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

August 23, 2006

Honorable Jeffrey A. Beard, Ph.D., Secretary  
Department of Corrections  
2520 Lisburn Road  
P. O. Box 598  
Camp Hill, PA 17011

Re: Regulation #19-7 (IRRC #2544)  
Department of Corrections  
County Correctional Institutions

Dear Secretary Beard:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman  
Executive Director

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Enclosure

cc: Honorable Stewart J. Greenleaf, Chairman, Senate Judiciary Committee  
Honorable Jay Costa, Jr., Minority Chairman, Senate Judiciary Committee  
Honorable Dennis M. O'Brien, Majority Chairman, House Judiciary Committee  
Honorable Thomas R. Caltagirone, Democratic Chairman, House Judiciary Committee

# Comments of the Independent Regulatory Review Commission

on

## Department of Corrections Regulation #19-7 (IRRC #2544)

### County Correctional Institutions

August 23, 2006

We submit for your consideration the following comments on the proposed rulemaking published in the June 24, 2006 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Corrections (Department) to respond to all comments received from us or any other source.

#### **1. Fiscal impact of the regulation.**

The Preamble states that this proposed rulemaking “is not expected to have significant fiscal impact upon the Commonwealth, its political subdivisions or the general public.” The Regulatory Analysis Form (RAF) notes the following: “The Department cannot provide a specific estimate of the costs and/or savings to local governments....” Commentators disagree with the Department’s cost analysis for local government. They believe that many aspects of the proposed rulemaking will significantly increase costs to counties and those costs will have to be passed on to county taxpayers. In the Preamble to the final-form regulation, the Department should provide a more detailed fiscal analysis that supports its contention that this rulemaking will not have a significant fiscal impact.

#### **2. Reasonableness of the regulation.**

The Department has stated in the RAF that these amendments are intended to “afford county prison administrators with sufficient flexibility to address prison management problems that are local in nature.” Similar to our comment above, commentators disagree with this statement. While these commentators generally agree that standards are needed, they believe this rulemaking is overly prescriptive. In the Preamble to the final-form regulation, the Department should explain how amendments to each section provide County Correctional Institutions (local prisons) with greater flexibility in carrying out their duties.

### 3. Implementation procedures.

#### *Effective date*

The Preamble notes that this regulation will become effective upon final-form publication in the *Pennsylvania Bulletin*. In order for the local prisons to have time to implement the new standards, the Department should consider an effective date that occurs six to twelve months after final-form publication.

#### *Written local policy*

Existing Chapter 95 and this proposed rulemaking provide the minimum requirements that local prisons must meet. It is our understanding that local prisons are responsible for developing their own written policy that reflects the minimum requirements of Chapter 95. The phrase “written local policy” appears throughout the existing and proposed regulation. However, not all paragraphs under sections that establish standards begin with a phrase similar to “Written local policy must provide....” We recommend that each paragraph begin with this phrase. In the alternative, the opening sentence of each section that addresses standards should be revised to state something similar to “Written local policy must address or provide for the following....”

### 4. Section 95.220a. Definitions. – Reasonableness; Implementation procedures; Clarity.

#### *Definitions that contain substantive provisions*

Several definitions contain substantive provisions. These provisions either allow or require certain parties to take certain action or not take certain action. Since substantive provisions in a definition are not enforceable, those provisions should be deleted and placed in the body of the regulation. Listed below are the definitions that contain substantive provisions:

- Bed capacity
- Community resources
- Counseling
- Financial audit
- Health care screening
- Health care training
- Major infraction
- Minor infraction
- Noncontact visitation
- Preinspection audit
- Prison inspection
- Procedures
- Security perimeter
- Segregation
- Training
- Treatment professional
- Treatment training
- Vulnerability analysis

*Alcohol and other drugs treatment* - This definition states the following: “A treatment service designed to address the impact and ramifications of use or abuse of alcohol and other drugs, or both, to prevent illegal or destructive, or both, conduct and avoid addiction.” The phrase “or both” is unnecessary and should be deleted.

*Bed capacity* - “Recognized professional standards” are referenced in this definition. Since the standards are recognized, they should be specifically referenced in the definition.

*Building code* - This definition references “Federal, State or local regulations that dictate the construction of a prison.” The final-form regulation should include references to the specific regulations that must be followed.

*Contraband* - The phrase “within the prison or on prison grounds” is used in this definition. “Prison grounds,” by definition, is part of the prison. Therefore, the phrase “or on prison grounds” should be deleted.

*Force, use of* - Commentators are concerned that the use of force to effect compliance with an order is not included in this definition. They note that this omission will make it difficult to maintain order in county prisons. We understand that the use of force to effect compliance with an order is an accepted standard in the corrections community and recommend that the definition be amended accordingly.

