

ABA CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS
Black Letter as passed by the House of Delegates, February 2010
Commentary as approved by Standards Committee, June 2011

TABLE OF CONTENTS

INTRODUCTION	4
Notes on Usage, Organization, and Related Standards and ABA Resolutions	7
 PART I: GENERAL PRINCIPLES	11
Standard 23-1.0 Definitions	11
Standard 23-1.1 General principles governing imprisonment	14
Standard 23-1.2 Treatment of prisoners	17
 PART II: INTAKE AND CLASSIFICATION	24
Standard 23-2.1 Intake screening	27
Standard 23-2.2 Classification system	29
Standard 23-2.3 Classification procedures	32
Standard 23-2.4 Special classification issues	33
Standard 23-2.5 Health care assessment	35
Standard 23-2.6 Rationales for segregated housing	36
Standard 23-2.7 Rationales for long-term segregated housing	37
Standard 23-2.8 Segregated housing and mental health	40
Standard 23-2.9 Procedures for placement and retention in long-term segregated housing	42
 PART III: CONDITIONS OF CONFINEMENT	45
Standard 23-3.1 Physical plant and environmental conditions	45
Standard 23-3.2 Conditions for special types of prisoners	49
Standard 23-3.3 Housing areas	55
Standard 23-3.4 Healthful food	56
Standard 23-3.5 Provision of necessities	59
Standard 23-3.6 Recreation and out-of-cell time	62
Standard 23-3.7 Restrictions relating to programming and privileges	64
Standard 23-3.8 Segregated housing	66
Standard 23-3.9 Conditions during lockdown	69
 PART IV: RULES OF CONDUCT AND DISCIPLINE	71
Standard 23-4.1 Rules of conduct and informational handbook	71
Standard 23-4.2 Disciplinary hearing procedures	73
 PART V: PERSONAL SECURITY	80
Standard 23-5.1 Personal security and protection from harm	80
Standard 23-5.2 Prevention and investigation of violence	81
Standard 23-5.3 Sexual abuse	83
Standard 23-5.4 Self-harm and suicide prevention	86
Standard 23-5.5 Protection of vulnerable prisoners	89
Standard 23-5.6 Use of force	91
Standard 23-5.7 Use of deadly force	94
Standard 23-5.8 Use of chemical agents, electronic weaponry, and canines	95

Standard 23-5.9	Use of restraint mechanisms and techniques	98
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PART VI: HEALTH CARE 102

Standard 23-6.1	General principles governing health care	104
Standard 23-6.2	Response to prisoner health care needs	107
Standard 23-6.3	Control and distribution of prescription drugs.....	108
Standard 23-6.4	Qualified health care staff.....	109
Standard 23-6.5	Continuity of care	111
Standard 23-6.6	Adequate facilities, equipment, and resources.....	112
Standard 23-6.7	Quality improvement	114
Standard 23-6.8	Health care records and confidentiality	115
Standard 23-6.9	Pregnant prisoners and new mothers	118
Standard 23-6.10	Impairment-related aids	121
Standard 23-6.11	Services for prisoners with mental disabilities	122
Standard 23-6.12	Prisoners with chronic or communicable diseases.....	125
Standard 23-6.13	Prisoners with gender identity disorder	127
Standard 23-6.14	Voluntary and informed consent to treatment	129
Standard 23-6.15	Involuntary mental health treatment and transfer	132

PART VII: PERSONAL DIGNITY 137

Standard 23-7.1	Respect for prisoners	137
Standard 23-7.2	Prisoners with disabilities and other special needs	138
Standard 23-7.3	Religious freedom.....	141
Standard 23-7.4	Prisoner organizations.....	144
Standard 23-7.5	Communication and expression.....	145
Standard 23-7.6	Personal appearance.....	147
Standard 23-7.7	Records and confidentiality	147
Standard 23-7.8	Searches of facilities	150
Standard 23-7.9	Searches of prisoners' bodies	151
Standard 23-7.10	Cross-gender supervision.....	159
Standard 23-7.11	Prisoners as subjects of behavioral or biomedical research.....	161

PART VIII: REHABILITATION AND REINTEGRATION 165

Standard 23-8.1	Location of facilities	165
Standard 23-8.2	Rehabilitative programs.....	166
Standard 23-8.3	Restorative justice.....	171
Standard 23-8.4	Work programs	171
Standard 23-8.5	Visiting	175
Standard 23-8.6	Written communications.....	179
Standard 23-8.7	Access to telephones.....	182
Standard 23-8.8	Fees and financial obligations.....	184
Standard 23-8.9	Transition to the community.....	186

PART IX: GRIEVANCES AND ACCESS TO COURTS..... 192

Standard 23-9.1	Grievance procedures	195
Standard 23-9.2	Access to the judicial process	201
Standard 23-9.3	Judicial review of prisoner complaints	203
Standard 23-9.4	Access to legal and consular services	208
Standard 23-9.5	Access to legal materials and information	212

PART X: ADMINISTRATION AND STAFFING	216
Standard 23-10.1 Professionalism.....	216
Standard 23-10.2 Personnel policy and practice	217
Standard 23-10.3 Training.....	219
Standard 23-10.4 Accountability of staff	221
Standard 23-10.5 Privately operated correctional facilities	222
 PART XI: ACCOUNTABILITY AND OVERSIGHT	 229
Standard 23-11.1 Internal accountability	229
Standard 23-11.2 External regulation and investigation	233
Standard 23-11.3 External monitoring and inspection	236
Standard 23-11.4 Legislative oversight and accountability	238
Standard 23-11.5 Media access to correctional facilities and prisoners.....	240

ABA Criminal Justice Standards on the Treatment of Prisoners Black Letter and Commentary

INTRODUCTION

These *Standards on the Treatment of Prisoners*, over five years in the drafting, were approved by the American Bar Association House of Delegates in February 2010. Based on constitutional and statutory law, a variety of relevant correctional policies and professional standards, the deep expertise of the many people who assisted with the drafting, and the extensive contributions and comments of dozens of additional experts and groups, they set out principles and functional parameters to guide the operation of American jails and prisons, in order to help the nation's criminal justice policy-makers, correctional administrators, legislators, judges, and advocates protect prisoner's rights while promoting the safety, humaneness, and effectiveness of our correctional facilities.

These Standards are part of the ABA's multi-set Criminal Justice Standards project.¹ They replace the ABA's 1981 *Criminal Justice Standards on the Legal Status of Prisoners*, which were supplemented by two additions in 1985 but not subsequently amended.² In the 1980s, the now-replaced *Legal Status of Prisoners* Standards proved a useful source of insight and guidance for courts and correctional administrators, and were frequently cited and used. But this revision is long overdue: enormous changes have affected American corrections since 1981, and even in the 1990s, the 1981 standards had grown sadly out of date. It is this project's goal to provide up-to-date guidelines addressing current conditions and challenges and helping to shape the fair and humane development of the law and operation of the criminal justice system. There are eighty-three Standards in this volume, covering a wide range of issues affecting the 2.4 million people housed on any given day in America's jails and prisons.

The most consequential change since 1981 is the astronomical growth in incarceration in the United States. In 1981, 557,000 prisoners were held in American jails and prisons; that number has since skyrocketed to its current level, two-thirds in prisons and one-third in jails.³ Justice Anthony Kennedy's address to the ABA in 2003 highlighted the "remarkable scale" of incarceration in the United States, and the consequent "need to improve our corrections system" by addressing "the inadequacies—and the injustices—in our prison and correctional systems."⁴ The population explosion has imposed severe

¹ There are currently 23 sets of ABA Criminal Justice Standards, many in their third edition, covering topics from *Discovery and Pretrial Release* to *Sentencing and Collateral Sanctions and Discretionary Disqualification of Convicted Persons*. See http://www.americanbar.org/groups/criminal_justice/policy/standards.html. The *Legal Status of Prisoners Standards* were in volume 23 when they came out in 1981, and that numbering has been preserved in this new (and re-titled) edition.

² See also 1984 *Mental Health Standards*, Part X ("Mentally Ill and Mentally Retarded Prisoners"). In August 2003, Part VIII of the 1981 Standards, on Civil Disabilities of Convicted Persons, was superseded by the new *Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*.

³ William J. Sabol *et al.*, *Prisoners in 2008* (Bureau of Justice Statistics, Dec. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>; Todd D. Minton & William J. Sabol, *Jail Inmates at Midyear 2008—Statistical Tables* (Bureau of Justice Statistics, March 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf>.

⁴ Justice Anthony Kennedy, Speech at the ABA Annual Meeting (Aug. 9, 2003), available at http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf. For the policy document adopted by the ABA in direct response to Justice Kennedy's challenge, see American Bar Ass'n, Justice Kennedy Commission, Report with Recommendations (Aug. 2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

ABA Treatment of Prisoners Standards

Introduction

pressure on incarcerating authorities, as they attempt to cope with more people and longer terms of incarceration. New challenges have appeared and old ones have expanded (among them private prisons, long-term and extreme isolation of prisoners, and the special needs of a variety of prisoners). At the same time, increased scale and generations of experience with modern correctional approaches have produced many examples of expertise and excellence. Social science research has developed significant insights in a large body of highly respected work.

The growing scale of modern American incarceration means, too, that an ever increasing number of our citizens have, at least at some point, been subject to criminal justice supervision. Whatever problems exist now affect more people than ever. On any given day, there are about as many people incarcerated as live in our 35th most populous state, Nevada. And even this record figure understates substantially the human impact of our current correctional system: over the course of a year, about 13 million people spend time behind bars in our nation's jails and prisons.⁵ Our most basic democratic commitments forbid us to write off so many individuals as part of the polity, and accordingly their dignity and humanity must be front and center in our nation's criminal justice policy.

As the landscape has been transformed by time and increased population over the past decades, relevant law has also changed considerably. Statutory and decisional law have in some ways expanded, in others contracted, the scope of legal protection for prisoners. International human rights standards have likewise evolved substantially, and more uniformly in favor of prisoners' rights. New approaches in corrections have elicited new legal standards and rules; new approaches to a variety of legal questions have varied in their application to corrections; and the application of the Eighth Amendment, the "basic concept underlying [which] is nothing less than the dignity of man," has continued to safeguard "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

In light of all these changes since 1981, this new version of the ABA Standards takes a new look at American prisons and jails, and sets out practical guidelines to help those concerned about what happens behind bars. (These Standards apply to all adult correctional and criminal detention facilities, and to all persons confined in such facilities regardless of age or reason for confinement. They do not apply to facilities dedicated entirely to either juvenile or immigration detention.) In large part, the Standards state the law, with sources from the Constitution, federal statutes and regulations, and court decisions developing each. They also rely on other legal sources, such as settlements negotiated between the U.S. Department of Justice and state and local governments under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, as well as non-DOJ consent decrees, as models for implementation of legal norms.

In addition, there are occasions in which the litigation-developed constitutional minima for prisoners' rights and their remediation omit critical issues that are of concern to criminal justice policy-makers and correctional administrators. In particular, many Standards aim at what might be called the infrastructure of constitutional compliance. The Constitution does not, for example, guarantee prisoners trained correctional officers. But Standard 23-10.3 nonetheless addresses training because it is a necessary precondition for compliance with substantive constitutional requirements. Two background points are relevant here. First, even in litigation, some infrastructure is recognized in some circumstances as a constitutional obligation of an incarcerating authority. Supervisory failures—failure to screen, failure to train, failure to supervise, failure to discipline—can all *cause* the violation of prisoners' rights, though they do not *constitute* such a violation. Accordingly, while the Supreme Court has underscored that

⁵ JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH (CHAIRS), CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 11 (2006).

ABA Treatment of Prisoners Standards

Introduction

supervisory liability is the exception rather than the rule, such failures can be a predicate for damages liability and an object of a mandatory injunction.⁶ It is important to note, however, that these Standards go beyond these limited precedents for a second reason: the Standards can appropriately be less deferential to prison administrators than are courts adjudicating constitutional claims, because the Standards offer advice not only to courts—which grant correctional administrators a good deal of deference in order to respect the principle of separation of powers—but to the political branches. As the Supreme Court explained in *Lewis v. Casey*, 518 U.S. 343, 349 (1996):

It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

The Standards role is not to constitute a restatement of the litigated constitutional law of corrections, guided as that law is by this principle of deference. Rather, they have as their very purpose—most prominently in their provisions related to oversight and private prisons, but elsewhere as well—“to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”

It may be helpful to highlight the connection between these and other professional standards. Mindful of the importance of the variety of professional standards that apply to prison and jails (relevant provisions of which are identified in a list that follows each section), what follows below is very largely consonant with such documents, as well as entirely consistent with good professional practice. But these Standards are not mere replication or generalization of American Correctional Association (ACA) and other professional approaches. Indeed, most other professional corrections standards serve a different function than these; as accreditation standards, most other corrections standards are directed entirely at corrections administrators who have limited authority to change certain aspects of their operations. In addition, most professional standards in corrections are written by insiders—correctional officials and those who work in correctional systems in a variety of capacities.⁷ The undeniable expertise of such corrections professionals can be usefully supplemented by the Bar’s institutional commitment to the rule of law in all institutions, to equality, due process, and transparency. And the Bar is uniquely well positioned to take into account the sometimes competing interests of prisoners, administrators, correctional officers, and the

⁶ The Supreme Court has emphasized that when Congress enacted 42 U.S.C. § 1983, the cause of action for most civil rights litigation involving prisons, the statute was not intended to impose vicarious liability on government agencies or supervisors for the unconstitutional conduct of employees. That is, Section 1983 does not implement the ordinary rule of respondeat superior. *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658, 689 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). Nonetheless, the Court has held that an agency’s deficient supervision of staff, such as a failure to train, supports a finding of liability against the agency itself, where a “constitutional wrong has been caused by that failure to train.” *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989). Similarly, supervisors face liability for their “own culpable action or inaction in the training, supervision, or control of . . . subordinates.” *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987); *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990) (finding alleged failures to supervise sufficient to defeat summary judgment in prison suicide case against clinical director, mental health director, and warden). And failure to screen employees can also, under limited circumstances, be actionable under § 1983. See *Bd. of Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 412-13 (1997) (finding liability appropriate where hiring agency neglected to screen an employee who violated plaintiff’s constitutional rights, if the agency “should have concluded that [the employee’s] use of excessive force would be a plainly obvious consequence of the hiring decision”).

⁷ In recognition of the ABA’s contribution and importance to American corrections, the American Correctional Association’s Constitution requires that the ACA’s Commission on Accreditation for Corrections include an ABA representative. See Constitution of the American Correctional Association, Art. V § 1(11), available at <http://www.aca.org/pastpresentfuture/constitution06.pdf>.

ABA Treatment of Prisoners Standards

public. Accordingly, several of the Standards below do impose stricter limits on prison and jail operations than, for example, the ACA accreditation standards require.⁸ The number and scope of such divergences have been minimized, but the few that are here are important, and their rationale is discussed in the commentary below. It bears emphasizing in this regard that professional corrections standards are themselves thoroughly related to law and justice, not just to technocratic correctional expertise. (In illustration, the cover art of the ACA's most recent edition of prison standards depicts a statue of blind Justice holding the scales of justice, with the Constitution and a set of case reporters in the background.⁹) The Bar should, accordingly, remain a full partner in our polity's conversation about prison conditions. On the merits, it is our view that these ABA Standards appropriately balance the institutional interests at stake.

At the same time, the Standards avoid topics more appropriately left to operational experts rather than lawyers. They are directed at establishing the conditions that should exist in confinement facilities. How these conditions come into being is left to the skill and resourcefulness of correctional administrators. There are no doctor-prisoner ratios here, no minimum library collections or the like. It is clear that officials who run jails and prisons are better equipped than lawyer-observers to operationalize legal standards. For example, adequate light is necessary for humane operation of a prison. But translation of this general command into a specific measure of "footcandles" in different settings is beyond the institutional expertise and appropriate role of the Bar. Likewise, general principles guiding correctional health care are here, but the various health-related professional organizations (National Commission on Correctional Health Care, American Public Health Association, and others) set out far more operationalizing detail, all of it useful for correctional administrators.

Notes on Usage, Organization, and Related Standards and ABA Resolutions

A few general notes on Standards usage: First, like the ABA's other criminal justice Standards, this set uses the word "should" to be prescriptive. The Standards constitute the American Bar Association's recommendations, based on law and policy. Because they do not impose their own mandate, they avoid the word "shall."

Second, a number of Standards include time limits. For example, Standard 23-2.3 states that "Initial classification of a prisoner should take place within [48 hours] of the prisoner's detention in a jail and within [30 days] of the prisoner's confinement in a prison." The times are bracketed to indicate that certain facilities may, for particular reasons, use slightly different time limits. For example, a jail with limited reception space may appropriately implement a policy under which initial classification is done more quickly than 48 hours, to enable prisoners to be housed in non-reception areas. Other time limits that are more rigid are not bracketed. See, e.g., Standard 23-5.4 ("At a minimum, prisoners presenting a

⁸ For example, Standard 23-3.6(b) requires all prisoners—whether in jail or prison, and whether in segregated or ordinary housing—to receive a daily opportunity to exercise for an hour in the open air, weather permitting. The American Correctional Association similarly requires accredited jails to provide prisoners at least one hour per day for physical exercise outside the cell, outdoors when weather permits. ACA, JAIL STANDARDS 4-ALDF-5C-01, -03. But for prisons, such a general requirement is only implicit in the ACA's accreditation standards; prisons are required to have sufficient outdoor and covered or enclosed exercise areas "to ensure that each inmate is offered at least one hour of access daily." ACA, PRISON STANDARDS 4-4154. Moreover, the ACA's requirements for prisoners in segregated housing is that they should receive one hour per day out-of-cell exercise time only five days per week, not daily. ACA, PRISON STANDARDS 4-4270; ACA, JAIL STANDARDS 4-ALDF-2A-65.

⁹ ACA, PRISON STANDARDS cover; *see also id.* at xvi (listing as a benefit from the accreditation process "a defense against lawsuits through documentation and the demonstration of a 'good faith' effort to improve conditions of confinement"); William J. Rold, *The Legal Context of Correctional Health Care*, in NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS 137-47 (2003).

ABA Treatment of Prisoners Standards

Notes on Usage, Organization, and Related Standards and ABA Resolutions

serious risk of suicide should be housed within sight of staff and observed by staff, face-to-face, at irregular intervals of no more than 15 minutes.”).

Finally, following each “black-letter” Standard, approved by the ABA House of Delegates, are three additional sections. The first, cross-references, refers the reader to related provisions of this set of Standards (in the online version of this commentary, they are hyperlinks). The second, labeled “related standards and ABA resolutions” provides a guide to other professional standards that bear on the relevant issues, and also other ABA resolutions about them. Two dozen such ABA resolutions are included. The text of these can be found in the Appendix, along with links to background reports that accompanied them to the ABA policymaking House of Delegates where these reports are available on line; these reports contain abundant background and analysis that may be useful to the reader. The third section, commentary, offers some discussion of the choices embodied in the black letter.

The citations to the related standards are abbreviated in these lists because they recur. Full citations and sources are:

- AMERICAN ASSOCIATION FOR CORRECTIONAL PSYCHOLOGY, STANDARDS FOR PSYCHOLOGY SERVICES IN JAILS, PRISONS, CORRECTIONAL FACILITIES, AND AGENCIES (2d ed. 1999), reprinted in 27 CRIM. JUST. & BEHAVIOR 433 (2000). [Cited hereinafter as AM. ASS’N FOR CORR. PSYCHOL., STANDARDS]
- AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE STANDARDS: LEGAL STATUS OF PRISONERS (2d ed. 1981). [Cited hereinafter as ABA, LEGAL STATUS OF PRISONERS STANDARDS]
- AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE STANDARDS: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004). [Cited hereinafter as ABA, COLLATERAL SANCTIONS STANDARDS.]
- AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE STANDARDS: MENTAL HEALTH (1986, 1999), Part X (Mentally Ill and Mentally Retarded Prisoners). [Cited hereinafter as ABA, MENTAL HEALTH STANDARDS.]
- AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES (3d ed. 1992). [Cited hereinafter as ABA, PROVIDING DEFENSE SERVICES STANDARDS.]
- AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE STANDARDS: SENTENCING (3d ed. 1994). [Cited hereinafter as ABA, SENTENCING STANDARDS.]
- AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE STANDARDS: TRIAL BY JURY (3d ed. 1996). [Cited hereinafter as ABA, TRIAL BY JURY STANDARDS.]
- AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (4th ed. 2003). [Cited hereinafter as ACA, PRISON STANDARDS.]
- AMERICAN CORRECTIONAL ASSOCIATION, PERFORMANCE-BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES (4th ed. 2004). [Cited hereinafter as ACA, JAIL STANDARDS.]
- AMERICAN NURSES ASSOCIATION, STANDARDS OF CORRECTIONS NURSING PRACTICE (2004). [Cited hereinafter as AM. NURSES ASS’N, CORRECTIONS STANDARDS.]
- AMERICAN PUBLIC HEALTH ASSOCIATION, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (2003). [Cited hereinafter as AM. PUB. HEALTH ASS’N, CORRECTIONS STANDARDS.]

ABA Treatment of Prisoners Standards

Notes on Usage, Organization, and Related Standards and ABA Resolutions

- AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON PSYCHIATRIC SERVICES IN JAILS AND PRISONS, GUIDELINES FOR PSYCHIATRIC SERVICES IN JAILS AND PRISONS & PRINCIPLES GOVERNING THE DELIVERY OF PSYCHIATRIC SERVICES IN JAILS AND PRISONS (Task Force Report 29, 1989). [Cited hereinafter as AM. PSYCHIAT. ASS'N, GUIDELINES, or AM. PSYCHIAT. ASS'N, PRINCIPLES.]
- ASSOCIATION OF SPECIALIZED AND COOPERATIVE LIBRARY AGENCIES, LIBRARY STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (American Library Association 1992).
- CORRECTIONAL EDUCATION ASSOCIATION, PERFORMANCE STANDARDS FOR CORRECTIONAL EDUCATION PROGRAMS IN ADULT INSTITUTIONS & CORRECTIONAL EDUCATION ASSOCIATION, PERFORMANCE STANDARDS FOR CORRECTIONAL EDUCATION PROGRAMS IN JAILS AND DETENTION CENTERS (2004) [Cited hereinafter, together, as CORR. ED. ASS'N, PERFORMANCE STANDARDS.]
- NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN JAILS (2008) & NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS (2008). [Cited hereinafter, together, as NCCHC, HEALTH SERVICES STANDARDS].
- NATIONAL FIRE PROTECTION ASSOCIATION, LIFE SAFETY CODE, Chs. 22-23 (2009).
- United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, *adopted* Aug. 30, 1955, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977). [Cited hereinafter as U.N. Standard Minimum Rules].
- World Professional Association for Transgender Health, *Standards of Care for Gender Identity Disorders*, available at http://www.wpath.org/publications_standards.cfm.

Sources on this list were chosen as the most useful and current, but other standards might have been included, as well. Most states, for example, have jail standards.¹⁰ But no one set of these is particularly influential, so they were not included. Other standards were omitted as largely duplicative of the ones included—the federal Office of the Federal Detention Trustee’s performance standards,¹¹ for example, are based in large part on the American Correctional Association jail standards. Finally, useful though they are, it did not seem vital to include highly specialized sets of standards such as the American Diabetes Association’s guidelines on Diabetes Management in Correctional Institutions.¹²

Acknowledgements

Margo Schlanger served as Reporter from July 2007 until January 2009, when she left the project to become the U.S. Department of Homeland Security Civil Rights and Civil Liberties Officer. (The views expressed in this document do not represent the position of the Department of Homeland Security.) Michele Deitch served as Reporter in the initial stages of the project, from January 2005 until July 2007. Margo Schlanger drafted the lion’s share of the commentary before entering government service, and the job was completed, under the general supervision of Task Force Chair Margaret Love, with the generous

¹⁰ See Mark D. Martin, *Jail Standards and Inspection Programs: Resource and Implementation Guide* (National Institute of Corrections, April 2007), available at <http://nicic.org/DOWNLOADS/PDF/Library/022180.pdf>.

¹¹ Available at http://www.justice.gov/ofdt/07pbds_review_book.pdf,

¹² Available at http://care.diabetesjournals.org/content/28/suppl_1/s53.full.

ABA Treatment of Prisoners Standards

Notes on Usage, Organization, and Related Standards and ABA Resolutions

assistance of experts who had participated in earlier phases of the project, including Elizabeth Alexander, John Boston, Lynn Branham, Brett Dignam, David Fathi, Amy Fettig, Michael Hamden, and Carl Reynolds. John Boston generously allowed us to see the new edition of the *Prisoners Self-Help Litigation Manual* while it was still in draft, and to borrow freely from that Manual's comprehensive footnotes and case descriptions. Susan Hillenbrand of the Standards staff provided skillful assistance in organizing and presenting ABA policies and other authorities, and Benedict Warr and Jonathan Waisnor bluebooked and cite-checked the commentary.

PART I: GENERAL PRINCIPLES

Part I General Commentary

The definitions Standard and the two substantive Standards in this Part introduce the entire project, announcing general principles that are fleshed out in subsequent sections. No cross-references are provided because they would refer to all of the other Standards.

Standard 23-1.0 Definitions

Correctional agencies, facilities, staff, and prisoners

(a) The term “chief executive officer of the facility” means the correctional official with command authority over a particular correctional facility. In a prison, the chief executive officer is the person usually termed the warden; in a jail, the chief executive officer might be a sheriff, or might have a title such as superintendent, jailer, or commander. The term includes the chief executive officer’s emergency designee, if, for example, the chief executive officer is away or ill and has turned over command authority for a period of time.

(b) The term “correctional administrator” means an individual with responsibility for system-wide operations and management.

(c) The term “correctional agency” means an agency that operates correctional facilities for a jurisdiction or jurisdictions and sets system-wide policies or procedures, along with that agency’s decision-makers.

(d) The term “correctional authorities” means all correctional staff, officials, and administrators.

(e) The term “correctional facility” means any place of adult criminal detention, including a prison, jail, or other facility operated by or on behalf of a correctional or law enforcement agency, without regard to whether such a facility is publicly or privately owned or operated. The term “correctional facility” does not include a facility that serves solely as an immigration detention facility, a juvenile detention facility, or a juvenile correctional facility.

(f) The term “correctional official” means an individual with responsibility for facility-wide operations and management.

(g) The term “correctional staff” or “staff” means employees who have direct contact with prisoners, including both security and non-security personnel, and employees of other governmental or private organizations who work within a correctional facility.

(h) The term “governmental authorities” encompasses persons in all branches and levels of government whose conduct affects correctional policy or conditions, including members of the legislature, prosecutors, judges, governors, etc.

(i) The term “jail” means a correctional facility holding primarily pretrial detainees and/or prisoners sentenced to a term of one year or less.

ABA Treatment of Prisoners Standards
Standard 23-1.0 Definitions

(j) The term “prison” means a correctional facility holding primarily prisoners sentenced to a term of at least one year.

(k) The term “prisoner” means any person incarcerated in a correctional facility.

Other defined terms

(l) The term “counsel” means retained or prospectively retained attorneys, or others sponsored by an attorney such as paralegals, investigators, and law students.

(m) The term “effective notice” means notice in a language understood by the prisoner who receives the notice; if that prisoner is unable to read, effective notice requires correctional staff to read and explain the relevant information, using an interpreter if necessary.

(n) The term “health care” means the diagnosis and treatment of medical, dental, and mental health problems.

(o) The term “long-term segregated housing” means segregated housing that is expected to extend or does extend for a period of time exceeding 30 days.

(p) The term “qualified health care professional” means physicians, physician assistants, nurses, nurse practitioners, dentists, qualified mental health professionals, and others who by virtue of their education, credentials, and experience are permitted by law to evaluate and provide health care to patients.

(q) The term “qualified mental health professional” means psychiatrists, psychologists, psychiatric social workers, licensed professional counselors, psychiatric nurses, or others who by virtue of their education, credentials, and experience are permitted by law to evaluate and provide mental health care to patients.

(r) The term “segregated housing” means housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action. “Segregated housing” includes restriction of a prisoner to the prisoner’s assigned living quarters.

(s) The term “serious mental illness” means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality or cope with the ordinary demands of life within the prison environment and is manifested by substantial pain or disability. It includes the status of being actively suicidal; severe cognitive disorders that result in significant functional impairment; and severe personality disorders that result in significant functional impairment and are marked by frequent episodes of psychosis, depression, or self-injurious behavior.

Related Standards

NCCHC, HEALTH SERVICES STANDARDS, glossary (“qualified health care professionals” and “qualified mental health professionals”)

ABA Treatment of Prisoners Standards
Standard 23-1.0 Definitions

Commentary

Subdivisions (e), (i), (j), & (k): The definitions of jail, prison, correctional facility, and prisoner together render the Standards applicable to all adult correctional and criminal detention facilities, including community correctional facilities, and to all persons confined in such facilities, whatever the reason for their confinement, including immigrant detainees, and persons incarcerated as contemnors or material witnesses. These Standards do not apply to separate dedicated juvenile facilities or separate dedicated immigration detention facilities, because of substantial differences in law and policy considerations.¹³ But they do cover all persons confined at covered facilities, no matter what their prisoners' legal status or age.

Note that the definition of the term "jail," in subdivision (i), covers temporary holding or lockup facilities, from which prisoners are usually transferred within 72 hours and not held beyond arraignment. At last count, in 2003, a quarter of the nation's police departments operated such lockups, with a total capacity of about 25,000 prisoners.¹⁴ But complete compliance with these Standards by such facilities cannot be expected. Simply because of prisoners' short length of stay, some of the Standards are entirely inapplicable (for example, Standards on rehabilitative programming or re-entry planning, 23-8.2 and 23-8.9) and others apply only in part (for example, Standards on medical care, 23-6.1 to 6.15, and provision of necessities, 23-3.5). Still others are inconsistent with the ordinary functioning of these kinds of congregate holding areas, and not necessary given the very short lengths of stay of all the prisoners (for example, Standards requiring prisoners to have a writing area and seating, and storage for personal items, 23-3.3). Those who administer lockups should use these Standards as guidance for their operations, and comply with as many of them as practicable and sensible, in light of the unique needs and challenges lockups present. Other Standards, however, should apply in full force to all facilities (for example, all of the Standards in Part VI (Personal Security), including sexual abuse, protection of vulnerable prisoners, suicide prevention, use of force, and use of restraints)..

Likewise, the definition of "correctional facility" in subdivision (e) includes even very small facilities, of which there are many. The most recent data available indicate that about half the nation's 3000 jails (excluding lockups) housed fewer than 50 prisoners on an average day. (Such small jails confined, in total, about 5% of the nation's jail population.¹⁵) Those Standards that require particular bureaucratic structures in order to facilitate humane and constitutional treatment of prisoners—for example, several

¹³ On juvenile detention, among other issues, see ABA CRIMINAL JUSTICE SECTION TASK FORCE ON YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *YOUTH IN THE CRIMINAL JUSTICE SYSTEM: GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS* 21-33 (2001) (key principles adopted as ABA policy by resolution 101D, 2002 Midyear Meeting, available at <http://www.abanet.org/crimjust/policy/cjpol.html#my02101d>). On immigration, see STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES (2004) (black letter adopted as ABA policy by resolution 117, 2004 Annual Meeting, available at <http://www.abanet.org/immigration>); ABA resolution 111B, 2008 Midyear Meeting, available at http://www2.americanbar.org/sdl/Documents/2008_MY_111B.pdf. Immigration detention is very much in transition right now, see Dora Schriro, Special Advisor on ICE Detention and Removal, *Immigration Detention: Overview and Recommendations* (Immigration and Customs Enforcement, Oct. 2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>, as U.S. Immigration and Customs Enforcement is in the process of transitioning between two sets of standards, the 2000 Detention Operations Manual, available at <http://www.ice.gov/detention-standards/2000/>, and the 2008 Operations Manual ICE Performance Based National Detention Standards, available at <http://www.ice.gov/detention-standards/2008/>.

¹⁴ Matthew J. Hickman & Brian A. Reaves, *Bureau of Justice Statistics, Local Police Departments, 2003* (Bureau of Justice Statistics, May 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd03.pdf>.

¹⁵ Data derived from Bureau of Justice Statistics, *National Jail Census, 1999* (2002), available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/03318>.

ABA Treatment of Prisoners Standards

Standard 23-1.1 General principles governing imprisonment

layers of review of agency operations (see Standards 23-11.1 to 11.4)—may need adaptation for such small facilities. But most of the Standards that present compliance challenges for small facilities—for example, the requirements of mental health monitoring for prisoners in segregated housing (Standard 23-2.8)—are required for prisoner safety no less in a small than a large facility. If a small facility finds itself unable to comply with such mandates, it should seek out some cooperative arrangement with a larger facility that has developed the required operational expertise and capacity.

Subdivision (g): The broad definition of the word “staff” is particularly important in light of the many types of employees within prisons and jails. Within a secure facility, private contractors (e.g., employees of a private health care contractor) or non-correctional government employees (e.g., teachers or public health officials) are just as much state actors as both security and non-security staff who work more directly for correctional agencies, and it is important to make it clear that they are equally bound by operative norms. See Standard 23-1.1(k).

Subdivision (l): The term “counsel” is defined broadly in keeping with the relevant case law.¹⁶ It extends to lawyers who consult or seek to consult with prisoners who expect that their communications with the lawyer will be confidential, even though the lawyer is not formally retained. And see *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000) (“the First Amendment protects the right of an individual or group to consult with an attorney on any legal matter.”).

Subdivisions (p) & (q): The Standards repeatedly use the defined terms “qualified health care professional” and “qualified mental health professional,” with definitions borrowed from the National Commission on Correctional Health Care’s standards. The definition is not meant to suggest that any health professional of the types listed is “qualified” for a particular task. Rather, professional standards and licensing regulations will determine according to the context precisely who is qualified to provide various types of care and supervision.

Standard 23-1.1 General principles governing imprisonment

(a) A correctional facility should be safe and orderly and should be run in a fair and lawful manner.

(b) Imprisonment should prepare prisoners to live law-abiding lives upon release. Correctional authorities should facilitate prisoners’ reintegration into free society by implementing appropriate conditions of confinement and by sustained planning for such reintegration.

(c) A correctional facility should maintain order and should protect prisoners from harm from other prisoners and staff. Restrictions placed on prisoners should be necessary and proportionate to the legitimate objectives for which those restrictions are imposed.

(d) Correctional authorities should respect the human rights and dignity of prisoners. No prisoner should be subjected to cruel, inhuman, or degrading treatment or conditions.

¹⁶ See *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (striking down a rule barring attorneys from using students and paraprofessionals to conduct prisoner interviews); *U.S. v. Mikhel*, 552 F.3d 961, 963-64 (9th Cir. 2009) (striking down “Special Administrative Measures” barring use of translator at interviews and barring public defender’s investigator from meeting with criminal defendant without an attorney or paralegal present).

ABA Treatment of Prisoners Standards

Standard 23-1.1 General principles governing imprisonment

(e) For a convicted prisoner, loss of liberty and separation from society should be the sole punishments imposed by imprisonment. For a prisoner not serving a sentence for a crime, the purpose of imprisonment should be to assure appearance of the prisoner at trial and to safeguard the public, not to punish.

(f) A correctional facility should be appropriately staffed.

(g) Correctional officials should implement internal processes for continually assessing and improving each correctional facility.

(h) A correctional facility should be monitored and regularly inspected by independent government entities.

(i) A lack of resources should not excuse treatment or conditions that violate prisoners' constitutional or statutory rights.

(j) Governmental authorities should provide sufficient resources to implement these Standards.

(k) If governmental authorities elect to furnish prisoners any services by contracting with private providers, those contracted services should comply with these Standards, and the correctional agency should monitor and ensure such compliance, and should be held accountable for doing so.

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d ed., superseded), Standard 23-1.1 (general principle).

ABA, RESOLUTIONS (text in Appendix), 115B (Feb. 1990) (prison privatization), 115C (Feb. 1990) (correctional education), 101C (1993) (correctional accreditation), 120B (1995) (correctional impact statements), 113B (1996) (release of terminally ill inmates), 109 (1996) (1996) (compassionate release, alternative sentencing), 113C (1999) (national commission on criminal justice), 107 (Aug. 2002) (blueprint for corrections), 103B (2003) (sentence reduction for compelling circumstances), 121C (2004) (sentence reduction for compelling reasons), 121D (2004) (reentry), 104B (2008) (prison oversight).

ACA, JAIL STANDARDS, Performance Standards 1A (protection from injury and illness), 5A (inmate opportunities for improvement), 6B (fair treatment of inmates), 7B (staff, contractor, volunteer competency), 4-ALDF-2A-14 (staffing)

ACA, PRISON STANDARDS, Principles 1A (general administration) and 3A (security and control), Performance Standard 4E-3A (offender treatment), 4-4049 (personnel policy manual), 4-4017 and 4-4018 (monitoring and assessment), 4-4296 (classification), 4-4451 (work opportunities)

U.N. Standard Minimum Rules, arts. 27 & 31 (discipline), 46 (personnel), 55 (inspection), 57-61 (purpose of imprisonment), 65 (treatment), 80 (post-release planning)

Commentary

Subdivisions (a), (c), & (e): One important substantive commitment that runs through the Standards is an insistence that prisons be safe, but that, simultaneously, restrictions upon prisoners should be justified rather than reflexive. Subdivision (a) emphasizes the first half of this dual commitment, while subdivisions (c) and (e) delineate the other half. Many restrictions on prisoners are entirely legitimate and

ABA Treatment of Prisoners Standards

Standard 23-1.1 General principles governing imprisonment

even necessary, but others are gratuitous and even harmful. The ABA has long endorsed the general principle that “prisoners retain the constitutional rights of free citizens” except “when restrictions are necessary to provide reasonable protection for the rights and physical safety of all members of the prison system and the general public.”¹⁷ The ideal embedded in this Standard’s discussion of “necessary and proportionate” restrictions is similar. It goes beyond constitutional case law, but reflects both good correctional practice and international standards.¹⁸ (Subdivision (e)’s reference to the purpose of imprisonment of unconvicted prisoners is framed in terms of their appearance at trial, but of course for those who face deportation rather than trial, the purpose is to ensure their appearance at relevant proceedings.)

Subdivision (b): A second overarching commitment embodied in the Standards is a thoroughgoing orientation towards prisoners’ re-entry into the community, first mentioned in Standard 23-1.1(b). Particularly in light of the massive numbers of prisoners and their correspondingly increased presence in their communities after they leave prison, the Standards, like many participants in the American criminal justice system, urge that prison itself should be oriented towards re-entry considerations. The Second Chance Act, Pub. L. No. 110-199, 122 Stat. 657 (2008), took important steps in this direction.¹⁹

Subdivision (c): Prisoners should be protected from hazardous living and working conditions, and should be accorded privacy consistent with safety and security.

Subdivision (d): This general statement summarizes the basic approach of constitutional case law, but also uses the language—“cruel, inhuman, or degrading”—that often serves as the touchstone of international law approaches to the same topic. Derived from Article 5 of the Universal Declaration of Human Rights,²⁰ it is contained in generally applicable multilateral treaties including the International Covenant on Civil and Political Rights²¹ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment.²² The key concept in international law interpretations of these concepts is dignity; prisoners’ humanity and dignity are to be respected at all times.²³ It is not the intent of these Standards to adopt international human rights law as binding in every respect, but international sources can provide insight into appropriate policy, and should inform domestic law.

¹⁷ ABA resolution 120B, 1995 Annual Meeting, available at http://www2.americanbar.org/sdl/Documents/1995_AM_120B.pdf.

¹⁸ See U.N. Basic Principles for the Treatment of Prisoners, 15 G.A. Res. 45/111, Art. 5, U.N.Doc. A/45/49 (1990) (“[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration,” all prisoners retain human rights and fundamental freedoms set out in UN covenants); U.N. Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment No. 21, ¶ 3, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994). (“Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”).

¹⁹ For a summary of many recent relevant governmental initiatives, see, e.g., Reentry Policy Council, <http://www.reentrypolicy.org>.

²⁰ G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948).

²¹ G.A. Res. 2200A (XXI), Art. 7, U.N. Doc. A/6316 (1966).

²² G.A. Res. 39/46, Annex, U.N. Doc. A/39/51/Annex (1984) (the “Torture Convention” is in Articles 10-13; extending the prohibition against cruel, inhuman or degrading treatment or punishment in Article 16).

²³ See Basic Principles for the Treatment of Prisoners, *supra* note 18 (“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”); ICCPR, *supra* note 21, Article 10(1) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”).

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

Subdivision (h): This provision, along with several in Part XI, delineates the ABA's views on oversight of prison operations. See ABA resolution 104B, 2008 Annual Meeting (prison oversight), available at <http://www.abanet.org/crimjust/policy/am08104b.pdf>. As that policy recognizes, independent monitoring of correctional facilities protects prisoners' substantive rights and is equally necessary for both private and public facilities. Transparency and accountability are difficult challenges in closed institutions such as prisons, but without them rights cannot be assured. The Standards in Part XI develop the point, but it is important enough to need inclusion in this summary Standard. The Standard's use of the word "independent" is not meant to prefer a stand-alone agency to an inspector general structure, so long as the other requirements for oversight set out in Part XI are met.

Subdivisions (i) & (j): The Standard's two references to resource scarcity deal with a frequent circumstance, but one that is, as the Standard explains, of no constitutional import.²⁴

Subdivision (k): The important issues raised by private prisons are covered in detail in Standard 23-10.5; this provision, along with Standard 11.1(c), is more general, and deals as well with less encompassing contracting arrangements, with entities such as private food or health care providers.

Standard 23-1.2 Treatment of prisoners

In order to effectuate these principles, correctional authorities should:

- (a) provide prisoners with:**
 - (i) humane and healthful living conditions;**
 - (ii) safety from harm, including protection from punitive or excessive force and protection from abuse by other prisoners and staff;**
 - (iii) necessary health care;**
 - (iv) freedom from staff harassment and invidious discrimination;**
 - (v) freedom of religion and substantial freedom of expression;**
 - (vi) conditions conducive to maintaining healthy relationships with their families;**
 - (vii) opportunities to participate in constructive activity and rehabilitative programs; and**
 - (viii) comprehensive re-entry planning; and**
- (b) implement effective policies and procedures for:**
 - (i) investigation and resolution of complaints and problems;**
 - (ii) fair and rational decision-making; and**
 - (iii) internal and external oversight of correctional operations.**

²⁴ See, e.g., *Watson v. City of Memphis*, 373 U. S. 526, 537 (1963) ("[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."); *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) ("[A] lack of funds allocated to prisons by the state legislature . . . will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment."); *Finney v. Arkansas Board of Corr.*, 505 F.2d 194, 201 (8th Cir. 1974) ("Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration.").

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS, (2d ed., superseded), Standards 23-6.9 (physical security), 23-6.13 (maintenance of institutions), 23-6.14 (nondiscriminatory treatment), 23-7.1 (resolving prisoner grievances)

ABA, RESOLUTIONS, 115C (Feb. 1990) (correctional education), 104B (Aug. 1996) (children with parents in correctional custody), 101B (Feb. 2002) (prisoner work), 107 (Aug. 2002) (blueprint for corrections), 121D (Aug. 2004) (reentry), 115B (Aug. 2007) (telephones in prison), 102B (Feb. 2007) (Prison Litigation Reform Act), 102E (Feb. 2010) (impact of incarceration on mother/child relationship), 102F (Feb. 2010) (need for legal services for prisoners on family law issues)

ACA, JAIL STANDARDS, 4-ALDF-6A-07 (protection from abuse), 4-ALDF-6B-02 (discrimination)

ACA, PRISON STANDARDS, Performance Standard 4E-3A (offender treatment)

NCCHC, HEALTH SERVICES STANDARDS, A-01 (access to care)

U.N. Standard Minimum Rules, art. 6 (nondiscrimination and respect for religion)

Commentary

Subdivision (a): Like Standard 23-1.1, this introductory Standard highlights some of the principles developed in subsequent provisions, and as in 23-1.1, an important tension must be navigated. “There is no iron curtain drawn between the Constitution and the prisons of this country.” *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Constitutional rights of prisoners, however, are subject to restrictions and limitations “justified by the considerations underlying our penal system.” *Bell v. Wolfish*, 441 U.S. 520, 546 (quoting *Price v. Johnson*, 334 U.S. 266, 285 (1948)); a prisoner “simply does not possess the full range of freedoms of an unincarcerated individual.” *Bell v. Wolfish*, 441 U.S. at 546.

Subdivisions (a)(i), (a)(ii), and (a)(iii) relate to prisoners’ rights and interests under the Eighth Amendment, whose Cruel and Unusual Punishments Clause enforces “contemporary standards of decency” for convicted prisoners, *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), and under the Due Process Clause of the Fourteenth Amendment (and for federal detainees, of the Fifth Amendment), under which pretrial detainees cannot be punished, but rather are detained to ensure their presence at trial and subjected to rules and restrictions reasonably related to jail management and security.²⁵ The Supreme Court has hinted several times that perhaps pretrial detainees are entitled to greater constitutional protection than sentenced prisoners, in conditions of confinement cases. See *City of Revere v. Mass. General Hosp.*, 463 U.S. 239, 244 (1983) (under the Fourteenth Amendment, the “due process rights of a person [in custody] are at least as great as the Eighth Amendment protections available to a convicted prisoner”); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (“*A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”). But in practice, courts determining detainees’ rights under the Due Process Clauses have nearly entirely adopted the analogous Eighth Amendment standards.²⁶

²⁵ See *Bell v. Wolfish*, 441 U.S. 520, 535, 540 (1979); *Block v. Rutherford*, 468 U.S. 576, 585-86 (1984); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004).

²⁶ See, e.g., *Surprenant v. Rivas*, 424 F.3d 5, 18 (1st Cir. 2005) (holding that the “parameters” of detainees’ rights concerning conditions of confinement are “coextensive” with Eighth Amendment protections); *Hart v. Sheahan*, 396 F.3d 887, 893 (7th Cir. 2005) (“[W]hen the issue is whether brutal treatment should be assimilated to punishment, the interests of the prisoner is [sic] the same whether he is a convict or a pretrial detainee. In either case he (in this case she) has an interest in being free from gratuitously severe restraints and hazards, while the detention facility has an interest in protecting the safety of inmates and guards and preventing escapes.”); *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) (“Although the Due Process Clause governs a pretrial detainee’s claim of unconstitutional

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

The core value that underlies the Eighth Amendment is prisoners' inalienable human dignity. See *Trop v. Dulles*, 356 U.S. 86, 100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); the United States's signature on the International Covenant on Civil and Political Rights recognizes the same value.

The Constitution's regulation of prison and jail conditions begins with the bedrock principle that corporal punishment is unconstitutional. See *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.), cited with approval in, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). The Eighth Amendment forbids the "wanton infliction of pain" by excessive force. *Hudson v. McMillian*, 503 U.S. 1 (1992). The Supreme Court's decision in *Hope v. Pelzer*, 536 U.S. 730, 738 (2002), declared use of a hitching post to restrain a prisoner clearly unconstitutional, because it was "punitive treatment [that] amounts to gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." Subdivision (a)(ii), and many of the provisions in the several use-of-force Standards, are aimed to avoid summary corporal punishment.²⁷

But of course official force serves important interests in correctional facilities, and many such uses are appropriate. In *Whitley v. Albers*, 475 U.S. 312, 319 (1986), the Court distinguished between corporal punishment and "conduct that does not purport to be punishment at all"—that is, use of physical force for control and security purposes. In both *Whitley* and *Hudson v. McMillian*, 503 U.S. 1, 5 (1992), the Court held that physical abuses against prisoners create constitutional liability only where the force is applied "maliciously and sadistically for the very purpose of causing harm," rather than in a "good faith effort to maintain or restore discipline."²⁸ The Court held in *Hudson*, however, that no serious physical injury need result for constitutional liability to exist. 503 U.S. at 8-9. See also *Wilkins v. Gaddy*, ___ U.S. ___, 130 S.Ct. 1175, 1178-79 (2010), which makes the point that serious injury need not be shown to find a constitutional violation even more forcefully than does *Hudson*.

The case law imposes greater constraints on correctional officials in situations in which the penological purpose of a use of force or restraint is something other than a current security need—more general maintenance of order, for example. As the 11th Circuit has held, for example, in such situations the

conditions of confinement, . . . the Eighth Amendment standard provides the benchmark for such claims."); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (under Eighth Amendment and Due Process Clause, "the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees").

²⁷ This requirement is even more imperative for pretrial detainees, who are constitutionally entitled not to be punished, at all. See *Simms v. Hardesty*, 303 F. Supp. 2d 656, 667-68 (D. Md. 2003), *aff'd*, 104 Fed. App'x 853 (4th Cir. 2004) (unpublished).

²⁸ While the leading case on use of force against pretrial detainees, *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), uses very similar language, some courts have applied or announced a slightly less stringent test for pretrial detainees. See, e.g., *Andrews v. Neer*, 253 F.3d 1052, 1060-61 (10th Cir. 2001) (detainees are entitled to an "objective reasonableness" standard under the Due Process Clause similar to arrestees under the Fourth Amendment); *Wilson v. Williams*, 83 F.3d 870, 875-76 (7th Cir. 1996) (detainees are arguably entitled to a higher standard of conduct in the use of force than are convicts; actual intent or reckless disregard must be shown for liability, but may be inferred from objective factors, including the extent of injury, the need for force, relationship between need and amount of force, the threat reasonably perceived by staff, and any attempt to temper the severity of the response); *Moore v. Hosier*, 43 F. Supp. 2d 978, 985 (N.D. Ind. 1998) (detainees arguably are entitled to a higher degree of legal protection than the Eighth Amendment; plaintiff must prove that the defendants "acted with deliberate or callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights"); *Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009) (assuming due process standard provides greater protections than Eighth Amendment, but not saying what they are because plaintiff waived the argument).

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

Constitution bans not just “malicious[] and sadistic[]” force, but “deliberate indifference.”²⁹ Under *Farmer v. Brennan*, 511 U.S. 825, 837, 845 (1994), a case about the related issue of protection from harm, “deliberate indifference” means recklessness with respect to “an excessive risk to inmate health or safety.” An example of force used not for security but for compliance might be use of pepper spray against a prisoner passively resisting following an order; if pepper spray is used notwithstanding knowledge of that prisoner’s serious asthma, and harm results, it would be deliberately indifferent and therefore unconstitutional (and forbidden under Subdivision (a)(ii)), even though not used for the very purpose of causing pain.

Still, when force *is* used to cope with a security threat, constitutional case law focuses on the officer’s subjective thought process rather than the objective necessity of the force in question. These Standards do not share this focus because they are concerned not with blame or liability but with sound correctional practice; their focus is on practices that promote the responsible and effective use of force that minimizes injury to both officers and prisoners.

Moving beyond force, subdivisions (a)(i) and (a)(iii), and many of the more specific Standards, are designed to protect prisoners’ health and safety and to assure that their basic needs are met, and in this respect they more closely track what the Eighth Amendment requires. Prison officials may not “deprive inmates of the minimal civilized measure of life’s necessities.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Rather, the Court held in *Estelle v. Gamble*, 429 U.S. 97 (1976), that the constitutional ban on cruel and unusual punishment reached not only intentionally imposed sanctions but unintentionally harmful conditions in prison. That essential rule has remained firmly in place, even growing more robust since the 1970s. *Estelle* held that the Cruel and Unusual Punishments Clause reaches prison officials’ failure to provide medical care; more recent cases have held that the clause reaches exposure to second-hand smoke, *Helling v. McKinney*, 509 U.S. 25 (1993); and failure to protect a transgender prisoner from rape by other prisoners, *Farmer v. Brennan*, 511 U.S. 825 (1994). Indeed, these last two cases make clear that the Eighth Amendment forbids not only imposition of serious harm but unreasonable *risks* of serious harm. Recklessness with respect to such risk is unconstitutional. For example, fire safety in prison is constitutionally mandated, and, as one district court put it, “The Court does not have to wait for the Plaintiffs to be incinerated before it can order the Defendants to raise the level of fire safety at the [prison].” *Women Prisoners of D.C. Dep’t of Corrs. v. District of Columbia*, 877 F. Supp. 634, 669 (D.D.C. 1994), rev’d on other grounds, 93 F.3d 910, 932 (D.C. Cir. 1996). Padlocks on cell doors instead of automated cell locks, the absence of heat detectors, high concentration of combustible materials, etc. have all been held to contribute to findings of unconstitutional conditions,³⁰ and all are inappropriate. This is one area in which prisons should “comply with health, safety, and building codes, subject to regular inspection,” in accordance with Standard 23-3.1(a)(viii).

Finally, it is worth emphasizing that this Standard does not exempt prisoners in segregated housing from its general prescriptions. Standards 23-2.6 to 2.9 and 3.8 to 3.9 devote a good deal of attention to segregated custody—isolation of prisoners, for whatever reason, in circumstances limiting their ability to interact with others. The point here is that the constitutional standard governing conditions of confinement in isolation is the same as outside of isolation. The key is harm to the prisoner. While the Supreme Court has never assessed the constitutionality of conditions in long-term segregation (although, as discussed in the commentary following Standard 23-2.9, it has evaluated the process by which prisoners may be assigned to a “supermax” facility), lower federal courts have held segregated conditions

²⁹ *Sims v. Mashburn*, 25 F.3d 980, 984 n.9 (11th Cir. 1994).

³⁰ See *Carty v. Farrelly*, 957 F. Supp. 727, 737 (D.V.I. 1997); *Alexander v. Boyd*, 876 F. Supp. 773, 786 (D.S.C. 1995); *Tillery v. Owens*, 907 F.2d 418, 424, 427-28 (3d Cir. 1990).

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

unconstitutional based on absence of light or exercise, inadequate food, and so on.³¹ Isolation itself has been held unconstitutional for prisoners with serious mental illness, because of the probability of further psychological harm.³²

Subdivision (a)(iv) references prisoners' antidiscrimination rights—covered not by the Eighth Amendment but by the Equal Protection Clause and a variety of federal statutes. Courts have explained that these rights have important application within prisons and jails.³³ More detailed analysis is provided in the commentary to Standards 23-2.4(a), 23-5.1, 23-7.1, 23-7.5, and 23-8.4.

Subdivisions (a)(v) and (a)(vi) deal with prisoners' First Amendment and substantive due process rights, in connection with which the Supreme Court has emphasized the substantial deference appropriately granted prison administrators. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Under the Eighth Amendment some rights—rights related to protection from harm, in particular—are even broader in prison than they are outside.³⁴ But *Turner* makes it clear that the scope of many other rights shrinks behind the prison walls. Chief among these highly limited rights are privacy, free speech, and association. Even under *Turner*, however, prison regulations are unconstitutional if they reflect an “exaggerated response” even to real security concerns. *Turner* itself overturned a prison rule against prisoner marriages on this basis. The approach of these Standards is to offer a referent useful for those administrators seeking to avoid such an exaggerated response, and for courts seeking to assess correctional practices in application of this test.

Subdivision (b)(ii): An additional key strand of the constitutional law of corrections involves prisoners' procedural rights—in particular, the process due for further deprivations of liberty within the prison or jail setting. Under the established general analysis, see *Mathews v. Eldridge*, 424 U.S. 319 (1976), the process due depends upon the gravity of the liberty interest, the value of the process sought and the risk of erroneous deprivations if it is omitted, and the burden the process would impose. In the prison setting, this has meant that the law does not require the full panoply of due process protections familiar from criminal trials. But notice, an opportunity to be heard before a decision-maker who had no involvement in the relevant events, a limited right to assistance where it is needed, and a written statement of reasons for the decision have frequently been required. The Supreme Court has insisted on various procedural protections to ensure accurate and fair decision-making in such contexts as prison discipline involving deprivation of good-time credits, *Wolff v. McDonnell*, 418 U.S. 539 (1974); transfer to a psychiatric institution, *Vitek v. Jones*, 445 U.S. 480 (1980); and forced administration of psychotropic medication, *Washington v. Harper*, 494 U.S. 210 (1990). Those precedents remain good law: contemporary case law is clear that substantial process continues to be due in proceedings to further deprive prisoners of their liberty. Decisions relating to classification and inter-prison transfers, however, have been held not to

³¹ See, e.g., *Gillis v. Litscher*, 468 F.3d 488 (7th Cir. 2006) (reversing district court's grant of summary judgment to defendants in supermax conditions of confinement case); *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (“[T]he isolation and idleness of Death Row combined with the squalor, poor hygiene, temperature, and noise of extremely psychotic prisoners create an environment ‘toxic’ to the prisoners’ mental health.”).

³² See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

³³ See *Johnson v. California*, 543 U.S. 499, 500 (2005) (no exceptional deference is due prison administrators challenged under the Equal Protection Clause because it confers “right[s] that need [not] necessarily be compromised for the sake of proper prison administration”); see also, e.g., *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206 (1998) (Americans with Disabilities Act applies to prisons and jails).

³⁴ See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Washington v. Harper*, 494 U.S. 210, 225 (1990); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984). Cf. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 198-99 (1989).

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

deprive prisoners of a protected liberty interest, and therefore the Due Process Clause does not reach them.³⁵ The same is true for decisions relating to various privileges. See *Sandin v. Conner*, 515 U.S. 472 (1995) (noting this result for shock incarceration, tray lunches rather than box lunches, and in-cell television).

As a general matter, after *Sandin* many decisions about prisoners previously thought to require due process no longer do. Moreover, in *Sandin*, the Supreme Court introduced a significant restriction on prisoners' rights when it ruled that a liberty interest, and thus the need for due process, is not implicated in a prison disciplinary case unless the disciplinary penalty imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. Thus discipline that does not impact the length of a prisoners' incarceration but only its conditions is often not regulated by the Due Process Clause; if similar conditions are sometimes imposed not as a matter of discipline but for administrative reasons, they are not deemed "atypical." Especially in states and settings in which prison life is particularly stark, this test, from *Sandin*, shrinks the liberty interests protected.

The Standards cover procedural protections in four contexts, for decisions relating to: classification (Standard 23-2.3); long-term administrative segregation (Standard 23-2.9); discipline (Standard 23-4.2); and involuntary mental health treatment and transfer (Standard 23-6.15). Note that some of the recommended procedural protections are not required by constitutional case law, but are included where they seem highly advisable to avoid erroneous and arbitrary decision-making. In particular, Standard 23-4.2(d) requires a due process hearing prior to imposition of any penalty of disciplinary segregation. The recommendation that hearings be provided even when *Sandin* does not mandate them follows current corrections practice: correctional administrators, by and large, have not accepted the Supreme Court's invitation to limit the provision of procedural protections against erroneous and unfair decision-making. Similarly, the limited procedural protections for classification decisions—a written decision, the possibility of appeal, and periodic review (Standard 23-2.3) - are not compelled for compliance with the Due Process Clause, but are generally offered in prisons because of their value for institutional functioning. Another example involves procedures for placement in long-term segregation. While the Court held in *Wilkinson v. Austin*, 545 U.S. 209 (2005), that the indefinite transfer of prisoners to a "supermax" administrative segregation unit did not require that they have the right to present evidence and call witnesses, Standard 23-2.9(a) does include those protections.

One of the few areas in which courts have held that the rights of pretrial detainees vary from the rights of convicted prisoners is due process; more than a few courts have held that *Sandin*'s liberty interest standard does not apply to pre-trial detainees. Even though the *Sandin* Court severely criticized the Supreme Court's prior case law, and on grounds that apply to detainees as well as convicts, some lower courts have applied that prior case law to detainees; under that approach, any statute or regulation that contains "mandatory language" and "substantive predicates" establishes a liberty interest that receives constitutional due process protections.³⁶ More often, courts have held that pretrial detainees are entitled to due process hearings prior to imposition of punishment or conditions akin to punishment.³⁷

³⁵ See *Moody v. Daggett*, 429 U.S. 78 (1976) (classification, in dicta); *Meachum v. Fano*, 427 U.S. 215 (1976) (inter-prison transfers); *Olim v. Wakinekona*, 461 U.S. 238 (1983) (interstate prison transfers).

³⁶ *Valdez v. Rosenbaum*, 302 F.3d 1039, 1044-45 (9th Cir. 2002) (applying liberty interest analysis to state telephone access statute and regulations); *Carlo v. City of Chino*, 105 F.3d 493, 499-500 (9th Cir. 1997) (applying liberty interest analysis to restriction on arrestees' telephone calls); *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 173 (S.D.N.Y. 2000) (applying liberty interest analysis, holding classification directive left too much discretion to create a liberty interest), *aff'd* on other grounds, 264 F.3d 175 (2d Cir. 2001).

³⁷ *Iqbal v. Hasty*, 490 F.3d 143, 164-65 (2d Cir. 2007) (holding that detainee was entitled to procedural protections based directly upon the Due Process Clause where he was subjected to conditions so harsh as to comprise

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

Subdivisions(b)(i) through (b)(iii): These provisions, relating to investigation and resolution of complaints and problems (further developed in Standards 23-9.1 to 9.3) and oversight (further developed in Standards 23-11.1 to 11.5), aim to promote compliance with more substantive requirements by identifying and correcting violations of law, prison rules and regulations, and good institutional practice; by providing guidance and discipline for staff to avoid further violations; and by putting in place an infrastructure conducive to accountability and transparency. Their goal, that is, is “to shape the institutions of government in such fashion as to comply with the laws and the Constitution.” *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

punishment, as well as under federal regulations that created a liberty interest, regardless of defendants’ punitive intent), aff’d in part, rev’d in part, and remanded on other grounds sub nom. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009); *Surprenant v. Rivas*, 424 F.3d 5, 17 (1st Cir. 2005) (holding detainees have a liberty interest in avoiding punishment); *Peoples v. CCA Detention Centers*, 422 F.3d 1090, 1106 n.12 (10th Cir. 2005) (with respect to detainees’ rights, *Sandin* leaves *Bell v. Wolfish* “untouched”), vacated in part on other grounds, 449 F.3d 1097 (10th Cir. 2006); *Holly v. Woolfolk*, 415 F.3d 678, 679-80 (7th Cir. 2005) (“[A]ny nontrivial punishment of a person not yet convicted [is] a sufficient deprivation of liberty to entitle him to due process of law.”); *Rapier v. Harris*, 172 F.3d 999, 1005 (7th Cir. 1999) (applying *Bell v. Wolfish* punishment analysis to due process claim); *Mitchell v. Dupnik*, 75 F.3d 517, 523-24 (9th Cir. 1995); *Zarnes v. Rhodes*, 64 F.3d 285, 292 (7th Cir. 1995). The First Circuit has held that detainees are denied due process when they are punished as a result of false charges made by staff members with the intent to cause them to be punished. *Surprenant v. Rivas*, 424 F.3d at 13-14. One federal circuit has said: “Although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in the SHU without explanation or review of their confinement” because “the protections due to sentenced inmates provide a floor for what pretrial detainees may expect.” *Stevenson v. Carroll*, 495 F.3d 62, 69 (3d Cir. 2007), cert. denied, 552 U.S. 1180 (2008). It added that detainees are entitled to the usual procedural safeguards for administrative or disciplinary confinement, and possibly “a higher level of procedure” for persons accused of participating in a riot. 495 F.3d at 70-71. It did not state any minimum period of confinement required to trigger those due process rights.

PART II: INTAKE AND CLASSIFICATION

Part II General Commentary

This Part deals with the reception of prisoners, their initial and subsequent custody and health screening and assessment, and their assignment to particular levels of custody and control. It places a good deal of emphasis on prisoner “classification”—the process by which correctional agencies decide on appropriate housing, custody, and programming for prisoners. Initial classification and regular reclassification, using appropriate evidence-based methods, are key to both safe confinement and rehabilitation, because appropriate individualized risk analysis puts dangerous prisoners in more confined settings but leaves less dangerous prisoners with more liberty, facilitating productive and rehabilitative activity. Standards 23-2.2 and 23-2.3 set out the core principles of using and periodically reviewing the application of a classification regimen, along with some details. Many of the other Standards can be safely and effectively implemented only if they are preceded by sound classification of the affected prisoners.

The most secure classification status is long-term solitary confinement, sometimes in a facility or unit labeled “supermax.” Living conditions in this kind of isolated setting are generally the same, however, whether it is conferred after a classification or other non-disciplinary process (in which event it is usually labeled “administrative segregation”) or as discipline for a serious rule infraction (in which event it is usually labeled “disciplinary segregation”). Sometimes, that is, segregation is used to control or even (as “protective custody”) to protect, other times to punish. Most of the Standards deal generally with all assignments to segregated housing, regardless of the justification. Eight Standards, including four in this part (23-2.6 to 2.9) regulate administrative and disciplinary segregation, long and short-term. Standard 23-2.6 sets out very broad substantive prerequisites for placing a prisoner in segregation even for a short time; 23-2.7 provides far narrower rationales acceptable for segregation for a longer period. 23-2.8 deals with the extremely important topic of mental health monitoring of prisoners in segregation, and forbids housing of prisoners with serious mental illness in segregation. Standard 23-2.9 governs the process by which a decision is made to house a prisoner in long-term segregation. In Part III, Standard 23-3.7 and 23-3.8 limit the degree of sensory deprivation and isolation even in such a setting, and Standard 23-3.9 deals with facility “lockdowns,” which can sometimes operate, *de facto*, as wholesale segregating reclassification. Finally, 23-6.11(c) and (d) repeat 2.8(a)’s rule against housing prisoners with serious mental illness in anti-therapeutic environments—which long-term segregation cannot help but be—and require development, instead, of high-security mental health housing appropriate for those whose mental illness interferes with their appropriate functioning in general population.

Some background may be helpful. The forerunner of today’s “supermax” facilities was the federal maximum security prison at Alcatraz, which closed in 1963. A high-security control unit at the U.S. Penitentiary in Marion, Illinois, opened in 1978, but the modern supermax prison was not born until USP Marion was locked-down permanently in 1983, after the murder of two correctional officers by prisoners on the same day. The federal Bureau of Prisons opened another such facility in Florence, Colorado, in 1994; by 1999, more than 30 States operated supermax prisons.³⁸ These freestanding facilities hold thousands of prisoners, and have also made more salient the issues raised by similar custody arrangements in units within general population facilities.

³⁸ Chase Riveland, *Supermax Prisons: Overview and General Considerations* 5, 1 (NIC 1999), available at <http://www.nicic.org/pubs/1999/014937.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

To understand life in long-term segregation, consider, for example, the Supreme Court's description of life in the Ohio State Penitentiary, the supermax facility that was the subject of *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005):

In the OSP almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Some prisoners are sufficiently mentally resilient (or their stays in segregation sufficiently short) that isolating confinement does them no lasting harm; for others, the human cost can be devastating. Abundant research demonstrates that prisoners in segregation often experience physical and mental deterioration. Indeed, even in 1890, the Supreme Court discussed some of the evidence relating to the penitentiary system of solitary confinement:

[E]xperience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168 (1890).³⁹ The modern evidence is abundant. As a leading expert summarizes:

Solitary confinement—that is the confinement of a prisoner alone in a cell for all, or nearly all, of the day with minimal environmental stimulation and minimal opportunity for social interaction—can cause severe psychiatric harm. It has indeed long been known that severe restriction of environmental and social stimulation has a profoundly deleterious effect on mental functioning.⁴⁰

Some dangerous prisoners pose a threat to others unless they are physically separated. But such separation does not necessitate the social and sensory isolation that has become routine. Extreme isolation is not about physical protection of prisoners from each other. It is a method of deterrence and

³⁹ See also *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940) (referring to “solitary confinement” as one of the techniques of “physical and mental torture” governments have used to coerce confessions).

