Outline

Forced Medication and Treatment and Transgender Housing Issues

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Forced Medication and Treatment:

Estelle v. Gamble, 97 S. Ct 285 (1977) Government has obligation to provide medical care for those whom it is punishing by incarceration. Deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain proscribed by Eighth Amendment whether the indifference is manifested by prison doctors in response to prison needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed; regardless of how evidenced deliberate indifference to prisoner's serious illness or injuries states cause of action under civil rights statute.

Turner v. Safley, 107 S. Ct 2254 (1987) In deciding whether prison regulation which impinges on inmates' constitutional rights can be sustained as "reasonably related " to legitimate penological interest, court should consider: whether there is a valid, rational connection between prison regulation and legitimate governmental interest put forward to justify it; whether there are alternative means of exercising rights that remain open to inmates; whether accommodation of asserted rights will have significant "ripple effect" on fellow inmates or prison staff; and whether there is ready alternative to regulation that fully accommodates prisoner's rights at de minimis cost to valid penological interest.

Cruzan v. Director, Missouri Department of Health, 110 S. Ct 2841 (1990) A competent person has a liberty interest under the Due Process Clause in refusing unwarranted medical treatment.

Washington v. Harper, 110 S. Ct 1028 (1990) Mentally ill inmate possessed a liberty interest in avoiding unwanted administration of antipsychotic drugs under the due process clause of the Fourteenth Amendment. The proper standard for determining validity of prison regulation claimed to infringe on inmates constitutional rights is whether regulation is reasonably related to legitimate penological interest. Treatment permitted if inmate is dangerous to himself or others and treatment is in inmate's interest. Upheld the prison policy as comporting with due process even though review was by administrative panel.

Riggins v. Nevada, 504 U.S. 127 (1992) Sets minimum standards for forced medication of a pretrial detainee. Because "[t]he forcible injection of medication into a nonconsenting person's body... represents a substantial interference with the person's liberty," Id. at 134, quoting ***Washington v. Harper***, 494 U.S. 210, 229 (1990), forcing anti-psychotic medication on an accused, "is impermissible absent a finding of overriding justification and a determination of medical appropriateness," Id. at 135. The Supreme Court indicated that standard could be met: (1) if it is demonstrated that the treatment "was medically appropriate and, considering less intrusive alternatives, essential for the sake of [the accused's] own safety or the safety of others," or, possibly, (2) if the State establishes "that it could not obtain an adjudication of [the accused's] guilt or innocence by using less intrusive means." According to the Court, however, a trial court errs when it permits forced

medication but fails to make "[a] determination of the need for this course or any findings about reasonable alternatives," or fails to ***16** make "a finding that safety considerations or other compelling concerns outweighed [the accused's] interest in freedom from unwanted antipsychotic drugs." Id. at 136.

Hunger Strikes and Forced Feeding

Federal Law: 28 CFR 549.61 provides a statutory basis for classifying a prisoner as a hunger striker and to force feed. Policy attached.

Utah Code Ann. 77-16b-101 et seq. Involuntary Feeding and Hydration of Inmates

Pell v. Procunier, 417 U.S. 817 (1974) **First Amendment Challenge**: Inmate alleged that forced feeding interfered with his first amendment right of freedom of expression. In the analysis, the US Supreme Court stated that in determining if an abridgement of a prisoner's first amendment right is constitutional, a court should consider whether a prisoner could exercise this right in an alternative means. Where an alternative means exists the court will not protect them from being forced fed.

Boyce v. Petrovksy, No. 81-3322 (W. D. Mo. Sept 16, 1981) **Right to Privacy**: Inmate alleged that forced feeding violated his right to privacy and ***Von Holden v. Chapman***, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982); Court permitted forced feeding of prisoner stating that it is self-evident that the right to privacy does not include the right to commit suicide.

On a few cases support hunger strikers: **Zant v. Prevatte**, 248 GA 832, 286 S. E. 2d 715 (1982) denied forced feeding.

Other resources and articles:

Joel K. Greenberg, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 Fordham Law Review, Issue 4, Article 7 (1983)

Tracey M. Ohm, "*What They Can Do About It: Prison Administrators' Authority to Force-Feed Hunger-Striking Inmates*", 23 Wash. U.J.L. & Policy 151 (2007).

James E. Robertson, *Hunger Strikes as Symbols of Power and Dual Loyalty in Prison Health Care*, August 2014 Correctional Law Reporter, page 29.

Bureau of Prisons Regulations 28 CFR 549 (Medical Services)
Subpart C Psychiatric Evaluation and Treatment
Subpart E Hunger Strikes, Inmates

Transgender Housing Issues:

Defining the population:

> **Transgendered:** A term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth. Transgender is a broad term and is good for non-transgender people to use. "Trans" is shorthand for "transgender."
>
> **Transsexual:** An older term for people whose gender identity is different from their assigned sex at birth who seeks to transition from male to female or female to male. Many do not prefer this term because it is thought to sound overly clinical.
>
> **Transvestite:** a person and especially a male who adopts the dress and often the behavior typical of the opposite sex especially for purposes of emotional or sexual gratification
>
> **Intersex:** A term used for people who are born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. Intersex conditions are also known as differences of sex development (DSD).
>
> **Gender Identity:** An individual's internal sense of being male, female, or something else. Since gender identity is internal, one's gender identity is not necessarily visible to others.

REVIEW OF LEGAL CONCERNS AND COURT DECISIONS

Cases holding no Right to Sex resassignment:

Medical Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997) (recognizing that sex reassignment is the only effective treatment for transsexual prisoners, but holding that it is permissible to withhold treatment from transsexual prisoners in light of fact that neither public nor private health insurance programs will pay for sex reassignment); *Long v. Nix*, 86 F. 3d 761 (8th Cir. 1996) (holding that prisoner diagnosed with gender identity disorder had no right to cross-dress or to estrogen therapy); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995) (rejecting equal protection claim brought by pre-operative male-to-female transsexual based on evidence that Colorado provided hormone therapy to non-transsexual prisoners with low hormone levels and to post-operative male-to-female transsexuals); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988) (holding that male-to-female transsexual prisoner is not entitled to cross-dress or wear cosmetics and does not have a constitutional right to hormone therapy); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987), *cert. denied*, 484 U.S. 935 (1987) (holding that transsexual prisoner is constitutionally entitled to some type of medical treatment for diagnosed condition of transsexualism, but she "does not have a right to any particular type of treatment, such as estrogen therapy"); *Jones v. Flannigan*, 1991 U.S. App. LEXIS 29606 (7th Cir. 1991) (same);*Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986) (same); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kansas 1986) (holding that transsexual prisoner had no right to hormone therapy).