*Life safety code* - The last sentence, which states, “Two chapters are devoted to correctional facilities” is not needed and should be deleted.

*Major infraction and minor infraction* - Commentators believe these definitions do not provide county prisons the flexibility needed to handle misconduct. The Department should explain the need for including both types of infractions in the regulation.

*Prison administrator* - The phrase “regardless of local title” is not needed and should be deleted.

*Restraint* - This definition references an “authorized” device. The final-form regulation should either delete that term or specify how the device is authorized.

*Treatment service(s)* - This term is used throughout the proposed rulemaking. We recommend that it be defined.

##### **5. Section 95.220b. Scope. – Statutory authority; Reasonableness; Implementation procedures; Clarity.**

This section is being amended to delete provisions that allow for a waiver of inspections for local prisons achieving accreditation from the American Correctional Association and the National Commission on Correctional Health Care. The waiver provisions are being replaced with a multiple-step inspection process that could eventually lead to a local prison becoming “declassified.” Steps that lead to the declassification of a local prison include the following: preinspection audit, inspection, issuance of a compliance report, notice of deficiency, warning of potential citation of noncompliance, citation of noncompliance, vulnerability analysis, public hearings ordered by the Secretary of the Department, and a finding that a prison should be declassified. As written, it could take over three years for a prison to be declassified.

We have four concerns. First, the term “declassified” is undefined. We recommend that it be defined.

Second, commentators raised other objections to the inspection and declassification process. These objections pertain to the following: a lack of a consultation and appeal process for local prisons found not to be in compliance; a concern that declassification for noncompliance with standards not related to security issues could occur; and questions on who must pay for mandatory vulnerability analysis. Commentators also question what will happen to pretrial detainees and inmates if a local prison is declassified. We agree with the commentators and recommend that both a consultation and appeals process be included in the final-form regulation. We also recommend that the language be included that describes who will pay for mandatory and voluntary vulnerability analyses.

Third, the Department has indicated that it is not their intent to declassify prisons for noncompliance not related to security. The final-form regulation should specify that declassification would only occur in instances where there is noncompliance with the security standards.

Fourth, this section provides detail on what will happen during the inspection and declassification process but lacks specificity on time frames for certain actions. For example, Paragraph (3) notes that the next preinspection audit will occur “approximately” 24 months after the first preinspection audit. This is problematic for two reasons. First, the regulation does not specify when the first preinspection audit will be completed. Is it the day the inspector leaves the facility or is it the day the results of the inspection are conveyed to the local prison? Paragraph (2) should address more specifically within what time frame the preinspection audit report will be issued to the prison. Second, the term “approximately” is vague. A more definitive term is “within.” The final-form regulation should include more detail on what signifies the end of a certain step in the inspection and declassification process and how much time either the local prison or the Department has to take the next appropriate step.

#### **6. Section 95.224. Inmate rules and staff procedures. – Reasonableness.**

Paragraph (2) states that new or revised rules shall be disseminated to staff and, when appropriate, to inmates prior to implementation. The final-form regulation should specify when it would not be appropriate to disseminate new or revised rules to inmates.

#### **7. Section 95.229. Bedding. – Reasonableness.**

Commentators have expressed concern that these regulations fail to recognize the potential need for temporary bedding when a prison facility must process a large number of inmates in a short period of time. In those instances, prisons may need to use temporary bedding that does not meet the requirement that bedding be at least 12 inches off the floor. The final-form regulation should be amended to provide an exception to the 12-inch requirement for a limited time to manage a dramatic increase in population.

**8. Section 95.230. Food services. – Clarity.**

Paragraph (2) requires one supervisory food service employee to become “certified in food safety and sanitation.” The final-form regulation should specify what type of certification will be acceptable.

**9. Section 95.232. Medical and health services. – Clarity.**

The reference to the “certifying health organization” under Paragraph (8) should be more specific.

Paragraph (9)(ii) references State and Federal law. The final-form regulation should include specific citations to the applicable laws.

**10. Section 95.235. Work programs. – Clarity.**

Paragraph (3) requires local prisons to provide “some form of compensation” to inmates participating in work programs. The term compensation is defined. Therefore, the phrase “some form of” should be deleted.

Paragraph (4) references applicable Federal, State or local work safety laws and regulations and Paragraph (5) references applicable law. The final-form regulation should include specific citations to the applicable laws and regulations.

**11. Section 95.237. Religion. – Need; Implementation procedures.**

Paragraph (1) states that inmates must have access to religious activities. Commentators believe this provision is too broad and question if they must provide activities for religious activities that are outside of what could be considered “mainstream.” To what extent are prisons required to accommodate the religious activities of an inmate that might be considered unique?

