

DEPARTMENT OF JUSTICE**Bureau of Prisons****28 CFR Part 549****[BOP-1017-I]****RIN 1120-AA23****Infectious Diseases****AGENCY:** Bureau of Prisons, Justice.**ACTION:** Interim rule.

SUMMARY: In this document, the Bureau of Prisons adopts as interim regulations provisions for the correctional management of chronic infectious diseases. These provisions, with minor adjustments, extend the scope of the existing provisions for Human Immunodeficiency Virus (HIV) programs to encompass the correctional management of other chronic infectious diseases such as hepatitis and tuberculosis. The intended effect of these regulations is to provide for the continued care of inmates in the Bureau's custody and for the continued secure and orderly operation of the institution.

DATES: Effective October 5, 1995; comments must be submitted by December 4, 1995.

ADDRESSES: Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514-6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is adopting as interim regulations the following procedures for the management of infectious diseases in a correctional setting. A final rule on the management of human immunodeficiency virus (HIV) programs (28 CFR part 549, subpart A) was published in the Federal Register December 21, 1990 (55 FR 52826). These interim regulations represent a broadening of the existing provisions for HIV programs to encompass the management (e.g., mandatory testing requirements) of other chronic infectious diseases such as hepatitis and tuberculosis.

The existing provisions have been reorganized in order to clearly separate requirements specific to the HIV and to the hepatitis B virus (HBV) from requirements common to the management of other chronic infectious diseases.

Section 549.10 has been revised to state the regulations' common purpose of providing instruction and guidance in

the management of infectious diseases in the confined environment of a correctional setting. The treatment and handling of routine infectious diseases continue to be covered by medical protocols and therefore are unaffected by the revised regulations.

The provisions in former § 549.11 relating to intake screening for HIV-infected inmates have been transferred to new § 549.18(a) and are discussed below. New § 549.11 is added detailing program administrative responsibilities.

The provisions in former § 549.12 on housing have been transferred to new § 549.16 and are discussed below. New § 549.12 is added to detail administrative requirements for state health department reporting requirements and to reference further provisions specific to chronic infectious diseases.

The provisions in former § 549.13 on precautionary measures for the use of communal implements have been removed. The Bureau believes such measures are more suitably addressed in implementing instructions to staff. This allows for greater flexibility in following updated guidance on this subject from the Centers for Disease Control.

A new § 549.13 is added containing provisions on medical testing. Paragraph (a) of new § 549.13 contains new provisions for testing of inmates following a bloodborne pathogen exposure incident. Such testing requires the written, informed consent of the inmate, except if the test is ordered by a court with proper jurisdiction. Under paragraph (a), an inmate may be subjected to disciplinary action for assaultive behavior related to an exposure incident. The Bureau's disciplinary procedures (see 28 CFR 541, subpart B) already specify assault as a prohibited act subject to disciplinary action. The provision in paragraph (a) is intended to clarify that an exposure incident could involve assaultive behavior; involvement in an exposure incident, however, does not, in and of itself, constitute grounds for disciplinary action.

Paragraph (b) of new § 549.13 summarizes the provisions previously stated in paragraphs (a), (b), and (c) of former § 549.16. Testing provisions for HIV are also restated in new § 549.18 along with provisions for HBV and are discussed below.

Paragraph (c) of new § 549.13 specifies new correctional procedures to be used in conjunction with the medical diagnosis and evaluation of infectious and communicable diseases. Under paragraph (c)(1), an inmate who refuses such diagnostic procedures and evaluations is subject to an incident

report for failure to follow an order. This requirement is intended to encourage the inmate's voluntary cooperation with medically indicated procedures. Paragraph (c)(2) restates medical protocols for isolation or quarantine. Paragraph (c)(3) specifies that when isolation is not practicable, an inmate who refuses to comply with or adhere to the diagnostic process or evaluation shall be involuntarily evaluated or tested. The Bureau believes that the secure and orderly operation of the institution necessitates interim implementation of these provisions.

The provisions of former § 549.14 on work assignments have been transferred to new § 549.16 and are discussed below. A new § 549.14 has been added containing training requirements for inmates pertinent to infectious diseases. This section largely restates the education provisions of former § 549.15 which were pertinent solely to HIV education. In addition to the broadening of subject matter covered (i.e., infectious diseases instead of merely HIV), this section reduces the requirements for supplementing the training given during Admission and Orientation.