Cases moving toward providing some level of medical intervention for transgendered inmates:

Cuoco v. Mortisugo, 222 F.3d 99 (2nd Cir. 2000) (holding officials entitled to immunity against claim by transsexual pre-trial detainee who was denied hormones). *See South v. Gomez*, 211 F.2d 1275, 2000 WL 222611 (9th Cir. 2000) (finding 8th Amendment violation where a prisoner's course of hormone treatment was abruptly cut off after being transferred to a new prison). *Cf. Kosilek v. Nelson*, 2000 WL 1346898, at * 3 (D. Mass. 2000) (assuming without deciding that transsexualism is a serious medical need, but finding insufficient evidence of deliberate indifference). *Cf. Wolf v. Horn*, 130 F. Supp. 2d 648 (D. Pa. 2001) (noting that abrupt termination of prescribed hormonal treatment by a prison official with no understanding of Wolfe's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute "deliberate indifference"). *See also Phillips v. Michigan Department of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991) (granting preliminary injunction directing prison officials to provide estrogen therapy to a pre-operative transsexual woman who had been taking estrogen for several years prior to her transfer to a new prison and distinguishing failure "to provide an inmate with care that would improve his or her medical state, such as refusing to provide sex reassignment surgery" from "[t]aking measures which actually reverse the effects of years of healing medical treatment").

PRISON RAPE ELIMINATION ACT (PREA)

The Prison Rape Elimination Act (PREA), 42 USC §147 was passed into law on September 4, 2003. It was created to eliminate sexual abuse in confinement. The regulations implementing PREA can be found at Part 115 of Title 28 of the Code of Federal Regulations.

The following is a summary of the standards impacting jails relating to housing **Lesbian, Gay, Bisexual, Transgender, Intersex (LGBTI), and Gender-Nonconforming Inmates:**

The standards account in various ways for the particular vulnerabilities of inmates, detainees, and residents who are LGBTI or whose appearance or manner does not conform to traditional gender expectations. **Standard 115.31/115.231/115.331** requires agencies to train employees in effective and professional communication with LGBTI and gender-nonconforming inmates and residents, and **Standard 115.41/115.241/115.341** requires the screening process to consider whether the inmate or resident is, or is perceived to be, LGBTI or gender nonconforming.

Standard 115.86/115.186/115.286/115.386also requires that post-incident reviews consider whether the incident was motivated by LGBTI identification, status, or perceived status. In addition, **Standard 115.42/115.242/115.342**[8] prohibits agencies from placing LGBTI inmates and residents in dedicated facilities, units, or wings in adult prisons, jails, or community confinement facilities solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates or residents. Such placement is not allowed

at all in juvenile facilities. The standard also mandates that transgender and intersex inmates and residents be given the opportunity to shower separately from other inmates and residents.

Finally, the standards address some issues specific to transgender and intersex inmates, detainees, and residents. **Standard 115.15/115.115/115.215/115.315**imposes a complete ban on searching or physically examining a transgender or intersex inmate/detainee/resident for the sole purpose of determining the person's genital status. Agencies must train security staff in conducting professional and respectful cross-gender pat-down searches and searches of transgender and intersex individuals.

In the lockup standards, Standards 115.131 and 115.141 do not specifically reference LGBTI identity or gender-nonconforming appearance. Standard 115.131 requires training on how to communicate effectively with all detainees, and Standard 115.141 requires staff to ask detainees about their own perceptions of vulnerability and to consider the physical build and appearance of detainees.

OTHER RESOURCES AND ARTICLES:

See Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 530 (2000).

77-16b-101. Title.

This chapter is known as the "Involuntary Feeding and Hydration of Inmates."

Enacted by Chapter 355, 2012 General Session

77-16b-102. Definitions.

As used in this chapter:

(1) "Correctional facility" means:

(a) a county jail;

(b) a secure correctional facility as defined by Section 64-13-1; or

(c) a secure facility as defined by Section 62A-7-101.

(2) "Correctional facility administrator" means:

(a) a county sheriff in charge of a county jail;

(b) a designee of the executive director of the Utah Department of Corrections; or

(c) a designee of the director of the Division of Juvenile Justice Services.

(3) "Medical supervision" means under the direction of a licensed physician, physician assistant, or nurse practitioner.

(4) "Mental health therapist" has the same definition as in Section 58-60-102.

(5) "Prisoner" means:

(a) any person who is a pretrial detainee or who has been committed to the custody of a sheriff or the Utah Department of Corrections, and who is physically in a correctional facility; and

(b) any person older than 18 years of age and younger than 21 years of age who has been committed to the custody of the Division of Juvenile Justice Services.

Amended by Chapter 121, 2014 General Session

77-16b-103. Involuntary feeding or hydration of prisoners -- Petition procedures, venue -- Prisoner rights.

(1) A correctional facility administrator may petition the district court where the correctional facility is located for an order permitting the involuntary feeding or hydration of any prisoner who is likely to suffer severe harm or death by refusing to accept sufficient nutrition or hydration.

(2) Prior to the filing of a petition under this section, a mental health therapist who is designated by the correctional facility administrator shall conduct a mental health evaluation of the subject prisoner.

