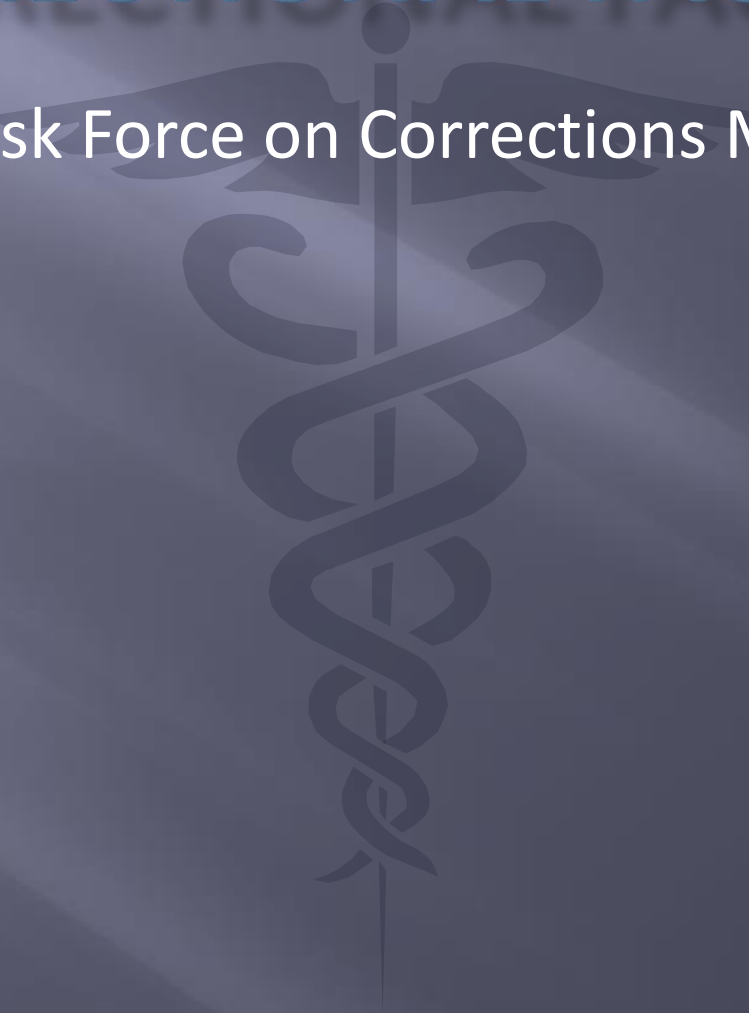


LEGAL PRINCIPLES FOR MEDICAL CARE IN OREGON CORRECTIONAL FACILITIES

House Bill 3035 (2022) Task Force on Corrections Medical Care

April 13, 2022 Meeting



Presentation Roadmap

- ▣ This presentation provides legal background concerning two areas of potential interest for the Workgroup:
 - An adult in custody's statutory and constitutional rights to medical care in a Department of Corrections (DOC) correctional facilities.
 - An overview of DOC's grievance system as it concerns patient complaints about access to medical care.

Overview on Right to Medical Care for Adults in Custody



Right to Medical Care for Adults in Custody

■ Statutory Right to Medical Care

- ORS 423.020(1)(d): DOC shall “[p]rovide adequate food, clothing, health and medical care, sanitation and security for persons confined[.]”
 - ORS 421.085(2): an adult in custody may not be subject to medical, psychiatric, or psychological experimentation or research.
- ORS 677.095: physicians practicing medicine has a duty “to use that degree of care, skill and diligence that is used by ordinarily careful physicians in the same or similar circumstances in the community of the physician or a similar community”
- ORS 423.020(4): DOC may assess a “reasonable health care fee for any health care services, medications and equipment” if DOC:
 - “Provides necessary medical care regardless of the person’s ability to pay,”
 - “Provides equal treatment to all confined persons regardless of a person’s ability to pay,”
 - Provides notice regarding the fees and services provided, and
 - Provides a grievance system to challenge fee deductions.

