

JOHN R. MCGINLEY, JR., ESQ., CHAIRMAN
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ROBERT J. HARBISON, III
JOHN F. MIZNER, ESQ.
ROBERT E. NYCE, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

May 20, 1999

Honorable Martin F. Horn, Commissioner
Department of Corrections
2520 Lisburn Road
P.O. Box 598
Camp Hill, PA 17011

Re: IRRC Regulation #19-4 (#2011)
Department of Corrections
County Correctional Institutions

Dear Commissioner Horn:

Enclosed are our Comments on the subject regulation. They are also available on our website at <http://www.irrc.state.pa.us>.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact James M. Smith at 783-5439 or Fiona E. Wilmarth at 783-5438.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:wbg

Enclosure

cc: William M. Resnor
Mark E. Guzzi
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF CORRECTIONS REGULATION NO. 19-4

COUNTY CORRECTIONAL INSTITUTIONS

MAY 20, 1999

We have reviewed this proposed regulation from the Department of Corrections (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to need for the regulation, duplication of existing regulations, reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Recommended guidelines - Need for the regulation and Clarity.

Sections 95.220, 95.221(b), 95.222(b), and 95.226(b) of the regulation set forth recommended guidelines which are not mandatory. It is not clear why recommended guidelines are needed in regulation, since the Department does not intend to enforce them.

A regulation has the force of law and is binding on the agency and anyone affected by the regulation. An announcement that provides guidance to regulated entities, but does not constitute a binding norm, is not a regulation. The recommended guidelines would be appropriate as a statement of policy or as a guidance document, but not as a regulation.

The Department should identify the recommended guidelines which it intends to enforce as binding norms and include those as minimum requirements in the regulation. Recommended guidelines which are not mandatory should be deleted from the regulation. More specific comment is included with the comments on Sections 95.220, 95.221(b), 95.222(b), and 95.226(b).

2. Written local policy - Clarity.

The terms "written local policy" and "local policy" are used repeatedly in the regulation. However, these terms are not defined or used consistently in the regulation. We understand that because of differences in facilities and prisoners there is a need for written policies which are specific to each institution. For clarity, the Department should define one of the terms and use that term throughout the regulation.

The regulation is also not clear on the significance of the written local policy. The Department should state in the regulation how the written local policy for each institution will be reviewed and enforced by the Department.

3. Section 95.220. Purpose. - Clarity.

Recommended guidelines

The phrase "and recommended guidelines, which are not mandatory" should be deleted from Section 95.220.

Scope of the regulation

The last two sentences of Section 95.220 describe waivers of the regulations for counties which are accredited by other bodies. These waivers describe the scope of the regulation rather than the purpose. The Department should delete these sentences from Section 95.220 and add them to a new Section which states the scope of the regulation.

American Correctional Association accreditation

The waiver for counties achieving American Correctional Association accreditation states this "chapter" will be waived in its entirety. Since the rulemaking is limited to Subchapter B, the Department should clarify whether the waiver applies to other subchapters within Chapter 95, or just to Subchapter B.

National Commission on Correctional Healthcare accreditation

For counties achieving National Commission on Correctional Healthcare accreditation, the Department is waiving "regulations pertaining to medical and health services." It is not clear which specific regulations will be waived. The Department should specify in the regulation which medical and health service regulations will be waived.

4. Section 95.221. Personnel. - Need and Clarity.

Paragraph (a)(1)

It is not clear why Paragraph (a)(1) is needed or how it can be fulfilled as a minimum personnel requirement. The Department should explain the need for Paragraph (a)(1), and how it would be enforced, or delete it.

Paragraphs (a)(2), (a)(3), and (a)(4)

We have four concerns with the training requirements in Paragraphs (a)(2), (a)(3), and (a)(4). First, Paragraph (a)(2) requires all personnel to have "a course of training" before being assigned duties. Paragraph (3) requires full-time personnel to receive training within 12 months of assuming duties. Paragraph (4) allows part-time personnel to work who have not completed training. The regulation is not clear regarding whether these are different types of training programs. The Department should amend the personnel training requirements in Paragraphs (a)(2), (a)(3), and (a)(4) to specify the type and amount of training required before each category of personnel can be assigned duties.

Second, Paragraph (a)(3) does not require any supervision of full-time personnel who have not completed a training program. Whereas, Paragraph (a)(4) requires close supervisory direction of part-time personnel who have not completed a training program. Both part-time and full-time personnel may perform the same duties and encounter the same situations. Consequently, the regulation should clearly state the supervision requirement for full-time and part-time personnel who have not completed training programs.