(3) Upon the filing of a petition, the district court shall hold a hearing within two working days. The court:

(a) shall confidentially review the prisoner's medical and mental health records as they are available;

(b) may hear testimony or receive evidence, subject to the Utah Rules of Evidence, concerning the circumstances of the prisoner's lack of nutrition or hydration; and

(c) may exclude from the hearing any person whose presence is not necessary

for the purposes of the hearing, due to the introduction of personal medical and mental health evidence.

(4) After conducting the hearing under Subsection (3), the district court shall issue an order to involuntarily feed or hydrate the prisoner, if the court finds by a preponderance of evidence that:

(a) (i) the prisoner is likely to suffer severe harm or death by refusing to accept sufficient nutrition or hydration; and

(ii) the correctional facility's medical or penological objectives are valid and outweigh the prisoner's right to refuse treatment; or

(b) the prisoner is refusing sufficient nutrition or hydration with the intent to obstruct or delay any judicial or administrative proceeding pending against the prisoner.

(5) The district court shall state its findings of fact and conclusions of law on the record.

(6) The correctional facility administrator shall serve copies of the petition and a notice of the district court hearing on the prisoner and the prisoner's counsel, if the prisoner is represented by counsel, at least 24 hours in advance of the hearing under Subsection (3).

(7) The prisoner has the right to attend the hearing, testify, present evidence, and cross-examine witnesses.

Enacted by Chapter 355, 2012 General Session

77-16b-104. Involuntary feeding or hydration of prisoners -- Standards, continuing jurisdiction, and records.

(1) Any involuntary nutrition or hydration of a prisoner pursuant to this chapter shall be conducted under immediate medical supervision and in a medically recognized and acceptable manner.

(2) Upon the filing of a petition pursuant to Section 77-16b-102, the court has the continuing jurisdiction to review the prisoner's need for involuntary nutrition or hydration as long as the prisoner remains in custody of the correctional facility.

(3) A correctional facility shall maintain records of any involuntary feeding or hydration of prisoners under this chapter.

(a) The records are classified as "controlled" under Section 63G-2-304.

(b) All medical or mental health records submitted to the court under this chapter shall be kept under seal.

Enacted by Chapter 355, 2012 General Session

Section 5. Section **77-16b-105** is enacted to read:

77-16b-105. Involuntary feeding or hydration of prisoners -- Exceptions.

This chapter does not apply to medically imposed fasts for the purpose of conducting medical procedures or tests, or to religious fasts of reasonable duration.

Enacted by Chapter 355, 2012 General Session

SAMPLE POLICIES

NH DEPARTMENT OF CORRECTIONS POLICY AND PROCEDURE DIRECTIVE	CHAPTER Health Services STATEMENT NUMBER 6.51
SUBJECT: **HUNGER STRIKE/HEALTH MANAGEMENT** PROPONENT: Helen Hanks, Administrative Dir. *Name/Title* Medical/Forensic Services 271-3707 *Office* *Phone #*	EFFECTIVE DATE 06/15/14 REVIEW DATE 06/15/15 SUPERSEDES PPD# 6.51 DATED 01/01/06
ISSUING OFFICER: *William Wrenn, Commissioner*	DIRECTOR'S INITIALS DATE APPENDIX ATTACHED: YES NO
REFERENCE NO: See reference section on last page of PPD.	

I. PURPOSE:
To provide for consistent management and health monitoring of an inmate on a hunger strike.

II. APPLICABILITY:
To all staff

III. POLICY:
It is the policy of the Department of Corrections that:
A. Those individual inmates who refuse to eat will be monitored for changes in health status with physician ordered medical interventions as clinically indicated.
B. In life-threatening cases, the Court will be petitioned for approval to force feed those in danger of death as a result of refusal to eat.
C. Mass hunger strikes will be managed both as an overall security management concern and a health status concern.

IV. PROCEDURE:
A. Individual Hunger Strike
1. Security:
When an inmate has made a clear statement not to eat or has been observed not to have eaten food for six (6) meals, security staff will:
a. Initiate the hunger strike log (Attachment 1);
b. Complete an incident report;
c. Notify the Health Services on-duty nurse;
d. Notify the Warden; and
e. Notify the Investigations Unit.
2. Nursing:
Upon notification, nursing staff will:
a. Initiate a Refusal to Eat flowsheet;
b. Notify the on- call physician/Chief Medical Officer by the next MD duty day or as clinically indicated;

c. Complete a health status baseline;
d. Assess daily with interventions as clinically indicated; and
e. Admit as clinically indicated to Health Services inpatient for continued observation and evaluation by the physician.

3. Medical

Upon notification, the Physician will:

a. Review the health record for current health concerns and health status impact of refusal to eat;
b. Write for a dietary consult;
c. Prescribe medical treatment as indicated;
d. Review the Refusal to Eat flowsheet every three (3) days or as clinically requested/indicated;
e. Determine when to admit to a health services inpatient center for more intense observation, monitoring, and/or treatment;
f. Notify the Administrative Director of progress or changes; and
g. Determine when refusal to eat has become life-threatening and consult with the Administrative Director and DOC legal counsel regarding Court petition to force feed.

B. Mass Hunger Strike

When a group or mass hunger strike occurs, an operational team representing Security, Health, and Administration will be organized for the safe management of both the individuals involved in the hunger strike and the rest of the prison population.

REFERENCES:

Standards for the Administration of Correctional Agencies
Second Edition. Standards

Standards for Adult Correctional Institutions
Fourth Edition Standards
4-4224

Standards for Adult Community Residential Services
Fourth Edition. Standards

Standards for Adult Probation and Parole Field Services
Third Edition. Standards

Other

HANKS/clr

Attachment

NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS
HUNGER STRIKE LOG

INMATE NAME_____ I.D._____

D.O.B._____ HOUSING SITE_____

NOTIFICATIONS:

1. WARDEN: DATE: _____ TIME: _____

2. NURSE: NAME: _____

3. INCIDENT FORM COMPLETED: DATE: _____ TIME:_____

DATE	WEIGHT	BREAK-FAST	LUNCH	DINNER	FLUID INTAKE	C.O. INITIALS
		Y/N	Y/N	Y/N	Y/N	
		Y/N	Y/N	Y/N	Y/N	
		Y/N	Y/N	Y/N	Y/N	
		Y/N	Y/N	Y/N	Y/N	
		Y/N	Y/N	Y/N	Y/N	

Code of Federal Regulations

TITLE 28 — JUDICIAL ADMINISTRATION [28 CFR]

PART 549 — MEDICAL SERVICES [28 CFR 549]

Note:
— Current as of: 12/12/2013, Updated weekly.
— Enhanced with links to US Code, FR and CFR References where ever possible and more to come.
— You can embed the URL to this page in your documents to access the current CFR part.

