



[4410-050P]

**DEPARTMENT OF JUSTICE**

**Bureau of Prisons**

**28 CFR Part 550**

[BOP-1168-P]

RIN 1120-AB68

**Drug Abuse Treatment Program**

**AGENCY:** Bureau of Prisons, Justice.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Bureau of Prisons (Bureau) proposes revisions to the Residential Drug Abuse Treatment Program (RDAP) regulations to allow greater inmate participation in the program and positively impact recidivism rates.

**DATES:** Comments are due by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** The public is encouraged to submit comments on this proposed rule using the [www.regulations.gov](http://www.regulations.gov) comment form. Written comments may also be submitted to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW, Washington, DC 20534. You may view an electronic version of this regulation at

www.regulations.gov. When submitting comments electronically you must include the BOP Docket Number in the subject box.

**FOR FURTHER INFORMATION CONTACT:** Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307-2105.

**SUPPLEMENTARY INFORMATION:**

Posting of Public Comments

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#### Discussion

In this document, the Bureau proposes revisions to the Residential Drug Abuse Treatment Program (RDAP) regulations in four areas to allow greater inmate participation in the program and positively impact recidivism rates. Specifically, the Bureau proposes to (1) remove the regulatory requirement for RDAP written testing because it is more appropriate to assess an inmate's progress through clinical evaluation of behavior change (the written test is no longer used in practice); (2) remove existing regulatory provisions which automatically expel inmates who have committed certain acts (e.g., abuse of drugs or alcohol, violence, attempted escape); (3) limit the time frame for review of prior offenses for early release eligibility purposes to ten years before the date of federal

imprisonment; and (4) lessen restrictions relating to early release eligibility.

**Community Treatment Services.** Currently, the Bureau's regulations contain the term "Transitional drug abuse treatment (TDAT)" in 28 CFR 550.53(a)(3) and in the title and paragraphs (a) and (b) of § 550.56. We propose to replace this phrase because the name of this program has been changed to "Community Treatment Services (CTS)." This is a minor change to more accurately reflect the nature of the treatment program.

**§ 550.50 Purpose and scope.** We propose changes to this regulation to more accurately describe the purpose of the subpart and to reflect the source of drug treatment services within the Bureau of Prisons. The current regulation states that Bureau facilities have drug abuse treatment specialists who are supervised by a Coordinator and that facilities with residential drug abuse treatment programs (RDAP) should have additional specialists for treatment in the RDAP unit. This is inaccurate. We propose to change the regulation to explain that the Bureau's drug abuse treatment programs, which include drug abuse education, RDAP and non-residential drug abuse treatment services, are provided by the Psychology Services Department.

We likewise propose to make a minor corresponding change in § 550.53(a)(1), which also refers inaccurately to the Drug Abuse

Program Coordinator, when instead the course of activities referenced in that regulation is provided by the Psychology Services Department.

**§ 550.53 Residential Drug Abuse Treatment Program (RDAP) (f) (2) .**

The Bureau proposes to remove subparagraph (f) (2) of § 550.53, which requires inmates to pass RDAP testing procedures and refers to an RDAP exam. The RDAP program no longer includes written testing as a requirement for completion of the program. Instead, RDAP uses clinical observation and clinical evaluation of inmate behavior change to assess readiness for completion. Therefore, the current language is inaccurate and imposes a requirement upon inmates that no longer exists.

In 2010, the Bureau converted the Residential Drug Abuse Treatment Programs to the Modified Therapeutic Community Model of treatment (MTC). This evidenced-based model is designed to assess progress through treatment as determined by the participants' completion of treatment goals and activities on their individualized treatment plan, and demonstrated behavior change. Each participant jointly works with their treatment specialist to create the content of their treatment plan. Every three months, or more often if necessary, each participant meets with their clinical team (four or more treatment staff) to review their progress in treatment. Progress in treatment is determined through assessing the

accomplishment of their treatment goals and activities, along with demonstrated behavior change, such as improved personal and social conduct, no disciplinary incidents, etc. Unsatisfactory progress is evident when the participant does not accomplish their treatment goals and does not demonstrate mastery of skill development.