Third, Paragraph (a)(4) allows the part-time personnel who have not completed training to work under "close supervisory direction." The regulation does not specify what training the person providing "close supervisory direction" must have. The Department should specify that the person providing supervision must have completed their training.

Finally, full-time personnel must complete training within 12 months of assuming their duties. There is no commensurate time requirement for part-time personnel in Paragraph (a)(4). We recognize that part-time personnel will spend less time in the prisons than full-time personnel. However, both part-time and full-time personnel may perform the same duties and encounter the same situations. The Department should specify in Paragraph (a)(4) when part-time personnel training is required to be completed.

Paragraph (a)(3)

Paragraph (a)(3) contains a reference to the "Department of Corrections (Department)." Since "Department" is used throughout the regulation, the Department should add a new section to the regulation entitled "Definitions" and include the definition of "Department" in the new section.

Subsection (b) Recommended guidelines

The paragraphs in Subsection (b) contain vague standards such as "careful selection," "adequate to attract and retain competent and professional men and women," "in a professional manner," and "good physical condition." If the Department includes any of the paragraphs in Subsection (b) as minimum requirements, the Department should amend those paragraphs for clarity; and explain why the paragraph is needed (i.e., elevated from not mandatory to mandatory); how the standard would be determined; and how the paragraph would be enforced.

5. Section 95.222. Admission. - Duplication of existing regulations and Clarity.

Subsection (a) Minimum requirements

The Department's intent in the last sentence of Paragraph (2) is not clear. As drafted, a written verification of treatment from a medical doctor would be required with all admissions. Verification of treatment would only be needed for new inmates who may require medical attention that cannot be provided at the prison. The Department should revise this paragraph to require verification of treatment only where it is necessary or explain the need for verification of treatment for all admissions.

Paragraph (a)(3)

We have three clarity concerns with Paragraph (a)(3). First, the paragraph begins with the phrase "intake procedures." The Department should use the term "admission procedures" to be consistent with the title of Section 95.222.

Second, Paragraph (a)(3) states the procedures "should be described" in local policy. This language gives the impression that compliance with this paragraph may be optional. The Department should change the word "should" to the word "shall." To improve clarity, the Department should also change "described" to "specified."

Third, the concluding phrase "developed from recognized professional standards" is vague. The Department should either delete this phrase or directly reference the required standards.

Paragraph (a)(4)

The beginning of Paragraph (a)(4) is confusing because it requires basic personal information for admissions, but the list of information is conditioned on "the event of a transfer." It does not appear that the information required for a transfer differs from the information required for an admission. Therefore, the Department should delete the phrase "In the event of a transfer" and directly specify the information required to be obtained upon admission.

Some of the subparagraphs under Paragraph (a)(4) lack clarity as follow:

- Subparagraph (iii) should specify what address of the inmate is sought, such as previous address or prison address.
- Subparagraph (iv) should specify the information needed to satisfy the requirement for the description of the inmate, such as "a description of the inmate including height, weight, eye color,...."
- Subparagraph (xii) should be combined with Subparagraph (vii) and should specify what facts are required.

Paragraph (a)(5)

Paragraph (a)(5) duplicates existing requirements in Sections 95.223 and 95.224(3). The Department should delete Paragraph (a)(5), or explain why it is needed.

Paragraph (a)(6)

Paragraph (a)(6) should be written in clear language. It may be clearer if it stated "Written local policy shall specify how an inmate can notify a relative of the inmate's location."

Subsection (b) Recommended guidelines

The paragraphs in Subsection (b) contain vague standards such as "coincide with prevailing laws and statutes," "conducted in a professional fashion," and "serious wounds." A minimum requirement also should use the word "shall" rather than "should." If the Department includes any of the paragraphs in Subsection (b) as minimum requirements, the Department should amend those paragraphs for clarity; and explain why the paragraph is needed (i.e., elevated from not mandatory to mandatory); how the standard would be determined; and how the paragraph would be enforced.

Paragraph (b)(1)

Paragraph (b)(1) is a recommended guideline for strip searches. It is directly related to Paragraph (a)(3) in regard to contraband searches. If the Department chooses to make Paragraph (b)(1) a minimum requirement, we have five concerns with this paragraph. First, the search is described as an "unclothed search" and as a "strip search." For clarity, the Department should use one term or the other consistently in the regulation.