— This consolidated CFR Part was last updated by Federal Register(FR) dated 07/08/2011 for Subpart C; §549.40; §549.41; §549.42; §549.43; §549.44; §549.45; §549.46; .

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 876b; 18 U.S.C. 3621, 3622, 3524, 4001, 4005, 4042, 4045, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), Chapter 313, 5006-5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Subpart A—Infectious Disease Management

SOURCE: 70 FR 29193, May 20, 2005, unless otherwise noted.

§549.10 Purpose and scope.

The Bureau will manage infectious diseases in the confined environment of a correctional setting through a comprehensive approach which includes testing, appropriate treatment, prevention, education, and infection control measures.

§549.11 Program responsibility.

Each institution's Health Services Administrator (HSA) and Clinical Director (CD) are responsible for the operation of the institution's infectious disease program in accordance with applicable laws and regulations.

§549.12 Testing.

(a) *Human Immunodeficiency Virus (HIV)*—(1) *Clinically indicated.* The Bureau tests inmates who have sentences of six months or more if health services staff determine, taking into consideration the risk as defined by the Centers for Disease Control guidelines, that the inmate is at risk for HIV infection. If the inmate refuses testing, staff may initiate an incident report for refusing to obey an order.

(2) *Exposure incidents.* The Bureau tests an inmate, regardless of the length of sentence or pretrial status, when there is a well-founded reason to believe that the inmate may have transmitted the HIV infection, whether intentionally or unintentionally, to Bureau employees or other non-inmates who are lawfully present in a Bureau institution. Exposure incident testing does not require the inmate's consent.

(3) *Surveillance Testing.* The Bureau conducts HIV testing for surveillance purposes as needed. If the inmate refuses testing, staff may initiate an incident report for refusing to obey an order.

(4) *Inmate request.* An inmate may request to be tested. The Bureau limits such testing to no more than one per 12-month period unless the Bureau determines that additional testing is warranted.

(5) *Counseling.* Inmates being tested for HIV will receive pre- and post-test counseling, regardless of the test results.

(b) *Tuberculosis (TB).* (1) The Bureau screens each inmate for TB within two calendar days of initial incarceration.

(2) The Bureau conducts screening for each inmate annually as medically indicated.

(3) The Bureau will screen an inmate for TB when health services staff determine that the inmate may be at risk for infection.

(4) An inmate who refuses TB screening may be subject to an incident report for refusing to obey an order. If an inmate refuses skin testing, and there is no contraindication to tuberculin skin testing, then, institution medical staff will test the inmate involuntarily.

(5) The Bureau conducts TB contact investigations following any incident in which inmates or staff may have been exposed to tuberculosis. Inmates will be tested according to paragraph (b)(4) of this section.

(c) *Diagnostics.* The Bureau tests an inmate for an infectious or communicable disease when the test is necessary to verify transmission following exposure to bloodborne pathogens or to infectious body fluid. An inmate who refuses diagnostic testing is subject to an incident report for refusing to obey an order.

§549.13 Programming, duty, and housing restrictions.

(a) The CD will assess any inmate with an infectious disease for appropriateness for programming, duty, and housing. Inmates with infectious diseases that are transmitted through casual contact will be prohibited from work assignments in any area, until fully evaluated by a health care provider.

(b) Inmates may be limited in programming, duty, and housing when their infectious disease is transmitted through casual contact. The Warden, in consultation with the CD, may exclude inmates, on a case-by-case basis, from work assignments based upon the security and good order of the institution.

(c) If an inmate tests positive for an infectious disease, that test alone does not constitute sole grounds for disciplinary action. Disciplinary action may be considered when coupled with a secondary action that could lead to transmission of an infectious agent. Inmates testing positive for infectious disease are subject to the same disciplinary policy that applies to all inmates (*see* 28 CFR part 541, subpart B). Except as provided for in our disciplinary policy, no special or separate housing units may be established for HIV-positive inmates.

§549.14 Confidentiality of information.

Any disclosure of test results or medical information is made in accordance with:

(a) The Privacy Act of 1974, under which the Bureau publishes routine uses of such information in the Department of Justice Privacy Act System of Records Notice entitled "Inmate Physical and Mental Health Record System, JUSTICE/BOP-007"; and

(b) The Correction Officers Health and Safety Act of 1998 (codified at 18 U.S.C. 4014), which provides that test results must be communicated to a person requesting the test, the person tested, and, if the results of the test indicate the presence of HIV, to correctional facility personnel consistent with Bureau policy.

§549.15 Infectious disease training and preventive measures.

(a) The HSA will 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.

(b) Inmates in work assignments which staff determine to present the potential for occupational exposure to blood or infectious body fluids will receive annual training on prevention of work-related exposures and will be offered vaccination for Hepatitis B.

Subpart B—Over-The-Counter (OTC) Medications

SOURCE: 68 FR 47849, Aug. 12, 2003, unless otherwise noted.

§549.30 Purpose and scope.

This subpart establishes procedures governing inmate access to Over-The-Counter (OTC) medications for all inmates except those in inpatient status at Federal Medical Centers. Inmates may buy OTC medications which are available at the commissary. Inmates may also obtain OTC medications at sick call if the inmate does not already have the OTC medication and:

(a) Health services staff determine that the inmate has an immediate medical need which must be addressed before his or her regularly scheduled commissary visit; or

(b) The inmate is without funds.

§549.31 Inmates without funds.

