

**NOTE: THIS GUIDANCE REPLACES THE FOLLOWING OHRP GUIDANCE: "OHRP Guidance on Approving Research Involving Prisoners" (May 19, 2000) found on the OHRP website at: <http://ohrp.osophs.dhhs.gov/humansubjects/guidance/prison.htm> THIS GUIDANCE HAS BEEN UPDATED FOR FORMAT AND TO PROVIDE ADDITIONAL GUIDANCE ON RESPONSIBILITIES OF IRBs AND INSTITUTIONS REQUIRED UNDER SUBPART C**

**Office for Human Research Protections  
Department of Health and Human Services**

## **OHRP Guidance on the Involvement of Prisoners in Research**

**Date: May 23, 2003**

**Scope:** This document describes the requirements of Department of Health and Human Services (HHS) regulations at 45 CFR part 46, subpart C, which provides additional protections to prisoners involved as subjects in HHS-conducted or supported research.

**Target Audience:** Research institutions, institutional review boards (IRBs), investigators, and sponsors.

**For further information contact:** OHRP Prisoner Research Contact Person at (301) 496-7005 (phone); (301) 402-0527(fax)

### **A. General Regulatory Background**

HHS regulations at 45 CFR part 46, subpart C provide additional protections pertaining to biomedical and behavioral research involving prisoners as subjects. The regulations are applicable to all biomedical and behavioral research conducted or supported by HHS. See 45 CFR 46.301. It is important to note that the regulations provide that “biomedical or behavioral research conducted or supported by HHS shall not involve prisoners as subjects” unless the research is specifically authorized within the subpart. See 45 CFR 46.306(b).

In the preamble to the final subpart C rule, the drafters noted: “In fact, most testimony before the Commission opposed the use of prisoners in any form of medical research not intended to benefit the individual prisoner.” 43 Fed. Reg. 53652,53653 (November 16, 1978). HHS did determine that some limited research would be permissible but not “until additional and more stringent review procedures are conducted.” Id. at page 53652.

**B. Subpart C applies where any subject is or becomes a prisoner.**

The provisions of subpart C apply to any research conducted or supported by HHS in which prisoners are subjects. This includes situations where a human subject becomes a prisoner after the research has commenced. As the Purpose section of the regulation notes: “Inasmuch as prisoners may be under constraints because of their incarceration which could affect their ability to make a truly voluntary and uncoerced decision whether or not to participate as subjects in research, it is the purpose of this subpart to provide additional safeguards for the protection of prisoners involved in activities to which this subpart is applicable.” 45 CFR 46.302. These concerns apply whether the research involves individuals who are prisoners at the time of enrollment in the research or who become prisoners after they become enrolled in the research. In the latter situation, it is unlikely that review of the research and the consent document contemplated the constraints imposed by incarceration.

**C. What does the definition of prisoner encompass?**

“Prisoner” is defined by HHS regulations at 45 CFR part 46.303(c) as “any individual involuntarily confined or detained in a penal institution. The term is intended to encompass individuals sentenced to such an institution under a criminal or civil statute, individuals detained in other facilities by virtue of statutes or commitment procedures which provide alternatives to criminal prosecution or incarceration in a penal institution, and individuals detained pending arraignment, trial, or sentencing.”

**D. Special Composition of IRB**

In addition to satisfying the requirements of 45 CFR 46.116 and 46.117, when an IRB reviews a protocol involving prisoners as subjects that is conducted or supported by HHS, the composition of the IRB must satisfy the following requirements of HHS regulations at 45 CFR 46.304(a) and (b):

- A majority of the IRB (exclusive of prisoner members) shall have no association with the prison(s) involved, apart from their membership on the IRB.
- At least one member of the IRB must be a prisoner, or a prisoner representative with appropriate background and experience to serve in that capacity, except that where a particular research project is reviewed by more than one IRB, only one IRB need satisfy this requirement.

In the absence of choosing someone who is a prisoner or has been a prisoner, the IRB should choose a prisoner representative who has a close working knowledge, understanding and appreciation of prison conditions from the perspective of the prisoner.

In addition, the IRB must notify OHRP of any change in the IRB roster occasioned by the addition of a prisoner or a prisoner representative, as required by HHS regulations at 45 CFR 46.103(b)(3). IRBs should be alert to the impact of roster changes on quorum requirements under HHS regulations at 45 CFR 46.108(b).

If a protocol involving prisoners as subjects is to be reviewed by more than one IRB, only one IRB must satisfy the requirement that at least one member of the IRB be a prisoner or a prisoner representative.

For research involving prisoners as subjects, the IRB must meet the special composition requirements of 45 CFR 46.304 for all types of review of the protocol, including initial review, continuing review, review of protocol amendments, and review of reports of unanticipated problems involving risks to subjects.