⁴⁰ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006).

ABA Treatment of Prisoners Standards

Standard 23-1.2 Treatment of prisoners

control—and as currently practiced it is a failure. The segregation units of American prisons are full not of Hannibal Lecters but of “the young, the pathetic, the mentally ill.”⁴¹

Long-term segregation units are extraordinarily expensive to build and operate. Too many prisoners are housed in them for too long, in conditions whose harshness stems more from criminal justice politics than from correctional necessity or even usefulness. Those prisoners experience extreme suffering within the units, and those who have serious mental illness frequently decompensate and become floridly psychotic. As one judge has explained, “[f]or these inmates, placing them in the SHU [Security Housing Unit] is the mental equivalent of putting an asthmatic in a place with little air to breathe.” *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995), mandamus denied, 103 F.3d 828 (9th Cir. 1996).⁴² Some prisoners who start off relatively psychologically healthy experience mental health damage, as well. Such conditions are inconsistent with the human dignity of prisoners, and frequently also make prisoners angrier, more difficult to manage, and less well equipped to live in general population or outside prison. It is for this reason that the Standards require several important reforms in this area of criminal justice policy—and the ABA is far from the first organization to offer proposals along these lines⁴³:

- Provide sufficient process prior to placing or retaining a prisoner in segregation to be sure that it is warranted. (23-2.9)
- Limit the permissible reasons for segregation. Disciplinary segregation should generally be brief and should rarely exceed one year. Longer-term segregation should be imposed only if the prisoner poses a continuing and serious threat. Segregation for protective reasons should take place in the least restrictive setting possible. (23-2.6, 23-5.5)
- Decrease isolation within segregated settings. Even prisoners who cannot mix with others can be allowed in-cell programming, supervised (and physically isolated) out-of-cell exercise time, face-to-face interaction with staff, access to television or radio, phone calls, correspondence, and reading material. (23-3.7, 23-3.8)
- Decrease sensory deprivation within segregated settings. Limit the use of auditory isolation, deprivation of light and reasonable darkness, punitive diets, etc. (23-3.7, 23-3.8)
- Allow prisoners to progress gradually towards more privileges and fewer restrictions, even if they continue to require physical separation. (23-2.9)
- Do not place prisoners with serious mental illness in what is an anti-therapeutic environment. Maintain appropriate secure mental health housing for them, instead. (23-2.8, 23-6.11)
- Carefully monitor prisoners in segregation for mental health deterioration, and deal with it appropriately if it occurs. (23-6.11)

⁴¹ Rob Zaleski, *Supermax Doesn't Reflect the Wisconsin that Walter Dickey Knows*, CAPITAL TIMES (Madison, Wis.), Aug. 27, 2001 (quoting Walter Dickey, former secretary of the Wisconsin Department of Corrections).

⁴² See also *Jones'El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001); Settlement Agreement, *Disability Advocates v. N.Y. State Office of Mental Health*, No. 1:02-cv-04002 (S.D.N.Y. Apr. 25, 2007), available at <http://disability-advocates.org/complaints/DAIvOMHSettlement.pdf>.

⁴³ See, e.g., JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH (CHAIRS), CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 52-60 (Vera Institute of Justice 2006) (making similar recommendations and discussing other comparable proposals).

Standard 23-2.1 Intake screening

(a) Correctional authorities should screen each prisoner as soon as possible upon the prisoner's admission to a correctional facility to identify the prisoner's immediate potential security risks, including vulnerability to physical or sexual abuse, and should closely supervise prisoners until screening and follow-up measures are conducted.

(b) Correctional authorities should screen each prisoner as soon as possible upon the prisoner's admission to a correctional facility to identify issues requiring immediate assessment or attention, such as illness, communicable diseases, mental health problems, drug or alcohol intoxication or withdrawal, ongoing medical treatment, risk of suicide, or special education eligibility. Medical and mental health screening should:

- (i) use a properly validated screening protocol, including, if appropriate, special protocols for female prisoners, prisoners who have mental disabilities, and prisoners who are under the age of eighteen or geriatric;
- (ii) be performed either by a qualified health care professional or by specially trained correctional staff; and
- (iii) include an initial assessment whether the prisoner has any condition that makes the use of chemical agents or electronic weaponry against that prisoner particularly risky, in order to facilitate compliance with Standard 23-5.8(d).

(c) Correctional authorities should take appropriate responsive measures without delay when intake screening identifies a need for immediate comprehensive assessment or for new or continuing medication or other treatment, suicide prevention measures, or housing that takes account of a prisoner's special needs.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.4(d) (special classification issues, transgender prisoners), 23-5.4(b) (self-harm and suicide prevention), 23-5.4(b) (self-harm and suicide prevention), 23-5.8(d) (use of chemical agents, electronic weaponry, and canines), 23-6.11(b) (services for prisoners with mental disabilities), 23-6.12 (prisoners with chronic and communicable diseases)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-3.4 (classification)

ABA, RESOLUTION, 116 (Feb. 2004) (mental and emotional illness)

ACA, JAIL STANDARDS, 4-ALDF-2A-19 and 2A-25 (reception), 4-ALDF-4C-22 (health screens) and 4C-29 (mental health screen)

ACA, PRISON STANDARDS, 4-4285 (admission), 4-4372 (mental health evaluations)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS § 28-29 (reception screening)

AM. PSYCHIAT. ASS'N, GUIDELINES, C.1 (jail mental health screening and evaluation), D.1 (prison mental health screening and evaluation)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, III.A.1 to .5, .7 (receiving medical and mental health screening), III.C (follow-up), VI.B (drug and alcohol detoxification and treatment), VII.B.7 to .12 (initial screening of juveniles)

ABA Treatment of Prisoners Standards

Standard 23-2.1 Intake screening

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶¶ 31 (education and classification), 60 (special needs students)

NCCHC HEALTH SERVICES STANDARDS, E-02 (receiving screening), E-03 (transfer screening)

U.N. Standard Minimum Rules, art. 24 (immediate examination)

Commentary

The Standard requires intake screening that covers both security and health issues, and that looks for both vulnerability and risk to others. Intake screening must be done not only for newly incarcerated prisoners but for those being transferred from other correctional facilities. Security intake screening should assess both general and individual issues—vulnerability, for example, might be based on characteristics like age or weight, or on personal history with other prisoners. Health care intake screening can occur at the same time, by appropriately health-trained correctional staff or health care staff. This screening, often called “receiving screening” in relevant professional standards, is not to be confused with the subsequent, more detailed evaluation required by Standard 23-2.5 (though the two can be combined in institutions that are able to provide a complete evaluation promptly upon admission). The relevant NCCHC standards, E-02 (receiving screening) and E-03 (transfer screening), provide more detail on timing and content, and on responses to various health issues found in the screening, explaining, for example, differences between the screening necessary for prisoners transferred intrasystem and others. The National Institute of Justice has a helpful publication that sets out sample mental health screening instruments and discusses their validation.⁴⁴

For jails, the intake screening (as well as the health care assessment required by Standard 23-2.5) should be an occasion for correctional authorities to identify persons with mental illness who may be eligible for diversion from the criminal justice system and to connect with mental health service providers, pretrial service providers, and others, as recommended by ABA policy.⁴⁵ As an important and comprehensive report on mental illness and the criminal justice system notes,

The admission of an individual with mental illness into a county or municipal detention facility presents an opportunity to determine whether continued involvement with the criminal justice system is the most appropriate strategy to address that individual's situation. Once a detainee has been identified as having a mental illness, corrections officials can work with pretrial service programs, mental health service providers, and other partners to determine whether the detainee may be eligible for programs that provide an alternative to further detention.⁴⁶

Subdivision 2.1(b)(iii)'s requirement that intake screening “include an initial assessment whether the prisoner has any condition that makes the use of chemical agents or electronic weaponry against that prisoner particularly risky” is a rare instance in which these Standards actually conflict with an extant professional standard. The American Public Health Association standards, wary of involving health care professionals in non-care-giving roles that might undermine the patient-provider relationship, forbid such professionals to screen prisoners “for suitability for restraint by stun gun weapons, noxious gases, or

⁴⁴ JULIAN FORD *ET AL.*, MENTAL HEALTH SCREENS FOR CORRECTIONS (Nat'l Inst. of Justice, Research for Practice, May 2007).

⁴⁵ See AM. BAR ASS'N, RESOLUTION 116, (Feb. 2004) (mental and emotional illness).

⁴⁶ CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT REPORT 104 (2002), *available at* http://consensusproject.org/downloads/Entire_report.pdf. (See generally *id.*, chapters 13 and 17, on intake screening).

ABA Treatment of Prisoners Standards

Standard 23-2.2 Classification system

restraint boards.”⁴⁷ The approach embodied in Standard 23-2.1 prioritizes safety in uses of force over the subtler risk about which the APHA is concerned.

Note that the assessment in question is only the first occasion for staff to note in a prisoner’s file the existence of a condition that augments the risk of either chemical agents or electronic weaponry. See commentary to Standard 5.8(d).

Standard 23-2.2 Classification system

In order to implement appropriate classification, housing, and programming, correctional officials should:

(a) implement an objective classification system that determines for each prisoner the proper level of security and control, assesses the prisoner’s needs, and assists in making appropriate housing, work, cellmate, and program assignments;

(b) initially and periodically validate an objective classification instrument to ensure consistent and appropriate custody and other decisions for each correctional facility’s population, including prisoners’ assignments to multiple occupancy cells or dormitories; and

(c) ensure that classification and housing decisions, including assignment to particular cells and cellmates, take account of a prisoner’s gender, age, offense, criminal history, institutional behavior, escape history, vulnerability, mental health, and special needs, and whether the prisoner is a pretrial detainee.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.3 (classification procedures), 23-2.4 (special classification issues), 23-2.9 (procedures for placement and retention in long-term segregated housing), 23-3.2 (conditions for special types of prisoners), 23-5.2(a)(i) (prevention and investigation of violence), 23-5.4 (self-harm and suicide prevention), 23-5.5 (protection of vulnerable prisoners), 23-8.2 (rehabilitative programs), 23-10.5(f)(iii) (privately operated correctional facilities, classification systems)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d ed., superseded), Standard 23-3.4 (classification)

ACA, JAIL STANDARDS, 4-ALDF-2A-22 and 2A-25 (reception), 2A-30 and 2A-32 (classification and separation)

ACA, PRISON STANDARDS, Principle 4B (classification), 4-4295 and 4-4296 (classification plan), 4-4399 (special needs)

AM. PUB. HEALTH ASS’N, CORRECTIONS STANDARDS, III.A.8 (medical classification)

NCCHC, HEALTH SERVICES STANDARDS, A-08 (Communication on Patients’ Health Needs)

U.N. Standard Minimum Rules, arts. 8 (separation of categories), 63 (purpose of classification), 67-69 (classification and individualization)

⁴⁷ AM. PUB. HEALTH ASS’N, CORRECTIONS STANDARDS, III.A.4.c.

ABA Treatment of Prisoners Standards
Standard 23-2.2 Classification system

Commentary

As discussed in the general commentary to this Part, appropriate classification of prisoners, which then guides their appropriate housing, supervision, and programming, is key for prisoner safety and rehabilitation. This Standard requires use of a classification system that is both “objective” and “validated.” A helpful discussion of objective classification is included in the 2006 report of the Commission on Safety and Abuse in America’s Prisons:

Before 1980, most of the nation’s prisons and jails used “subjective classification,” which relies heavily on the judgment and hunches of line officers. Since then, every prison system has shifted, at least as a matter of policy, to “objective classification.” These standardized and automated classification criteria “place greater emphasis on fairness, consistency, and openness in the decision-making process.”

Numerous studies of both jails and prisons demonstrate that violent acts, escapes, and deaths by violence can all be significantly reduced by using a validated objective classification system. But currently, the full potential of this tool is not being realized. As James Austin, a leading researcher, reported in 2003: “Although prison classification and other risk assessment instruments are now common, there is a disturbing trend that suggests that many of these systems were implemented without first being properly designed and tested.” In addition, many jails do not use objective classification at all: In eight of the 21 states surveyed in 2003, fewer than half of local jails reported using objective classification.⁴⁸

Validation and revalidation are population-specific processes that seek to ensure, both initially and over time, that classification systems continue to make “consistent and reliable custody decisions, use valid criteria for those decisions, systematically assess inmate program needs, and increase the safety and security of staff and inmates.”⁴⁹ As described in the Department of Justice (National Institute of Corrections) publication, “[v]alidation studies track the misconduct of a sample of prisoners (e.g., an admission, release, or current population cohort) over a given period to determine whether the risk factors scored by the classification system are associated with prisoner misconduct. Statistical tests are used in completing the analysis of the risk factors.”⁵⁰ Validation studies must be performed on a facility’s particular population. But generally, they have shown the following factors to be the most predictive of prisoner misbehavior: younger age; male gender; history of violence; history of mental illness; gang membership; program nonparticipation; recent disciplinary actions. Factors that tend to have little if any

⁴⁸ CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 29 (Vera Institute of Justice 2006), available at <http://www.prisoncommission.org> (internal citations omitted; the sources quoted and cited are: JAMES AUSTIN, FINDINGS IN PRISON CLASSIFICATION AND RISK ASSESSMENT (National Institute of Corrections 2003), available at <http://www.nicic.org/Library/018888>; Connie Clem & Dave Sheanin, *Issues in Jail Operations*, in PERSPECTIVES FROM STATE JAIL INSPECTION AGENCIES (National Institute of Corrections, 2003), available at <http://www.nicic.org/Library/019259>; NATIONAL INSTITUTE OF CORRECTIONS, JAIL CLASSIFICATION SYSTEM DEVELOPMENT: A REVIEW OF THE LITERATURE (1992), available at <http://www.nicic.org/Library/010681>).

⁴⁹ Patricia L. Hardyman, James Austin & Owan Tulloch, *Revalidating External Prison Classification Systems: The Experience of Ten States and Model for Classification Reform* (Institute on Crime, Justice and Corrections, January 2002), available at <http://www.nicic.org/pubs/2002/017382.pdf>.

⁵⁰ James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Administrators* (National Institute of Corrections, July 2004), available at <http://www.nicic.org/pubs/2004/019319.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-2.2 Classification system

predictive capability include: severity of the current offense; sentence length; time left to serve; detainees; alcohol and drug use.⁵¹

The U.S. Department of Justice has frequently insisted on both objectivity and validation of classification systems in its prison and jail settlement agreements under the Civil Rights of Institutionalized Persons Act.⁵²

Subdivision (c): This provision lists factors that ought to enter into classification; no one factor should alone be dispositive for classification decision-making. How the factors affect housing and other decisions varies. Some prisoner characteristics are incorporated relatively simply into a general classification system; others—in particular, age and gender (including transgender status, see Standard 23-2.4(d))—require more systematically different treatment. For youthful prisoners and for women prisoners, appropriate classification requires careful research and separate validation of a classification instrument.⁵³

Among the special needs referenced that may affect classification and housing decisions, along with work and program assignments, are various types of chronic illness, serious communicable diseases, physical or mental disability, pregnancy, and others. For discussion, see NCCHC, HEALTH SERVICES STANDARDS, A-08 (communication on patients' health needs).

International law sources are substantially more rigid than this Standard on the separation of pretrial detainees from convicted prisoners. For example, Article 10 (¶2(a)) of the International Covenant on Civil and Political Rights states that: "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons."⁵⁴ The issue comes up routinely in jails, which incarcerate people in many situations, including those: (a) waiting to make bail, (b) unable to make bail and awaiting trial, (c) post-trial awaiting sentencing, (d) post-sentencing but awaiting transfer to prison, (e) serving misdemeanor or short-term felony sentences, (f) detained as unlawful immigrants rather than for criminal justice reasons. Convicted prisoners in jails are mostly in category (e), and they tend to be less dangerous than some of the more violent offenders in categories (b), (c), and (d). U.S. jail practice focuses the classification inquiry on dangerousness and consequent need for supervision, rather than on conviction status. Experts agree that this increases safety and security. The Standard therefore accords with U.S. practice rather than international sources.

Prisoners whose classification has not been completed present unknown needs and risks and should therefore be held in appropriate housing, preferably separately from general population prisoners, but in any case sufficiently secure and with sufficient supervision to ensure their safety.

⁵¹ *Id.* at 46.

⁵² See, e.g., Settlement Agreement Between the United States and the County of Gila, Arizona Regarding the Gila County Jail, *United States v. Gila County*, 98-2269 (D. Ariz. Jan. 5, 2009), available at <http://www.usdoj.gov/crt/split/documents/gilajailsa.htm>.

⁵³ See, e.g., Craig S Schwalbe, *Risk Assessment for Juvenile Justice: A Meta-Analysis*, 31 LAW & HUM. BEHAV. 449 (2007); Miles D. Harer & Neal P. Langan, *Gender Differences in Predictors of Prison Violence: Assessing the Predictive Validity of a Risk Classification System*, 47 CRIME & DELINQ. 513 (2001); Kathryn Ann Farr, *Classification for Female Inmates: Moving Forward*, 46 CRIME & DELINQ. 3 (2000).

⁵⁴ The text of the ICCPR is available at <http://www2.ohchr.org/english/law/ccpr.htm>. The U.S. is signatory to the ICCPR, but signed with an "understanding: relevant to this provision: "[T]he United States understands the reference to 'exceptional circumstances' in paragraph 2(a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons." See http://untreaty.un.org/humanrightsconvs/Chapt_IV_4/reservations/USA.pdf.

Standard 23-2.3 Classification procedures

(a) **Initial classification of a prisoner should take place within [48 hours] of the prisoner's detention in a jail and within [30 days] of the prisoner's confinement in a prison.**

(b) **Each classification decision should be in writing, and should set forth the considerations and factors that led to the decision; the written decision should be made available to the prisoner, and should be explained by an appropriate staff member if the prisoner is incapable of understanding it. Correctional authorities should be permitted to summarize or redact information provided to the prisoner if it was obtained under a promise of confidentiality or if its disclosure could harm the prisoner or others or would not serve the best treatment interests of the prisoner.**

(c) **If a classification decision has an impact on a prisoner's release date or ability to participate in facility programs, correctional authorities should provide the prisoner an opportunity to request reconsideration and at least one level of appeal.**

(d) **Correctional authorities should review the classification of a prisoner housed in a prison at least every [12 months], and the classification of a prisoner housed in a jail at least every [90 days].**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.2 (classification system), 23-2.9 (procedures for placement and retention in long-term segregated housing)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d ed., superseded), Standard 23-3.4 (classification)

ACA, JAIL STANDARDS, 4-ALDF-2A-31 (classification and separation)

ACA, PRISON STANDARDS, 4-4300 through 4-4303 (classification status reviews)

Commentary

Case law establishes that the Due Process Clause has no application to general classification procedures, because prisoners' limited liberty interests are not affected by routine classification decisions:

[N]o due process protections [are] required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where that transfer visit[s] a 'grievous loss' upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system.

Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976). Standard 23-2.3 reflects that legal holding, as well as the fact that in practice corrections facilities do not generally provide many process protections in classification. Yet in light of the centrality of classification to the experience and safety of prisoners, 23-2.3 does require written decision-making and the opportunity for appeal of classification decisions. These requirements match typical practice and the ACA's standards.

Subdivision (d): The requirement of reclassification every 12 months for people in prison corresponds to the ACA's prison accreditation requirement. The ACA's jail standards do not, by contrast, specify the timing of routine reclassification of people in jail, stating only that it must be "periodic." Subdivision (d) specifies that jail reclassification should occur at least every 90 days; experts agree that jail inmates

ABA Treatment of Prisoners Standards

Standard 23-2.4 Special classification issues

should receive more frequent reclassification than prison inmates, because jail inmates' situations change more rapidly. Reclassification should comply with the procedural requirements for classification. Reclassification for prisoners in long-term segregated housing should also comply with the requirements in Standard 23-2.9(d).

Standard 23-2.4 Special classification issues

(a) **Classification and housing assignments should not segregate or discriminate based on race unless the consideration of race is narrowly tailored to serve a compelling governmental interest.**

(b) **A prisoner should not be separated from the general population or denied programmatic opportunities based solely on the prisoner's offense or sentence, except that separate housing areas should be permissible for prisoners under sentence of death. If convicted capital offenders are separately housed based solely on their sentence, conditions should be comparable to those provided to the general population.**

(c) **Correctional authorities should assign to single occupancy cells prisoners not safely or appropriately housed in multiple occupancy cells, and correctional and governmental authorities should maintain sufficient numbers of such single cells for the needs of a facility's particular prisoner population.**

(d) **Correctional authorities should make individualized housing and custody decisions for prisoners who have undergone sex reassignment surgery or have had other surgical or hormonal treatment and present themselves and identify as having a gender different from their physical sex at birth. In deciding whether to assign such a prisoner to a facility for male or female prisoners and in making other housing and programming assignments, staff should consider on a case by case basis whether a placement would ensure the prisoner's health and safety, and whether the placement would present management or security problems. Placement and programming assignments for such a prisoner should be reassessed at least twice each year to review any threats to safety experienced by the prisoner. The prisoner's own views with respect to his or her own safety should be given serious consideration.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.2 (classification system), 23-3.3 (housing areas), 23-7.1(a) (respect for prisoners)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d ed., superseded), Standard 23-6.14 (non-discriminatory treatment)

ACA, JAIL STANDARDS, 4-ALDF-2A-25 (reception), 2A-30 through 2A-35 (classification and separation)

ACA, PRISON STANDARDS, Performance Standard 4B (classification), 4-4133 (single cells), 4-4296 (classification plan), 4-4300 and 4-4303 (classification status reviews)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VII.E.3 (housing of transgendered persons), X.E.D.1 (single cells)

NCCHC, *Position Statement on Transgender Health Care in Correctional Settings*, ¶7 (<http://ncchc.org/resources/statements/transgender.html>)

ABA Treatment of Prisoners Standards
Standard 23-2.4 Special classification issues

Commentary

Subdivision (a): This provision implements the Equal Protection Clause as interpreted in *Johnson v. California*, 543 U.S. 499 (2005), and Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d.⁵⁵ These authorities forbid race discrimination in prison housing decisions in the absence of a specific and compelling governmental interest and tailoring of the policy as narrowly as possible to satisfy that interest. The possibility of racial violence in prison is real, but the best evidence is that racial integration actually “leads to less violence . . . and better prepares inmates for re-entry into society.” Brief for United States as Amicus Curiae at 25, *Johnson v. California*, 543 U.S. 499 (2005) (No. 03-636), 2004 WL 1261255.⁵⁶ Accordingly, consideration of race is appropriate only rarely, when it is a temporary measure that is necessary to avoid significant violence among prisoners; even then, such measures are allowed only for the shortest time possible to devise non-racial means of keeping order.

Subdivision (b): There is, it should be noted, no case law support for subdivision (b)’s discussion of prisoners under sentence of death, which requires that if such prisoners are housed separately from the rest of the prison population (a separation that most but not all states impose⁵⁷) conditions on the resulting “death row” should be those the prisoners’ objective and validated classification suggests, rather than made particularly harsh because of their legal status. The fact of a death sentence, without more, does not automatically make a prisoner more dangerous than a prisoner with an otherwise similar record. (Note, too, that death row prisoners may have special needs that should be accommodated, such as the need for more space for legal visits.) Probably for most states, this Standard requires death row conditions to be less stark than is currently the case. Rather than reflecting a constitutionally compelled rule, this Standard instantiates Standard 23-1.1(c)’s requirement that “Restrictions placed on prisoners should be necessary and proportionate to the legitimate objectives for which those restrictions are imposed.”

Subdivision (c): Standard 23-3.3(a) expresses a general preference for single-occupancy cells for prisoners, to ensure their safety and to allow them a greater degree of privacy. But it is clear that the Constitution does not require single celling for its own sake. *Rhodes v. Chapman*, 452 U.S. 337 (1981). There are, however, prisoners for whom single cells are necessary for safe housing, either to protect other prisoners from them, or to protect them from other prisoners. The ACA’s accreditation standards provide that single cells should be available, “when indicated,” for prisoners with “special needs for single housing,” including those with “severe medical disabilities” or “suffering from serious mental illness” sexual predators or those whose are “likely to be exploited or victimized by others,” and prisoners assigned to “maximum custody.”⁵⁸ Such requirements have also been imposed in lawsuit settlements.⁵⁹

⁵⁵ See also State and Local Fiscal Assistance Act of 1972, § 122(a), 31 U.S.C. § 6716.

⁵⁶ See also Chad R. Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 LAW & SOC’Y REV. 743, 774 (2002) (“[O]ver [10 years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated.”) (cited by the Court in *Johnson v. California*, 543 U.S. 499, 507-08 (2005)); CHAD R. TRULSON & JAMES W. MARQUART, FIRST AVAILABLE CELL: DESEGREGATION OF THE TEXAS PRISON SYSTEM (2009); Brief for Former State Corrections Officials as Amici Curiae at 19, *Johnson v. California*, 543 U.S. 499 (2005) (No. 03-636), 2004 WL 1261255 (former corrections officials from six States argued that “racial integration of cells tends to diffuse racial tensions and thus diminish interracial violence” and that “a blanket policy of racial segregation of inmates is contrary to sound prison management”).

⁵⁷ See <http://www.deathpenaltyinfo.org/documents/DeathRowConditions.xls>.

⁵⁸ ACA, PRISON STANDARDS 4-4133; ACA, JAIL STANDARDS 4-ALDF-2A-34. The commentary to Prison Standard 4-4133 states that “the caveat ‘when indicated’ refers to determinations made by the classification system, medical diagnosis, or other professional conclusions.”

ABA Treatment of Prisoners Standards

Standard 23-2.5 Health care assessment

Subdivision (c)'s requirement of single celling applies to prisoners who present particular risks of aggression or are particularly vulnerable for whatever reason; the ACA's estimate that 10% of facility beds be in single cells seems appropriate.⁶⁰ See Standard 23-3.3(a), which expresses a general preference for single-celling for all prisoners.

Subdivision (d): Though it is numerically small, the population of transgender prisoners presents important challenges for safety and for medical and mental health care. The Standard aims to provoke individualized consideration of the issues by correctional administrators, and to assist them in striking an appropriate balance. For a helpful discussion of this issue see *Phillips v. Michigan Dep't of Corr.*, 731 F. Supp. 792 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991). There is disagreement among practitioners as to whether it is appropriate to have an option for separate housing for either transgender or lesbian or gay prisoners.⁶¹ The Standard takes no position on the question, apart from its explicit requirement of individualized housing decision-making and serious consideration of the prisoner's own views.

Standard 23-2.5 Health care assessment

Each prisoner should receive a comprehensive medical and mental health assessment by qualified medical and mental health professionals no later than [14 days] after admission to a correctional facility, and a comprehensive medical assessment periodically thereafter, which should include mental health screening. The frequency of periodic medical assessments should accord with community health standards, taking account of the age and health status of each prisoner. No new comprehensive medical and mental health assessment need occur for a prisoner transferred or readmitted to a correction facility who has received comprehensive health assessment within the prior year unless it is medically necessary, or the prisoner's medical records are not available. Unless a dental emergency requires more immediate attention, a dental examination by a dentist or trained personnel directed by a dentist should be conducted within [90 days] of admission if the prisoner's confinement may exceed one year, and annually thereafter.

Cross References

ABA, TREATMENT OF PRISONERS STANDARDS, 23-2.1 (intake screening), 23-6.1(c) (general principles governing health care), 23-6.11 (services for prisoners with mental disabilities)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.3 (medical examinations)

⁵⁹ See, e.g., Stipulated Agreement, *United States v. Montana*, 94-90 (D. Mont. Jan. 27, 1997), available at <http://clearinghouse.net/chDocs/public/PC-MT-0003-0005.pdf>.

⁶⁰ See ACA, JAIL STANDARDS 4-ALDF-2A-34 ("no less than 10% of the rated capacity of the facility [should be] available for single occupancy"). The ACA Prison Standards contain no analogous requirement.

⁶¹ Compare NPREC [Proposed] Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails SC-1 (Screening for risk of victimization and abusiveness), in NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 217 (June 2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>, with Stipulation and Request for Dismissal, *Robertson v. Block*, 82-1442 (C.D. Cal. July 18, 1985), available at <http://www.clearinghouse.net/chDocs/public/JC-CA-0064-0001.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-2.6 Rationales for segregated housing

ACA, JAIL STANDARDS, 4-ALDF-4C-24 (health appraisal) and 4C-30 (mental health appraisal)

ACA, PRISON STANDARDS, 4-4362 through 4-4367 (health screens), 4-4368 and 4-4370 through 4-4372 (mental health)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, §§ 30 (routine psychological evaluation), 31 (special comprehensive psychological evaluation)

AM. PSYCHIAT. ASS'N, GUIDELINES, C.1 (jail mental health screening and evaluation), D.1 (prison mental health screening and evaluation)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, III.A.6 (complete medical examination), III.G (periodic health assessment), VI.E (dental care)

NCCHC, HEALTH SERVICES STANDARDS E-04 (initial health assessment), E-05 (mental health screening and evaluation), E-06 (Oral Care), E-12 (Continuity of Care During Incarceration)

Commentary

The health assessment required by this Standard is a hands-on medical physical plus a mental health assessment. The standards by health organizations cited in the related standards list, above, are useful sources for a detailed description of appropriate care. Periodic comprehensive re-assessments are crucial, especially for prisoners with chronic health conditions, and should proceed without respect to prisoners' symptoms. Intake assessments and reassessments, though they require resources, are likely to save money through early identification and treatment of medical conditions that may be more costly to treat if diagnosed at a later stage.

Standard 23-2.6 Rationales for segregated housing

(a) Correctional authorities should not place prisoners in segregated housing except for reasons relating to: discipline, security, ongoing investigation of misconduct or crime, protection from harm, medical care, or mental health care. Segregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner. Segregation for health care needs should be in a location separate from disciplinary and long-term segregated housing. Policies relating to segregation for whatever reason should take account of the special developmental needs of prisoners under the age of eighteen.

(b) If necessary for an investigation or the reasonable needs of law enforcement or prosecuting authorities, correctional authorities should be permitted to confine a prisoner under investigation for possible criminal violations in segregated housing for a period no more than [30 days].

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.7 (rationales for long-term segregated housing), 23-2.8 (segregated housing and mental health), 23-3.8 (segregated housing), 23-4.3 (disciplinary sanctions), 23-5.5 (protection of vulnerable prisoners)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-3.2(e) (disciplinary hearing procedures)

ACA, JAIL STANDARDS, 4-ALDF-2A-44, 2A-46, and 2A-47 (special management inmates)

ABA Treatment of Prisoners Standards

Standard 23-2.7 Rationales for long-term segregated housing

ACA, PRISON STANDARDS, Principle 3D (removal to special units), 4-4249 through 4250 (general policy and practice), 4-4281 (protection from harm)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.A.A.8 (medical isolation), VI.A.B (issues raised by specific communicable diseases)

NCCHC, HEALTH SERVICES STANDARDS I-01 (Restraint and Seclusion)

Commentary

This Standard, along with Standard 2.8, deals with *any* placement of a prisoner in segregated housing, defined in Standard 23-1.0 to include “housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action,” including “restriction of a prisoner to the prisoner’s assigned living quarters.” Standards 23-2.7 and 2.9 deal with the more limited category of long-term segregation—segregated housing “that is expected to extend or does extend for a period of time exceeding 30 days.” Standard 3.8 sets out requirements for conditions in segregated housing of any term. Even short-term segregated housing imposes serious burdens on prisoners (even, or perhaps especially, when it is for their own protection), and it should be used only when justified.

Subdivision (a): Segregation for medical or mental health care purposes is typically termed “seclusion,” and should be tightly constrained, just as medical and mental health uses of restraint devices are limited. See NCCHC, HEALTH SERVICES STANDARDS, I-01 (restraint and seclusion). In addition, isolation can be particularly damaging to youthful prisoners,⁶² and adult facilities housing minors should implement specific policies that take account of this developmental difference; segregation for youthful prisoners should be even more disfavored than for adults.

Subdivision (b): It may be useful in the first days of an investigation dealing with serious misconduct or crime to house the investigation’s subject in segregated housing. The Standard allows this. But it does not permit the term of such investigatory (administrative) segregation to extend past 30 days. By that time, investigation needs have largely faded and the segregation has become, *de facto*, punitive. Alternative methods to safeguard the integrity of investigations include unit and facility transfers, separation orders, and the like.

Standard 23-2.7 Rationales for long-term segregated housing

(a) Correctional authorities should use long-term segregated housing sparingly and should not place or retain prisoners in such housing except for reasons relating to:

- (i) discipline after a finding that the prisoner has committed a very severe disciplinary infraction, in which safety or security was seriously threatened;**
- (ii) a credible continuing and serious threat to the security of others or to the prisoner’s own safety; or**
- (iii) prevention of airborne contagion.**

⁶² See, e.g., *Mary & Crystal v. Ramsden*, 635 F.2d 590, 595 (7th Cir. 1980) (citing expert testimony that “children or adolescents are particularly vulnerable to the negative effects” of isolated confinement); *Jones’El v. Berge*, 164 F.Supp.2d 1096, 1111 (W.D. Wis. 2001) (citing psychiatric testimony that risk of suicide for 17 year old in supermax prison “is especially acute because of his young age”).

ABA Treatment of Prisoners Standards

Standard 23-2.7 Rationales for long-term segregated housing

(b) Correctional authorities should not place a prisoner in long-term segregated housing based on the security risk the prisoner poses to others unless less restrictive alternatives are unsuitable in light of a continuing and serious threat to the security of the facility, staff, other prisoners, or the public as a result of the prisoner's:

- (i) history of serious violent behavior in correctional facilities;**
- (ii) acts such as escapes or attempted escapes from secure correctional settings;**
- (iii) acts or threats of violence likely to destabilize the institutional environment to such a degree that the order and security of the facility is threatened;**
- (iv) membership in a security threat group accompanied by a finding based on specific and reliable information that the prisoner either has engaged in dangerous or threatening behavior directed by the group or directs the dangerous or threatening behavior of others; or**
- (v) incitement or threats to incite group disturbances in a correctional facility.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS: 23-2.7 (rationales for long-term segregated housing), 23-2.8 (segregated housing and mental health), 23-2.9(a) (procedures for placement and retention in long-term segregated housing), 23-3.8 (segregated housing), 23-4.3(b) (disciplinary sanctions, housing), 23-5.5 (protection of vulnerable prisoners), 23-6.12 (prisoners with chronic and communicable diseases)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-44, 2A-46 and 2A-47 (special management inmates)

ACA, PRISON STANDARDS, Principle 3D (special management), 4-4249 and 4250 (general policy and practice), 4-4281 (protection from harm)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.A.A.8 (medical isolation), VI.A.B (issues raised by specific communicable diseases)

NCCHC, HEALTH SERVICES STANDARDS I-01 (Restraint and Seclusion)

Commentary

This Standard delineates the appropriate substantive predicate for long-term (more than 30 days) segregation, whether it is imposed for punishment, security, or health care reasons. These Standards allow long-term disciplinary segregation of up to a year for very serious misconduct, see subdivision (a)(i) and Standard 23-4.3(b), and terms of disciplinary segregation of up to 30 days for more minor misconduct, see Standard 23-4.3(b). As discussed in the commentary that introduces this Part, administrative segregation and supermax units currently house many prisoners placed there not because they are dangerous but because they are disruptive or have disobeyed facility rules. But under this Standard, non-disciplinary long-term segregation cannot be imposed unless the prisoner is dangerous to him or herself or to others.

Subdivision (a)(i): This subdivision's limit on disciplinary segregation, under which a rule infraction should be punished by more than 30 days in segregation only if it was very severe, posing a serious threat to security or safety, is reiterated in Standard 23-4.3(b). An example of a system that implements this approach is the federal Bureau of Prisons' disciplinary scale, under which violations classified as

ABA Treatment of Prisoners Standards

Standard 23-2.7 Rationales for long-term segregated housing

“greatest severity” can be punished with up to 60 days in disciplinary segregation, but violations one level down, of “high severity” can receive only up to 30 days. (Greatest severity includes killing, assault “when serious physical injury has been attempted or carried out,” escape from a secure institution, and the like, as well as narcotics possession).⁶³

Other sanctions for prisoner misconduct remain available, including forfeiture of sentencing credit earned for good behavior. And if a disciplinary infraction indicates that a prisoner poses a continuing serious security threat, the prisoner is eligible for consideration of segregated confinement not for discipline but as a classification measure, under subdivision (a)(ii).

Subdivision (a)(ii): This subdivision authorizes the long-term segregation of a prisoner for security reasons, based on the security risk posed either *by* or *to* that prisoner. If the justification for segregation is risk posed *by* the prisoner, segregation is further limited by the requirements of subdivision (b). If the justification is risk posed *to* the prisoner, segregation is further limited by the requirements of Standard 23-5.5 (protection of vulnerable prisoners), which dictates that prisoners assigned to protective custody should be “housed in the least restrictive environment practicable, in segregated housing only if necessary.” Either way, the procedures for assignments to long-term segregation are governed by Standard 23-2.9.

Subdivision (a)(iii): Medical isolation is appropriately used to house prisoners with infectious tuberculosis.⁶⁴ See Standard 23-6.12(b)(Prisoners with chronic and communicable diseases)(medical isolation areas). Isolation is generally not required for other communicable diseases.⁶⁵ For prisoners with a condition that has recently posed a public health threat in jails and prisons, the virulent staph skin infection known as MRSA (methicillin-resistant *Staphylococcus aureus*), single celling may be appropriate, so that other prisoners are not exposed to infectious dressings.⁶⁶

Subdivision (b): The several provisions in this subdivision are intended to ensure that long-term segregation of a prisoner based on the threat the prisoner poses to others is not predicated merely on the prisoner’s offense. In addition, the predicate for long-term segregation cannot be, simply, gang affiliation (“membership in a security threat group”). Rather, as subdivision (b)(iv) specifies, prison authorities must have “specific and reliable information” (not a mere accusation) that the prisoner “either has engaged in dangerous or threatening behavior directed by the group or directs the dangerous or threatening behavior of others.”

⁶³ See BOP Policy Statement 5270.07 (Inmate Discipline and Special Housing Units) (Dec. 29, 1987 and modifications), available at http://www.bop.gov/policy/progstat/5270_007.pdf; compare ch. 4 p. 4 with ch. 4 p. 7.

⁶⁴ See AM. PUB. HEALTH ASS’N, CORRECTIONS STANDARDS, VI.A.B.2.c.

⁶⁵ See *id.* at VI.A.B.1.b (HIV), VI.A.B.3.a(3) (Hepatitis A), VI.A.B.3.b(3) (Hepatitis C), VI.A.B.4.g(1)(b), (2)(b), (3)(b), (4)(b), (5)(b), (6)(b) (sexually transmitted diseases), VI.A.B.5.a(3) (lice), VI.A.B.5.b(2) (ringworm), VI.A.B.5.c(2) (scabies).

⁶⁶ Federal Bureau of Prisons, *Clinical Practice Guidelines: Management of Methicillin-Resistant Staphylococcus aureus (MRSA) Infections* (Aug. 2005), available at <http://www.bop.gov/news/PDFs/mrsa.pdf>.

Standard 23-2.8 Segregated housing and mental health

(a) No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing.

(b) No prisoner should be placed in segregated housing for more than [1 day] without a mental health screening, conducted in person by a qualified mental health professional, and a prompt comprehensive mental health assessment if clinically indicated. If the assessment indicates the presence of a serious mental illness, or a history of serious mental illness and decompensation in segregated settings, the prisoner should be placed in an environment where appropriate treatment can occur. Any prisoner in segregated housing who develops serious mental illness should be placed in an environment where appropriate treatment can occur.

(c) The mental health of prisoners in long-term segregated housing should be monitored as follows:

- (i) Daily, correctional staff should maintain a log documenting prisoners' behavior.
- (ii) Several times each week, a qualified mental health professional should observe each segregated housing unit, speaking to unit staff, reviewing the prisoner log, and observing and talking with prisoners who are receiving mental health treatment.
- (iii) Weekly, a qualified mental health professional should observe and seek to talk with each prisoner.
- (iv) Monthly, and more frequently if clinically indicated, a qualified mental health professional should see and treat each prisoner who is receiving mental health treatment. Absent an individualized finding that security would be compromised, such treatment should take place out of cell, in a setting in which security staff cannot overhear the conversation.
- (v) At least every [90 days], a qualified mental health professional should perform a comprehensive mental health assessment of each prisoner in segregated housing, unless a qualified mental health professional deems such assessment unnecessary in light of observations made pursuant to subdivisions (ii)-(iv).

Cross References

ABA, TREATMENT OF PRISONERS STANDARDS, 23-2.1 (intake screening), 23-2.5 (health care assessment), 23-2.6 (rationales for segregated housing), 23-3.8 (segregated housing), 23-5.4 (self-harm and suicide prevention), 23-6.11(c) (services for prisoners with mental disabilities, housing options)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-45, 2A-52 through 2A-55 (special management supervision)

ACA, PRISON STANDARDS, 4-4257 through 4-4260 (special management supervision), 4-4400 (health care in segregation)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, §§ 43 (consultation with psychologist), 44 (psychological services in segregation)

ABA Treatment of Prisoners Standards

Standard 23-2.8 Segregated housing and mental health

AM. PSYCHIAT. ASS'N, PRINCIPLES, F.5 (discussing confidentiality and therapeutic milieu)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.B.11-12 (health care for prisoners in segregation), V.A.3.c (psychiatric screening and segregation), VII.D (segregation)

NCCHC, HEALTH SERVICES STANDARDS, A-08 (Communication on Patients' Health Needs), E-09 (Segregated Inmates).

U.N. Standard Minimum Rules, art. 32 (punishment by close confinement)

Commentary

The general commentary on this Part introduces the topic of segregation and mental health. Because, as discussed there, segregation of prisoners with mental illness can be so damaging, and because isolation itself can incubate mental illness, this Standard requires specific steps to monitor prisoners' mental health. (Standard 23-3.8 focuses on conditions in segregation that lessen mental health stress.)

Subdivisions (a) & (b): First, if a prisoner is seriously mentally ill, but in need of highly secure housing, that prisoner should *not* be housed in long-term segregation, but instead in a therapeutic setting as described in Standard 23-6.11. Subdivision (b) sets out procedures that allow implementation of this general rule. It is similar to but slightly more extensive than NCCHC, HEALTH SERVICES STANDARDS, E-09. (segregated inmates). See also U.N. Standard Minimum Rules, art. 32(1) ("Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.").

Subdivision (c): If a prisoner is appropriately housed in ordinary segregation, the Standard collates best practices, which combine daily documented observation by correctional staff of all prisoners with frequent rounds by mental health staff, who perform rounding for prisoners on the mental health caselist several times each week, and weekly rounding for all prisoners. Again this is similar to the approach taken in NCCHC, HEALTH SERVICES STANDARDS, E-09 (segregated inmates) (requiring daily monitoring by medical staff and at least weekly monitoring by mental health staff of "inmates under extreme isolation with little or no contact with other individuals"). In addition, the Standard would forbid "through the door" therapy absent an individualized finding that security would otherwise be compromised. See NCCHC, HEALTH SERVICES STANDARDS A-09 (requiring "discussion of patient information and clinical encounters" to be "conducted in private and carried out in a manner designed to encourage the patient's subsequent use of health services").

Subdivision (c)(v) provides, as well, for a 90-day mental health assessment for every prisoner in segregated housing, unless a qualified mental health professional deems this unnecessary. This requirement is part of the ACA's prison accreditation standards. ACA, PRISON STANDARDS 4-4256. If the rounding required in (c)(ii) and (c)(iii) has provided substantially equivalent monitoring, it would be reasonable to substitute in-person screening by a qualified mental health professional instead of a full assessment, with comprehensive assessment as clinically indicated.

Standard 23-2.9 Procedures for placement and retention in long-term segregated housing

(a) A prisoner should be placed or retained in long-term segregated housing only after an individualized determination, by a preponderance of the evidence, that the substantive prerequisites set out in Standards 23-2.7 and 23-5.5 for such placement are met. In addition, if long-term segregation is being considered either because the prisoner poses a credible continuing and serious threat to the security of others or to the prisoner's own safety, the prisoner should be afforded, at a minimum, the following procedural protections:

- (i) timely, written, and effective notice that such a placement is being considered, the facts upon which consideration is based, and the prisoner's rights under this Standard;
- (ii) decision-making by a specialized classification committee that includes a qualified mental health care professional;
- (iii) a hearing at which the prisoner may be heard in person and, absent an individualized determination of good cause, has a reasonable opportunity to present available witnesses and information;
- (iv) absent an individualized determination of good cause, opportunity for the prisoner to confront and cross-examine any witnesses or, if good cause to limit such confrontation is found, to propound questions to be relayed to the witnesses;
- (v) an interpreter, if necessary for the prisoner to understand or participate in the proceedings;
- (vi) if the classification committee determines that a prisoner is unable to prepare and present evidence and arguments effectively on his or her own behalf, counsel or some other appropriate advocate for the prisoner;
- (vii) an independent determination by the classification committee of the reliability and credibility of confidential informants if material allowing such determination is available to the correctional agency;
- (viii) a written statement setting forth the evidence relied on and the reasons for placement; and
- (ix) prompt review of the classification committee's decision by correctional administrators.

(b) Within [30 days] of a prisoner's placement in long-term segregated housing based on a finding that the prisoner presents a continuing and serious threat to the security of others, correctional authorities should develop an individualized plan for the prisoner. The plan should include an assessment of the prisoner's needs, a strategy for correctional authorities to assist the prisoner in meeting those needs, and a statement of the expectations for the prisoner to progress toward fewer restrictions and lower levels of custody based on the prisoner's behavior. Correctional authorities should provide the plan or a summary of it to the prisoner, and explain it, so that the prisoner can understand such expectations.

(c) At intervals not to exceed [30 days], correctional authorities should conduct and document an evaluation of each prisoner's progress under the individualized plan required by subdivision (b) of this Standard. The evaluation should also consider the state of the prisoner's mental health; address the extent to which the individual's behavior, measured against the plan, justifies the need to maintain, increase, or decrease the level of

controls and restrictions in place at the time of the evaluation; and recommend a full classification review as described in subdivision (d) of this Standard when appropriate.

(d) At intervals not to exceed [90 days], a full classification review involving a meeting of the prisoner and the specialized classification committee should occur to determine whether the prisoner's progress toward compliance with the individual plan required by subdivision (b) of this Standard or other circumstances warrant a reduction of restrictions, increased programming, or a return to a lower level of custody. If a prisoner has met the terms of the individual plan, there should be a presumption in favor of releasing the prisoner from segregated housing. A decision to retain a prisoner in segregated housing following consideration by the classification review committee should be reviewed by a correctional administrator, and approved, rejected, or modified as appropriate.

(e) Consistent with such confidentiality as is required to prevent a significant risk of harm to other persons, a prisoner being evaluated for placement in long-term segregated housing for any reason should be permitted reasonable access to materials considered at both the initial and the periodic reviews, and should be allowed to meet with and submit written statements to persons reviewing the prisoner's classification.

(f) Correctional officials should implement a system to facilitate the return to lower levels of custody of prisoners housed in long-term segregated housing. Except in compelling circumstances, a prisoner serving a sentence who would otherwise be released directly to the community from long-term segregated housing should be placed in a less restrictive setting for the final months of confinement.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.2 (classification system), 23-2.3 (classification procedures), 23-5.5 (protection of vulnerable prisoners)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-48 through 2A-49 (special management inmates)

ACA, PRISON STANDARDS, 4-4253 and 4-4254 (review of inmates in administrative segregation and protective custody)

Commentary

This Standard governs the procedures to be followed before placing a prisoner in long-term segregated housing for security reasons, whether that placement is protecting the prisoner from others, or protecting others from the prisoner. This decision is a special classification decision and so any additional protections set out in Standard 23-2.3, which delineates procedures governing *all* classification and reclassification, apply as well—in particular, the requirement that the written decision (required under subdivision (a)(viii)) “should be made available to the prisoner, and should be explained by an appropriate staff member if the prisoner is incapable of understanding it.” Standard 23-2.3(b). The disclosure limitations in Standard 2.3(b) apply as well.

Subdivision (a): As discussed in the Commentary to Standards 23-1.2, there is Supreme Court case law on the topic of procedural due process in the context of a classification decision to send a prisoner to indefinite isolation in administrative segregation. In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Court found a liberty interest at stake, and therefore held that some process was due; it approved Ohio's implemented procedural protections. This subdivision goes somewhat beyond the process ratified in *Wilkinson*, by giving prisoners a qualified right to call available witnesses, access to the information that

ABA Treatment of Prisoners Standards

Subdivision (d): Reclassification should also comply with any additional requirements in Standard 23-2.3.

forms the basis of the classification decision, and a qualified right to confrontation and cross-examination. There is no constitutional right to these procedural protections, but the Standard includes them because of their clear importance to accurate and fair decision-making.

Witnesses against the prisoner may appear in person or evidence may be offered as written statements. Either way the prisoner must, as subdivision (a)(iv) specifies, be able to ask questions of the witness. If the prisoner's writing is not sufficiently fluent for effective response to written statements, that triggers subdivision (a)(vi)'s requirement that "counsel or some other appropriate advocate for the prisoner" be provided a prisoner found by the decision-making committee to be unable to prepare and present evidence and arguments effectively on his or her own behalf. As the word "advocate" connotes, this is more than a mere assistant, carrying out the prisoner's instructions. The advocate can, however, be a prison employee if that employee is given sufficient independence to serve the assigned function. Some prisoners will need such an advocate because at the time of the long-term segregation hearing, they are already in (short-term) segregation, and are therefore unable to talk to potential witnesses on their behalf. For others the need is based on personal cognitive or literacy impairments. Whatever the source of the prisoner's need for assistance, the point of the requirements in subdivision (a) is to allow the prisoner a meaningful opportunity to participate in the proceedings and rebut the adverse evidence.

Subdivisions (b) & (c): These provisions require planning and regular reviews toward release from segregation, emphasizing re-entry within the prison regimen, and subdivision (d) requires a full classification review every 90 days. The individualized plan called for by subdivision (b) should include an assessment of the risk the prisoner presents and the means of reducing that risk, including meaningful incentives for building a record of compliant and non-disruptive conduct, and medical or mental health interventions where indicated. The object should be for the prisoner to progress towards fewer restrictions and lower levels of custody based on good behavior, where possible, and the plan should include a statement of the expectations for the prisoner in that regard. Each of these safeguards exceeds the constitutional minima approved in *Wilkinson*, but is crucial to implement the general approach of Standard 23-1.1, that "[r]estrictions placed on prisoners should be necessary . . . to the legitimate objectives for which those restrictions are imposed." Changes that might be implemented after the reviews include increasing out-of-cell time and opportunities for work, programming, and recreation, and allowing some interaction with other prisoners.

Individualized plans described in subdivision (b), setting out expectations for the segregated prisoner's behavior, are not an effective strategy for prisoners with serious mental illness, see, e.g., *Walker v. State*, 68 P.3d 872 (Mont. 2003). But such prisoners should not, under these Standards, be housed in long-term segregation.

Subdivision (d): Reclassification should also comply with any additional requirements in Standard 23-2.3.

PART III: CONDITIONS OF CONFINEMENT

Part III General Commentary

This Part deals with conditions of confinement, ranging from physical plant to food to out-of-cell time. In large part, it implements case law under the Eighth Amendment's Cruel and Unusual Punishments Clause, described in the commentary to Standard 23-1.2(a). Other legal sources are discussed in the commentary below.

Standard 23-3.1 Physical plant and environmental conditions

- (a) The physical plant of a correctional facility should:**
 - (i) be adequate to protect and promote the health and safety of prisoners and staff;**
 - (ii) be clean and well-maintained;**
 - (iii) include appropriate housing, laundry, health care, food service, visitation, recreation, education, and program space;**
 - (iv) have appropriate heating and ventilation systems;**
 - (v) not deprive prisoners or staff of natural light, of light sufficient to permit reading throughout prisoners' housing areas, or of reasonable darkness during the sleeping hours;**
 - (vi) be free from tobacco smoke and excessive noise;**
 - (vii) allow unrestricted access for prisoners to potable drinking water and to adequate, clean, reasonably private, and functioning toilets and washbasins; and**
 - (viii) comply with health, safety, and building codes, subject to regular inspection.**
- (b) Governmental authorities in all branches in a jurisdiction should take necessary steps to avoid crowding that exceeds a correctional facility's rated capacity or adversely affects the facility's delivery of core services at an adequate level, maintenance of its physical plant, or protection of prisoners from harm, including the spread of disease.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.2 (conditions for special types of prisoners), 23-3.3 (housing areas), 23-3.4 (healthful food), 23-3.5 (provision of necessities), 23-3.7 (restrictions relating to programming and privileges, 23-5.2(a)(ii) (prevention and investigation of violence), 23-6.6 (adequate facilities, equipment, and resources), 23-8.5 (visiting), 23-11.4 (legislative oversight and accountability)

Related Standards and ABA Resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13 (maintenance of institutions)

ABA, RESOLUTION, 100B (Feb. 1990) (anti-crowding councils)

ABA Treatment of Prisoners Standards

Standard 23-3.1 Physical plant and environmental conditions

ACA, JAIL STANDARDS, 4-ALDF-1A-01 (sanitation), 1A-04 (housekeeping), 1A-05 (crowding), 1A-06 (physical plant), 1A-07 (water supply), 1A-14 through 1A-16, 1A-18, 1A-19 (environmental conditions), 1A-21 (smoking), 4-ALDF-4A-01 (food service), 4-ALDF-4B-08 (plumbing fixtures), 4-ALDF-4C-41 (exercise), 4-ALDF-5B-02 (visiting)

ACA, PRISON STANDARDS, Principles 2A (building and safety codes), 2E (program and service areas), 3B (safety and emergency procedures), and 4D (sanitation and hygiene), 4-4123 (building codes), 4-4124 (fire codes), 4-4129 (rated capacity), 4-4329 (sanitation inspections), 4-4137 (toilets), 4-4138 (washbasins), 4-4145 (light levels), 4-4147 (natural light), 4-4149 through 4-4159 (dayrooms, noise levels, air quality, temperature, exercise and recreation, visiting, classrooms, dining, food service), 4-4214 (fire safety), 4-4333 (housekeeping), 4-4407 (exercise)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.C.2 (smoking restrictions), X (environmental health).

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶ 57 (facilities).

National Fire Protection Association, Life Safety Code, Chs. 22-23 (2009).

NCCHC, HEALTH SERVICES STANDARDS, B-01 (Infection Control Program), B-03 (Staff Safety), D-03 (Clinic Space, Equipment, and Supplies), F-03 (Use of Tobacco)

U.N. Standard Minimum Rules, arts. 10-14 (accommodation), 20(2) (water)

Commentary

Subdivision (a): The specific provisions in this subdivision are founded on abundant Eighth Amendment and Fourteenth Amendment case law,⁶⁷ as well as the provisions of settlement agreements.⁶⁸

The cited professional standards provide helpful detail about the components of a safe, sanitary, and suitable physical environment, as well as inspection and preventative and corrective maintenance programs necessary to sustain that environment. Facility spaces must be appropriate for particular confined populations: for example, a prison with an older population needs different types of recreation facilities than one with younger prisoners. One particularly contentious topic has been heating and cooling, which should be appropriate to maintain humane comfort and safety in all living and work areas.⁶⁹

⁶⁷ See, e.g., *Helling v. McKinney*, 509 U.S. 25 (1993) (second-hand smoke); *Board v. Farnham*, 394 F.3d 469, 486 (7th Cir. 2005) (inadequate ventilation); *Miller v. King*, 384 F.3d 1248, 1261-62 (11th Cir. 2004) (inadequate access to showers and toilets); *Gates v. Cook*, 376 F.3d 323, 334, 339-42 (5th Cir. 2004) (failure to maintain toilets; excessive heat; inadequate lighting); *Delaney v. DeTella*, 256 F.3d 679, 686 (7th Cir. 2001) (lack of exercise); *Gaston v. Coughlin*, 249 F.3d 156, 165 (2d Cir. 2001) (exposure to excessive cold); *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (excessive noise); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992) (defective plumbing); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) (lack of beds due to crowding).

⁶⁸ See, e.g., Consent Decree, *United States v. Clay County*, No. 95-cv-151 (M.D. Ga. Aug. 19, 1997), available at <http://www.justice.gov/crt/about/edu/documents/claymot.pdf>; Settlement Agreement, *United States v. Columbus Consol. City County Gov't*, (M.D. Ga., Sept. 23, 1999), available at <http://www.clearinghouse.net/chDocs/public/JC-GA-0003-0003.pdf>.

⁶⁹ For an order correcting an egregious heating situation, see Temporary Restraining Order, *Duvall v. Glendening* (C.A. No. JFM-94-2541, Aug. 16, 2002), available at <http://chadadmin.clearinghouse.net/chDocs/public/PC-MD-0006-0002.pdf> (emergency order benefitting “persons in the Women’s Detention Center of the Baltimore City Detention Center who take medications and/or who have medical conditions that put them at risk of serious injury, if not death, from excessive heat”).

ABA Treatment of Prisoners Standards

Standard 23-3.1 Physical plant and environmental conditions

Subdivision (b): As discussed in the introduction to these Standards, the most important trend in American corrections for the past 30 years has been population growth. The result of growth is not inevitably crowding; space and resources may—and sometimes have—kept pace with increasing populations. But particular jurisdictions have indisputably housed more prisoners than they were prepared for, and this crowding affects not just sleeping arrangements (although requiring prisoners to sleep on mattresses on the floor is a common and very problematic response to crowding⁷⁰). Crowding can undermine security and all aspects of conditions of confinement.

In 2009, a three-judge district court in California found that crowding in the California prison system was the primary cause of that system’s currently unconstitutionally deficient medical and mental health care. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 & No. C01-1351, 2009 WL 2430820 (E.D. Cal., Aug. 4, 2009).⁷¹ In an opinion currently pending on appeal before the U.S. Supreme Court, the district court set out a case study of the problematic impact of egregious crowding, describing the “everyday threat to [prisoner] health and safety” caused by “the unprecedented overcrowding of California’s prisons.” *Id.* at *1. The court elaborated:

Since reaching an all-time population record of more than 160,000 in October 2006, the state’s adult prison institutions have operated at almost double their intended capacity. As Governor Schwarzenegger observed in declaring a prison state of emergency that continues to this day, this creates “conditions of extreme peril” that threaten “the health and safety of the men and women who work inside [severely overcrowded] prisons and the inmates housed in them” Ex. Pl at 1, 8. Thousands of prisoners are assigned to “bad beds,” such as triple-bunked beds placed in gymnasiums or day rooms, and some institutions have populations approaching 300% of their intended capacity. In these overcrowded conditions, inmate-on-inmate violence is almost impossible to prevent, infectious diseases spread more easily, and lockdowns are sometimes the only means by which to maintain control. In short, California’s prisons are bursting at the seams and are impossible to manage.

Focusing on medical and mental health care, the court elaborated on the connection between crowding and its unconstitutional result:

The evidence conclusively demonstrates the many ways in which crowding prevents the

⁷⁰ For cases holding unconstitutional conditions that required prisoners to sleep on the floor, see, e.g., *Moore v. Morgan*, 922 F.2d 1553, 1555 n.1 (11th Cir. 1991); *Mitchell v. Cuomo*, 748 F.2d 804, 807 (2d Cir. 1984) (infirmaries, program rooms, storage areas, etc.); *LaReau v. Manson*, 651 F.2d 96, 105-08 (2d Cir. 1981) (“fishtank” dayroom, medical isolation cells); *Benjamin v. Sielaff*, 752 F. Supp. 140, 142-43 (S.D.N.Y. 1990) (floors of intake pens); *Albro v. County of Onondaga, N.Y.*, 627 F. Supp. 1280, 1287 (N.D.N.Y. 1986) (corridors). The case law is not, however, unanimous. See *Brown v. Crawford*, 906 F.2d 667, 672 (11th Cir. 1990) (mattresses on the floor not unconstitutional unless imposed “arbitrarily”).

⁷¹ This holding was affirmed by the Supreme Court in *Brown v. Plata*, No. 09-1233 (May 2, 2011). More specifically, the *Brown* Court ruled that the three-judge court had jurisdiction to issue a “prisoner release order” pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626 (2006); that the court below had properly interpreted and applied § 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that “crowding is the primary cause of the violation of a Federal right; and . . . no other relief will remedy the violation of the Federal right” in order to issue a “prisoner release order;” and that the three-judge court’s “prisoner release order,” which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, satisfied the PLRA’s nexus and narrow tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State’s operation of its criminal justice system.

ABA Treatment of Prisoners Standards

Standard 23-3.1 Physical plant and environmental conditions

state from providing constitutionally adequate medical and mental health care in its prison system. Prison overcrowding has created a state of emergency in California's prisons, as the Governor has proclaimed. It forces prison administrators to devote most of their energy to addressing crises and has overwhelmed the prison system's management infrastructure. Crowding of reception centers at levels approaching 300% design capacity prevents the state from identifying the medical problems of entering inmates, and makes it impossible to provide necessary medical and mental health care to incoming inmates, who routinely remain in reception centers for more than sixty days and may serve their entire sentence there. Crowding has also left the California prison system without the space, beds, and medical, mental health, and custodial staff required to provide constitutionally adequate medical and mental health care in all parts of the prison system, and has prevented proper classification of inmates and appropriate housing according to their needs. Furthermore, crowding has created conditions of confinement that contribute to the spread of disease, and it requires the increased use of lockdowns as a method of prison control, further impeding the prison authorities' ability to provide needed medical and mental health care. In addition, crowding has prevented the development of an adequate medical records system. The consequences of crowding are often dangerous, and on many occasions fatal. Crowding contributes to an alarming number of extreme departures from the standard of care and an unacceptably high number of inmate deaths that are preventable or possibly preventable. Likewise, crowding worsens many of the risk factors for suicide among California inmates and increases the prevalence and acuity of mental illness throughout the prison system.

Id. at *62. Crowding can be partially addressed by correctional officials; they can improve efficiency and develop various coping strategies. But they do not control most of the policy levers that might relieve crowding (for example, their budgets or their populations) and accordingly this provision is addressed not just to correctional agencies, but more broadly to federal, state, and local authorities of all types who can cause or solve a crowding problem.

The definition of crowding in corrections policy is somewhat controversial; disputes occur about whether a facility is crowded when its population exceeds "design capacity," "operational capacity," or "rated capacity." The Standard provides two definitions. One is entirely functional (and very minimalist). Like the Supreme Court's test for evaluating the constitutionality of double celling in *Rhodes v. Chapman*, the Standard's reference to "crowding that . . . adversely affects the facility's delivery of core services at an adequate level, maintenance of its physical plant, or protection of prisoners from harm, including the spread of disease" takes as its touchstone the existence of an adverse impact on core services—those relating to prisoner health and safety. See *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (upholding double celling where it "did not lead to deprivations of essential food, medical care, or sanitation" and did not "increase violence among inmates or create other conditions intolerable for prison confinement"); *Coleman v. Schwarzenegger*, 2009 WL 2430820 at *32 (E.D. Cal. 2009) ("A prison system's capacity is not defined by square footage alone; it is also determined by the system's resources and its ability to provide inmates with essential services such as food, air, and temperature and noise control."). Thus, compliance with the Standards in Parts II through VI is one rough measure of the acceptability of an institution's population level: crowding is not an excuse for non-compliance with those Standards, and if non-compliance results from the institution's population level, the institution is too crowded.

In addition, following the American Correctional Association, crowding is also defined to mean population "that exceeds a correctional facility's rated capacity." (Rated capacity is defined by the ACA to mean "the original design capacity, plus or minus capacity changes resulting from building additions,

ABA Treatment of Prisoners Standards

Standard 23-3.2 Conditions for special types of prisoners

reductions, or revisions.” ACA, PRISON STANDARDS 4-4129.) This definition has the benefit of easy administrability and the potential to change to reflect changes in the facilities.

During the 1980s, many court orders relieved crowding in individual jails and prisons by imposing numerical caps on the prison population permitted. Such orders have grown much more rare,⁷² both because of the Supreme Court’s insistence in *Rhodes* that crowding is not itself a constitutional violation and because of the provisions of the 1996 Prison Litigation Reform Act (PLRA), in which Congress made it extremely difficult for civil rights plaintiffs to obtain population caps. See 18 U.S.C. § 3626(a)(3).⁷³ The Standards do not address the use of population caps to relieve crowding, since these are matters of judicial remedy rather than correctional practice. Rather, the Standards in effect urge authorities to avoid situations that might call for a population cap by using the methods available to them to keep their facilities from becoming overcrowded as measured by the definitions discussed above. Certainly, where crowding exists, it should trigger a review of options for housing prisoners in other correctional settings or in the community, as well as an examination of the policies and processes that resulted in crowding.

Standard 23-3.2 Conditions for special types of prisoners

(a) Correctional agencies and facilities should provide housing options with conditions of confinement appropriate to meet the protection, programming, and treatment needs of special types of prisoners, including female prisoners, prisoners who have physical or mental disabilities or communicable diseases, and prisoners who are under the age of eighteen or geriatric.

(b) No prisoner under the age of eighteen should be housed in an adult correctional facility. Where applicable law does not provide for all such prisoners to be transferred to the care and control of a juvenile justice agency, a correctional agency should provide specialized facilities and programs to meet the education, special education, and other needs of this population.

(c) A correctional agency should be permitted to confine female prisoners in the same facility as male prisoners but should house female and male prisoners separately. Living conditions for a correctional agency’s female prisoners should be essentially equal to those of the agency’s male prisoners, as should security and programming. A facility that confines female prisoners should have on duty at all times adequate numbers of female staff to comply with Standard 23-7.10.

(d) Correctional authorities should house and manage prisoners with physical disabilities, including temporary disabilities, in a manner that provides for their safety and security. If necessary, housing should be designed for use by prisoners with disabilities; such housing should be in the most integrated setting appropriate for such prisoners. Correctional authorities should safely accommodate prisoners who are particularly

⁷² As the number of state and federal prisons increased from 1300 to over 1800, the number of facilities that reported court orders limiting the size of their prisoner population, declined from 264 in 1990 and 229 in 1995, to 145 in 2000 and only 44 in 2005. See James J. Stephan, *Census of State and Federal Correctional Facilities, 1995*, at iv (Bureau of Justice Statistics, Aug. 1997), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/Csfcf95.pdf>; James J. Stephan, *Census of State and Federal Correctional Facilities, 2005*, at 3 (Bureau of Justice Statistics, Oct. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf05.pdf>.

⁷³ The PLRA and its legislative history, including subsequent efforts to amend it, are discussed in detail in the Introduction to Part IX, *infra*..