(a) The Warden must establish procedures to provide up to two OTC medications per week for an inmate without funds. An inmate without funds is an inmate who has not had a trust fund account balance of $6.00 for the past 30 days.

(b) An inmate without funds may obtain additional OTC medications at sick call if health services staff determine that he/she has an immediate medical need which must be addressed before the inmate may again apply for OTC medications under this section.

(c) To prevent abuses of this section (*e.g.*, inmate shows a pattern of depleting his or her commissary funds before requesting OTC medications), the Warden may impose restrictions on the provisions of this section.

[68 FR 47849, Aug. 12, 2003, as amended at 69 FR 53805, Sept. 3, 2004]

Subpart C—Psychiatric Evaluation and Treatment

SOURCE: 76 FR 40231, July 8, 2011, unless otherwise noted.

§549.40 Purpose and scope.

(a) This subpart describes procedures for voluntary and involuntary psychiatric evaluation, hospitalization, care, and treatment, in a suitable facility, for persons in Bureau of Prisons (Bureau) custody. These procedures are authorized by 18 U.S.C. Chapter 313 and 18 U.S.C. 4042.

(b) This subpart applies to inmates in Bureau custody, as defined in 28 CFR part 500.

§549.41 Hospitalization in a suitable facility.

As used in 18 U.S.C. Chapter 313 and this subpart, "hospitalization in a suitable facility" includes the Bureau's designation of inmates to medical referral centers or correctional institutions that provide the required care or treatment.

§549.42 Use of psychiatric medications.

Psychiatric medications will be used only for treatment of diagnosable mental illnesses and disorders, and their symptoms, for which such medication is accepted treatment. Psychiatric medication will be administered only after following the applicable procedures in this subpart.

§549.43 Transfer for psychiatric or psychological examination.

The Bureau may transfer an inmate to a suitable facility for psychiatric or psychological examination to determine whether hospitalization in a suitable facility for psychiatric care or treatment is needed.

§549.44 Voluntary hospitalization in a suitable facility for psychiatric care or treatment, and voluntary administration of psychiatric medication.

(a) *Hospitalization.* An inmate may be hospitalized in a suitable facility for psychiatric care or treatment after providing informed and voluntary consent when, in the professional medical judgment of qualified health services staff, such care or treatment is required and prescribed.

(b) *Psychiatric medication.* An inmate may also provide informed and voluntary consent to the administration of psychiatric medication that complies with the requirements of §549.42 of this subpart.

(c) *Voluntary consent.* An inmate's ability to provide informed and voluntary consent for both hospitalization in a suitable facility for psychiatric care or treatment, and administration of psychiatric medications, will be assessed by qualified health services staff and documented in the inmate's medical record. Additionally, the inmate must sign a consent form to accept hospitalization in a suitable facility for psychiatric care or treatment and the administration of psychiatric medications. These forms will be maintained in the inmate's medical record.

§549.45 Involuntary hospitalization in a suitable facility for psychiatric care or treatment.

(a) *Hospitalization of inmates pursuant to 18 U.S.C. Chapter 313.* A court determination is necessary for involuntary hospitalization or commitment of inmates pursuant to 18 U.S.C. Chapter 313, who are in need of psychiatric care or treatment, but are unwilling or unable to voluntarily consent.

(b) *Hospitalization of inmates not subject to hospitalization pursuant to 18 U.S.C. chapter 313.* Pursuant to 18

U.S.C. 4042, the Bureau is authorized to provide for the safekeeping, care, and subsistence, of all persons charged with offenses against the United States, or held as witnesses or otherwise. Accordingly, if an examiner determines pursuant to §549.43 of this subpart that an inmate not subject to hospitalization pursuant to 18 U.S.C. chapter 313 should be hospitalized for psychiatric care or treatment, and the inmate is unwilling or unable to consent, the Bureau will provide the inmate with an administrative hearing to determine whether hospitalization for psychiatric care or treatment is warranted. The hearing will provide the following procedural safeguards:

(1) The inmate will not be involuntarily administered psychiatric medication before the hearing except in the case of psychiatric emergencies, as defined in §549.46(b)(1).

(2) The inmate must be provided 24-hours advance written notice of the date, time, place, and purpose, of the hearing, including an explanation of the reasons for the proposal to hospitalize the inmate for psychiatric care or treatment.

(3) The inmate must be informed of the right to appear at the hearing, to present evidence, to have a staff representative, to request witnesses, and to request that witnesses be questioned by the staff representative or by the person conducting the hearing. If the inmate does not request a staff representative, or requests a staff representative with insufficient experience or education, or one who is not reasonably available, the institution mental health division administrator must appoint a qualified staff representative.

(4) The hearing is to be conducted by a psychiatrist other than the attending psychiatrist, and who is not currently involved in the diagnosis or treatment of the inmate.

(5) Witnesses should be called if they are reasonably available and have information relevant to the inmate's mental condition or need for hospitalization. Witnesses who will provide only repetitive information need not be called.

(6) A treating/evaluating psychiatrist/clinician, who has reviewed the case, must be present at the hearing and must present clinical data and background information relative to the inmate's need for hospitalization. Members of the treating/evaluating team may also be called as witnesses at the hearing to provide relevant information.

(7) The psychiatrist conducting the hearing must determine whether involuntary hospitalization is necessary because the inmate is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(8) The psychiatrist must prepare a written report regarding the initial decision. The inmate must be promptly provided a copy of the initial decision report, and informed that he/she may appeal it to the institution's mental health division administrator. The inmate's appeal, which may be handwritten, must be submitted within 24 hours after receipt of the hearing officer's report. Upon request of the inmate, the staff representative will assist the inmate in preparing and submitting the appeal.

(9) If the inmate appeals the initial decision, hospitalization must not occur before the administrator issues a decision on the appeal. The inmate's appeal will ordinarily be reviewed by the administrator or his designee within 24 hours of its submission. The administrator will review the initial decision and ensure that the inmate received all necessary procedural protections, and that the justification for hospitalization is appropriate.

