underground-regulations\]](https://casetext.com/regulation/california-code-of-regulations/title-1-general-provisions/division-1-office-of-administrative-law/chapter-2-underground-regulations/section-260-submission-of-petitions-regarding-underground-regulations)

THE CALIFORNIA DPH UPDATE ON JANUARY 9, 2024 OF COVID-19 ISOLATION GUIDANCE

LEGAL STATEMENT ON WHY IT CONSTITUTES A REGULATION

According to the definition of "Regulation" ([CA Gov't Code Section 11342.600](#)) provided, as a rule, regulation, order, or standard of general application, or an amendment, supplement, or revision adopted by a state

agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, the California Department of Public Health (CDPH) Update on January 9, 2024, of COVID-19 Isolation Guidance constitutes a Regulation.

1. Rule, Regulation, Order, or Standard of General Application:

The COVID-19 Isolation Guidance issued by the CDPH on January 9, 2024, is a rule, regulation, order, or standard that applies to the general population of California. It provides specific guidelines and requirements for individuals who need to isolate due to COVID-19 infection or exposure.

2. Amendment, Supplement, or Revision:

By issuing the update on January 9, 2024, the CDPH is amending, supplementing, or revising the existing COVID-19 Isolation Guidance that was previously in effect. The update is intended to provide further clarification, modifications, or additions to the previous guidance, thereby altering the previous requirements and obligations imposed upon individuals subject to isolation measures.

3. Adopted by a State Agency:

The COVID-19 Isolation Guidance update was issued by the California Department of Public Health, which is a state agency responsible for enforcing and administering public health laws within the state. As such, the update is adopted by a state agency and falls within the jurisdiction and authority of the CDPH.

The California Department of Public Health guideline was further incorporated into a regulation of Cal/OSHA, a division of the State of California Department of Public Relations, which is a state agency, on the same date of January 9, 2023, and is explicitly stated on the regulation that “These regulations apply to most workers in California who are not covered by the Aerosol Transmissible Diseases standard.”

4. Implements, Interprets, or Makes Specific the Law Enforced or Administered by the CDPH and Cal/OSHA:

The COVID-19 Isolation Guidance update is issued by the CDPH to implement and provide specific guidelines for the enforcement and administration of public health laws related to COVID-19. It clarifies the requirements for individuals who must isolate due to infection or exposure, thereby making specific the obligations imposed by the public health laws enforced by the CDPH.

5. Governs Procedure:

The January 9, 2024, update on COVID-19 Isolation Guidance includes procedural instructions and protocols that individuals must follow when isolating. It outlines the steps to be taken, such as testing, duration of isolation, monitoring symptoms, and when it is safe to discontinue isolation. Therefore, the guidance governs the procedure that individuals must adhere to when undergoing isolation, making it a regulation within the defined scope.

6. An exception might be claimed if the CDPH was issued during the period of time during California's COVID-19 State of Emergency. Due to special conditions under that Emergency Order. However, the emergency order ended as of Feb 28, 2023 and does not provide a basis for exemption (Attachment D).

<https://www.gov.ca.gov/2023/02/28/governor-newsom-marks-end-of-californias-covid-19-state-of-emergency/>

In conclusion, The California DPH Update on January 9, 2024, of COVID-19 Isolation Guidance constitutes a regulation as defined by the provided definition. It is a rule, regulation, order, or standard of general application, adopted by a state agency, which implements, interprets, or makes specific the law enforced or administered by the California Department of Public Health, and governs the procedure to be followed during the isolation period.

Information demonstrating that the petition raises an issue of considerable public importance. (Title 1, Section 260(b)(6))

The revised guidance issued by the California Department of Public Health (CDPH) regarding COVID-19 isolation raises a significant issue of public importance due to the following reasons:

1. Inconsistency with CDC Guidance: The CDPH guidance contradicts the Isolation and [Precautions for People with COVID-19 issued by the Centers for Disease Control and Prevention \(CDC\)](#) (Attachment E). The CDC guidelines clearly state that individuals who test positive for COVID-19 should isolate for at least 5 days, irrespective of symptoms, as they are most infectious during this period. The inconsistency between CDPH and CDC guidelines is of considerable public importance, as COVID-19 infections pose significant risks to students, employees, and their households.

Recent rumors that CDC will change its guidance <https://www.washingtonpost.com/health/2024/02/13/covid-isolation-guidelines-cdc-change/> (Attachment F) do not relieve CDPH of its responsibility for public comment in California.

2. Concerns raised by Secretary of HHS Becerra: Secretary Becerra has expressed concern about the deviation from the CDC isolation guidance and opposition to the California guidelines. As reported in an [article](#) titled "Health Secretary Becerra defends CDC's COVID isolation guidance that California shortened," (Attachment G) Secretary Becerra emphasized the importance of adhering to the CDC guidance and stated that those who downplay the COVID threat are "playing with fire." This further highlights the public importance of the matter.

3. Impacts on workers in California: The updated rule by Cal/OSHA, which aligns with the CDPH guidance, affects a significant portion of workers in California who are not covered by the Aerosol Transmissible Diseases standard. These regulations are expected to be implemented for a period of at least two to three years beginning February 3, 2023. The updated regulations by Cal/OSHA are based on the CDPH COVID-19 Isolation Guidance, which therefore has been "adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" and thus qualifies as a "Regulation" under the definition in CA Gov't Code Section 11342.600. This demonstrates the public importance of the CDPH guidance, as it has far-reaching impacts on workers' health and safety.