ABA Treatment of Prisoners Standards

Standard 23-3.2 Conditions for special types of prisoners

vulnerable to heat-related illness or infectious disease, or are otherwise medically vulnerable.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.2 (classification system), 23-2.4 (special classification issues), 23-3.1 (physical plant and environmental conditions), 23-5.1 (personal security and protection from harm), 23-5.4 (self-harm and suicide prevention), 23-6.9 (pregnant prisoners and new mothers), 23-7.2 (treatment of prisoners with disabilities and other special needs), 23-7.10 (cross-gender supervision), 23-8.4(b) (work programs (non-discrimination))

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.14 (non-discriminatory treatment)

ABA, RESOLUTIONS, 102B (Feb. 2000) (elderly prisoners), 101D (Feb. 2002) (youth in the criminal justice system, adopting key principles from ABA CRIMINAL JUSTICE SECTION TASK FORCE ON YOUTH IN THE CRIMINAL JUSTICE SYSTEM, YOUTH IN THE CRIMINAL JUSTICE SYSTEM: GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS, 2001)

ACA, JAIL STANDARDS, 4-ALDF-2A-37, 2A-38, 2A-40, and 2A-41 (youthful offenders), 4-ALDF-4C-40 (special needs inmates), 4-ALDF-6B-03 (discrimination), 6B-04 and 6B-05 (disabled inmates)

ACA, PRISON STANDARDS, 4-4142 (housing for the disabled), 4-4181 (correctional officer assignments), 4-4278 (access to programs and services), 4-4306 (adjudicated youth and status offenders), 4-4307, 4-4309 and 4-4311 (youthful offenders)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VII.B (children and adolescents), VII.C (housing and services for frail-elderly and disabled persons)

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶ 60 (special needs students)

NCCHC, HEALTH SERVICES STANDARDS A-08 (Communication on Patients' Health Needs), B-01 (Infection Control Program)

Commentary

Subdivision (a): Prisons and jails incarcerate large numbers of prisoners whose needs differ from those of the average prisoner. Disregard of these needs harms such prisoners or those with whom they come in contact, sometimes very seriously. Women, for example, need different bathroom arrangements than men, and have different dietary needs as well. Prisoners with infectious tuberculosis must be housed in negative pressure rooms (in which air flow is directed into the room, and air flow out is filtered). See, e.g., NCCHC Health Standard B-01. This standard deals with all such needs, and is founded on both constitutional law and the Americans with Disabilities Act.

Subdivision (b): The Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601 *et seq.*, requires the separation of adults from juveniles not processed through the adult criminal justice system. See also 28 C.F.R. § 31.303(d). This subdivision implements that requirement, but goes further, also requiring separation from adults of those prisoners under eighteen who *are* criminally processed as adults. Our adult prisons currently house approximately three thousand prisoners under 18 (0.2% of total population); adult jails house about another eight thousand (1% of total population).⁷⁴ It is particularly important to

⁷⁴ See William J. Sabol *et al.*, *Prisoners in 2008* (Bureau of Justice Statistics, Dec. 2009), App'x tbl.13, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>, (estimate is computed by subtracting listed ages, 18 and above,

ABA Treatment of Prisoners Standards

Standard 23-3.2 Conditions for special types of prisoners

separate minors from adults because minors confined with adults are much more likely to be physically and sexually assaulted by other prisoners, and to commit suicide.⁷⁵ See Convention on the Rights of the Child, G.A. Res. 44/25, Annex, Art. 37, U.N. Doc. A/44/49 (Nov. 20, 1989) (requiring that every child deprived of liberty shall be separated from adults unless it is in the best interest of the child not to do so).

Separation of minors from adults can be accomplished in several ways. One approach is to use a blended sentencing regime to house minors processed as adults in juvenile facilities until they reach majority, at which time they are transferred to an adult facility. As of 2000, seven states housed minors exclusively in juvenile systems, by this method. Another way to separate youthful from adult offenders is to maintain separate facilities within the adult system. In 2000, of the 44 state prison systems that housed at least some minors in the adult system, 18 maintained designated youthful offender housing units.⁷⁶ This Standard urges all the other states to choose one of these two approaches; in this, it accords with prior ABA policy. See ABA resolution 101D, 2002 Midyear Meeting, available at <http://www.abanet.org/crimjust/policy/cjpol.html#my02101d> (“[I]f detained or incarcerated, youth should be housed in institutions or facilities separate from adult institutions or facilities at least until they reach the age of eighteen.”).

The Standard does not address what should happen if the kinds of specialized facilities it requires are *not* implemented, and juveniles are instead confined in a facility that also houses adult prisoners, for fear that covering in black letter what should happen if subdivision (b) is disregarded would undermine that key provision. Nonetheless, the next-best rule is very important: if housed in a single facility (in violation of Standard 23-3.2(b)), adults and youths should be housed separately. In fact, any facility with a significant juvenile population should strive for sight and sound separation of this group from other prisoners, though incidental sight contact during movement throughout the facility would be acceptable.⁷⁷ At the same time, it is particularly important that juvenile prisoners not be denied access to programs or services, or to out-of-cell opportunities, due to their small numbers. Isolation and idleness are particularly psychologically damaging for young people. The need to avoid isolation and idleness for young prisoners may present logistical difficulties for small facilities with only a handful of prisoners under eighteen; but this is precisely the reason the Standard urges instead the use of specialized facilities for youthful offenders.

In any event, wherever they are housed, juveniles require substantially different treatment than older prisoners. A U.S. Bureau of Justice Assistance monograph on the topic explains, for example, that there are important differences with respect to classification, security, programming, communication, education, and housing needs.⁷⁸ Prisoner orientation (under Standard 23-4.1) must be developmentally appropriate, for example. Even more important, the authors write that staff accustomed to adult prisoners must adapt their use of physical force against youthful offenders:

Staff in adult facilities are trained to respond to disruptive and confrontational adult offenders. The use of chemical agents such as mace or pepper spray, forced cell

from listed total); Todd D. Minton & William J. Sabol, *Jail Inmates at Midyear 2008 – Statistical Tables*, at 5 tbls .6-7 & 9 tbl.13 (Bureau of Justice Statistics, March 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf>.

⁷⁵ James Austin *et al.*, *Juveniles in Adult Prisons and Jails: A National Assessment* 9 (Bureau of Justice Assistance, 2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

⁷⁶ *Id.* at x-xi.

⁷⁷ See, e.g., Memorandum of Agreement, DOJ Investigation: Baltimore City Detention Center (Jan. 1, 2006), available at <http://www.clearinghouse.net/chDocs/public/JC-MD-0010-0002.pdf>.

⁷⁸ Austin *et al.*, *supra* note 75 at 65.

ABA Treatment of Prisoners Standards

Standard 23-3.2 Conditions for special types of prisoners

extractions, physical restraints, and special response teams, although typically effective with adult offenders, may not be appropriate for juvenile populations. Most juvenile correctional systems discourage the use of such techniques as viable methods of controlling youth except in the most extreme situations, and even then only when lesser measures have been exhausted. Physical handling of a youth is permitted only when other measures, such as counseling and crisis intervention techniques, have failed. For such instances, officers are trained on a myriad of other measures such as emptyhand control tactics, which include various holds, leverage, pressure, self-defense measures, and pressure control techniques.⁷⁹

In addition, youthful prisoners present a significantly heightened risk of self-harm and suicide, and of victimization, and they are likely to experience more psychological stress as the result of either isolation or restraint.⁸⁰

With respect to education and programming, “youthful offenders need educational programming that is more structured, thorough, and intensive than that provided in adult institutions.”⁸¹ Most young prisoners are also covered by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* which guarantees a “free appropriate public education” to persons under 22 who have an educationally relevant disability.

Subdivision (c): Women comprise only about 7% of those incarcerated in U.S. prisons, and about 13% of those incarcerated in U.S. jails, although that proportion has been growing.⁸² Common problems for women prisoners have included scarcity in both housing options and appropriate programming, due to small numbers of prisoners,⁸³ and disciplinary sanctions that tend to be harsher than those for male prisoners.⁸⁴ (Other important problems related to childbirth and to sexual misconduct are discussed at Standards 23-6.9 and 23-5.3, respectively.) This subdivision requires that conditions, security, and programming for women prisoners be “essentially equal” to those for men.

The requirement of essential equality is consonant with a good deal of Equal Protection case law. In cases challenging lack of program opportunities or disparate conditions for female prisoners, for example, many courts have required “parity of treatment”; prison officials must “provide women inmates with treatment facilities that are substantially equivalent to those provided for men—i.e., equivalent in substance, if not in form—unless their actions . . . nonetheless bear a fair and substantial relationship to

⁷⁹ *Id.* at 66.

⁸⁰ See cases cited *supra* note 62.

⁸¹ Austin et al., *supra* note 76, at 67.

⁸² See sources cited *supra* note 74.

⁸³ See, e.g., *Klinger v. Dep’t of Corr.*, 31 F.3d 727 (8th Cir. 1994).

⁸⁴ See, e.g., Dorothy Spektorov McClellan, *Disparity in the Discipline of Male and Female Inmates in Texas Prisons*, 5 WOMEN & CRIM. JUST. 71 (1994) and sources cited; JOCELYN M. POLLOCK, SEX AND SUPERVISION: GUARDING MALE AND FEMALE INMATES 48-49 (1986); see also Cassandra Shaylor, “It’s Like Living in a Black Hole”: Women of Color and Solitary Confinement in the Prison Industrial Complex, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385 (1998) (observing in a women’s prison in California that “Women are far more likely than men to be sentenced to the SHU [segregation unit] for minor infractions. While men are confined to control units for allegedly attacking guards, participating in gangs or selling drugs in the institution, women are placed in the SHU for spitting at guards, for fighting with other women, or for attempting suicide.”).

ABA Treatment of Prisoners Standards

Standard 23-3.2 Conditions for special types of prisoners

achievement of the State's correctional objectives.”⁸⁵ (Reasonable and justified gender differences in security policies such as grooming rules have generally been upheld under this same approach.⁸⁶)

Some recent court decisions have, however, declined to analyze unequal program access for women after finding that women are not “similarly situated” to men—because, for example, the women's prison is smaller than the men's prisons, the length of stay for men is longer, and women prisoners have “special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims.”⁸⁷ In the view of some courts, once women are determined not similarly situated to men, officials need not justify unequal treatment at all, no matter how extreme it may be.⁸⁸ The constitutional footing of this approach is doubtful,⁸⁹ but regardless of its ultimate resolution, agencies of law enforcement, prisons and jails included, should not countenance gross inequalities by gender any more than they should tolerate racial disparities. This is especially true in connection with program activities, many of which are or should be directly related to prisoners' ability to re-enter society and avoid recidivism. The requirement of “parity of treatment” is a practical approach to achieving “essential equality,” since it allows for the fact that housing men and women in different prisons (which may be of different sizes, in different locations, etc.) may make precise equality impracticable.

Prisoners also enjoy some protection under Title IX of the Education Amendments of 1972, which prohibits gender discrimination in any education program or activity receiving federal funds.⁹⁰ While the

⁸⁵ *Glover v. Johnson*, 478 F. Supp. 1075, 1079-80 (E.D. Mich. 1979) (parity was violated when vocational programs for men were more numerous and more likely to provide marketable skills than those for women); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1043 (S.D. N.Y. 1995) (provision of a Sensorially Disabled Unit for men but not women denied equal protection); *West v. Virginia Dep't of Corr.*, 847 F. Supp. 402, 407-09 (W.D. Va. 1994) (failure to provide boot camp programs for women as well as men denied equal protection); *Casey v. Lewis*, 834 F. Supp. 1477, 1550-51 (D. Ariz. 1993) (inequalities in mental health treatment denied equal protection); *McCoy v. Nevada Dep't of Prisons*, 776 F. Supp. 521, 523 (D. Nev. 1991); *Glover v. Johnson*, 721 F. Supp. 808, 848-49 (E.D. Mich. 1989) (explaining “parity” in more detail), *aff'd* in part and *rev'd* in part on other grounds, 934 F.2d 703 (6th Cir. 1991); *Canterino v. Wilson*, 546 F. Supp. 174, 210-12 (W.D. Ky. 1982), vacated and remanded on other grounds, 869 F.2d 948 (6th Cir. 1989); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1317 (S.D. W.Va. 1981); *McMurry v. Phelps*, 533 F. Supp. 742, 767-68 (W.D. La. 1982). See also *Roubideaux v. North Dakota Dep't of Corr. and Rehab.*, 570 F.3d 966, 974-75 (8th Cir. 2009) (applying heightened scrutiny, but upholding the placement of some female prisoners, but no males, in county jails with more limited programming because the placements “substantially relate to the important government objective of providing adequate segregated housing for women inmates”).

⁸⁶ See, e.g., *Ashann-Ra v. Commonwealth of Va.*, 112 F. Supp. 2d 559, 570-72 (W.D. Va. 2000) (most grooming rules were the same for men and women, and the hair length difference was justified by men's greater propensities to violence, hiding contraband, and escape).

⁸⁷ *Klinger v. Dep't of Corr.*, 31 F.3d 727, 733 (8th Cir. 1994); see also, e.g., *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 925-27 (D.C. Cir. 1996); *Keevan v. Smith*, 100 F.3d 644, 647-50 (8th Cir. 1996); *Pargo v. Elliott*, 894 F. Supp. 1243, 1258-62 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1993) (*per curiam*). In *Yates v. Stalder*, 217 F.3d 332 (5th Cir. 2000), the appeals court cautioned that lower courts cannot simply assume that prisons housing men and women are dissimilar, but must develop a record and analyze the facts.

⁸⁸ See cases cited *supra* note 87. .

⁸⁹ See *Keevan v. Smith*, 100 F.3d at 652 (Heaney, J., dissenting); see also Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated,"* 51 N.Y.L. SCH. L. REV. 595 (2007).

⁹⁰ 20 U.S.C. §1681(a) (2006). Title IX does not require proof of discriminatory intent. *Communities for Equity v. Mich. High School Athletic Ass'n*, 459 F.3d 676, 696 (6th Cir. 2006), *cert. denied*, 549 U.S. 1322 (2007). However,

ABA Treatment of Prisoners Standards

Standard 23-3.2 Conditions for special types of prisoners

statute has several express exceptions, prisons are not among them, and some courts have held that prisons are within its scope.⁹¹ The Title IX jurisprudence is similar to that under the Equal Protection Clause.⁹²

The last sentence of the subdivision requires sufficient number of female staff to comply with Standard 23-7.10's rules limiting cross-gender supervision. In a facility with only one female housing unit, this might be satisfied by the presence of a single woman officer at any given time; larger populations will, of course, require more staff.

Subdivision (d): This subdivision about housing accommodations for prisoners with disabilities implements both constitutional law, see *United States v. Georgia*, 546 U.S. 151 (2006), and Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, which regulate access to government programs and facilities for people with disabilities.⁹³ (Protection of prisoners with disabilities from other prisoners is the subject of Standard 23-5.5; access for prisoners with disabilities to correctional facilities, programs, services, and activities is covered in Standard 23-7.2.) Prisoners with physical disabilities need suitable housing with appropriate conditions of confinement. They may or may not need physical plant modifications—wheelchair accessible bathrooms, strobe lights rather than intercoms or aural alarms, and the like. As the Department of Justice has explained, “[a]ccessible cells do not compromise the security of prison personnel. In fact, having accessible cells increases security because they allow inmates with mobility disabilities to function independently, minimizing the need for assistance from guards.”⁹⁴

The Standard's requirement that prisoners with disabilities be housed “in the most integrated setting appropriate” means that a prisoner's need for housing-related accommodations should not necessitate the prisoner's being housed in isolation or in a medical setting like an infirmary. Rather, disability-appropriate cells should be available in ordinary housing units, if that is possible. See 28 C.F.R. § 35.130(d) (“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”). Again, the Justice Department has explained correctional implementation of this requirement: “Dispersing accessible cells throughout a facility ensures that inmates with disabilities are able to be housed with inmates of the same

a showing of intent may be required to recover damages against a public agency. See *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74-75 (1992).

⁹¹ *Roubideaux v. North Dakota Dep't of Corr. and Rehab.*, 570 F.3d 966, 976-77 (8th Cir. 2009) (“A state's prison system as a whole qualifies as a program or activity within the meaning of Title IX.”); *Jeldness v. Pearce*, 30 F.3d 1220, 1224-25 (9th Cir. 1994). The *Roubideaux* court rejected the argument that the prison industries program was an educational program, but applied Title IX to vocational education. 570 F.3d at 977-78.

⁹² Compare *Jeldness v. Pearce*, 30 F.3d at 1229 (“[S]tate prisons receiving federal funds are required by Title IX to make reasonable efforts to offer the same educational opportunities to women as to men. Although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality.”), with *Roubideaux*, 570 F.3d at 978 (because women and men prisoners are not similarly situated, Title IX does not require similar educational opportunities).

⁹³ 42 U.S.C. §§ 12131-12134; 28 C.F.R. Part 35; 29 U.S.C. §§ 701 *et seq.*

⁹⁴ U.S. Dep't of Justice, Civil Rights Division, Disability Rights Section, *ADA/Section 504 Design Guide: Accessible Cells in Correctional Facilities* (Feb. 2005) available at <http://www.ada.gov/accessiblecells.htm>.

ABA Treatment of Prisoners Standards

Standard 23-3.3 Housing areas

classification levels. Generally inmates with disabilities who are not ill do not need to be housed in a medical ward.”⁹⁵

The subdivision’s last sentence deals with prisoners with various medical vulnerabilities. For example, in a prison without air conditioning, heat poses acute dangers to prisoners who are taking certain psychoactive medications, who are pregnant, or who have heart disease. These types of medical threats are predictable and may be accommodated with forethought; conscious disregard of them is constitutionally culpable. See, e.g., *Gibson v. Moskowitz*, 523 F.3d 657 (8th Cir. 2008) (upholding large jury verdict against prison doctor who disregarded the known risk of dehydration and overheating, which led to the death of a prisoner taking psychotropic medication).

Standard 23-3.3 Housing areas

(a) Correctional authorities should provide prisoners living quarters of adequate size. Single-occupancy cells should be the preferred form of prisoner housing. Facilities that must use dormitories or other multiple-prisoner living quarters should provide sufficient staffing, supervision, and personal space to ensure safety for prisoners and security for their belongings. All prisoner living quarters and personal hygiene areas should be designed to facilitate adequate and appropriate supervision of prisoners and to allow prisoners privacy consistent with their security classification.

(b) Correctional authorities should provide each prisoner, at a minimum, with a bed and mattress off the floor, a writing area and seating, an individual secure storage compartment sufficient in size to hold personal belongings and legal papers, a source of natural light, and light sufficient to permit reading.

(c) Correctional authorities should provide sufficient access to showers at an appropriate temperature to enable each prisoner to shower as frequently as necessary to maintain general hygiene.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.4(c) (special classification issues, single celling), 23-3.1 (physical plant and environmental conditions, 23-3.8(e) (segregated housing, cells), 23-5.2(a)(iii) (prevention and investigation of violence, supervision), 23-5.4(e) (self-harm and suicide prevention in housing areas), 23-7.10 (cross-gender supervision), 23-9.5(d) (access to legal materials and information, personal materials)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13(b) & (c) (maintenance of institutions)

⁹⁵ *Id.* See also Settlement Agreement Between the United States of America and the Wood County Sheriff’s Department, Bowling Green, Ohio, Dep’t of Justice Complaint No. 204-57-100 (June 6, 1997), available at http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_settlements/oh/oh6.txt. In certain situations, dispersing prisoners with disabilities in the general population may make it impracticable to provide appropriate specialized programming for them. Jurisdictions should be able to experiment with innovative solutions to this problem, such as New York’s alcohol and substance abuse treatment programs for prisoners in units for the sensorially disabled. See *Program Services- Sensorially Disabled Unit (SDU) ASAT Program*, DEP’T OF CORR. SERVS., <http://www.docs.state.ny.us/ProgramServices/substanceabuse.html#sens> (last visited May 27, 2011).

ABA Treatment of Prisoners Standards

Standard 23-3.4 Healthful food

ACA, JAIL STANDARDS, 4-ALDF-1A-09 (single occupancy cells), 1A-10 (multiple-occupancy rooms/cells), 1A-11 (cell/room furnishings), 1A-15 and 1A-16 (environmental conditions), 4-ALDF-4B-09 (plumbing fixtures)

ACA, PRISON STANDARDS, Performance Standard 4E-5A (offender hygiene), 4-4132 (inmate sleeping), 4-4134 (cell furnishings), 4-4139 (showers), 4-4140 and 4-4141 (special management housing)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, X.E.A.6 (showers), X.E.D (space)

U.N. Standard Minimum Rules, arts. 9 to 13 (accommodation)

Commentary

Subdivision (a): Violence between cellmates or in congregate housing areas is a major danger of prison life, and single celling without isolation is obviously the safest way to run a prison, as well as granting prisoners humane privacy. It is for these reasons that Rule 9 of the United Nations Standard Minimum Rules for the Treatment of Prisoners provides that where prisoners are assigned to cells, each prisoner shall occupy the cell at night alone. This subdivision states a similar preference for single celling, recognizing it as the preferred housing situation.

However, single celling is not constitutionally required by either the Eighth or Fourteenth Amendment. See *Rhodes v. Chapman*, 452 U.S. 337 (1981), and *Bell v. Wolfish*, 441 U.S. 520 (1979). And because of population pressure, dormitory housing and multi-occupancy cells have become more prevalent in recent years. If double cells or other housing arrangements are to be used, it is vitally important that they be designed to allow both safe supervision and some limited privacy for prisoners. For example, the use of freestanding bunk beds should be avoided, but if such beds must be used, they should be placed where they do not obscure surveillance of the area.⁹⁶ For dormitory-style housing, the three key elements are appropriate classification (so that only low security prisoners are housed in dormitories), sufficient staffing, and direct supervision. (For a discussion of direct supervision, see the commentary to Standard 23-5.2(a)(3)).

Subdivisions (b) & (c): Eighth and Fourteenth Amendment case law supports the specific provisions of these subdivisions.⁹⁷ In addition, prisoners' legitimate interest in court-access is assisted by policies that allow them to keep their legal papers in their living areas where that is practicable. See Standard 23-9.5(d), Access to legal materials and information (personal materials).

Standard 23-3.4 Healthful food

⁹⁶ See, e.g., *Laube v. Haley*, 234 F. Supp. 2d 1227 (M.D. Ala. 2002) (granting preliminary injunction in case in which security was unacceptably compromised by large dormitories, use of bunk beds and corresponding obstructed visibility, and low staffing levels).

⁹⁷ See, e.g., *Gates v. Cook*, 376 F.3d 323, 341-42 (5th Cir. 2004) (inadequate lighting); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) (deprivation of a bed and mattress due to crowding violates the rights of jail detainee); *Carver v. Knox County*, 753 F. Supp. 1370, 1389 (E.D. Tenn. 1989) (showers), remanded for reconsideration, 887 F.2d 1287 (6th Cir. 1989), adhered to on remand, 753 F. Supp. 1398 (E.D. Tenn. 1990); *Battle v. Anderson*, 447 F. Supp. 516, 520 (E.D. Okla. 1977) (inadequate storage space). See also, e.g., Consent Decree, *United States v. Clay County* (M.D. Ga. Aug. 19, 1997), available at <http://www.justice.gov/crt/about/edu/documents/claymot.pdf>; Settlement Agreement between the U.S. Department of Justice and Wicomico County, Maryland Regarding the Wicomico County Detention Center (July 16, 2004), available at http://www.justice.gov/crt/about/spl/documents/split_setagree_wicomico_7-16-04.pdf.

ABA Treatment of Prisoners Standards

Standard 23-3.4 Healthful food

(a) Correctional authorities should provide each prisoner an adequate amount of nutritious, healthful, and palatable food, including at least one hot meal daily. Food should be prepared, maintained, and served at the appropriate temperatures and under sanitary conditions.

(b) Correctional authorities should make appropriate accommodations for prisoners with special dietary needs for reasons of health or age.

(c) Correctional authorities should not withhold food or water from any prisoner. The standard menu should not be varied for any prisoner without the prisoner's consent, except that alternative food should be permitted for a limited period for a prisoner in segregated housing who has used food or food service equipment in a manner that is hazardous to the prisoner or others, provided that the food supplied is healthful, palatable, and meets basic nutritional requirements.

Cross References

ABA, TREATMENT OF PRISONERS STANDARDS, 23-3.1(a)(viii) (physical plant and environmental conditions), 23-3.7 (restrictions relating to programming and privileges), 23-7.2 (treatment of prisoners with disabilities and other special needs), 23-7.3(c) (religious freedom, diets), 23-11.2(a) (external regulation and investigation, ordinary enforcement)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13(c)(iii) (maintenance of institutions)

ACA, JAIL STANDARDS, 4-ALDF-2A-59 (special management inmates), Performance Standard 4A (food service), 4-ALDF-4A-08 (menus), 4A-09 (therapeutic diets), 4A-18 (required meals)

ACA, PRISON STANDARDS, 4-4264 (general conditions of confinement), 4-4316 through 4-4321 (dietary allowances, menu planning, therapeutic diets, health and safety regulations), 4-4-4328 (meal service)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.I (food services and nutrition), VII.A.4 (women and nutrition), VII.B.22 (juveniles and nutrition)

NCCHC, HEALTH SERVICES STANDARDS, F-02 (Medical Diets)

U.N. Standard Minimum Rules, arts. 20 (food), 32(1) (punishment by reduction of diet)

Commentary

Adequate food is a basic human need, and the provisions of this Standard protect prisoners' Eighth and Fourteenth Amendment rights related to it.⁹⁸ Intentional food deprivations are an inappropriate corporal punishment⁹⁹—uncontroversially forbidden in modern American corrections, see, e.g., ACA, PRISON

⁹⁸ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); see also, e.g., *Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002).

⁹⁹ One of the very first modern prison conditions class actions enjoined punishment by imposition of a bread and water diet. See *Landman v. Royster*, 333 F. Supp. 621, 647 (E.D. Va. 1971). See also, e.g., *Willis v. Bell*, 726 F. Supp. 1118, 1121-22 (N.D. Ill. 1989) (12-hour deprivation of food in police lockup, if intentional, was “obviously” unlawful).

ABA Treatment of Prisoners Standards

Standard 23-3.4 Healthful food

STANDARDS 4-4320.¹⁰⁰ Likewise unconstitutional are deprivations that demonstrate deliberate indifference to prisoners' nutritional needs.¹⁰¹ In general, a prison may set out reasonable rules for food service, such as requiring prisoners to be clothed prior to delivering them a meal. Even such a rule must bend, however, to prisoners' nutritional needs, for example, if a prisoner has missed more than a few meals because he is, for example, unwilling to return a food tray.¹⁰² Correctional staff should also notice if a prisoner is skipping many meals, and investigate the reason, which may be a security or health problem.

Leaving litigated rights to the side, bad or insufficient food is also a flashpoint for conflict in prisons and jails; complaints about inadequate food have historically been a common cause of prison disturbances.¹⁰³ Serving ample portions of decent and healthy food three times a day not only helps prisoners but keeps tensions lower in correctional facilities. The facility's commissary should offer healthy food items along with the more customary junk food.

The cited professional standards set out mechanisms by which a correctional facility can ensure that its food service is both sanitary and nutritionally adequate. Dieticians should review all diets—regular, medical, and religious. Appropriate temperatures for institutional food service are spelled out in health codes, which under Standard 23-11.2(a) should be applicable in jails and prisons.

Subdivision (c): The use of special disciplinary diets is not uncommon in prison. Courts have generally upheld the use of “food loaf,” an unappetizing substance made by mixing various foods and baking the mixture, as a valid measure to control misuse of utensils, food, and human waste.¹⁰⁴ One court, however,

¹⁰⁰ Note that international standards seem, by contrast, to approve “punishment by . . . reduction of diet” in situations in which the prisoners' health will not be compromised. U.N. Standard Minimum Rules 31(1).

¹⁰¹ *Simmons v. Cook*, 154 F.3d 805, 808-09 (8th Cir. 1998) (affirming damage award to paraplegic prisoners who missed four consecutive meals when placed where they could not get to their food trays in their wheelchairs); *Dearman v. Woodson*, 429 F.2d 1288, 1290 (10th Cir. 1970) (two days' deprivation of food stated a constitutional claim); *Hodge v. Ruperto*, 739 F. Supp. 873, 876 (S.D.N.Y. 1990) (two and a half day denial of food prior to arraignment stated a constitutional claim).

¹⁰² This result is supported by some, but not all, case law. Compare *Cooper v. Sheriff, Lubbock County, Tex.*, 929 F.2d 1078, 1082-83 (5th Cir. 1991) (allegation that prisoner was denied meals for 12 days because he would not “fully dress” stated Eighth Amendment and due process claims); *Williams v. Coughlin*, 875 F. Supp. 1004, 1013 (W.D.N.Y. 1995) (denying summary judgment where prisoner was denied five meals after refusing to return food tray); *Moss v. Ward*, 450 F. Supp. 591, 595-97 (W.D.N.Y. 1978) (several days' deprivation of food for refusing to return a cup violated the Eighth Amendment); *Graves v. TDC Employees*, 827 S.W.2d 47, 48 (Tex. App. 1992) (complaint alleging exclusion from dining hall for 98 of 120 meals in 40 days should not have been dismissed), with *Freeman v. Berge*, 441 F.3d 543 (7th Cir. 2006) (upholding denial of meals because prisoner was not properly dressed or his cell was unsanitary); *Talib v. Gilley*, 138 F.3d 211, 212, 214-215 (5th Cir. 1998) (upholding denial of meals because prisoner in lockdown refused to kneel with hands behind back before being served).

¹⁰³ See, e.g., Tom Wicker, A TIME TO DIE 317 (1975) (explaining that improved food was among prisoner demands during the Attica riot). See also R. Leidholdt, *Challenge of Food Service in Jail Systems*, AMERICAN JAILS, May-June 1992, at 36.

¹⁰⁴ See, e.g., *Myers v. Milbert*, 281 F. Supp. 2d 859, 865-66 (N.D. W. Va. 2003) (upholding use of food loaf with prisoner who threw his food tray out of his cell; the alleged adverse effects (vomiting, frequent bowel movements, burning in chest and throat) were not serious medical conditions, and defendants could rely on medical opinion as to when diet should be discontinued); *Breazil v. Bartlett*, 998 F. Supp. 236, 242 (W.D.N.Y. 1997) (“[T]he cruel and unusual punishment clause of the eighth amendment does not prohibit prison officials from restricting an inmate's diet as a punitive measure, as long as the inmate receives nutritionally adequate food that does not present an imminent health risk.”); *Adams v. Kincheloe*, 743 F. Supp. 1385, 1390-92 (E.D. Wash. 1990); *U.S. v. Michigan*, 680

ABA Treatment of Prisoners Standards

Standard 23-3.5 Provision of necessities

held unconstitutional a similar diet of “grue”, even though it was nutritionally adequate in theory, because it was so revolting that prisoners simply would not eat it enough of it. *Finney v. Hutto*, 410 F. Supp. 251, 276 n.12 (E.D. Ark. 1976).

On the issue of the appropriate predicate for a disciplinary diet, the Standard follows the ACA accreditation rules, which allow “alternative meal service” only for a prisoner in segregation, and only if that prisoner “uses food or food service equipment in a manner that is *hazardous* to self, staff, or other inmates.” ACA, PRISON STANDARD 4-4264 (emphasis added). Not all food-related misconduct qualifies; the basis for the diet must, the ACA insists, be “health and safety.” Throwing jello is irritating but not dangerous.

As for what the alternative diet may permissibly consist of, subdivision (c) requires more than the ACA’s rule does. The ACA states that alternative meals must “meet[] basic nutritional requirements,” whereas this subdivision requires not only nutritional adequacy also requires that the food must be “palatable.” Food loaf—which is designed to be entirely unappealing—does not fit that description.¹⁰⁵

Correctional officials who defend the use of food loaf as a useful punishment for those in segregation who persistently disobey prison rules argue that they are unresponsive to sanctions of increased segregation time and even to uses of force.¹⁰⁶ However, such persistent and intractable disobedience is often a sign of serious mental illness, counseling removal of the prisoner from segregation, as called for by Standard 23-2.8(a) and 23-6.11. In other instances, persistent disruption may reflect issues in the administration of the segregation unit, since prisoners in isolation who are not provided those limited rights and services called for by prison rules may misbehave as their only means of protest. The use of alternative food as a disciplinary sanction should in any event never be authorized unless disobedience involves food or food service equipment.

Standard 23-3.5 Provision of necessities

(a) Correctional authorities should maintain living quarters and associated common areas in a sanitary condition. Correctional authorities should be permitted to require prisoners able to perform cleaning tasks to do so, with necessary materials and equipment provided to them regularly and without charge.

(b) Correctional authorities should provide prisoners with clean, appropriately sized clothing suited to the season and facility temperature and to the prisoner’s work assignment and gender, in quantities sufficient to allow for a daily change of clothing. Prisoners should receive opportunities to mend and machine launder their clothing if the facility does not provide these services. Correctional authorities should implement procedures to permit prisoners to wear street clothes when they appear in court before a jury.

F. Supp. 270, 274-76 (W.D. Mich. 1988); *Smith v. Or. Dep’t of Corr.*, 792 P.2d 109, 110 (Or. App. 1990), review denied, 799 P.2d 646 (Or. 1990).

¹⁰⁵ For one system’s recipe, see Scott Simon, *Prison Loaf: Maryland Lockup Uses Horrid Bread Dish as Disciplinary Tool* (National Public Radio 2002) available at <http://www.npr.org/programs/wesat/features/2002/apr/loaf/index.html>. The correspondent who ate Maryland facility’s food loaf described it as: “Bland. I didn’t know anything could take this bland. . . . Few sips of water I’ve had in my life have been more welcome, after swallowing this.”

¹⁰⁶ For an interview with a correctional administrator making these arguments, see *id.*

ABA Treatment of Prisoners Standards

Standard 23-3.5 Provision of necessities

(c) **Correctional authorities should provide prisoners, without charge, basic individual hygiene items appropriate for their gender, as well as towels and bedding, which should be exchanged or laundered at least weekly. Prisoners should also be permitted to purchase hygiene supplies in a commissary.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.1 (physical plant and environmental conditions), 23-8.4(a) (work programs)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standards 23-4.1(a) (prisoner participation in housekeeping and maintenance programs), 23-6.13(c) (maintenance of institutions)

ABA, TRIAL BY JURY STANDARDS, 15-3.2(b) (prisoner attire at trial)

ACA, JAIL STANDARDS, 4-ALDF-A-04 (housekeeping), 4-ALDF-4B-02 (bedding issue), 4B-03 (clothing), 4B-06 (personal hygiene)

ACA, PRISON STANDARDS, 4-4333 (housekeeping), 4-4336 and 4-4338 (clothing), 4-4340 (bedding), 4-4342 (bathing and personal hygiene)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, X.B.D (housekeeping), X.B.E (laundry), X.B.I (vermin control), X.B.J (wastewater), X.E.A (personal hygiene)

U.N. Standard Minimum Rules, arts. 12, 14, 15 (hygiene), 17 to 19 (clothing and bedding)

Commentary

This Standard is based on abundant Eighth Amendment case law, applicable professional standards, and the requirements of Rules 17 and 18 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

Subdivision (a): Prison officials have an obligation under the Eighth Amendment (as well as health and safety codes) to maintain sanitary conditions, free of infestation and contamination. Those obligations cannot be sloughed off by blaming prisoners, either for causing unsanitary conditions or for failing to clean them up.¹⁰⁷ Prison officials can assign prisoners to keep living areas and associated common areas clean,¹⁰⁸ but it is still the officials' responsibility to provide adequate supplies, maintain fixtures and

¹⁰⁷ As one court observed, "We see no reason why well-behaved inmates should have to suffer cruel and unusual punishment because of the activities of some disruptive ones. . . . [T]he prison administration must bear the ultimate responsibility for cell block conditions." *Blake v. Hall*, 668 F.2d 52, 57-58 (1st Cir. 1981); see also *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991) (holding that allegations of vandalism by prisoners other than the plaintiff do not defeat an Eighth Amendment claim); *Beck v. Lynaugh*, 842 F.2d 759, 761 (5th Cir. 1988) (same); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 963-64 (D.R.I. 1977) (noting that even if some prisoners don't keep their cells clean, common areas "must be the basic responsibility of management"; citing "abdication" of any attempt to maintain cleanliness). Confinement in an area where prisoners with mental illness cause unsanitary conditions may violate the Eighth Amendment. *Thaddeus-X v. Blatter*, 175 F.3d 378, 402-03 (6th Cir. 1999) (en banc); *Bracewell v. Lobmiller*, 938 F. Supp. 1571, 1578-79 (M.D. Ala. 1996), aff'd, 116 F.3d 1493 (11th Cir.1997) (unpublished).

¹⁰⁸ But see *Benjamin v. Fraser*, 156 F. Supp. 2d 333, 355 (S.D.N.Y. 2001) (holding that patients cannot be relied upon to maintain sanitation in infirmary; "The fact that they can walk does not mean that they are capable of working with mops and scrub brushes."), aff'd in part, vacated and remanded in part on other grounds, 343 F.3d 35 (2d Cir. 2003).

ABA Treatment of Prisoners Standards

Standard 23-3.5 Provision of necessities

equipment, and organize cleaning activities.¹⁰⁹ In addition, when a prisoner is unable to clean his or her own living area, whether physically or because of a mental disability, correctional authorities should arrange for it to be cleaned. It is inhumane to abandon a prisoner to live in filth. Pretrial detainees may be required to keep their own living areas clean, though requiring such prisoners to perform any additional work assignments may be constitutionally problematic.

Subdivisions (b) & (c): Like food, clothing is a basic human need, preserving dignity and personal hygiene, and often protecting against exposure to excessive cold.¹¹⁰ Laundry services and hygiene supplies help prevent the spread of communicable diseases ranging from lice to methicillin-resistant staphylococcus aureus (MRSA). Thus, denial of necessary laundry facilities, cleaning supplies, and basic hygiene materials can violate the Eighth Amendment.¹¹¹ Requiring prisoners to hand-laundry their own clothing does not meet current standards of hygiene. The requirement in subdivision (c) covers a comb, soap, shampoo, deodorant, toothbrush and toothpaste or tooth powder, an adequate supply of toilet paper, and tampons and sanitary napkins for female prisoners, and access to shaving materials. See, e.g., AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, X.E.A.3 & .4.

Although there is no constitutional right to clothing that fits well or looks good,¹¹² the Standards' commitment to prisoners' dignity dictates that clothing provided to prisoners should not be degrading. See U.N. Standard Minimum Rules, art. 17(1). In addition, prisoners should be provided with

¹⁰⁹ *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989) (lack of cleaning supplies); *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989) (same); *Carty v. Farrelly*, 957 F. Supp. 727, 736 (D.V.I. 1997) (noting threat to health caused by lack of plans for institutional housekeeping, kitchen maintenance, and sanitation); *Carver v. Knox County*, 753 F. Supp. 1370, 1388 (E.D. Tenn. 1989) ("The provision of basic cleaning supplies, such as mops, brooms, toilet brushes and cleaners are a basic necessity of civilized life."), remanded for reconsideration, 887 F.2d 1287 (6th Cir. 1989), adhered to on remand, 753 F. Supp. 1398 (E.D. Tenn. 1990); *Tillery v. Owens*, 719 F. Supp. 1256, 1271 (W.D. Pa. 1989) (citing lack of a formal housekeeping plan), aff'd, 907 F.2d 418 (3d Cir. 1990); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 866-67 (D.D.C. 1989); *Palmigiano v. Garrahy*, 443 F. Supp. at 963-64.

¹¹⁰ See, e.g., *Gillis v. Litscher*, 468 F.3d 488, 490-94 (7th Cir. 2006) (applying principle that deprivation of adequate clothing can violate the Eighth Amendment); *Dixon v. Godinez*, 114 F.3d 640, 643 (7th Cir. 1997) (clothing must be adequate in reference to the temperature in cell); *Blissett v. Coughlin*, 66 F.3d 531, 537 (2d Cir. 1995) (upholding jury verdict for prisoner under "contemporary standards of decency"; issues included deprivation of clothing and bedding).

¹¹¹ See, e.g., *Board v. Farnham*, 394 F.3d 469, 481-82 (7th Cir. 2005) (holding that the law has clearly established that the Eighth Amendment would be violated by denying a prisoner toothpaste for 3½ weeks); *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) ("Indigent inmates have the right to personal hygiene supplies such as toothbrushes and soap"; allegation that plaintiff was denied such items except when he could pay for them, and that the indigency standard forced him to choose between hygiene items and legal supplies, stated a claim), amended on other grounds, 135 F.3d 1318 (9th Cir. 1998); *Myers v. Hundley*, 101 F.3d 542, 544 (8th Cir. 1996) ("[A] long-term, repeated deprivation of adequate hygiene supplies violates inmates' Eighth Amendment rights. . . . Prisons may either regularly provide these supplies to inmates free of charge, or they may give inmates a sufficient allowance with which to buy them."); *Divers v. Dep't of Corr.*, 921 F.2d 191, 194 (8th Cir. 1990) (prisoners are entitled to adequate laundry services and cleaning supplies); Settlement Agreement between the U.S. Department of Justice and Wicomico County, Maryland Regarding the Wicomico County Detention Center (July 16, 2004), available at http://www.justice.gov/crt/about/spl/documents/split_setagree_wicomico_7-16-04.pdf.

¹¹² *Young v. Berks County Prison*, 940 F. Supp. 121, 124 (E.D. Pa. 1996) (requiring the plaintiff to wear ill-fitting, dirty or torn clothes was "an indignity incidental to prison life that does not rise to the level of a constitutional violation"; he weighed 300 pounds and they didn't have much in his size); see also *Knop v. Johnson*, 667 F. Supp. 467, 475 (W.D. Mich. 1987).

ABA Treatment of Prisoners Standards

Standard 23-3.6 Recreation and out-of-cell time

undergarments that are not shared, and should be allowed to exchange their clothing for reasons such as weight loss or weight gain or when clothing is worn out.

For a person on trial in criminal court, being observed in jail clothing may create an impression of dangerousness or guilt. In order to protect the presumption of innocence, such a prisoner is entitled to wear civilian clothes on request when appearing before a jury.¹¹³ Typically, the prisoners' lawyer or family brings the clothes to the courthouse; subdivision (b) requires correctional authorities to implement procedures that allow the prisoner an opportunity to put the clothes on prior to being seen in court—and to leave them with the lawyer or family member upon leaving court, so that they are available the next time, as well.

Standard 23-3.6 Recreation and out-of-cell time

(a) To the extent practicable and consistent with prisoner and staff safety, correctional authorities should minimize the periods during the day in which prisoners are required to remain in their cells.

(b) Correctional authorities should provide all prisoners daily opportunities for significant out-of-cell time and for recreation at appropriate hours that allows them to maintain physical health and, for prisoners not in segregated housing, to socialize with other prisoners. Each prisoner, including those in segregated housing, should be offered the opportunity for at least one hour per day of exercise, in the open air if the weather permits.

(c) Correctional authorities should whenever practicable allow each prisoner not in segregated housing to eat in a congregate setting, whether that is a specialized room or a housing area dayroom, absent an individualized decision that a congregate setting is inappropriate for a particular prisoner. Prisoners should be allowed an adequate time to eat each meal.

Cross References

ABA, TREATMENT OF PRISONERS STANDARDS, 23-3.8 (segregated housing), 23-1.1(c) & (e) (general principles governing imprisonment, 23-7.2 (treatment of prisoners with disabilities and other special needs)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13 (c) & (d) (maintenance of institutions)

ACA, JAIL STANDARDS, 4-ALDF-2A-01 (control), 2A-64 (special management inmates), 4-ALDF-4A-01 (food service), 4-ALDF-5C-01 through 5C-04 (exercise and recreation)

ACA, PRISON STANDARDS, 4-4154 (exercise and recreation), 4-4158 (dining), 4-4270 (exercise outside of cell), 4-4326 and 4-4327 (meal service), 4-4481 (comprehensive recreational program), 4-4484 (equipment and facilities)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, IX.D.5 (daily exercise)

U.N. Standard Minimum Rules, art. 21 (exercise and sport)

¹¹³ *Estelle v. Williams*, 425 U.S. 501 (1976); *Felts v. Estelle*, 875 F.2d 785, 786 (9th Cir. 1989) (state must provide civilian clothing for indigent defendant); *McFarland v. English*, 111 F. Supp. 2d 591, 600-02 (E.D. Pa. 2000) (same).

ABA Treatment of Prisoners Standards

Standard 23-3.6 Recreation and out-of-cell time

Commentary

Subdivision (a): This Standard is key to operationalizing the overarching idea, announced in Standard 23-1.1(c) and (e), that restrictions within prison should be imposed only to the extent they are “necessary and proportionate” to their legitimate objectives. If prisoners are appropriately classified and supervised, prisons and jails can operate smoothly and safely with prisoners spending a large number of hours out of their cells—at meals, work assignments and programming, recreation and religious observances, and in congregate day rooms. Allowing prisoners more scope of movement within a structured environment better prepares prisoners for life in the community and can alleviate the boredom that is behind a good deal of prison misbehavior. The punishment of incarceration remains in the confinement to the prison and the prisoners’ absence of self-determination.

Subdivision (b): Large motor exercise is essential to physical health¹¹⁴, and is nearly impossible in a small prison cell. More generally, exercise and recreation play a critical role in maintaining physical and mental health. Exercise becomes even more important when prisoners spend extended periods of time locked into cells.¹¹⁵ Subdivision (b) therefore insists on daily access to exercise “in the open air” for all prisoners. For days in which the weather is inclement and for prisoners who prefer it, there should be indoor recreational areas of sufficient size to allow for exercise, equipped for a variety of activities. Note that the ACA’s standards set a somewhat lower level of exercise for prisoners in segregated housing, requiring that they should receive one hour per day out-of-cell exercise time only five days per week, not daily. ACA, PRISON STANDARDS 4-4270, ACA, JAIL STANDARDS 4-ALDF-2A-65; see also ACA, PRISON STANDARDS 4-4154; ACA, JAIL STANDARDS 4-ALDF-5C-01, -03 (exercise standards more generally). There is no apparent reason for this restriction other than administrative convenience related to the common practice of reduced staffing on weekends. Subdivision (b)’s daily requirement is part of the group of Standards aimed at alleviating the debilitating monotony of segregation. See especially Standard 23-3.8.

Subdivision (c): Congregate eating is a useful antidote for social isolation in prison, particularly for prisoners who spend a lot of time in-cell. Most jails and prisons allow nearly all their prisoners to eat in a congregate setting, whether that is a chow hall or the dayroom of a more self-contained unit. Outside of segregated housing, if security concerns counsel against allowing a particular high security prisoner to eat in a congregate setting, this subdivision insists that such a decision be made in an individualized way, not as an inevitable concomitant of any particular custody level. This decision could readily be added to the tasks performed by a classification committee.

The ACA requires meals to last at least 20 minutes, ACA, JAIL STANDARDS 4-ALDF-2A-01, ACA, PRISON STANDARDS 4-4158, which is a reasonable general rule. But if more time is needed by prisoners who are frail or have a disability that slows their eating, that would be a reasonable modification of the meal policy.

¹¹⁴ See, e.g., C. Barr. Taylor, James F. Sallis & Richard Needle, *The Relation of Physical Activity and Exercise to Mental Health*, 100 PUB. HEALTH REP. 195-202 (1985).

¹¹⁵ See, e.g., *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (five hours exercise per week required for prisoners in segregation); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1402, 1412 (N.D. Cal.1984) (eight hours exercise per week required for prisoners in segregation), aff’d in part and rev’d in part on other grounds, 801 F.2d 1080 (9th Cir. 1986). The opportunity to breathe fresh air and see the sky provides independent physical and mental health benefits, and a number of courts have also required outdoor exercise. See, e.g., *Fogle v. Pierson*, 435 F.3d 1252, 1259-60 (10th Cir. 2006) (noting “substantial agreement” in cases that “regular outdoor exercise is extremely important to the psychological and physical well being of inmates”); *Toussaint v. Yockey*, 722 F.2d 1490, 1492-93 (9th Cir. 1984); *Spain v. Procunier*, 600 F.2d 189, 199-200 (9th Cir. 1979).

Standard 23-3.7 Restrictions relating to programming and privileges

(a) In no case should restrictions relating to a prisoner's programming or other privileges, whether imposed as a disciplinary sanction or otherwise, detrimentally alter a prisoner's:

- (i) exposure to sufficient light to permit reading in the prisoner's housing area, and reasonable darkness during the sleeping hours;**
- (ii) adequate ventilation;**
- (iii) living area temperature;**
- (iv) exposure to either unusual amounts of noise or to auditory isolation;**
- (v) opportunity to sleep;**
- (vi) access to medication or medical devices or other health care;**
- (vii) nutrition, except as permitted by Standard 23-3.4(c);**
- (viii) access to water; and**
- (ix) counsel or clergy visits, or written communication with family members, except as provided in subdivision (d) of this Standard.**

(b) A prisoner should not be administered sedating or otherwise psychoactive drugs for purposes of discipline or convenience, or because of any decision relating to programming or privileges; such drugs should be used only to treat health conditions.

(c) Restrictions relating to a prisoner's programming or other privileges, whether as a disciplinary sanction or otherwise, should be permitted to reduce, but not to eliminate, a prisoner's:

- (i) access to items of personal care and hygiene;**
- (ii) opportunities to take regular showers;**
- (iii) personal visitation privileges, but suspension of such visits should be for no more than [30 days];**
- (iv) opportunities for physical exercise;**
- (v) opportunities to speak with other persons;**
- (vi) religious observance in accordance with Standard 23-7.3; and**
- (vii) access to varied reading material.**

(d) Correctional authorities should be permitted to reasonably restrict, but not eliminate, counsel visits, clergy visits, and written communication if a prisoner has engaged in misconduct directly related to such visits or communications.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.1(a) (physical plant and environmental conditions: heating, ventilation, light, darkness, noise, water, toilets), 23-3.3 (housing areas), 23-3.4 (healthful food), 23-3.8 (segregated housing), 23-4.3 (disciplinary sanctions, disallowed sanctions), 23-6.14 (voluntary and informed consent to treatment), 23-6.15 (involuntary mental health treatment and transfer), 23-7.3 (religious freedom), 23-8.5 (visiting), 23-8.6(a) (written communications, family)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13(d) (maintenance of institutions)

ABA Treatment of Prisoners Standards

Standard 23-3.7 Restrictions relating to programming and privileges

ACA, JAIL STANDARDS, 4-ALDF-2A-60 through 2A-64 (special management inmates), 4-ALDF-4B-06 (personal hygiene), 4-ALDF-4D-17 (involuntary administration)

ACA, PRISON STANDARDS, 4-4261 through 4-4263 (general conditions of confinement), 4-4267 (visiting), 4-4268 and 4-4269 (access to legal and reading materials), 4-4270 (exercise outside of cell), 4-4272 (telephone privileges), 4-4273 (administrative segregation, protective custody), 4-4401 (involuntary administration)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.I.3 (food, segregation, and punishment), VIII (restraints, including chemical restraints)

NCCHC, HEALTH SERVICES STANDARDS, A-01 (access to care), D-02 (medication services), E-07 (nonemergency health care requests and services), E-09 (segregated inmates), G-10 (aids to impairment), I-02 (emergency psychotropic medication)

U.N. Standard Minimum Rules, arts. 31-32 (punishment)

Commentary

Lower courts have agreed that deprivation of such “life’s necessities” as food,¹¹⁶ light,¹¹⁷ and sleep¹¹⁸ can run afoul of the Eighth Amendment. This Standard establishes certain aspects of prison life as beyond the reach of programming or disciplinary restrictions: light, dark, ventilation, temperature, noise, sleep (intended to cover sleep during ordinary sleeping hours—it is entirely appropriate for programming obligations to be scheduled at any time during normal waking hours), health care, and water. For each of these, the related standards set out minimal requirements; this Standard adds the rule that correctional officials may not vary these items detrimentally for particular prisoners. For other listed items—personal care/hygiene items, and the opportunity to shower, exercise, and speak with other prisoners—the Standard allows restriction but not elimination; although the degree of or reason for restriction is not explicit, the intent is that even a prisoner being punished should retain reasonable access. For several items, however—food, visiting (by counsel, clergy, or someone else), and correspondence, the Standards allow restrictions only to a specified point or only for specified reasons:

- Under Standard 23-3.4(c), referenced in subdivision (a), food can be restricted only for segregated prisoners, and only if their food-related misconduct is hazardous; even then alternative food must be nutritious and palatable.

¹¹⁶ See, e.g., *Landman v. Royster*, 333 F. Supp. 621, 647 (E.D. Va. 1971); *Willis v. Bell*, 726 F. Supp. 1118, 1121-22 (N.D. Ill. 1989).

¹¹⁷ See, e.g., *Wycoff v. Brewer*, 572 F.2d 1260, 1263 & n.5 (8th Cir. 1978) (confinement of a prisoner in a cell that was or could be totally darkened, where the prisoner was placed nude, without bedding or covering, “would unquestionably be held unconstitutional”); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972) (“We cannot approve of threatening an inmate’s sanity and severing his contacts with reality by placing him in a dark cell almost continuously day and night.”), cert. denied, 414 U.S. 878 (1973); *Keenan v. Hall*, 83 F.3d 1083, 1090 (“Moreover, ‘[t]here is no legitimate penological justification for requiring [prisoners] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional.’”) (quoting *LeMaire v. Maass*, 745 F. Supp. 623, 636 (D. Or. 1990)), amended on other grounds, 135 F.3d 1318 (9th Cir. 1998); *King v. Frank*, 328 F. Supp. 2d 940, 946-47 (W.D. Wis. 2004) (“Constant illumination may violate the Eighth Amendment if it causes sleep deprivation or leads to other serious physical or mental health problems”; noting previous holding that a 5-watt bulb doesn’t violate the Eighth Amendment)..

¹¹⁸ *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999); *Merritt v. Hawk*, 153 F. Supp. 2d 1216, 1228 (D. Colo. 2001).

ABA Treatment of Prisoners Standards

Standard 23-3.8 Segregated housing

- Subdivisions (a)(ix) and (d) allow restrictions on but not elimination of correspondence with family, as well as counsel and clergy visits, and only if a prisoner has committed misconduct with respect to the activity in question. See commentary to Standards 23-8.5(d) and 23-8.6(a).
- Influenced by international law, which far more than domestic law protects prisoners' access to the non-prison community, see commentary to Standard 23-8.5, subdivisions (c)(iii) allows restriction of personal visitation privileges; visits can be suspended for up to 30 days, and can be reasonably restricted but not eliminated after that time. In extraordinarily rare circumstances, visitation rights may need to bend to considerations of national security.
- Subdivisions (c)(vii) allows some deprivation of reading materials, so long as there remains to the prisoner a variety of things to read, if he or she so chooses. There is a long though now largely defunct tradition in American corrections of allowing prisoners in disciplinary status to read only the Bible; this provision disapproves such a policy (although certainly a Bible might be one allowed reading item). In *Beard v. Banks*, 548 U.S. 521, 525-26 (2006), the Supreme Court upheld a flat ban on newspapers and magazines for the 40 prisoners Pennsylvania housed in its Long Term Segregation Unit—the “most restrictive of the three special units that Pennsylvania maintains for difficult prisoners.” But the Court emphasized that the prisoners in question were *not* deprived of all reading material, that they were “permitted legal and personal correspondence, religious and legal materials, two library books, and writing paper.”

Subdivision (b): This provision on inappropriate use of medication deals with what are sometimes called “chemical restraints”; its language is adapted from federal regulations on nursing home operation. See 42 C.F.R. § 483.13(a) (“The resident has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident’s medical symptoms.”) The U.S. Department of Health and Human Services defines “convenience” as “any action taken by the facility to control a resident’s behavior or manage a resident’s behavior with a lesser amount of effort by the facility and not in the resident’s best interest.”¹¹⁹ This provision bans sedation to ensure docility, whether in a facility or during transport. Involuntary medication for health purposes (including the protect the prisoner from self-harm) must proceed under the restrictions in Standard 23-6.14 and 6.15.

Standard 23-3.8 Segregated housing

- (a) Correctional authorities should be permitted to physically separate prisoners in segregated housing from other prisoners but should not deprive them of those items or services necessary for the maintenance of psychological and physical wellbeing.**
- (b) Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner’s separation from the general population. Conditions of extreme isolation generally include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation.**
- (c) All prisoners placed in segregated housing should be provided with meaningful forms of mental, physical, and social stimulation. Depending upon individual assessments of risks, needs, and the reasons for placement in the segregated setting, those forms of stimulation should include:**

¹¹⁹ See Department of Health and Human Services, *Guidance to Surveyors, Long-term Care Facilities* (Sep. 2000), available at <http://www.cms.hhs.gov/Transmittals/Downloads/R20SOM.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-3.8 Segregated housing

- (i) **in-cell programming, which should be developed for prisoners who are not permitted to leave their cells;**
- (ii) **additional out-of-cell time, taking into account the size of the prisoner's cell and the length of time the prisoner has been housed in this setting;**
- (iii) **opportunities to exercise in the presence of other prisoners, although, if necessary, separated by security barriers;**
- (iv) **daily face-to-face interaction with both uniformed and civilian staff; and**
- (v) **access to radio or television for programming or mental stimulation, although such access should not substitute for human contact described in subdivisions (i) to (iv).**

(d) **Prisoners placed in segregated housing for reasons other than discipline should be allowed as much out-of-cell time and programming participation as practicable, consistent with security.**

(e) **No cell used to house prisoners in segregated housing should be smaller than 80 square feet, and cells should be designed to permit prisoners assigned to them to converse with and be observed by staff. Physical features that facilitate suicide attempts should be eliminated in all segregation cells. Except if required for security or safety reasons for a particular prisoner, segregation cells should be equipped in compliance with Standard 23-3.3(b).**

(f) **Correctional staff should monitor and assess any health or safety concerns related to the refusal of a prisoner in segregated housing to eat or drink, or to participate in programming, recreation, or out-of-cell activity.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.6 (rationales for segregated housing), 23-2.7 (rationales for long-term segregated housing), 23-2.8 (segregated housing and mental health), 23-2.9 (procedures for placement and retention in long-term segregated housing), 23-3.3 (housing areas), 23-3.6 (recreation and out-of-cell time), 23-3.7 (restrictions relating to programming and privileges), 23-4.3 (disciplinary sanctions), 23-5.4 (self-harm and suicide prevention), 23-5.5 (protection of vulnerable prisoners), 23-8.4 (work programs)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13(d) (maintenance of institutions)

ACA, JAIL STANDARDS, 4-ALDF-2A-44, 2A-51, 2A-52, 2A-64 (special management inmates), 4-ALDF-5C-04 (exercise and recreation)

ACA, PRISON STANDARDS, 4-4140 and 4-4141 (special management housing), 4-4249 (general policy and practice), 4-4251, 4-4252 and 4-4255 (admission and review of status), 4-4258 (supervision), 4-4261 through 4-4264 (general conditions of confinement), 4-4266 (mail), 4-4267 (visiting), 4-4269 (access to legal and reading materials), 4-4270 (exercise outside of cell), 4-4271 (telephone privileges), 4-4273 (administrative segregation/protective custody)

ABA Treatment of Prisoners Standards
Standard 23-3.8 Segregated housing

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶ 61 (students in segregated, restricted, or suspended status)

NCCHC, HEALTH SERVICES STANDARDS, E-09 (segregated inmates)

Commentary

Subdivision (a): For an introduction to the issues of prison segregation, see the commentary at the start of Part II. This Standard insists on conditions of confinement conducive to prisoners' mental and physical wellbeing even in segregated housing, defined by Standard 23-1.0(r) as "housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action." The key security feature of segregated housing is separation of prisoners from each other, and neither this nor any of the other related Standards interfere with that separation.

Subdivisions (b) & (c): Even extremely dangerous prisoners need mental, physical, and social stimulation; avoiding the most damaging conditions for them is not only more humane but also serves prison and public safety, because it promotes their rehabilitation, or at least is not *debilitating*. The Standard's approach is to ban what is termed "extreme isolation," described in subdivision (b). Isolation is more likely to become extreme, and therefore damaging to a prisoner's mental and physical health, the longer it lasts, and the more thorough the sensory and social deprivation imposed. To avoid extreme isolation, these Standards insist that even prisoners properly in segregation must be allowed various sorts of stimulation, including human contact. (Note that under Standard 23-3.7(c)(iii), personal visitation cannot be eliminated for more than 30 days, and under 23-3.7(d), counsel and clergy visits can be restricted only if the prisoner has committed misconduct with respect to such visits.)

Subdivision (d): Prisoners are placed in segregated housing for a variety of reasons and for short and long periods of time, see Standards 23-2.6 and 23-2.7. This subdivision's requirement of "as much out-of-cell time and programming participation as practicable" applies when a prisoner is placed in segregation for reasons other than discipline. Even for a prisoner who cannot safely spend any time out of cell, programming that makes use of a television or books is possible.

Subdivision (e): The requirement that a segregation cell be at least 80 square feet incorporates ACA prison accreditation standard 4-4132. (Note, however, that ACA *jail* accreditation standard 2-ALDF-2A-51 requires only 70 square feet, of which 35 must be space unencumbered by furniture or fixtures.) No more than one person should be housed in a segregation cell. Space should be commensurate with the amount of time the prisoner is required to spend in the cell; for long-term segregation with the minimum out-of-cell time, see Standard 23-3.6(b), more space should be provided, both to allow some large-muscle exercise within the cell and to decrease mental stress.

Because suicide is a particularly acute problem in segregated housing, this subdivision is more exacting than the general Standard, Standard 23-5.4(e), relating to suicide prevention measures in housing areas. The problem of suicide in segregated housing should be ameliorated, as well, by the rule against housing prisoners with serious mental illness in segregated housing and by Standard 23-5.4(c)'s rule that correctional authorities should avoid isolating prisoners at risk of suicide.

Under this subdivision, the requirements of Standard 23-3.3(b)—a bed and mattress off the floor, a writing area and seating, a storage compartment, natural light, and light sufficient to permit reading—apply in segregated housing unless correctional authorities have a particular security reason to limit a particular prisoner. Restrictions should be made item by item: it is difficult to think of a situation in which any prisoner should be denied natural light, but much easier, for example, to imagine appropriate reasons to deny a prisoner a storage compartment. Note that the additional requirements of Standard 23-3.7 (darkness during sleeping hours, adequate ventilation, etc.) also apply in segregation as elsewhere.

ABA Treatment of Prisoners Standards

Standard 23-3.9 Conditions during lockdown

Subdivision (f): One important sign of mental or physical health deterioration for prisoners in segregation is when they stop eating, drinking, or participating in the limited programming or recreation available to them.¹²⁰ It is crucial for correctional staff to notice and investigate such refusals, both by recording them in the log required by Standard 23-2.8(c)(i), and by taking more expedited action when appropriate.

Standard 23-3.9 Conditions during lockdown

(a) The term “lockdown” means a decision by correctional authorities to suspend activities in one or more housing areas of a correctional facility and to confine prisoners to their cells or housing areas.

(b) A lockdown of more than one day should be imposed only to restore order; to address an imminent threat of violence, disorder, or serious contagion; or to conduct a comprehensive search of the facility.

(c) During any lockdown, correctional authorities should not suspend medical services, food service, and provision of necessities, although necessary restrictions in these services should be permitted. Prisoners should continue to have unrestricted access to toilets, washbasins, and drinking water. Except in the event of an emergency lockdown of less than [72 hours] in which security necessitates denial of such access, prisoners should be afforded access to showers, correspondence, delivery of legal materials, and grievance procedures.

(d) In the event of a lockdown of longer than [7 days], a qualified mental health professional should visit the affected housing units at least weekly to observe and talk with prisoners in order to assess their mental health and provide necessary services.

(e) A lockdown should last no longer than necessary. As the situation improves, privileges and activities for the affected area should be progressively increased. Procedures should exist for identifying individual prisoners who did not participate in incidents that led to the lockdown and whose access to programs and movement within the facility may be safely restored prior to the termination of lockdown status. In the extraordinary situation that a lockdown lasts longer than [30 days], officials should mitigate the risks of mental and physical deterioration by increasing out-of-cell time and in-cell programming opportunities.

(f) Correctional officials should not use a lockdown to substitute for disciplinary sanctions or for reclassification of prisoners.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.3 (classification procedures), 23-3.7 (restrictions relating to programming and privileges), 23-4.2 (disciplinary hearing procedures), 23-4.3 (disciplinary sanctions), 23-7.8 (searches of facilities)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-3.2(f) (disciplinary hearing procedures)

¹²⁰ See, e.g., *Jenkins v. Leavell*, No. 5:07-CV-2-R, 2008 WL 4000557, at *2-3 (W.D. Ky. Aug 25, 2008) (describing how prisoner in isolation cell stopped eating; a few days later, she died of “overwhelming pneumonia”).

ABA Treatment of Prisoners Standards

Standard 23-3.9 Conditions during lockdown

Commentary

A brief lockdown is a legitimate response to an emergency security need. But once the emergency has passed and correctional authorities have regained control of the facility, this Standard requires that the lockdown should be lightened and then lifted. The 1983 lockdown at the federal penitentiary at Marion that inaugurated the current wave of supermax confinement is far from the only time a sustained lockdown was used as an informal method of imposing long-term segregation. In some cases, lockdowns have lasted two years or more, although the term more naturally covers only very temporary (e.g., day-long) measures in response to an isolated problem. Without some regulation of lockdowns, the requirements of other Standards would be undermined.

PART IV: RULES OF CONDUCT AND DISCIPLINE

Part IV General Commentary

This Part deals with institutional rules and what happens when they are broken. Standard 23-4.1 begins by setting out requirements for informing prisoners what the rules are; Standard 23-4.2 treats the procedure by which violations are punished; and Standard 23-4.3 addresses imposition of punishment.

Standard 23-4.1 Rules of conduct and informational handbook

(a) Correctional administrators and officials should promulgate clear written rules for prisoner conduct, including specific definitions of disciplinary offenses, examples of conduct that constitute each type of offense, and a schedule indicating the minimum and maximum possible punishment for each offense.

(b) Upon a prisoner's entry to a correctional facility, correctional authorities should provide the prisoner a personal copy of the rules for prisoner conduct and an informational handbook written in plain language. A written translation in a language the prisoner understands should be provided within a reasonable period of time to each literate prisoner who does not understand English. Copies of the rules and handbook in the languages a facility's prisoners understand should also be available in areas of the facility readily accessible to prisoners, including libraries. Staff should explain and read the rules and the handbook to any prisoner unable to read them by reason of illiteracy or disability.

(c) The handbook should contain specific criteria and procedures for discipline and classification decisions, including decisions involving security status and work and housing assignments. In addition, the handbook should set forth the facility's policy forbidding staff sexual contact or exploitation of prisoners, and the procedures for making complaints, filing grievances, and appealing grievance denials, as well as describing any types of complaints deemed not properly the subject of the grievance procedures.

(d) The handbook should specify the authorized means by which prisoners should seek information, make requests, obtain medical or mental health care, seek an accommodation relating to disability or religion, report an assault or threat, and seek protection.