(c) *Psychiatric medication.* Following an inmate's involuntary hospitalization for psychiatric care or treatment as provided in this section, psychiatric medication may be involuntarily administered only after following the administrative procedures provided in §549.46 of this subpart.

§549.46 Procedures for involuntary administration of psychiatric medication.

Except as provided in paragraph (b) of this section, the Bureau will follow the administrative procedures of paragraph (a) of this section before involuntarily administering psychiatric medication to any inmate.

(a) *Procedures.* When an inmate is unwilling or unable to provide voluntary written informed consent for recommended psychiatric medication, the inmate will be scheduled for an administrative hearing. The hearing will provide the following procedural safeguards:

(1) Unless an exception exists as provided in paragraph (b) of this section, the inmate will not be involuntarily administered psychiatric medication before the hearing.

(2) The inmate must be provided 24-hours advance written notice of the date, time, place, and purpose, of the hearing, including an explanation of the reasons for the psychiatric medication proposal.

(3) The inmate must be informed of the right to appear at the hearing, to present evidence, to have a staff representative, to request witnesses, and to request that witnesses be questioned by the staff representative or by the person conducting the hearing. If the inmate does not request a staff representative, or requests a staff representative with insufficient experience or education, or one who is not reasonably available, the institution mental health division administrator must appoint a qualified staff representative.

(4) The hearing is to be conducted by a psychiatrist other than the attending psychiatrist, and who is not currently involved in the diagnosis or treatment of the inmate.

(5) Witnesses should be called if they are reasonably available and have information relevant to the inmate's mental condition or need for psychiatric medication. Witnesses who will provide only repetitive information need not be called.

(6) A treating/evaluating psychiatrist/clinician, who has reviewed the case, must be present at the hearing and must present clinical data and background information relative to the inmate's need for psychiatric medication. Members of the treating/evaluating team may also be called as witnesses at the hearing to provide relevant information.

(7) The psychiatrist conducting the hearing must determine whether involuntary administration of psychiatric medication is necessary because, as a result of the mental illness or disorder, the inmate is dangerous to self or others, poses a serious threat of damage to property affecting the security or orderly running of the institution, or is gravely disabled (manifested by extreme deterioration in personal functioning).

(8) The psychiatrist must prepare a written report regarding the initial decision. The inmate must be promptly provided a copy of the initial decision report, and informed that he/she may appeal it to the institution's mental health division administrator. The inmate's appeal, which may be handwritten, must be submitted within 24 hours after receipt of the hearing officer's report. Upon request of the inmate, the staff representative will assist the inmate in preparing and submitting the appeal.

(9) If the inmate appeals the initial decision, psychiatric medication must not be administered before the administrator issues a decision on the appeal, unless an exception exists as provided in paragraph (b) of this section. The inmate's appeal will ordinarily be reviewed by the administrator or his designee within 24 hours of its submission. The administrator will review the initial decision and ensure that the inmate received all necessary procedural protections, and that the justification for administering psychiatric medication is appropriate.

(10) If an inmate was afforded an administrative hearing which resulted in the involuntary administration of psychiatric medication, and the inmate subsequently consented to the administration of such medication, and then later revokes his consent, a follow-up hearing will be held before resuming the involuntary administration of psychiatric medication. All such follow-up hearings will fully comply with the procedures outlined in paragraphs (a)(1) through (10) of this section.

(b) *Exceptions.* The Bureau may involuntarily administer psychiatric medication to inmates in the following circumstances without following the procedures outlined in paragraph (a) of this section:

(1) *Psychiatric emergencies.*

(i) During a psychiatric emergency, psychiatric medication may be administered only when the medication constitutes an appropriate treatment for the mental illness or disorder and its symptoms, and alternatives (*e.g.*, seclusion or physical restraint) are not available or indicated, or would not be effective. If psychiatric medication is still recommended after the psychiatric emergency, and the emergency criteria no longer exist, it may only be administered after following the procedures in §§549.44 or 549.46 of this subpart.

(ii) For purposes of this subpart, a psychiatric emergency exists when a person suffering from a mental illness or disorder creates an immediate threat of:

(A) Bodily harm to self or others;

(B) Serious destruction of property affecting the security or orderly running of the institution; or

(C) Extreme deterioration in personal functioning secondary to the mental illness or disorder.

(2) *Court orders for the purpose of restoring competency to stand trial.* Absent a psychiatric emergency as defined above, §549.46(a) of this subpart does not apply to the involuntary administration of psychiatric medication for the sole purpose of restoring a person's competency to stand trial. Only a Federal court of competent jurisdiction may order the involuntary administration of psychiatric medication for the sole purpose of restoring a person's competency to stand trial.

Subpart D—Plastic Surgery

SOURCE: 61 FR 13322, Mar. 26, 1996, unless otherwise noted.

§549.50 Purpose and scope.

The Bureau of Prisons does not ordinarily perform plastic surgery on inmates to correct preexisting disfigurements (including tattoos) on any part of the body. In circumstances where plastic surgery is a component of a presently medically necessary standard of treatment (for example, part of the treatment for facial lacerations or for mastectomies due to cancer) or it is necessary for the good order and security of the institution, the necessary surgery may be performed.

§549.51 Approval procedures.

The Clinical Director shall consider individually any request from an inmate or a BOP medical consultant.

(a) In circumstances where plastic surgery is a component of the presently medically necessary standard of treatment, the Clinical Director shall forward the surgery request to the Office of Medical Designations and Transportation for approval.

(b) If the Clinical Director recommends plastic surgery for the good order and security of the institution, the request for plastic surgery authorization will be forwarded to the Warden for initial approval. The Warden will forward the request through the Regional Director to the Medical Director. The Medical Director shall have the final authority to approve or deny this type of plastic surgery request.

(c) If the Clinical Director is unable to determine whether the plastic surgery qualifies as a component of presently medically necessary standard of treatment, the Clinical Director may forward the request to the Medical Director for a final determination in accordance with the provisions of paragraph (b) of this section.

§549.52 Informed consent.

Approved plastic surgery procedures may not be performed without the informed consent of the inmate involved.