As noted above, the provisions of former § 549.15 have been incorporated in new § 549.14. A new § 549.15 has been added on medical isolation and quarantining for infectious diseases which are transmitted through casual contact. This new section adapts standard medical protocols for use in a correctional setting.

The provisions of former § 549.16 have been transferred to new § 549.18 and are discussed below. A new § 549.16 is added containing provisions on duty and housing restrictions. Paragraph (a) of new § 549.16 specifies that the Clinical Director shall assess any inmate with an infectious disease for appropriateness for duties and housing, and that inmates demonstrating infectious diseases which are transmitted through casual contact shall be prohibited from employment in any area until fully evaluated by a health care provider. This new provision, therefore, is an administrative measure intended to ensure that duty and housing restrictions are imposed only after appropriate review by health care providers or as a precautionary measure pending review. Paragraph (b), which derives from the provisions of § 549.14, specifies that inmates may be limited in duty and housing assignments only if their disease could be transmitted despite the use of environmental/engineering controls or personal protective equipment, or when precautionary measures cannot be

implemented or are not available to prevent the transmission of the specific disease. Reference to HIV antibody screening as a criterion for work detail assignment has been removed. The Bureau believes that the provisions of paragraph (b) precisely state the criteria used for both housing and work detail assignment, and consequently there is no need to exclude further criteria. Paragraph (c) restates the provisions of former § 549.12.

The provisions in § 549.17 on confidentiality have been revised for the purpose of indicating wider applicability to chronic infectious diseases, to include reference to release under the Privacy Act, and to include a prohibition against third party disclosure.

The provisions in former § 549.18 have been designated as paragraph (i) of new § 549.18. As revised, new § 549.18 contains miscellaneous provisions pertaining to HIV or HBV. Paragraph (a) restates the provisions of former § 549.11 and, for the sake of emphasis, repeats the advisory on incident reports prescribed by new § 549.13(b). Paragraph (b) restates the provisions of the introductory text of former § 549.16 (non-prescriptive language was not restated for the sake of conciseness). Paragraphs (c) and (d) partly restate the provisions of former §§ 549.16(a) (1) and (2). The remainder of §§ 549.16(a) (1) and (2) have been restated in new § 549.13(b). Paragraph (e) revises the provisions of former § 549.16(b)(1) to limit inmate requests for voluntary HIV/ HBV antibody tests to no more than once yearly. Paragraph (f) restates the provisions of former § 549.16(b)(2). Paragraph (g) restates the provisions of former § 549.16(c). Paragraph (h) restates the provisions of former § 549.16(d) and adjusts the timeframe for notification to the United States Probation Office. Paragraph (i) restates the provisions of former § 549.18. Paragraph (j), formerly contained in § 549.19, has been revised to require clinical evaluation and review at least quarterly rather than monthly. This change is being made pursuant to guidelines on managing early HIV infection issued by the Agency for Health Care Policy and Research, Public Health Service. Paragraph (k) restates the provisions contained in former § 549.19.

The provisions on autologous blood banking contained in former § 549.20 have been removed. Under community standards of care, these provisions are considered to be discretionary. Because the typical procedures for blood banking necessitate a disproportionate allocation of Bureau resources (namely, staff

escorts to community hospitals and constraints of time schedules), the Bureau has determined that it is impractical to offer this procedure to inmates.

The Bureau is publishing these revisions as an interim rule for two reasons. First, the Bureau has determined that it is important to effect these changes as quickly as possible in order to allow for the judicious management of those contagious diseases which can pose serious problems in the confined environment of a prison. Second, a significant portion of the regulations are restatements of provisions which had previously gone through proposed rulemaking. Members of the public may submit comments concerning this rule by writing to the previously cited address. These comments will be considered before the rule is finalized.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a significant impact on a substantial number of small entities.

List of Subjects in 28 CFR Part 549

Prisoners.

Kathleen M. Hawk,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), part 549 in subchapter C of 28 CFR, chapter V is amended as set forth below.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 549—MEDICAL SERVICES

1. The authority citation for 28 CFR part 549 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4005, 4042, 4045, 4081, 4082, (Repealed in part as to offenses committed on or after November 1, 1987), 4241-4247, 5006-5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99.

2. Subpart A, consisting of §§ 549.10 through 549.20, is revised to consist of §§ 549.10 through 549.18 as follows:

Subpart A—Infectious Diseases

Sec.