(e) Correctional officials and administrators should annually review and update facility and agency rules and regulations to ensure that they comport with current legal standards. Correctional officials should annually review and update the handbooks provided to prisoners to ensure that they comport with current legal standards, facility and agency rules, and practice.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.2 (classification system), 23-3.9 (conditions during lockdown), 23-4.2 (disciplinary hearing procedures), 23-5.2 (prevention and investigation of violence), 23-5.3 (sexual abuse), 23-6.2 (response to prisoner requests for health care), 23-7.2 (treatment of prisoners with disabilities and other special needs), 23-7.3 (religious freedom), 23-9.1 (grievance procedures), 23-9.2 (access to the judicial process)

ABA Treatment of Prisoners Standards

Standard 23-4.1 Rules of conduct and informational handbook

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-3.1 (rules of conduct)

ACA, JAIL STANDARDS, 4-ALDF-2A-27 and 2A-28 (orientation), 4-ALDF-3A-01 (rules and discipline)

ACA, PRISON STANDARDS, 4-4226 through 4-4228 (rules of conduct), 4-4288 (new inmates)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 26 (reception)

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶ 30 (orientation)

NCCHC, HEALTH SERVICES STANDARDS, B-04 (Federal Sexual Assault Reporting Regulations), E-01 (Information on Health Services)

U.N. Standard Minimum Rules, art. 35 (information to prisoners)

Commentary

Prisons and jails function better when authorities promulgate clear prisoner rules that set expectations for conduct, consequences for misconduct, and avenues to ask questions and get problems solved. When prisoners are treated fairly, and believe they are treated fairly, they are more compliant and easier to manage. Staff can do their jobs better when they have a clear understanding of what the rules are and how they will be enforced. In addition, notice is a core element of due process; prisoners must receive fair notice of a rule before they can be penalized for its violation. (Case law and discussion of this point are included in the commentary accompanying Standard 23-4.2.)

Subdivision (b): In order to satisfy the requirement in this subdivision that the prisoner handbook be provided in a language each literate prisoner understands, correctional authorities should arrange in advance for translation of the handbook into all the languages read by a significant number of non-English-speaking prisoners. But if a prisoner arrives who reads only a language for which no translation has been done, the subdivision authorizes “a reasonable period of time” for authorities to obtain a translation. Because of the central importance of the prisoner handbook, this requirement is more specific than the more general rule, in Standard 23-7.2(f)(i), for translation of written documents “to the extent practicable.” (In this Internet age, it should be possible to get a document like the rule book translated with an acceptable degree of precision.) Also, prisoner orientation usually includes both an oral presentation of rules and a written handbook; this Standard emphasizes the importance of both, particularly given many prisoners’ poor reading skills. Subdivision (b)’s requirement that correctional authorities read the handbook to prisoners unable to read it themselves can be satisfied by video recording. However, oral presentation of the information, alone, may be insufficient to satisfy the Americans with Disabilities Act requirement, reflected in Standard 23-7.2(e), of “effective communication” with prisoners who have disabling speech, hearing, or vision impairments, because a prisoner is likely to want to refer back to the information. Other possible additional methods of effective communication are listed in that Standard.

Subdivision (c): This subdivision’s reference to “complaints deemed not properly the subject of the grievance procedures” refers to complaints dealing with challenges to the court’s judgment, which should be excluded from the grievance system. But under Standard 23-9.1(c), correctional officials should not preclude prisoner use of the system (or in some specific cases an alternative system) for “any complaint relating to the agency’s or facility’s policies, rules, practices, and procedures or the action of any correctional official or staff.”

Subdivision (e): Without periodic updating, books that describe procedures for staff or prisoners vary too much from actual practice to serve their intended function.

Standard 23-4.2 Disciplinary hearing procedures

(a) Correctional authorities should not seek to impose a disciplinary sanction upon a prisoner for misconduct unless the misconduct is a criminal offense or the prisoner was given prior written and effective notice of the violated rule.

(b) Informal resolution of minor disciplinary violations should be encouraged provided that prisoners have notice of the range of sanctions that may be imposed as a result of such an informal resolution, those sanctions are only minimally restrictive, and the imposition of a sanction is recorded and subject to prompt review by supervisory correctional staff, ordinarily on the same day.

(c) Correctional authorities should be permitted to confine a prisoner in segregated housing pending the hearing required by subdivision (d) of this Standard, if necessary for individual safety or institutional security. Such prehearing confinement should not exceed [3 days] unless necessitated by the prisoner's request for a continuance or by other demonstrated good cause. Prisoners should receive credit against any disciplinary sentence for time served in prehearing confinement if prehearing conditions were substantially similar to conditions in disciplinary segregation.

(d) When the possible sanction for a disciplinary offense includes the delay of a release date, loss of sentencing credit for good conduct or good conduct time earning capability, or placement in disciplinary segregation, a prisoner should be found to have committed that offense only after an individualized determination, by a preponderance of the evidence. In addition, the prisoner should be afforded, at a minimum, the following procedural protections:

- (i) at least 24 hours in advance of any hearing, written and effective notice of the actions alleged to have been committed, the rule alleged to have been violated by those actions, and the prisoner's rights under this Standard;
- (ii) an impartial decision-maker;
- (iii) a hearing at which the prisoner may be heard in person and, absent an individualized determination of good cause, has a reasonable opportunity to present available witnesses and documentary and physical evidence;
- (iv) absent an individualized determination of good cause, opportunity for the prisoner to confront and cross-examine any witnesses or, if good cause to limit such confrontation is found, to propound questions to be relayed to the witnesses;
- (v) an interpreter, if necessary for the prisoner to understand or participate in the proceedings;
- (vi) if the decision-maker determines that a prisoner is unable to prepare and present evidence and arguments effectively on his or her own behalf, counsel or some other advocate for the prisoner, including a member of the correctional staff or another prisoner with suitable capabilities;
- (vii) an independent determination by the decision-maker of the reliability and credibility of any confidential informants;

ABA Treatment of Prisoners Standards

Standard 23-4.2 Disciplinary hearing procedures

- (viii) a written statement setting forth the evidence relied on and the reasons for the decision and the sanction imposed, rendered promptly but no later than [5 days] after conclusion of the hearing except in exceptional circumstances where good cause for the delay exists; and
- (ix) opportunity for the prisoner to appeal within [5 days] to the chief executive officer of the facility or higher administrative authority, who should issue a written decision within [10 days] either affirming or reversing the determination of misconduct and approving or modifying the punishment imposed.

(e) If correctional officials conduct a disciplinary proceeding during the pendency of a criminal investigation or prosecution, correctional authorities should advise the prisoner of the right to remain silent during the proceeding, and should not use that silence against the prisoner.

(f) A prisoner should be permitted to waive the right to a hearing if the prisoner so chooses after being informed of the disciplinary offense of which he or she is accused and the potential penalties and other consequences; such a waiver should be made in person to a designated correctional official who should accept it only if the prisoner understands the consequences.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.9 (conditions during lockdown), 23-4.1 (rules of conduct and informational handbook), 23-4.3 (disciplinary sanctions), 23-7.2 (treatment of prisoners with disabilities and other special needs), 23-8.2 (rehabilitative programs)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standards 23-3.2 (disciplinary hearing procedure), 23-3.3 (criminal misconduct)

ACA, JAIL STANDARDS, 4-ALDF-3A-02 (rules and discipline), Performance Standard 6C (due process for inmates), 4-ALDF-6C-01 through 6C-18 (inmate discipline)

ACA, PRISON STANDARDS, 4-4230 (resolution of minor infractions), 4-4232 (disciplinary reports), 4-4234 through 4-4237 (prehearing action), 4-4238 through 4-4243 (disciplinary hearing), 4-4244 through 4-4248 (hearing decisions)

U.N. Standard Minimum Rules, arts. 29 to 30 (discipline)

Commentary

Subdivision (a): “Living under a rule of law entails . . . that ‘(all persons) are entitled to be informed as to what the State commands or forbids.’” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). Notice of what conduct is prohibited is therefore a fundamental component of due process. This subdivision accordingly requires effective notice of prison rules prior to punishment of a prisoner for those rules’ violation; effective notice is defined in Standard 1.0(m) to mean notice in a language the prisoner understands, and is also covered by Standard 7.2(e)’s description of the requirement of effective communication under the Americans with Disabilities Act. As the black letter states, however, the written and effective notice requirement has no application to statutory criminal prohibitions; for prisoners as for non-prisoners, the existence of a penal statute

ABA Treatment of Prisoners Standards

Standard 23-4.2 Disciplinary hearing procedures

constitutes sufficient notice to satisfy due process. See, e.g., *Torres v. INS*, 144 F.3d 472, 474 (7th Cir. 1998) (“A defendant convicted of a crime created by a statute that took effect the day before he committed the crime would ordinarily have no defense of lack of fair notice, even if the enactment of the statute had received no publicity at all, so that the defendant had proceeded in warranted, perhaps indeed unavoidable, ignorance of it.”).

For non-criminal rule violations, the subdivision requires more than, for example, a rule against “misconduct.” See, e.g., *Landman v. Royster*, 333 F. Supp. 621, 655-56 (E.D. Va. 1971). As the Supreme Court has explained in a non-prison context, rules should “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Some degree of vagueness is more tolerable in prison rules than in criminal statutes, see, e.g., *Gibbs v. King*, 779 F.2d 1040, 1045-46 (5th Cir. 1986), but reasonably specific rather than vague rules serve a regulatory function, educating prisoners about what conduct is acceptable and also encourages their compliance. In addition, it avoids “resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 109; see also *Chatin v. Coombe*, 186 F.3d 82 (2d Cir. 1999).

Subdivision (b): This subdivision allows the omission of due process protections for prisoners accused of minor disciplinary violations, so long as the sanctions are, likewise, minor. Examples of minor sanctions are a reprimand; loss of commissary, entertainment, or recreation privileges for a limited time; and extra duties for a limited time.

Subdivision (d): A question logically precedent to what process is due in prison discipline is *which* disciplinary decisions require the stated due process protections. As the commentary to Standard 23-1.2(b)(ii) discusses, in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), the Supreme Court held that the Constitution does not guarantee any due process protection for prison discipline unless it leads to an “atypical and significant hardship” beyond that which is generally inherent in “the ordinary incidents of prison life.” This was a sharp change from the prior constitutional case law. This subdivision provides for disciplinary due process in situations in which under *Sandin* no such process is constitutionally required, because process protections are extremely helpful in assuring fair, consistent, and accurate decision-making and rule enforcement. It is for these same reasons that correctional administrators have mostly declined *Sandin*’s invitation to abolish disciplinary due process. See, e.g., ACA, JAIL STANDARDS 4-ALDF-6C-01 to -18, ACA, PRISON STANDARDS 4-4234 to -4248. Still, by choosing placement in disciplinary segregation as a punishment that triggers due process, subdivision (d) makes a significant choice not compelled by case law.

Moving, then, to what process is due, the key authority is *Wolff v. McDonnell*, 418 U.S. 539 (1974), in which the Court indicated in broad strokes the process due in prison disciplinary cases: timely notice of the charges, an opportunity to be heard before an impartial decision-maker, a limited right to assistance, and a written statement of reasons for the decision. Subdivision (d) largely follows *Wolff*, though the *Wolff* court rejected confrontation rights whereas subdivision (d)(iv) allows prisoners the presumptive opportunity to confront adverse witnesses. In addition, *Wolff* did not address the standard of proof, confidential informants, or the timing of decision-making, discussed below.

This subdivision requires use of a preponderance of the evidence standard. Although the Supreme Court has decided that the Due Process Clause is satisfied by a standard of judicial review of disciplinary findings that upholds them if they are supported by “some evidence,” *Superintendent v. Hill*, 472 U.S.

ABA Treatment of Prisoners Standards

Standard 23-4.2 Disciplinary hearing procedures

445 (1985),¹²¹ there is scant authority examining the standard of proof for the hearing officer's decision itself, and what precedent exists is mixed. The Standard rejects the rule stated in *Goff v. Dailey*, 991 F.2d 1437, 1440-43 (8th Cir. 1993), that (mistakenly in our view) makes the standard of proof the same as the standard of judicial review. The result of the *Goff* holding is to allow hearing officers to impose discipline even if they believe it more likely than not that the prisoner is not guilty, so long as some evidence supports the accusation. This approach would allow disciplinary sanctions based entirely, for example, on an unelaborated and probably (but not certainly) malicious accusation by another prisoner. Instead, like the Vermont Supreme Court in *LaFaso v. Patrissi*, 633 A.2d 695 (Vt. 1993), this subdivision embraces for prison disciplinary hearings the ordinary standard of proof for civil decision-making. As that court noted, any lower standard would allow a hearing officer to impose discipline even if the officer believed it more probable than not that the prisoner violated no rule. In addition, the deference to prison administrators that underlies *Hill*'s "some evidence" standard of review has no application to the *ab initio* standard of proof issue, since it is the prison hearing officer who gets to decide whether it is more likely than not that the prisoner committed the charged violation. Finally, the state has no interest in punishing prisoners who are innocent of charged misconduct—if security concerns about a prisoner remain worrisome even after a hearing officer finds the prisoner not guilty of the charged violation, that prisoner can be reclassified to increase supervision, but should not face disciplinary sanctions. (Note, however, that classification into long-term segregated housing requires compliance with Standard 23-2.9(a), which has its own preponderance of the evidence rule.) In general, however, if a prisoner is found not guilty of a disciplinary infraction, the rejected allegations should not be used against him.

Subdivision (d)(ii): The requirement of an impartial decision-maker is from *Wolff v. McDonnell*, but what is impartial? It is clear that "[t]he degree of impartiality required of prison officials does not rise to the level of that required of judges generally," *Allen v. Cuomo*, 100 F.3d 253, 259 (2d Cir. 1996), and that prison officials, including those with security responsibilities, can be impartial. *Wolff v. McDonnell*, 418 U.S. at 570-71; *Powell v. Ward*, 542 F.2d 101, 103 (2d Cir. 1976). But the requirement remains a meaningful one. Someone who was involved in the current incident or the filing of charges, witnessed the incident, or investigated it is generally not considered impartial. See, e.g., *Diercks v. Durham*, 959 F.2d 710, 713 (8th Cir. 1992); *Merritt v. De Los Santos*, 721 F.2d 598, 600-01 (7th Cir. 1983). In addition, fixed presumptions about the truth or falsity of statements by either prisoners or staff are not impartial; an impartial decision-maker "does not prejudge the evidence and . . . cannot say . . . how he would assess evidence he has not yet seen." *Patterson v. Coughlin*, 905 F.2d 564, 570 (2d Cir. 1990); see *Surprenant v. Rivas*, 424 F.3d 5, 17-18 (1st Cir. 2005) (a hearing officer who refused to interview an alibi witness based on a preconceived and subjective belief that the witness would lie was not impartial). In addition, correctional administrators should be sure not to undermine their hearing officers' impartiality. In *Perry v. McGinnis*, 209 F.3d 597, 605-06 (6th Cir. 2000), the court found that "overwhelming evidence suggests that there was, at the very least, a strong expectation that the not-guilty/dismissal rate should not rise above 10%" and stated that "[i]f hearing officers focus on finding 90% of the defendants before them guilty, as the evidence adduced thus far suggests, they cannot possibly be impartial, as is required by *Wolff*." See *Heit v. Van Ochten*, 126 F. Supp. 2d 487 (W.D. Mich. 2001) (approving settlement forbidding the 10% quota).

¹²¹ The "some evidence" requirement is a federal one, which distinguishes the situation from that in *Swarthout v. Cooke*, 131 S. Ct. 859 (2011), in which the Court emphasized that a *state-law* requirement of "some evidence" is not enforceable in a federal habeas action.

ABA Treatment of Prisoners Standards

Standard 23-4.2 Disciplinary hearing procedures

Subdivision (d)(v) & (d)(vi): An interpreter, if one is needed, is a basic requirement of due process.¹²² In addition, even where the Due Process Clause does not come into play, prison officials are required by the Americans with Disabilities Act to communicate effectively with prisoners disabled by hearing, vision, or speech impairments. See Standard 23-7.2(e). Prisoners may, however, need more than an interpreter. They may need, and the Standard requires provision of, an advocate to a prisoner who needs assistance during a disciplinary hearing because of limited literacy or English language proficiency, mental disability, or prehearing segregation that makes it difficult to investigate and present the case. *Wolff* requires such assistance where the prisoner is illiterate or the issues are too complex for a prisoner adequately to present on his own. The same reasoning that supports providing assistance to those prisoners—that they cannot adequately prepare and present a defense on their own—applies to prisoners faced with language barriers, mental illness or cognitive impairment, or placement in segregation. Indeed, some systems allow prisoners who are able to find such counsel to be represented in disciplinary hearings by a lawyer or law student,¹²³ an approach that is helpful for fair and accurate imposition of discipline.

Subdivision (d)(vii): Each decision-maker is required by this subdivision to independently review the reliability and credibility of confidential informants, addressing the problem discussed in *Broussard v. Johnson*, 253 F.3d 874 (5th Cir. 2001), in which the court found a due process violation where the testifying officer had no knowledge of the identity or reliability of the confidential informant. In the Standard governing procedural protections surrounding assignment of a prisoner to long-term segregation, a similar requirement is imposed, but is qualified to cover only situations when “material allowing such determination is available to the correctional agency.” Standard 23-2.9(b)(vii). That limitation is not repeated here, because unlike long-term segregation, which can respond to risks reported from other prisons or elsewhere, prison discipline much more typically deals with events at a particular prison; there is therefore little occasion for prison authorities to discipline a prisoner unless they have independent knowledge of the facts making the discipline appropriate.

Subdivisions (d)(viii) & (ix): Speedy resolution of prison disciplinary decision-making is crucial, because prisoners are typically kept in segregated housing until the decision is rendered or they have, given the charge, served the maximum possible segregation term. A slow decision will often be too late to avoid any of the punishment. If necessary to avoid this situation, hearing officers should try to render a nonwritten decision right away, either on the spot or within a day or two; a written decision can follow.

Subdivision (e): Prison officials cannot compel prisoners facing discipline to testify at their hearings without granting them immunity. *Baxter v. Palmigiano*, 425 U.S. 308, 316-17 (1976); *Tinch v. Henderson*, 430 F. Supp. 964, 968-69 (M.D. Tenn. 1977). (Such immunity is routinely granted in some states.¹²⁴) If, however, the prisoner chooses to remain silent, the hearing officer is permitted to use that

¹²² See, e.g., *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1049-50 (S.D.N.Y. 1995) (failure to provide interpretive services for deaf and hearing-impaired prisoners at hearings denied due process); *Bonner v. Arizona Dep’t of Corr.*, 714 F. Supp. 420, 425-26 (D. Ariz. 1989) (refusal to provide a needed sign language interpreter at a prisoner’s disciplinary hearing denied due process); *Powell v. Ward*, 487 F. Supp. 917, 932 (S.D.N.Y. 1980) (prisoners who speak only Spanish must be provided translators at the hearing), *aff’d as modified*, 643 F.2d 924 (2d Cir. 1981).

¹²³ See, e.g., 103 MASS. CODE REGS. 430.12 (“An inmate may be represented by an attorney or a law student in disciplinary proceedings . . . It shall be the inmate’s responsibility to secure such representation and the inmate shall be allowed to make, or have made on the inmate’s behalf, a telephone call for that purpose. . . . The inmate’s representative shall be entitled to make an amended written request for witnesses, evidence or the reporting staff person’s presence . . .”).

¹²⁴ See, e.g., 7 N.Y.C.R.R. § 251-3.1(d)(1) (misconduct reports state: “You are hereby advised that no statement made by you in response to the charge, or information derived therefrom may be used against you in a criminal proceeding.”).

ABA Treatment of Prisoners Standards

Standard 23-4.2 Disciplinary hearing procedures

silence as evidence (along with other evidence) against the prisoner. *Baxter v. Palmigiano*, 425 U.S. at 317-19. This subdivision deals with the special situation of a prisoner whose disciplinary hearing occurs during the pendency of a criminal investigation or prosecution, and requires both notice to the prisoner of the right to remain silent, see, e.g., *Grant v. State*, 154 Ga. App. 758, 270 S.E.2d 42 (Ga. App. 1980); *State v. Harris*, 576 P.2d 257 (Mont. 1978), and a special rule against negative inferences from that silence. This protects the prisoner's Fifth Amendment rights, and at a low cost to prison prerogatives, because officials will remain able to introduce whatever other evidence led them to charge the prisoner.¹²⁵ If disciplinary proceedings are postponed until the criminal matter is concluded, this subdivision does not apply.

Standard 23-4.3 Disciplinary sanctions

(a) Correctional authorities should be permitted to impose a range of disciplinary sanctions to maintain order and ensure the safe custody of prisoners. Sanctions should be reasonable in light of the offense and the prisoner's circumstances, including disciplinary history and any mental illness or other cognitive impairment. In addition to the limitations itemized in Standard 23-3.7, sanctions should never include:

- (i) corporal punishment;**
- (ii) conditions of extreme isolation as described in Standard 23-3.8(b);**
- (iii) use of restraints, such as handcuffs, chains, irons, strait-jackets, or restraint chairs; or**
- (iv) any other form of cruel, inhuman, or degrading treatment.**

(b) Only the most severe disciplinary offenses, in which safety or security are seriously threatened, ordinarily warrant a sanction that exceeds [30 days] placement in disciplinary housing, and no placement in disciplinary housing should exceed one year.

(c) No disciplinary sanction should ever be administered by other prisoners, even under the direction of correctional authorities.

Cross References

ABA, TREATMENT OF PRISONERS STANDARDS, 23-2.6 (rationales for segregated housing), 23-2.7 (rationales for long-term segregated housing), 23-3.4(c) (healthful food, withholding of food disallowed), 23-3.7 (restrictions relating to programming and privileges), 23-3.8 (segregated housing), 23-3.9 (conditions during lockdown), 23-4.2 (disciplinary hearing procedures), 23-5.2(a)(vi) (prevention and investigation of violence, prisoners' authority), 23-5.9 (use of restraint mechanisms and techniques), 23-8.5 (visiting)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-47, 2A-48, and 2A-50 (special management inmates), 4-ALDF-2B-02 (use of force)

ACA, PRISON STANDARDS, 4-4190 (use of restraints), 4-4206 (use of force), 4-4252 and 4-4255 (admission and review of status)

¹²⁵ An alternative approach, taken in some states, is to forbid use of disciplinary hearing testimony at a criminal trial. See *Avant v. Clifford*, 341 A.2d 629, 653-54 (N.J. 1975); *People v. Nunez-Ramos*, 554 N.Y.S.2d 947, 949 (N.Y. App. Div. 1990), appeal denied, 76 N.Y.2d 793 (N.Y. 1990).

ABA Treatment of Prisoners Standards

Standard 23-4.2 Disciplinary hearing procedures

U.N. Standard Minimum Rules, arts. 27, 31 (discipline and punishment), 33 (instruments of restraint)

Commentary

Subdivision (a): Prison discipline is intended to punish and deter misbehavior; classification is the method to augment incapacitation. So if correctional authorities determine that an incident for which sanctions are being considered was caused by a prisoner's mental illness or other cognitive impairment and that sanctions are unlikely to effect a change in the behavior, Standard 23-1.1(c)'s general rule that "Restrictions placed on prisoners should be necessary and proportionate to the legitimate objectives for which those restrictions are imposed" dictates against imposition of discipline. In an analogous context, the Individuals with Disabilities Education Act requires schools to make this kind of assessment before seeking to impose certain suspensions and expulsions of students with disabilities. See § 615(k)(1)(E)(i), 20 U.S.C. § 1415(k)(1)(E)(i).

The case law underlying the prohibitions in subdivision (a) are discussed in the commentary to Standard 23-1.2(a) and the cross-referenced Standards. *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.), is the leading case prohibiting corporal punishment; it has been cited with approval by the Supreme Court many times. Much more recently, *Hope v. Pelzer*, 536 U.S. 730 (2002), held that use of a "hitching post" violated clearly established constitutional rights. Note that use of restraints is not prohibited in the prison context when it is an appropriate management or treatment tool, see Standard 23-5.9, but only where it is imposed as a punishment.

Subdivision b: For discussion of the time limits applicable to disciplinary segregation, see the commentary to Standard 2.7(a)(i). The subdivision's language that "no placement in disciplinary housing should exceed one year" is intended to limit any continuous stay in disciplinary housing, and is very important. It frequently happens that a person in disciplinary housing engages in repeated misbehavior there—throwing human waste, banging on cell doors, refusing to return a food tray, and the like — and receives still more segregation time as a result. (This kind of misbehavior is very often a sign of mental illness and can be a response to extreme isolation.¹²⁶ Since extreme isolation is forbidden under Standard 23-3.8, and Standard 23-2.8(a) and 23-6.11(d) require that people with serious mental illness be removed from the anti-therapeutic environment of segregated housing, compliance with these Standards should ameliorate the problem of segregation misbehavior.) Report of Plaintiff's Expert Steve J. Martin, *Disability Advocates Inc. v. NYS Office of Mental Health*, 02-Civ.-4002 (S.D.N.Y. June 1, 2005), available at <http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0003.pdf> (setting out numerous examples of "self-destructive and/or irrational behavior, followed by punishment, followed by continued self-destructive behavior, followed by more punishment" in New York State segregation units).

For these reasons, this subdivision states the considered position that humane use of segregated housing for discipline has a limit of one year, even for repeated misconduct. After that long a period of continuous time, segregated housing should be reserved for prisoners who pose security threats, under Standard 23-2.7(b). Other sanctions should be imposed for misbehavior while serving a segregation sentence.

Subdivision (c): The rule in this subdivision against administration of any disciplinary sanction by another prisoner is a particular instance of the general rule in Standard 23-5.2(a)(vi) against allowing prisoners to exercise control over other prisoners.

¹²⁶ For a summary of the evidence, see Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent at 15-17, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-495), available at <http://www.clearinghouse.net/chDocs/public/PC-OH-0001-0009.pdf>; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006).

PART V: PERSONAL SECURITY

Part V General Commentary

This Part deals with protection of prisoners from physical harm—by other prisoners, by suicide or other self-harm, and by prison staff through use of force. Standard 23-5.1 is an introduction; Standards 23-5.2 to 5.5 deal with violence by prisoners, and Standards 23-5.6 to 5.9 with use of force, including restraints.

Protection from harm has developed a large body of case law, including Supreme Court case law, and there is now a federal statutory foundation for particular concern about sexual assault in correctional facilities. See Prison Rape Elimination Act, 42 U.S.C. §§ 15601 *et seq.* As various populations with special vulnerabilities have increased in number in correctional facilities, it has become more evident that their safety requires focused attention. In addition, the array of weapons and restraints available for use in jails and prisons—such as chemical agents, electronic weaponry, and restraint chairs -- pose particular concerns, addressed in individual provisions. All of these technologies are potentially helpful for safe order within jails and prisons, but they are also potentially injurious to prisoners and can be lethal; all are sometimes abused to serve as a method of summary punishment.

Standard 23-5.1 Personal security and protection from harm

(a) **Correctional authorities should protect prisoners from physical injury, corporal punishment, sexual assault, extortion, harassment, and personal abuse, among other harms.**

(b) **Correctional authorities should exercise reasonable care with respect to property prisoners lawfully possess or have a right to reclaim. A remedy should be reasonably available to prisoners if correctional authorities negligently or intentionally destroy or lose such property.**

Cross Reference

ABA, TREATMENT OF PRISONER STANDARDS, 23-7.1 (respect for prisoners)

Related Standards and ABA Resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.9 (physical security)

ABA, RESOLUTION, 121D (Aug. 2004) (Justice Kennedy Commission)

ACA, JAIL STANDARDS, Performance Standard 2A (protection from harm), 4-ALDF-6A-07 (protection from abuse)

ACA, PRISON STANDARDS, 4-4281 (protection from harm), 4-4292 through 4-4294 (personal property)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, IX.A (intentional and unintentional injury), IX.B (workplace injuries)

NCCHC, HEALTH SERVICES STANDARDS, B-04 (Federal Sexual Assault Reporting Regulations), B-05 (Procedure in the Event of Sexual Assault)

U.N. Standard Minimum Rules, art. 43 (retention of prisoners' property)

ABA Treatment of Prisoners Standards

Standard 23-5.2 Prevention and investigation of violence

Commentary

Subdivision (a): Prisons simultaneously assemble large groups of sometimes-violent individuals and deprive them of the most effective method of avoiding conflict with each other: closing the door. Correctional staff work under great stress and in conditions of power imbalance that can promote abuses. As a result, prisons and jails are threatening and often dangerous places, in which prisoners face assault and abuse. By quite a few measures, however, prisons have become safer over the past decades; rates of rioting, staff homicides, and escape are all down. U.S. Bureau of Justice Statistics data indicate that rates of suicide and of assaults on prisoners declined a great deal beginning in the 1980s, and have been reasonably stable since the mid-1990s. BURT USEEM & ANNE MORRISON PIEHL, *PRISON STATE: THE CHALLENGE OF MASS INCARCERATION* 94-99 (2009) (presenting all data). These trends occurred as population (and population capacity) soared. In short, prison violence is not inevitable; it can be managed and reduced by focused, sound policy. That policy imperative is the goal of this Standard.

Harassment of prisoners is inconsistent with the principle of respect for the dignity of all persons described in Standard 23-1.1, and staff harassment is forbidden under both Standard 23-1.2(a)(iv) and Standard 23-7.1(a). This Standard, as well as Standard 23-7.1(b), requires protection from harassment by other prisoners as well. The term “harassment” includes such actions as derogatory comments, unequal enforcement of rules against certain prisoners, and threats. Harassment could occur on racial (or other group-based) grounds, as retaliation for the filing of a grievance or lawsuit, or simply on the basis of dislike of an individual prisoner. Correctional officials should create an institutional culture that does not condone this kind of activity, either by staff or by prisoners.

Subdivision (b): A duty of reasonable care with respect to prisoners’ property is uncontroversial. See, e.g., ACA, JAIL STANDARDS 4-ALDF-6A-07, ACA, PRISON STANDARDS 4-4281. The Supreme Court has held that the Constitution requires a post-deprivation process to remedy intentional deprivations of property, *Hudson v. Palmer*, 468 U.S. 517 (1984), but *not* to remedy negligent deprivations, *Daniels v. Williams*, 474 U.S. 327 (1986). The Standard nonetheless requires the broad availability of a remedial process for property damage or loss, following the workable practice in many jurisdictions.¹²⁷ This is particularly important for jail inmates whose personal property is typically confiscated when they are first incarcerated.

Standard 23-5.2 Prevention and investigation of violence

(a) Correctional and governmental authorities should take all practicable actions to reduce violence and the potential for violence in correctional facilities and during transport, including:

- (i) using a validated objective classification system and instrument as provided in Standard 23-2.2;**
- (ii) preventing crowding as provided in Standard 23-3.1(b);**
- (iii) ensuring adequate and appropriate supervision of prisoners during transport and in all areas of the facility, preferably direct supervision in any congregate areas;**
- (iv) training staff and volunteers appropriately as provided in Standard 23-10.3;**

¹²⁷ Vermont is an example of a jurisdiction with a functional system to respond to complaints about prisoner property issues. See VT. DEP’T OF CORR. DIRECTIVE 321.01: OFFENDER/INMATE PROPERTY (Dec. 6, 2010), available at <http://doc.vermont.gov/about/policies/rpd/321-01-offender-inmate-property/view?searchterm=prepare>; see also VT. STAT. ANN. TIT 32 § 932 (West 2011).

ABA Treatment of Prisoners Standards

Standard 23-5.2 Prevention and investigation of violence

- (v) preventing introduction of drugs and other contraband, and providing substance abuse treatment as provided in Standard 23-8.2(b);
 - (vi) preventing opportunities for prisoners to exercise coercive authority or control over other prisoners, including through access to another prisoner's confidential information;
 - (vii) preventing opportunities for gangs to gain any power;
 - (viii) promptly separating prisoners when one may be in danger from another;
 - (ix) preventing staff from tolerating, condoning, or implicitly or explicitly encouraging fighting, violence, bullying, or extortion;
 - (x) regularly assessing prisoners' level of fear of violence and responding accordingly to prisoners' concerns; and
 - (xi) preventing idleness by providing constructive activities for all prisoners as provided in Standards 23-8.2 and 23-8.4.
- (b) Correctional officials should promptly and thoroughly investigate and make a record of all incidents involving violence, and should take appropriate remedial action.

Cross References

ABA, TREATMENT OF PRISONERS STANDARDS, 23-2.2 (classification system), 23-3.1(b) (physical plant and environmental conditions, crowding), 23-3.3(a) (housing areas, supervision), 23-4.3(c) (disciplinary sanctions), 23-8.2 (rehabilitative programs), 23-8.4 (work programs), 23-10.3 (training)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-09 (control), 2A-44 (special management inmates)

ACA, PRISON STANDARDS, Principle 3D (special management)

U.N. Standard Minimum Rules, art. 28(1) (prisoner authority)

Commentary

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court acknowledged what lower courts had long since recognized—the government's constitutional obligation to protect prisoners from each other. The methods in this Standard are those that experience supports as useful in fulfilling that obligation. The cross-referenced Standards elaborate many of them.

Subdivision (a)(iii): The reference in this subdivision to “direct supervision” is important because there is so much room for improvement in this area. Despite the advantages of direct supervision, relatively few correctional facilities in the United States currently use it.¹²⁸ “Direct supervision” was first developed by the Federal Bureau of Prisons in the early 1970s. In a direct supervision unit, prisoners generally spend at least half of their time in common areas rather than their cells. In contrast to the traditional model of supervision where corrections officers monitor prisoners' living areas from posts enclosed behind glass or bars, direct supervision “allows, and even requires, continuous direct personal interaction between correctional officers and inmates by putting them together, face-to-face in the living unit.” Jay Farbstein

¹²⁸ A 2001 NIC directory listed fewer than 300 jails with any direct supervision units; collectively, those units housed less than a quarter of the nation's total jail population. NATIONAL INSTITUTE OF CORRECTIONS, 2001 DIRECTORY OF DIRECT SUPERVISION JAILS (2001), available at <http://nicic.gov/Library/017416>.

ABA Treatment of Prisoners Standards

Standard 23-5.3 Sexual abuse

et al., *Comparison of 'Direct' and 'Indirect' Supervision Correctional Facilities* (NIC 1989), available at <http://www.nicic.org/pubs/pre/007807.pdf>. From that position, staff with appropriate training can detect and defuse potential problems.

As researchers have observed, “The first reaction to this arrangement by traditional wardens, jail officials, and most visitors is usually astonishment. They think of the public and staff safety in terms of hard barriers between us and them. The new design seemingly places officers at the mercy of inmates.” Richard Wener *et al.*, *Direct Supervision of Correctional Institutions* (1987), reprinted in National Institute of Corrections, *Podular, Direct Supervision Jails*, at 1 (NIC Jan. 1993), available at <http://www.nicic.org/pubs/1993/015527.pdf>. In fact, “[o]fficers in constant and direct contact with inmates get to know them and can recognize and respond to trouble before it escalates into violence. They are no longer forced to wait to respond after trouble starts.” *Id.* The most comprehensive study to date, by the National Institute of Corrections, found impressive safety advantages. Its 1989 research showed that those who run direct supervision facilities gave their own facilities higher safety ratings, compared with those who operate facilities that use indirect supervision. Prisoners in direct supervision seem neither to have nor to need weapons to protect themselves. Direct supervision carries no greater cost and requires no additional staff yet appears to produce a safer, more livable environment. NIC, *Comparison of 'Direct' and 'Indirect' Supervision*, *supra*. Smaller studies reach similar conclusions. For example, another study found: “Compared to traditional jails of similar size, the Metropolitan Correctional Centers and other direct supervision jails report much less conflict among inmates, and between inmates and staff. Violent incidents are reduced 30 to 90 percent.” Wener *et al.*, *Direct Supervision*, *supra*. In a direct supervision facility, “Negotiation and communication become more important staff skills than brute strength.” *Id.* Staff prevent violence rather than interrupt it, while modeling prosocial behavior.

Because direct supervision is not possible without certain architectural features (like the common space in which prisoners spend their time), this subdivision expresses only a preference for the approach, rather than a requirement.

Subdivision (a)(vi): The use of prisoner enforcers was, in a different era, a source of terrible abuse. The requirement that prisoners not be allowed to assert authority or control over other prisoners is well supported in case law as well as common sense. See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), appeal dismissed in pertinent part, 679 F.2d 1115, 1163 (5th Cir. 1982).

Subdivision (a)(viii): The need to separate one prisoner from another may become apparent when one expresses fear of the other, or when there is other evidence of danger.

Standard 23-5.3 Sexual abuse

(a) Correctional authorities should protect all prisoners from sexual assault by other prisoners, as well as from pressure by other prisoners to engage in sexual acts. Correctional officials should strive to create an institutional culture in which sexual assault or sexual pressure is not tolerated, expected, or made the subject of humor by staff or prisoners. Correctional authorities should evaluate reports of sexual assault or threats of sexual assault without regard to a prisoner’s sexual orientation, gender, or gender identity and should not be permitted to retaliate formally or informally against prisoners who make such reports. Correctional authorities should not presume that sexual activity among prisoners is consensual.

(b) Correctional authorities should protect all prisoners from any sexual contact with or sexual exploitation by staff, including volunteers and employees of other

governmental or private organizations who work in the correctional facility. States and the federal government should prohibit by statute and correctional agencies by policy any form of sexual contact between staff and prisoners.

(c) Correctional officials should establish and publicize the means by which prisoners and others may easily and confidentially report to any staff member or appropriate outside entity a sexual assault or pressure to engage in sexual acts, sexual contact or exploitation involving a prisoner and staff, or the fear of such conduct. Correctional authorities should promptly relay any such report, or any other information they obtain regarding such conduct, to the chief executive officer of the facility. Correctional officials should implement a policy of prompt and thorough investigation of any credible allegation of the threat or commission of prisoner sexual assault or sexual contact with or sexual exploitation by staff. Correctional officials should establish criteria for forwarding such reports to a specialized unit trained in the appropriate investigation methods. Correctional authorities should take steps necessary to protect the prisoner from further sexual assaults, contacts, or exploitation. If a complaining prisoner and the subject of the complaint are separated during any such investigation, care should be taken to minimize conditions for the complaining prisoner that a reasonable person would experience as punitive.

(d) Medical treatment and testing, and psychological counseling, should be immediately available to victims of sexual assault or of sexual contact with or sexual exploitation by staff. Correctional authorities, including health care staff, should be alert to identify and document signs of sexual assault and should implement a protocol for providing victims with a thorough forensic medical examination performed by an appropriately trained qualified medical professional.

(e) Correctional authorities, including health care staff, should not reveal information about any incident of prisoner sexual abuse to any person, except to other staff or law enforcement personnel who need to know about the incident in order to make treatment, investigation, or other security or management decisions, or to appropriate external oversight officials or agencies.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.4(d) (special classification issues, classification of transgender prisoners), 23-4.1(c) (rules of conduct and informational handbook, orientation regarding sexual misconduct), 23-7.9 (searches of prisoners' bodies), 23-7.10 (cross-gender supervision), 23-10.2 (personnel policy and practice), 23-10.3 (training)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-29 (orientation), 4-ALDF-4D-22-2 and 4D-22-5 through 4D-22-7 (sexual assault)

ACA, PRISON STANDARDS, 4-4281-1, 4-4281-4, 4-4281-6 and 4-4281-7 (protection from harm), 4-4406 (sexual assault)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.D.2.c (violence prevention planning), VII.A.13 (sexual abuse of women prisoners), IX.A.A.6 (counseling), IX.A.A.8 (rape examination and counseling)

ABA Treatment of Prisoners Standards

Standard 23-5.3 Sexual abuse

NCCHC, HEALTH SERVICES STANDARDS B-04 (Federal Sexual Assault Reporting Regulations), B-05 (Procedure in the Event of Sexual Assault)

Commentary

Rape and sexual abuse are “not part of the penalty that criminal offenders pay for their offenses against society.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1998) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). But in many (though not all) correctional facilities, sexual assault and abuse are persistent and devastating realities. Prisoner-on-prisoner rape and lesser forms of sexual pressure pose one set of problems, while staff-on-prisoner sexual abuse poses another. Staff abuse ranges from inappropriate sexual touching to forcible rape, and includes rape by threat (of discipline, transfer, or other adverse official action), and sex coerced or induced by promises of favors. (It is the impossibility of unraveling distinctions like these, along with the power imbalance that negates the plausibility of meaningful consent, that makes it so important to ban *all* sexual relationships between prisoners and prison staff. See subdivision (b).) As used in the Standard, the term “sexual exploitation” includes, for example, voyeurism, indecent exposure, or other forms of misconduct such as enlisting a prisoner to engage in sexual activity with another person. Both constitutional provisions and statutory law, under the Prison Rape Elimination Act, 42 U.S.C. §§ 15601 *et seq.*, require prison officials to prevent prison rape and other forms of sexual misconduct. And it is clear that leadership and appropriate policy can make a huge difference. See NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT 51-67 (2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>. The provisions of this Standard represent the ABA’s own views, but are consonant with the regulations recommended by the National Prison Rape Elimination Commission, currently under review by the Attorney General. 42 U.S.C. § 15607(a)(1). This Standard deals with sexual misconduct generally; Standards 23-7.9 and 23-7.10 deal with the specific issues of searches and cross-gender supervision.

Subdivision (a): This subdivision states the general principle that sexual assault and pressure by prisoners are serious problems to be solved by correctional authorities. Staff attitudes that it is up to a prisoner to fight or submit,¹²⁹ or that gay or transgender prisoners must have consented to sex,¹³⁰ are unacceptable.

Subdivision (b): As already stated in the commentary introducing this Standard, consent is no defense to an accusation of sexual contact with a prisoner by a staff member; such contact is a criminal offense in all U.S. states.¹³¹ The investigation of sexual abuse accusations is discussed in subdivision (c), but it is worth commenting here that when such an accusation is substantiated, it should be considered extremely serious misconduct. Even if prosecuting authorities decline to prosecute, any staff member who is confirmed to have engaged in sexual contact with a prisoner should have his or her employment with the agency permanently terminated. (Prior complaints of sexual abuse by staff should be considered as corroborative evidence of a prisoner allegation of misconduct during administrative investigations and disciplinary actions, in the same way that such evidence is admissible under the Fed. R. Evid. 415.) And as discussed in the commentary to Standard 23-10.2, a central clearinghouse of information about such terminations would usefully inform hiring by other agencies. There should, however, be no disciplinary consequence

¹²⁹ It is a common claim that in some facilities the response of some correctional officers to prisoners who report allegations of threats of sexual assault is that they should fight or submit. See, e.g., *Johnson v. Johnson*, 385 F.3d 503, 526-27 (5th Cir. 2004).

¹³⁰ NAT’L PRISON RAPE ELIMINATION COMM’N REPORT, *supra* at 73.

¹³¹ *Id.* at 192 n.34 (citing state laws prohibiting sexual misconduct with individuals in custody in NATIONAL INSTITUTE OF CORRECTIONS/WASHINGTON COLLEGE OF LAW, PROJECT ON ADDRESSING PRISON RAPE (2008), , available at http://www.wcl.american.edu/nic/legal_responses_to_prison_rape/fifty_state_checklist.pdf?rd=1).

ABA Treatment of Prisoners Standards

Standard 23-5.4 Self-harm and suicide prevention

for the prisoner; the same power imbalance that undermines claims of consent renders such consequence inappropriate.

There are also many policies apart from staff discipline and criminal prosecution that can reduce the incidence of staff sexual abuse. Training is crucial; see Standard 23-10.3. In addition, situations in which abuse seems particularly likely to occur can be specially scrutinized. See, e.g., Standard 23-7.8 (body searches of prisoners). Cross-gender supervision can be regulated to curtail staff's visual access to prisoners' naked bodies. See Standard 23-7.9. Video cameras can be installed in areas in which individual staff and prisoners would otherwise be unobserved. This subdivision requires reasonable policies and practices along these lines.

Subdivision (c): Investigations into alleged sexual abuse should be conducted with no presumption of the truthfulness or falsity of statements by either prisoners or staff, and no arbitrary evidentiary prerequisites (such as physical proof or physical injury) should exist before a report of sexual assault or contact will be credited. It is important for overall prevention and policy development, in addition, that investigations be completed even if the staff member resigns or the prisoner is transferred. This subdivision's requirement of a specialized unit with staff with special training to investigate credible allegations of sexual abuse serves two functions. It will lead to more competent investigations, by officers with the requisite forensic and psychological training. In addition, for accusations relating to staff abuse, it is important to move these sensitive matters out of the chain of command of the accused staff to investigators with fewer personal and professional ties to the accused.

Subdivision (d): Medical and mental health treatment for sexual abuse should be available to prisoners regardless of whether they name their abuser or otherwise cooperate with an investigation.

Standard 23-5.4 Self-harm and suicide prevention

(a) Correctional officials should implement procedures to identify prisoners at risk for suicide and to intervene to prevent suicides.

(b) When the initial screening pursuant to Standard 23-2.1 or any subsequent observation identifies a risk of suicide, the prisoner should be placed in a safe setting and promptly evaluated by a qualified mental health professional, who should determine the degree of risk, appropriate level of ongoing supervision, and appropriate course of mental health treatment.

(c) Instead of isolating prisoners at risk of suicide, correctional authorities should ordinarily place such prisoners in housing areas that are designed to be suicide resistant and that allow staff a full and unobstructed view of the prisoners inside. A suicidal prisoner's clothing should be removed only if an individualized assessment finds such removal necessary, and the affected prisoner should be provided with suicide resistant garments that are sanitary, adequately modest, and appropriate for the temperature. Physical restraints should be used only as a last resort and their use should comply with the limitations in Standard 23-5.9.

(d) At a minimum, prisoners presenting a serious risk of suicide should be housed within sight of staff and observed by staff, face-to-face, at irregular intervals of no more than 15 minutes. Prisoners currently threatening or attempting suicide should be under continuous staff observation. Suicide observation should be documented, and prisoners under suicide observation should be evaluated by a qualified mental health professional prior to being removed from observation.

ABA Treatment of Prisoners Standards

Standard 23-5.4 Self-harm and suicide prevention

(e) **Correctional authorities should minimize the risk of suicide in housing areas and other spaces where prisoners may be unobserved by staff by eliminating, to the extent practicable, physical features that facilitate suicide attempts.**

(f) **When staff observe a prisoner who appears to have attempted or committed suicide, they should administer appropriate first-aid measures immediately until medical personnel arrive and assess the situation. Cut-down tools should be readily available to security personnel, who should be trained in first aid and cardiopulmonary resuscitation, cut-down techniques, and emergency notification procedures.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 1.0(s) (definitions, “serious mental illness”), 23-2.1 (intake screening), 23-2.2 (classification system), 23-2.8 (segregated housing and mental health), 23-3.2 (conditions for special types of prisoners), 23-3.3 (housing areas), 23-3.8 (segregated housing), 23-6.11 (services for prisoners with mental disabilities), 23-10.3 (training)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-52 (special management inmates), 4-ALDF-4C-32 (suicide prevention and intervention)

ACA, PRISON STANDARDS, 4-4373 (suicide prevention and intervention)

AM. ASS’N FOR CORR. PSYCHOL., STANDARDS, §§ 25 (correctional staff and mental health referrals), 32 (crisis evaluation)

AM. PSYCHIAT. ASS’N, PRINCIPLES, B (quality of care)

AM. PUB. HEALTH ASS’N, CORRECTIONS STANDARDS, V.B.E (suicide prevention), VIII.2 (suicide and restraints)

NCCHC, HEALTH SERVICES STANDARDS, G-05 (Suicide Prevention Program)

Commentary

Prisoners (especially those in jails) are at an elevated risk of self-harm, both because of their high rate of mental illness and the many situational pressures they experience. Officials therefore should anticipate suicide risk and deal with it in training and policy. Suicide has become an important topic in jail litigation; cases deal both with officials’ failure to discern the decedent’s suicidal tendencies, and with their failure to take appropriate preventive measures.¹³² As discussed below, the provisions of this Standard reflect factors noted in the reported cases, the Department of Justice’s recommendations for cures and settlements in its civil rights cases, the standards of the NCCHC and the American Public Health Association, and best professional practice. All these sources direct attention towards the same policy features: training for staff; screening; individualized assessment; suicide resistant physical

¹³² See *Rellergert v. Cape Girardeau County*, 924 F.2d 794, 796 (8th Cir. 1991); *Sanders v. Howze*, 177 F.3d 1245 (11th Cir. 1999); *Jacobs v. West Feliciana Sheriff’s Dep’t*, 228 F.3d 388 (5th Cir. 2000); *Manarite v. City of Springfield*, 957 F.2d 953 (1st Cir. 1992). The Department of Justice Civil Rights Division has focused a good deal of federal attention on this issue as well, finding constitutional violations in many small jails’ failure to screen prisoners for suicide risk and to implement suicide prevention policies. See, e.g., Consent Order, *United States v. Corinth City*, 1:94-cv-311 (N.D. Miss. Sept. 2, 1994), available at <http://www.clearinghouse.net/chDocs/public/JC-MS-0008-0003.pdf>; Consent Decree, *United States v. Alcorn County*, 1:94-cv-00271-LTS (N.D. Miss. Sept. 19, 1984), available at <http://www.clearinghouse.net/chDocs/public/JC-MS-0007-0004.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-5.4 Self-harm and suicide prevention

environments; and frequent, even constant, observation for those who are suicidal. With appropriate interventions, the rate of successful suicides can be greatly diminished.¹³³

Subdivision (a): The most important identification technique is initial classification; the suicide risk is highest immediately after admission.¹³⁴ But attention to changed circumstances and affect are also key. Suicide prevention requires communication between facility staff and prisoners, and among security, medical, and mental health staff. Specific types of interventions are the topic of the other subdivisions.

Subdivision (b): One frequent response to reported suicidal ideation is disbelief. Correctional staff decide that a prisoner is manipulative or seeking attention,

conclud[ing] that the inmate is simply attempting to manipulate their environment and, therefore, such behavior should be ignored and not reinforced through intervention. Too often, however, a feigned suicide attempt goes further than anticipated and results in death. Recent research has warned us that we should not assume that inmates who appear manipulative are not also suicidal, i.e., they are not necessarily members of mutually exclusive groups.¹³⁵

The judgment of how to respond to a prisoner whose suicide threat might be serving some secondary purpose is a difficult one even for a trained professional, as are other suicide-related decisions. This subdivision assigns to a mental health professional the responsibility for determining appropriate responses to suicide risk, including when to start and end special supervision.

Subdivisions (c) & (d): Another frequent response to suicide risk is isolation of the suicidal prisoner. Experts agree that isolation is convenient but counterproductive.

In determining the most appropriate housing location for a suicidal inmate, correctional officials (with concurrence from medical and/or mental health staff) often tend to physically isolate and sometimes restrain the individual. These responses might be more convenient for all staff, but they are detrimental to the inmate since the use of isolation escalates the inmate's sense of alienation and further removes the individual from proper staff supervision. To every extent possible, suicidal inmates should be housed in the general population, mental health unit, or medical infirmary, located close to staff. Further, removal of an inmate's clothing (excluding belts and shoelaces) and the use of physical restraints (e.g., leather straps, straitjackets, chairs, etc.) should be avoided whenever possible, and used only as a last resort when the inmate is physically engaging in self-destructive behavior. Handcuffs should never be used to restrain a suicidal inmate. Housing assignments should be based on the ability to maximize staff interaction with the inmate, not on decisions that heighten depersonalizing aspects of incarceration.¹³⁶

¹³³ For recent statistics, see Christopher J. Mumola, *Suicide and Homicide in State Prisons and Local Jails* (Bureau of Justice Statistics, Aug. 2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/shsplj.pdf>.

¹³⁴ *Id.* On development of suicide prevention protocols, see, e.g., Lindsay M. Hayes, *Guide to Developing and Revising Suicide Prevention Protocols* (November 2004).

¹³⁵ Lindsay M. Hayes, National Center on Institutions and Alternatives, *Guiding Principles to Suicide Prevention in Correctional Facilities* (2007), available at <http://www.ncianet.org/suicideprevention/publications/guidingprinciples.asp>.

¹³⁶ Lindsay M. Hayes, National Center on Institutions and Alternatives, *Key Components of a Suicide Prevention Program* (2007), available at <http://www.ncianet.org/suicideprevention/publications/keycomponents.asp>.

ABA Treatment of Prisoners Standards

Standard 23-5.5 Protection of vulnerable prisoners

As the American Public Health Association explains, “isolation may increase the chance that a prisoner will commit suicide and must not be used as a substitute for continuity of contact with staff and appropriate supervision. (The practice of placing suicidal prisoners in ‘safety cells’ instead of talking to them and maintaining continuing observation is inappropriate.)” AM. PUB. HEALTH ASS’N, CORRECTIONS STANDARDS, V.E.4. The requirement of continuous *staff* observation follows best practices. Some prison systems instead use a “buddy” system, assigning one prisoner to watch another. The NCCHC explains that this is not an acceptable approach: “[W]hen an actively suicidal inmate is housed alone in a room, supervision through continuous monitoring by staff should be maintained. Other supervision aids (e.g., closed circuit television, inmate companions or watchers) can be used as a supplement to, but never as a substitute for, staff monitoring.” NCCHC, HEALTH SERVICES STANDARDS, G-05. The DOJ decrees, *supra* note 132, also take this approach.

Subdivision (e): Careful thought and research has produced “suicide resistant” fixtures and architecture for jails and prisons. For example, exposed lighting fixtures and air vents can be avoided, and sprinkler heads can be designed to break away from their mountings at a low weight load.

Subdivision (f): This subdivision is aimed in part at the particular problem that correctional staff sometimes give up on first aid before hope for saving the prisoner is actually gone. The requirement of continuing first-aid measures can obviously be superseded by emergencies, such as a riot.

Standard 23-5.5 Protection of vulnerable prisoners

(a) The term “protective custody” means housing of a prisoner in segregated housing or under any other substantially greater restrictions than those applicable to the general population with which the prisoner would otherwise be housed, in order to protect the prisoner from harm.

(b) Correctional officials should implement procedures for identifying those prisoners who are particularly vulnerable to physical or sexual abuse, manipulation, or psychologically harmful verbal abuse by other prisoners or by staff, and for protecting these and other prisoners who request and need protection.

(c) Correctional authorities should minimize the extent to which vulnerable prisoners needing protection are subjected to rules and conditions a reasonable person would experience as punitive. Correctional authorities should not stigmatize prisoners who need protection. Such prisoners should not be housed with prisoners who have been identified as potential aggressors.

(d) Correctional authorities should not assign a prisoner to involuntary protective custody for a period exceeding [30 days] unless there is a serious and credible threat to the prisoner’s safety and staff are unable to adequately protect the prisoner either in the general population or by a transfer to another facility.

(e) At intervals not to exceed three months, correctional authorities should afford a prisoner placed in protective custody a review to determine whether there is a continuing need for separation from the general population.

ABA Treatment of Prisoners Standards

Standard 23-5.5 Protection of vulnerable prisoners

(f) **Consistent with such confidentiality as is required to prevent a significant risk of harm to other persons, a prisoner being evaluated for involuntary placement in protective custody should be permitted reasonable access to materials considered at both the initial and the periodic reviews, and should be allowed to meet with and submit written statements to persons reviewing the prisoner's classification.**

(g) **If correctional authorities assign a prisoner to protective custody, such a prisoner should be:**

- (i) **housed in the least restrictive environment practicable, in segregated housing only if necessary, and in no case in a setting that is used for disciplinary housing;**
- (ii) **allowed all of the items usually authorized for general population prisoners;**
- (iii) **provided opportunities to participate in programming and work as described in Standards 23-8.2 and 8.4; and**
- (iv) **provided the greatest practicable opportunities for out-of-cell time.**

Cross References

ABA TREATMENT OF PRISONER STANDARDS, 23-2.2 (classification system), 23-2.6 (rationales for segregated housing), 23-2.7 (rationales for long-term segregated housing), 23-2.9 (procedures for placement and retention in long-term segregated housing), 23-3.3(b) (housing areas), 23-3.6 (recreation and out-of-cell time), 23-3.8 (segregated housing), 23-5.1 (personal security and protection from harm), 23-5.3 (sexual abuse), 23-8.2 (rehabilitative programs), 23-8.4 (work programs)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-46 and 2A-49 (special management inmates)

ACA, PRISON STANDARDS, 4-4133 ((inmate sleeping areas), 4-4251 and 4-4253 (admission and review of status)

Commentary

A prisoners may be vulnerable to harm or abuse because of some particular relationship with another prisoner: one may have testified against the other, for example. Or a prisoner may be vulnerable for more generic reasons: small stature, mental or physical disabilities, gay or lesbian sexual orientation or transgender status, youth or old age, and history as a sex offender or police informant. When a risk is based on an individual's history or relationships with other prisoners, careful interviewing of the prisoner, and responsive housing assignments or transfers, can separate potential enemies. And appropriate classification of all prisoners can minimize the extent to which various characteristics pose risks; vulnerability is in part about a mismatch between a prisoner and the population in which that prisoner is placed.

But even in a properly classified facility with an effective enemies policy, one important tool for prisoner safety is "protective custody," an arrangement in which vulnerable prisoners are separated, as a group, from those most likely to harm them. Although protective custody housing, as defined in subdivision (a), is not inevitably segregated housing, maintaining the requisite degree of separation between protective custody prisoners and others means that protective custody is unavoidably restrictive. Subdivision (d) emphasizes that it is to be avoided where possible, if a prisoner resists the assignment. Subdivisions (d), (e), and (f) provide for procedural protections for a prisoner assigned involuntarily to protective custody,

ABA Treatment of Prisoners Standards

Standard 23-5.6 Use of force

whether or not such assignment is to segregated housing. (Standard 23-2.9's procedural protections apply in addition, if the protective custody assignment is to segregated housing.)

Whether or not protective custody status involves full-fledged segregation, many restrictions *can* be avoided in such status; conditions of confinement need not be as stark as disciplinary segregation. In fact, far from furthering safety, such conditions tend to discourage prisoners from seeking protection from harm; subdivisions (c) and (g) address this issue. See, e.g., Stipulated Agreement, *United States v. Montana*, Civ. No. 94-90-H-CCL (D. Mont. Jan. 27, 1997), available at <http://www.clearinghouse.net/chDocs/public/PC-MT-0003-0005.pdf>. These provisions require protective custody to be in the least restrictive environment practicable. The bar in subdivision (g)(i) on using disciplinary segregation housing for protective custody does not extend to an *administrative* segregation unit, if such a setting otherwise complies with the Standards and is truly necessary for safety, but such use should be required only extremely rarely.

Standard 23-5.6 Use of force

(a) “Force” means offensive or defensive physical contact with a prisoner, including blows, pushes, or defensive holds, whether or not involving batons or other instruments or weapons; discharge of chemical agents; discharge of electronic weaponry; and application of restraints such as handcuffs, chains, irons, strait-jackets, or restraint chairs. However, force does not include a firm hold, or use of hand or leg restraints, or fitting of a stun belt, on an unresisting prisoner.

(b) Correctional authorities should use force against a prisoner only:

- (i) to protect and ensure the safety of staff, prisoners, and others; to prevent serious property damage; or to prevent escape;**
- (ii) if correctional authorities reasonably believe the benefits of force outweigh the risks to prisoners and staff; and**
- (iii) as a last alternative after other reasonable efforts to resolve the situation have failed.**

(c) In no case should correctional authorities use force against a prisoner:

- (i) to enforce an institutional rule or an order unless the disciplinary process is inadequate to address an immediate security need;**
- (ii) to gratuitously inflict pain or suffering, punish past or present conduct, deter future conduct, intimidate, or gain information; or**
- (iii) after the risk that justified the use of force has passed.**

(d) A correctional agency should implement reasonable policies and procedures governing staff use of force against prisoners; these policies should establish a range of force options and explicitly prohibit the use of premature, unnecessary, or excessive force. Control techniques should be intended to minimize injuries to both prisoners and staff. Except in highly unusual circumstances in which a prisoner poses an imminent threat of serious bodily harm, staff should not use types of force that carry a high risk of injury, such as punches, kicks, or strikes to the head, neck, face, or groin.

(e) Correctional authorities should not be assigned responsibilities potentially requiring the use of force unless they are appropriately trained for the anticipated type of force, and are initially and periodically evaluated as being physically and mentally fit for such hazardous and sensitive duties.

ABA Treatment of Prisoners Standards

Standard 23-5.6 Use of force

(f) Except in an emergency, force should not be used unless authorized by a supervisory officer. Such an officer should be called to the scene whenever force is used, to direct and observe but ordinarily not to participate in the physical application of force, and should not leave the scene until the incident has come to an end. To the extent practicable, continually operating stationary video cameras should be used in areas in which uses of force are particularly likely, such as intake areas, segregation, and mental health units. Correctional authorities should video and audio record every planned or anticipated use of force from the initiation of the action, and should begin recording any other use of force incident as soon as practicable after the incident starts.

(g) If practicable, staff should seek intervention and advice from a qualified mental health professional prior to a planned or predictable use of force against a prisoner who has a history of mental illness or who is exhibiting behaviors commonly associated with mental illness.

(h) Following any incident in which a prisoner is subjected to use of either chemical agents or any kind of weapon or is injured during a use of force, the prisoner should receive an immediate health care examination and appropriate treatment, including decontamination. Health care personnel should document any injuries sustained.

(i) Correctional agency policies should strive to ensure full staff accountability for all uses of force. Correctional authorities should memorialize and facilitate review of uses of force. Following any incident that involves a use of force against a prisoner, participants and witnesses should be interviewed or should file written statements. Correctional authorities should prepare a complete file for the chief executive officer of the facility, including a report, any recordings, and written statements and medical reports for both prisoners and staff. Correctional officials and administrators should review and retain the file for purposes of management, staff discipline, training, and the identification of trends.

(j) A jurisdiction or correctional agency should establish criteria, based on the extent of prisoner injury and the type of force, for forwarding use of force reports to a person or office outside the relevant facility's chain of command for a more in-depth investigation. Such investigation should take place for every use of force incident that results in a death or major traumatic injury to a prisoner or to staff.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.1 (intake screening), 23-4.3 (disciplinary sanctions), 23-5.7 (use of deadly force), 23-5.8 (use of chemical agents, electronic weaponry, and canines), 23-5.9 (use of restraint mechanisms and techniques), 23-10.3 (training)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.12 (use of force or deadly force)

ACA, JAIL STANDARDS, Performance Standard 2B (use of physical force), 4-ALDF-2B-01 (use of force), 4-ALDF-7B-14 and 7B-16 (training and staff development)

ACA, PRISON STANDARDS, 4-4090 (use of force), 4-4091 (use of firearms), 4-4173 (security equipment storage), 4-4202 and 4-4203 (security equipment), 4-4206 (use of force)

ABA Treatment of Prisoners Standards

Standard 23-5.6 Use of force

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, IX.A.A.2 (health care examination after uses of force)

U.N. Standard Minimum Rules, art. 54 (use of force)

Commentary

The use of force need not result in a serious injury to the prisoner in order to be considered wrongful. The case law governing corporal punishment, force used to cope with threats to security, and force used to enforce institutional rules is canvassed in the commentary to Standard 1.2(a). As it discusses, corporal punishment is unconstitutional under both the Due Process Clause protections for pretrial detainees and the Eighth Amendment ban on cruel and unusual punishment. Many of the provisions in the several use of force Standards, introduced by this general Standard, are aimed to avoid summary corporal punishment. Other provisions require practices that promote the responsible and effective use of force in order to minimize injury to both officers and prisoners.

Subdivision (a): This subdivision defines “force” very broadly—to cover basically all non-trivial physical control with a prisoner except for use of a firm hold, and to cover all uses of restraint except for placement of handcuffs or leg restraints on an unresisting prisoner. The “stun belt” mentioned is a device that allows infliction from a distance of an electronic shock to the wearer. Activation of the stun belt is certainly a use of force, governed by this Standard and Standard 23-5.8’s provisions on electronic weaponry. But putting the belt on an unresisting prisoner is not.¹³⁷

Subdivisions (b) & (c): Use of force should not be routine, but should be undertaken only when no other method of control is available or effective. For example, even minor force should not be used to enforce a rule or order unless the disciplinary process or some other method of enforcement is inadequate. If a prisoner refuses to return a meal tray, a “cell extraction” (a major use of force in which a resisting prisoner is wrestled into restraints and removed from the cell) is a far too drastic response, unless the prisoner is using the meal tray to hurt someone. See *Walker v. Bowersox*, 526 F.3d 1186, 1189 (8th Cir. 2008) (use of pepper spray against prisoner locked in his cell who was refusing to return a food tray presented an Eighth Amendment jury question); *Lock v. Jenkins*, 641 F.2d 488, 495-96 (7th Cir. 1981) (tear gas upheld against locked-in prisoners who were “inciting a riot at a time of tremendous tension,” but not to retrieve a metal tray or to make prisoners stop shouting and uttering threats); TEXAS DEP’T OF CRIM. JUST., USE OF FORCE PLAN I.A (March 2007) (forbidding even “minor force” unless “Standard disciplinary sanctions and procedures alone are insufficient to modify the offender’s behavior; and . . . [i]t is expected that the use of minor force will directly lead to the necessary level of compliance.”); CITY OF N.Y. DEP’T OF CORR. DIRECTIVE 5006 R-C (allowing use of force “[t]o enforce jail or prison rules and court orders under circumstances where there is an immediate security need to do so”).

Subdivisions (d) & (e): Nowhere are training and policy more important than with respect to use of force. Policy should be specific, setting out when different levels and types of force are and are not appropriate. The phrase “range of force options” is current preferred language for what used to be called the “use of force continuum”; the new usage suggests, appropriately, that the type as well as the level of force ought to suit the circumstances. Training, likewise, should cover not only *how* to use force but *when* different types of force options are appropriate. See Standard 23-10.3(b)(iii) and commentary. The goal, for both policy and training, is to apply the least force suitable to the situation. See, e.g., Settlement Agreement, *United States v. Nassau County Sheriff’s Dep’t* (E.D.N.Y. Jan. 1, 2002), available at <http://www.clearinghouse.net/detailDocument.php?id=937>.

¹³⁷ Attaching stun belts to prisoners may, however, interfere illegitimately with other rights, for example by chilling their participation in their own defense at trial. See, e.g., *United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002).

ABA Treatment of Prisoners Standards

Standard 23-5.7 Use of deadly force

Subdivisions (f), (h), (i), & (j): The provisions of this subdivision emphasize that use of force is not routine but highly unusual and a proper matter for planning, supervision, and review. Video recording of force is useful because it allows post-incident review and additional training or policy revision. In addition, video recording can provide evidence if the appropriateness of the use of force is later contested, and can deter abuse. The recordings should be kept a reasonable amount of time, for example 90 days, if no person is injured and there is no sign of a dispute relating to a particular use of force; if injury occurs or a dispute arises, the video should be retained indefinitely.