#### **E. Additional duties of the IRB where prisoners are involved.**

When an IRB is reviewing a protocol in which a prisoner is a subject, the IRB must make, in addition to other requirements under 45 CFR 46, subpart A, seven additional findings under 45 CFR 46.305(a), as follows:

- (1) the research under review represents one of the categories of research permissible under 45 CFR 46.306(a)(2);
- (2) any possible advantages accruing to the prisoner through his or her participation in the research, when compared to the general living conditions, medical care, quality of food, amenities and opportunity for earnings in the prison, are not of such a magnitude that his or her ability to weigh the risks of the research against the value of such advantages in the limited choice environment of the prison is impaired;
- (3) the risks involved in the research are commensurate with risks that would be accepted by nonprisoner volunteers;
- (4) procedures for the selection of subjects within the prison are fair to all prisoners and immune from arbitrary intervention by prison authorities or prisoners. Unless the principal investigator provides to the IRB justification in writing for following some other procedures, control subjects must be selected randomly from the group of available prisoners who meet the characteristics needed for that particular research project;
- (5) the information is presented in language which is understandable to the subject population;
- (6) adequate assurance exists that parole boards will not take into account a prisoner's

participation in the research in making decisions regarding parole, and each prisoner is clearly informed in advance that participation in the research will have no effect on his or her parole; and

(7) where the IRB finds there may be a need for follow-up examination or care of participants after the end of their participation, adequate provision has been made for such examination or care, taking into account the varying lengths of individual prisoners' sentences, and for informing participants of this fact.

#### **F. Permitted research involving prisoners.**

For research conducted or supported by HHS to involve prisoners, two actions must occur:

(1) the institution engaged in the research must certify to the Secretary (through OHRP) that the IRB designated under its assurance of compliance has reviewed and approved the research under 45 CFR 46.305; and

(2) the Secretary (through OHRP) must determine that the proposed research falls within the categories of research permissible under 45 CFR 46.306(a)(2). The categories of permissible research are the following:

(i) study of the possible causes, effects, and processes of incarceration, and of criminal behavior, provided that the study presents no more than minimal risk and no more than inconvenience to the subjects;

*(Note that the definition of minimal risk for prisoner research at 45 CFR 46.303(d) differs from the definition of minimal risk for other research, contained in 45 CFR 46, subpart A, 45 CFR 46.102(i)) [See Section J.7 of this document]*

(ii) study of prisons as institutional structures or of prisoners as incarcerated persons, provided that the study presents no more than minimal risk and no more than inconvenience to the subjects;

(iii) research on conditions particularly affecting prisoners as a class (for example, vaccine trials and other research on hepatitis which is much more prevalent in prisons than elsewhere; and research on social and psychological problems such as alcoholism, drug addiction, and sexual assaults) provided that the study may proceed only after the Secretary (through OHRP) has consulted with appropriate experts including experts in penology, medicine, and ethics, and published notice, in the Federal Register, of his intent to approve such research; or

(iv) research on practices, both innovative and accepted, which have the intent and reasonable probability of improving the health or well-being of the subject. In cases in which those studies require the assignment of prisoners in a manner consistent with protocols approved by the IRB to control groups which may not benefit from the research, the study may proceed only after the Secretary (through OHRP) has consulted with appropriate experts including experts in penology, medicine, and ethics, and published notice, in the Federal Register, of his intent to approve such research.

#### **G. Responsibilities of IRBs: Documentation of IRB Findings Required Under Subpart C**

Pursuant to HHS regulations at 45 CFR 46.115(a), an institution or, when appropriate, an IRB, shall prepare and maintain adequate documentation of IRB activities. For the purposes of subpart C, the IRB activities include making the specific findings required under HHS regulations at 45 CFR 46.305(a). OHRP would consider documentation of protocol-specific information justifying each IRB finding required under 45 CFR 46.305(a) to be one way of adequately documenting the IRB activities required under subpart C.

#### **H. Responsibilities of Institutions**

Pursuant to HHS regulations at 45 CFR 46.115(a), an institution must maintain adequate documentation of IRB activities. These records must be made accessible to authorized representatives of HHS, at reasonable times and in a reasonable manner, under HHS regulations at 45 CFR 46.115(b). OHRP recommends that one way for an institution responsible for the conduct of the proposed research to adequately document the IRB review of the research:

- The curriculum vitae of the prisoner or prisoner representative serving on the IRB.
- A record of the determination of the IRB regarding the seven additional findings required under HHS regulations at 45 CFR 46.305(a).

Under 45 CFR 46.305(c), the institution responsible for conducting research involving prisoners that is supported by HHS shall certify to the Secretary (through OHRP) that the IRB has made the seven findings required under 45 CFR 46.305(a). The institution must send to OHRP a certification letter to this effect, which should also include the name and address of the institution and specifically identify the research protocol in question and any relevant HHS grant application or protocol. HHS conducted or supported research involving prisoners as subjects may not proceed until OHRP issues its approval in writing to the institution on behalf of the Secretary under 45 CFR 46.306(a)(2).