549.10 Purpose and scope.

549.11 Program responsibility.

549.12 Reporting.

549.13 Medical testing.

549.14 Training.

549.15 Medical isolation and quarantining.

549.16 Duty and housing restrictions.

549.17 Confidentiality of information.

549.18 Human immunodeficiency virus (HIV) and hepatitis B virus (HBV).

Subpart A—Infectious Diseases

§ 549.10 Purpose and scope.

This policy is designed to provide instruction and guidance in the management of infectious diseases in the confined environment of a correctional setting.

§ 549.11 Program responsibility.

(a) The Health Services Administrator (HSA) and Clinical Director (CD) of each institution shall be responsible for the development and implementation of this program.

(b) Each HSA shall designate a member of the clinical health care staff, for example, a physician, dentist, physician assistant, nurse practitioner, or nurse, as the Coordinator of Infectious Diseases (CID).

§ 549.12 Reporting.

The HSA shall ensure that each institution's respective state health department is informed of all cases of reportable infectious diseases. See § 549.17 for reporting requirements of chronic infectious diseases and for Freedom of Information Act requests.

§ 549.13 Medical testing.

(a) *Bloodborne pathogens.* Following an incident in which a staff member or an inmate may have been exposed to bloodborne pathogens, written, informed consent shall be obtained prior to acquiring or processing the source individual's blood or other biological specimen for the purpose of determining an actual exposure to a bloodborne pathogen. In the context of exposure incidents, no inmate shall be tested forcibly or involuntarily, unless such testing is ordered by a court with proper jurisdiction. Inmates may be subjected to disciplinary action for assaultive behavior related to an exposure incident.

(b) *HIV testing.* HIV testing programs are mandatory and include a yearly random sample, yearly new commitment sample, new commitment re-test sample, pre-release testing, and clinically indicated testing. Inmates must participate in all mandatory testing programs. Staff shall initiate an incident report for failure to follow an order for any inmate refusing one of the mandatory HIV testing programs.

(c) *Diagnostics.* (1) An inmate who refuses clinically indicated diagnostic

procedures and evaluations for infectious and communicable diseases shall be subject to an incident report for failure to follow an order; involuntary testing subsequently may be performed in accordance with paragraph (c)(3) of this section.

(2) Any inmate who refuses clinically indicated diagnostic procedures and evaluations for infectious and communicable diseases shall be subject to isolation or quarantine from the general population until such time as he/she is assessed to be non-communicable or the attending physician determines the inmate poses no health threat if returned to the general population.

(3) If isolation is not practicable, an inmate who refuses to comply with or adhere to the diagnostic process or evaluation shall be involuntarily evaluated or tested.

§ 549.14 Training.

The HSA shall ensure that a qualified health care professional provides training, incorporating a question-and-answer session, about infectious diseases to all newly committed inmates, during Admission and Orientation (A&O). Additional training shall be provided at least yearly.

§ 549.15 Medical isolation and quarantining.

(a) The CD, in consultation with the HSA, shall ensure that inmates with infectious diseases which are transmitted through casual contact (e.g., tuberculosis, chicken pox, measles) are isolated from the general inmate population until such time as they are assessed or evaluated by a health care provider.

(b) Inmates shall remain in medical isolation unless their activities, housing, and/or duty assignments can be limited or environmental/engineering controls or personal protective equipment is available to eliminate the risk of transmitting the disease.

§ 549.16 Duty and housing restrictions.

(a) The CD shall assess any inmate with an infectious disease for appropriateness for duties and housing. Inmates demonstrating infectious diseases, which are transmitted through casual contact, shall be prohibited from employment in any area, until fully evaluated by a health care provider.

(b) Inmates may be limited in duty and housing assignments only if their disease could be transmitted despite the use of environmental/engineering controls or personal protective equipment, or when precautionary measures cannot be implemented or are

not available to prevent the transmission of the specific disease. The Warden, in consultation with the CD, may exclude inmates, on a case-by-case basis, from work assignments based upon the classification of the institution and the safety and good order of the institution.

(c) With the exception of the Bureau of Prisons rule set forth in subpart E of 28 CFR part 541, there shall be no special housing established for HIV-positive inmates.

§ 549.17 Confidentiality of information.

(a) Medical information relevant to chronic infectious diseases shall be limited to members of the institutional medical staff, institutional psychologist, and the Warden and case manager, as needed, to address issues regarding pre- and post-release management. Prior to an inmate's release, medical information may be shared with the United States Probation Officer in the respective area of intended release for the inmate and, if applicable, with the Community Corrections Manager and the Director of the Community Correctional Center (CCC) for purposes of post-release management and access to care. Any other release of information shall be in accordance with the Privacy Act of 1974.