Full reports about uses of force are crucial parts of appropriate supervision. Generally, when a use of force is more than very minor, all prisoners and staff involved in the incident should be photographed as soon as practicable after the incident in order to document any injuries sustained, and the file should include accounts of interviews of all witnesses, staff and prisoner, done by a supervisor who was not involved in the incident, and covering events that led up to the use of force, the incident itself, a description of the type of force used and how it was deployed, and a description of any injuries suffered. Appropriate steps should be taken to ensure that all such statements are prepared without collusion. Prisoners should be interviewed in a confidential setting, so that they do not fear retaliation by staff or accusations of “snitching” by prisoners. Statements written by the participants are not sufficient for supervision of any but the most minor of uses of force.

The medical examination and documentation specified in subdivision (h) serves both a health care and an investigation function, documenting possible prisoner injuries soon after they are inflicted. Non-health care staff should offer all prisoners involved in uses of force the opportunity to be seen right away by medical staff, who can provide both whatever medical assistance is required and comprehensive documentation of any injury sustained. Correctional staff should not be expected to determine whether there is an injury. Questions concerning the nature and extent of injuries, and the manner in which they were sustained, should be referred to an appropriate medical expert when necessary to resolve conflicting accounts.

Standard 23-5.7 Use of deadly force

(a) “Deadly force” means force that creates or is intended to create a substantial risk of death or serious bodily harm. The use of firearms should always be considered the use of deadly force.

(b) Correctional agency policies and procedures should authorize the use of deadly force only by security personnel trained in the use of deadly force, and only in a situation when correctional authorities reasonably believe that deadly force is necessary to prevent imminent death or serious bodily harm or to prevent an escape from a secure correctional facility, subject to the qualification in subdivision (c) of this Standard.

(c) Deadly force to prevent an escape should be permitted only when the prisoner is about to leave the secure perimeter of a correctional facility without authorization or, if the prisoner is permitted to be on the grounds outside the secure perimeter, the prisoner is about to leave the facility grounds without authorization. Before staff use a firearm to prevent an escape, they should shout a warning and, if time and circumstances allow, summon other staff to regain control without shooting. For purposes of this subdivision, a prisoner in custody for transit to or from a secure correctional facility is considered to be within the perimeter of such facility.

ABA Treatment of Prisoners Standards

Standard 23-5.8 Use of chemical agents, electronic weaponry, and canines

(d) The location and storage of firearms should be strictly regulated. Correctional authorities carrying firearms should not be assigned to positions that are accessible to prisoners or in which they come into direct contact with prisoners, except during transport or supervision of prisoners outside the secure perimeter, or in emergency situations. In those situations, each staff member should also have available for use a weapon less likely to be lethal.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-4.3 (disciplinary sanctions), 23-5.6 (use of force), 23-10.3 (training)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.12 (use of force or deadly force)

ACA, JAIL STANDARDS, 4-ALDF-2B-04, 2B-06, and 2B-08 (weapons)

ACA, PRISON STANDARDS, 4-4173 (security equipment storage), 4-4204 (use of firearms)

U.N. Standard Minimum Rules, art. 54 (use of force)

Commentary

Subdivisions (a) & (b): Outside of the prison and jail setting, the Supreme Court has held that special limits exist on policy authority to use deadly force: even against a fleeing felon, it is authorized only “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.” *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In prison, however, the standards governing deadly force are the same as those governing force more generally. *Whitley v. Albers*, 475 U.S. 312, 322-26 (1986).

Subdivision (c): In particular, case law establishes that it is permissible to use deadly force to prevent an escape from prison; dangerousness is essentially presumed. See, e.g., *Kinney v. Indiana Youth Center*, 950 F.2d 462, 465-66 (7th Cir. 1991) (“[A] prisoner in the act of escaping may pose a serious threat to members of the community, prompting prison officials to take reasonable measures to prevent the escape.”); *Henry v. Perry*, 866 F.2d 657, 659 (3d Cir. 1989). This subdivision limits the authority to use deadly force to secure facilities. If a jurisdiction has decided that a prisoner poses little enough risk to the community to be housed in a non-secure facility, it would be inappropriate to use deadly force to prevent what is commonly termed a “walkaway.”

Subdivision (d): Prisons and jails are, of course, secure institutions. Often the most effective way to neutralize a dangerous prisoner is to lock him in his cell. In addition, arming a correctional officer creates an extremely attractive target for any prisoner seeking a weapon. Accordingly, it is both unnecessary and dangerous to allow officers who come into contact with prisoners in the facility to carry firearms; guns are, except during major riots, to be limited to locations like watch towers and to transport officers outside the secure perimeter of the facility.

Standard 23-5.8 Use of chemical agents, electronic weaponry, and canines

(a) Correctional administrators should develop and implement policies governing use of chemical agents and electronic weaponry. Such policies should:

(i) provide for testing and training;

ABA Treatment of Prisoners Standards

Standard 23-5.8 Use of chemical agents, electronic weaponry, and canines

- (ii) specify that, as with any use of force, chemical agents and electronic weaponry are to be used only as a last resort after the failure of other reasonable conflict resolution techniques;
 - (iii) cover the medical and tactical circumstances in which use of such agents and weaponry is inappropriate or unsafe;
 - (iv) forbid the use of such agents and weaponry directly on vital parts of the body, including genitals and, for electronic weaponry, eyes, mouth, and neck; and
 - (v) forbid the use of electronic weaponry in drive-stun or direct contact mode.
- (b) Correctional agency policy should prohibit use of electronic or chemical weaponry for the following purposes:
- (i) as punishment;
 - (ii) as a prod;
 - (iii) to rouse an unconscious, impaired, or intoxicated prisoner;
 - (iv) against any prisoner using passive resistance when there is no immediate threat of bodily harm; or
 - (v) to enforce an order after a prisoner has been immobilized or a threat has been neutralized.
- (c) Correctional officials should implement any appropriate facility-specific restrictions on use of chemical agents and electronic weaponry that are appropriate for the particular facility and its prisoner population, and should promulgate policy that sets forth in detail the circumstances in which such weapons may be used.
- (d) When practicable, before using either chemical agents or electronic weaponry against a prisoner, staff should determine whether the prisoner has any contraindicating medical conditions, including mental illness and intoxication, and make a contemporaneous record of this determination.
- (e) Correctional authorities should be permitted to use canines inside the secure perimeter of a correctional facility only for searches and, except in emergencies, only if prisoners have been moved away from the area to be searched. Canines should never be used for purposes of intimidation or control of a prisoner or prisoners.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.1 (intake screening), 23-4.3 (disciplinary sanctions), 23-5.6 (use of force), 23-7.8 (searches of facilities), 23-10.3 (training)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2B-04 and 2B-06 (weapons), 4-ALDF-2C-01 (searches) and 2C-02 (canine units), 4-ALDF-7B-15 (training and staff development)

ACA, PRISON STANDARDS, 4-4092 (use of chemical agents), 4-4199 (security equipment), 4-4208 (canine units)

Commentary

The issues addressed in this Standard are some of the most important issues arising in the use of force context. The arsenal of chemical and electronic weaponry available to modern correctional officers is

ABA Treatment of Prisoners Standards

Standard 23-5.8 Use of chemical agents, electronic weaponry, and canines

very helpful in avoiding hands-on force—particularly if force can be threatened rather than delivered. But chemical and electronic weapons are painful by design, as well as a threat to prisoner safety,¹³⁸ and detection of abuse is often difficult. Careful regulation is therefore key. International human rights standards go much further than anything in this Standard and would ban as an assault on the dignity of the individual use of many weapons that are commonplace in this country. See U.N. Committee against Torture, Nov. 5-23, 2007, Report of the Committee against Torture, U.N. Doc A/63/44 (Nov. 5, 2008), available at <http://www.unhcr.org/refworld/pdfid/492fb6522.pdf>.

Subdivisions (a) & (b): These provisions are designed to implement the constitutional requirement, discussed in the Commentary to Standard 23-1.2(a), that corporal punishment is not allowed and that force is reserved for situations that require its use to maintain security. Prisoners are “not require[d] to be subjected to the malicious whims of prison guards.” *DeSpain v. Uphoff*, 264 F.3d 965, 978 (10th Cir. 2001) (officer could be held liable for spraying pepper spray indiscriminately along a tier); see also *Parker v. Asher*, 701 F. Supp. 192, 194-95 (D. Nev. 1988) (threatening a prisoner with a Taser gun solely to inflict fear stated an Eighth Amendment claim). Moreover, as the Eighth Circuit has held, “use of pepper spray will not be justified every time an inmate questions orders or seeks redress for an officer’s actions. . . . A basis for an Eighth Amendment claim exists when, as alleged here, an officer uses pepper spray without warning on an inmate who may have questioned his actions but who otherwise poses no threat.” *Treats v. Morgan*, 308 F.3d 868, 873 (8th Cir. 2002).

Nor, as is stated generally in Standard 5.6(c)(i), is an officer’s wish to compel a prisoner’s compliance with an order sufficient to justify use of either electronic or chemical weaponry. See, e.g., *Hickey v. Reeder*, 12 F.3d 754, 758-59 (8th Cir. 1993) (shooting a prisoner with a stun gun to make him clean his cell violated the Eighth Amendment). Compelling a passive or immobilized prisoner to comply through the infliction of pain is not necessary for security in a secure institution such as a jail or prison; it is at best order-maintenance, and generally simply too close to summary punishment.¹³⁹ The words in subdivision (a)(v), “drive-stun or direct contact mode,” refer to use of a Taser touching the prisoner. As the Taser company itself explains, “The drive-stun mode will not cause NMI [neuromuscular incapacitation] and generally becomes primarily a pain compliance option.” Advanced Taser M18/M18L Operating Manual, at 32, available at <http://www.stungunweapon.com/taser-m18-manual.html>. See also NYPD Interim Order 20, Use of Conducted Energy Devices 2 (June 4, 2008) (forbidding use of Taser in “touch stun” mode except in “exceptional circumstances” and requiring investigation of each such use by commanding officer). In addition to the areas of the body specified in the Standard, staff should be trained to avoid directing a Taser at the chest area, because of the possible risk of disrupting cardiac rhythm.

Subdivision (c): This subdivision, like the American Correctional Association, requires that wardens give substantial thought to the use of weaponry, limiting use according to the facility’s physical plant and population. (For example, pepper spray is inadvisable for areas with limited ventilation or for infirmaries.) See ACA, PRISON STANDARDS 4-4199; ACA, JAIL STANDARDS 4-ALDF-2B-04.

Subdivision (d): If at any point staff learn that a prisoner has a condition that augments the risk of either chemical agents or electronic weaponry, that augmented risk should be noted in the prisoner’s file in

¹³⁸ For studies of the risks, see Braidwood Commission on Conducted Energy Weapon Use, *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia*, (Commissions of Inquiry, Jun. 2009), available at <http://www.braidwoodinquiry.ca/report/>; National Institute of Justice, *Study of Deaths Following Electro Muscular Disruptions: Interim Report*, (National Institute of Justice, Jun. 2008), available at <http://www.ncjrs.gov/pdffiles1/nij/222981.pdf>; National Institute of Justice, *The Effectiveness and Safety of Pepper Spray*, (National Institute of Justice, Apr. 2003), available at <http://www.ncjrs.gov/pdffiles1/nij/195739.pdf>.

¹³⁹ For a thorough discussion of this point, see Steve J. Martin, *Staff Use of Force in United States Confinement Settings*, 22 WASH. U. J. L. & POL’Y 145 (2006).

ABA Treatment of Prisoners Standards

Standard 23-5.9 Use of restraint mechanisms and techniques

some way obvious to an officer making a time-sensitive decision such as whether to authorize a particular use of force. This inquiry is not limited to the intake screening done pursuant to Standard 23-2.1.

Subdivision (e): In policing, a canine is useful because it can find suspects and contraband, and because it can hold suspects until an officer restrains them. This subdivision allows only the first use in correctional facilities. Canines used for apprehension rather than for searching are trained to “bite and hold”—so injury is not merely a risk but an inevitability. That injury is not justifiable in prison, where many other methods are available to constrain prisoner mobility or otherwise enforce rules. See Human Rights Watch, *Cruel and Degrading: The Use of Dogs for Cell Extractions in U.S. Prisons* (Human Rights Watch, Oct. 2006), available at <http://www.hrw.org/sites/default/files/reports/us1006webwcover.pdf>. This subdivision is not intended to deal with service dogs or other dogs not used for law enforcement purposes, which are sometimes trained by prisoners. See, e.g., Gennifer Furst, *Prison-Based Animal Programs: A National Survey*, 86:4 PRISON J. 407 (2006).

Standard 23-5.9 Use of restraint mechanisms and techniques

(a) Correctional authorities should not use restraint mechanisms such as handcuffs, leg irons, straitjackets, restraint chairs, and spit-masks as a form of punishment or retaliation. Subject to the remainder of this Standard, restraints should not be used except to control a prisoner who presents an immediate risk of self-injury or injury to others, to prevent serious property damage, for health care purposes, or when necessary as a security precaution during transfer or transport.

(b) When restraints are necessary, correctional authorities should use the least restrictive forms of restraints that are appropriate and should use them only as long as the need exists, not for a pre-determined period of time. Policies relating to restraints should take account of the special needs of prisoners who have physical or mental disabilities, and of prisoners who are under the age of eighteen or are geriatric, as well as the limitations specified in Standard 23-6.9 for pregnant prisoners or those who have recently given birth. Correctional authorities should take care to prevent injury to restrained prisoners, and should not restrain a prisoner in any manner that causes unnecessary physical pain or extreme discomfort, or that restricts the prisoner’s blood circulation or obstructs the prisoner’s breathing or airways. Correctional authorities should not hog-tie prisoners or restrain them in a fetal or prone position.

(c) Correctional authorities should prevent co-mingling of restrained and unrestrained prisoners either in a correctional facility or during transport.

(d) Other than as allowed by subdivision (e) of this Standard, correctional authorities should not use restraints in a prisoner’s cell except immediately preceding an out-of-cell movement or for medical or mental health purposes as authorized by a qualified medical or mental health professional. Reasonable steps should be taken during movement to protect restrained prisoners from accidental injury.

(e) If restraints are used for medical or mental health care purposes, the restrained prisoner should, if possible, be placed in a health care area of the correctional facility, and the decision to use, continue, and discontinue restraints should be made by a qualified health care professional, in accordance with applicable licensing regulations.

(f) Four- or five-point restraints should be used only if a prisoner presents an immediate and extreme risk of serious self-injury or injury to others and only after less restrictive forms of restraint have been determined likely to be ineffective to control the prisoner's risky behavior. Whenever practicable, a qualified health care professional should participate in efforts to avoid using four- or five-point restraints.

(g) If it is necessary for correctional authorities to apply four- or five-point restraints without participation of a qualified health care professional because the situation is an emergency and health care staff are not available, a qualified health care professional should review the situation as soon as possible and assess whether such restraints are appropriate. If correctional authorities have applied four- or five-point restraints without the participation of a qualified health care professional or if that professional disagrees with the application of the restraints, correctional authorities should notify the facility's chief executive office immediately on gaining control of the prisoner. The chief executive officer should decide promptly whether the use of such restraints should continue.

(h) Whether restraints are used for health care or for custodial purposes, during the period that a prisoner is restrained in a four- or five-point position, staff should follow established guidelines for use of the restraint mechanism that take into account the prisoner's physical condition, including health problems and body weight, should provide adequate nutrition, hydration, and toileting, and should take the following precautions to ensure the prisoner's safety:

- (i) for the entire period of restraint, the prisoner should be video- and audio-recorded;
- (ii) immediately, a qualified health care professional should conduct an in-person assessment of the prisoner's medical and mental health condition, and should advise whether the prisoner should be transferred to a medical or mental health unit or facility for emergency treatment;
- (iii) until the initial assessment by a qualified health care professional required by subdivision (ii), staff should continuously observe the prisoner, in person;
- (iv) after the initial medical assessment, at least every fifteen minutes medically trained staff should conduct visual observations and medical checks of the prisoner, log all checks, and evaluate the continued need for restraint;
- (v) at least every two hours, qualified health care staff should check the prisoner's range of motion and review the medical checks performed under subdivision (iv); and
- (vi) at least every four hours, a qualified medical professional should conduct a complete in-person evaluation to determine the prisoner's need for either continued restraint or transfer to a medical or mental health facility.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.1 (intake screening), 23-4.3 (disciplinary sanctions), 23-5.4(c) (self-harm and suicide prevention, restraints), 23-5.6 (use of force), 23-6.9 (pregnant prisoners and new mothers), 23-10.3 (training)

ABA Treatment of Prisoners Standards

Standard 23-5.9 Use of restraint mechanisms and techniques

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2B-02 and 2B-03 (use of force), 4-ALDF-4D-21 (use of restraints)

ACA, PRISON STANDARDS 4-4190 and 4-4191 (use of restraints), 4-4405 (health care use of restraints)

AM. PSYCHIAT. ASS'N, PRINCIPLES B.5.d (seclusion and restraints)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VII.B.26 (juveniles and restraints), VIII (restraints administered by health care providers)

NCCHC, HEALTH SERVICES STANDARDS, I-01 (Restraint and Seclusion)

U.N. Standard Minimum Rules, arts. 33-34 (instruments of restraint)

42 C.F.R. § 482.13(e) (Patient's Rights: restraints)

Commentary

In *Hope v. Pelzer*, 536 U.S. 730, 730-31 (2002), the Supreme Court unanimously held that clear constitutional law banned Alabama's use of a "hitching post"—horizontal metal bars, above shoulder height, to which prisoners are hand-cuffed. This atavistic restraint was unlawful because of the pain and risk of injury it imposed without security justification:

Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated the "basic concept underlying the Eighth Amendment [which] is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). This punitive treatment amounts to gratuitous infliction of "wanton and unnecessary" pain that our precedent clearly prohibits.

Id. at 731. As *Hope* holds, using restraints as summary punishment flatly violates the Constitution. Using them in a way that is dangerous can amount to unconstitutional deliberate indifference. (For discussion of the case law of deliberate indifference, see the commentary to Standard 23-1.2(a).)

Hitching posts and the like were quite rare in modern American corrections, even before the decision in *Hope*. See *id.* at 733. But correctional authorities have abundant other methods of restraining prisoners. Some of them are identified in subdivision (a); whether they are named or not, this Standard covers their use. The restraints of particular concern are those that hold a prisoner's body largely immobile. This type of restraint includes "four-point restraints," referred to in subdivision (f), which bind a subject's arms and legs to a stationary object such as a bed or chair; and "five-point restraints," which add a waist or chest-level restraint. Restraints that bind a prisoner's head to a stationary object are unsafe and categorically inappropriate.

Restraints may be coupled with unnecessary abuses—restrained prisoners may be forced to lie in their own waste, or deprived of food and water, or stripped naked or nearly naked and left in the cold or the heat. In addition, applied the wrong way or on a prisoner with medical contraindications, four- and five-point restraints are potentially dangerous, and are associated with cardiac difficulties, aspiration (breathing in of vomitus), and positional asphyxia (death by respiratory obstruction).¹⁴⁰ But even without

¹⁴⁰ See JOINT COMM'N ON ACCREDITATION OF HEALTHCARE ORGS., PREVENTING RESTRAINT DEATHS (Nov. 18, 1998), available at, http://www.jointcommission.org/assets/1/18/SEA_8.pdf; GEN. ACCOUNTING OFFICE, MENTAL HEALTH: IMPROPER RESTRAINT OR SECLUSION USE PLACES PEOPLE AT RISK, GAO/HEHS-99-176, (1999), available

ABA Treatment of Prisoners Standards

Standard 23-5.9 Use of restraint mechanisms and techniques

those concomitant issues, four- and five-point restraints hold a person in one position, which after a period of time becomes very painful. And they are extraordinary mentally stressful. It is for these reasons that in medical settings the standards for restraints require that all lesser forms of restraint be exhausted, that the restraints be applied for as short a time as possible to ensure safety, and that medical management include frequent and repeated examinations and re-writing by a physician of the order for restraint.¹⁴¹ At the same time, there are times in which security or safety requires full-body restraint. The basic orientation of this Standard is that four- and five-point restraints are deeply invasive and to be avoided if at all possible. When they are used, it should be for the briefest time possible and with abundant trained supervision to ensure safety and as little pain as possible.¹⁴²

Outside of prison, this orientation is becoming mainstream. As the federal Substance Abuse and Mental Health Services Administration summarizes recent history, “Federal and State mental health authorities [have] furthered the development and implementation of policy change and the active pursuit of a reduction and ultimate elimination of seclusion and restraint.”¹⁴³ The same approach should apply in prison.

The situation is complicated, however, because in a corrections setting restraints are used by both correctional staff and health care staff. Except for use of arm and leg restraints on an unresisting prisoner, they are always a use of force, see Standard 5.6(a), but are sometimes simultaneously a medical/mental health intervention. Many of the applicable professional standards distinguish deployment of restraints for health care reasons from that done for security reasons. See, e.g., NCCHC, HEALTH SERVICES STANDARDS, I-01 (Restraint and Seclusion). But because the same safety issues apply in either event, this Standard largely applies to both. The key distinction made between the two is that if a prisoner is restrained for health care reasons, health care staff should have authority to decide whether to use, continue, or discontinue the restraints. See subdivision (e).

The specifics of this Standard are, nonetheless, very much informed by the cited professional standards, although those professional standards include much more detail, especially about appropriate professional qualifications for the various decision-making roles.¹⁴⁴

at <http://www.gao.gov/archive/1999/he99176.pdf>; John Parkes, *A Review of the Literature on Positional Asphyxia as a Possible Cause of Sudden Death during Restraint*, 4 BRIT. J. FORENSIC PRAC. 24 (2002).

¹⁴¹ See, e.g., 42 C.F.R. §482.13(e); see Am. Psychiatric Ass’n, *Use of Restraint and Seclusion in Correctional Mental Health Care* (Dec. 2006) (discussing general applicability to correctional settings of these Center for Medicaid and Medicare Services rules), available at http://archive.psych.org/edu/other_res/lib_archives/archives/200605.pdf.

¹⁴² As with chemical and electronic weaponry, see commentary to Standard 23-5.8 *supra*. International human rights standards go much further than anything in this Standard and would ban many uses of restraints that are commonplace in this country as an assault on the dignity of the individual. See U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America* ¶ 33, UN Doc. CAT/C/USA/CO/2 (July 25, 2006); U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 33, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (July 27, 2006).

¹⁴³ DEP’T OF HEALTH AND HUMAN SERVS., ROADMAP TO SECLUSION AND RESTRAINT FREE MENTAL HEALTH SERVICES (Dep’t of Health and Human Servs., 2005), available at <http://store.samhsa.gov/shin/content/SMA06-4055/SMA06-4055-A.pdf>.

¹⁴⁴ See, e.g., Jeffrey L. Metzner *et al*, *Resource Document on the Use of Restraint and Seclusion in Correctional Mental Health Care*, 35 J. AM. ACAD. PSYCHIATRY L. 417 (2007); Del. Dep’t of Corr., Policy 11-I-01.1 (Apr. 1, 2009) (use of clinical therapeutic restraints), available at http://doc.delaware.gov/pdfs/policies/policy_11-I-01-1.pdf.

PART VI: HEALTH CARE

Part VI General Commentary

This Part deals with health care, encompassing medical (including vision) care, mental health care, and dental care. The components of the health care system that are involved in reception and intake—the immediate medical and mental health screening given prisoners on their arrival at an institution, and a first, comprehensive, medical assessment done within the first two weeks—are covered in Standards 23-2.1 and 2.5. And other specialized issues are covered elsewhere, in particular in Part V, on physical security, which covers health care issues related to sexual abuse (23-5.3), suicide prevention (23-5.4), uses of force (23-5.6 and 23-5.8), and restraints (23-5.9). But the general principles and core requirements are contained here.

Outside of prison, no constitutional right to health care exists.¹⁴⁵ But because prisoners are precluded by their confinement from the possibility of arranging for their own care, they have a constitutional claim for health care against the jurisdiction that imprisons them. (Prisoners are cut off from medical benefits such as Medicaid and Medicare.¹⁴⁶) At the same time, merely negligent provision of care does not, the Supreme Court has explained, breach the government's constitutional duty. The guiding principle of constitutional law, articulated in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), is that correctional officials or their designees are liable for failures to provide medical care, but only if those failures demonstrate "deliberate indifference" to a prisoner's "serious medical needs."¹⁴⁷ The deliberate indifference doctrine is designed to ensure that no person will be found constitutionally liable without a sufficient degree of culpability to render the harm "punishment" under the Eighth (or Fourteenth) Amendment.

But while "merely" negligent care for prisoners is not unconstitutional, it remains tortious in many circumstances.¹⁴⁸ And in any event, for purposes of policy development and design, where the goal is to "shape the institutions of government in such fashion as to comply with the laws and the Constitution," *Lewis v. Casey*, 518 U.S. 343, 349 (1996), the better approach is to focus less on blame and more on the appropriate standard of care. The medical, mental health, and dental care provided to prisoners is essential for public health, and such policies are essential in order to protect prisoners' health and the health of the community at large. Accordingly, what is needed is not care that barely passes the "deliberate indifference" test, but rather a standard of care set by reference to the community. If medical science has determined the appropriate treatment for a given illness, that treatment is no less appropriate in prison. This approach is universally accepted within American corrections,¹⁴⁹ and is the key element of

¹⁴⁵ Cf. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (Constitution does not impose upon the government a duty to protect or provide services).

¹⁴⁶ 42 U.S.C. § 1396d(a)(25)(A).

¹⁴⁷ A "serious medical need" exists when the failure to treat could result in further significant injury or the unnecessary and wanton infliction of pain. *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002).

¹⁴⁸ See, e.g., *Moss v. Miller*, 625 N.E.2d 1044, 1052 (Ill. App. Ct. 1993); *Sloan v. Ohio Dep't of Rehab. & Corr.*, 695 N.E.2d 298, 300 (Ohio Ct. App. 1997). Under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, the tort law of the state in which the relevant conduct occurred applies to federal employees who provide medical care to prisoners. See, e.g., *Berman v. United States*, 205 F. Supp. 2d 362 (M.D. Pa. 2002). Note, however, that federal contractors are not susceptible to suit under the FTCA, although state tort law may apply of its own force.

¹⁴⁹ See, e.g., AM CORR. ASS'N, PUBLIC CORRECTIONAL POLICY ON CORRECTIONAL HEALTH CARE (ratified Aug. 6, 1987, and reviewed and amended Aug. 23, 1996) (mandating that health services within correctional facilities "be

the Standards in this Part. International law, too, insists that prisoners receive care “of the same quality and standard as is afforded to those who are not imprisoned or detained.”¹⁵⁰

Over time, a large correctional facility will house prisoners with just about every health problem known in the community, from the common to the obscure. At the same time, prison and jail health care poses unique challenges, as well. The populations within them are sicker than those on the outside, and they are under enormous psychological stress. Communicable diseases (hepatitis C, HIV, tuberculosis, MRSA) are prevalent and dangerous not only to those who enter prison with the disease but to the closely confined population behind bars, staff and fellow prisoners alike. Asthma has proven particularly dangerous behind bars.¹⁵¹ Persons entering jail are frequently in need of alcohol and drug detoxification. What some call the “transcarceration” of people with serious mental illness, from mental health institutions to jails and prisons, has driven the proportion of such prisoners to new heights.¹⁵² And longer sentences have sharply increased the age of prison populations, with serious consequences for their health needs. (In 2008, 2.5% of state and federal prisoners, over 36,000 people, were 60 or older, and another 7.9%, or 122,000 were between 50 and 59.¹⁵³)

An additional challenge is created by the fact that some health care workers see a job in a correctional facility as undesirable, and by environmental pressures on correctional health care providers. As summarized in the leading textbook on correctional medicine:

Incarceration results in the transformation of a person into a prisoner. A prisoner is not always a patient, seeking and deserving of the professional’s skills and compassion. Correctional medical care for a prisoner can transform the attitudes and goals of the practitioner. The care and protection of the institution and its resources intrude on the primacy of the patient’s welfare. Prisoners may perceive their treating physician as remote, indifferent, or hostile. Physicians and other health workers in prison may view their prisoner patients as manipulative and demanding. . . .

Compassion is not easily taught but may be effectively ground down by the daily experience of working in prison. Disrespect for prisoners may be easily learned. The doctor-patient relationship may often be fatally compromised by the transformation of the patient into a prisoner, with a consequent loss of sympathy and standing. It will not be possible to effectively apply the methods of quality assurance to correctional medicine

consistent with community health care standards”); NAT’L COMM’N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS (2008). AM. PUB. HEALTH ASS’N, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (3d ed. 2003).

¹⁵⁰ Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, Annex, Principle 1, U.N. Doc A/37/51/Annex (18th Dec. 1982)

¹⁵¹ See, e.g., Tim Reiterman, *Deadly Medical Lapses in Prison*, L.A. TIMES, Sept. 20, 2007, available at <http://articles.latimes.com/2007/sep/20/local/me-prisons20> (reporting interview with medical receiver Robert Sillen about preventable deaths in the California prison system: “The leading cause of [preventable] death being asthma is unconscionable, and it is evidence of systemic problems and problems with individual clinical judgments,” Sillen said in an interview. “Adults in 21st century California should not have asthma as a primary cause of death.”).

¹⁵² Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates* (Bureau of Justice Statistics, Sept. 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>. See commentary to Standard 23-6.8.

¹⁵³ William J. Sabol *et al.*, *Prisoners in 2008* (Bureau of Justice Statistics, Dec. 2009), App’x tbl.13, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-6.1 General principles governing health care

unless health professionals working in prison identify the goal of quality solely as patient welfare.¹⁵⁴

It is evident, however, that these pressures can be resisted because so many correctional health providers do work effectively, competently, and with compassion to provide health care behind bars.

In short, health care behind bars is simultaneously challenging but vital, and appropriate care that meets the community standard of care is possible. The Standards that follow offer guidance.

Standard 23-6.1 General principles governing health care

- (a) Correctional authorities should ensure that:**
 - (i) a qualified health care professional is designated the responsible health authority for each facility, to oversee and direct the provision of health care in that facility;**
 - (ii) prisoners are provided necessary health care, including preventive, routine, urgent, and emergency care;**
 - (iii) such care is consistent with community health care standards, including standards relating to privacy except as otherwise specified in these Standards;**
 - (iv) special health care protocols are used, when appropriate, for female prisoners, prisoners who have physical or mental disabilities, and prisoners who are under the age of eighteen or geriatric; and**
 - (v) health care that is necessary during the period of imprisonment is provided regardless of a prisoner's ability to pay, the size of the correctional facility, or the duration of the prisoner's incarceration.**
- (b) Prisoners should not be charged fees for necessary health care.**
- (c) Dental care should be provided to treat prisoners' dental pain, eliminate dental pathology, and preserve and restore prisoners' ability to chew. Consistent with Standard 23-2.5, routine preventive dental care and education about oral health care should be provided to those prisoners whose confinement may exceed one year.**
- (d) Prisoners should be provided timely access to appropriately trained and licensed health care staff in a safe and sanitary setting designed and equipped for diagnosis or treatment.**
- (e) Health care should be based on the clinical judgments of qualified health care professionals, not on non-medical considerations such as cost and convenience. Clinical decisions should be the sole province of the responsible health care professionals, and should not be countermanded by non-medical staff. Work assignments, housing placements, and diets for each prisoner should be consistent with any health care treatment plan developed for that prisoner.**
- (f) Prisoners should be provided basic educational materials relating to disease prevention, good health, hygiene, and proper usage of medication.**

¹⁵⁴ Robert L. Cohen, *Health and Public Health Advocacy for Prisoners*, in CLINICAL PRACTICE IN CORRECTIONAL MEDICINE 28, 29, 38 (Michael Puisis ed., 2d ed. 2006).

ABA Treatment of Prisoners Standards

Standard 23-6.1 General principles governing health care

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.1 (intake screening), 23-2.5 (health care assessment), 23-2.8 (segregated housing and mental health), 23-6.2 to 6.15 (health care), 23-7.10 (cross-gender supervision), 23-7.11 (prisoners as subjects of behavioral or biomedical research), 23-8.2(b) (rehabilitative programs, substance abuse treatment), 23-8.8 (fees and financial obligations)

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-2.5 (health care assessment), 23-5.1 (care to be provided), 23-5.2 (prompt medical treatment)

ABA, RESOLUTIONS, 101C (Aug. 1993) (correctional accreditation), 102B (Aug. 2002) (elderly prisoners)

ACA, JAIL STANDARDS, Performance Standard 4C (continuum of health care services), 4-ALDF-4C-02 (access to care), 4C-20 (dental care), 4C-21 (health education), 4-ALDF-4D-02 (provision of treatment)

ACA, PRISON STANDARDS, Performance Standards 4E-1A (continuum of health care services) and 4E-2A (staff training), 4-4345 (access to care), 4-4360 (dental care), 4-4381 (provision of treatment), 4-4398 (elective procedures)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, §§ 5 (professional autonomy), 15 (general ethical principle), 33 (treatment)

AM. NURSES ASS'N, CORRECTIONS STANDARDS, *passim*

AM. PSYCHIAT. ASS'N, PRINCIPLES, B (quality of care)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.B (access to care), I.C.A.1-2 (medical autonomy and ethics), II.C.7 (medical director), III.C (follow-up), III.E (urgent and emergency treatment), VI.J (palliative care and pain management), VI.K (hospice care), VII.A (health services for women), VII.B (children and adolescents), IX.C (health education and health promotion)

NCCHC, HEALTH SERVICES STANDARDS A-01 (Access to Care), A-02 (Responsible Health Authority), A-03 (Medical Autonomy), A-08 (Communication on Patients' Health Needs), A-09 (Privacy of Care), B-01 (Infection Control Program), B-02 (Patient Safety), B-03 (Staff Safety), C-01 (Credentialing), C-03 (Professional Development), C-09 (Orientation for Health Staff), D-03 (Clinic Space, Supplies, and Equipment), E-06 (Oral Care), E-07 (Nonemergency Health Care Requests and Services), E-08 (Emergency Services), F-01 (Healthy Lifestyle Promotion), F-02 (Medical Diets), G-01 (Chronic Disease Services), G-02 (Patients with Special Health Needs), G-04 (Basic Mental Health Services)

U.N. Standard Minimum Rules, arts. 22 to 26 (medical services).

Commentary

Subdivision (a): This subdivision introduces the topic of health care in jail and prison, making explicit certain key features of an acceptable system: autonomy for health care providers (subdivision (a)(i); see also subdivision (e)); coverage of all necessary health care, not just emergency care (subdivision (a)(ii)), without exception (subdivision (a)(v)); consistency with the community standard of care (subdivision (a)(iii)); see introductory commentary to Part VI, and planned and knowledgeable consideration of the needs of special populations (subdivision (a)(iv)).

ABA Treatment of Prisoners Standards

Standard 23-6.1 General principles governing health care

Subdivision (b): This subdivision disapproves the increasingly prevalent practice of charging prisoners fees for medical services.¹⁵⁵ (The federal government uses such fees,¹⁵⁶ as did at least 36 state prison systems in 2004.¹⁵⁷) Medical copays are not intended to recover a significant amount of money from prisoners; their purpose is rather to reduce prisoner use of medical services by discouraging malingering. But even seemingly small copays are daunting to prisoners; many are not offered paying jobs, and those who do work typically earn only a few dollars per day, or less.¹⁵⁸ The growing evidence that the result compromises health and safety¹⁵⁹ lies behind the American Public Health Association's stand against copayment policies. As that organization's Standards explain:

Copayment for medical service is a tool often used in the penal system to decrease requests for medical services. Rather than raise financial barriers that make prisoners with limited funds choose between health care and subsistence items such as cleaning supplies and postage, it is more appropriate to relieve clinics of administrative functions and nonmedical referrals. Therefore, copayment requirements are considered a barrier to health care and are punitive.¹⁶⁰

The Commission on Safety and Abuse in America's Prisons has similarly explained that "While copayments seem reasonable on the surface, they cost more in the long run by discouraging sick prisoners from seeking care early on, when treatment is less expensive and more effective and before disease spreads."¹⁶¹ International law agrees. Principle 24 of the UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment requires: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."¹⁶²

It should be noted, however, that both the ACA and the NCCHC standards allow assessment of medical copays against prisoners. The ACA Prison Standards require, "at a minimum," that prisoners be informed on admission about the copayment requirement, that "[n]eeded offender health care is not denied due to lack of available funds," and that "[c]opayment fees shall be waived when appointments or services,

¹⁵⁵ Susan L. Clayton, *Inmate Health Care*, 29 CORRECTIONS COMPENDIUM 10 (2004).

¹⁵⁶ Federal Prisoner Health Care Copayment Act of 2000, 18 U.S.C. § 4001 note.

¹⁵⁷ See Clayton, *Inmate Health Care*, *supra* note 155, at 28-29 tbl.7 (36 of 44 responding prison systems use copays); see also National Institute of Corrections, *Fees Paid by Jail Inmates: Findings from the Nation's Largest Jails*, SPECIAL ISSUES IN CORRECTIONS (Feb. 1997), available at <http://www.nicic.org/pubs/1997/013599.pdf>.

¹⁵⁸ See CAMILLE GRAHAM CAMP & GEORGE M. CAMP, CRIMINAL JUSTICE INST., THE CORRECTIONS YEARBOOK 2000: ADULT CORRECTIONS 111 (2000).

¹⁵⁹ For example, the CDC found that copayments have contributed significantly to the spread of aggressive infections within correctional facilities, by discouraging prisoners from seeking treatment. See, e.g., Centers for Disease Control and Prevention, *Methicillin-Resistant Staphylococcus aureus Infections in Correctional Facilities—Georgia, California, and Texas, 2001-2003*, 52 MORBIDITY & MORTALITY WEEKLY REP. 992 (Oct. 17, 2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5241a4.htm>.

¹⁶⁰ AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS I.B.7.

¹⁶¹ COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 14 (2006), available at <http://prisoncommission.org>

¹⁶² G.A. Res. 43/173, Annex, principle 24, U.N. Doc. A/RES/43/173/Annex, available at http://www.unodc.org/pdf/compendium/compendium_2006_part_01_01.pdf.

ABA Treatment of Prisoners Standards

Standard 23-6.2 Response to prisoner health care needs

including follow-up appointments, are initiated by medical staff.”¹⁶³ The NCCHC approves of reasonable copayments by implication, including in a list of “examples of unreasonable barriers to care” “assessing excessive co-payments that prevent or deter inmates from seeking care for their serious health needs.”¹⁶⁴ This Standard disagrees with this regulatory approach; the flat ban in subdivision (b) reflects a judgment that it is inevitable, in the straitened economic setting of a jail or prison, for a copayment policy to “prevent or deter inmates from seeking care,” and that it is not only the prisoners who are deterred from seeking care but those with whom they come in contact, behind bars and later in the community, who suffer the public health consequences.

Subdivision (c): Dental treatment should not be limited to extractions; prisoners should receive services designed to save teeth where possible, and if their loss of teeth interferes with biting and chewing, they should receive dental prostheses.

Standard 23-6.2 Response to prisoner health care needs

(a) Correctional authorities should implement a system that allows each prisoner, regardless of security classification, to communicate health care needs in a timely and confidential manner to qualified health care professionals, who should evaluate the situation and assess its urgency. Provision should be made for prisoners who face literacy, language, or other communication barriers to be able to communicate their health needs. No correctional staff member should impede or unreasonably delay a prisoner’s access to health care staff or treatment.

(b) A prisoner suffering from a serious or potentially life-threatening illness or injury, or from significant pain, should be referred immediately to a qualified medical professional in accordance with written guidelines. Complaints of dental pain should be referred to a qualified dental professional, and necessary treatment begun promptly.

(c) When appropriate, health care complaints should be evaluated and treated by specialists. A prisoner who requires care not available in the correctional facility should be transferred to a hospital or other appropriate place for care.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-6.1 (general principles governing health care), 23-4.1 (rules of conduct and informational handbook), 23-7.2 (treatment of prisoners with disabilities and other special needs)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.2 (prompt medical attention)

ACA, JAIL STANDARDS, 4-ALDF-4C-05 (referrals)

ACA, PRISON STANDARDS, 4-4346 (clinical services), 4-4348 (referrals), 4-4351 (emergency plan)

¹⁶³ ACA, PRISON STANDARDS 4-4345; *see also* ACA, JAIL STANDARDS 4-ALDF-4C-02 (same, except including only first and last restriction).

¹⁶⁴ NCCHC, HEALTH SERVICES STANDARDS, A-01 (Access to Care) (emphasis added); *see also* NCCHC position statement, Charging Inmates a Fee for Health Care Services, *available at* <http://www.ncchc.org/resources/statements/healthfees.html>

ABA Treatment of Prisoners Standards

Standard 23-6.3 Control and distribution of prescription drugs

AM. PSYCHIAT. ASS'N, PRINCIPLES, B.2.b (staffing levels and access), E (confidentiality), F.4 (access to treatment), F.5 (modalities of treatment)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.B (access to care), III.B (prisoner-initiated care), III.D (specialty consultative services)

NCCHC, HEALTH SERVICES STANDARDS A-01 (Access to Care), A-07 (Emergency Response Plan), E-06 (Oral Care), D-05 (Hospital and Specialty Care), E-05 (Mental Health Screening and Evaluation), E-07 (Nonemergency Health Care Requests and Services), E-08 (Emergency Services), E-12 (Continuity of Care During Incarceration)

U.N. Standard Minimum Rules, arts. 22(2) (hospital and specialized care), 25 (care for prisoners)

Commentary

There are three keys to appropriate health care access systems for prisoners, the topic of this Standard. First, in subdivision (a), prisoners must have a way to communicate their health care needs in a timely way—professional standards agree that prisoners need daily opportunities to make health care requests.¹⁶⁵ Second, in subdivisions (a) and (b), those needs must be relayed promptly, and without impediment, to health care staff; staff should avoid any obstacles for such communication.¹⁶⁶ The American Public Health Association notes that health care request should be

submit[ted] . . . to health care staff whether the request is made in writing or verbally or whether the request is made by the prisoner or through other prisoners, correctional staff, cellmates, family members, or other workers in the facility. Even requests that do not arrive in the standard format must be reviewed and addressed.¹⁶⁷

In addition, emergency needs need to be relayed immediately—and subdivision (b)'s provisions are written to ensure that it is qualified health care staff evaluate whether a reported need is an emergency. And third, in subdivisions (b) and (c), the health care staff that evaluate requests and provide treatment should be professionally qualified, even if that requires a specialist consultation or referral or a transfer to a hospital. Especially in isolated locations, telemedicine can be a helpful way to provide prompt consults by specialists.

Standard 23-6.3 Control and distribution of prescription drugs

A correctional facility should store all prescription drugs safely and under the control and supervision of the physician in charge of the facility's health care program. Prescription drugs should be distributed in a timely and confidential manner. Ordinarily, only health care staff should administer prescription drugs, except that health care staff should be permitted to authorize prisoners to hold and administer their own asthma inhalers, and to implement other reasonable "keep on person" drug policies. In an emergency, or when necessary in a facility in which health care staff are available only part-time, medically trained correctional staff should be permitted to administer prescription

¹⁶⁵ See AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS I.B.4; NCCHC Correctional Standards E-07; ACA, PRISON STANDARDS 4-4346; ACA, JAIL STANDARDS 4-ALDF-4C-26.

¹⁶⁶ The language in subdivision (a) barring impediments to access to health care also means that correctional authorities should not interfere with furloughed prisoners who may wish to consult their own doctors.

¹⁶⁷ AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS I.B.4.

ABA Treatment of Prisoners Standards

Standard 23-6.4 Qualified health care staff

drugs at the direction of qualified health care professionals. In no instance should a prisoner administer prescription drugs to another prisoner.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-5.2(a)(v) & (vi) (prevention and investigation of violence (drugs, and prisoners' authority), 23-6.1 (general principles governing health care), 23-6.8 (health care records and confidentiality), 23-10.3 (training)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.6 (control of drugs)

ACA, JAIL STANDARDS, 4-ALDF-4C-38 (pharmaceuticals)

ACA, PRISON STANDARDS, 4-4378 (pharmaceuticals), 4-4379 (nonprescription medication)

NCCHC, HEALTH SERVICES STANDARDS, C-05 (Medication Administration Training), C-06 (Inmate Workers), D-01 (Pharmaceutical Operations), D-02 (Medication Services)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.E.1.b (drugs and biologicals)

Commentary

Professional standards, cited above, are far more detailed in their regulation of pharmaceutical operations; this Standard signals the importance of the topic.

Allowing prisoners with asthma to have their own inhalers can be useful for their safety; a sufficiently speedy response to an asthma attack is otherwise very difficult. The Standard makes clear that such a policy and other reasonable "keep on person" policies are not foreclosed if a correctional facility's decision-makers so choose.

For discussion of the general requirement that no prisoner administer prescription drugs to another prisoner, see the commentary on Standard 23-6.4(c).

Standard 23-6.4 Qualified health care staff

(a) Each correctional agency should employ or contract with a sufficient number of qualified medical, dental, and mental health professionals at each correctional facility to render preventive, routine, urgent, and emergency health care in a timely manner consistent with accepted health care practice and standards.

(b) Health care providers in a non-federal correctional facility should be fully licensed in the state in which the facility is located; health care providers in a federal correctional facility should be fully licensed in the United States. No health care provider should be permitted to practice in a correctional facility beyond the scope permissible for that individual provider outside of a correctional facility, given the provider's particular qualifications and licensing.

(c) Regardless of any training a prisoner may have had, no prisoner should be allowed to provide health care evaluation or treatment to any other prisoner.

ABA Treatment of Prisoners Standards

Standard 23-6.4 Qualified health care staff

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 1.1(k) (general principles governing imprisonment, private contractors), 23-5.2(a)(v) & (vi) (prevention and investigation of violence, drugs, and prisoners' authority), 23-5.9 (use of restraint mechanisms and techniques), 23-6.1 (general principles governing health care), 23-6.8 (health care records and confidentiality), 23-6.13 (prisoners with gender identity disorder), 23-10.2 (personnel policy and practice), 23-10.3 (training)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.1 (care to be provided)

ACA, JAIL STANDARDS, Performance Standard 4D (health services staff), 4-ALDF-4D-03 (personnel qualifications), 4D-05 (credentials), 4D-11 (inmate assistants)

ACA, PRISON STANDARDS, 4-4382 and 4-4383 (personnel qualifications), 4-4384 (credentials), 4-4393 (offender assistants)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 2 (licensure), 12-13 (staffing requirements)

AM. PSYCHIAT. ASS'N, PRINCIPLES, B.2.b (staffing levels and access)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.C (staffing and organization)

NCCHC, HEALTH SERVICES STANDARDS, C-01 (Credentialing), C-06 (Inmate Workers), C-07 (Staffing)

NCCHC position statement, Licensed Health Care Providers in Correctional Institutions

<http://ncchc.org/resources/statements/lhcp2005.html>

U.N. Standard Minimum Rules, arts. 22 (medical staff), 52 (medical officer)

Commentary

Subdivision (a): Prisons and jails cannot provide adequate care if they do not employ or contract with enough health care providers, covering all the necessary disciplines, specialties, and licensing levels.

Subdivision (b): This subdivision applies the general parity principle articulated in Standard 23-6.1(a), that correctional health care should satisfy the community standard of care. See introductory commentary to Part VI. Prisons and jails should not be dumping grounds for the dregs of the profession (e.g., doctors or nurses with suspended licenses or ethics complaints). Like this subdivision, NCCHC standards forbid correctional facilities to employ health care personnel whose license restricts their practice to correctional institutions. The NCCHC elaborates in a position statement:

[S]uch practice imparts a sense that patients in a correctional environment are undeserving of qualified care that is similar to care available in the community. This concept is anathema to the important medical canons of ethics and disregards the important public health role correctional health care can play.

Further, correctional systems should not employ licensed health care professionals whose licenses are restricted to government institutions, including corrections. It conveys a substandard image of correctional health care that can inhibit patients from seeking necessary care; adversely affects recruitment of other health professionals; and potentially leads to unwelcome public reaction when there is a negative patient

ABA Treatment of Prisoners Standards
Standard 23-6.5 Continuity of care

outcome.¹⁶⁸

Subdivision (c): Allowing a prisoner to provide health care to another discloses confidential information and puts the former prisoner in a position to have coercive authority over the latter, which is forbidden under Standard 23-5.6(a)(vi). Subdivision (c)'s particular ban on prisoner provision of health care is clear in the case law.¹⁶⁹ Of course in a situation in which health care personnel are unable to reach a prisoner in need of emergency care—for example, when a prisoner is wounded during a riot—this subdivision does not mean that authorities should prevent prisoners from assisting each other.

The existence of this ban also does not mean that prisoners cannot serve as health care attendants or in other health-related roles, if no medical treatment is provided. The NCCHC, which has a similar rule in its standards, explains that if care is taken, some health-related activities are acceptable.

The use of inmates in appropriate peer health-related programs is permitted. For example, inmates may assist other inmates in activities of daily living (ADL) [defined elsewhere as “generally refer[ing] to ambulation, bathing, dressing, feeding, and toileting”] in regular housing units. Inmates also may participate in support groups that assist other inmates with health problems (e.g., a buddy system for potentially suicidal inmates) and hospice programs. Inmates are not substitutes for regular program or health staff.¹⁷⁰

As the NCCHC explains, “An intent of this standard is that the health services program is not used as a vehicle that places inmates in a position of power over their peers.”¹⁷¹

In addition, when prisoner workers are assigned to assist health services, care should be taken to safeguard confidentiality, security, and both worker and patient health. See NCCHC, HEALTH SERVICES STANDARDS, C-06 (Inmate Workers).

Standard 23-6.5 Continuity of care

(a) A correctional agency should ensure each prisoner’s continuity of care, including with respect to medication, upon entry into the correctional system, during confinement and transportation, during and after transfer between facilities, and upon release. A prisoner’s health care records and medication should travel with the prisoner in the event of a transfer between facilities, including facilities operated by different agencies.

¹⁶⁸ NCCHC, CORRECTIONAL STANDARDS, C-01 (essential); *see also* NCCHC and Society of Correctional Physicians, Position Statement: Licensed Health Care Providers in Correctional Institutions, (NCCHC, Oct. 9 2005) available at <http://ncchc.org/resources/statements/lhcp2005.html>.

¹⁶⁹ *See, e.g., Newman v. Alabama*, 503 F.2d 1320, 1323 (5th Cir. 1974); *Williams v. Edwards*, 547 F.2d 1206, 1215 (5th Cir. 1977); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1326 (S.D. Tex. 1980), *aff’d in part and vacated in part*, 679 F.2d 1115, amended in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

¹⁷⁰ NCCHC, HEALTH SERVICES STANDARDS, C-06 (Inmate Workers).

¹⁷¹ *Id.*

ABA Treatment of Prisoners Standards

Standard 23-6.6 Adequate facilities, equipment, and resources

(b) Prisoners who are determined to be lawfully taking prescription drugs or receiving health care treatment when they enter a correctional facility directly from the community, or when they are transferred between correctional facilities—including facilities operated by different agencies—should be maintained on that course of medication or treatment or its equivalent until a qualified health care professional directs otherwise upon individualized consideration.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.5 (health care assessment), 23-6.11 (services for prisoners with mental disabilities), 23-6.13 (prisoners with gender identity disorder), 23-8.9 (transition to the community)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.2(b) & (c) (prompt medical treatment)

ACA, JAIL STANDARDS, 4-ALDF-4C-04 (continuity of care)

ACA, PRISON STANDARDS, 4-4347 (continuity of care)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 61 (transfer of records)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.F.2 (transfer of records), III.H (transfer and discharge)

NCCHC, HEALTH SERVICES STANDARDS, D-02 (Medication Services), E-02 (Receiving Screening), E-03 (Transfer Screening), E-10 (Patient Escort), E-13 (Discharge Planning), H-04 (Management of Health Records)

Commentary

Times of transition—whether at the start of incarceration (especially when it is unexpected), or at the time of transfer or release—can be medically dangerous for prisoners with serious medical needs, if their health records are delayed or their medications disallowed or lost.

Subdivision (b): This subdivision is modeled on an NCCHC subdivision, Standard D-02. When a prisoner arrives at a correctional facility from the community or from another facility, substitution of a close-to-equivalent treatment—for example a generic form of the prescribed medication—is acceptable. But it is inappropriate to simply discontinue or suspend that prisoners' treatment, whether or not the prisoner brings prescribed medication to the facility. Instead, previously prescribed treatment should continue until a qualified health professional, with appropriate credentials to authorize prescription of drugs, individually assesses the prisoner and the pre-existing treatment, and decide upon a treatment plan going forward.

Standard 23-6.6 Adequate facilities, equipment, and resources

(a) Health care areas in a correctional facility should be safe and sanitary, should include appropriately private areas for examination and treatment, and should be designed so that prisoners can hold confidential discussions with health care personnel.

(b) A correctional facility should have equipment necessary for routine health care and emergencies, and an adequately supplied pharmacy. Specialized equipment may

ABA Treatment of Prisoners Standards

Standard 23-6.6 Adequate facilities, equipment, and resources

be required in larger facilities and those serving prisoners with special medical needs. Smaller facilities should be permitted to provide for prisoners' health care needs by transferring them to other facilities or health care providers, but should have equipment that is reasonably necessary in light of its preexisting transfer arrangements.

(c) Hospitals and infirmaries operated by or within correctional facilities should meet the licensing standards applicable to similar, non-prison hospitals or infirmaries.

(d) Vehicles used to transport prisoners to and from medical facilities should be adequately equipped with emergency medical equipment and provisions for prisoners with special needs.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-1.1(i) & (j) (general principles governing imprisonment, resources), 23-3.1 (physical plant and environmental conditions), 23-6.2(a) (response to prisoner requests for health care (confidential communication), 23-6.12(b) (prisoners with chronic and communicable diseases, medical isolation areas), 23-11.2(a) (external regulation and investigation, licensing and enforcement)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-4C-06 (transportation) and 4C-09 (infirmiry care), 4-ALDF-4D-19 (privacy)

ACA, PRISON STANDARDS, 4-4349 (transportation), 4-4352 (infirmiry care), 4-4426 and 4-4427 (physical plant)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 6 (support services)

AM. PSYCHIAT. ASS'N, PRINCIPLES, F.5 (modalities of treatment)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.E (health care facilities), III.F (hospital and infirmiry care), VI.G (pharmacy services)

NCCHC, HEALTH SERVICES STANDARDS, A-09 (Privacy of Care), B-01 (Infection Control Program), D-01 (Pharmaceutical Operations), D-03 (Clinic Space, Equipment, and Supplies), E-08 (Emergency Services), G-03 (Infirmiry Care)

Commentary

This Standard fleshes out in a particularly important setting the general rules of Standard 23-3.1, which requires appropriate facilities for various needs and activities; Standard 23-1.1(h) and (i), which require adequate resources; and Standard 23-11.2(a), which requires that licensing and enforcement provisions applicable to non-prison institutions, including hospitals, should apply in prisons and jails as well (subdivision (c)). For each health care area, relevant professional standards provide both content and enforcement methods, setting out equipment requirements, inspection schedules and the like.

Subdivision (a): Privacy and confidentiality sometimes have little sway in correctional settings, but they are essential to adequate health care, as the National Commission on Correctional Health Care explains, to “foster necessary and candid conversation between patient and health care professional.” NCCHC, HEALTH SERVICES, A-9. The physical plant, operations, and attitudes must come together to ensure that “patient trust is not violated and a patient-provider relationship is established so that health care can be effectively delivered.”¹⁷² This serves both individual and public health, because “[d]istrust of health care

¹⁷² AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.C.A.

ABA Treatment of Prisoners Standards

Standard 23-6.7 Quality improvement

providers may deter prisoner-patients from seeking health care.”¹⁷³ See also Standard 23-6.2(a) (confidential communication). In the vast majority of circumstances, true privacy is possible; in those rare circumstances where complete privacy is impossible, strategies to provide partial privacy should be implemented:

Privacy is made more difficult when triaging health complaints at the inmate’s cell, in segregated housing, or in supermax housing. When cellside triage is required, health professionals take extra precautions to promote private communication between health staff and the inmate.

When safety is a concern and full privacy is lacking, it is recommended that alternative strategies for partial visual privacy, such as a privacy screen, or partial auditory privacy, such as white noise devices (to mask normal conversation) be considered.¹⁷⁴

Subdivision (d): It is to be expected that prisoners going to and from medical facilities will have a large number of special needs. Medical transport vehicles should, for example, be equipped for prisoners who use wheelchairs or have various mobility impairments.

Standard 23-6.7 Quality improvement

A correctional health care system should include an ongoing evaluation process to assess and improve the health care provided to prisoners and to enable health care staff to institute corrective care or other action as needed. The evaluation process should include mechanisms by which prisoners can provide both positive and negative comments about their care.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-6.8(c)(iii) (health care records and confidentiality, exception for quality improvement), 23-9.1 (grievance procedures), 23-11.1 (internal accountability)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-4D-24 (health care internal review and quality assurance)

ACA, PRISON STANDARDS, 4-4410 and 4-4411 (internal review and quality assurance)

AM. ASS’N FOR CORR. PSYCHOL., STANDARDS, §§ 8 (quarterly reporting), 9 (internal quality assessment/improvement), 10 (external quality assessment/improvement), 48 (quality assessment)

AM. NURSES ASS’N, CORRECTIONS STANDARDS, §§ 7 (quality of practice), 9 (professional practice evaluation)

¹⁷³ *Id.*

¹⁷⁴ NCCHC, HEALTH SERVICES STANDARDS, A-9 (discussion); *see also, e.g.*, Ralph Boyd, Findings Letter, Investigation of Patrick County (VA) Jail, (March 6, 2003), *available at* <http://www.clearinghouse.net/chDocs/public/JC-VA-0009-0001.pdf> (citing lack of privacy at intake); Order, *United States v. Terrell County, Ga.*, 1:04-cv-00076 (M.D. Ga., Dec. 21, 2007), ¶¶ 20; introduction (requiring “reasonable efforts to ensure inmate privacy when conducting medical and mental health screening, assessments, and treatment” as among the “remedial measures that the Defendants must undertake to ensure constitutional conditions of confinement at the Terrell County Jail”), *available at* http://www.justice.gov/crt/split/documents/terrell_countyjail_relieforder_12-21-07.pdf.

ABA Treatment of Prisoners Standards

Standard 23-6.8 Health care records and confidentiality

AM. PSYCHIAT. ASS'N, PRINCIPLES, G.2.a (quality control/program evaluation)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.C.B.1 (quality improvement)

NCCHC, HEALTH SERVICES STANDARDS, A-06 (Continuous Quality Improvement Program), A-10 (Procedure in the Event of an Inmate Death), A-11 (Grievance Mechanisms for Health Complaints), B-01 (Patient Safety)

Commentary

Quality improvement is an essential part of a health care system, and is discussed in detail in the cited professional standards. Health-related grievances should be among the components of a quality improvement system; every correctional agency should implement an effective system for receiving, responding to, and reviewing prisoners' grievances relating to the health care system, the treatment they have received, or their housing or programming placement based upon a medical condition.

Standard 23-6.8 Health care records and confidentiality

(a) Prisoners' health care records should:

- (i) be compiled, maintained, and retained in accordance with accepted health care practice and standards;**
- (ii) not include criminal or disciplinary records unless a qualified health care professional finds such records relevant to the prisoner's health care evaluation or treatment;**
- (iii) be maintained in a confidential and secure manner, separately from non-health-care files;**
- (iv) accompany a prisoner to every facility to which the prisoner is transferred; and**
- (v) be available to the prisoner who is the subject of the records, absent an individualized finding of good cause.**

(b) Information about a prisoner's health condition should not be disclosed to other prisoners. No prisoner should have access to any other prisoner's health care records.

(c) Information about a prisoner's health condition should be shared with correctional staff only when necessary and permitted by law, and only to the extent required for:

- (i) the health and safety of the prisoner or of other persons;**
- (ii) the administration and maintenance of the facility or agency;**
- (iii) quality improvement relating to health care; or**
- (iv) law enforcement purposes.**

(d) Health care personnel or correctional authorities should provide information about a prisoner's health condition to that prisoner's family or other persons designated by the prisoner if the prisoner consents to such disclosure or, unless the prisoner has previously withheld consent, if the prisoner's condition renders the prisoner unable to consent or if the prisoner has died.

ABA Treatment of Prisoners Standards

Standard 23-6.8 Health care records and confidentiality

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.5 (health care assessment), 23-5.2(a)(vi) (prevention and investigation of violence, prisoners' authority), 23-6.2(a) (response to prisoner requests for health care, confidential communication), 23-6.3 (control and distribution of prescription drugs), 23-6.4(c) (qualified health care staff, ban on prisoner providers), 23-6.5(a) (continuity of care, health care records and transfer), 23-6.6(a) (adequate facilities, equipment, and resources, confidentiality), 23-6.12 (prisoners with chronic and communicable diseases), 23-7.7 (records and confidentiality)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.4 (medical records)

ACA, JAIL STANDARDS, 4-ALDF-4D-12 (notification), 4D-13 and 4D-14 (confidentiality), 4D-26 (health records)

ACA, PRISON STANDARDS, 4-4395 (notification), 4-4396 (confidentiality), 4-4415 (inactive records)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, §§ 18 (documentation), 19a-19b (confidentiality of files and records), 57-58 (record policies), 60 (inmate review of records), 62 (release of psychological information)

AM. NURSES ASS'N, CORRECTIONS STANDARDS, § 12 (Ethics)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.B.D (confidentiality), II.F (health records)

NCCHC, HEALTH SERVICES STANDARDS, C-06 (Inmate Workers), H-01 (Health Record Format and Contents), H-02 (Confidentiality of Health Records), H-03 (Access to Custody Information), H-04 (Management of Health Records), I-05 (Informed Consent and Right to Refuse)

U.N. Standard Minimum Rules, art. 44(1) (notification of death)

Commentary

This Standard incorporates a number of elements of the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-6, and 45 C.F.R. § 164.512, which covers many prisons and jails.¹⁷⁵ However, subdivision (d), discussed below, advocates that HIPAA be interpreted or modified to allow particular disclosures in this context. Several provisions in this Standard deal with confidentiality, which is particularly important in a correctional setting; because prisoners are simultaneously patients and offenders, inappropriate sharing of health care information with non-health-care staff is particularly likely to elicit their distrust. *See also* commentary to Standard 23-6.6(a). The relevant provisions apply both to health-care and non-health-care staff, and forbid not only official (but unnecessary) sharing of confidential information but also casual dissemination of prisoner health-related information in the form of humor or gossip. The rule in subdivision (b) against sharing of health information among prisoners does not prevent facilities from using a “buddy” program, in which one prisoner is assigned to keep an eye on another who is at a non-acute risk of suicide, so long as the “buddy” is not privy to the diagnosis or other medical details.

¹⁷⁵ *See, e.g.,* Wesley D. Bizzell, *A New Task for Corrections: Protecting Inmates' Medical Records*, CORRECTIONS TODAY (Feb. 1, 2003), available at <http://www.allbusiness.com/public-administration/justice-public-order/1168370-1.html>.

ABA Treatment of Prisoners Standards

Standard 23-6.8 Health care records and confidentiality

Subdivision (a): Documentation is an essential part of health care in prison as elsewhere.¹⁷⁶ Good record-keeping and record-transfer policies are particularly important because they can ameliorate the health risk caused by prisoner transfers, which can disrupt continuity of care. Subdivision (a)(iv) combines with Standard 23-6.5(a) to emphasize that point. The cited professional standards contain much more guidance on the content and organization of prisoner health records.

Confidentiality requires not sharing health information with non-health personnel. Subdivision (a)(ii) addresses the opposite concern; a challenge specific to prisons and jails is to ensure appropriate boundaries between correctional information and health care information. Although there may be exceptions, health care providers do not generally need to know about a prisoner's disciplinary or criminal history, and routine sharing of security information with health care staff can subvert their care-giving role, potentially to the detriment of health care. See the general commentary to Part VI for a discussion of the importance of health care staff maintaining their commitment to patient-care rather than prison order.

Finally, subdivision (a)(v) deals with another issue unfamiliar to most non-prisoners; some agencies enforce a policy that prisoners may not see, or may not copy, their own health records. This subdivision requires that prisoner health records be made routinely available to the prisoner, to inspect or copy, at the prisoner's choice and without a fee. Again, there may be exceptions (rare for medical care records, but less so for mental health records), for situations in which seeing the records might be anti-therapeutic. But such a general policy is inappropriate, see, e.g., AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.F.13, because it deprives prisoners of the chance to understand their own treatment, advocate for changes to it, and in some circumstances obtain care outside the facility (either during a furlough or after they are released). Even if there is a reason not to share some portion of the prisoner's health file with a prisoner who has requested access, the remainder of the file should be made available.

Subdivision (d): This subdivision requires correctional agencies to share health information with a prisoners' family if the prisoner is dead or unable to consent (for example because of brain injury or a coma), not only if the prisoner has expressly consented to the disclosure but also if the prisoner has not previously withheld consent. This is an important issue both for accountability and for basic humanity. All too often, even when prisoners die their families are entirely unable to find out the most basic information about their loved one's situation. One reason is HIPAA, which covers some jails and prisons, and which by regulation forbids most disclosures even after a patient's death.¹⁷⁷ To quote one newspaper report, "The Health Insurance Portability and Accountability Act of 1996 is perceived by jail officials as an immutable muzzle when it comes to inmate medical treatment. Even after a prisoner dies. Even if his sister wants the information, or his mother, or her father."¹⁷⁸ It seems clear that the drafters of the

¹⁷⁶ Douglas L. Wood, *Documentation Guidelines: Evolution, Future Direction, and Compliance*, 110 AM. J. MED. 332 (2001).

¹⁷⁷ See 45 C.F.R. § 164.502(f) ("A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual."). Family members can, however, go through the often cumbersome and time-consuming state law procedure to become an executor or administrator of the deceased prisoner's estate, and are then entitled to full disclosure. See *id.* at (g)(1) ("As specified in this paragraph, a covered entity must, except as provided in paragraphs (g)(3) and (g)(5) of this section, treat a personal representative as the individual for purposes of this subchapter."); *id.* at (g)(4) ("If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.").

¹⁷⁸ *Deaths of Two Greene County Jail Inmates Highlight HIPAA Medical Disclosure Rules*, SPRINGFIELD NEWS-LEADER, Dec. 13, 2009, at B1; see also Jeff Gerritt, *Editorial: After Death, Families of Prisoners Should Know*

ABA Treatment of Prisoners Standards

Standard 23-6.9 Pregnant prisoners and new mothers

regulation were not thinking about the situation of the death of prisoners locked away from their families, who have a very important interest in understanding whether the death was unavoidable.

Statutory or regulatory amendment to HIPAA would be one way to solve the problem this subdivision addresses. A less thorough but often effective solution would be, instead, to present prisoners with a release form on their admission to a particular facility, in which the prisoner could name family members or others who should be affirmatively notified in the event of the prisoner's death or incapacity, and to whom records should be released upon request. Every prisoner could receive such a form and be required to hand it in, with either designations for notification or an express withholding of consent.

Standard 23-6.9 Pregnant prisoners and new mothers

(a) A pregnant prisoner should receive necessary prenatal and postpartum care and treatment, including an adequate diet, clothing, appropriate accommodations relating to bed assignment and housing area temperature, and childbirth and infant care education. Any restraints used on a pregnant prisoner or one who has recently delivered a baby should be medically appropriate; correctional authorities should consult with health care staff to ensure that restraints do not compromise the pregnancy or the prisoner's health.