Under its authority at 45 CFR 46.115(b), OHRP requires that the institution responsible for the conduct of the proposed research also submit to OHRP a copy of the research proposal so that OHRP

can determine whether the proposed research involves one of the categories of research permissible under 45 CFR 46.306(a)(2), and if so, which one. The term "research proposal" includes the IRB-approved protocol, any relevant HHS grant application or proposal, any IRB application forms required by the IRB, and any other information requested or required by the IRB to be considered during initial IRB review.

**Prisoner research certification letters should be mailed to:**

Attention: OHRP Prisoner Research Contact Person  
Office for Human Research Protections  
Department of Health and Human Services  
The Tower Building  
1101 Wootton Parkway, Suite 200  
Rockville, MD 20852

**I. Responsibilities of OHRP**

Following receipt of the research proposal, OHRP will determine which, if any, of the four categories of research permissible under HHS regulations at 45 CFR 306(a)(2) the proposed research meets. OHRP will consult with appropriate experts with respect to certain research that falls under paragraphs (iii) and (iv) of 45 CFR 46.306(a)(2).

When applicable, OHRP also will publish in the Federal Register a notice of intent to approve such research. HHS conducted or supported research involving prisoners as subjects may not proceed until OHRP issues its approval in writing to the institution on behalf of the Secretary under 45 CFR 46.306(a)(2).

**J. Frequently Asked Questions**

1. Does subpart C apply only where the research targets prisoners as subjects?

**Answer:** No, subpart C applies whenever any human subject in a research protocol subject to 45 CFR part 46 becomes a prisoner at any time during the study.

2. What should an investigator do if a subject becomes a prisoner after enrollment in research?

**Answer:** The investigator should report this situation to the IRB immediately.

3. What should be done when a subject becomes a prisoner after enrollment in a study which was not reviewed and approved by the IRB in accordance with the requirements of subpart C?

**Answer:** When a previously enrolled research subject becomes a prisoner and the relevant research protocol was NOT reviewed and approved by the institutional review board (IRB) in accordance with the requirements of HHS regulations at 45 CFR part 46, subpart C, the principal investigator should promptly notify the IRB of this event. All research interactions and interventions with, and obtaining identifiable private information about, the now-incarcerated prisoner-subject must cease until the requirements of subpart C have been satisfied with respect to the relevant protocol.

**NOTE:** OHRP has allowed one important exception. In special circumstances in which the principal investigator asserts that it is in the best interests of the subject to remain in the research study while incarcerated, the IRB Chairperson may determine that the subject may continue to participate in the research until the requirements of subpart C are satisfied.

Upon receipt of notification that a previously enrolled research subject has become a prisoner, the IRB should promptly re-review the protocol in accordance with the requirements of subpart C if the principal investigator wishes to have the prisoner subject continue to participate in the research.

It is important that the IRB remind the principal investigator that, except in the special circumstances noted above, all research interactions and interventions with, and obtaining identifiable private information about, the now-incarcerated prisoner-subject must cease until all of the requirements of subpart C have been satisfied with respect to the relevant protocol.

4. Is an adolescent (e.g., age 14) detained in a juvenile detention facility a prisoner?

**Answer:** Yes. In addition to subpart C, most likely subpart D would also apply.

5. Can research involving prisoners be expedited?

**Answer:** Yes, however, OHRP recommends that the convened IRB review research involving prisoners as human subjects.

6. Do the exemptions apply to research involving prisoners?

**Answer:** The exemptions at 45 CFR 46.101(b) do not apply to research involving prisoners. See 45 CFR 46.101(i), footnote 1.

7. What is the definition of minimal risk for prisoner research?

**Answer:** The definition of minimal risk for research involving prisoners can be found at 45 CFR 46.303(d). This definition, promulgated in 1978, differs from the definition of minimal risk in subpart A of 45 CFR 46. See 45 CFR 46. 102(i).

For research involving prisoners, the definition of minimal risk requires reference to physical or psychological harm, as opposed to harm or discomfort, to risks normally encountered in the daily lives, or routine medical, dental or psychological examination of *healthy persons*.

<p>Definition of Minimal Risk in Prisoner Research 45 CFR 46.303(d)</p>	<p>Definition of Minimal Risk in 45 CFR part 46, subpart A, 45 CFR 46.102(i)</p>
<p>“Minimal risk” is the probability and magnitude of <b>physical or psychological</b> harm that is normally encountered in the daily lives, or in the routine medical, dental, or psychological examination of <b>healthy persons</b>.</p>	<p>“Minimal risk means that the probability and magnitude of <b>harm or discomfort anticipated</b> in the research <b>are not greater</b> in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.</p>