Pace Law Review

Volume 30
Issue 5 *Fall 2010*
Opening Up a Closed World: A Sourcebook on Prison Oversight

Article 17

11-18-2010

Effective Corrections Oversight: What Can We Learn from ACA Standards and Accreditation?

David M. Bogard
Pulitzer/Bogard & Associates

Effective Corrections Oversight: What Can We Learn from ACA Standards and Accreditation?

David M. Bogard, M.P.A., J.D.*

This brief essay will discuss the nexus between the standards and accreditation process of the American Correctional Association (ACA) and the call for increased external oversight of our nation's jails, prisons, and juvenile detention and correctional facilities.

By way of background, the American Correctional Association is a private, non-profit professional association representing corrections practitioners. Among the activities it promotes are two that pertain directly to the issue of corrections oversight—the promulgation of standards and the maintenance of an accreditation process. These two functions work hand-in-hand but, as will be explained below, are also somewhat severable.

ACA publishes more than twenty distinct manuals of correctional standards, covering a variety of facility types and programs, including prisons, jails, juvenile detention facilities, juvenile correctional facilities, probation/parole, and numerous

* David M. Bogard is a corrections consultant with the New York-based criminal justice consulting firm, Pulitzer/Bogard & Associates (P/BA). In addition to operations consulting, policy/procedure development, and facility planning, the firm has worked with government officials throughout the country on a variety of compliance monitoring and performance reviews of correctional facilities. He is currently serving as a federal court inspector for the Houston, TX City Jails' *Morgan* Consent Decree, and is a consultant to the federal court monitor of the juvenile correctional system in Puerto Rico. His experience includes: director of corrections for Arlington County, VA; labor relations attorney with a law firm in Philadelphia, PA; special assistant to the commissioner of corrections in Philadelphia; and, special assistant in the Office of the Deputy Mayor for Criminal Justice in New York City. From 1998-2006, he was a commissioner on the American Correctional Association's Commission on Accreditation for Corrections, and he also served as a member of the ACA Standards Committee. He has been an expert witness in numerous jail operations cases, and was an adjunct professor of law at Howard University's School of Law. He holds a J.D. from Temple University and an M.P.A. from New York University.

others. In addition, over the past several years, ACA has ventured into the all-important realm of institutional health care standards, publishing its first such manual of standards for health care in 2002.

The ACA Standards Committee, composed of twenty members with extensive corrections expertise, such as prison and jail administrators, community corrections administrators, attorneys, architects, consultants, etc., promulgates standards for all the manuals. Members represent all realms of corrections—adult and juvenile, institutional and field, long-term and shorter-term facilities and programs. The Standards Committee meets twice a year to consider the adoption of new or revised standards, typically acting on recommendations that come from the field through an active and formal solicitation process. Recommended changes to standards are generated by prisoners' advocacy organizations; managers of facilities; architects, consultants, and others who use the standards; physicians and other health care providers who provide care in correctional institutions; as well as by members of the Commission on Accreditation for Corrections who must interpret and rely on these standards in the context of their accreditation decisions (more on this later). Several of the positions on the Standards Committee are held by Commission members, who bring to the table their individual expertise and knowledge of how the standards are used in the accreditation process.

Standards Committee decisions are frequently subject to robust discussion and debate, and persons recommending changes are afforded the opportunity to address the Committee directly. Debate often centers on whether proposals will serve to "water down" standards or make them more practical and achievable. Members of the Committee who are administrators will frequently voice concern about the cost of implementing proposed standards and whether the bodies that fund them will agree to absorb the cost implications of adherence to proposed standards. Occasionally, attorneys will propose changes to standards to reflect changes in law based on federal statutes or appellate court decisions. New or revised standards are sometimes the inevitable product of compromises forged to address concerns, albeit not to the degree or in the same manner that some would prefer. Moreover, sometimes

standards are not modified as proposed because the Committee does not believe that the issue is of sufficient gravity to warrant a change, or because it is believed that the value of continuity outweighs the need for change.

The decisions of the Standards Committee are typically reflected in the inclusion of new or modified standards in supplements, which are published every two years, and in new manuals that are released about every ten years.