(b) A prisoner in labor should be taken to an appropriate medical facility without delay. A prisoner should not be restrained while she is in labor, including during transport, except in extraordinary circumstances after an individualized finding that security requires restraint, in which event correctional and health care staff should cooperate to use the least restrictive restraints necessary for security, which should not interfere with the prisoner's labor.

(c) Governmental authorities should facilitate access to abortion services for a prisoner who decides to exercise her right to an abortion, as that right is defined by state and federal law, through prompt scheduling of the procedure upon request and through the provision of transportation to a facility providing such services.

(d) Governmental authorities should ensure that no birth certificate states that a child was born in a correctional facility.

(e) Governmental and correctional authorities should strive to meet the legitimate needs of prisoner mothers and their infants, including a prisoner's desire to breastfeed her child. Governmental authorities should ordinarily allow a prisoner who gives birth while in a correctional facility or who already has an infant at the time she is admitted to a correctional facility to keep the infant with her for a reasonable time, preferably on extended furlough or in an appropriate community facility or, if that is not practicable or reasonable, in a nursery at a correctional facility that is staffed by qualified persons. Governmental authorities should provide appropriate health care to children in such facilities.

First, DETROIT FREE PRESS (Jan. 9, 2009) ("Families of prisoners should not have to learn how loved ones died by reading about it in the newspaper.").

ABA Treatment of Prisoners Standards

Standard 23-6.9 Pregnant prisoners and new mothers

(f) If long-term imprisonment is anticipated, a prisoner with an infant should be helped to develop necessary plans for alternative care for the infant following the period described in subdivision (e) of this Standard, in coordination with social service agencies. A prisoner should be informed of the consequences for the prisoner's parental rights of any arrangements contemplated. When a prisoner and infant are separated, the prisoner should be provided with counseling and other mental health support.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.2 (conditions for special types of prisoners), 23-5.9 (use of restraint mechanisms and techniques), 23-6.2(b) (response to prisoner requests for health care, response to urgent requests), 23-8.2 (rehabilitative programs), 23-8.5 (visiting), 23-8.9(g) (transition to the community, early release)

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.7 (services for women prisoners)

ABA, RESOLUTIONS, 102A (Aug. 2000) (prison oversight) (accompanying report is reprinted as Myrna S. Raeder, *Creating Correctional Alternatives for Nonviolent Women Offenders and their Children*, 44 ST. LOUIS UNIV. L.J. 377 (2000)), 102E (Aug. 2010) (impact of incarceration on mother/child relationship), 102F (Aug. 2010) (legal services for prisoners on family law issues)

ACA, JAIL STANDARDS, 4-ALDF-4C-13 (pregnancy management)

ACA, PRISON STANDARDS, 4-4353 (pregnancy management), 4-4436 (counseling for pregnant inmates)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VII.A.5 to .10 (pre-natal and post-natal care, and contraception), VII.A.14 (counseling when custody is withdrawn)

NCCHC, HEALTH SERVICES STANDARDS, G-07 (Care of the Pregnant Inmate), G-09 (Pregnancy Counseling)

U.N. Standard Minimum Rules, art. 23 (pre- and post-natal care and treatment)

Commentary

Thousands of prisoners come to prison pregnant; thousands give birth behind bars every year.¹⁷⁹ But conditions and practices at many jails and prisons are not adjusted to meet the unique needs of pregnant prisoners. Nor do prisons and jails do everything they could to meet the needs of newborns and their mothers, whether the babies are born in prison or just before a prisoner starts a term of incarceration. This Standard addresses these issues.

¹⁷⁹ Approximately 5% of women are pregnant on admission to prison, and approximately 6% on admission to jail. Lawrence A. Greenfield & Tracy L. Snell, *Women Offenders* 8 tbl.19 (Bureau of Justice Statistics, Dec. 1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/wo.pdf>. (There are currently about 115,000 women incarcerated in state and federal prisons, and another 100,000 in local jails. See William J. Sabol *et al.*, *Prisoners in 2008*, at 16 app. tbl.1 (Bureau of Justice Statistics, December 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>; Todd D. Minton & William J. Sabol, *Jail Inmates at Midyear 2008—Statistical Tables*, at 5 tbl.6 (Bureau of Justice Statistics, March 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf>. For birth estimates, see, e.g., Susan L. Clayton, *Female Offenders*, 26 CORRECTIONS COMPENDIUM 5-27 (survey of 45 prison systems, finding that over 1400 babies were born in prison in 2001). The current total number is presumably higher, because it includes all 52 prison systems as well as jails, and because prisoner population has increased greatly.

ABA Treatment of Prisoners Standards

Standard 23-6.9 Pregnant prisoners and new mothers

Subdivision (a): Pregnant prisoners need a variety of particular accommodations, such as a higher-calorie diet, with medically-indicated vitamin supplementation; appropriate prenatal care including maternal dental care; and special consideration relating to heat. They also need prompt and compassionate health care for suspected miscarriage and for postpartum issues including pain and depression. This subdivision's first sentence is intended to cover all this and other reasonably necessary services and treatment.

Pregnant prisoners not in labor may appropriately be restrained when security requires, in the same circumstances as non-pregnant prisoners—but the methods of restraint used must be adjusted to their medical circumstances, both when the prisoner is stationary and when she is moving. (Restraints during transportation should be carefully considered due to the increased risk of falling and problems that may be caused by a prisoner's inability to break her fall.).

Subdivision (b): The first problem faced by prisoners in labor is obtaining prompt medical care. Just like women outside of prison, women prisoners sometimes believe they are in labor earlier than they are. This can lead staff to be dismissive of women prisoners' claims that they are in labor. Under Standard 23-6.2(b), a woman who believes she is in labor should be referred immediately to a qualified medical professional for evaluation. Then, if she is in fact in labor, this subdivision forbids delay in taking her to an appropriate medical facility.

The next problem is one whose salience has increased in recent years. It is inhumane and nearly always unnecessary to routinely restrain prisoners in labor (which includes delivery).¹⁸⁰ Restraint—whether by handcuffs, shackles, or other device—decreases a laboring prisoner's ability to move during contractions to alleviate pain, and can obstruct labor progress. Restraints can also seriously injure the mother,¹⁸¹ and if complications arise during delivery, can delay response such as an emergency C-section, at a time when even a brief period of delay can cause irreversible brain damage to the baby. The caselaw indicates that restraints during labor generally violate the Constitution,¹⁸² and several jurisdictions have come to the broader realization that restraints during labor are needed only in exceedingly unusual circumstances.¹⁸³

¹⁸⁰ For a survey and other information about this practice, see AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND THE SHACKLING OF PREGNANT WOMEN (2001 and updated 2005), available at <http://www.amnestyusa.org/violence-against-women/abuse-of-women-in-custody/page.do?id=1108288>.

¹⁸¹ See *Nelson v. Correctional Medical Services*, 583 F.3d 522, 526 (8th Cir. 2009) (en banc):

Nelson . . . produced evidence that the shackling caused her extreme mental anguish and pain, permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair. She has also alleged damage to her sciatic nerve. According to Nelson's orthopedist, the shackling injured and deformed her hips, preventing them from going "back into the place where they need to be." In the opinion of her neurosurgeon the injury to her hips may cause lifelong pain, and he therefore prescribed powerful pain medication for her. Nelson testified that as a result of her injuries she cannot engage in "ordinary activities" such as playing with her children or participating in athletics. She is unable to sleep or bear weight on her left side or to sit or stand for extended periods. Nelson has also been advised not to have any more children because of her injuries.

¹⁸² See *id.* (holding that the constitutional right to be free of restraints during labor in the absence of a pressing security need is clearly established); *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 877 F. Supp. 634, 668-69 (D.D.C. 1994), modified in part on other grounds, 899 F. Supp. 659 (D.D.C. 1995).

¹⁸³ For a state-by-state breakdown in 2005, see Amnesty International, Key Findings: Use of Restraints on Pregnant Women in Custody, at <http://www.amnestyusa.org/violence-against-women/abuse-of-women-in-custody/key-findings-use-of-restraints-on-pregnant-women-in-custody/page.do?id=1108300>. The Federal Bureau of Prisons and several states have recently limited the use of restraints on laboring prisoners. See Federal Bureau of Prisons, Program Statement 5538.05, Escorted Trips, at 10 (Oct. 6, 2008) ("An inmate who is in labor, delivering her baby, or is in post-delivery recuperation, or who is being transported or housed in an outside medical facility for the purpose of treating labor symptoms, delivering her baby, or post-delivery recuperation, should not be placed in

ABA Treatment of Prisoners Standards

Standard 23-6.10 Impairment-related aids

Subdivision (c): Courts have held unconstitutional policies that make it impossible for prisoners to choose to have an abortion. See, e.g., *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987). The subdivision does not delineate the scope of the reproductive right to abortion—but whatever that scope, it should be respected for prisoners as for non-prisoners.

Subdivision (d): This subdivision reflects international law. See, e.g., U.N. Standard Minimum Rules, art. 23(1). Children should not be stigmatized because of the criminal offense of their mother. Birth certificates for children born in a prison or jail can state a city and even a street address, but should not state that the child was born in a correctional facility. (It may be necessary to amend the birth certificate rules in some places to enable compliance with this subdivision, or perhaps prison infirmaries can be listed as the place of birth without use of any language that connotes imprisonment).

Subdivision (e): Most prisons and jails separate prisoners and their newborns immediately upon birth, which can harm both the mother and the child. Nurseries of the kind contemplated by subdivision (a) are nonetheless used in a number of prisons and jails and contemplated by subdivision (e) have proved beneficial for prisoners and children.¹⁸⁴

Subdivision (f): Under the Adoption and Safe Families Act, § 103(a)(3), 42 U.S.C. § 675(5)(E), after a child has been in foster care for 15 of the last 22 months, the state must (subject to limited exceptions) petition for the termination of parental rights. This rule applies even if the parent's inability to care for the child has a certain end-point only a short time later. Thus a prisoner's placement of a child into foster care can trigger a life-changing consequence the mother should understand as she chooses childcare arrangements.

Standard 23-6.10 Impairment-related aids

Prisoners whose health or institutional adjustment would otherwise be adversely affected should be provided with medical prosthetic devices or other impairment-related aids, such as eyeglasses, hearing aids, or wheelchairs, except when there has been an individualized finding that such an aid would be inconsistent with security or safety. When the use of a specific aid believed reasonably necessary by a qualified medical professional is deemed inappropriate for security or safety reasons, correctional authorities should consider alternatives to meet the health needs of the prisoner.

restraints unless there are reasonable grounds to believe the inmate presents an immediate, serious threat of hurting herself, staff or others, or there are reasonable grounds to believe the inmate presents an immediate and credible risk of escape that cannot be reasonably contained through other methods. If an inmate who is in labor or is delivering her baby is restrained, the restraints used must be the least restrictive restraints necessary to still ensure safety and security.”), available at http://www.bop.gov/policy/progstat/5538_005.pdf; See also N.Y.CORRECT.LAW § 611 (McKinney 2009) (substantially restricting use of restraints on prisoners during labor and delivery).

¹⁸⁴ Women's Prison Association, *Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives* (May 2009), available at <http://www.wpaonline.org/pdf/Mothers%20Infants%20and%20Imprisonment%202009.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-6.11 Services for prisoners with mental disabilities

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.2(d) (conditions for special types of prisoners, prisoners with physical disabilities), 23-6.1 (general principles governing health care), 23-7.2 (treatment of prisoners with disabilities and other special needs)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-4C-35 (prostheses and orthodontic devices)

ACA, PRISON STANDARDS, 4-4375 (prostheses and orthodontic devices)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.F.A.4 (provision of ophthalmic eyewear)

NCCHC, HEALTH SERVICES STANDARDS, G-10 (Aids to Impairment)

Commentary

For some prisoners, devices such as hearing aids, eyeglasses, prosthetic limbs, or wheelchairs can make an enormous difference in daily life. With the needed device, the prisoner can function adequately in an incarcerated environment; without it, the prisoner may be unable to get to meals, participate in programs, read or write, or communicate with staff or other prisoners. Sometimes, devices are truly necessary for health, safety, due process, free speech, and other constitutional guarantees. In those circumstances, the case law holds, provision of the device is prison officials' constitutional obligation.¹⁸⁵ This Standard, however, requires more. Even where assistive devices like glasses, hearing aids, wheelchairs, and prosthetics, are not, strictly speaking, necessary—perhaps because a prisoner could hop to get around, or because his sight is only bad in one eye—prisons and jails should routinely provide them in order to facilitate safe integration of prisoners with disabilities,¹⁸⁶ promote effective communication with prisoners with sight and hearing impairments,¹⁸⁷ and generally facilitate institutional adjustment, which is a prerequisite to the success of the programming specified in other Standards such as 23-8.2.

Standard 23-6.11 Services for prisoners with mental disabilities

(a) A correctional facility should provide appropriate and individualized mental health care treatment and habilitation services to prisoners with mental illness, mental retardation, or other cognitive impairments.

(b) Correctional officials should implement a protocol for identifying and managing prisoners whose behavior is indicative of mental illness, mental retardation, or other cognitive impairments. In addition to implementing the mental health screening

¹⁸⁵ See, e.g., *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1031 (D. Kan. 1999) (refusing to provide a wheelchair to an amputee was not unconstitutional in itself, but “the ability of the plaintiff to move himself about the jail in an appropriate manner—to use the toilet, to use the shower, to obtain his meals, and to obtain suitable recreation and exercise—was a basic need—part of the ‘minimal civilized measure of life’s necessities’—that the defendants were obligated to help provide under the Eighth Amendment”; in that context, forcing the prisoner to get around on knee pads stated a constitutional claim).

¹⁸⁶ See commentary to Standard 23-3.2(d) for a discussion of the Americans with Disabilities Act integration requirement. Note that under the ADA, *employers* are not required to provide employees aids such as eye glasses, hearing aids, or prosthetic devices; these types of items are deemed personal rather than job-related. See 29 C.F.R. Pt. 1630 App. 1630.9. The ADA may, however, require provision of these kinds of aids in a prison, where governmental obligations are not limited to the job-related.

¹⁸⁷ See commentary to Standard 23-7.2(e) for a discussion of the ADA effective communication requirement.

required in Standard 23-2.1 and mental health assessment required in Standard 23-2.5, this protocol should require that the signs and symptoms of mental illness or other cognitive impairments be documented and that a prisoner with such signs and symptoms be promptly referred to a qualified mental health professional for evaluation and treatment.

(c) A correctional facility should provide prisoners diagnosed with mental illness, mental retardation, or other cognitive impairments appropriate housing assignments and programming opportunities in accordance with their diagnoses, vulnerabilities, functional impairments, and treatment or habilitation plans. A correctional agency should develop a range of housing options for such prisoners, including high security housing; residential housing with various privilege levels dependent upon treatment and security assessments; and transition housing to facilitate placement in general population or release from custody.

(d) When appropriate for purposes of evaluation or treatment, correctional authorities should be permitted to separate from the general population prisoners diagnosed with mental illness, mental retardation, or other cognitive impairments who have difficulty conforming to the expectations of behavior for general population prisoners. However, prisoners diagnosed with serious mental illness should not be housed in settings that may exacerbate their mental illness or suicide risk, particularly in settings involving sensory deprivation or isolation.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.1 (intake screening), 23-2.5 (health care assessment), 23-2.8 (segregated housing and mental health), 23-5.4 (self-harm and suicide prevention), 23-6.5 (continuity of care)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standards 23-5.1(a) (care to be provided), 23-5.3(b) (medical examinations)

ABA, MENTAL HEALTH STANDARDS, Part X (Mentally Ill and Mentally Retarded Prisoners) [Note: Mental Health Standard 7-10.2 and Standards 7-10.5 through 7-10.9 are supplanted by Treatment of Prisoners Standard 23-6.15.]

ACA, JAIL STANDARDS, 4-ALDF-4C-27 (mental health program)

ACA, PRISON STANDARDS, 4-4368 (mental health program), 4-4371 (mental health appraisal), 4-4374 (mental illness and developmental disability)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, §§ 33 (diagnosis and treatment), 35 (emergency housing and supervision), 39 (acute, chronic, and convalescent care), 40 (management of severely psychologically disturbed inmates), 45 (inmates with developmental disabilities)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, III.A.1 to .5, .7 (receiving medical and mental health screening), V.A (continuum of mental health care), V.B.D (therapeutic services)

NCCHC, HEALTH SERVICES STANDARDS E-02 (Receiving Screening), E-05 (Mental Health Screening and Evaluation), E-07 (Nonemergency Health Care Requests and Services), G-02 (Patients With Special Health Needs), G-04 (Basic Mental Health Services), G-05 (Suicide Prevention Program)

U.N. Standard Minimum Rules, art. 82 (insane and mentally abnormal prisoners)

Commentary

In recent years, as the scarcity of free mental health services has led to homelessness and deviant behavior, jails and prisons have routinely incarcerated hundreds of thousands of people with serious mental illness.¹⁸⁸ Many people with mental illness cycle in and out of jails, arrested repeatedly for low-level nuisance violations or for more serious violations related to their cognitive impairments. According to the Department of Justice's most recent report:

More than two-fifths of State prisoners (43%) and more than half of jail inmates (54%) reported symptoms that met the criteria for mania. About 23% of State prisoners and 30% of jail inmates reported symptoms of major depression. An estimated 15% of State prisoners and 24% of jail inmates reported symptoms that met the criteria for a psychotic disorder.¹⁸⁹

As the commentary to Standard 23-2.1 discusses, it is advisable for jail authorities to work with mental health service providers and others to see if incoming prisoners with mental illness may be eligible for some alternative to incarceration. While a person with mental illness remains a prisoner, however, mental health care is constitutionally required, as are systems to meet the predictable needs for such care.¹⁹⁰ Appropriate mental health care can also ameliorate the significant management challenges posed by prisoners with mental illness, who frequently “act out” in ways that provoke disciplinary responses, tend to be targeted by other prisoners,¹⁹¹ and have high rates of suicide attempts.¹⁹²

Prisoners with other intellectual disabilities, such as mental retardation and brain injury, are also far more prevalent in jails and prisons than in the general population and pose similar management problems. To quote one article, “In sum, the offender with MR does more time, does harder time, gets less out of his time, and is more likely to be returned once released from prison than persons who are not disabled.”¹⁹³ Habilitation (defined as treatment or training to help a person develop maximum independence in

¹⁸⁸ On the shift from mental health institutions to prisons, see, e.g., Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX L. REV. 1751 (2006).

¹⁸⁹ Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates* (Bureau of Justice Statistics, Sept. 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>.

¹⁹⁰ See, e.g., *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004); *Young v. City of Augusta, Ga.*, 59 F.3d 1160 (11th Cir. 1995); *Coleman v. Wilson*, 912 F. Supp. 1282, 1305-06 (E.D. Cal. 1995).

¹⁹¹ See James & Glaze, *supra* note 189, at 10 Table 16.

¹⁹² See, e.g., J. Richard Goss *et al.*, *Characteristics of Suicide Attempts in a Large Urban Jail System With an Established Suicide Prevention Program*, 53 PSYCHIATRIC SERVICES 574 (2002) (77% of prisoners who attempted suicide during study period had chronic psychiatric problems, compared to 15% of total jail population with such problems).

¹⁹³ Joan Petersilia, *Justice for All? Offenders with Mental Retardation and the California Corrections System*, 77 PRISON J. 358, 362 (1997). Petersilia explains:

The responses of MR inmates to such threatening situations are more likely to be physical than verbal or intellectual. The result is that MR inmates are more prone to getting into fights and becoming correctional management problems, both because of their outbursts and their high profile for victimization by others. The offender with MR takes up an inordinate amount of staff time, and many are eventually reclassified to a higher (and more expensive) security level and moved to maximum-security cells. Their poor institutional behavior and “overclassification” also means that they fail to earn good-time or work-time credits, are unable to participate in institutional or early release programs, and in states with parole, fail to become eligible for parole because they have not finished the programs or procedures required for parole consideration.

ABA Treatment of Prisoners Standards

Standard 23-6.12 Prisoners with chronic or communicable diseases

activities of daily living) is necessary for many of these prisoners to live safely in a correctional facility, and is, like mental health treatment, helpful for prison and jail management. Moreover, habilitation or other accommodation will frequently be required for the program accessibility mandated by the ADA.¹⁹⁴

Subdivisions (a) & (b): Staff should use the systems discussed in subdivision (b) to document symptoms of mental illness and other cognitive impairments and refer prisoners for evaluation; those prisoners who mental health professionals identify as having such an impairment are then covered by subdivision (a).

Subdivisions (c) & (d): Subdivisions (c) and (d) require that for these prisoners, as for non-impaired prisoners, a range of housing options should be developed. A facility should not provide only high security, low-privilege housing for prisoners with intellectual disabilities. If a prisoner needs no more than minimum or medium custody, such housing should be available, as should placement in a half-way house. Similarly (and required under Standard 23-7.2(a)) prisoners with mental disabilities should not be excluded from participation in substance abuse programs, pretrial supervision programs, and early release programs. Moreover, under Standard 23-3.2(d), housing for prisoners with disabilities should be in the most integrated setting appropriate. But even if separate housing for some prisoners with cognitive disabilities is, in a particular circumstance, appropriate (given their vulnerabilities, functional impairments, and treatment or habilitation plans), subdivision (c) requires that such housing also allow a range of privilege levels.

Finally, as already discussed in the Part II General Commentary, and the commentary to Standards 23-2.8(a), subdivision (d) works with Standard 23-2.8(a) to forbid placement of prisoners diagnosed with serious mental illness in an anti-therapeutic environment such as segregated housing. The inevitable isolation of segregated housing is simply inhumane for such prisoners.¹⁹⁵

Standard 23-6.12 Prisoners with chronic or communicable diseases

(a) Correctional officials should provide for the voluntary medically appropriate testing of all prisoners for widespread chronic and serious communicable diseases and for appropriate treatment, without restricting the availability of treatment based on criteria not directly related to the prisoner's health.

(b) Correctional authorities should not discriminate against a prisoner in housing, programs, or other activities or services because the prisoner has a chronic or communicable disease, including HIV or AIDS, unless the best available objective evidence indicates that participation of the prisoner poses a direct threat to the health or safety of others. When medically necessary, correctional authorities should be permitted to place a prisoner with a readily transmissible contagious disease in appropriate medical isolation or to restrict such a prisoner in other ways to prevent contagion of others.

¹⁹⁴ 28 C.F.R. §§ 35.149-35.150.

¹⁹⁵ See *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001) (explaining that isolated confinement under "supermax" conditions is known to cause serious psychiatric illness, even among previously healthy prisoners); cf. *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (holding isolated confinement, combined with squalor and other substandard prison conditions in Death Row unit, was toxic to prisoners' mental health).

ABA Treatment of Prisoners Standards

Standard 23-6.12 Prisoners with chronic or communicable diseases

(c) Any accommodation made to address the special needs or risks of a prisoner with a communicable disease should not unnecessarily reveal that prisoner's health condition.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.1 (intake screening), 23-2.7(a)(iii) (rationales for long-term segregated housing), 23-6.1 to 6.2 (health care), 23-6.3 (control and distribution of prescription drugs), 23-6.8 (health care records and confidentiality), 23-6.14 (voluntary and informed consent to treatment), 23-7.2 (treatment of prisoners with disabilities and other special needs)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.3(a) (medical examinations)

ACA, JAIL STANDARDS, 4-ALDF-4C-19 (chronic care)

ACA, PRISON STANDARDS, 4-4354 through 4-4357 (communicable disease and infection control), 4-4359 (chronic care)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.B.D.2 (special housing and confidentiality), III.A.8 (medical classification), IV (chronic care), VI.A (communicable diseases)

NCCHC, HEALTH SERVICES STANDARDS, A-08 (Communication on Patients' Health Needs), B-01 (Infection Control Program), E-02 (Receiving Screening), E-04 (Initial Health Assessment), G-01 (Chronic Disease Services), H-02 (Confidentiality of Health Records)

Commentary

Both chronic and communicable diseases are disproportionately prevalent in correctional facilities, including, for example, hypertension, asthma, hepatitis C and A, HIV, tuberculosis, and methicillin-resistant staphylococcus aureus (MRSA). The crucial chronic care challenges are providing appropriate access and treatment, and continuity of care. Communicable diseases present public health threats, and have also been the subject of undue fear and resulting discrimination. The general requirement of appropriate treatment is covered by the other Standards dealing with health care: Standards 23-6.1 to 23-6.6. This Standard addresses some more particular issues.

Subdivision (a): This subdivision encourages voluntary testing for widespread chronic and serious communicable diseases. Involuntary testing is forbidden under Standard 23-6.14, except under the narrow circumstances specified in 23-6.13(c). In addition, this subdivision requires treatment of prisoners based on health considerations only; for example, it is not acceptable practice to deny a prisoner medically indicated treatment because of the length (or shortness) of the term of incarceration.¹⁹⁶

Subdivision (b): This subdivision deals with non-medical management issues. It is based on the fact that prisoners with the diseases listed have disabilities, under the ADA, and are therefore entitled to the ADA's protection against discrimination and failures to accommodate. This requirement is stated more generally in Standard 23-7.2.¹⁹⁷ The "direct threat" language in the text of this subdivision, from the

¹⁹⁶ See, e.g., *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (finding that allegations that treatment for Hepatitis C was denied because plaintiff might be released within a year stated a claim).

¹⁹⁷ For a discussion of the ADA's coverage of people with HIV, relevant more generally to people with chronic illnesses, see *Bragdon v. Abbott*, 524 U.S. 624 (1998). On program access in prison, see, e.g., *Harris v. Thigpen*,

ABA Treatment of Prisoners Standards

Standard 23-6.13 Prisoners with gender identity disorder

ADA, does not license overreaction to minimal threats, and requires an effort to accommodate any medical risk prior to using it as justification for exclusion of a prisoner.¹⁹⁸ The issue of medical isolation is referenced in Standard 23-2.7(a)(iii), and discussed in the commentary to that subdivision.

Subdivision (c): This subdivision is a particular application of the general rule of health care confidentiality in Standard 23-6.8(b). It applies to both chronic and communicable diseases.

Standard 23-6.13 Prisoners with gender identity disorder

A prisoner diagnosed with gender identity disorder should be offered appropriate treatment. At a minimum, a prisoner who has begun or completed the medical process of gender reassignment prior to admission to a correctional facility should be offered treatment necessary to maintain the prisoner at the stage of transition reached at the time of admission, unless a qualified health care professional determines that such treatment is medically inadvisable for the prisoner.

Cross-references

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.4(d) (special classification issues, transgender prisoners), 23-5.3(a) (sexual abuse, gender identity), 23-6.1 (general principles governing health care), 23-6.4 (qualified health care staff), 23-6.5 (continuity of care), 23-7.9(e) (searches of prisoners' bodies, transgender prisoners)

Related Standards

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VII.E (transgendered persons)

NCCHC, Position Statement, Transgender Health Care in Correctional Settings, available at <http://www.ncchc.org/resources/statements/transgender.html>

World Professional Association for Transgender Health, Standards of Care for Gender Identity Disorders, available at http://www.wpath.org/publications_standards.cfm

941 F.2d 1495 (11th Cir. 1991) (holding that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, forbids categorical exclusion of HIV-positive prisoners from prison privileges and programs); *Moore v. Mabus*, 976 F.2d 268, 271-272 (5th Cir. 1992) (adopting analysis of *Harris*).

¹⁹⁸ Title II of the ADA, 42 U.S.C. §§ 12131-12134; 28 C.F.R. part 35, which covers public entities such as correctional facilities, does not contain a textual “direct threat” exception—but the concept has been borrowed from the ADA’s employment and public accommodations provisions, 42 U.S.C. §§ 12113(b), 12182(b)(3). See DEPARTMENT OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL, available at <http://www.ada.gov/taman2.html>:

What is a “direct threat”? A “direct threat” is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity’s modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services. The public entity’s determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.

How does one determine whether a direct threat exists? The determination must be based on an individualized assessment that relies on current medical evidence, or on the best available objective evidence, to assess—

- 1) The nature, duration, and severity of the risk;
- 2) The probability that the potential injury will actually occur; and,
- 3) Whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.

Commentary

Gender identity disorder, also known as transsexualism, is characterized by strong and persistent cross-gender identification that causes clinically significant distress or impairment. It is a rare but serious medical condition and is recognized by the American Psychiatric Association and included in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) as well as in the World Health Organization's *International Classification of Diseases* (ICD-10). Untreated, gender identity disorder causes serious mental suffering and poses a risk of serious self-harm including genital self-mutilation and suicide. Treatment may include psychotherapy, hormonal therapy, and/or surgery. In prison as in the community, appropriate medical and mental health treatment of the condition is essential, and should be available in prison and jail according to community standards, which are described in the *Standards of Care for Gender Identity Disorders* promulgated by the World Professional Association for Transgender Health and cited above as a related standard.

Many people, both in and out of corrections, belittle gender identity disorder's seriousness. Accordingly, this Standard begins by emphasizing the need for treatment, a word that encompasses both medical and mental health care. All too many prisons and jails have categorically denied medical and mental health treatment for transgender prisoners notwithstanding that such denial is prohibited by the Eighth Amendment.¹⁹⁹ Courts have recognized repeatedly that gender identity disorder is a serious medical condition,²⁰⁰ such that "deliberately indifferent" care is unconstitutional.²⁰¹

Some jurisdictions, rather than categorically denying appropriate care to transgender prisoners, have adopted policies that limit the treatment provided to whatever care regime the prisoner was able to secure prior to incarceration.²⁰² When this approach is made categorically, without consideration of individual circumstances, it has been held unconstitutional. See, e.g., *Allard v. Gomez*, 9 Fed. App'x 793, 2001 WL 638413 (9th Cir. 2001). This Standard takes the stronger position that even if rare exceptions are made, a "freeze-frame" presumption artificially limits care, both for prisoners whose disorder was untreated or inappropriately treated prior to incarceration, or those whose disorder manifested only after incarceration. Under the Standard's first sentence, *every* prisoner diagnosed with gender identity disorder, whenever the diagnosis occurs and regardless of whether the prisoner was treated prior to incarceration, should be offered appropriate medical and mental health care.

At the same time, for a prisoner with gender identity disorder who *did* receive treatment prior to incarceration, the Standard's requirement that "at a minimum . . . the prisoner be offered treatment necessary to maintain the prisoner at the stage of transition reached at the time of admission" forbids prisons and jails to discontinue or reverse pre-incarceration treatment, which the prisoner chose at a time the prisoner had greater medical autonomy. (Of course, correctional authorities need not continue

¹⁹⁹ See, e.g., Inmate Sex Change Prevention Act, Wis. Stat. § 302.386(5m) (2007); *De'Lonta v. Angelone*, 330 F.3d 630, 632 (4th Cir. 2003) (prisoner's hormone therapy terminated due to prison policy against "medical [and] surgical interventions related to gender or sex change").

²⁰⁰ See, e.g., *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir.1987); *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997); *Brown v. Zavaras*, 63 F.3d 967, 969 (10th Cir. 1995); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 184 (D. Mass. 2002).

²⁰¹ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that the Eighth Amendment prohibits "deliberate indifference to serious medical needs").

²⁰² Federal Bureau of Prisons Program Statement 6031.01(30), Patient Care (Jan. 15, 2005), *available at* http://www.bop.gov/policy/progstat/6031_001.pdf.

dangerous pre-incarceration treatment; if a qualified medical professional finds that the pre-incarceration treatment is medically inadvisable, that can justify its safe cessation.) The Standard's use of the phrase "at a minimum" should not be read to connote that mere maintenance is always, or even usually, constitutionally acceptable—as already explained, a "freeze-frame" policy can fail to provide adequate care to transgender prisoners for a variety of reasons. Rather, the "at a minimum" language is intended to emphasize that while more may often be required, for prisoners already diagnosed and receiving treatment, continuation of at least that treatment is presumptively appropriate. (The requirement is similar, but more stringent, than Standard 23-6.5's general presumption in favor of maintenance of medication and other treatment on admission to a correctional facility.)

Finally, the Standard's reference to a "qualified health professional" and to "appropriate treatment" means more than simply a licensed physician and the care that physician prescribes. Few physicians are qualified to provide care and treatment for transgender prisoners. If treatment providers at a correctional facility lack expertise in the area—and most of them will—they should consult with one or more specialists with experience and developed expertise.²⁰³

Standard 23-6.14 Voluntary and informed consent to treatment

(a) Correctional officials should implement a policy to require voluntary and informed consent prior to a prisoner's health care examination, testing, or treatment, except as provided in this Standard. A prisoner who lacks the capacity to make decisions consenting or withholding consent to care should have a surrogate decision-maker designated according to applicable law, although that decision-maker's consent should not substitute for the protections specified in Standard 23-6.15. A competent prisoner who refuses food should not be force-fed except pursuant to a court order.

(b) Prisoners should be informed of the health care options available to them. If a prisoner refuses health care examination, testing, or treatment, a qualified health care professional should discuss the matter with the prisoner and document in the prisoner's health care record both the discussion and the refusal; the health care professional should attempt to obtain the prisoner's signature attesting to the refusal. Any claim that a prisoner is refusing treatment for a serious medical or mental health condition should be investigated by a qualified health care professional to ensure that the refusal is informed and voluntary, and not the result of miscommunication or misunderstanding. If a prisoner refuses care in such a situation, health care staff should take steps to involve other trusted individuals, such as clergy or the prisoner's family members, to communicate to the prisoner the importance of the decision.

(c) A prisoner who refuses testing or treatment for a serious communicable disease should be housed in a medically appropriate setting until a qualified health care professional can ascertain whether the prisoner is contagious. Involuntary testing or treatment should be permitted only if:

- (i) there is a significant risk of the spread of disease;**
- (ii) no less intrusive alternative is available; and**
- (iii) involuntary testing or treatment would accord with applicable law for a non-prisoner.**

²⁰³ See Settlement Agreement, *De'Lonta v. Angelone*, 7:99-CV-00642 (W.D. Va. June 1, 2004), available at <http://www.clearinghouse.net/chDocs/public/PC-VA-0006-0001.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-6.14 Voluntary and informed consent to treatment

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.7 (restrictions relating to programming and privileges), 23-6.1(a)(iii) (general principles governing health care, community standards), 23-6.12 (prisoners with chronic or communicable diseases), 23-6.15 (involuntary mental health treatment and transfer), 23-7.2(e) & (f) (treatment of prisoners with disabilities and other special needs, effective communication), 23-7.11 (prisoners as subjects of behavioral or biomedical research)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.5 (refusal of medical treatment)

ACA, JAIL STANDARDS, 4-ALDF-4D-15 (informed consent)

ACA, PRISON STANDARDS, 4-4397 (informed consent)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, §§ 21, 37 (informed consent)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.B.C (consent and refusal), VI.L (end-of-life decision-making)

NCCHC, HEALTH SERVICES STANDARDS, I-04 (End-of-Life Decision Making), I-05 (Informed Consent and Right to Refuse)

Commentary

Subdivision (a): A patient's right to refuse health care examination, testing, and treatment is paramount to medical ethics, in prison as elsewhere. If a prisoner lacks the capacity to grant or withhold consent, because of injury or mental disability or for some other reason, this subdivision requires the appointment of a surrogate decision-maker, who can then grant or withhold consent on the prisoner's behalf. However, the subdivision forecloses the use of surrogate decision-makers to avoid the protections surrounding involuntary mental health treatment under Standard 23-6.15; the surrogate's authority does not extend to acceding to proposed mental health treatment that the prisoner him- or herself opposes, even if the prisoner has diminished capacity. For involuntary mental health treatment to proceed requires compliance with the procedures in Standard 23-6.15.

The issues raised by emergencies in which a patient is unable to consent because of incapacity or time pressure are the same in prisons and jails as elsewhere; the subdivision does not discuss this topic because the community standards relating to consent during such an emergency should apply.²⁰⁴ See Standard 23-6.1(a)(iii), on the general applicability of community health care standards.

It is important to note what is *not* in the subdivision: an exception from the requirement of consent for life-saving treatment. Medical ethicists are clear that patients have a right to refuse even life-saving

²⁰⁴ See, e.g., NATIONAL ASSOCIATION OF EMERGENCY MEDICAL SERVICES PHYSICIANS ETHICS COMMITTEE, ETHICAL CHALLENGES IN EMERGENCY MEDICAL SERVICES (1982), available at <http://www.naemsp.org/documents/EthicalChallengesinEmergencyMedicalServices.pdf> (discussing community standards for providing medical treatment without consent in emergency situations).

ABA Treatment of Prisoners Standards

Standard 23-6.14 Voluntary and informed consent to treatment

measures, if that is truly their choice²⁰⁵; subdivision (b) sets out methods to ensure that the choice is informed and genuine. Some, though not all, of the case law about prisoners concurs.²⁰⁶ However, subdivision (a) creates a special rule for force-feeding, allowing such feeding pursuant to a court order. Although the Standard does not textually distinguish between them, two contexts seem most relevant—when a prisoner refuses food as a component in an end-of-life refusal of medical treatment, and when a prisoner goes on a hunger strike to convey a message. As to the first, it seems appropriate to protect such a refusal as a component of patient autonomy.²⁰⁷ The second context is more controversial. On the one hand, force-feeding is a very intrusive step, causing pain, posing a risk of injury, and undermining basic self-determination. On the other hand, outside of the right to consent or withhold consent to health care treatment, self-determination does not loom large in jail and prison, and allowing a prisoner to die from hunger is likely to promote unrest in the facility. Many bio-ethicists (and human rights advocates²⁰⁸) feel that force-feeding is unconsented treatment and is never appropriate. Prison officials, by contrast, tend to be of the view that force-feeding is little different from the other deprivations of liberty that suffuse a term of incarceration.²⁰⁹ The case law largely supports the latter view, although with some exceptions;²¹⁰

²⁰⁵ See, e.g., PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 3 (1983) ("Health care professionals serve patients best by maintaining a presumption in favor of sustaining life, while recognizing that competent patients are entitled to choose to forego any treatments, including those that sustain life."); see also *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (discussing right to die jurisprudence in case about how to assess an incompetent patient's wishes).

²⁰⁶ Compare, e.g., *Thor v. Superior Court*, 855 P.2d 375 (Cal. 1993) (prisoner had the right to refuse medication and nutrition by feeding tube), with *Mass. Comm'r of Corr. v. Myers*, 399 N.E.2d 452 (Mass. 1979) (prisoner lacked the right to refuse dialysis).

²⁰⁷ See *Thor*, 855 P.2d 375.

²⁰⁸ See, e.g., WORLD MEDICAL ASSOCIATION. DECLARATION ON HUNGER STRIKERS 21 (Declaration of Malta) (1991, revised 1992 and 2006), available at <http://www.wma.net/en/30publications/10policies/h31/index.html> ("Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting."); Letter from Jamil Dakwar, Director, ACLU Human Rights Program, to U.S. Defense Secretary Robert M. Gates (Jan. 9, 2009), available at <http://www.aclu.org/human-rights/aclu-calls-end-inhumane-force-feeding-guantanamo-prisoners> ("Force-feeding is universally considered to be a form of cruel, inhuman and degrading treatment.").

²⁰⁹ For a thorough discussion of the issues, see Mara Silver, *Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN. L. REV. 631 (Nov. 2005).

²¹⁰ See, e.g., *Freeman v. Berge*, 441 F.3d 543, 546 (7th Cir. 2006), in which the court (in dicta) summarizes its view of the case law governing "two situations" in which prisoners refuse food:

In the first, the prisoner is insane, and his insanity causes him to refuse food; the prison is constitutionally obligated to treat his mental illness, if necessary by force-feeding him. In the second situation, the prisoner is perfectly sane, but he either wants to commit suicide (and there are rational suicides) or he is prepared to risk death from a hunger strike to make a political point. Free people who are sane have a liberty interest in refusing life-saving medical treatment and likewise in refusing to eat, a method by which some elderly people commit suicide. But either prisoners don't have such an interest, or it is easily overridden. The reasons are practical. (No longer does one hear that prisoners must not be allowed to evade punishment by killing themselves and thus "cheating the gallows.") If prisoners were allowed to kill themselves, prisons would find it even more difficult than they do to maintain discipline, because of the effect of a suicide in agitating the other prisoners. Prison officials who let prisoners starve themselves to death would also expose themselves to lawsuits by the prisoners' estates. Reckless indifference to the risk of a prisoner's committing suicide is a standard basis for a federal civil rights suit. So at some point in Freeman's meal-

ABA Treatment of Prisoners Standards

Standard 23-6.15 Involuntary mental health treatment and transfer

Subdivision (a) requires a court order as a compromise that matches the practice in some jurisdictions;²¹¹ this marks the seriousness of the decision to forcibly feed a prisoner, but leaves to the court in question the balancing of autonomy and order, and avoids the difficult question of how to distinguish in the abstract from end-of-life health care decision-making and other types of hunger strikes.

Subdivision (b): One problem in correctional facilities arises when a prisoner refuses advisable treatment. Another problem occurs when the patient's refusal turns out, on investigation, to be a result of misunderstanding or poor communication, either by the staff person offering the treatment or by the prisoner. This subdivision aims to protect against such occurrences. The relevant NCCHC standard has more detail that serves the same goal, requiring documentation of any refusals and of the fact that the prisoner has been made aware of any adverse consequences to health that may occur as a result of the refusal. The NCCHC standard also requires a witness, which is a very useful precaution. See NCCHC, HEALTH SERVICES STANDARDS, I-05.

Subdivision (c): This subdivision deals with the response when a prisoner refuses to be tested or treated for a serious communicable disease. For most but not all diseases the medically appropriate setting even for a potentially contagious prisoner is general population, perhaps with certain accommodations such as a single cell. See commentary to Standard 23-2.7(a)(iii). The narrow exception for involuntary testing in the event of a "significant risk of the spread of disease" should incorporate both the risk of contagion and the gravity of the disease that might be spread. Thus an involuntary blood test for HIV would not ordinarily be appropriate, but might well be reasonable after an exposure incident involving a non-consenting prisoner's blood.

In addition to the individual response identified in the several provisions, a systemic response may be necessary; frequent prisoner refusal of risk-free tests such as for tuberculosis can indicate a critical health care system problem—for example, widespread prisoner distrust of health providers. If such a problem becomes evident at a correctional facility, senior staff need to develop and implement a solution. See Standard 23-6.7 (quality improvement).

Standard 23-6.15 Involuntary mental health treatment and transfer

(a) Involuntary mental health treatment of a prisoner should be permitted only if the prisoner is suffering from a serious mental illness, non-treatment poses a significant risk of serious harm to the prisoner or others, and no less intrusive alternative is reasonably available.

(b) Prior to long-term involuntary transfer of a prisoner with a serious mental illness to a dedicated mental health facility, the prisoner should be afforded, at a minimum, the following procedural protections:

skipping the prison doctors would have had a duty and certainly a right to step in and force him to take nourishment.

Citations omitted. *But see, e.g., Thor v. Superior Court*, 855 P.2d 375 (Cal. 1993) (allowing prisoner to refuse medication and gastric tube feeding); *In re Warren G. Lilly, Jr.*, Case No. 07CV392 (Wis. Cir., May 19, 2009) (discontinuing force-feeding of hunger-striking prisoner).

²¹¹ For court orders authorizing force-feeding, see, e.g., *Von Holden v. Chapman*, 450 N.Y.S.2d 623 (N.Y. App. Div. 1982); *In re Caulk*, 480 A.2d 93 (N.H. 1984). But in the federal prison system, for example, the policy for force-feeding hunger-striking prisoners does not require a court order, except if a nasogastric tube cannot be used and feeding is done instead through the stomach. See FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT 5562.05, HUNGER STRIKES 7 (Jul. 29, 2005), available at http://www.bop.gov/policy/progstat/5562_005.pdf.

- (i) at least [3 days] in advance of the hearing, written, and effective notice of the fact that involuntary transfer is being proposed, the basis for the transfer, and the prisoner's rights under this Standard;
- (ii) decision-making by a judicial or administrative hearing officer independent of the correctional agency, or by an independent committee that does not include any health care professional responsible for treating or referring the prisoner for transfer or any other correctional staff but does include at least one qualified mental health professional;
- (iii) a hearing at which the prisoner may be heard in person and, absent an individualized determination of good cause, present testimony of available witnesses, including the prisoner's treating mental health professional, and documentary and physical evidence;
- (iv) absent an individualized determination of good cause, opportunity for the prisoner to confront and cross-examine witnesses or, if good cause to limit such confrontation is found, to propound questions to be relayed to the witnesses;
- (v) an interpreter, if necessary for the prisoner to understand or participate in the proceedings;
- (vi) counsel, or some other advocate with appropriate mental health care training;
- (vii) a written statement setting forth in detail the evidence relied on and the reasons for a decision to transfer;
- (viii) an opportunity for the prisoner to appeal to a mental health care review panel or to a judicial officer; and
- (ix) a de novo hearing held every [6 months], with the same procedural protections as here provided, to decide if involuntary placement in the mental health facility remains necessary.

(c) In an emergency situation requiring the immediate involuntary transfer of a prisoner with serious mental illness to a dedicated mental health facility because of a serious and imminent risk to the safety of the prisoner or others, the chief executive of a correctional facility should be authorized to order such a transfer, but the procedural protections set out in subdivision (b) of this Standard should be provided within [7 days] after the transfer.

(d) Prior to involuntary mental health treatment of a prisoner with a serious mental illness, the prisoner should be afforded, at a minimum, the procedural protections specified in subdivision (b) of this Standard for involuntary mental health transfers, except that:

- (i) decision-making in the first instance and on appeal should be by a judicial or administrative hearing officer independent of the correctional agency, or by an neutral committee that includes at least one qualified mental health professional and that may include appropriate correctional agency staff, but does not include any health care professional responsible for treating or referring the prisoner for transfer;
- (ii) the notice should set forth the mental health staff's diagnosis and basis for the proposed treatment, a description of the proposed

ABA Treatment of Prisoners Standards

Standard 23-6.15 Involuntary mental health treatment and transfer

treatment—including, where relevant, the medication name and dosage—and the less-intrusive alternatives considered and rejected; and

- (iii) the de novo hearing held every [6 months] should decide whether to continue or modify any involuntary treatment, and in reaching that decision should consider, in addition to other relevant evidence, evidence of side effects.

(e) In an emergency situation requiring the immediate involuntary medication of a prisoner with serious mental illness, an exception to the procedural requirements described in subdivision (d) of this Standard should be permitted, provided that the medication is administered by a qualified health care professional and that it is discontinued within 72 hours unless the requirements in subdivision (d) of this Standard are met.

(f) Notwithstanding a finding pursuant to subdivision (d) of this Standard that involuntary treatment is appropriate, mental health care staff should continue attempting to elicit the prisoner's consent to treatment.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.8 (segregated housing and mental health), 23-6.11 (services for prisoners with mental disabilities), 23-6.14 (voluntary and informed consent to treatment)

Related Standards and ABA resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.5 (refusal of medical treatment)

ABA, MENTAL HEALTH STANDARDS, Part X (Mentally Ill and Mentally Retarded Prisoners) [Note: Mental Health Standard 7-10.2 and Standards 7-10.5 through 7-10.9 are supplanted by Treatment of Prisoners Standard 23-6.15.]

ABA, RESOLUTION (text in Appendix), 122A (Aug. 2006) (death penalty and persons with mental disabilities)

ACA, JAIL STANDARDS, 4-ALDF-4D-17 (involuntary administration)

ACA, PRISON STANDARDS, 4-4401 (involuntary administration), 4-4404 (transfer)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 22 (involuntary commitment/treatment), 42 (involuntary transfer)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, V.B.A(non-imposition of mental health services), V.B.B (separation of therapeutic and administrative decision-making functions)

NCCHC, HEALTH SERVICES STANDARDS, I-02 (Emergency Psychotropic Medication)

Commentary

Both involuntary mental health medication and transfer of a prisoner to a mental health facility involve acknowledged liberty interests, and must therefore be accompanied by due process. The Standard essentially follows the analysis in *Washington v. Harper*, 494 U.S. 210 (1990), and in *Vitek v. Jones*, 445 U.S. 480 (1980). *Harper* covers the procedural and substantive prerequisites for involuntary mental health medication of a prisoner at a prison; *Vitek* addresses involuntary transfer to a mental health facility.

ABA Treatment of Prisoners Standards

Standard 23-6.15 Involuntary mental health treatment and transfer

Subdivisions (a), (d)-(f): Involuntary medication of a prisoner with mental illness, while sometimes justified, is always a very grave affront to autonomy. Refusal to take medication is not necessarily irrational; while antipsychotic drugs are often effective in alleviating the psychotic symptoms of mental disorders, some patients do not benefit, and for some, the benefits may be outweighed by severe side effects.²¹² Moreover, research shows that in many cases individuals who refuse drugs do not persist in their refusal, and that refusal itself and the ensuing negotiation can be therapeutically valuable.²¹³

Given the importance of the interest at stake, procedural protections are necessary—and, as explained in the commentary to Standard 23-6.14(a) the protections in this Standard may not be waived by a surrogate decision-maker for the prisoner, even if the prisoner is held incompetent. (There is, however, nothing to prevent consent by advance directive, to apply in the event of a prisoner's subsequent incompetence.) The differences between the procedural steps required by this Standard and by *Washington v. Harper* are very limited: the Standard, but not *Harper*, requires an interpreter for the prisoner where necessary (an issue neither raised nor addressed in *Harper*); the Standard specifies the timing for the written notice to the prisoner and for the periodic review of the decision to medicate; and the Standard requires an avenue of appeal not to a corrections official but to a mental health care panel. More important are the differences between the *substantive* predicate allowed in *Harper* and that here. *Harper* allows involuntary medication for “gravely disabled” prisoners, without a finding of danger to self or others; the Court found that this meant that treatment was in the medical interest of the patient. Subdivision (a) instead authorizes involuntary treatment only for what is probably a subset, though a large one, of cases that meet *Harper*'s requirement, when “non-treatment poses a significant risk of serious harm to the prisoner or others, and no less intrusive alternative is reasonably available.”

The qualified mental health care professional required by subdivision (b)(ii) should have the knowledge and professional credentials to prescribe psychotropic drugs. Even when drugs are beneficial, researchers agree that therapeutic alliances are vital for the treatment to be effective and that effective treatment can be jeopardized by the forced administration of the drugs. Such expertise is essential to properly assess the validity of arguments regarding the need for medication.

Special and sensitive issues are raised by the situation of a prisoner under death sentence who has been found incompetent to be executed by reason of mental illness, but who might be rendered competent by medication. Treatment in these circumstances is not undertaken to serve the prisoner's best medical interests, but rather at least in part for penal reasons, i.e., to make it legally permissible to carry out the death sentence. Therefore, whether such a prisoner should be treated to restore competence implicates not only the prisoner's right to refuse treatment but also the ethical integrity of the mental health professions.²¹⁴ Some courts have decided that the government may forcibly medicate incompetent individuals if necessary to render them competent to be executed, on the ground that once an individual is fairly convicted and sentenced to death, the state's interest in carrying out the sentence outweighs any individual interest in avoiding medication. *Singleton v. Norris*, 319 F.3d 1018 (8th Cir.) (en banc), cert. denied, 540 U.S. 832 (2003). Other courts disagree. The Louisiana Supreme Court, for example, observed in 1992 that medical treatment to restore execution competence “is antithetical to the basic

²¹² See Brief for Am. Psychological Ass'n as Amicus Curiae at *15-*26, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664), 2002 WL 31898300 (Dec. 19, 2002), and sources cited.

²¹³ See, e.g., Rosemarie McCabe & Stefan Priebe, *The Therapeutic Relationship in the Treatment of Severe Mental Illness: A Review of Methods and Findings*, 50 INT'L J. SOC. PSYCHIATRY 115 (2004).

²¹⁴ Kirk S. Heilbrun, Michael L. Radelet & Joel A. Dvoskin, *The Debate on Treating Individuals Incompetent for Execution*, 149 AM. J. PSYCHIATRY 596 (1992); Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics and the Needs of the Legal System*, 14 LAW & HUM. BEHAV. 67 (1990).

ABA Treatment of Prisoners Standards

Standard 23-6.15 Involuntary mental health treatment and transfer

principles of the healing arts,” fails to “measurably contribute to the social goals of capital punishment,” and “is apt to be administered erroneously, arbitrarily or capriciously.” *Perry v. Louisiana*, 610 So.2d 746, 751 (La. 1992). After a thorough examination of the relevant law and ethics in 2006, the ABA adopted the position that a person mentally incompetent to be executed should have his or her sentence reduced. ABA resolution 122A, 2006 Annual Meeting (the Death Penalty and Persons with Mental Disabilities), available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwoa.doc>. This subdivision’s narrow allowance of involuntary mental health treatment should be read consistently with this prior (and specialized) policy. Once the prisoner’s sentence has been reduced, subdivision (a) allows involuntary treatment, if the prerequisites are met.

Subdivisions (b) & (c): These provisions relating to involuntary transfer of prisoners with mental illness to dedicated mental health facilities conform largely to the Supreme Court’s precedent in *Vitek v. Jones*, 445 U.S. 480 (1980). Again, the requirement of an interpreter if necessary (not raised or addressed in *Vitek*) is added. Also added are requirements that the decision-making group include a mental health professional not responsible for treating the prisoner; that the prisoner’s assistant have some appropriate mental health care training; and that the decision be subject to periodic review.

Given the very large number of prisoners with mental illness,²¹⁵ the current urgent problem in jails and prisons is not an over-tendency to send such prisoners to mental health facilities but under-treatment. It is for this reason that the Standard does not take the position that the rules for involuntary transfer of a prisoner to a dedicated mental health facility should be substantively and procedurally the same as the non-prison civil commitment rules (which include the right to state-provided counsel and decision by a judge). The civil-commitment framework is followed by some jurisdictions, including for federal prisoners, see 18 U.S.C. § 4245, and it certainly complies with this Standard. But the ABA’s previous endorsement of it, see *ABA Criminal Justice Mental Health Standards*, Standard 7-10.5, is now superseded by this Standard’s broader approach, which aligns more closely with *Vitek* and the typical practice in most states.

Under subdivision (c) emergency transfers for evaluation are permissible without the procedural protections in subdivision (b). This follows the approach in the federal system under *United States v. Jones*, 811 F.2d 444 (8th Cir. 1987). The seven days specified in the Standard before a hearing must take place should be more than sufficient for evaluation in an emergency situation.

²¹⁵ See commentary to Standard 23-6.8.

PART VII: PERSONAL DIGNITY

Part VII General Commentary

This Part brings together Standards forbidding discrimination and harassment; Standards relating to prisoners' First Amendment interests in free speech and freedom of religion; Standards relating to privacy (which remains an important concern in prison, even if not a right); and finally, a Standard dealing with prisoners as subjects of research. The theme is personal dignity: each of these Standards relates to correctional authorities' overarching obligation to treat prisoners with respect, acknowledging their status as persons of individual value. See Standard 23-1.1(d) (dignity).

Standard 23-7.1 Respect for prisoners

(a) Correctional authorities should treat prisoners in a manner that respects their human dignity, and should not subject them to harassment, bullying, or disparaging language or treatment, or to invidious discrimination based on race, gender, sexual orientation, gender identity, religion, language, national origin, citizenship, age, or physical or mental disability.

(b) Correctional authorities should implement policies and practices to prevent any such discrimination, harassment, or bullying of prisoners by other prisoners.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.4(a) (special classification issues, race discrimination), 23-5.1(a) (personal security and protection from harm), 23-7.5 (communication and expression), 23-8.4(b) (work programs, nondiscrimination)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standards 23-6.9 (physical security), 6.14 (nondiscriminatory treatment)

ACA, JAIL STANDARDS, 4-ALDF-6B-02 (non-discrimination)

ACA, PRISON STANDARDS, 4-4277 (non-discrimination)

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶ 56 (educational equity)

Commentary

Subdivision (a) of this Standard fleshes out the general statement forbidding staff harassment and invidious discrimination in the introductory Standard 23-1.2(a), and subdivision (b) augments that requirement by requiring correctional authorities to supervise prisoners and prevent them from discriminating, harassing, or bullying other prisoners. (It overlaps substantially with Standard 23-5.1(a), which requires correctional authorities to protect prisoners from a variety of harms including harassment.)

The Standard's use of the phrase "invidious discrimination" is not intended to be limited to unconstitutional conduct; rather, it should be read to mean "inappropriate" or "unjustified" discrimination.

Standard 23-7.2 Prisoners with disabilities and other special needs

(a) If a prisoner with a disability is otherwise qualified to use a correctional facility, program, service, or activity, correctional authorities should provide such a prisoner ready access to and use of the facility, program, service, or activity, and should make reasonable modifications to existing policies, procedures, and facilities if such modifications are necessary. Modifications are not required if they would pose an undue burden to the facility, cause a fundamental alteration to a program, or pose a direct threat of substantial harm to the health and safety of the prisoner or others. Disabled prisoners' access to facilities, programs, services, or activities should be provided in the most integrated setting appropriate.

(b) To the extent practicable, a prisoner who does not have a disability but does have special needs that affect the prisoner's ability to participate in a prison program, service, or activity should receive programs, services, and activities comparable to those available to other prisoners. Correctional authorities should assess and make appropriate accommodations in housing placement, medical services, work assignments, food services, and treatment, exercise, and rehabilitation programs for such a prisoner.

(c) A prisoner has the right to refuse proffered accommodations related to a disability or other special needs, provided that the refusal does not pose a security or safety risk.

(d) There should be no adverse consequences, such as loss of sentencing credit for good conduct, discipline, or denial of parole, for a prisoner who is unable to participate in employment, educational opportunities, or programming due to a disability or other special needs that cannot be accommodated. Such a prisoner should have the opportunity to earn an equal amount of good conduct time credit for participating in alternative activities.

(e) Correctional authorities should communicate effectively with prisoners who have disabling speech, hearing, or vision impairments by providing, at a minimum:

- (i) hearing and communication devices, or qualified sign language interpretation by a non-prisoner, or other communication services, as needed, including for disciplinary proceedings or other hearings, processes by which a prisoner may make requests or lodge a complaint, and during provision of programming and health care;
- (ii) closed captioning on any televisions accessible to prisoners with hearing impairments;
- (iii) readers, taped texts, Braille or large print materials, or other necessary assistance for effective written communication between correctional authorities and prisoners with vision impairments, and when a prisoner with a vision impairment is permitted to review prison records, as in preparation for a disciplinary or other hearing; and
- (iv) fire alarms and other forms of emergency notification that communicate effectively with prisoners with hearing or vision impairments.

ABA Treatment of Prisoners Standards

Standard 23-7.2 Prisoners with disabilities and other special needs

(f) Correctional authorities should make reasonable attempts to communicate effectively with prisoners who do not read, speak, or understand English. This requirement includes:

- (i) to the extent practicable, the translation of official documents typically provided to prisoners into a language understood by each prisoner who receives them;**
- (ii) staff who can interpret at all times in any language understood by a significant number of non-English-speaking prisoners; and**
- (iii) necessary interpretive services during disciplinary proceedings or other hearings, for processes by which a prisoner may lodge a complaint about staff misconduct or concerns about safety, and during provision of health care.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-1.0(m) (definitions, effective notice), 23-2.9(a)(i) (procedures for placement and retention in long-term segregated housing, effective notice), 23-3.2 (conditions for special types of prisoners), 23-3.4 (healthful food), 23-3.6 (recreation and out-of-cell time), 23-4.1(b) (rules of conduct and informational handbook, translation and explanation), 23-4.2 (disciplinary hearing procedures), 23-6.2 (response to prisoner health care needs), 23-6.10 (impairment-related aids), 23-6.11 (services for prisoners with mental disabilities), 23-6.12 (prisoners with chronic or communicable diseases), 23-6.14 (voluntary and informed consent to treatment), 23-6.15(b)(i) (involuntary mental health treatment and transfer, effective notice), 23-8.2 (rehabilitative programs), 23-10.1(c) (professionalism, effective communication)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.14 (nondiscriminatory treatment)

ACA, JAIL STANDARDS, 4-ALDF-6B-04 and 6B-05 (disabled inmates)

ACA, PRISON STANDARDS, 4-4277 (access to programs and services)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VII.C.3 (prisoners with disabilities)

NCCHC, HEALTH SERVICES STANDARDS G-02 (Patients with Special Health Needs)

U.N. Standard Minimum Rules, art. 51(2) (interpreter)

Commentary

Subdivisions (a), (c)-(e): These subdivisions implement Title II of the Americans with Disabilities Act, tracking closely the requirements of that statute and its regulations. See 42 U.S.C. §§ 12131-12134; 28 C.F.R. part 35. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, imposes substantially the same substantive requirements, but applies only to entities that accept federal funds. Both disability statutes serve important constitutional interests in prison, see *United States v. Georgia*, 546 U.S. 151 (2006), and likewise some of the disability-related components of this Standard also effectuate constitutional rights. For example, when a hearing is constitutionally compelled, due process requires effective communication during that hearing.

Protection of prisoners with disabilities from other prisoners is the subject of Standard 23-5.5; suitable housing for prisoners with disabilities is covered by this Standard, but more particularly by Standard 3.2.

ABA Treatment of Prisoners Standards

Standard 23-7.2 Prisoners with disabilities and other special needs

Subdivision (a)'s reference to "ready access" is intended to require advance planning where useful; if the moment a prisoner complains is the first time a prison official has thought about accessibility, a solution is unlikely to be timely available.

Under subdivision (c), prisoners must generally be allowed to refuse proffered accommodations. Where such refusals do not pose a security or safety risk, they should not have disciplinary consequences. But other consequences are permissible. For example, if a prisoner who uses a wheelchair refuses to use a ramp (compliant with relevant accessibility guidelines) to get to an assigned program, the prisoner may face the ordinary consequences for refusing programming. But under subdivision (d) if a prisoner cannot participate in programming because of an *unaccommodated* disability, no such adverse consequences should attach. The reference in subdivision (e)(iii) to "taped" texts should be understood as a reference to any recorded text.

Subdivision (b): This subdivision covers prisoners with special requirements that do not amount to ADA-recognized disabilities. For example, minor or temporary impairments may not be covered by the ADA,²¹⁶ but if such impairments are nonetheless significant enough to undermine a prisoners' "ability to participate in a prison program, service, or activity," prison officials should provide some degree of accommodation to allow access comparable to that of prisoners without impairment.

Subdivision (f): Incarceration can be particularly difficult, even dangerous, for prisoners who do not speak English. In some situations, effective communication with them is constitutionally required. This obligation extends to due process hearings²¹⁷ as well as encounters relating to mental health or medical care—including screening interviews and health care appointments.²¹⁸ If grievance processes are not accessible to non-English speaking prisoners, that can inappropriately impede their access to judicial remedies, as well, given the current law requiring prisoners to properly exhaust administrative grievance procedures prior to filing a civil rights lawsuit.²¹⁹ In addition, it only makes sense that a facility will run more smoothly and more safely if, as required in subdivision (f)(ii), staff are available who can speak and interpret languages spoken by a significant number of prisoners. See, e.g., Standard 23-10.1(c) (requiring staff to rely upon effective communication.)

²¹⁶ The question is open because of the recent broadening of the ADA's scope by the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

²¹⁷ See, e.g., *Powell v. Ward*, 487 F.Supp. 917, 932 (S.D.N.Y. 1980), modified on other grounds, 643 F.2d 924 (2d Cir.), cert. denied, 454 U.S. 832 (1981) ("Unless Spanish speaking inmates understand and can communicate with the hearing board, they are being denied the due process protections guaranteed in *Wolff*. Therefore, we find that due process requires that Spanish speaking inmates who cannot read and understand English must be given notice and statements in Spanish or provided with a translator, who should be present at the hearing in any case.").

²¹⁸ See, e.g., *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995) (failure to provide a translator for medical encounters can constitute deliberate indifference); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir.1983), cert. denied, 468 U.S. 1217 (1984) ("An impenetrable language barrier between doctor and patient can readily lead to misdiagnoses and therefore pain and suffering. This type of language problem which is uncorrected over a long period of time and as to which there is no prospect of alleviation, can contribute to unconstitutional deficiencies in medical care.") But see *Franklin v. District of Columbia*, 163 F.3d 625, 637-39 (D.C. Cir. 1998) (striking down injunctive order requiring Spanish interpreters during provision of medical care in D.C. correctional facilities).

²¹⁹ See *Woodford v. Ngo*, 548 U.S. 81 (2006) (interpreting Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)). Standard 23-9.2(d) urges modification of this rule.

Standard 23-7.3 Religious freedom

(a) Correctional authorities should recognize and respect prisoners' freedom of religion.

(b) Correctional authorities should permit prisoners to pursue lawful religious practices consistent with their orderly confinement and the security of the facility. Correctional facility policies should not significantly burden a prisoner's ability to engage in a practice motivated by a sincerely held religious belief, even by imposition of a facially neutral rule or policy, absent a compelling institutional interest and a determination that there are no less restrictive means of furthering that interest.

(c) As required by subdivision (b) of this Standard, correctional authorities should provide prisoners with diets of nutritious food consistent with their sincerely held religious beliefs. Prisoners should be entitled to observe special religious practices, including fasting and special dining hours.

(d) Correctional authorities should not require prisoners to engage in religious activities or programs. Prisoners should not receive as a direct result of their participation in a religious activity or program any financial or other significant benefit, including improved housing, additional out-of-cell time, extra sentencing credit for good conduct, or improved chances for early release, unless prisoners not participating in religious activities or programs are afforded comparable opportunities for such benefits.

(e) Correctional authorities should allow prisoners to follow religiously motivated modes of dress or appearance, including wearing religious clothing, headgear, jewelry, and other symbols, subject to the need to maintain security and to identify prisoners.

(f) Correctional officials should, to the extent reasonable, make resources and facilities available for religious purposes to all religious groups and prisoners following sincerely held religious beliefs within a correctional facility, and should not show favoritism to any religion.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.7(c)(6) (restrictions relating to programming and privileges, religious observance), 23-4.1(d) (rules of conduct and informational handbook, requesting religious accommodation), 23-7.6 (personal appearance), 23-7.9 (searches of prisoners' bodies), 23-8.4(b) (work programs, nondiscrimination)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.5 (religious freedom)

ACA, JAIL STANDARDS, 4-ALDF-5C-17 and 5C-23 (religious programs)

ACA, PRISON STANDARDS, Principle 5F (religious programs), 4-4277 (access to programs and services), 4-4319 (special diets), 4-4517 (opportunity to practice one's faith), 4-4520 (religious facilities and equipment)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.I.6. (vegetarian and religious diets)

U.N. Standard Minimum Rules, arts. 6 (nondiscrimination and respect for religion), 41-42 (religion)

ABA Treatment of Prisoners Standards
Standard 23-7.3 Religious freedom

Commentary

Subdivision (a): This subdivision states the broad principle that underlies the entire Standard. Correctional authorities' obligation to respect prisoners' freedom of religion covers three components. Prison and jail officials must allow prisoners to exercise their religion where such exercise is consistent with security. See subdivision (b). In fact, unlike government actors in most other settings, whose obligation to avoid "establishing" religion precludes sponsorship of religious activity, prison and jail officials should make resources and facilities available for religious purposes. See subdivision (f). At the same time, they must avoid requiring or even pressuring prisoners to engage in religious activities or programs. See subdivision (d).