Second, the second sentence regarding laws and statutes is vague. The Department should either state the specific laws and statutes governing strip searches, or delete this sentence.

Third, the requirement that a strip search be "conducted in a professional fashion" lacks clarity. Conducting a search in a professional fashion could be widely interpreted. The Department should specify in the regulation the standards a strip search must meet.

Fourth, the Department is deleting the requirement that a strip search be conducted in an area where the prisoner is in view of only those officers in charge of the search. Why is this requirement no longer needed?

Finally, Paragraph (b)(1) requires the strip search to be "supervised" by staff of the same sex. Why isn't it required that the search be "conducted and supervised" by staff of the same sex?

6. Section 95.225. Classification. – Need and Clarity.

Paragraph (a)(1)

We have identified a typographical error in Subsection (a) as printed in the *Pennsylvania Bulletin*. There are two paragraphs labeled "(1)." This error should be corrected in the final-form regulation.

Paragraph (a)(2)

Paragraph (a)(2) provides the following:

(2) In keeping with recognized professional standards, this plan shall establish categories based on the degree of security risk and need for supervision and

specify how the classification process is accomplished, what process of appeals exist, the review mechanism utilized and explicit procedures for reclassification.

We have several concerns related to the clarity of this provision. First, the phrase "In keeping with professional standards," is vague because it does not identify the specific standards or require compliance with those standards. This phrase should be deleted or clarified.

Second, since this section of the regulation refers to classification of prisoners, the word "categories" should be changed to "classifications."

Finally, this paragraph includes several items that are required in the classification plan. To improve the clarity of the regulation, we suggest the Department include these items as a list of new subparagraphs under Paragraph (a)(2).

Existing Paragraphs (a)(1), (2), and (3)

The Department is proposing to delete these paragraphs which address jail security, inmate welfare, and community protection. It is not clear that these subjects are adequately addressed in the new proposed Subsection (a). We request the Department explain why it is proposing to delete these provisions.

7. Section 95.226. Housing. – Need and Clarity.

Paragraph (a)(1)

This paragraph states the following:

Decisions involving housing segregation or removal and transfer of seriously ill inmates shall be in keeping with existing laws and National standards.

To improve the clarity of this provision, the Department should include citations to the applicable laws and standards. Also, the Department should define "seriously ill."

Paragraph (a)(2)

The word "possible" is unnecessary. The Department should delete "possible."

Paragraph (a)(4)

This paragraph contains a general reference to requirements of the Department of Health. To improve the clarity of the regulation, the Department should cite the specific requirements that apply.

In addition, Paragraph (4) lists items to consider in determining housing adequacy. A further list appears in Subparagraphs (4)(i) through (iv). To improve the clarity of the regulation, these lists should be combined into a single list.

Subsection (b) – Recommended guidelines

It appears the recommended guidelines in Subsection (b) are duplicative of the minimum requirements in Subsection (a). Consequently, Subsection (b) should be deleted in the final-form regulation.

8. Section 95.228. Clothing. – Need and Clarity.

The Department is deleting existing Subsection (b)(2) relating to changing and washing clothing to maintain hygiene. It does not appear that this provision is addressed elsewhere in the proposed regulation. Therefore, we request the Department explain why it is deleting Subsection (b)(2).

9. Section 95.231. Personal hygiene. – Need, Reasonableness and Clarity.

Subsection (1) requires inmates to maintain “proper hygiene standards.” We question the need for this vague requirement. Other sections of the regulation contain specific requirements related to bathing and clothing. Why is this additional requirement necessary?

10. Section 95.232. Medical and health services. – Reasonableness and Clarity.

Subsection (1)

This subsection requires that an inmate receive a “a health care screening performed and recorded by a person with health care training within 24 hours of admission.” We have two concerns related to the clarity of this provision. First, it is unclear what is included in the health care screening. The final-form regulation should specify the components of the screening.

Second, it is unclear what level of training is required to comply with the requirement that the person conducting the screening have “health care training.” The final-form regulation should specify the components of the required training.

Subsection (2)

This subsection requires an inmate who is not in good health to be assessed by a “health care professional” within 24 hours of admission. It is unclear what the required credentials are for the “health care professional.” For example, is a registered nurse, physician’s assistant, or physician required to perform the screening? The Department should specify these requirements in the final-form regulation.

Subsection (5)

This subsection and Subsection (6) use the term “health provider/authority,” but the term is not defined in the regulation. We request the Department explain the difference between a “health provider” and a “health authority” and define these terms in the final-form regulation.