Since 2001, there has been a significant push toward the adoption of performance-based standards. This new focus on results, as opposed to the prescriptive approach that goes to only what or how something ought to be done, is a positive change. Recently published manuals for jails (Adult Local Detention Facilities), community residential facilities, correctional industries, and correctional healthcare have been prepared to reflect this new approach. The performance-based standards include: *standards* (statements that define a required condition to be achieved), *outcome measures* (measurable events or conditions that demonstrate whether the performance standard has been achieved), *expected practices* (actions and activities that should produce the desired outcome), *protocols* (written instructions that guide implementation, such as policies and procedures, forms, etc.), and *process indicators* (documentation and other evidence that can be examined to determine that practices are being implemented properly).

Standards are grouped into such categories as "Safety," "Care," "Justice," and "Security." Many can be said to be aspirational, although others might be viewed as "minimum" standards and myriad others will fall somewhere in between. Of the more than 400 standards in each manual, approximately 10% will be weighted as "Mandatory"—these standards are generally those that most directly and profoundly affect institutional policies and practices that have the most direct impact on the health and life safety of inmates and staff. For example, many of the mandatory standards are in the area of fire safety, while others drive critical health care concerns or govern the use of force and restraints.

In 2002, a substantial effort resulted in the substantial reconciliation of ACA's standards with those of the international community, specifically the United Nations'

Standard Rules for the Treatment of Prisoners. At that time, some international standards were deemed by U.S. corrections professionals to be either outdated or just inconsistent with contemporary best practices, such as those that required that prisoners' families be allowed to bring food to them, or the practice of strict separation based on legal status (as opposed to more contemporary best practices, employed especially in jails, of disaggregating and classifying based on risk and behavior, and doing so based on validated objective scales and measures).

Many correctional agencies use the ACA standards as a foundation on which to base their policies and procedures, even without committing to the accreditation process. According to the ACA website, there are some 130 accredited jails (out of more than 3,300)[1] and 590[2] accredited prisons throughout the country. But myriad others have modeled their processes and expected practices on the ACA standards, and architects and consultants typically design facilities or recommend practices in strict compliance with the standards.

Separate and apart from the publishing of standards, ACA also maintains an accreditation process. It is voluntary in most instances inasmuch as accreditation by ACA is typically not required and agencies enter into the process on their own volition. There are exceptions to this rule, however. For example, the Maine legislature passed a law requiring that all of that state's adult and juvenile institutions take all necessary steps to become accredited[3], and the vast majority of contracts between government agencies and private contractors for facility operations require the operator to obtain and maintain accreditation as a strict contractual mandate. Occasionally, courts will mandate compliance with standards or accreditation, or parties to a settlement agreement may make this a requirement. But, for the most part, accreditation is a voluntary process, undertaken by agency administrators who recognize the value of the process in terms of improved operations.

---

1. E-mail from Kathy B. Dennis, Director, Standards and Accreditation of the American Correctional Association, to author (Apr. 19, 2010) (on file with author). Note that the number of accredited jails includes federal jails, immigration detention centers, and other non-county/city level jails.

2. *Id.* The 590 figure includes publicly and privately operated prisons.

3. ME. REV. STAT. ANN. tit. 34-a, § 1215 (2009).

The accreditation process is also fee-based; agencies pay ACA for the costs associated with their audits and the maintenance of the overall structure that governs and implements accreditation. It is a moneymaking venture for ACA that helps to support the full range of its professional development activities. And, with the fee-based system naturally come concerns (and rumors) about the power of the candidate agencies to directly or indirectly influence decision-making. To the degree that these rumors continue to circulate, or such influence does actually occur,[4] it serves to compromise the integrity and value of the accreditation process as an oversight mechanism.

The accreditation function is overseen and managed by a combination of paid ACA staff and a board of commissioners. The Commission on Accreditation for Corrections is composed of twenty-eight practitioners representing both adult and juvenile corrections, institutional and community. In addition to agency and facility administrators, the Commission includes attorneys (including a representative of the American Bar Association), an architect (selected by the American Institute of Architects) as well as corrections consultants, physicians, nurses, and citizens not employed in corrections.