There are several studies about the effectiveness of the MTC model of treatment. The most seminal study pertaining to this topic is titled "Outcome Evaluation of A Prison Therapeutic Community for Substance Abuse Treatment."<sup>1</sup>

This behavioral form of assessing progress is a much more powerful form of assessment than assessing the results of a written test. The written test assesses knowledge, but knowledge does not necessarily demonstrate whether the program has positively affected an individual's behavior or addictive lifestyle.

All of the treatment specialists in the Bureau have a doctorate degree in psychology. They are well qualified to use their knowledge of treatment and the behavior of individuals suffering from substance abuse to objectively determine if a participant is ready to complete

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<sup>1</sup> *Wexler, H., Falkin, G., Lipton, D., (1990). Outcome Evaluation of A Prison Therapeutic Community for Substance Abuse Treatment. Criminal Justice and Behavior, vol.17 No.1, March 1990 71-92, 1990 American Association for Correctional Psychology.*

the program. There are three decades of evaluation research that support the efficacy of the therapeutic community model of treatment. The most comprehensive source of program description, theory, and summary of research associated with this model of treatment is found in the book entitled *The Therapeutic Community: Theory, Model, and Method*. New York: Springer Publishing Company, Inc. (De Leon, G. (2000).

**§ 550.53(g) Expulsion from RDAP.** We propose to remove § 550.53(g) (3), which requires Discipline Hearing Officers (DHOs) to remove an inmate automatically from RDAP if there is a finding that the inmate has committed a prohibited act involving alcohol, drugs, violence, escape, or any 100-level series incident.

Removing the language would give the Bureau more latitude and clinical discretion when determining which inmates should be expelled from the program. If the language is deleted, inmates will then only be expelled from RDAP according to criteria in § 550.53(g) (1) which allows inmates to be removed from the program by the Drug Abuse Program Coordinator because of disruptive behavior related to the program or unsatisfactory progress in treatment, and requires at least one formal warning before removal, unless there is documented lack of compliance and the inmate's continued presence would present an immediate problem for staff and other inmates.

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Removing paragraph (g) (3) removes the automatic expulsion of inmates committing the listed prohibited acts and allows for greater possibility of continuance of the program for inmates with discipline problems.

**§ 550.55 (b) Inmates not eligible for early release.** We propose to make two changes to § 550.55 (b). The first is to modify the current language of (b) (4), which precludes inmates from consideration for early release if they have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, aggravated assault, arson, kidnaping, or an offense that involves sexual abuse of minors. The Bureau proposes to modify the language of (b) (4) to clarify that we intend to limit consideration of "prior felony or misdemeanor" convictions to those which were imposed within the ten years prior to the date of sentencing for the inmate's current commitment. By making this change, the Bureau clarifies that it will not preclude from early release eligibility those inmates whose prior felony or misdemeanor convictions were imposed longer than ten years before the date of sentencing for the inmate's current commitment.

Title 18 U.S.C. 3621(e) provides the Director of the Bureau of Prisons the discretion to grant an early release of up to one year upon the successful completion of a residential drug abuse treatment program. In exercising the Director's statutory discretion, we considered the crimes of homicide, rape, robbery, aggravated assault,

arson, and kidnaping. In the FBI's Uniform Crime Reporting (UCR) Program, violent crime is composed of four offenses: murder and nonnegligent manslaughter, rape, robbery, and aggravated assault. Violent crimes are defined in the UCR Program as those offenses which involve force or threat of force. The Director exercised his discretion, therefore, to include these categories of violent crimes and also expanded the list to include arson and kidnaping, as they also are crimes of an inherently violent nature and particular dangerousness to the public.

The Director exercises discretion to deny early release eligibility to inmates who have a prior felony or misdemeanor conviction for these offenses because commission of such offenses rationally reflects the view that such inmates displayed readiness to endanger the public. The UCR explained that "because of the variances in punishment for the same offenses in different state codes, no distinction between felony and misdemeanor crimes was possible."