What is the need for the clinical pastoral education/specialized training and certification requirements for individuals seeking to provide religious guidance under paragraph (2)? This should be explained in the Preamble to the final-form regulation. In the alternative, this provision should be deleted.

**12. Section 95.240. Inmate disciplinary procedures. – Need; Implementation procedures.**

As noted in our comment on the definitions of major infraction and minor infraction, the Department should explain the need for including two levels of infractions.

**13. Section 95.241. Security. – Need; Implementation procedures; Clarity.**

*Paragraph (1) Supervision of inmates*

Subparagraph (1)(ii) requires an initial staffing analysis to be conducted. It requires the results of the annual staffing analysis to be available at all times. The final-form regulation should specify who conducts the staffing analysis and who has access to it.

Subparagraph (1)(v) requires local prisons to maintain a permanent log and shift reports that record routine information, emergency situations and unusual circumstance. We question the need for recording routine information and recommend that it be deleted. If the Department does not delete this requirement, the term “routine information” should be defined.

*Paragraph (2) Use of force*

Subparagraph (2)(i) restricts the use of force to certain instances. Similar to our comment on the definitions of “force, use of,” we note that the use of force to effect compliance with an order is not included. We recommend that Paragraph (2) be amended to allow force to effect compliance with an order.

Subparagraph (2)(ii)(H) references both “authorized equipment” and a “recognized certification period.” These terms are vague and should be defined. We note that the term “authorized tools/equipment” is used in Paragraph (f) of this section and recommend that it also be defined.

*Paragraph (5) Contraband control*

Subparagraph (ii) states that individuals “entering *or* leaving” the prison will be subject to search. Will the local prison have discretion in this area, or is it the Department’s intent to have individuals inspected before “entering *and* leaving”?

**14. Section 95.243. Treatment services. – Fiscal impact; Need; Clarity.**

Commentators are concerned that this section will impose substantial costs and is inappropriate for county prisons. They note that treatment mandates imposed are more appropriate for state prisons and inmates with longer sentences. What is the need for this provision and how will counties be able to afford these types of services?

The terms “treatment services” and “treatment programs” are used in this section. Is there a difference? We recommend that one term be used and defined.

**15. Section 95.244. Community involvement. – Clarity.**

This section establishes standards for “community involvement,” which is an undefined term. To assist the regulated community with developing a written policy that would allow them to meet this standard, we recommend that it be defined.

**16. Section 95.246. Investigations – deaths and sexual assaults/threats. – Clarity.**

Subparagraph (1)(i) requires the prison administrator to notify the coroner and the appropriate law enforcement agency in the case of a death. Subparagraph (1)(ii) requires local written policy to specify who is responsible for contacting the coroner and the law enforcement agency. Since Subparagraph (1)(i) requires the prison administrator to provide notification, what is the need for including this provision in Subparagraph (1)(ii)? Similar language is also found in Paragraph (2), pertaining to sexual assaults/threats.

Subparagraph (2)(ii) requires the reporting of sexual assaults and threats. We note that § 95.242, relating to statistical/informational reporting, requires the reporting of assaults, but not the *threat* of sexual assaults on a report filed with the Department on a monthly basis. How are local prisons to report the threat of sexual assaults?

**17. Section 95.248. Sanitation, maintenance and safety. – Clarity.**

Paragraph (1) requires adherence to “applicable governmental regulations” regarding sanitation, maintenance and safety. A specific citation to the regulations should be included in the final-form regulation.

Paragraphs (2), (3) and (9) require written local policy to “identify” plans or programs related to the sanitation, maintenance and fire emergency/evacuation. Can local prisons simply identify such plans or programs or must they be incorporated into the written local policy?

**18. Miscellaneous clarity.**

The phrase “including, but not limited to” is used in the following sections. This is non-regulatory language that should be deleted:

- § 95.220b(1)
- § 95.221(8)
- § 95.232(12)
- § 95.235(1)
- § 95.241(1)(ii)
- § 95.243(2)
- § 95.243(4)
- § 95.243(6)

The reference to “generally accepted accounting *procedures*” in § 95.239(3) should be changed to “generally accepted accounting *principles*.”

Section 95.241(2)(ii)(F) appears to be an incomplete sentence.

The phrase “prison administration” should be amended to “prison administrator” under § 95.241(3)(ii).

The phrase “or designee” should be added to §95.246(1)(i) after the word administrator.

The second sentence of § 95.248(9) contains a typographical error. The word “departments” should be changed to the singular “department.”



## Facsimile Cover Sheet

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*Diane*  
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**Date:** August 23, 2006  
**Pages:** 9

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Department of Correction's regulation #19-7 (IRRC #2544). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

**Accepted by:** *Diane Kelly* **Date:** 8-23-06