Subdivisions (b), (c), & (e): Under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb,²²⁰ prison and jail officials are forbidden to impose substantial burdens on a prisoner's religious exercise, except in furtherance of a compelling governmental interest and in the least restrictive means of furthering that interest. (The test is the same one that was applicable under the Free Exercise Clause before a 1990 case that changed the relevant constitutional doctrine.²²¹)

The resulting case law is highly fact specific,²²² but experience has demonstrated that correctional officials interested in accommodating religious observance can very frequently find ways to do that without security risk. For example, subdivision (e) discusses religiously motivated modes of dress or appearance. The Federal Bureau of Prisons has a policy that lists the various religious garments and headgear allowed prisoners of different religions; it allows not only non-covering headbands and undergarments but even, for example, hijabs for Muslim women.²²³ Religious modesty concerns may require other accommodations, as well. For example, prisoners who wear the hijab may have religious objections to displaying an identification photo that shows them uncovered. But correctional authorities need an uncovered photo for security reasons. One solution that has been suggested is that the identification card prisoners are required to carry on their person and produce to staff on request matches the prisoner's daily and current appearance—including any coverings—but that a photo without religious head covering is maintained by prison administrators.²²⁴

In many facilities, rather than granting only religiously motivated prisoners some particular choice relating to food, clothing, and the like, officials have instead chosen to implement a rule granting the same freedom more generally, both to avoid favoritism towards religious practitioners and because experience

²²⁰ The Supreme Court struck down RFRA as beyond congressional authority, as applied to state and local governments, see *City of Boerne v. Flores*, 521 U.S. 507 (1997), but it remains applicable to federal facilities. See *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (noting RFRA's application to internal federal government operations rests on Art. I, § 8, clause 18 of the Constitution).

²²¹ See *Employment Division v. Smith*, 494 U.S. 872 (1990).

²²² Compare *Boles v. Neet*, 486 F.3d 1177, 1182-83 (10th Cir. 2007) (holding that officials failed to identify legitimate penological interests served by forbidding the Jewish plaintiff to wear a yarmulke and *tallit katan* (religious undergarments) on a medical visit), with *Muhammad v. Lynaugh*, 966 F.2d 901, 902-03 (5th Cir.1992) (upholding regulation restricting Muslim prisoners' wearing of Kufi caps based on extensive evidence of the possibility of hiding contraband in the caps).

²²³ Federal Bureau of Prisons, Program Statement 5360.09, Religious Beliefs and Practices, at 14.b.3, available at http://www.bop.gov/policy/progstat/5360_009.pdf.

²²⁴ *Forde v. Zickefoose*, 612 F.Supp.2d 171, 178-79 (D. Conn. 2009).

ABA Treatment of Prisoners Standards
Standard 23-7.3 Religious freedom

has borne out the low degree of risk entailed.²²⁵ The obligation to accommodate religious grooming and dress imposed by this Standard is part of the rationale for the more general rule in Standard 23-7.6, which requires that prisoners be allowed reasonable choices in such matters.

Another area in which accommodation issues arise with great regularity is religious dietary needs, addressed specifically by subdivision (c). Courts have frequently mandated provision of kosher and hallal meals,²²⁶ and meals at special hours and the like, for example during Ramadan (when many Muslims eat only before dawn and after sunset). Occasionally a court will allow a prison to substitute a vegetarian diet, instead,²²⁷ but when this accommodation is not only occasional or short term, it seems inadequate for non-vegetarian prisoners.

Subdivision (d): The rule that government actors may not compel participation in religious activities is the most basic requirement of the First Amendment's Establishment Clause. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992). This rule, stated in the first sentence of this subdivision, uncontroversially applies in prison and jail as elsewhere.²²⁸

There has, by contrast, been contentious recent debate about so-called "God-pods"—prison units suffused with religious orientation, which offer rehabilitative programming. These are the subject of the second sentence of subdivision (d). The problem with special religious units is that if they offer kinder conditions of confinement or other significant benefits to their participants, they may either discriminate against those unable to participate because of alternative religious (or atheistic) commitments, or create undue coercive pressure on prisoners to avow religion in order to reap those benefits. See *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 509 F.3d 406, 423-26 (8th Cir. 2007). Subdivision (d) accordingly disallows benefits that stem from participation in religious activities or programs, unless prisoners not participating in religious activities or programs are afforded comparable (although not necessarily identical) opportunities.

Subdivision (f): Because it is the state itself that has made it otherwise difficult for prisoners to engage in religious exercise, there is no Establishment Clause obstacle to the government hiring clergy and funding religious activities in prison.²²⁹ Prison officials are, however, obligated to treat religions in an even-

²²⁵ See, e.g., Note, *Developments in the Law, In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1904-14 (2002).

²²⁶ See, e.g., *Beerheide v. Suthers*, 286 F.3d 1179, 1188-89 (10th Cir. 2002) (holding plaintiffs denied a kosher diet lacked alternative ways of maintaining a kosher diet; paying for it themselves was not an alternative because even those with some money would have to sacrifice communication with family and legal representatives to pay for the food); *Moorish Science Temple of America, Inc. v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982) (failure to provide diet conforming to Muslim religious beliefs stated a claim); *Ross v. Coughlin*, 669 F. Supp. 1235, 1241-42 (S.D.N.Y. 1987) (failure to provide kosher food prepared according to the laws of Kashrut stated a constitutional claim);

²²⁷ See, e.g., *Williams v. Morton*, 343 F.3d 212 (3d Cir. 2002).

²²⁸ See, e.g., *Byar v. Lee*, 336 F. Supp. 2d 896, 905-06 (W.D. Ark. 2004) (disciplinary rules modeled after the Ten Commandments violated the Establishment Clause); *Campbell v. Thornton*, 644 F. Supp. 103, 106 (W.D. Mo. 1986) (evidence that proprietors of halfway house forced their religion on the plaintiff established a constitutional violation).

²²⁹ See, e.g., *Carter v. Broadlawns Med. Center*, 857 F.2d 448, 457 (8th Cir. 1988) (restrictions on prisoners and involuntarily committed mental patients "constitute a state-imposed burden on the patients' religious practices that the state may appropriately adjust for" by providing chaplains); *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988); see *Cutter v. Wilkinson*, 544 U.S. 709, 724-25 (2005) (quoting with apparent approval the observation that prisons "provide[] inmates with chaplains 'but not with publicists or political consultants,' and allow[] 'prisoners to assemble for worship, but not for political rallies'").

ABA Treatment of Prisoners Standards

Standard 23-7.4 Prisoner organizations

handed manner, as the Supreme Court explained in *Cruz v. Beto*, 405 U.S. 319, 322 (1972). In that case, the Court held that a Buddhist prisoner was entitled to “a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts.” The obligation is one of rough comparability, not strictly identical treatment.²³⁰

Standard 23-7.4 Prisoner organizations

Prisoners should be permitted to form or join organizations whose purposes are lawful and consistent with legitimate penological objectives. Correctional officials should allow reasonable participation by members of the general public in authorized meetings or activities of such organizations, provided the safety of the public or the security or safety of persons within the facility are not thereby jeopardized.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-8.6 (written communications), 23-8.7 (access to telephones), 23-11.2(e) (external regulation and investigation, visits by groups)

Related Standard

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.6 (organizations and petitions)

ACA, JAIL STANDARDS, 4-ALDF-6A-04 (communications)

Commentary

In *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 132 (1977), the Supreme Court held that associational rights in a prison setting “may be curtailed whenever the institution’s officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment.”²³¹

At the same time, it is important in this area as others for correctional officials to avoid “exaggerated response” even to real security concerns. *Turner v. Safley*, 482 U.S. 78, 91 (1987). Prisoner participation in organizations whose purposes are lawful and consistent with legitimate penological objectives—both prisoner organizations and community organizations, whose aims might include education, community

²³⁰ See *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (“We do not suggest . . . that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size, nor must a chaplain, priest, or minister be provided without regard to the extent of the demand.”). See also *Lindell v. Casperson*, 360 F. Supp. 2d 932, 958 (W.D. Wis. 2005) (“The denial of a privilege to adherents of one religion while granting it to others is discrimination on the basis of religion in violation of the equal protection clause of the Constitution.”), *aff’d*, 169 Fed. App’x 999 (7th Cir. 2006); *Al-Alamin v. Gramley*, 926 F.2d 680, 686 (7th Cir. 1991) (“qualitatively comparable” treatment required); *Lucero v. Hensley*, 920 F. Supp. 1067, 1075 (C.D. Cal. 1996) (allegation that there are as many Native American as Jewish prisoners and that there is a full-time rabbi, but not a full-time Native American chaplain, states an equal protection claim; defendants must show they have “made a good faith attempt to treat different religious groups equally”).

²³¹ For applications, see, e.g., *Preast v. Cox*, 628 F.2d 292, 294 (4th Cir. 1980) (prisoner groups could be required to receive official recognition before engaging in joint activities; denial of recognition would be virtually unreviewable by court); *Akbar v. Borgen*, 803 F. Supp. 1479, 1485-86 (E.D. Wis. 1992) (upholding a rule forbidding “unsanctioned group activity” on its face and as applied to a prisoner seeking to form a Muslim organization).

ABA Treatment of Prisoners Standards

Standard 23-7.5 Communication and expression

service, art, etc.—can be rehabilitative. Allowing members of the community into prisons and jails, required by this Standard and also by Standard 23-11.2(e), helps build bridges that may prove useful for prisoner reintegration, and avoids the insularity of correctional facilities that can undermine accountability and appropriate conditions.

Several other Standards require that prisoners be allowed to communicate with community organizations: Standard 23-8.6(a) covers written communication, and Standard 23-8.7(a) covers phone calls.

This Standard is not intended to extend to prisoners the right to strike or take other concerted action to affect institutional conditions, programs, or policies. Note, however, that under Standards 23-8.6(a), 23-9.1, 23-9.2, 23-11.2(b), and 23-11.4, individual prisoners may present grievances to correctional and other public officials, file lawsuits about these matters, and contact the media.

Standard 23-7.5 Communication and expression

(a) Governmental authorities should allow prisoners to produce newspapers and other communications media for the dissemination of information, opinions, and other material of interest, and to distribute such media to the prisoner population and to the general public. To the extent practicable, funding, space, and institutional support should be provided for such efforts, and prisoners should be allowed to establish and operate independently-funded publications.

(b) Correctional officials should be permitted to require that prior to publication of an internal newspaper all material be submitted for review by a designated official, and to prohibit the publication or dissemination of material that is obscene or that constitutes a substantial threat to institutional security or order or to the safety of any person. Correctional authorities should be permitted to censor material if it could be censored in publications sent to prisoners through the mail. Officials should provide a clear rationale in writing for any censorship decision, and should afford prisoners a timely opportunity to appeal the decision to a correctional administrator.

(c) Subject to the restrictions in Standard 23-8.6, correctional authorities should allow prisoners to produce works of artistic expression and to submit for publication books, articles, creative writing, art, or other contributions to media outside the facility under their own names.

(d) Correctional authorities should not subject prisoners to retaliation or disciplinary action based on their constitutionally protected communication and expression.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-7.1(b) (respect for prisoners, preventing harassment etc.), 23-8.6 (written communications)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.1 (communication rights), 23-6.7 (prisoner communications media)

ACA, JAIL STANDARDS, 4-ALDF-6A-04 (communications)

ACA, PRISON STANDARDS, 4-4486 (inmate activities)

ABA Treatment of Prisoners Standards

Standard 23-7.5 Communication and expression

U.N. Standard Minimum Rules, art. 37 (contact with the outside world)

Commentary

Subdivision (a): Once there were hundreds of prison newspapers and other publications, but at this point, only a few dozen prisons have magazines. They range from the award winning *Angolite*²³² to more modest endeavors such as the *Prison Mirror*, the country's longest-running continuously published prison publication, which is currently essentially a newsletter that focuses on activities and programs at Minnesota's Stillwater Prison.²³³ The First Amendment does not guarantee prisoners the right to publish their own newspapers, magazines, and the like (although it may protect them against retaliatory action if in fact they are permitted to publish²³⁴). Nonetheless, prisoner publications should be encouraged, because they generally advance the goals of correctional administration. All of them promote the writing and other skills of their authors and the literacy of their readers; the best of them inform prisoners about events and issues in their facilities and inform correctional officials about problems that need solving.

This subdivision distinguishes between publications that need no prison funding and those that do; the former should be allowed, while the latter should be supported "to the extent practicable" in light of resource and other constraints.

Subdivision (b): Pre-publication review of non-prison communication is an unlawful prior restraint. *Near v. Minnesota*, 283 U.S. 697 (1931). In prison and jail, however, it is not only lawful but in many circumstances advisable. Concerns include advocacy of criminal behavior, obscenity, and harassment of or disclosure of confidential information about other prisoners. Standard 23-8.6(c), on restrictions allowed for both outgoing and incoming written communications, provides more content for the censorship decision. In both settings, there is warrant only for reasonable censorship, not for bigotry or defensiveness. The case law (which deals with mail far more than with prison publications) is deferential to administrators, but even so, frequently overrules their censorship opinions. As one court has explained:

Time and again, one finds that the banned publications do not advocate criminal behavior or prison disruption, are not obscene, and do not instruct bomb-building, liquor-brewing, lock-picking, escape-planning or other dangerous activities. Rather, they express the views of racial, religious, political and sexual minorities or contain information and opinion negatively reflecting on authority figures or prison officials. Case law is replete with examples of overbroad censorship.²³⁵

Subdivision (c): For most prisoners, writing for publication means having their work published outside of their facilities. Again, this is rehabilitative for the prisoner authors. In addition, it is useful for the community, which can gain insight into what goes on behind bars. This subdivision requires that such writing, along with artistic expression of other types, be allowed, subject to the same censorship rules

²³² The *Angolite* is published by prisoners in the Louisiana State Penitentiary, in Angola. For information, see <http://www.doc.louisiana.gov/LSP/angolite.php>.

²³³ See Danielle Maestretti, *Shelf Life: The Toughest Beat: The Slow, Quite Demise of Prison Newspapers*, UTNE READER, Nov.-Dec. 2007, at 34.

²³⁴ See, e.g., *Simmat v. Manson*, 535 F. Supp. 1115 (D. Conn. 1982) (granting preliminary injunction against transfer of a prisoner based on prisoner's column in local newspaper, which was sometimes critical of prison administration).

²³⁵ *Lyon v. Grossheim*, 803 F. Supp. 1538, 1550-51 (S.D. Iowa 1992) and cases cited.

ABA Treatment of Prisoners Standards

Standard 23-7.6 Personal appearance

already discussed. See *Jordan v. Pugh*, 504 F. Supp. 2d 1109 (D. Colo. 2007) (holding unconstitutional the Federal Bureau of Prison's policy against allowing prisoners to have articles published under their own byline). The Standard does not take a position on the related constitutional question whether prisoners may be banned from receiving compensation for their publications.²³⁶

Standard 23-7.6 Personal appearance

Correctional authorities should allow prisoners a reasonable choice in the selection of their own hair styles and personal grooming, subject to the need to identify prisoners and to maintain security and appropriate hygienic standards.

Cross Reference

ABA, TREATMENT OF PRISONER STANDARDS, 23-7.3 (religious freedom)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.5(f) (religious freedom), 23-6.8 (personal grooming)

ACA, JAIL STANDARDS, 4-ALDF-6A-08 (grooming)

ACA, PRISON STANDARDS, 4-4283 (grooming)

Commentary

This Standard reflects current accepted practice, as reflected in the cited related professional standards, rather than a constitutional guarantee. Standard 23-7.3 deals with situations in which grooming choices—beards, hair length, medallions of various kinds, and the like—reflect religious practice. As its commentary notes, one of the rationales for this Standard's approach is to avoid favoritism towards religious practitioners and because experience with religiously motivated grooming choices demonstrates the low level of security risk such choices entail, when reasonably regulated.

Standard 23-7.7 Records and confidentiality

(a) Where consistent with applicable law, correctional authorities should be permitted to release without a prisoner's consent basic identifying information about the prisoner and information about the prisoner's crime of conviction, sentence, place of incarceration, and release date. All other information should be disclosed only upon the prisoner's written consent unless:

- (i) a government official specifies in writing the particular information desired, the official's agency is authorized by law to request that information, and the disclosure of the information is appropriately limited to protect the prisoner's privacy;**

²³⁶ See *Jordan v. Pugh*, 504 F. Supp. 2d 1109 (D. Colo. 2007) (discussing but not ruling on the constitutionality of the federal regulation, 28 C.F.R. § 541.13 (code 408), that authorizes disciplining prisoners for conducting a business while incarcerated, as applied to prisoner reporters).

ABA Treatment of Prisoners Standards

Standard 23-7.7 Records and confidentiality

- (ii) the material is sought only for statistical, research, or reporting purposes and is not in a form containing the prisoner's name, number, symbol, or other information that might identify the prisoner;
 - (iii) the disclosure is made pursuant to a valid court order or subpoena, or is otherwise required by law; or
 - (iv) the prisoner is dead, and disclosure is authorized by the prisoner's next of kin or by the administrator of the prisoner's estate if one has been appointed.
- (b) A correctional agency should allow a prisoner to examine and copy information in the prisoner's file, challenge its accuracy, and request its amendment. Correctional officials should be permitted to withhold:
- (i) information that constitutes diagnostic opinion that might disrupt the prisoner's rehabilitation;
 - (ii) sources of information obtained upon a promise of confidentiality, including as much of the information itself as risks disclosing the source;
 - (iii) information that, if disclosed, might result in harm, physical or otherwise, to any person; and
 - (iv) any other information reasonably believed to jeopardize institutional security if disclosed.
- (c) Information given by a prisoner to any employee of the correctional authority in a designated counseling relationship under a representation of confidentiality should be privileged, except if the information concerns a contemplated crime or disclosure is required by law. Exceptions to confidentiality should be explained to a prisoner prior to any conversation or course of counseling in which confidentiality is promised, explicitly or implicitly.

Cross Reference

ABA, TREATMENT OF PRISONER STANDARDS, 23-6.8 (health care records and confidentiality)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standards 23-5.4 (medical records), 23-6.11 (confidentiality of prisoner records)

ACA, JAIL STANDARDS, 4-ALDF-7D-21 (inmate records)

ACA, PRISON STANDARDS, 4-4095 (case record management), 4-4098 (inmate access to records), 4-4099 (release of information)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 20 (limits of confidentiality), 59 (confidentiality)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, V.B.C. (confidentiality and exceptions)

Commentary

Subdivision (a): Prisoners have an important dignitary interest in not having the details of their lives made publically available. The modern information age makes this interest all the more acute; the internet has eliminated the "practical obscurity" of information that was once technically "public" but accessible only to someone who went looking for it, usually in person, at a government office. The Standard exceeds the

ABA Treatment of Prisoners Standards

Standard 23-7.7 Records and confidentiality

constitutional floor: absent some potential for resulting physical harm, the Constitution does not forbid disclosure of non-medical information about a prisoner. See, e.g., *Kimberlin v. U.S. Dep't of Justice*, 788 F.2d 434, 438 (7th Cir.) (disclosure of prisoner's financial affairs), cert. denied, 478 U.S. 1009 (1986); *Davis v. Bucher*, 853 F.2d 718, 720 (9th Cir. 1988) (showing nude photographs of prisoner's wife to other prisoners). However, the federal Privacy Act, see 5 U.S.C. § 552a, does not exempt prisoners from its protection, and state law may well protect prisoners from certain disclosures. It should be evident, moreover, that failure to accord prisoners any privacy rights in the often extremely intimate details included in their prison and jail files is inconsistent with their human dignity. See Standard 23-1.1(d).

Several of the exceptions specified in the subdivision are for situations when the privacy intrusion is minimal, or susceptible to amelioration (subdivisions (a)(i), (ii), and (iv)). In addition, when a disclosure occurs pursuant to a court order or subpoena or is otherwise required by law (subdivision (iii)), a court or other actor can take appropriate steps to both balance the breach of privacy against the need for the information, and minimize the intrusion.

Subdivision (b): Prisoners' interest in examining their own records is quite different in nature. Correctional records are extraordinarily consequential for prisoners—determining the term of their incarceration, their custody level, whether they are safely housed or not, and a thousand other components of their treatment in jail or prison. Mistakes are far from unheard of, as in all areas of record keeping.²³⁷ It is therefore important to allow prisoners to see the records, as a check on their accuracy, and to implement an effective system that examines and corrects claimed errors.

Subdivision (c): Outside of jails and prisons, the federal courts and every state recognize some duty of counselor confidentiality and some form of therapist-patient privilege; although the contours of the duty and privilege vary, exceptions are frequently made for contemplated crimes.²³⁸ When confidentiality is promised a prisoner, it should hold, with the same exception. There may also be other disclosures required by law, either generally²³⁹ or applicable to jails and prisons. In particular, proposed Prison Rape Elimination Act regulations, currently under consideration by the Attorney General, specify:

All staff members are required to report immediately and according to agency policy any knowledge, suspicion, or information they receive regarding an incident of sexual abuse that occurred in an institutional setting; retaliation against inmates or staff who reported abuse; and any staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse or retaliation.²⁴⁰

²³⁷ Most mistakes in prisoner records are invisible to outsiders, never discussed in a court case, but overdetention occasionally becomes the subject of newspaper reports and lawsuits. See, e.g., *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998) (57 days overdetention because of a transposed case number); *Green v. Baca*, 306 F. Supp. 2d 903 (C.D. Cal. 2004) (7 days overdetention because of a missing "release" form); Carol D. Leonnig, *Warnings Of Wrongful Jailing Went Unheeded; Court Records Show Missteps in D.C. Case*, WASH. POST., Aug. 7, 2005, at C1 (over two years in jail because of missing dismissal order relating to misdemeanor charge); see also *Thomas v. Ramos*, 130 F.3d 754 (7th Cir. 1997) (51 days in segregation because of a mistaken reading of a disciplinary disposition).

²³⁸ See *Jaffee v. Redmond*, 518 U.S. 1 (1996); Harriet L. Glosoff et al., *Privileged Communication in the Counselor-Client Relationship*, 78 J. COUNSELING & DEV. 454 (2000).

²³⁹ See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

²⁴⁰ NPREC [Proposed] Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails OR-1 (Staff and facility head reporting duties), in NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 216 (June 2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-7.8 Searches of facilities

In the absence of a counseling relationship, or of an explicit or implicit promise of confidentiality, a prisoner's statements are available for legitimate institutional purposes.

Standard 23-7.8 Searches of facilities

(a) Correctional authorities should conduct all searches of prisoner living quarters and belongings so as to minimize damage to or disorganization of prisoner property and unnecessary invasions of privacy. When practicable and consistent with security, a prisoner should be permitted to observe any search of personal property belonging to that prisoner. Correctional authorities should not conduct searches in order to harass or retaliate against prisoners individually or as a group.

(b) When practicable, correctional authorities should prevent prisoners from observing searches and shakedowns of other prisoners' cells and property.

(c) A record should be kept of all facility searches, including documentation of any contraband that is found. The record should identify the circumstances of the search, the persons conducting the search, any staff who are witnesses, and any confiscated materials. When any property is confiscated, the prisoner should be given written documentation of this information.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.9 (conditions during lockdown), 23-5.1(b) (personal security and protection from harm, property damage), 23-5.8 (use of chemical agents, electronic weaponry, and canines), 23-7.1(a) (respect for prisoners, harassment), 23-9.5(e) (access to legal materials and information, searches for contraband), 23-10.3(b)(ii) (training, searches)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.10 (search of facilities and prisoners)

ACA, JAIL STANDARDS, 4-ALDF-2C-01 (searches)

ACA, PRISON STANDARDS, 4-4192 (control of contraband)

Commentary

This Standard covers searches of facilities; Standard 23-7.9 deals with searches of persons, which raise very different legal, policy, and operational issues.

The Supreme Court has held that the Fourth Amendment's protection against unreasonable searches has no application inside correctional facilities, because prisoners have no reasonable expectation of privacy relating to their cells. Privacy rights, the Court explained in *Hudson v. Palmer*, 468 U.S. 517 (1984), would be irreconcilable with the "needs and objectives of penal institutions" and "the concept of incarceration." Concretely, cell searches in correctional facilities serve vital safety purposes, especially finding (and deterring possession of) weapons and other dangerous contraband. This Standard does not

ABA Treatment of Prisoners Standards

Standard 23-7.9 Searches of prisoners' bodies

seek to limit such searches, except for subdivision (a)'s requirement that searches not be undertaken as harassment or retaliation, a requirement with full support from the case law.²⁴¹

At the same time, cell searches can be unnecessarily disruptive, even destructive. A search can leave a prisoner's property strewn about a cell, damaged, destroyed, or lost.²⁴² And personal letters or photos are necessarily exposed to the searcher, and can be revealed to passers-by, whether on purpose or by accident.²⁴³ The provisions of subdivision (a) direct staff to do their best to minimize both property damage and disarray and also unnecessary invasions of privacy. The use of the word privacy is not intended to imply any disagreement with the doctrine referenced above that there is no Fourth Amendment right to privacy in a prisoner's cell, but rather to refer to prisoners' emotional, if not legal privacy, interests. It may not be unconstitutional for staff to read a prisoner's diary, but that does not mean that the reading should be out loud to the cell block and punctuated by jokes and laughter. These Standards' focus on prisoners' dignity underlies this Standard's approach. See Standard 23-1.1(d) (dignity). Allowing a prisoner to watch a search of the prisoner's own property, as subdivision (a) encourages, is a safeguard against abuses; preventing prisoners from watching the search of another prisoner's cell, as subdivision (b) encourages, limits the privacy affront.

Subdivision (c): This subdivision's requirement of recordkeeping serves to preserve information about searches, which may prompt disciplinary charges against a prisoner, or grievances by a prisoner. In addition, the information serves as a receipt for the prisoner whose property is taken, in case that property is later required to be returned. Note that negligent or intentional damage to property is compensable under Standard 23-5.1(b).

Standard 23-7.9 Searches of prisoners' bodies

(a) In conducting a search of a prisoner's body, correctional authorities should strive to preserve the privacy and dignity of the prisoner. Correctional authorities should use the least intrusive appropriate means to search a prisoner. Searches of prisoners' bodies should follow a written protocol that implements this Standard.

(b) Except in exigent situations, a search of a prisoner's body, including a pat-down search or a visual search of the prisoner's private bodily areas, should be conducted by correctional staff of the same gender as the prisoner.

²⁴¹ See *Hudson*, 468 U.S. at 530 (Eighth Amendment would ban a search that constituted "calculated harassment unrelated to prison needs"); *Scher v. Engelke*, 943 F.2d 921 (8th Cir. 1991) (retaliatory cell searches are clearly unconstitutional). See also Standard 23-7.1(a) (forbidding staff harassment of prisoners).

²⁴² See, e.g., *Theodore v. Coughlin*, No. 83 Civ. 6668 (LLS), 1986 WL 11456 at *2 (S.D.N.Y. Oct. 7, 1986) (prisoner claims that "during the searches his legal papers, mail, pictures, clothes and bedding were strewn on the floor"); *Scher v. Engelke*, 943 F.2d 921, 924 (8th Cir. 1991) (upholding punitive damage award based on "evidence of fear, mental anguish, and misery inflicted through frequent retaliatory cell searches, some of which resulted in the violent dishevelment of Scher's cell"); *Chevere v. Johnson*, 38 F.3d 1220, 1994 WL 577554, at *2 (Table) (10th Cir. 1994) (defendant officer allegedly "removed a Puerto Rican flag and a ceramic crucifix from the wall, stepped on the flag several times, and 'then broke the crucifix by allowing it to fall to the floor and chip'"); *Teahan v. Wilhelm*, 2007 WL 5041440 at *6 (S.D. Cal. Dec. 21, 2007) ("Plaintiff incontrovertibly had a long and uncomfortable evening, hauled to and from his cell a number of times. Moreover, Plaintiff was yelled at by Defendant Wilhelm and his personal items strewn about his cell. Yet, thus is life in prison.").

²⁴³ *Theodore v. Coughlin*, *supra* note 242.

Standard 23-7.9 Searches of prisoners' bodies

(c) **Pat-down searches and other clothed body searches should be brief and avoid unnecessary force, embarrassment, and indignity to the prisoner.**

(d) **Visual searches of a prisoner's private bodily areas, whether or not inspection includes the prisoner's body cavities, should:**

- (i) **be conducted only by trained personnel in a private place out of the sight of other prisoners and of staff not involved in the search, except that a prisoner should be permitted to request that more than one staff member be present; and**
- (ii) **be permitted only upon individualized reasonable suspicion that the prisoner is carrying contraband, unless the prisoner has recently had an opportunity to obtain contraband, as upon admission to the facility, upon return from outside the facility or a work assignment in which the prisoner has had access to materials that could present a security risk to the facility, after a contact visit, or when the prisoner has otherwise had contact with a member of the general public; provided that a strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner's admission to a correctional facility or before the prisoner's placement in a housing unit.**

(e) **Any examination of a transgender prisoner to determine that prisoner's genital status should be performed in private by a qualified medical professional, and only if the prisoner's genital status is unknown to the correctional agency.**

(f) **Except as required by exigent circumstances, a digital or instrumental search of the anal or vaginal cavity of a prisoner should be conducted only pursuant to a court order. Any such search should be conducted by a trained health care professional who does not have a provider-patient relationship with the prisoner, and should be conducted in a private area devoted to the provision of medical care and out of the sight of others, except that a prisoner should be permitted to request that more than one staff member be present.**

(g) **A record should be kept documenting any digital or instrumental anal or vaginal cavity search and any other body search in which property is confiscated. The record should identify the circumstances of the search, the persons who conducted the search, any staff who are witnesses, and any confiscated materials. The prisoner should be given written documentation of this information.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-5.3 (sexual abuse), 23-6.13 (prisoners with gender identity disorder), 23-7.3 (religious freedom), 23-9.4(c)(ii)(E) (access to legal and consular services, bodily searches)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.10 (search of facilities and prisoners)

ABA Treatment of Prisoners Standards

Standard 23-7.9 Searches of prisoners' bodies

ACA, JAIL STANDARDS, 4-ALDF-2C-01 (searches), 2C-04 (inmate strip search), 2C-05 (body cavity search)

ACA, PRISON STANDARDS, 4-4192 through 4-4194 (control of contraband), 4-4282 (protection from unreasonable searches)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.C.A.3 (health care staff and non-clinical situations), VII.E.4 (strip searches of transgendered prisoners)

NCCHC, HEALTH SERVICES STANDARDS, J-I-03 (Forensic Information)

Commentary

This Standard regulates four types of searches of prisoners' bodies: pat-down searches (also known as frisk searches); strip searches; visual cavity searches (done as part of many but not all strip searches); and cavity probes. Constitutional decisions governing strip searches (described in this Standard as "visual searches of a prisoner's private bodily areas," to avoid any misunderstanding about what is encompassed by the term) have granted more protection to pretrial detainees who have not yet been arraigned or who are about to be released than to other prisoners. This Standard accordingly distinguishes between these groups in subdivision (d). But more generally, the overall requirements of the Standard apply to all types of body searches of all types of prisoners. As stated in the first two sentences of subdivision (a), the Standard requires that searches of a prisoner's body should strive to preserve the privacy and dignity of the prisoner, and should be done using the least intrusive method appropriate. Already, there are abundant occasions in which sensors of various kinds can be used instead of the types of body-searches regulated by the Standard. See ACA, PRISON STANDARDS 4-4192, Comment (requiring "use of nonintensive sensors and other techniques instead of body searches whenever feasible"). As technology develops, it is possible that sophisticated metal detectors and ion scanners, or other currently unfamiliar devices, can take the place of many more physical searches that are now routine. If such technology becomes available, its use might well be required by subdivision (a)'s requirement of the "least intrusive appropriate means."

Subdivision (b): Whatever the type of search, body searches of prisoners by correctional staff of the opposite sex have grave implications for the privacy interests of prisoners, and allow staff access to prisoners' bodies in ways that can be abusive. Absent an exigent situation—which does not include a predictable staff shortage that could be avoided by alternative shift or position assignments, or by reasonable hiring—this subdivision forbids correctional staff to conduct any cross-gender pat-down searches, strip-searches, and the more intrusive visual cavity searches and cavity probes. This same approach has been proposed by the National Prison Rape Elimination Commission²⁴⁴ with great resulting controversy, which prompts the following extended discussion.

To understand what is at stake in this subdivision requires some factual background. Pat-down searches in prisons and jails are highly intrusive—far more, for example, than the kind of pat-downs done as part of routine secondary screening at an airport. The description from one case that banned a policy allowing male staff to search female prisoners may be on the more-intrusive side of the spectrum, but gives a sense of what some jurisdictions require:

During the cross-gender clothed body search, the male guard stands next to the female inmate and thoroughly runs his hands over her clothed body starting with her neck and working down to her feet. According to the prison training material, a guard is to "[u]se a

²⁴⁴ NPREC [Proposed] Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails PP-4 (Limits to cross-gender viewing and searches), in NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 215 (June 2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-7.9 Searches of prisoners' bodies

flat hand and pushing motion across the [inmate's] crotch area.' The guard must '[p]ush inward and upward when searching the crotch and upper thighs of the inmate.' All seams in the leg and the crotch area are to be 'squeez[ed] and knead[ed].' Using the back of the hand, the guard also is to search the breast area in a sweeping motion, so that the breasts will be 'flattened.' Superintendent Vail estimated that a typical search lasts forty-five seconds to one minute. A training film, viewed by the court, gave the impression that a thorough search would last several minutes.²⁴⁵

Pat-down searches of male prisoners likewise involve intimate contact through clothing, including with genital areas.

And prison and jail strip searches, too, tend to be extremely intrusive, even if they are done in private (as required by subdivision (d)). Most frequently, strip searches are coupled with visual cavity searches, as in the search described in this excerpt from one account, given by a woman who was arrested for failure to obey a police order during a political protest:

After I removed all my clothes, the guard told me to turn around, bend all the way over, and spread my cheeks. . . . Bending over and "spreading my cheeks" exposed my genitalia and anus to a complete stranger, who had physical authority over me, so that she could visually inspect my body cavities. . . . The guard's next set of instructions were to squat — and then — to hop like a bunny. Remember, I'm still "spreading my cheeks," so I can't use my arms to balance or assist me in the hopping process. Hopping-like-a-bunny was physically very difficult for me to do since I've had bad knees for over thirty years. I didn't do it to the guard's liking, so I had to do it over several times — even though I explained to her that I physically couldn't do it. When that process was complete, the guard then told me to turn around and to remove my navel piercing. I explained that it was unlikely that I would be able to remove it since it wasn't made to be removed. Using a threatening tone of voice she told me to remove it or she would "cut it out." I tried to remove it, but I just couldn't unscrew the jewel. The guard then left and returned with large clippers and cut the navel ring off me. She then told me to put my clothes back on.

I stood, bent over, and hopped naked under orders and in view of at least two guards in a small room with a door open to a hallway that passersby could see in for about 10 to 15 minutes. My genitalia and anus were exposed and viewable to anyone passing through the hallway for over 5 minutes.²⁴⁶

Again, analogous searches of men involve similar exposure of genitals to correctional staff and others.

Both case law and current practice relating to cross-gender searches of prisoners vary depending on the type of search, and sometimes on whether the prisoners are male or female.

For both men and women prisoners, avoidance of cross-gender strip searches is quite uncontroversial in practice, at least when those strip searches involve body-cavity inspection. See, e.g., ACA, PRISON STANDARDS 4-4194. For both male and female prisoners, there are courts that have held such avoidance

²⁴⁵ *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (en banc) (internal citations to prison materials omitted).

²⁴⁶ Judy Haney, Statement to the Commission on Safety and Abuse in America's Prisons, Apr. 19, 2005, available at http://www.prisoncommission.org/statements/haney_judith.pdf.

ABA Treatment of Prisoners Standards

Standard 23-7.9 Searches of prisoners' bodies

constitutionally compelled, although there is other case law going the other way, particularly for male prisoners.²⁴⁷

The situation for pat-down searches is a bit more complicated, both with respect to case law and practice. Beginning with the pat-down search case law, female prisoners have won quite a few cases challenging policies that require them to submit to pat-downs by male officers, usually under the Eighth Amendment. The cases tend to emphasize the link between abusive pat-downs and past sexual abuse of the prisoners,²⁴⁸ or to demonstrate that male officers' pat-downs of women have escalated to other unwanted sexual contact, including forcible rape.²⁴⁹ Male prisoners have brought similar challenges, but have won them less often. A great deal of case law rejects frequent claims by male prisoners that female officers' pat-down searches violate their rights.²⁵⁰ (When related claims have been upheld, it is in situations in which female officers are called upon to view naked male prisoners, especially for an extended period of time.²⁵¹) As one court summarized, "a number of courts have viewed female inmates' privacy rights vis-

²⁴⁷ Cases in which courts have found that prisoners have a right to avoid strip-searches by officers of the opposite sex include: *Byrd v. Maricopa County Sheriff's Dep't*, 629 F.3d 1135 (9th Cir.)(en banc), cert. denied 2011 U.S. LEXIS 4328 (2011)(indignity of nonemergency strip search conducted by unidentified female cadet compounded by presence of onlookers, one of whom videotaped the humiliating event); *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999); *Hayes v. Marriott*, 70 F.3d 1144, 1147-48 (10th Cir. 1995) (summary judgment was inappropriate given allegation that plaintiff was subjected to a body cavity search in the presence of numerous witnesses, including female correctional officers and case managers and secretaries); *Skundor v. McBride*, 280 F. Supp. 2d 524, 527 (S.D. W. Va. 2003) (citing absence of opposite sex staff and avoidance of unnecessary viewers in upholding strip search practice), aff'd, 98 Fed. App'x 257 (4th Cir. 2004) (unpublished). Cases in which no such constitutional right was found include: *Letcher v. Turner*, 968 F.2d 508, 510 (5th Cir.1992); *Somers v. Thurman*, 109 F.3d 614, 620 (9th Cir. 1997); *Collins v. Scott*, 961 F. Supp. 1009, 1016-17 (E.D.Tex. 1997) (upholding use of stun shield against Muslim prisoner who objected to a strip search by a female officer on religious grounds).

²⁴⁸ See, e.g., *Jordan v. Gardner*, 986 F.2d 1521 (19th Cir. 1993) (en banc) (describing history and traumatized reactions of plaintiffs); *Colman v. Vasquez*, 142 F. Supp. 2d 226 (D. Conn. 2001) (denying qualified immunity on a claim in which the plaintiff alleged that cross-gender pat-downs violated the Eighth Amendment, pointing to plaintiffs' assignment to a special unit for sexually traumatized prisoners). Women prisoners are highly likely to have experienced past sexual abuse, which tends to increase the debilitation caused by additional involuntary touching by men. This is far less true for men. The Bureau of Justice Statistics puts the proportion of incarcerated women with a history of sexual abuse at 37-39%, and the corresponding proportion of men at 6%. The rates among federal prisoners are about one-third lower for women and two-thirds lower for men. Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers* (Bureau of Justice Statistics, Apr. 1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/parip.pdf>.

²⁴⁹ *Colman*, 142 F. Supp. 2d., at 236 ("[P]laintiff here challenges the constitutionality of, in summary, a policy allowing frequent cross-gender pat searches of a female inmate already identified as particularly vulnerable due to prior sexual assault, who allegedly became the victim of a sexual assault by a prison guard who was permitted to 'pat' her pursuant to that policy."); see also *Neal v. Dep't of Corr.*, 2009 WL 187813 (Mich. App. 2009) (describing trial in which pat-down searches and rapes were linked).

²⁵⁰ See *Colman*, 142 F. Supp. 2d at 231-232; cases cited *supra* note 247.

²⁵¹ See, e.g., *Kent v. Johnson*, 821 F.2d 1220 (6th Cir.1987) (finding facially valid a Fourth Amendment challenge to a prison policy requiring male prisoners to expose their naked bodies to regular and continuous surveillance by female officers). As in U.S. law, international law is somewhat less protective of male prisoners than female ones, with respect to cross-gender searching. But the newest international sources, with their focus on prisoners' dignitary interests, do require substantial care to avoid cross-gender searches and naked viewing, including for male prisoners. For example, the 2006 European Prison Rules state that "Persons shall only be searched by staff of the same gender." ¶54.5.

ABA Treatment of Prisoners Standards

Standard 23-7.9 Searches of prisoners' bodies

a-vis being monitored or searched by male guards as qualitatively different than the same rights asserted by male inmates vis-à-vis female prison guards.”²⁵²

Moving to current professional norms in this area, whereas a national consensus regards cross-gender strip searches as appropriate only in exigent circumstances, matching this subdivision's requirements, no such consensus exists with respect to cross-gender pat-down searches, at least pat-down searches of male prisoners by female correctional staff. In a 1999 prison survey done by the National Institute of Corrections in which information was obtained for 47 states and the District of Columbia as well as the federal Bureau of Prisons, eight systems reported that their policy allowed routine pat-down of women by men.²⁵³ But whether because of the differentially-restrictive U.S. case law or for other reasons, twenty-four states—or half the reporting jurisdictions—provided the information that they allowed routine pat-downs of male prisoners by female officers.²⁵⁴

Notwithstanding the gender-specific case law and the gender-differentiating prevalence of cross-gender searching in practice, subdivision (b) takes the position that because of the dignitary affront of cross-gender body searches of both men and women, such searches should generally be forbidden. There is admittedly some reason to think that this rule is less urgent for male prisoners—in particular, the lesser degree of sexual trauma in the background of male prisoners²⁵⁵ and male prisoners' lower rate of sexual victimization by correctional staff.²⁵⁶ Nonetheless, a rule against cross-gender strip searches and pat-

²⁵² *Colman v. Vasquez*, 142 F. Supp. 2d 226, 232 (D. Conn. 2001); see also *Oliver v. Scott*, 276 F.3d 736, 747 (5th Cir.) (rejecting Equal Protection Clause challenge to prison policy regulating cross-gender supervision of women prisoners, but not of men prisoners). International law on the topic has been somewhat gender-specific. The Standard Minimum Rules for the Treatment of Prisoners put gender asymmetry in their text, stating, “Women prisoners shall be attended and supervised only by women officers.” ¶ 53(3). Andrew Coyle, who has served as an advisor to the UN High Commissioner for Human Rights and the Council of Europe summarizes the general approach and attitude of international prescriptions:

Women prisoners are especially vulnerable in the closed environment of a prison and they should be protected from physical or sexual abuse by male members of staff at all times. The international instruments require that women prisoners should be supervised by women staff. If male staff are employed in a women's prison they should never be in sole control of the women. There should always be a female member of staff present. . . . Male members of staff should never be involved in personal searches of women prisoners. The need to observe common decency, for example, by not requiring a prisoner to strip completely naked in the course of a body search, applies especially in the case of women prisoners.

The newest international sources, however, do require substantial care to avoid cross-gender searches and naked viewing, including for male prisoners. For example, under the 2006 European Prison Rules, ¶54.5, “Persons shall only be searched by staff of the same gender.”

²⁵³ National Institute of Corrections Prisons Division and Information Center, *Cross-Sex Pat Search Practices: Findings from NIC Telephone Research* (January 6, 1999), available at <http://www.nicic.org/downloads/pdf/1999/014891.pdf>. The eight systems in the minority were: Connecticut, Kansas, Michigan, New Hampshire, New York, Pennsylvania, Federal Bureau of Prisons. The study did not include jails, and there is apparently no similar systematic jail research. But discussions with jail administrators confirm that pat-down searches of women prisoners by male officers are, in at least many jail systems, highly disfavored.

²⁵⁴ *Id.*

²⁵⁵ See *supra* note 248

²⁵⁶ Female prisoners, who make up only a small percentage of total prison and jail population (7% of state prison population; 12% of jail population), are far more likely than male prisoners to be the victims of sexual contact by correctional staff. According to the data reported in initial studies by the Bureau of Justice Statistics, female prisoners were 6 or 7 times as likely as male prisoners to be the victims of staff sexual contact in state prisons, and 17-30 times as likely in jails. See Allen J. Beck & Timothy A. Hughes, *Sexual Violence Reported by Correctional*

ABA Treatment of Prisoners Standards

Standard 23-7.9 Searches of prisoners' bodies

down searches is highly beneficial for both female and male prisoners, reducing occasions for sexual abuse and respecting their human dignity.²⁵⁷ Additional support for the approach of this subdivision is provided by the very serious objections of adherents of a number of religions, male and female, to exposure of their bodies to people of the opposite sex.²⁵⁸

The Standard's rule against cross-gender searches does, however, create an important risk that must be managed. Particularly when joined with Standard 23-7.10's ban on routine visual supervision of naked prisoners by correctional staff of the opposite gender, for example in showers, bathrooms, and during medical procedures, this subdivision's requirements might conflict with women's employment as correctional staff. (The impact on men's employment is much less significant, since such a small minority of prisoners are female.) Currently, about a third of prison security staff are women.²⁵⁹ The presence of female officers in large numbers in correctional facilities of all types is helpful in promoting normalcy and appropriate rehabilitation in men's as well as women's prisons. As the European Committee for the Prevention of Torture has explained, "the presence of both male and female staff will have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a prison."²⁶⁰ Especially if the proportion of women staff continues to increase, as some predict, there may come a time when corrections officials will have to make serious efforts in recruiting and assignments to have enough male officers available to comply with the Standards.

The Standards are not, however, intended to turn the clock back to the early 1970s, before women entered the correctional work-force in large numbers. The risk of this outcome is more theoretical than real; recall that over 20 state prison systems already have policies that take the approach this subdivision requires, yet continue to hire female officers. Correctional agencies can comply with both Standard 23-7.9 and 23-7.10 and simultaneously avoid limiting employment opportunities for women staff, which benefits staff and prisoners alike. The most important contribution to compliance with this subdivision comes from careful shift assignments that take account of the gender-specific roles allowed in searching. Exclusion of women from particular facilities or even posts should generally not be necessary and would

Authorities, 2004 (Bureau of Justice Statistics, Oct. 2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca04.pdf> (reporting that males represented 93% of State prisoners and 88% of local inmates, but were only 69% of victims of staff sexual misconduct in State prisons and only 30% in local jails); Allen J. Beck, Paige M. Harrison, & Devon B. Adams, *Sexual Violence Reported by Correctional Authorities, 2006* (Bureau of Justice Statistics, Aug. 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf> (males were 65% of victims of staff sexual misconduct in State prisons and 20% in local jails). Note that the base rate of reported sexual misconduct in this study was very low—under 3 incidents per 1000 prisoners. The same study suggested that female staff may be somewhat more likely than male staff to be the perpetrators of improper sexual contact, *id.* (reporting that women were 58% of the staff perpetrators of sexual contact with prisoners) but this disproportion is explained by the fact that nearly all male officers work with male prisoners.

²⁵⁷ It is possible that many men are less concerned about privacy than many women (using urinals in public bathrooms, etc.). But this is far from universally true, and even if it were, does not cover cross-gender exposure.

²⁵⁸ For an example of the kinds of conflicts that might be avoided by compliance, see, e.g., *Collins v. Scott*, 961 F. Supp. 1009, 1016-17 (E.D. Tex. 1997) (upholding use of stun shield against Muslim prisoner who objected to a strip search by a female officer on religious grounds).

²⁵⁹ United States Department of Justice, Bureau of Justice Statistics, Census of State and Federal Adult Correctional Facilities, 2005 [Computer file], ICPSR Study No.1 24642-version 1 (available at <http://dx.doi.org/10.3886/ICPSR24642>). Data are not available for jail employment, but if anything, the percentage of women may be higher.

²⁶⁰ EUROPEAN COMMITTEE ON THE PREVENTION OF TORTURE, VISIT REPORT (CROATIA), CPT/Inf (2008) 29 (Nov. 29, 2007).

ABA Treatment of Prisoners Standards

Standard 23-7.9 Searches of prisoners' bodies

likely be unlawful under the employment discrimination laws.²⁶¹ Compliance with Standard 23-7.10 is discussed in the commentary to that section.

One final issue arises in this area. If only same-sex strip searches and pat-down searches are allowed, who can perform a body search of a transgender prisoner? Whatever has been chosen as a prisoner's designated gender for other purposes, such as housing, it is sensible to use for this purpose as well. Note, however, that subdivision (e) presents a special rule that a search to assess a transgender prisoner's genital status should be done only by a medical professional and only if the prisoner's genital status is unknown.

Subdivision (c): Even when performed by a correctional officer of the same gender as the prisoner, pat-down searches can be extremely intimate. Obviously, unnecessary force is to be avoided, as are personal comments, teasing, or fondling. Experts agree that pat-down searches that use particular body-positioning and the back of the searching officer's hands are just as effective as others, but feel less intrusive.

Subdivision (d): For convicted prisoners, the case law establishes the constitutionality of strip searches and visual body cavity searches done without abuse or humiliation. See, e.g., *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992). But the law is different for detainees, not yet convicted of any offense. While probable cause is not required to authorize a strip search (including a visual bodily cavity inspection), see *Bell v. Wolfish*, 441 U.S. 520, 545 (1979), nonetheless some reasonable degree of suspicion is constitutionally compelled. This can either be individualized suspicion, or suspicion based on the nature of the offense. Current case law requires that persons arrested for minor, non-drug, non-violent offenses not be routinely strip-searched, even if they are about to be placed in a jail's general population.²⁶² Thus subdivision (d)(ii) implements what nearly all of the federal Courts of Appeals has declared to be the constitutional floor for pretrial detainees. For other prisoners, the subdivision's requirement of

²⁶¹ In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court struck down a general requirement that correctional officers be at least 5'2" and weigh at least 120 lbs because of the highly disparate impact on women's employment, which the Court held violated Title VII of the Civil Rights Act of 1964. But the Court simultaneously held that a prison *could* properly exclude women from employment in a maximum security unit in positions that required "close contact" with prisoners. Gender could in very limited circumstances be a bona fide occupational qualification (BFOQ) for employment in a prison, the Court held, but it emphasized the fact-specific nature of this holding, describing the security risk posed by and to women officers given that the Alabama system's "'rampant violence' and . . . 'jungle atmosphere'" had recently been held "constitutionally intolerable." *Id.* at 334 (quoting *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976)). Since *Dothard*, women officers have typically won such Title VII challenges; the facts, courts have held, rarely support the BFOQ analysis required under *Dothard* for approval of a facial exclusion. Many cases are summarized in Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 244-245 (2003).

²⁶² See *Savard v. Rhode Island*, 320 F.3d 34 (1st Cir. 2003); *Masters v. Crouch*, 72 F.2d 1248, 1255 (6th Cir. 1989); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1266, 1273 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985). Note, however, that this law is currently in flux: Both the Ninth and Eleventh Circuits have held en banc that a so-called "blanket" strip-search policy of individuals placed in custodial housing was permissible under the Fourth Amendment. *Bull v. City & County of San Francisco*, 595 F.3d 964, 981 (9th Cir. 2010) (overruling *Thompson v. City of Los Angeles*, 885 F. 2d 1439 (9th Cir. 1989) and *Giles v. Ackerman*, 746 F. 2d 614 (9th Cir. 1984) (per curiam); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc) (overruling *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001), and *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000)). The Supreme Court has granted certiorari to review the Third Circuit's holding to this same effect. See *Florence v. Board of Chosen Freeholders of the County of Burlington*, 621 F. 3d 296 (3d Cir. 2010) (upholding suspicionless strip search of individual arrested for minor offense upon the individual's admission to jail facility), cert. granted No. 10-945 (April 4, 2011).

ABA Treatment of Prisoners Standards

Standard 23-7.10 Cross-gender supervision

individualized reasonable suspicion unless a prisoner has recently had an opportunity to obtain contraband extends more-than-constitutional protection.

For both pretrial detainees and convicted prisoners, subdivision (d)(i) requires privacy for searches, in order to respect prisoners' dignity. Various methods may be used to allow one or two staff to supervise even a fairly large number of prisoners, and still afford prisoners privacy from one another; one example is an "open stall" set up, which obstructs prisoners' view of each other, but allows staff to see them all. The subdivision's requirement that a prisoner be permitted to request that more than one staff member be present is designed to avoid the occasion for sexual abuse—or a false accusation of sexual abuse—that may occur when a single staff member is supervising a single naked prisoner.

Subdivision (f): The requirement of a court order prior to "digital or instrumental search of the anal or vaginal cavity of a prisoner" exceeds the constitutional requirement²⁶³ (and the ACA accreditation requirement²⁶⁴), but accords with ordinary practice in some jurisdictions.²⁶⁵ Exigent circumstances can include a reasonable fear that evidence will be destroyed, if a ruling on an application for a court order cannot otherwise be obtained quickly enough.

Like this subdivision, the ACA's Jail Standards (although not the ACA's Prison Standards) require that such searches be conducted by health care personnel. See ACA, JAIL STANDARDS 4-ALDF-2C-04; ACA, PRISON STANDARDS 4-4193. Subdivision (f) adds the requirement that the health care professional doing the search not be one who has a provider-patient relationship with the patient. The goal of this provision is to avoid the kind of jeopardy to the patient-provider relationship inherent in having a patient's health provider perform a security function. The provision does not go as far in this direction as the NCCHC's accreditation requirements, which forbid health services staff from "participating in the collection of forensic information" expressly including body cavity searches. NCCHC, Health Services Standards, I-03.

Subdivision (g): As in Standard 23-7.8(c), this subdivision's requirement of recordkeeping serves to preserve information about searches, which may prompt disciplinary charges against a prisoner or grievances by a prisoner.

Standard 23-7.10 Cross-gender supervision

Correctional authorities should employ strategies and devices to allow correctional staff of the opposite gender to a prisoner to supervise the prisoner without observing the prisoner's private bodily areas. Any visual surveillance and supervision of a prisoner who is undergoing an intimate medical procedure should be conducted by correctional officers of the same gender as the prisoner. At all times within a correctional facility or during transport, at least one staff member of the same gender as supervised prisoners should share control of the prisoners.

²⁶³ See, e.g., *Vaughan v. Ricketts*, 950 F.2d 1464, 1468-69 (9th Cir. 1991) (requiring "reasonable cause" but not a court order to justify digital rectal searches).

²⁶⁴ See ACA, JAIL STANDARDS 4-ALDF 2C-05 (requiring authorization by the facility administrator or designee for manual or instrument body cavity search); ACA, PRISON STANDARDS 4-4193 (same).

²⁶⁵ See, e.g., Mass. Dep't of Corr. Search Policy, 506.03(3), available at <http://www.mass.gov/Eeops/docs/doc/policies/506.pdf>; *Rodrigues v. Furtado*, 575 N.E.2d 1124 (Mass. 1991).

ABA Treatment of Prisoners Standards

Standard 23-7.10 Cross-gender supervision

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.2(c) (conditions for special types of prisoners, female prisoners), 23-3.3 (housing areas), 23-5.3 (sexual abuse), 23-6.1 (general principles governing health care), 23-7.9 (searches of prisoners' bodies), 23-10.2 (personnel policy and practice)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-2A-08 (control)

ACA, PRISON STANDARDS, 4-4181 (correctional officer assignments)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VII.A.13 (cross-gender visual surveillance)

U.N. Standard Minimum Rules, art. 53 (women prisoners and officers)

Commentary

This Standard requires correctional authorities to avoid cross-gender intimate supervision—visual surveillance of areas in which prisoners are naked or using the toilet, including showers and (in prisons in which sleepwear is not provided) cells.²⁶⁶ One way to achieve this goal is to impose employment restrictions on male staff in women's units, and on female staff in men's units. This is, in fact, the approach endorsed by the U.N. Standard Minimum Rules, art. 53, with respect to female prisoners. It states: "Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women." American jails and prisons have occasionally banned assignment of opposite-sex officers to prisoner housing areas, or disallowed opposite-sex officers to patrol shower areas, or the like. These kinds of rules obviously raise employment discrimination issues. Exclusions of female staff from male units have generally been struck down under Title VII,²⁶⁷ while challenges to gendered exclusion of male staff from certain prison jobs have more mixed outcomes.²⁶⁸

²⁶⁶ As in the case law examining body searches of prisoners, the outcomes in cases about male prisoners and female officers are somewhat different; female prisoners are more likely than male prisoners to win challenges to cross-gender visual surveillance. For both men and women, the outcomes are quite fact specific. Upholding visual surveillance of naked male prisoners by female officers are, e.g., *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995); *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990) (same); *Grummet v. Rushen*, 779 F.2d 491 (9th Cir. 1985) (same). On the other side is, e.g., *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987) (finding facially valid a Fourth Amendment challenge to a prison policy requiring male prisoners to expose their naked bodies to regular and continuous surveillance by female officers). For women prisoners, see, e.g., *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir. 1981) (upholding jury verdict imposing liability for male officers' refusal to leave while prisoner disrobed); *Hill v. McKinley*, 311 F.3d 899 (8th Cir. 2002) (prisoner's Fourth Amendment rights were violated when she was naked and completely exposed to male officers, but those officers were entitled to qualified immunity); *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980) (prison provided sleepwear was sufficient to protect the privacy rights of female prisoners observed during sleeping hours by male officers). These cases and many others are analyzed in Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225 (2003).

²⁶⁷ See *supra* note 261.

²⁶⁸ See, e.g., *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223, 224-225 (8th Cir. 1995) (upholding women-only staffing plan for women's unit against Title VII challenge by men, because the impact on men's employment opportunities was minimal); *Torres v. Wis. Dep't of Health and Soc. Serv.*, 859 F.2d 1523, 1524, 1532 (7th Cir. 1988) (rehabilitative needs of female prisoners in maximum security prison could justify state policy to staff the prison's housing units with women only); *Carl v. Angelone*, 883 F. Supp. 1433, 1436 (D. Nev. 1995) (female gender is not necessarily a BFOQ for employment in a female correctional facility); *Edwards v. Dep't of Corr.*, 615 F. Supp. 804, 805-06 (M.D. Ala. 1985) (rejecting BFOQ defense for refusal to hire male supervisor of a women's correctional

ABA Treatment of Prisoners Standards

Standard 23-7.11 Prisoners as subjects of behavioral or biomedical research

Whatever asymmetry the case law endorses, this Standard is not gender-specific. For neither male officers supervising female prisoners nor female officers supervising male prisoners is the Standard intended to require general employment exclusions. (See discussion of employment issues in the commentary to Standard 23-7.9.) Experience demonstrates that it is possible to eliminate cross-gender intimate supervision without eliminating *all* cross-gender supervision. Many jails and prisons have implemented a variety of strategies to curtail visual exposure of naked female prisoners to male officers. Approaches include use of warnings (a shouted “Male officer on the tier!”); privacy panels allowed for several minutes at a time when a prisoner is changing; partially opaque shower curtains; small partial stalls in bathrooms; and provision of sleepwear. Some, though fewer, facilities use similar strategies to limit intimate visual supervision in male housing areas. The wording of this Standard is intended to endorse this approach for male and female prisoners and staff alike. Given that non-intimate cross-gender supervision remains possible, even likely, correctional officials may want to implement measures that address its particular risks, such as installing video cameras in areas in which such supervision occurs. See also Standard 23-5.3.

The requirement in the Standard’s last sentence, that at all times at least one staff member of the same gender as supervised prisoners share control of the prisoners, avoids some situations in which abuse may occur and is also a necessary step towards compliance with the first part of the Standard. If there is no officer around of the same gender as a prisoner or group of prisoners under supervision, there will often be no way to avoid intimate cross-gender supervision. The requirement is particularly important during transport, when the environment is less controlled and the possibility of abuse is particularly high.

Standard 23-7.11 Prisoners as subjects of behavioral or biomedical research

(a) Subject to the provisions of this Standard, prisoners should not be prohibited from participating in therapeutic behavioral or biomedical research if the potential benefits to prisoners outweigh the risks involved. For biomedical research that poses only a minimal risk to its participants or for behavioral research, prisoner participation should be allowed only if the research offers potential benefits to prisoners either individually or as a class. For biomedical research that poses more than a minimal risk to its participants, prisoner participation should be allowed only if the research offers potential benefits to its participants, and only if it has been determined to be safe for them. Except in unusual circumstances, such as a study of a condition that is solely or almost solely found among incarcerated populations, at least half the subjects involved in any behavioral or biomedical research in which prisoner participation is sought should be non-prisoners. No prisoner should receive preferential treatment, including improved living or work conditions or an improved likelihood of early release, in exchange for participation in behavioral or biomedical research, unless the purpose of the research is to evaluate the outcomes associated with such preferential treatment.

(b) Adequate safeguards and oversight procedures should be established for behavioral or biomedical research involving prisoners, including:

facility). Courts have refused to compel jurisdictions to impose mirror-image policies relating to male and female staff and their supervision of female and male prisoners. See *Oliver v. Scott*, 276 F.3d 736, 747 (5th Cir. 2002) (rejecting Equal Protection Clause challenge to prison policy regulating cross-gender supervision of women prisoners, but not of men prisoners).

ABA Treatment of Prisoners Standards

Standard 23-7.11 Prisoners as subjects of behavioral or biomedical research

- (i) Prior to implementation, all aspects of the research program, including design, planning, and implementation, should be reviewed and approved, disapproved, or modified as necessary by an established institutional review board that complies with applicable law and that includes a medical ethicist and a prisoners' advocate.
- (ii) Research studies should not be the sole avenue for prisoners to receive standard treatment for any medical or mental health condition.
- (iii) The institutional review board should ensure that mechanisms exist to closely monitor the progress of the study to detect and address adverse events or unanticipated problems. Correctional staff, health care staff, and the researchers should promptly report all adverse events involving prisoner study subjects to the institutional review board's chair and the prisoners' advocate.
- (iv) Provision should be made for appropriate health care for adverse medical or mental health conditions or reactions resulting from participation.
- (v) No prisoner should be allowed to participate in behavioral or biomedical research unless that prisoner has given voluntary and informed consent in writing in accordance with an approved protocol which requires that the prisoner be informed and express understanding of:
 - A. the likely risks, including possible side effects, of any procedure or medication;
 - B. the likelihood and degree of improvement, remission, control, or cure resulting from any procedure or medication;
 - C. the uncertainty of the benefits and hazards of any procedure or medication and the reasonable alternatives;
 - D. the fact that a decision to participate or to decline participation will not affect the conditions of the prisoner's confinement;
 - E. the ability to withdraw from the study at any time without adverse consequences unrelated to any physical or psychological results of such withdrawal; and
 - F. the contact information for a person to whom questions about the study can be posed and problems reported.
- (vi) All consent forms should be reviewed and approved by the institutional review board before they are presented to the prisoner.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-6.1 (general principles governing health care), 23-6.14 (voluntary and informed consent to treatment)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-5.8 (experimental programs)

ACA, JAIL STANDARDS, 4-ALDF-4D-18 (research)

ACA, PRISON STANDARDS, 4-4111 through 4-4113 (research activities), 4-4402 (research)

ABA Treatment of Prisoners Standards

Standard 23-7.11 Prisoners as subjects of behavioral or biomedical research

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 65-66 (research)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.B.E (prisoner research)

NCCHC, HEALTH SERVICES STANDARDS, J-I-06 (Medical and Other Research)

Commentary

The history of prisoner participation in biomedical and other research is laden with abuses—dangerous experiments, inadequate follow-up to address harm to participants, misleading or no disclosure, and coerced participation.²⁶⁹ The American Correctional Association's response to this history is accreditation standards that forbid “the use of offenders for medical, pharmaceutical, or cosmetic experiments.” ACA, Prison Standards 4-4402; ACA, Jail Standards 4-ALDF-4D-18. The relevant law is not so absolute. What is termed the “Common Rule” on protection of human research subjects, 45 C.F.R. pt. 46, includes Subpart C, “Additional Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects,” §§ .301-.306, 43 Fed. Reg. 53655 (Nov. 16, 1978). Subpart C is binding only with respect to research funded by one of three (out of 17) federal agencies, or if a research organization such as a university has voluntarily adopted Subpart C. Within this limited coverage, research is allowed only if it studies incarceration and presents no more than minimal risk to its participants; if it studies conditions disproportionately affecting prisoners, such as hepatitis, alcoholism, or drug addiction; or if it examines practices which have the intent and reasonable probability of improving the health or well-being of the subject. See 45 C.F.R. §§ 46.305(a)(1); 46.306(a)(2).

In 2006, the Institute of Medicine's Committee on Ethical Considerations for Revisions to the DHHS Regulations for Protection of Prisoners Involved in Research made an important proposal. That proposal broadened human subjects regulation to cover *all* research done in prisons. It also changed the calculus by which research ethics are evaluated, shifting from what the IOM report labeled Subpart C's “categorical approach” to a “risk-benefit approach” under which research is allowed only if its “potential benefits to prisoners . . . outweigh the risks.”²⁷⁰ Under this framework, biomedical research should be permitted only if there are strong potential benefits for the prisoner compared to the risks involved. Studies that offer no benefit to subjects, such as the testing of cosmetic products, should be precluded. The provisions of this Standard match the IOM recommendations in their particulars.

Bioethicists emphasize that research participants should not be given incentives—whether monetary or not—that unduly pressure their choice to participate. When it applies, Subpart C, the current regulation, disallows compensation or benefits from participation that “when compared to the general living conditions, medical care, quality of food, amenities and opportunity for earnings in the prison” are “of such a magnitude that [the prisoner's] ability to weigh the risks of the research against the value of such advantages in the limited choice environment of the prison is impaired.” 45 C.F.R. § 46.305(a)(2). Subdivision (a) of our Standard would ban “preferential treatment, including improved living or work conditions . . . or an improved likelihood of early release, in exchange for participation in behavioral or biomedical research, unless the purpose of the research is to evaluate the outcomes associated with such preferential treatment.”

The Standard thus takes a middle position between a more absolute ban on biomedical research involving prisoners (such as that in the ACA accreditation standards), and proposals to allow prisoners more

²⁶⁹ See, e.g., ALLEN M. HORNBLUM, *ACRES OF SKIN: HUMAN EXPERIMENTS AT HOLMESBURG PRISON: A TRUE STORY OF ABUSE AND EXPLOITATION IN THE NAME OF MEDICAL SCIENCE* (1998); INSTITUTE OF MEDICINE, *ETHICAL CONSIDERATIONS FOR RESEARCH INVOLVING PRISONERS* (Lawrence O. Gostin *et al.* eds., 2007), available at http://books.nap.edu/openbook.php?record_id=11692&page=R1.

²⁷⁰ See *id.*

ABA Treatment of Prisoners Standards

Standard 23-7.11 Prisoners as subjects of behavioral or biomedical research

freedom to choose to participate in human subjects research—in particular, allowing them to receive unregulated benefits as compensation.

PART VIII: REHABILITATION AND REINTEGRATION

Part VIII General Commentary

America's prisons release over 700,000 people annually²⁷¹; jails release millions more.²⁷² It is imperative that correctional administrators develop appropriate rehabilitative and vocational programming for them; help them maintain and reestablish connections to their families; ensure that, upon their release, they have continuity of medical and mental health care, as well as access to housing, work, and treatment options. Prisoners who successfully re-enter the community, and establish functional ties with their communities, are less likely to return to prison.