4. Adoption of guidance in school districts: The CDPH guidance has been adopted by school districts, as evidenced by the case of [Oakland Schools allowing COVID-positive students to attend class](#) (Attachment H). The CDPH guidance, which bases isolation solely on symptoms, fails to consider asymptomatic transmission, contrary to the CDC guidelines. Furthermore, the CDPH guidance violates federal law ([Section 504](#) (Attachment I) of the Rehabilitation Act of 1973) and California State Code ([California's Educational Equity Code](#) (Attachment J)) by allowing COVID-positive individuals to attend school while requiring them to avoid contact with higher-risk individuals. This violation jeopardizes the right to a [Free and Appropriate Public Education \(FAPE\)](#) (Attachment K) for higher-risk students and may lead to [truancy](#) (Attachment L) charges against parents due to medically justified but [unexcused absences](#) (Attachment M).

5. Lack of support from current recommendations, research, and reports: The updated CDPH COVID-19 Isolation Guidance is not supported by current recommendations, research, and reports. The use of symptoms alone to determine isolation poses considerable risks to the public in terms of COVID-19 infection and the associated short and long-term risks, such as Long COVID and COVID-induced organ damage. The guidance's attendance and sick policies are inadequate compared to the CDC's isolation standards, which mandate a minimum 5-day isolation followed by 5 days of masking, irrespective of symptoms or COVID-19 hospitalization levels.

6. Compromised principle of public impact without public feedback: The release process of the CDPH guidance undermines the principle of allowing public impact with public feedback. This violates the fundamental purpose of California regulations on agency actions, which aim to ensure fair and transparent decision-making processes by government agencies, emphasizing public participation, protection of rights, procedural due process, and accountability. The CDPH guidance release process fails to uphold these essential principles.

7. Significance of COVID-19's impact: [The global impact of the COVID-19 pandemic continues to cause significant harm](#) (Attachment N), with reports indicating the [high number](#) (Attachment O) of children testing positive for COVID-19 and experiencing [persistent symptoms](#) (Attachment P). Additionally, [the transmission of COVID-19 from children to households](#) (Attachment Q) has been a major contributing factor in the spread of the disease. The risks associated with COVID-19 infection and the potential for long-term health consequences highlight the urgency for sound, comprehensive and effective public health measures.

8. Public interest: CDPH has not provided any opportunity for public comment. The members of the public recognize the importance of this guidance and have attempted to provide comments at the California Conference of Local Health Officers (CCLHO) Board of Directors Meeting, which is an unrelated meeting. See call to action on Action Network https://actionnetwork.org/events/action-public-comment-at-ca-public-health-meeting-with-director-dr-tomas-aragon?clear_id=true (Attachment R)

Considering the aforementioned reasons, the issue raised by the CDPH COVID-19 Isolation Guidance is of considerable public importance and requires careful examination and rectification.

We ask that the Office of Administrative Law make a determination of an underground regulation and adopt it as a regulation pursuant the requirements and procedures of the APA.

In summary: The California Department of Health Updated Isolation Guidance is an “[underground regulation](#)” as it is a “guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA (Administrative Procedure Act) and is not subject to an express statutory exemption from adoption pursuant to the APA”. It is of considerable public importance as it poses serious health risks to children, workers, their households, and the community. It is required that this underground regulation be subjected to the process of regulation to facilitate a period of public comment.

Optional: Please attach any additional relevant information that will assist OAL in evaluating your petition.

See Attachment S.

Confirmation Pursuant to Title 1, Section 260(b)(7):

A copy of this petition and all attachments were submitted to the challenged agency.

Challenged
Agency:

California Department of Public Health

Name of individual at Challenged Agency to whom petition was sent:

Chief Counsel Drew Brereton

If submitted by mail, commercial or hand delivery:

Address:

If submitted by email:

Email Address: Drew.Brereton@cdph.ca.gov

Please Note: When a petition is submitted to OAL and the challenged agency concurrently in the same e-mail, and the e-mail address of the recipient at the challenged agency is visible to OAL, the e-mail satisfies the written confirmation requirement. (Title 1, Section 260(b)(7)(B).)

If the state agency whose rule you are challenging is the California Department of Corrections and Rehabilitation (CDCR) or any prison or facility within the CDCR, you may want to send a copy of the petition to:

Regulations and Policy Management Branch
CDCR
P.O. Box 942883
Sacramento, CA 94283-0001

Additional information, including status of petitions under review, may be found on the OAL web site at www.oal.ca.gov.

If you have additional questions, contact the OAL Reference Attorney by calling (916) 323-6815, or by sending an e-mail message to staff@oal.ca.gov.

Deliver this petition and all supporting documentation to:

Attention: CTU
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Or by email to staff@oal.ca.gov

Petitions and accompanying documentation may be submitted to OAL in hard copy, either through the mail, or by hand delivery in person or by a commercial delivery service (FedEx, UPS, etc.), or by e-mail.