The application of national standards to the numerous local, state, tribal, and federal prior convictions promotes uniformity, but creates unique issues since each separate entity will have its own criminal statutory schemes in which offenses may be categorized as either misdemeanors or felonies. Limiting the Bureau to an analysis of how an offense is categorized in local, state, tribal,

or federal criminal codes, rather than to an analysis of the nature of the prior offense, would effectively prevent the Director from exercising the discretion authorized by 18 U.S.C. 3621(e).

Furthermore, eliminating the analysis of prior violent misdemeanor convictions would allow inmates to receive the benefit of early release merely because of the manner in which the prior convictions were categorized.

Additionally, 28 CFR 550.55(b)(6) provides that inmates who have been convicted of an attempt, conspiracy, or other offense which involved certain underlying offenses are also precluded from early release eligibility. Many state statutes provide that "attempt" convictions are to be categorized as one degree lower than the underlying offense (e.g., Alaska Statutes sec. 11.31.100(d), N.C. Gen Stat. sec. 14-2.5, Tex. Penal Code sec. 15.01(d), and Wash. Rev. Code sec. 9A.28.020(3)). Therefore, eliminating the analysis of prior misdemeanor convictions may result in offenders convicted of attempting to commit a precluding offense being found eligible for early release, despite the provisions of 28 CFR 550.55(b)(6).

Further, based on a random sampling of inmates who participated in RDAP but were precluded from RDAP early release eligibility, the Bureau estimates that of the 856 inmates precluded in the year 2014 based only on convictions for prior offense, at least half that number would have been eligible for early release if the Bureau had not

considered prior offenses greater than 10 years old. The Fiscal Year 2015 estimated annual marginal rate to incarcerate an inmate in the Bureau of Prisons is \$11,324 per inmate. Based on an estimate of 400 inmates released up to a year early if this proposed rule change is made, that could equate to a cost avoidance of over \$4.5 million per year.

We also propose to narrow the language in § 550.55(b) (6) relating to early release eligibility. In § 550.55(b), the Director exercises his discretion to disallow particular categories of inmates from eligibility for early release, including, in (b) (6), those who were convicted of an attempt, conspiracy, or other offense which involved an underlying offense listed in paragraph (b) (4) and/or (b) (5) of § 550.55.

We propose to narrow the language of § 550.55(b) (6) to preclude only those inmates whose prior conviction involved direct knowledge of the underlying criminal activity and who either participated in or directed the underlying criminal activity. The proposed change would more precisely tailor the regulation to the congressional intent to exclude from early release consideration only those inmates who have been convicted of a violent offense. Furthermore, the changed language would potentially expand early release benefits to more inmates.

Beginning in 1991, in coordination with the National

Institute on Drug Abuse, the Bureau conducted a 3-year outcome study of the RDAP. Federal Bureau of Prisons (2000). TRIAD Drug Treatment Evaluation Project Final Report of Three-Year Outcomes: Part I. ("TRIAD Study"). The study evaluated the effect of treatment on both male and female inmates (1,842 men and 473 women). This study demonstrates that the Bureau's RDAP makes a positive difference in the lives of inmates and improves public safety.

The TRIAD study showed that the RDAP program is effective in reducing recidivism. Male participants were 16 percent less likely to recidivate and 15 percent less likely to relapse than similarly situated inmates who do not participate in residential drug abuse treatment for up to 3 years after release. The analysis also found that female inmates who participate in RDAP are 18 percent less likely to recidivate than similarly situated female inmates who do not participate in treatment.

The TRIAD study defined criminal recidivism was defined two ways: 1) an arrest for a new offense or 2) an arrest for a new offense or supervision revocation. Revocation was defined as occurring only when the revocation was solely the result of a technical violation of one or more conditions of supervision (e.g., detected drug use, failure to report to probation officer). Drug use as a post-release outcome, for the purposes

of the study, referred to the *first* occurrence of drug or alcohol use as reported by U.S. Probation officers (i.e., a positive urinalysis (u/a), refusal to submit to a urinalysis, admission of drug use to the probation officer, or a positive breathalyser test).