Right to Medical Care for Adults in Custody

- ▣ Constitutional Right to Medical Care
 - Under federal law, “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ * * * proscribed by the Eighth Amendment.” *Estelle v. Gamble*, 429 US 97, 104 (1976).
 - ▣ The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
 - ▣ Components of an 8th Amendment Claim: (1) objective element (“serious medical need”) + (2) subjective element (deliberate indifference)
 - Oregon state law: Article I, section 16, of the Oregon Constitution, which provides that “cruel and unusual punishments shall not be inflicted,” follows the same standard. *Billings v. Gates*, 323 Or 167, 180 (1996).

Right to Medical Care for Adults in Custody

Constitutional Right to Medical Care (Continued)

- ▣ What is a “serious medical need” (the objective element)?
 - The term has been described in the Ninth Circuit as including: “failure to treat a prisoner's condition [that] could result in further significant injury or the unnecessary and wanton infliction of pain; ... [t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.” *McGuckin v. Smith*, 974 F2d 1050, 1059–60 (9th Cir 1992)
 - The term may apply to mental health care and dental care.
- ▣ What may not be a “serious medical need?”
 - Routine discomfort associated with incarceration or separation from family “routine discomfort” that may result merely from incarceration and the concomitant separation from one's family. *Doty v. Cty. of Lassen*, 37 F3d 540, 546 (9th Cir 1994).
 - Conditions that do not cause discomfort or may not be effectively treated.

Right to Medical Care for Adults in Custody

Constitutional Right to Medical Care (Continued)

- ▣ What is “deliberate indifference” (the subjective element)?
 - ▣ “A complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend “evolving standards of decency” in violation of the Eighth Amendment.” *Estelle*, 429 US 97, 105–06 (1976)
 - An isolated failure to respond to a non-serious medical need is not “deliberate indifference.” *Doty v. City of Lassen*, 37 F3d 540, 547 (9th Cir 1994).
 - A failure to meet the “community standard of care” is not deliberate indifference. *Estelle*, 429 US at 105-06, nor is negligence. *Sanchez v. Vild*, 891 F2d 240, 242 (9th Cir 1989).

Prioritization of Medical Care in DOC Facilities

- “Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations.” *Peralta v. Dillard*, 744 F3d 1076, 1083 (9th Cir. 2014).
- DOC’s provision of medical care is guided by the National Commission on Correctional Health Care (NCCHC) standards for patient care: *Standards for Health Services in Prisons*



Prioritization of Medical Care in DOC Facilities

- ▣ To protect incarcerated patients' constitutional rights to medical care, DOC prioritizes care on individual need in four levels (OAR 291-124-0041):
 1. Level 1 Care (medically mandatory): care that is essential to life and health, without which rapid deterioration may be expected and where intervention makes a very significant difference or has a very high cost-effectiveness
 2. Level 2 Care (medically necessary): care without which an AIC could not be maintained without significant risk of serious deterioration of the condition or significant reduction in the chance of possible repair, or without significant pain or discomfort
 3. Level 3 Care (medically acceptable): care for non-fatal conditions that may improve the quality of life
 4. Level 4 Care (of limited medical value): care that may be valuable to an individual but is significantly less likely to be cost-effective or produce substantial long-term gain

Prioritization of Medical Care in DOC Facilities

- ▣ The level of care is determined by consideration of the following non-exclusive factors under OAR 291-124-0041(8). :
 - The urgency of the care and treatment, and the length of the AIC's remaining sentenced stay.
 - Whether care may be reasonably delayed without causing a significant progression, complication, or deterioration of the condition and would not otherwise be in clear violation of sound medical principles.
 - Any relevant functional disability and the degree of functional improvement to be gained;
 - Medical necessity, or the overall morbidity and mortality of the condition if left untreated;
 - Pre-existing conditions, whether the condition existed prior to the AIC's incarceration and, if treatment was not obtained previously, the reasons for not obtaining earlier treatment;
 - The probability the procedure or therapy will have a successful outcome along with relevant risks;
 - Alternative therapy or procedures that may be appropriate;
 - The AIC's desire for the procedure and the likelihood of the AIC's cooperation in the treatment efforts;
 - Any known risks or benefits relative to those risks;
 - Any known costs or benefits relative to those costs;
 - Pain complaints or pain behaviors; and
 - Any other relevant or pertinent factors.