Subpart E—Hunger Strikes, Inmate

SOURCE: 45 FR 23365, Apr. 4, 1980, unless otherwise noted.

§549.60 Purpose and scope.

The Bureau of Prisons provides guidelines for the medical and administrative management of inmates who engage in hunger strikes. It is the responsibility of the Bureau of Prisons to monitor the health and welfare of individual inmates, and to ensure that procedures are pursued to preserve life.

[45 FR 23365, Apr. 4, 1980, as amended at 59 FR 31883, June 20, 1994]

§549.61 Definition.

As defined in this rule, an inmate is on a *hunger strike:*

(a) When he or she communicates that fact to staff and is observed by staff to be refraining from eating for a period of time, ordinarily in excess of 72 hours; or

(b) When staff observe the inmate to be refraining from eating for a period in excess of 72 hours. When staff consider it prudent to do so, a referral for medical evaluation may be made without waiting 72 hours.

§549.62 Initial referral.

(a) Staff shall refer an inmate who is observed to be on a hunger strike to medical or mental health staff for evaluation and, when appropriate, for treatment.

(b) Medical staff ordinarily shall place the inmate in a medically appropriate locked room for close monitoring.

[59 FR 31883, June 20, 1994]

§549.63 Initial medical evaluation and management.

(a) Medical staff shall ordinarily perform the following procedures upon initial referral of an inmate on a hunger strike:

(1) Measure and record height and weight;

(2) Take and record vital signs;

(3) Urinalysis;

(4) Psychological and/or psychiatric evaluation;

(5) General medical evaluation;

(6) Radiographs as clinically indicated;

(7) Laboratory studies as clinically indicated.

(b) Medical staff shall take and record weight and vital signs at least once every 24 hours while the inmate is on a hunger strike. Other procedures identified in paragraph (a) of this section shall be repeated as medically indicated.

(c) When valid medical reasons exist, the physician may modify, discontinue, or expand any of the medical procedures described in paragraphs (a) and (b) of this section.

(d) When medical staff consider it medically mandatory, an inmate on a hunger strike will be transferred to a Medical Referral Center or to another Bureau institution considered medically appropriate, or to a community hospital.

[45 FR 23365, Apr. 4, 1980, as amended at 59 FR 31883, June 20, 1994]

§549.64 Food/liquid intake/output.

(a) Staff shall prepare and deliver to the inmate's room three meals per day or as otherwise authorized by the physician.

(b) Staff shall provide the inmate an adequate supply of drinking water. Other beverages shall also be offered.

(c) Staff shall remove any commissary food items and private food supplies of the inmate while the inmate is on a hunger strike. An inmate may not make commissary food purchases while under hunger strike management.

[45 FR 23365, Apr. 4, 1980, as amended at 59 FR 31883, June 20, 1994]

§549.65 Refusal to accept treatment.

(a) When, as a result of inadequate intake or abnormal output, a physician determines that the inmate's life or health will be threatened if treatment is not initiated immediately, the physician shall give consideration to forced medical treatment of the inmate.

(b) Prior to medical treatment being administered against the inmate's will, staff shall make reasonable efforts to convince the inmate to voluntarily accept treatment. Medical risks faced by the inmate if treatment is not accepted shall also be explained to the inmate. Staff shall document their treatment efforts in the medical record of the inmate.

(c) When, after reasonable efforts, or in an emergency preventing such efforts, a medical necessity for immediate treatment of a life or health threatening situation exists, the physician may order that treatment be administered without the consent of the inmate. Staff shall document their treatment efforts in the medical record of the inmate.

(d) Staff shall continue clinical and laboratory monitoring as necessary until the inmate's life or permanent health is no longer threatened.

(e) Staff shall continue medical, psychiatric and/or psychological follow-up as long as necessary.

[45 FR 23365, Apr. 4, 1980, as amended at 59 FR 31883, June 20, 1994]

§549.66 Release from treatment.

Only the physician may order that an inmate be released from hunger strike evaluation and treatment. This order shall be documented in the medical record of the inmate.

[59 FR 31883, June 20, 1994]

Subpart F—Fees for Health Care Services

SOURCE: 70 FR 43050, July 26, 2005, unless otherwise noted.

§549.70 Purpose and scope.

(a) The Bureau of Prisons (Bureau) may, under certain circumstances, charge you, an inmate under our care and custody, a fee for providing you with health care services.

(b) Generally, if you are an inmate as described in §549.71, you must pay a fee for health care services of $2.00 per health care visit if you:

(1) Receive health care services in connection with a health care visit that you requested, (except for services described in §549.72); or

(2) Are found responsible through the Disciplinary Hearing Process to have injured an inmate who, as a result of the injury, requires a health care visit.

§549.71 Inmates affected.

This subpart applies to:

(a) Any individual incarcerated in an institution under the Bureau's jurisdiction; or

(b) Any other individual, as designated by the Director, who has been charged with or convicted of an offense against the United States.

§549.72 Services provided without fees.

We will not charge a fee for:

(a) Health care services based on staff referrals;

(b) Staff-approved follow-up treatment for a chronic condition;

(c) Preventive health care services;

(d) Emergency services;

(e) Prenatal care;

(f) Diagnosis or treatment of chronic infectious diseases;

(g) Mental health care; or

(h) Substance abuse treatment.

§549.73 Appealing the fee.

You may seek review of issues related to health service fees through the Bureau's Administrative Remedy Program (see 28 CFR part 542).

§549.74 Inmates without funds.

You will not be charged a health care service fee if you are considered indigent and unable to pay the health care service fee. The Warden may establish procedures to prevent abuse of this provision.

Subpart G—Authority To Conduct Autopsies

FOR SEXUAL ABUSE
FACT SHEET
SERVICE PROVIDERS

JUST DETENTION INTERNATIONAL

RAPE IS NOT PART OF THE PENALTY

MARCH 2013

Two transgender women inmates in a men's jail.
© Axel Koester/Corbis

"My rape crisis counselor was the first person to see me as a woman, apart from the people who wanted to abuse me."