Offenders who completed the residential drug abuse treatment program and had been released to the community for three years were less likely to be re-arrested or to be detected for drug use than were similar inmates who did not participate in the drug abuse treatment program. Specifically, 44.3 percent of male inmates who completed the program were likely to be re-arrested or revoked within three years after release to supervision in the community, compared to 52.5 percent of those inmates who did not receive such treatment. For women, 24.5 percent of those who completed the residential drug abuse treatment program were arrested or revoked within three years after release, compared to 29.7 percent of the untreated women.

With respect to drug use, 49.4 percent of men who completed treatment were likely to use drugs within 3 years following release, compared to 58.5 percent of those who did not receive treatment. Among female inmates who completed treatment, 35.2 percent were likely to use drugs within the three-year postrelease period in the community, compared to 42.6 percent

of those who did not receive such treatment.

**§ 550.56 Community Transitional Drug Abuse Treatment Program (TDAT).** In addition to changing "Transitional Drug Abuse Treatment Program (TDAT)" to "Community Treatment Services (CTS)" throughout this regulation as indicated earlier, we also propose to delete paragraph (c) which appears to require that inmates successfully completing RDAP and participating in transitional treatment programming must participate in such programming for one hour per month. The provision in the regulation is an error. It does not relate to Community Treatment Services (CTS), but instead relates to RDAP. It is therefore unnecessary to retain this language. The substance of this language will be retained as implementing text in the relevant policy statement as part of RDAP procedures.

**Executive Orders 12866 and 13563**

This proposed regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation, and Executive Order 13563, "Improving Regulation and Regulatory Review." These executive orders direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including

potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Director, Bureau of Prisons has determined that this proposed rule is a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this proposed rule has been reviewed by the Office of Management and Budget.

As context regarding the current impact of the RDAP (i.e., without the changes proposed in this rule), in FY 2014, 18,102 inmates participated in the residential drug abuse treatment program. Title 18 U.S.C. 3621(e) (2) allows the Bureau to grant a non-violent offender up to one year off his/her term of imprisonment for successful completion of the RDAP. In fiscal year 2014, 5,229 inmates received a reduction in their term of imprisonment resulting in a cost avoidance of nearly \$50 million based on this law (average reduction was 10.4 months and the marginal cost avoidance was \$10,994 annually). The changes made by this proposed rule would increase the number of current inmates who benefit from the RDAP program and would increase the number of inmates who may be eligible for early release, thereby resulting in cost avoidance to the Bureau in the future.

For instance, the change we propose to make to § 550.55(b) (6), regarding changing "other offense" to "solicitation to commit," based

on prior year data (Jan 2014 through Dec 2014), we estimate that approximately 45 inmates would be made eligible for early release as a result of the suggested change.

We will not require more resources in order to put more individuals through RDAP. RDAP is a nine-month program. The program has a treatment capacity large enough to accommodate about 8,400 participants at any given time. Therefore, during a year, program capacity is filled twice, which means that at least 16,800 participants can be accommodated every year. It is not uncommon for more than 16,800 to participate. For example, in FY 2014, approximately 18,000 inmates participated. This number also reflects inmates who may drop out of the program and are replaced with other inmates on the wait list.

### **Executive Order 13132**

This proposed regulation would not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rulemaking does not have sufficient federalism implications for which we would prepare a Federalism Assessment.

### **Regulatory Flexibility Act**

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation. By approving it, the Director certifies that it will not have a significant economic impact upon a substantial number of small entities because: This proposed rule is about the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

### **Unfunded Mandates Reform Act of 1995**

This proposed rule will not cause State, local and tribal governments, or the private sector, to spend \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. We do not need to take action under the Unfunded Mandates Reform Act of 1995.