(b) All parties, with whom confidential medical information regarding another individual is communicated, shall be advised not to share this information, by any means, with any other person. Medical information may be communicated among medical staff directly concerned with a patient's case in the course of their professional duties.

§ 549.18 Human immunodeficiency virus (HIV) and hepatitis B virus (HBV).

(a) During routine intake screening, all new commitments shall be interviewed to identify those who may be HIV- or HBV-infected. Medical personnel may request any inmates identified in this manner to submit to an HIV or HBV test. Failure to comply shall result in an incident report for failure to follow an order.

(b) A seropositive test result alone may not constitute grounds for disciplinary action. Disciplinary action may be considered when coupled with a secondary action that could lead to transmission of the virus, e.g. sharing razor blades.

(c) A sample of all newly incarcerated inmates committed to the Bureau of Prisons ordinarily shall be tested annually.

(d) Additionally, a random sample for HIV of all inmates in the Bureau of

Prisons shall be conducted once yearly. Inmates tested in this random sample are not scheduled for follow-up routine retesting.

(e) After consultation with a Bureau of Prisons' health care provider, an inmate may request an HIV/HBV antibody test. Ordinarily, an inmate will not be allowed to test, as a volunteer, more frequently than once yearly.

(f) A physician may order an HIV/ HBV antibody test if an inmate has chronic illnesses or symptoms suggestive of an HIV or HBV infection. Inmates who are pregnant, inmates receiving live vaccines or inmates being admitted to community hospitals, if required by the hospital, shall be tested. Inmates demonstrating sexual behavior which is promiscuous, assaultive, or predatory shall also be tested.

(g) (1) An inmate being considered for full-term release, parole, good conduct time release, furlough, or placement in a community-based program such as a Community Corrections Center (CCC) shall be tested for the HIV antibody. An inmate who has been tested within one year of this consideration ordinarily will not be required to submit to a repeat test prior to the lapse of a one-year period. An inmate who refuses to be tested shall be subject to an incident report for refusing an order and will ordinarily be denied participation in a community activity.

(2) A seropositive test result is not sole grounds for denying participation in a community activity. Test results ordinarily must be available prior to releasing an inmate for a furlough or placement in a community-based program. When an inmate requests an emergency furlough, and current (within one year) HIV and HBV antibody test results are not available, the Warden may consider authorizing an escorted trip for the inmate, at government expense.

(h) (1) No later than thirty days prior to release on parole or placement in a community-based program, the Warden shall send a letter to the Chief United States Probation Officer (USPO) in the district where the inmate is being released, advising the USPO of the inmate's positive HIV status. A copy of this letter shall also be forwarded to the Community Corrections Manager. The Community Corrections Manager, in turn, shall notify the Director of the CCC (if applicable). In all instances of notification, precautions shall be taken to ensure that only authorized persons with a legitimate need to know are allowed access to the information.

(2) Prior to an HIV-positive inmate's participation in a community activity

(including furloughs), notification of the inmate's infectious status shall be made:

(i) By the Warden to the USPO in the district to be visited, and

(ii) By the Health Service Administrator to the state health department in the state to be visited, when that state requires such notification.

Notification is not necessary for an escorted trip.

(3) Prior to release on parole, completion of sentence, placement in a community-based program, or participation in an unescorted community activity, an HIV-positive inmate shall be strongly encouraged to notify his/her spouse (legal or common-

law) or any identified significant others with whom it could be assumed the inmate might have contact resulting in possible transmission of the virus.

(4) When an inmate is confirmed positive for HIV or HBV, the HSA shall be responsible for notifying the state health departments in the state in which the institution is located and the state in which the inmate is expected to be released, when either state requires such notification. The HSA shall ensure medical staff perform the notification at the time of confirmed positive HIV or HBV antibody tests.

(5) The HSA shall notify the Immigration and Naturalization Service

(INS) of any inmate testing positive who is to be released to an INS detainer.

(i) Inmates receiving the HIV or HBV antibody test shall receive pre- and post-test counseling, regardless of the test results.

(j) Health service staff shall clinically evaluate and review each HIV-positive inmate at least once quarterly.

(k) Pharmaceuticals approved by the Food and Drug Administration for use in the treatment of AIDS, HIV-infected, and HBV-infected inmates shall be offered, when indicated, at the institution.

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