— Michelle, a transgender survivor of sexual abuse behind bars

Targets for Abuse: Transgender Inmates and Prisoner Rape

While anyone can be sexually assaulted in detention, transgender inmates are exceptionally vulnerable to this form of violence. One study of California prisoners found that 59 percent of transgender women housed in men's prisons had been sexually abused while incarcerated, as compared to 4 percent of non-transgender inmates in men's prisons.[1] Making matters worse, transgender inmates often face prejudice and discrimination in the aftermath of an assault.

The Basics about the Transgender Community

People who are transgender have a gender identity that is different from their assigned sex at birth. Everyone has a gender identity – a sense of being male or female (and for some, neither male nor female). A transgender woman is someone who was identified as male at birth but whose gender identity is female and lives, or desires to live, her life as a woman. A transgender man is someone who was identified as female at birth but whose gender identity is male and lives, or desires to live, his life as a man. Gender identity and sexual orientation are not the same thing – a transgender person may identify as lesbian, gay, bisexual, or heterosexual.

The federal government and almost every state recognize transgender people's right to change their name and to have identification documents with the gender marker that matches their gender identity.[2] Despite that right, grave misconceptions about what it means to be transgender are common, in detention facilities and in society as a whole. Some think that transgender people's "true" sex or gender is the one they were assigned at birth. Others believe that transgender people only become "real men" or "real women" after they have had surgery, failing to recognize that each person transitions in their own way and that someone's gender identity always is that person's "true" gender.

Most transgender people face discrimination. Many are rejected by their families, denied housing, and verbally abused simply for being themselves. Transgender people also have a very hard time finding a job; employment discrimination forces many to become involved in the street economy and in survival crime.[3] Widespread bias and ignorance among law enforcement and other officials mean that transgender people are disproportionately subjected to arrest and, in turn, imprisonment.[4]

Transgender People in Detention

In most cases, corrections agencies make gender classifications based on genitalia and not a person's gender identity. As such, transgender women are held in men's facilities and called "he"; transgender men are held in women's facilities and called "she."[5]

Transgender inmates face unique challenges and extreme danger, fuelled by hostile and ill-informed notions among officials and prison-

ers alike. In many cases, the gender identity of transgender inmates is simply ignored and they are denied gender-appropriate clothing and hygiene products. Because transgender women are typically housed in men's facilities, they often have to shower and change their clothes in front of male inmates and staff. Once targeted for abuse, the majority of transgender survivors are subjected to repeated sexual assaults.[6]

Transgender inmates are frequently unable to get the health care they need, especially care related to their gender transition, resulting in significant medical and emotional problems. Many are also cut off from the outside world, as visitation policies in prisons and jails typically do not recognize transgender inmates' chosen families as relatives. For those who already have been rejected by their birth families, such policies can lead to an acute sense of isolation.

The health and wellbeing of transgender inmates is further affected by relentless verbal abuse by staff and other inmates. Sexual abuse thrives in prisons and jails in which staff allow, or participate in, the degradation of inmates on the basis of their gender identity. Widespread use of epithets creates a hostile environment for transgender people and anyone who is gender non-conforming. Because of their masculine appearance, transgender men (and gender non-conforming women) held in women's facilities are often incorrectly identified as safety threats or aggressors. When transgender inmates report sexual violence they are frequently blamed for the abuse by staff members, who may feel that transgender inmates deserve to be victimized, that they "are asking for it."

In many facilities, officials have a standing policy to house transgender inmates in solitary confinement, either as soon as they enter a facility or after they have been sexually assaulted. Sometimes officials make such housing decisions in an attempt to protect transgender people; other times the isolation itself is used as a form of abuse. Regardless of the intent, solitary confinement causes significant emotional distress. Inmates who are locked down in a tiny cell for 23 hours a day are cut off from vital services and programs. Not surprisingly, many transgender rape survivors suffer in silence, afraid that speaking out will result in isolation.

Because of the unique challenges facing transgender inmates, and their extreme vulnerability to sexual violence, rape crisis service providers play a particularly important role in promoting their health. As Michelle described in the opening quote, counselors are sometimes the only people who will treat transgender detainees with respect, recognize their gender identity as their true gender, and care about their safety.[7]

Tips for Advocates

- Seek out an appropriate advocacy organization and request training for your staff. The membership list of the National Coalition of Anti-Violence Projects is a good place to start for regional resources: www.ncavp.org/AVPs/default.aspx.
- Remember that transgender detainees have likely faced significant discrimination, harassment, and violence before they contact you, and that they may fear the same reaction from your agency.
- Listen carefully and use the same language as the client for pronouns, relationships, and names. The words that transgender people use to describe themselves vary, but you should use their language. If in doubt, be comfortable asking simple, clarifying questions – transgender people, as other clients, will appreciate your candor.
- Do not let a mistake in your language stop you from helping the survivor. Apologize and continue to offer help.
- Respect the privacy of transgender people. Only ask questions about his or her body and medical history if it is necessary for your crisis counseling.

Endnotes

[1] Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Irvine: Center for Evidence-Based Corrections, University of California, 2007), 3.

[2] Jami Kathleen Taylor, "Transgender Identities and Public Policy in the United States: The Relevance for Public Administration," *Administration & Society* vol. 39 (2007): 837-8.

[3] In a recent survey, the percentage of transgender people who were unemployed was double that of the national average. See Jaime M. Grant et al., *Injustice at Every Turn A Report of the National: Transgender Discrimination Survey* (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), 55.

[4] Ibid., 158.

[5] More information about transgender people can be found in JDI's forthcoming *Advocate's Manual* (due in 2013).

[6] For first-person testimony from transgender survivors, visit JDI's website: www.justdetention.org; such accounts of abuse can also be found in a joint report by JDI and the ACLU National Prison Project, *Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners* (Los Angeles: 2005), 6.

[7] For more information on new protections for transgender detainees required by the Prison Rape Elimination Act, see JDI's factsheet, *The Prison Rape Elimination Act (PREA) Standards: An Overview for Community Service Providers*, 2013.

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