Agencies that apply for accreditation must first employ a self-evaluation, which then triggers the ACA audit. The self-evaluation is an internal review, typically conducted by agency staff but frequently undertaken by colleagues from other nearby facilities to inject a more objective perspective of the agency's status of compliance before ACA auditors arrive. Where agencies discover that they are not as compliant as they believed they would, or should, be at a certain juncture, they can delay the audit to allow for additional time to correct the deficiencies that were discovered via the self-evaluation process. After the self-evaluation is submitted to ACA, the audit is scheduled and an audit team, comprised of three to four experienced correctional practitioners (typically including one with corrections health care expertise), is selected.

Prior to arriving on site, the facility is required to post notice of the audit to all inmates, including an invitation to

4. In eight years as a commissioner on the Commission on Accreditation for Corrections, I did not experience any external pressure or undue interference with panel decisions concerning accreditation.

send confidential communications to the audit team in advance of their arrival and to speak with auditors while they are on-site (this occurs occasionally). The audits typically last two or three days, depending on the size of the institution. Auditors review files of documentation provided by the agency as evidence of compliance with the applicable standards. The team visits all areas of the facility, speaking with staff and inmates along the way. In addition to speaking privately and confidentially with any inmates who indicated a desire to speak with the team before or during the audit, auditors generally select inmates with whom they will speak informally, during the course of their tours of the facility, and have free reign as to which inmates they will interview. The results of these interviews are summarized in the audit report (e.g., "numerous inmates complained about the temperature of food," or "there was general agreement among the 70 inmates interviewed that it takes too long to see a nurse"). The results of inquiries into more specific complaints raised by individual inmates are also published, which typically result in auditors checking inmate records, or interviewing staff, to determine whether the complaints are valid or indicative of larger concerns.

While a significant element of the audit involves paper documentation, the auditors are also tasked with assessing the climate of the facility and the quality of life for inmates and staff. Here, the auditors go beyond the four corners of the more than 400 standards, to evaluate such issues as safety, sanitation, life safety, programming, inmate complaints, staff working conditions, health care, recreation, and security. The auditors also review records and interview administrators about statistical incident data provided by the facility (inmate-inmate assaults, inmate-staff assaults, use of restraint chairs, suicide attempts/deaths, escapes, injuries, grievances filed/resolved for the inmates, etc.).

The results of all of these audit elements are compiled into a report for the Commission staff and members. While the compliance score is important, it is not, by any measure, the only factor that commissioners look to for guidance when making an accreditation decision. Most commissioners pay close attention to the Quality of Life discussion, the incident data, and the comments/complaints of inmates and staff. Certainly, the efficacy of the audit team's assessment is key to

the ability of the commissioners to reach judgments concerning the facility's accreditation status. A score of 90% on non-mandatory standards and 100% on mandatory standards is required; however, contrary to popular belief, these scores only make a facility *eligible* for consideration and do not by any means guarantee it. It is not at all infrequent for agencies with scores in the 90-95% range to be denied initial or re-accreditation, to receive a probationary status, or to be subjected to monitoring visits simply because they have missed 20-30 standards, which is often, although not always, indicative of a larger set of concerns. A poor quality of life assessment will frequently result in accreditation being denied or some alternative mechanism being required to provide assurance to the Commission that concerns will be addressed and remedied.

Commissioners can entertain requests for waivers—for non-compliances deemed *de minimus* or where a statute requires a different course of action than a standard—or can require plans of action for non-compliances with deadlines associated with specific implementation steps. Additionally, in recognition of political realities or forces beyond the agencies' control, such as decisions by governors to suspend furloughs or union agreements that just cannot be undone, agencies can apply for a limited number of "discretionary non-compliances," where failure to satisfy the standard is deemed to have no negative impact on the life, health, safety or constitutional operation of the facility.[5]

The question then is whether the ACA standards and accreditation process, in and of itself, is a sufficient form of external oversight.