Prioritization of Medical Care in DOC Facilities

- ▣ Level of Care examples:
 1. Level 1 (medically mandatory): acute potentially fatal problems (appendectomy, myocardial infarction); acute problems where treatment prevents death but doesn't necessarily allow for full recovery (burns, severe head injuries); maternity care
 2. Level 2 (medically necessary): treatment of chronic conditions where treatment improves life span and quality of life; immunization; comfort care; palliative care; proven preventive care; treatment that causes a return to a previous state of health (fillings for cavities, infection treatment)
 3. Level 3 (medically acceptable): individualized determination
 4. Level 4 care (of limited medical value): *e.g.*, tattoo removal, common cold treatment
- ▣ DOC may make exceptions to the four levels of care based on an individual's circumstances. OAR 291-124-0041(8)
- ▣ Individual cases are subject to clinical review by a "Therapeutic Levels of Care" (TLC) committee. OAR 291-124-0041(9).

Prioritization of Medical Care in DOC Facilities

- ▣ Other DOC rules that may affect prioritization:
 - Health Care and Treatment Rule, OAR 291-124-0041.
 - Dental Care and Treatment Rule, OAR 291-124-0042
 - Health screening during the intake and transfer process, OAR 291-124-0030.
 - Medication-assisted treatment (MAT) for opioid use disorder, OAR 291-124-0042(12).
 - Procedures for transfers, and community releases, OAR 291-124-0060.
 - Pharmaceutical management, OAR 291-124-0070.
 - Elective care, eyeglasses, hearing aids, and mechanical aids. OAR 291-124-0085.
 - Informed consent. OAR 291-124-0080.

Prioritization of Medical Care in DOC Facilities

- ▣ Legal considerations when developing prioritized lists of medical care.
 - Prioritization for budgetary reasons must yield to an AIC's constitutional right to medical care under the Eighth Amendment
 - ▣ Consider Statement of Intent 4 of HERC's Prioritization list (Page SI-2):

STATEMENT OF INTENT 4: ROLE OF THE PRIORITIZED LIST IN COVERAGE (CONT'D)

The Commission recognizes that a condition and treatment pairing above the funding line does not necessarily mean that the service will be covered by the Oregon Health Plan (OHP). There may be other restrictions that apply, such as the service not being medically necessary or appropriate for an individual member. Likewise, the absence of a treatment and condition pairing above the funding line is not meant to be an absolute exclusion from coverage. Coverage may still be authorized under applicable federal and state laws, and Oregon's Medicaid State Plan and Waiver for an individual member. For example, OAR 410-141-3820 (Oregon

<https://www.oregon.gov/oha/HPA/DSI-HERC/PrioritizedList/1-1-2022%20Prioritized%20List%20of%20Health%20Services.pdf>

Grievances About Medical Care Overview



Grievances About Medical Care

- ▣ Incarcerated persons have a constitutional right to raise complaints about medical care, under the Eighth Amendment, and the First Amendment, which applies to Oregon under the Due Process Clause of the Fourteenth Amendment.
 - First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
 - Oregon constitutional rights are found in Article I, section 16 (cruel and unusual punishment prohibited), and Article I, section 8 (freedom of speech).

Grievances About Medical Care

- ▣ DOC's grievance system performs several functions concerning medical care:
 - Provides a formal way for patients to raise disputes about their medical care
 - ▣ Grievances do not postpone or stop medical care
 - Provides review by someone other than a patient's direct care providers
 - Provides protection against retaliation for complaints about medical care
 - Often a prerequisite step for patients to be able to pursue further redress in federal courts—to satisfy the “exhaustion of available administrative remedies” under the Prison Litigation Reform Act.

Legal Remedies for Medical Care Disputes

- ▣ Adults in custody may, depending on the circumstances, seek relief against DOC in state and federal courts in several types of proceedings:
 - Civil rights actions under 42 USC § 1983, in state or federal court
 - Habeas corpus lawsuits in state or federal court
 - Tort claims (negligence actions) in state or federal court
 - Declaratory judgment actions (with or without injunctive relief)
 - Mandamus proceedings in state court
 - Other proceedings (*e.g.*, rule challenges)

Closing Remarks / Questions