Subsection (5) also provides that “This authority shall have sole province on matters involving medical judgement.” Subsection (9) requires “A written plan shall outline

management of treatment by appropriate credentialed professionals.” It is unclear if, or how, these two provisions are interrelated. We request the Department explain the meaning of these provisions.

Subsection (6)

This subsection requires the following:

(6) Written local policy shall provide that the health provider/authority report on the health care delivery system in writing and review findings with prison administrators on a routine basis.

We have two concerns related to the clarity of this provision. First, it is unclear what information is to be contained in the report. The final-form regulation should specify the subjects to be included in the report.

Second, it is unclear how often a report must be submitted. “On a routine basis” is vague. The Department should specify if the report is due annually, monthly, or at some other interval.

Subsection (7)

This subsection requires an annual documented review of a prison’s health care delivery system. It is unclear how this requirement differs from the report required by Subsection (6). We request that the Department clarify the distinction between Subsections (6) and (7) in the final-form regulation.

In addition, this provision is vague because it does not specify who is responsible for conducting the annual review. Furthermore, the regulation does not identify who is responsible for evaluating the annual review and implementing changes as necessary in the prison’s health care procedures and program. The Department needs to clarify these issues in the final-form regulation.

Subsection (9)

Subsection (9) requires written local policy to outline mental health care treatment by “appropriate credentialed professionals.” It is unclear what credentials would meet the Department’s standard of “appropriate credentialed professionals.” The Department should clarify this standard in the final-form regulation.

Subsections (9) and (10)

Subsection (9) requires that a written plan “specify management of treatment by appropriate credentialed professionals.” Subsection (10) requires that a written plan “outline management of treatment.” It is unclear what the Department means by “specify management” and “outline management of treatment.” We note that Subsection (5) gives the health provider/authority “sole province on matters involving medical judgement.” We request the Department clarify the intent of Subsections (9) and (10) and explain how these provisions are consistent with Subsection (5).

Subsection (11)

This subsection references “existing Federal and State laws” relating to pharmaceuticals. To improve the clarity of the regulation, the Department should include citations for the specific laws it is referencing.

11. Section 95.234. Inmate mail privileges. – Clarity.

Subsection (a)(1)(iv) permits an inmate’s mail to be restricted for valid “penological reasons.” To improve the clarity of the regulation, the Department should include specific reasons an inmate would be restricted or prohibited from sending or receiving mail.

12. Section 95.236. Access to legal resources. – Reasonableness and Clarity.

Paragraph (a)(1) permits inmates to have access to “adequate legal resources” to enable them to exercise their right of access to the courts. Paragraph (a)(2) gives county wardens the discretion to determine the type of legal resources that shall be made available. If access to the courts is a right of all inmates, we question the reasonableness of giving county wardens the discretion to determine the type of legal resource to be made available. The result of granting such broad discretion to county wardens will be inconsistent availability of legal resources throughout the county prisons. The Department should specify what type of legal resources should be made available.

13. Section 95.238. Recreation. – Reasonableness and Clarity.

Subsection (2)

This subsection requires that inmates have at least one hour of access to “out of cell activity” daily. The existing regulation requires two hours of “physical exercise in the open, weather permitting.” In the case of inclement weather, two hours of daily exercise are required indoors. It is unclear why the Department has reduced the time period from two hours to one hour. It is also unclear if “out of cell activity” refers to exercise or to any activity out of the inmate’s cell, such as reading in the library. We request the Department clarify these points in the final-form regulation.

Subsection (4)

This subsection provides the following:

Inmates under disciplinary status (**segregation**), shall receive 1 hour of outdoor activity 5 days a week, weather permitting. (Emphasis added.)

It is unclear why “(segregation)” appears after “disciplinary status.” If this provision applies only to inmates in segregation, the Department should delete “disciplinary status” and replace it with “segregation.”

14. Section 95.239. Commissary. – Clarity.

Subsection (2) refers to generally accepted accounting “procedures.” To improve clarity and to be consistent with standard accounting terminology, we suggest the Department replace “procedures” with “principles.”

15. Section 95.240. Inmate Disciplinary procedures. – Reasonableness.

The Department is proposing to delete existing Subsections (10) and (11) which address conditions for prisoners in segregation. It is unclear why the Department is deleting these subsections, since these provisions are not included elsewhere in the proposed regulation. We request the Department explain the reasonableness of deleting Subsections (10) and (11).