The ACA accreditation process is as close as we currently get to a national corrections oversight process. The standards are, by and large, well-conceived and indicative of sound correctional practices. There is general agreement in the field

5. The Commission of Accreditation implemented this policy in 2005 as a measure to increase the integrity of the process. The objective was to allow agencies to avoid committing to plans of action that they knew they could not meet for political or policy reasons (e.g., a governor decreed that there would no longer be furloughs) or because of labor relations agreements that cannot be abrogated (e.g., collective bargaining agreements frequently allow staff to bid on posts and give management little or no leeway to require certain rotations as set forth in standards).

that the standards are reasonable and that the process of accreditation is extremely beneficial to participating agencies in terms of internal quality assurance and self-awareness enhanced by external oversight. While pressure may sometimes be brought on the Association by applicant agencies, this hopefully occurs in relatively few cases and does not diminish the value of the process to all the other participating agencies. Most people who have been involved in the ACA accreditation process as agency heads, facility administrators, auditors, or commissioners will say that while all accredited agencies are not necessarily model facilities, they are likely better than many or most facilities that are not accredited, and they are better facilities than they would otherwise be if they were not accredited. The process of designing an operation around the widely accepted professional practices and standards, combined with the objective evaluation of a facility by professionals in the field, and the necessary follow-up activities to redress non-compliances, *almost always* results in improved operations. This clearly is beneficial to inmates, staff and the public.

As it is presently configured, however, the ACA standards and accreditation process does not alone satisfy some of the key elements of external oversight: it is not transparent and it does not generally enhance accountability, in terms of allowing the public or policy makers to hold corrections administrators responsible for the quality of institutions and how they care for people. The fact that the accreditation process operates pursuant to a fee-based contract with a contractual guarantee of confidentiality clearly mitigates the degree to which it allows for transparency and accountability to the public. This is *not* offered as criticism; it is the process that works best for the current goals and objectives of the accreditation process that the association and its applicants desire, and, as stated above, it is highly valuable from those perspectives. However, the process does not satisfy other important objectives.

I am reluctant to suggest that the existing ACA process be fundamentally altered to become the external oversight format of choice. In some respects, the strength of the current standards and accreditation process of ACA is in the fact that it is voluntary. The fact that the impetus for accreditation, on the part of many agencies at least, derives from an internal

quest for enhanced professionalism can mean that there is more ownership in the process. I worry that making it mandatory may result in agencies seeking shortcuts or attempting to deceive auditors because the objective will be the certificate, rather than an internal desire for excellent operations.

The Maine experience referred to earlier offers some lessons. Although the legislature mandated accreditation, each of the state's adult and juvenile correctional facilities that have been working toward accreditation have viewed the process as more than something they must do because it was mandated. Facility staff members have invested great amounts of time and effort, plus a huge emotional investment, in ensuring that their facilities measure up to the ACA standards.[6] Further, although any funding body can certainly require that the correctional agency share the results and content of an accreditation audit, in Maine, the legislative requirement means that policy makers clearly have access to the audit reports as a matter of legislative oversight, and this could be a step in the direction of transparency and increased accountability.

While we can learn from Maine, we must consider that the application there is limited to state institutions, and there is presently only one ACA-accredited jail in the state.[7] Requiring county jails and juvenile detention facilities to become accredited carries with it obvious funding questions and concerns about unfunded state mandates. For that matter, a federal law mandating that states accredit all of their institutions would likely carry the same objection.

Those of us who embrace the central tenets of external oversight should look to the ACA standards and to the ACA accreditation process as two existing mechanisms that have stood the test of time and offer much in the way of a foundation from which the external oversight movement can build. While these mechanisms are not without their flaws, and bad incidents certainly do occur in accredited facilities, there is

6. The author and his associates assisted the Maine Department of Corrections in the planning of new adult and juvenile facilities and development of policies and procedures that would meet ACA standards.

7. The Cumberland County Jail in Portland, Maine was first accredited in 2002 and has subsequently been reaccredited.

much to be learned and applied. Without question, we have many safer and more humane correctional facilities in this country because of the ACA standards and the accreditation process.