### **Small Business Regulatory Enforcement Fairness Act of 1996**

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule would not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment,

productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 550:

Prisoners.

Charles E. Samuels, Jr.  
Director, Bureau of Prisons

Under the rulemaking authority vested in the Attorney General in 5 U.S.C 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we propose to amend 28 CFR part 550 as follows:

**PART 550 -- DRUG PROGRAMS**

1. The authority citation for part 550 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3521-3528, 3621, 3622, 3624, 4001, 4042, 4046, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 21 U.S.C. 848; 28 U.S.C. 509, 510; Title V, Pub. L. 91-452, 84 Stat. 933 (18 U.S.C. Chapter 223).

2. Revise § 550.50 to read as follows:

**§ 550.50 Purpose and scope.**

The purpose of this subpart is to describe the Bureau's drug abuse treatment programs for the inmate population, to include drug abuse education, non-residential drug abuse treatment services, and residential drug abuse treatment programs (RDAP). These services are provided by Psychology Services department.

3. Amend § 550.53 by revising paragraphs (a) (1), (a) (3), (f), and (g) to read as follows:

**§ 550.53 Residential Drug Abuse Treatment Program (RDAP).**

(a) \* \* \*

(1) Unit-based component. Inmates must complete a course of activities provided by the Psychology Services Department in a treatment unit set apart from the general prison population. This component must last at least six months.

\* \* \* \* \*

(3) Community Treatment Services (CTS). Inmates who have completed the unit-based program and (when appropriate) the follow-up treatment and transferred to a community-based program must complete CTS to have successfully completed RDAP and receive incentives. The Warden, on the basis of his or her discretion, may find an inmate

ineligible for participation in a community-based program; therefore, the inmate cannot complete RDAP.

\* \* \* \* \*

(f) Completing the unit-based component of RDAP. To complete the unit-based component of RDAP, inmates must have satisfactory attendance and participation in all RDAP activities.

(g) Expulsion from RDAP. (1) Inmates may be removed from the program by the Drug Abuse Program Coordinator because of disruptive behavior related to the program or unsatisfactory progress in treatment.

(2) Ordinarily, inmates must be given at least one formal warning before removal from RDAP. A formal warning is not necessary when the documented lack of compliance with program standards is of such magnitude that an inmate's continued presence would create an immediate and ongoing problem for staff and other inmates.

(3) We may return an inmate who withdraws or is removed from RDAP to his/her prior institution (if we had transferred the inmate specifically to participate in RDAP).

\* \* \* \* \*

4. Revise § 550.55(b) (4) and (6) to read as follows:

**§ 550.55 Eligibility for early release.**

\* \* \* \* \*

(b) \* \* \*

(4) Inmates who have a prior felony or misdemeanor conviction within the ten years prior to the date of sentencing for their current commitment for:

(i) Homicide (including deaths caused by recklessness, but not including deaths caused by negligence or justifiable homicide);

(ii) Forcible rape;

(iii) Robbery;

(iv) Aggravated assault;

(v) Arson;

(vi) Kidnaping; or

(vii) An offense that by its nature or conduct involves sexual abuse offenses committed upon minors;

\* \* \* \* \*

(6) Inmates who have been convicted of an attempt, conspiracy, or solicitation to commit an underlying offense listed in paragraph (b) (4) and/or (b) (5) of this section; or

\* \* \* \* \*

5. Revise § 550.56 to read as follows:

**§ 550.56 Community Treatment Services (CTS)**

(a) For inmates to successfully complete all components of RDAP, they must participate in CTS. If inmates refuse or fail to complete

CTS, they fail RDAP and are disqualified for any additional incentives.

(b) Inmates with a documented drug use problem who did not choose to participate in RDAP may be required to participate in CTS as a condition of participation in a community-based program, with the approval of the Supervisory Community Treatment Services Coordinator.

**[FR Doc. 2015-17707 Filed: 7/21/2015 08:45 am; Publication Date: 7/22/2015]**