In light of the massive numbers of prisoners and the correspondingly increased numbers of former prisoners, the Standards urge that prison itself be oriented towards re-entry and reintegration of those leaving prison into non-prison communities. This has been a theme in prior ABA policy as well; the resolutions and reports cited in the "related standards and ABA resolutions" following each standard provide helpful background. For a summary of many recent governmental initiatives in this area, see Re-Entry Policy Council, <http://www.reentrypolicy.org>.

The most relevant provisions, after an initial statement in Standard 23-1.1(b), are contained in this Part, which groups together Standards relating to "Rehabilitation and Reintegration"—including Standards relating to the location of facilities, prisoner work programs, visiting, access to telephones, and preparation for release. Overall, the intent of these several provisions is to focus the attention of those who operate and oversee jails and prisons on the fact that nearly all of their prisoners will be released. Policies and procedures should maximize the ability of all prisoners to remain engaged with their families and to lead productive and healthy lives upon their return to the community.

Standard 23-8.1 Location of facilities

Governmental authorities should strive to locate correctional facilities near the population centers from which the bulk of their prisoners are drawn, and in communities where there are resources to supplement treatment programs for prisoners and to provide staff for security, programming, and treatment.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-8.5 (visiting), 23-9.4(b) (access to legal and consular services, housing prisoners near courthouses), 23-10.2(c) (personnel policy and practice, staff demographics)

Related Standard and ABA resolution

ABA, RESOLUTION (text in Appendix), 107 (Aug. 2002) (blueprint for corrections)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, I.A.2 (links to community agencies)

²⁷¹ The most recent data available are from 2005. See William Sabol et al., *Prison and Jail Inmates at Midyear 2006*, at 1 (Bureau of Justice Statistics, June 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf>.

²⁷² Todd D. Minton & William J. Sabol, *Jail Inmates at Midyear 2008—Statistical Tables 5 tbl.4* (Bureau of Justice Statistics, Mar. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf> (average daily jail population is over 775,000; weekly turnover rate is 66.5%, which means that every week, on average, about one-third of the jail population leaves).

Commentary

Jails, nearly all of which are run by cities and counties, are typically located close to both the homes of the prisoners they house and the courthouses through which those prisoners are processed. This is convenient for court and jail personnel as well as for prisoners and their families. In addition, it protects prisoners' Sixth Amendment right of access to counsel. See Standard 23-9.4(b) and commentary. The siting of prisons, by contrast, is in many states related less to efforts to improve prison efficiency or function than to political considerations. Prisons are located disproportionately in rural areas, even though the prisoners' homes (like those of other Americans) are mostly urban and suburban.²⁷³ This disconnect increases the distance prisoners' families must travel to visit, to the detriment of both prisoners and their families. Correctional facilities are divorced from the community resources that could improve services within the facility and build re-entry bridges for released prisoners. And this disconnect makes it more difficult to recruit appropriate staff—particularly professional staff for whom specialized training or credentials are essential—because few qualified people live in the remote locations of some prisons.

This Standard emphasizes the importance of reversing the current imbalance and locating prison facilities near the cities where prisoners used to live and where their families continue to live. While there are sometimes security reasons not to build a correctional facility right in a city, authorities advise that it should preferably take less than an hour to travel to the prison from the nearest population center. Of course, prison siting decisions cannot be revisited once the facility is built. But this Standard should influence both new facility siting and facility closing decisions.

International law, which gives visitation and other community communication a higher priority than does U.S. law, agrees. For example, the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, requires: "If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence." Principle 20, General Assembly resolution 43/173, annex, available at http://www.unodc.org/pdf/compendium/compendium_2006_part_01_01.pdf.

Standard 23-8.2 Rehabilitative programs

(a) For the duration of each prisoner's confinement, the prisoner—including a prisoner in long-term segregated housing or incarcerated for a term of life imprisonment—should be engaged in constructive activities that provide opportunities to develop social and technical skills, prevent idleness and mental deterioration, and prepare the prisoner for

²⁷³ No firm figures exist on how many prisoners are incarcerated in the counties labeled "nonmetro" by the Census Bureau (which have under twenty percent of the nation's population), but it is probably about half. See Calvin L. Beale, *Rural Prisons: An Update*, RURAL DEV. PERSP., Feb. 1996, at 25–27 (documenting the shift towards nonmetro prisons); Calvin L. Beale, *Prisons, Population, and Jobs in Nonmetro America*, RURAL DEV. PERSP., Mar. 1993, at 16 (390 prisons in nonmetro areas in 1991 housed forty-four percent of all state and federal prisoners); see also, e.g., WILLIAM G. NAGEL, *THE NEW RED BARN: A CRITICAL LOOK AT THE MODERN AMERICAN PRISON* 46–52 (1973) (analyzing reasons for prison site selection in rural areas); Daniel L. Feldman, *20 Years of Prison Expansion: A Failing National Strategy*, 53 PUB. ADMIN. REV. 561, 561–62 (1993) (observing that in 1992, in New York state, "low-density, Republican districts . . . housed over 89 percent of state inmates"). This is a phenomenon that has racial consequences as well. Outside the South, rural counties are nearly always much whiter, demographically, than urban areas. See JESSE MCKINNON, U.S. CENSUS BUREAU, *THE BLACK POPULATION: 2000*, at 5 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

eventual release. Correctional authorities should begin to plan for each prisoner's eventual release and reintegration into the community from the time of that prisoner's admission into the correctional system and facility.

(b) After consultation with each prisoner, correctional authorities should develop an individualized programming plan for the prisoner, in accordance with which correctional authorities should give each prisoner access to appropriate programs, including educational opportunities, mental health and substance abuse treatment and counseling, vocational and job readiness training, personal financial responsibility training, parenting skills, relationship skills, cognitive or behavioral programming, and other programs designed to promote good behavior in the facility and reduce recidivism.

(c) Correctional authorities should afford every prisoner an opportunity to obtain a foundation in basic literacy, numeracy, and vocational skills. Correctional authorities should offer prisoners expected to be incarcerated for more than six months additional educational programs designed to meet those prisoners' individual needs. Correctional authorities should offer high school equivalency classes, post-secondary education, apprenticeships, and similar programs designed to facilitate re-entry into the workforce upon release. While on-site programs are preferred, correctional authorities without resources for on-site classes should offer access to correspondence courses, online educational opportunities, or programs conducted by outside agencies. Correctional authorities should actively encourage prisoner participation in appropriate educational programs.

(d) A correctional facility should have or provide adequate access to a library for the use of all prisoners, adequately stocked with a wide range of both recreational and educational resources, books, current newspapers, and other periodicals. Prisoners should also have regular access to a variety of broadcast media to enable them to remain informed about public affairs.

(e) Correctional officials should provide programming and activities appropriate for specific types of prisoners, including female prisoners, prisoners who face language or communication barriers or have physical or mental disabilities, prisoners who are under the age of eighteen or geriatric, and prisoners who are serving long sentences or are assigned to segregated housing for extended periods of time.

(f) Correctional authorities should permit each prisoner to take full advantage of available opportunities to earn credit toward the prisoner's sentence through participation in work, education, treatment, and other programming.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.2 (classification system), 23-4.2(d) (disciplinary hearing procedures, good-time sanctions), 23-5.2 (prevention and investigation of violence), 23-5.5(g)(iii) (protection of vulnerable prisoners, programming in protective custody), 23-6.1 (general principles governing health care), 23-6.9 (pregnant prisoners and new mothers), 23-6.11 (services for prisoners with mental disabilities), 23-6.12(b) (prisoners with chronic or communicable diseases, non-discrimination), 23-7.2 (prisoners with disabilities and other special needs), 23-7.3(b) (religious freedom, accommodations), 23-8.4 (work programs), 23-8.9 (transition to the community)

ABA Treatment of Prisoners Standards

Standard 23-8.2 Rehabilitative programs

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-4.3 (availability of rehabilitative programs)

ABA, RESOLUTIONS, 115C (Feb. 1990) (correctional education), 101C (Feb. 1992) (correctional literacy programs), 104B (Aug. 1996) (children with parents in correctional custody), 102B (Feb. 2000) (elderly prisoners), 107 (2002) (blueprint for corrections), 121D (Aug. 2004) (Justice Kennedy Commission), 11B (Aug. 2009) (national criminal justice study), 102E (Feb. 2010) (impact of incarceration on mother/child relationship)

ACA, JAIL STANDARDS, Goal 5 (successful reentry), Performance Standard 5A (inmate opportunities for improvement), 4-ALDF-5A-01 (programs and services), 5A-04 (substance abuse programs), and 5A-09 (academic and vocational education), 4-ALDF-5C-05 (library services)

ACA, PRISON STANDARDS, Principle 4F (social services), 4-4363-1 (health screens), 4-4428 and 4-4429 (scope of services), 4-4433 (counseling), 4-4437 through 4-4441 (drug, alcohol treatment), 4-4449 (inmate work plan), 4-4464, 4-4467, and 4-4468, (comprehensive education program), 4-4475 (inmate assessment and placement), 4-4505 (comprehensive library services)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.B.11 (substance abuse treatment), VII.A.14 (parenting skills), VII.B.C (prisoners with disabilities)

ASS'N OF SPECIALIZED AND COOPERATIVE LIBRARY AGENCIES, LIBRARY STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS, *passim*.

CORR. ED. ASS'N, PERFORMANCE STANDARDS, *passim*. See especially ¶¶ 43 (comprehensive education programs), 44 (library services), 48 (skills education).

U.N. Standard Minimum Rules, arts. 39 (contact with the outside world), 40 (books), 65-66 (treatment), 67 (classification and individualization)

Commentary

This Standard is motivated by the obvious fact that nearly all prisoners are released.²⁷⁴ If jails and prisons are going to make our communities safer, prison programs should be designed to enable former prisoners to lead a responsible and crime-free life. Pessimism about the efficacy of prison programs²⁷⁵ has in recent years given way to evidence-based programming that can, in many though not all cases, assist in effective rehabilitation.²⁷⁶ This Standard accordingly requires appropriately trained staff to assess the individual needs of each prisoner, determine the types of programming that will address those needs, and thereafter strive to provide access to as many such programs as feasible.

²⁷⁴ TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf>

²⁷⁵ Robert Martinson, *What Works? Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22, 25 (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”); see DOUGLAS LIPTON, ROBERT MARTINSON, & JUDITH WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975).

²⁷⁶ E.g., Steve Aos, Marna Miller & Elizabeth Drake, *Evidence-Based Adult Corrections Programs: What Works and What Does Not* (Washington State Institute for Public Policy 2006), available at <http://www.wsipp.wa.gov/pub.asp?docid=06-01-1201>; Elizabeth Drake, Steve Aos & Marna Miller, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (Washington State Institute for Public Policy 2009), available at <http://www.wsipp.wa.gov/pub.asp?docid=09-00-1201>.

ABA Treatment of Prisoners Standards

Standard 23-8.2 Rehabilitative programs

This Standard exceeds the constitutional floor; in general, there is no federal right to rehabilitative programming in prison.²⁷⁷ Even more generally, idleness by itself does not violate the Constitution,²⁷⁸ although courts will find idleness unconstitutional if it has serious consequences like mental deterioration or increased violence.²⁷⁹ Idleness will also occasionally remedy a constitutional violation by requiring prison officials to offer programming.²⁸⁰ There are, however, exceptions. Young prisoners with disabilities are entitled under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, to a “free and appropriate public education.” Prisoners with serious mental illness have a right to treatment, and prisoners with cognitive disabilities may have a constitutional entitlement to habilitation. See Standard 23-6.11 and commentary. In addition, if programming is provided, as this Standard requires, discrimination on account of, inter alia, race, religion, national origin, or disability is forbidden. As Standard 23-7.3 spells out, correctional authorities may be required to accommodate sincerely held religious beliefs, absent a compelling institutional interest, for example by offering programming that does not meet on a prisoner’s rest day. Programming for women should be as extensive and available as the programming provided men.

The legal requirement of non-discrimination towards prisoners with disabilities has a number of components. Sometimes, non-discrimination requires physical access: if, for example, a prisoner who uses a wheelchair wants to enroll in a class and the classroom is not wheelchair accessible. Sometimes, what is required is a scheduling accommodation: a prisoner who walks too slowly to arrive on time to a program might need permission to leave his housing area early or arrive late. Other times, what is needed is substitution of individualized consideration for an overbroad exclusion. For example, some agencies exclude prisoners with mental disabilities from substance abuse programs or other vital programs.²⁸¹ The ADA requires, instead, a case-by-case determination of each prisoner’s eligibility for these programs, including consideration of reasonable accommodations that would provide prisoners with mental illness an equal opportunity to participate. Finally, the ADA’s requirement of effective communication with prisoners with visual or hearing impairments, see Standard 23-7.2 and commentary, applies to programming as to other communications.

Subdivisions (a) & (b): These subdivisions echo the requirements imposed on the federal Bureau of Prisons by the Second Chance Act, 42 U.S.C. 17541(a)(1). That statute requires the BOP to:

(A) assess each prisoner’s skill level (including academic, vocational, health, cognitive,

²⁷⁷ See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237, 1254 (9th Cir. 1982); *French v. Heyne*, 547 F.2d 994, 1002 (7th Cir. 1976).

²⁷⁸ See, e.g., *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia*, 93 F.3d 910, 927 (D.C. Cir. 1996); *Peterkin v. Jeffes*, 855 F.2d 1021, 1029-30 (3d Cir. 1988); *Toussaint v. McCarthy*, 801 F.2d 1080, 1106-07 (9th Cir. 1986) and cases cited.

²⁷⁹ *Madrid v. Gomez*, 889 F. Supp. 1146, 1262-65 (N.D. Cal. 1995); *Morales Feliciano v. Romero Barcelo*, 672 F. Supp. 591, 619-20 (D.P.R. 1986); *Knop v. Johnson*, 667 F. Supp. 512, 522-23 (E.D. Mich. 1987), *aff’d in part, rev’d in part on other grounds*, 977 F.2d 996 (6th Cir. 1992); *Capps v. Atiyeh*, 559 F. Supp. 894, 908-09 (D. Ore. 1982); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 981 (D.R.I. 1977), *remanded on other grounds*, 599 F.2d 17 (1st Cir. 1979).

²⁸⁰ See, e.g., *Finney v. Arkansas Bd. of Corr.*, 505 F.2d 194, 209 (8th Cir. 1974).

²⁸¹ The implementing regulations for Title II of the ADA state that “no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.” 28 C.F.R. § 35.130(a). Furthermore, a public entity is prohibited from “impos[ing] or apply[ing] eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disability from fully and equally enjoying any service, program or activity.” 28 C.F.R. § 35.130(b)(8).

ABA Treatment of Prisoners Standards

Standard 23-8.2 Rehabilitative programs

interpersonal, daily living, and related reentry skills) at the beginning of the term of imprisonment of that prisoner to identify any areas in need of improvement prior to reentry;

(B) generate a skills development plan for each prisoner to monitor skills enhancement and reentry readiness throughout incarceration;

(C) determine program assignments for prisoners based on the areas of need identified through the assessment described in subdivision (A);

(D) ensure that priority is given to the reentry needs of high-risk populations, such as sex offenders, career criminals, and prisoners with mental health problems;

(E) coordinate and collaborate with other Federal agencies and with State, Tribal, and local criminal justice agencies, community-based organizations, and faith-based organizations to help effectuate a seamless reintegration of prisoners into communities;

(F) collect information about a prisoner's family relationships, parental responsibilities, and contacts with children to help prisoners maintain important familial relationships and support systems during incarceration and after release from custody; and

(G) provide incentives for prisoner participation in skills development programs.

Subdivision (c): This subdivision requires that every prisoner—including those incarcerated for a short period, and those in segregated housing—be offered an opportunity to receive basic educational and vocational assistance. For many prisoners, this will be appropriate programming. For prisoners expected to be incarcerated for more than six months, the requirement is stricter: they should be offered correctional educational programs designed to meet their individual needs, which might include higher-level programming. Before 1994, the Higher Education Act authorized Pell Grants for universities that enrolled prisoners as students, which enabled hundreds of thousands of prisoners access to higher education.²⁸² Such grants were life-changing for many prisoners, and were demonstrably effective at reducing recidivism.²⁸³ Compliance with this subdivision's requirement that correctional authorities offer prisoners access to post-secondary education will be difficult without reinstating Pell Grant eligibility for prisoner education.

Subdivision (d): An adequate library provides prisoners with news, and with recreational, educational, and news and other current information. Libraries should include materials suitable for varied literacy levels, in large type and Braille, and in languages spoken by large numbers of prisoners. Prisoners who are not allowed to visit the library should be afforded access in some other way. For small facilities or unexpected needs (e.g., Braille books in Spanish), library access might be appropriately provided by a robust lending arrangement with another facility.

Subdivision (e): Apart from the antidiscrimination requirements discussed in the general commentary to this Standard, subdivision (e) requires programming and activities specifically aimed at various groups of prisoners with special needs of various kinds.

²⁸² See, e.g., Richard Tewksbury & Jon Marc Taylor, *The Consequences of Eliminating Pell Grant Eligibility for Students in Post-Secondary Correctional Education Programs*, 60 FED. PROBATION 60 (1996). See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1829 (1994), 20 U.S.C. § 1070a(b)(7) (eliminating program).

²⁸³ Daniel Karpowitz & Max Kenner, *Education as Crime Prevention: The Case for Reinstating Pell Grant Eligibility for the Incarcerated* (Bard Prison Institute, 2003) available at http://www.bard.edu/bpi/pdfs/crime_report.pdf.

ABA Treatment of Prisoners Standards
Standard 23-8.3 Restorative justice

Subdivision (f): Correctional officials should not withhold good conduct time credit or earning capability except as a consequence of a disciplinary charge and hearing conducted as required by Standard 23-4.2(a).

Standard 23-8.3 Restorative justice

(a) Governmental and correctional authorities should facilitate programs that allow crime victims to speak to groups of prisoners, and, at the request of a crime victim and with the consent of the prisoner, appropriate meetings or mediation between prisoners and their victims.

(b) Consistent with security needs, correctional officials should provide opportunities for prisoners to contribute to the community through volunteer activities.

Related Standards and ABA Resolution

ABA, RESOLUTION, 101B (Aug. 1994) (victim/offender mediation)

ACA, JAIL STANDARDS, 4-ALDF-7F-03 (community relations)

ACA, PRISON STANDARDS, 4-4428 (scope of services), 4-4461-1 (inmate compensation)

Commentary

This Standard recognizes the value of reconciliation involving victims, prisoners' families, and the community.²⁸⁴ Neither prisoners nor crime victims should be allowed to participate in the restorative justice programs without appropriate screening and preparation.

Standard 23-8.4 Work programs

(a) Each sentenced prisoner should be employed substantially full-time unless there has been an individualized determination that no work assignment for that prisoner is consistent with security and safety. Substantial educational or rehabilitative programs can substitute for employment of the same duration. Whenever practicable, pretrial detainees should also be offered opportunities to work. Correctional authorities should be permitted to assign prisoners to community service; to jobs in prison industry programs; or to jobs useful for the operation of the facility, including cleaning, food service, maintenance, and agricultural programs. Prisoners' work assignments, including community service assignments, should teach vocational skills that will assist them in finding employment upon release, should instill a work ethic, and should respect prisoners' human dignity. To promote occupational training for prisoners, work release programs should be used when appropriate.

²⁸⁴ See, e.g., Kay Pranis, *The Minnesota Restorative Justice Initiative: A Model Experience*, in THE CRIME VICTIMS REPORT (May/June 1997), available at <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/perspectives/minnesota.htm>; Bandy Lee & James Gilligan, *The Resolve to Stop the Violence Project: Transforming an In-House Culture of Violence Through a Jail-Based Programme*, 27 J. PUB. HEALTH 149, 150 (2005); Marian Liebmann & Stephanie Braithwaite, *Restorative Justice in Custodial Settings* (May 1999), available at http://www.restorativejustice.org.uk/resource/research_into_restorative_justice_in_custodial_settings/; KIMMETT EDGAR & TIM NEWELL, RESTORATIVE JUSTICE IN PRISONS: A GUIDE TO MAKING IT HAPPEN (2006).

ABA Treatment of Prisoners Standards

Standard 23-8.4 Work programs

(b) Prisoners' job assignments should not discriminate on the basis of race, national origin, ethnicity, religion, or disability. Correctional authorities should make reasonable accommodations for religion and disability with respect to job requirements and sites. Correctional authorities should provide female prisoners job opportunities reasonably similar in nature and scope to those provided male prisoners.

(c) Prisoners should work under health and safety conditions substantially the same as those that prevail in similar types of employment in the free community, except to the extent that security requires otherwise. No prisoner should be shackled during a work assignment except after an individualized determination that security requires otherwise. Prisoners should not be required to work more than 40 hours each week, and should be afforded at least one rest day each week and sufficient time apart from work for education and other activities.

(d) Prisoners employed by a correctional facility should be compensated in order to create incentives that encourage work habits and attitudes suitable for post-release employment.

(e) Correctional officials should be permitted to contract with private enterprises to establish industrial and service programs to employ prisoners within a correctional facility, and goods and services produced should be permitted to freely enter interstate commerce. If such enterprises are for-profit firms, prisoners should be paid at least minimum wage for their work.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.2 (conditions for special types of prisoners), 23-3.5(a) (provision of necessities, cleaning assignments), 23-3.8 (segregated housing), 23-5.2(a)(xi) (prevention and investigation of violence, preventing idleness), 23-5.5(g)(iii) (protection of vulnerable prisoners, work in protective custody), 23-7.1 (respect for prisoners), 23-7.3(b) (religious freedom, accommodations), 23-8.2 (rehabilitative programs), 23-8.8(a) (fees and financial obligations), 23-11.2(a) (external regulation and investigation, safety inspection)

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standards 23-4.1(b) (prisoner participation in housekeeping and maintenance programs), 23-4.2 (conditions of employment), 23-4.4 (repeal of legislative impediments to remunerative prisoner employment; contacts with private enterprise; occupational training), 23-4.5 (wage scales for privately-employed prisoners: proportional contributions to maintenance costs, family support and victim restitution)

ABA, RESOLUTIONS, 120B (Aug. 1995) (correctional impact statement), 101B (Feb. 2002) (prisoner work)

ACA, JAIL STANDARDS, 4-ALDF-5C-06 through 5C-13 (work and correctional industries)

ACA, PRISON STANDARDS, Principle 5A (work and correctional industries), 4-4448 through 44-50 (inmate work plan), 4-4452 and 4-4454 (work opportunities), 4-4456 (correctional industries), 4-4462 and 4-4463 (inmate compensation)

U.N. Standard Minimum Rules, arts. 71-76 (work), 89 (work and pretrial prisoners)

ABA Treatment of Prisoners Standards
Standard 23-8.4 Work programs

Commentary

Prison labor in the nineteenth and early twentieth centuries was rife with abuse and exploitation. Prisoners were forced to labor in brutal conditions, and punished corporally if they refused. Groups of convicts were contracted out for private exploitation, with few consequences if prisoners were injured or died.²⁸⁵ Public outcry over these kinds of abuses, joined with the objections of the organized labor movement to prison labor as unfair competition, and led Congress in the 1930s to pass the Hawes-Cooper and Ashurst-Sumners Acts, which made it a felony to move prison goods across state borders.²⁸⁶ The result was drastic; where once nearly all prisoners worked, there are now hundreds of thousands of prisoners who are never offered job assignments.²⁸⁷ Subsequent exceptions to the ban, discussed in the commentary to subdivision (e), have affected only a very small minority of prisoners. Mind-numbing idleness is a preeminent problem in American jails and prisons. The solution is a combination of work, covered by this Standard, and educational and rehabilitative programming, covered by Standard 23-8.2.²⁸⁸ At the same time, this Standard's requirements avoid the abuses of the past.

Subdivision (a): This Standard requires prisons to offer employment to every sentenced prisoner—whether or not release from prison is anticipated, and including prisoners in long-term segregation—unless there has been an individualized determination that no work assignment is appropriate. The goal is not to encourage punishment for prisoners' refusals to work, but to increase the jobs offered to prisoners.²⁸⁹ Work during incarceration not only gives prisoners something to do, it also serves as useful vocational training. But work that fails to respect prisoners' human dignity should not be offered to prisoners; this rule would preclude jobs like cleaning a bathroom with a toothbrush, busting rocks, moving around piles of dirt and then moving them back, or serving as a "dog lure."

Subdivision (b): This subdivision makes explicit the antidiscrimination and accommodation obligations with respect to job assignments, which are the same as for programming; see discussion in the general commentary to Standard 23-8.2.

Subdivision (c): This subdivision's requirement that prisoner workplace health and safety conditions should be substantially the same as outside a correctional facility is in keeping with Standard 23-11.2(a)'s general requirement that regulation of health, safety, and other topics be conducted the same way, and by the same agencies, in and out of prison. The provision on shackling disapproves the practice of prisoner

²⁸⁵ ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR* (1996); DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1997); for additional sources, see Margo Schlanger, *Beyond the Hero-Judge, Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2026-28 nn.137-141 (1995).

²⁸⁶ The Hawes-Cooper Act was passed as Act of Jan. 19, 1929, ch. 79, 45 Stat. 1084 and is codified as amended at 49 U.S.C. § 11507; the Ashurst-Sumners Act was passed as Act of July 24, 1935, ch. 412, 49 Stat. 494 and codified as amended at 18 U.S.C. §§ 1761-1762. For discussion, see Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339 (1998).

²⁸⁷ CAMILLE GRAHAM CAMP & GEORGE M. CAMP, *CRIMINAL JUSTICE INST., THE CORRECTIONS YEARBOOK 2000: ADULT CORRECTIONS* (2000).

²⁸⁸ Garvey, *supra* note 286; James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court* 34 HOUS. L. REV. 1003 (1997).

²⁸⁹ Note that pretrial detainees, unlike convicts, may not constitutionally be forced to work, except for housekeeping chores in their living units, because they are protected from mandatory labor by the Thirteenth Amendment, which prohibits "slavery [and] involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted." U.S. CONST. amend. XIII, § 1.

ABA Treatment of Prisoners Standards
Standard 23-8.4 Work programs

chain gangs, currently rare but high profile when they are used, which hobble prisoners' feet as they work.²⁹⁰

Subdivision (d): The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, does not cover prisoners,²⁹¹ and this subdivision does not require that prisoners be paid the ordinarily applicable minimum wage. (Subdivision (e) does impose that requirement, for prisoners employed by for-profit firms.) But it is difficult to see how the subdivision's specified purpose—encouraging good work habits and attitudes—can be achieved if wages are not set somewhat higher than the level some prisons currently offer.²⁹² Compensation for work should be sufficient to allow prisoners to make some commissary purchases and to accumulate some small amount of funds for release.

Note that not all prisons and jails currently pay money for prison labor—in a few, workers instead receive credit towards the term of confinement, though this is not as prevalent as in the past. It is preferable for such non-monetary incentives to be coupled with at least some monetary compensation, but this Standard does not so require; the non-monetary incentive can fairly be deemed compensation.

Subdivision (e): The introductory commentary to this Standard explained that prison-produced goods are banned from interstate transport. The Justice System Improvement Act of 1979, 18 U.S.C. § 1761(c), exempts from this general ban items produced in a limited number of programs certified by the Bureau of Justice Assistance as complying with rules governing prisoner wages and deductions from those wages.²⁹³ This subdivision urges modification of the general statutory/regulatory regime in this area.

This subdivision is both broader and narrower than the current regime. The statute applies to goods, but not services—so wages for prison labor that produces services are currently unregulated. This subdivision instead covers all work done by prisoners by arrangement with private enterprises, regardless of whether the job is in manufacturing or the service sector. In addition, the subdivision does not envision a few, selected projects that gain scarce exemptions from the interstate commerce ban, but rather an opening of interstate commerce to all the products of prison labor. Finally, the statute requires not *minimum* wages, but “prevailing” wages (although in practice, this seems very often to work out to the same wages). Under this subdivision, the rule is simply for minimum wages, and only when the employer is a for-profit firm. If prisoners are employed training service dogs or doing other work for non-profits, this subdivision does not regulate their wages. Of course, nothing prevents either correctional officials or other state authorities from requiring a higher level of compensation, whether for all firms or for some.

The point is that in order to increase opportunities for prisoner employment, responsible governmental authorities should repeal extant legal provisions restricting goods or services that may be produced or

²⁹⁰ See, e.g., Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 407 (2006); Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441 (1997); Nancy A. Ozimek, *Reinstitution of the Chain Gang: A Historical and Constitutional Analysis*, 6 B.U. PUB. INT. L.J. 753, 762 (1997).

²⁹¹ See, e.g., *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) (per curiam); *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994).

²⁹² CORRECTIONS YEARBOOK 2000, *supra* note 287 at 111 (documenting wages in some state prison systems of under a dollar per day).

²⁹³ Pub. L. No. 96-157, § 827, 93 Stat. 1167, 1215 (codified as amended at 18 U.S.C. § 1761(c)); see Bureau of Justice Assistance, *Program Brief: Prison Industry Enhancement Certification Program* (July 2002), available at <http://www.ncjrs.gov/pdffiles1/bja/193772.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-8.5 Visiting

provided by prisoners, except to the extent those restrictions relate to safety, security, or fair compensation.

Note that under Standard 23-8.8(a), prisoners earning minimum wage or higher may be assessed a reasonable portion of their wages in applicable fees.

Standard 23-8.5 Visiting

(a) To the extent practicable, a prisoner should be assigned to a facility located within a reasonable distance of the prisoner's family or usual residence in order to promote regular visitation by family members and to enhance the likelihood of successful reintegration.

(b) Correctional officials should implement visitation policies that assist prisoners in maintaining and developing healthy family relationships by:

- (i) providing sufficient and appropriate space and facilities for visiting;
- (ii) establishing reasonable visiting hours that are convenient and suitable for visitors, including time on weekends, evenings, and holidays; and
- (iii) implementing policies and programs that facilitate healthy interactions between prisoners and their families, including their minor children.

(c) Correctional authorities should treat all visitors respectfully and should accommodate their visits to the extent practicable, especially when they have traveled a significant distance. Prisoners should be allowed to receive any visitor not excluded by correctional officials for good cause. Visitors should not be excluded solely because of a prior criminal conviction, although correctional authorities should be permitted to exclude a visitor if exclusion is reasonable in light of the conduct underlying the visitor's conviction. Correctional authorities should be permitted to subject all visitors to nonintrusive types of body searches such as pat-down and metal-detector-aided searches, and to search property visitors bring inside a correctional facility.

(d) Visiting periods should be of adequate length. Visits with counsel and clergy should not be counted as visiting time, and ordinarily should be unlimited in frequency. Pretrial detainees should be allowed visiting opportunities beyond those afforded convicted prisoners, subject only to reasonable institutional restrictions and physical plant constraints.

(e) For prisoners whose confinement extends more than [30 days], correctional authorities should allow contact visits between prisoners and their visitors, especially minor children, absent an individualized determination that a contact visit between a particular prisoner and a particular visitor poses a danger to a criminal investigation or trial, institutional security, or the safety of any person. If contact visits are precluded because of such an individualized determination, non-contact, in-person visiting opportunities should be allowed, absent an individualized determination that a non-contact visit between the prisoner and a particular visitor poses like dangers. Correctional officials should develop and promote other forms of communication between prisoners and their families, including

video visitation, provided that such options are not a replacement for opportunities for in-person contact.

(f) Correctional officials should facilitate and promote visiting by providing visitors travel guidance, directions, and information about visiting hours, attire, and other rules. If public transportation to a correctional facility is not available, correctional officials should work with transportation authorities to facilitate the provision of such transportation.

(g) Governmental authorities should establish home furlough programs, giving due regard to institutional security and community safety, to enable prisoners to maintain and strengthen family and community ties. Correctional officials should allow a prisoner not receiving home furloughs to have extended visits with the prisoner's family in suitable settings, absent an individualized determination that such an extended visit would pose a threat to safety or security.

(h) When practicable, giving due regard to security, public safety, and budgetary constraints, correctional officials should authorize prisoners to leave a correctional facility for compelling humanitarian reasons such as a visit to a dying parent, spouse, or child, either under escort or alone.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.1(a)(iii) (physical plant and environmental conditions), 23-3.7(c)(iii) (restrictions relating to programming and privileges, visitation), 23-4.3 (disciplinary sanctions), 23-6.9 (pregnant prisoners and new mothers), 23-7.9(d)(ii) (searches of prisoners' bodies, strip searches), 23-8.1 (location of facilities), 23-9.4 (access to legal and consular services), 23-11.2(e) (external regulation and investigation, community group visits), 23-11.5 (media access to correctional facilities and prisoners)

Related Standards and ABA Resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.2 (visitation; general), 23-6.3 (visitation; prisoners undergoing discipline), 23-6.4 (group and media visits).

ABA, RESOLUTION, 102E (Feb. 2010) (impact of incarceration on mother/child relationship)

ACA, JAIL STANDARDS, 4-ALDF-5B-01, 5B-02, and 5B-04 (visiting)

ACA, PRISON STANDARDS, 4-4267 (visiting), 4-4445 (escorted leaves), 4-4498 regular visitation), 4-4499-1 (physical contact), 4-4500, 4-4501, and 4-4502 (extended and special visits), 4-4504 (visitor transportation)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, VI.D.1 (personal and overnight visits), X.B.B (facilities available to the public)

U.N. Standard Minimum Rules, arts. 37 (contact with the outside world), 92 (visiting and pretrial prisoners)

Commentary

Visiting (Standard 23-8.5), written communication (Standard 23-8.6), and phone contact (Standard 23-8.7), are the three ways in which prisoners can maintain ties with their families and communities. For all three, the Constitution protects the rights to some extent. The Standards exceed that constitutional floor, for two reasons. First is basic humaneness. Incarceration is punishment enough without severing the human and community ties that people depend on for their psychological well-being. This is the

ABA Treatment of Prisoners Standards
Standard 23-8.5 Visiting

underlying reason for the substantial protection that visitation and other communication rights receive under international law.²⁹⁴

In addition, social supports for prisoners—which are maintained and strengthened by these three methods of contact—are helpful in minimizing misconduct during incarceration²⁹⁵ and promoting successful re-entry at its end.²⁹⁶ A recent scholarly investigation of the effect of visitation on recidivism identifies several different ways in which visits to prisoners can reduce reoffending. First, “strong bonds to family, friends, and community serves to constrain tendencies to commit crime.” Second (and similar), “social supports [function to] prevent or reduce strain or allow it to be addressed through noncriminal means,” because “individuals with support networks, including ties to family, friends, and community, may have more, and more prosocial, coping strategies for managing the many challenges associated with reentry into society.” Third, social ties “may serve to provide an important counter to” self-labeling that might otherwise occur, in which “inmates may come to believe that they are, at their core, deviants.” Visitation promotes “entry into support social networks . . . [that] help promote a more positive sense of personal identity.”²⁹⁷

On the particular topic of visitation, the subject of this Standard, this same study found that after controlling for all kinds of other differences among prisoners and the circumstances of their incarceration, the approximately 40% of prisoners released during the study period from the Florida state prison system who had received any visits at all the year before reoffended at much lower rates than those who received no visits—and the effect was observably strengthened with each additional visit.²⁹⁸ These findings were not unusual.

Visitation’s importance to an effective and humane correctional system is not matched by its constitutional protection. Two Supreme Court cases, *Block v. Rutherford*, 468 U.S. 576 (1984), and *Overton v. Bazzetta*, 539 U.S. 126 (2003), have held that prisoners’ constitutional visitation rights are very limited. There is no constitutional bar, for example, to a policy under which prisoners with substance abuse or disciplinary records are disallowed any visitors for two years or more, or one denying visits with minors who are not the children, grandchildren, or siblings of the visited prisoners, including nieces or nephews. *Id.*

The Standards nonetheless encourage generous visitation policies and facilities for the reasons just explained. Most of this encouragement is in the provisions of this Standard, but Standard 23-3.7(c)(iii) is

²⁹⁴ See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 19 (“A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.”); U.N. Standard Minimum Rules for the Treatment of Prisoners, art. 37 (“Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits”).

²⁹⁵ Karen Casey-Acevedo & Tim Bakken, *The Effects of Visitation on Women in Prison*, 25 INT’L J. COMP. & APP. CRIM. JUST. 48 (2001); Nance E. Schafer, *Exploring the Link between Visits and Parole Success: A Survey of Prison Visitors*, 38 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 17 (1994); Richard Tewksbury & Matthew DeMichele, *Going to Prison: A Prison Visitation Program*, 85 PRISON J. 292 (2005); John D. Wooldredge, *Inmate Experiences and Psychological Well-Being*, 26 CRIM. J. & BEHAV. 235 (1999).

²⁹⁶ William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?* 45 J. RES. CRIME & DELINQ. 287 (2008).

²⁹⁷ *Id.* at 291-93.

²⁹⁸ *Id.* at 304-06.

ABA Treatment of Prisoners Standards

Standard 23-8.5 Visiting

also an important component of the entire approach. Under that subdivision, a prisoner's visitation rights can be curtailed for up to 30 days as a penalty for a disciplinary infraction or for another reason (e.g., classification), but not for longer. Compliance with this requirement and the items below would be a major shift in some prison systems, where both segregated and other prisoners are not allowed visitors for months and years at a time.

Subdivision (a): Standard 23-8.1 requires that facilities be located near to the population centers from which their prisoners come. This subdivision correspondingly requires that prisoners be housed close to home. Policies and practices on prisoner transfers (including transfers out of state or to private facilities) should take account of the benefits of proximity to family. See commentary following Standard 23-10.5 ("Privately operated correctional facilities").

Subdivision (b): Whether a visit is positive or negative for both the prisoner and the visitor can turn on the issues governed by this subdivision—the timing and amount of time, the space, and the rules governing the visit. There is abundant room for improvement in many, even most correctional facilities: observers agree that “prison visitation is not pleasant,”²⁹⁹ in large part because “most prison’s visitation areas are makeshift areas . . . [that] are loud and crowded and the opportunity for meaningful conversations is virtually non-existent.”³⁰⁰

This subdivision’s call for policies and programs that facilitate healthy interaction between prisoners and their families means that officials should, for example, allow prisoners to play with their young children rather than just talk to them during visits. In combination with Standard 23-5.12, this subdivision protects the ability of a prisoner to breastfeed her visiting infant, in an appropriate location. *Berrios-Berrios v. Thornburgh*, 716 F. Supp. 987, 990-91 (E.D. Ky. 1989). Contact visitation more generally is covered by subdivision (e).

Subdivision (c): Prisoners’ families and other visitors have not committed any offense and should be treated with consideration. Searching visitors is necessary for security, but searches should be done respectfully, and pat-down searches should (as with searches of prisoners, see Standard 23-7.9(b)) be performed by staff of the same gender as the visitor. If the mere fact of a criminal conviction is allowed to bar visits, there are many prisoners who would not be able to see their close family members. This subdivision therefore disallows such a blanket rule, insisting instead on a more tailored policy. It would, for example, be reasonable to disallow visits by someone previously convicted of an offense involving bringing contraband into a correctional facility. Correctional facilities should allow the appeal of a decision to exclude a visitor through the grievance procedure. See Standard 23-9.1.

Subdivision (d): Too short a time for a visit is enormously frustrating for both the prisoner and the visitor, who often has spent many hours getting to the correctional facility. Best practice calls for visits to last at least one hour, and for prisoners to be able to cumulate visitation periods into longer amounts of time. Visiting is particularly important for pretrial detainees, who are in jail because of arrests that they and their families generally did not plan for. (By contrast, people who are sentenced to prison generally have advance notice of what is coming and time to get ready for it.) Detainees have a greater need for all kinds of contact with families and friends, including visits, to deal with the results of incarceration—to get a lawyer, try to arrange bail, pay the rent, get children taken care of, communicate with employers, get the car keys into the family’s possession, etc.

²⁹⁹ Schafer, *supra* note 295 at 19.

³⁰⁰ James Austin & Patricia L. Hardyman, *The Risks and Needs of the Returning Prisoner Population*, 21 REV. POL’Y RES. 13, 23-24 (2004).

ABA Treatment of Prisoners Standards

Standard 23-8.6 Written communications

For neither pretrial detainees nor convicted prisoners should counsel or clergy visits count against personal visitation. Visits with lawyers and consuls are governed by Standard 23-9.4; visits with clergy as well as counsel are also protected against most limitations by Standard 23-3.7(a)(ix). Media visits should be accommodated in accordance with Standard 23-11.5. Group visits, which are to be encouraged under Standard 23-11.2(e), are typically handled entirely separately from personal visits, and appropriately so.

Subdivision (e): A “contact visit” means a meeting that is face to face, without a barrier, but usually with opportunity for only limited physical contact such as a handshake or a hug. Denial of contact visits typically means that prisoners talk through a barrier to their visitors, usually using a phone-type handset. This is a very unsatisfactory kind of communication; it is often difficult to hear, and psychologically very distancing. Allowing face-to-face communication except when there is an individualized reason to avoid it is much more respectful of prisoners’ psychological needs and much more encouraging of visitation and the bonds it preserves. Because physical contact between parents and small children is so psychologically important, correctional officials should permit more extensive physical contact during such visits. For example, a child might be allowed to sit on her mother’s lap and read during a visit, or a prisoner might be allowed to play “pat-a-cake” with his toddler. Of course, if there is an individualized reason to disallow physical contact, correctional authorities can respond accordingly.

Subdivision (g): Home furlough programs, which allow prisoners to go home for a brief period, are particularly useful towards the end of a prisoner’s sentence. But if correctional officials decide against furloughs, long visitation periods with family are a partial substitute. This subdivision does not address the question whether authorities should make available suitably private accommodations to permit conjugal visits.

Standard 23-8.6 Written communications

(a) Correctional authorities should allow prisoners to communicate as frequently as practicable in writing with their families, friends, and representatives of outside organizations, including media organizations. Indigent prisoners should be provided a reasonable amount of stationery and free postage or some reasonable alternative that permits them to maintain contact with people and organizations in the community. Correctional policies regarding electronic communication by prisoners should consider public safety, institutional security, and prisoners’ interest in ready communication.

(b) Correctional authorities should allow prisoners to receive or access magazines, soft- or hard-cover books, newspapers, and other written materials, including documents printed from the Internet, subject to the restrictions in subdivisions (c) and (d) of this Standard.

(c) Correctional authorities should be permitted to monitor and restrict both outgoing and incoming written communications and materials to the extent necessary for maintenance of institutional order, safety, and security; prevention of criminal offenses; continuing criminal investigations; and protection of victims of crime. Correctional officials should be permitted to impose reasonable page limits and limitations on receipt of bound materials from sources other than their publisher, but should not require that items be mailed using particular rates or particular means of payment. Correctional officials should set forth any applicable restrictions in a written policy.

(d) Correctional authorities should be permitted to open and inspect an envelope, package, or container sent to or by a prisoner to determine if it contains

ABA Treatment of Prisoners Standards

Standard 23-8.6 Written communications

contraband or other prohibited material, subject to the restrictions set forth in these Standards on inspection of mail to or from counsel.

(e) A prisoner should be informed if correctional authorities deny the prisoner permission to send or receive any publication or piece of correspondence and should be told the basis for the denial and afforded an opportunity to appeal the denial to an impartial correctional administrator. If a publication or piece of correspondence contains material in violation of the facility's written guidelines, correctional authorities should make reasonable efforts to deny only those segregable portions of the publication or correspondence that present concerns.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.7(a)(ix) (restrictions relating to programming and privileges, written communication with family), 23-7.4 (prisoner organizations), 23-9.4 (access to legal and consular services), 23-11.5 (media access to correctional facilities and prisoners)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.1 (communication rights)

ACA, JAIL STANDARDS, 4-ALDF-5B-05 through 5B-08 (mail)

ACA, PRISON STANDARDS, 4-4487 through 4-4491 (mail)

U.N. Standard Minimum Rules, art. 37 (contact with the outside world)

Commentary

This Standard deals with the written communication rights of prisoners—usually, the right to send and receive mail. Mail is a crucial method by which prisoners maintain and build familial and community ties. Outgoing mail serves other functions as well, allowing communication by prisoners with authorities or other promoters of prison and jail accountability such as the media. The right to send mail free of interference was historically the foundational precedent of all prisoners' rights; the wall between prisons and the Constitution that characterized the "hands-off" era, during which courts refused to enforce any prisoners' rights,³⁰¹ was first seriously breached in *Ex parte Hull*, 312 U.S. 546 (1941), when the Supreme Court prohibited prison officials from screening prisoners' habeas corpus petitions prior to mailing them to a court. Mail is also a source of information, entertainment, religious texts, and other valuable resources for prisoners. The first case in which the Court held that prisoners could enforce constitutional rights in federal court (filed under the precedent of *Ex Parte Hull*), was about the right to receive religious material in the mail. *Cooper v. Pate*, 378 U.S. 546 (1964).

The First Amendment protects prisoners' rights both to send and receive correspondence, *Procunier v. Martinez*, 416 U.S. 396 (1974), but the application of First Amendment rights is softened by the deference due prison administrators, *Turner v. Safley*, 482 U.S. 78 (1987). More particularly, the Supreme Court held in *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) (emphasis added) that "regulations affecting the sending of [mail or publications] to a prisoner must be analyzed under the *Turner* reasonableness standard. Such regulations are 'valid if [they are] reasonably related to legitimate penological interests.' *Turner*, 482 U.S., at 89." The Court has explained, however, that "a reasonableness

³⁰¹ Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) (popularizing the phrase "hands off," and listing and quoting cases).

ABA Treatment of Prisoners Standards

Standard 23-8.6 Written communications

standard is not toothless.” *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) (internal quotation omitted).³⁰² Regulations affecting the prisoner’s *outgoing* mail must meet a somewhat stricter test: they must be “generally necessary” to further “one or more of the substantial governmental interests of security, order, and rehabilitation.” *Thornburgh*, 490 U.S. at 414 (discussing which parts of the holding of *Procunier v. Martinez* survive after *Turner*).

But even though the constitutional protection for mail is greater than the constitutional protection for visitation, this Standard still exceeds constitutional requirements in some respects, laid out below. For the reasons discussed in the commentary to Standard 23-8.5, even without a constitutional mandate, correctional authorities should look for ways to foster contacts between prisoners and the outside world. Such ties improve behavior while in prison, ease re-entry, and reduce recidivism. Moreover, official acknowledgement of the importance of prisoners’ connections to their communities recognizes that prisoners may be offenders but are not outcasts.

Correctional authorities should apply these rules not only to correspondence but to written material that prisoners bring to the facility.

Subdivision (a): The coverage of this subdivision is broad, and includes written communication between prisoners and organizations, and between prisoners and the media. See also Standard 23-7.4 on prisoner organizations, and Standard 23-11.5, on the media. Prisoners’ communication with counsel is governed by Standard 23-9.4. This Standard exceeds the constitutional floor, which does not, for example, require free postage for non-legal mail.³⁰³

Subdivisions (b) & (c): These subdivisions aim to resolve a few controversies in this area, and have some support in case law. For example, some courts have struck down bans on prisoners’ receipt of bulk rate mail,³⁰⁴ newspaper clippings,³⁰⁵ and any information downloaded from the Internet.³⁰⁶ Fear of contraband (the rationale for bans on receipt of hard-cover books, disallowed in subdivision (b)) can be solved by the provision in subdivision (c) that allows facilities to impose a publisher-only rule, and by searches of various kinds. The requirement that restrictions be described in a written policy is important for promoting prisoners’ compliance (and avoiding frustration). It also cabins the discretion of correctional staff and allows their readier supervision; specific rules can help to curb the tendency of prison and jail censorship to expand beyond its legitimate bounds.

Subdivision (e): This subdivision requires that an explanation be provided the prisoner for any denial of permission to send or receive a publication or correspondence. See *Jackson v. Ward*, 458 F. Supp. 546,

³⁰² See, e.g., *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004); *Crofton v. Roe*, 170 F.3d 957 (9th Cir.1999); *Thomas v. Leslie*, 176 F.3d 489 (10th Cir. 1999) (table op.).

³⁰³ *Johnson v. Goord*, 445 F.3d 532, 535 (2d Cir. 2006) (per curiam) (upholding rule prohibiting prisoners from receiving stamps through the mail and providing them only one free stamp a month for personal use did not violate rights of indigent prisoners); *Van Poyck v. Singletary*, 106 F.3d 1558, 1559 (11th Cir. 1997); *Kaestel v. Lockhart*, 746 F.2d 1323, 1325 (8th Cir. 1984); *Averhart v. Shuler*, 652 F. Supp. 1504, 1511 (N.D. Ind.), aff’d, 834 F.2d 173 (7th Cir. 1987).

³⁰⁴ *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001); *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001). But see *Sheets v. Moore*, 97 F.3d 164 (6th Cir. 1996).

³⁰⁵ *Lindell v. Frank*, 377 F.3d 655, 658-60 (7th Cir. 2004); *Allen v. Coughlin*, 64 F.3d 77, 80-81 (2d Cir. 1995).

³⁰⁶ *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148 (9th Cir. 2004) (per curiam); *West v. Frank*, 2005 WL 701703, *5-7 (W.D. Wis., Mar. 25, 2005) (prison officials did not demonstrate that coded messages were more likely in Internet-generated materials than in other documents). But see, e.g., *Williams v. Donald*, 2007 WL 4287718, *4-7 (M.D. Ga., Dec. 4, 2007) (upholding publishers-only rule as applied to ban Internet-generated materials), vacated as moot, 322 Fed. App’x 876 (11th Cir. 2009) (unpublished).

ABA Treatment of Prisoners Standards

Standard 23-8.7 Access to telephones

565 (W.D.N.Y. 1978) (stating in prison censorship case: “A reasons requirement promotes thought by the decision-maker, focuses attention on the relevant points and further protects against arbitrary and capricious decisions grounded upon impermissible or erroneous considerations.”).³⁰⁷ Notices must be provided to prisoners themselves; it is not enough to notify the senders of mail or packages that they have been rejected, because a sender may or may not tell the prisoner, and may have insufficient incentive to seek review of even an arbitrary or erroneous decision.

In *Thornburgh v. Abbott*, the Supreme Court affirmed the district court’s decision to uphold the Federal Bureau of Prisons “all-or-nothing rule,” under which the BOP withholds from prisoners the entirety of any publication containing material excludable for certain specified security reasons. Subdivision (e) of the Standard would nonetheless bar such an all-or-nothing approach, requiring instead “reasonable efforts to deny only those segregable portions of the publication or correspondence that present concerns.” If, for example, a single page, or a single article, in a magazine is out-of-policy, correctional authorities should notify the prisoner about that conclusion and offer the prisoner the option to either receive the publication minus the offending portion, or to have the publication sent, entire, to some non-prison address of the prisoner’s choosing.³⁰⁸

Standard 23-8.7 Access to telephones

(a) Correctional authorities should afford prisoners a reasonable opportunity to maintain telephonic communication with people and organizations in the community, and a correctional facility should offer telephone services with an appropriate range of options at the lowest possible rate, taking into account security needs. Commissions and other revenue from telephone service should not subsidize non-telephone prison programs or other public expenses.

(b) Correctional authorities should provide prisoners with hearing or speech impairments ready access to telecommunications devices for the deaf or comparable equipment and to telephones with volume control, and should facilitate prisoners’ telephonic communication with persons in the community who have such disabilities.

(c) Correctional authorities should be permitted to monitor or record telephonic communications subject to the restrictions set forth in these Standards relating to communications with counsel and confidential communications with external monitoring agencies. Correctional authorities should inform prisoners that their conversations may be monitored, and should not monitor or record conversations for purposes of harassment or retaliation.

³⁰⁷ For an example of written policy, see the “media review” guidelines of the New York State Department of Correctional Services, 7 N.Y. COMP. CODES R. & REGS. tit. 7, § 712.

³⁰⁸ In New York, an “item censorship” policy allows the prisoner to decide whether to receive the publication with offending matter removed or blotted out, to appeal the decision administratively, or to send the publication to someone outside the prison. The regulations also give some content to the concept of “segregability”:

This option shall be available only if the objectionable portions of the publication constitute eight or fewer individual pages or if they constitute a single chapter, article or section of any length. This option need not be made available if the publication is in a form other than a book, magazine, or newspaper, and if removing or blotting out portions would present physical difficulties.

7 N.Y. COMP. CODES R. & REGS. tit. 7, § 712.3(d)(2).

ABA Treatment of Prisoners Standards

Standard 23-8.7 Access to telephones

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-7.4 (prisoner organizations), 23-9.4(c)(iii) (access to legal and consular services, telephonic communication)

Related Standards and ABA Resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.1(f) (communication rights)

ABA, RESOLUTION, 115B (Aug. 2005) (telephones in prison)

ACA, JAIL STANDARDS, 4-ALDF-5B-11 and 5B-12 (telephone)

ACA, PRISON STANDARDS, 4-4497 and 4-4497-1 (telephone)

Commentary

Like other methods of communication, telephone services are enormously important to prisoners separated from family, friends, employers, landlords, etc. by the fact of incarceration. (See the discussion of the heightened needs of pretrial detainees in the commentary to Standard 23-8.5(d).) Telephone access is particularly crucial for the significant percentage of the incarcerated population with limited literacy skills.³⁰⁹ Prisoners have a constitutional right to reasonable telephone usage. See, e.g., *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994). At the same time, prisoners can use telephones to commit crimes, so careful monitoring is important. See *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991).

Subdivision a: Correctional authorities are on record supporting reasonable rates for prison telephone services, as evidenced by the policy and standards of various law enforcement organizations.³¹⁰ However, in recent years telephone rates charged to prisoners and their families have skyrocketed as correctional agencies have sought to offset operating costs through industry rebates and commissions. (Indeed, one state, Maine, found prison telephone services so lucrative that the Department of Correction began operating its own telephone service at a 30% profit.) As a result, the FCC has been urged to regulate the prison pay phone industry.³¹¹ Prohibitively high calling rates also implicates the constitutional right to counsel, to the extent it undermines the ability of counsel to confer with the client about the facts, possible

³⁰⁹ NAT'L CTR. FOR EDUC. STATISTICS, PUB. NO. 1994-102, LITERACY BEHIND PRISON WALLS 19 tbl.2.3 (Oct. 1994), available at <http://nces.ed.gov/pubs94/94102.pdf>

³¹⁰ See, e.g., AM. CORRECTIONAL ASS'N, PUBLIC CORRECTIONAL POLICY ON INMATE/JUVENILE OFFENDER ACCESS TO TELEPHONES (Jan., 24 2001); AM. CORRECTIONAL ASS'N, STANDARD GOVERNING CORRECTIONAL TELEPHONE SERVICES (Aug. 2002); NAT'L SHERIFFS' ASS'N, RESOLUTION (June 14, 1995). See also, AM. BAR ASS'N, POLICY REGARDING PRISON AND JAIL INMATE TELEPHONE SERVICES (Aug. 2005); NAT'L ASS'N OF STATE UTILITY CONSUMER ADVOCATES, RESOLUTION 2006-02: FAIR RATES FOR CALLS FROM INMATES OF CORRECTIONAL INSTITUTIONS.,

³¹¹ See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, FCC Docket No. 96-128 (Nov. 8, 1996). More than 1,000 signatures in support of presidential action to lower the cost of calls from prisoners (See *Lower the Cost of Calls From Prison!*, CARE2 PETITIONSITE, <http://www.thepetitionsite.com/3/lower-the-cost-of-calls-from-prison> (last visited May 27, 2011)). See also, e.g., Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, FCC Docket No. 96-128 (Nov. 8, 1996) (filings of the Brennan Center for Justice at New York University School of Law (Dec. 4, 2008); American Bar Association (Jan. 15, 2009); National Association of State Utility Consumer Advocates (Jan. 20, 2009); National Legal Aid & Defender Association (Feb. 24, 2009); Commission on Safety & Abuse in America's Prisons (Apr. 16, 2009); National Association of Criminal Defense Lawyers, (July 6, 2009), available at http://fjallfoss.fcc.gov/ecfs/comment_search/input?z=ka2dc by searching for Proceeding 96-128.

ABA Treatment of Prisoners Standards

Standard 23-8.8 Fees and financial obligations

witnesses, and viable defenses. For each obstacle, there are systems that have successfully implemented alternative policies, allowing prisoners several hours of phone calls each month³¹² through use of debit or pre-paid cards rather than just collect calls, and establishing rates that are close to community norms.³¹³

In addition to the high rates already described, telephone usage by prisoners is depressed by a number of unnecessary obstacles. In addition to unduly restrictive rules on the number of minutes or calls allowed by each prisoner, prisoners are, for example, frequently limited to collect calls, and policies blocking access to certain types of numbers are often overbroad, disabling calls made to cell phones. The issues are more thoroughly canvassed in the report accompanying ABA resolution 115B, 2005 Annual Meeting, available at <http://www.abanet.org/crimjust/policy/am05115b.pdf>:

This Standard exceeds constitutional and statutory guarantees: neither courts nor regulatory agencies have required correctional authorities to open the prison environment to competition, to provide a broader range of calling options, or to offer phone service at low (or even reasonable) rates.³¹⁴

Subdivision (b): When correctional facilities provide telephone services for prisoners, failure to make those services accessible to people with disabilities is actionable discrimination. The ADA Title II regulations require public entities such as prisons to “furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity,” 28 C.F.R. § 35.160(b)(1). The regulations define “auxiliary aid” to include, inter alia, “telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, . . . telecommunication devices for deaf persons (TDDs), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments,” 28 C.F.R. § 35.104. For calls made by prisoners to people with relevant disabilities, the same basic principle applies: the public entity is providing the service of communication with prisoners, and that service must be accessible. So, for example, if a prisoner wishes to call someone who uses a TDD (a device allowing typed rather than spoken communication, like instant messaging but using a phone line), the prison might supply that prisoner with a TDD from which to place the call, or else allow the prisoner access to a TDD relay service, which would transcribe the prisoner’s half of the conversation for the call recipient and read the other side of the conversation to the prisoner.

Standard 23-8.8 Fees and financial obligations

(a) Unless a court orders otherwise in a situation in which a prisoner possesses substantial assets, correctional authorities should not charge prisoners fees for any non-commissary services provided them during the period of imprisonment, including their food

³¹² See FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT 5264.07, TELEPHONE REGULATIONS FOR INMATES (2002).

³¹³ See Campaign to Promote Equitable Telephone Charges, Current Status by State: Cost of a 15-Minute Phone Call by Call Type, ETCCAMPAIGN, <http://www.etcccampaign.com/rates.php> (last visited May 27, 2011).. See also *Securus Technologies v. Millicorp* (WC Docket No. 09-144) (so-called “dial-around” services assigning telephone numbers based on prison location, thus circumventing long-distance charges).

³¹⁴ See, e.g., *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2000) (rejecting constitutional and statutory challenge to decision by Illinois to give a single phone company the exclusive right to provide telephone services to prisoners in return for 50 percent of the revenues generated); *In re: Petition of Outside Connection, Inc.*, DA 03-874 (Federal Communications Commission); *Voluntary Remand of Inmate Telephone Services Issues*. CC Docket No. 96-128 (Federal Communications Commission).

ABA Treatment of Prisoners Standards

Standard 23-8.8 Fees and financial obligations

or housing or incarceration itself, except that correctional authorities should be permitted to assess prisoners employed at or above minimum wage a reasonable portion of their wages in applicable fees.

(b) In imposing and enforcing financial obligations on prisoners, governmental authorities, including courts, should consider both the interest served by the imposition of the obligation and the cumulative effect of financial obligations on a prisoner's successful and law-abiding re-entry.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-6.1(b) (general principles governing health care, health care fees), 23-8.4 (work programs), 23-8.7(a) (access to telephones, rates), 23-8.9 (transition to the community)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-6A-09 (indigence)

ACA, PRISON STANDARDS, 4-4345 (access to care)

Commentary

In a growing number of correctional facilities, prisoners are charged a daily fee,³¹⁵ as well as copays for medical care.³¹⁶ Medical copays are forbidden by Standard 23-6.1(b); as its commentary discusses, they simply pose too high an obstacle to health access to serve the public health. More general fees may have political appeal but this Standard is premised on the view that they are unwise, except in situations in which prisoners are able to earn free-world wages. See 18 U.S.C. § 1761 (authorizing room and board fees for federal prisoners employed by prison industries and paid prevailing wages). Fees for services can leave prisoners in significant debt upon release, which will decrease their ability to reintegrate successfully into the community; sometimes, they present significant stress on prisoners' families, whose financial stability is often already precarious due to the loss of the prisoners' income.

Even fees that a prison system makes no effort to collect can have a detrimental effect, if for example it shows up on a credit report or a background check.

This Standard is not intended to ban fees for telephone service, which is governed by Standard 23-8.7(a). And its exemption for commissary items applies, as well, to other optional purchases, whatever their source.

³¹⁵ See National Institute of Corrections, *Fees Paid by Jail Inmates: Findings from the Nation's Largest Jails*, SPECIAL ISSUES IN CORRECTIONS (Feb. 1997), available at <http://www.nicic.org/pubs/1997/013599.pdf>. For an example of a jail that charges fees for everything from haircuts and drug testing to education to housing and food, see Karla Crocker, *Inmate Fees for Services*, CORRECTIONS TODAY MAG., July 2004, at 82.

³¹⁶ See *supra* commentary to Standard 23-6.1(b).

Standard 23-8.9 Transition to the community

(a) Governmental officials should ensure that each sentenced prisoner confined for more than [6 months] spends a reasonable part of the final portion of the term of imprisonment under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for re-entry into the community. A correctional agency should provide community-based transitional facilities to assist in this reintegration process.

(b) In the months prior to anticipated release of a sentenced prisoner confined for more than [6 months], correctional authorities should develop an individualized re-entry plan for the prisoner, which should take into account the individualized programming plan developed pursuant to Standard 23-8.2(b). In developing the re-entry plan, correctional authorities should involve any agency with supervisory authority over the prisoner in the community and, with the prisoner's permission, should invite involvement by the prisoner's family. Preparation for re-entry should include assistance in locating housing, identifying and finding job opportunities, developing a resume and learning interviewing skills, debt counseling, and developing or resuming healthy family relationships.

(c) Correctional authorities should provide each prisoner released to the community with a written health care discharge plan that identifies medical and mental health services available to the prisoner in the community. The plan should describe the course of treatment provided the prisoner in the facility and any medical, dental, or mental health problems that may need follow-up attention in the community.

(d) When a prisoner with ongoing medical or mental health care needs is released to the community, correctional authorities should make reasonable efforts to:

- (i) identify and arrange for community-based health care services, including substance abuse treatment; and
- (ii) ensure that all health care treatment and medications provided to the prisoner during the term of imprisonment will continue uninterrupted, including, if necessary, providing prescription medication or medical equipment for a brief period reasonably necessary to obtain access to health care services in the community; providing initial medically necessary transportation from the correctional facility to a community health care facility for continuing treatment; or otherwise addressing the prisoner's serious immediate post-release health care needs.

(e) Correctional authorities should provide each convicted prisoner being released to the community with:

- (i) specific information about when and how to contact any agency having supervisory responsibility for the prisoner in the community;
- (ii) general information about the collateral sanctions and disqualifications that may apply because of the prisoner's conviction, and where to get more details; and
- (iii) general information about the process for obtaining relief from such sanctions and disqualifications, and contact information for government or nonprofit organizations, if any, offering assistance to individuals seeking such relief.

ABA Treatment of Prisoners Standards

Standard 23-8.9 Transition to the community

(f) Whenever possible, prisoners should be released from a correctional facility at a reasonable time of day. Each prisoner should have or be provided with transportation to the prisoner's reasonable destination and with contact information for all relevant community service providers. Upon release, each prisoner who was confined for more than [3 months] should possess or be provided with:

- (i) photographic identification sufficient to obtain lawful employment;
- (ii) clothing appropriate for the season;
- (iii) sufficient money or its equivalent necessary for maintenance during a brief period immediately following release; and
- (iv) a voter registration card or general instructions on how to register to vote, if eligible to vote upon release.

(g) When public safety and the interests of justice would not be compromised, governmental authorities should provide judicial and administrative mechanisms to accomplish the early release of prisoners in exceptional circumstances, such as terminal illness, permanent disability that substantially diminishes the ability of the prisoner to provide self-care within a correctional facility, or exigent family circumstances.

(h) Governmental authorities should implement policies that allow government benefits, including health benefits, to be restored to prisoners immediately upon release, and correctional officials should ensure that correctional authorities or community service providers assist prisoners—especially prisoners with mental disabilities or significant health care needs—in preparing and submitting appropriate benefits applications sufficiently in advance of their anticipated release date to meet this objective and facilitate continuity of care.

Cross References

ABA TREATMENT OF PRISONER STANDARDS, 23-6.5(a) (continuity of care on release), 23-6.9 (pregnant prisoners and new mothers), 23-8.2 (rehabilitative programs), 23-8.8 (fees and financial obligations), 23-10.5(h) (privately operated correctional facilities, out-of-state transfers)

Related Standards and ABA Resolutions

ABA, STANDARDS ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION, 19-1.2 (general limitations on collateral sanctions), 19-2.1 (codification of collateral sanctions), 19-2.5 (relief from collateral sanctions), 19-2.6(a) (deprivation of right to vote)

ABA, RESOLUTIONS, 113B (Feb. 1996) (terminally ill prisoners), 109 (Aug. 1996) (terminally ill prisoners), 107 (Aug. 2002) (blueprint for corrections), 103B (Feb. 2003) and 121C (Aug. 2004) (sentence reduction, modification in compelling circumstances), 121D (Aug. 2004) (Justice Kennedy Commission), 122 (Aug. 2007) (Medicaid eligibility of prisoners), 102E (Feb. 2010) (impact of incarceration on mother/child relationship)

ACA, JAIL STANDARDS, 4-ALDF-5B-13 and 5B-18 (release)

ACA, PRISON STANDARDS, Principle 4G (release), 4-4097 (computation of time served), 4-4442 (release preparation), 4-4444 (temporary and graduated release), 4-4446 (final release)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 47 (postrelease follow-up care)

AM. NURSES ASS'N, CORRECTIONS STANDARDS, § 14 (resource utilization)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, III.H.4 to .7 (discharge planning, including Medicaid and other government enrollment)

ABA Treatment of Prisoners Standards

Standard 23-8.9 Transition to the community

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶ 45 (transition to the community)

NCCHC, HEALTH SERVICES STANDARDS, E-13 (Discharge Planning)

U.N. Standard Minimum Rules, arts. 81 (discharge planning), 83 (psychiatric after-care)

Commentary

This Standard embodies the basics of good practice on prisoner re-entry, which is (as commentary has repeatedly emphasized) central to these Standards. It is worth emphasizing here, as in the Standard 23-8.2, that nearly all prisoners are released.³¹⁷ It only makes sense for criminal justice authorities to attempt to ease that transition to assist prisoners' efforts to stay out of trouble.

Subdivision (a): The language of subdivision (a), dealing with transitional housing, is taken nearly verbatim from 18 U.S.C. 3624(c), which governs the Federal Bureau of Prisons.

Subdivision (b): Much of this subdivision has a direct analogue in (and none is inconsistent with) the Second Chance Act, 18 U.S.C. 4042(a), which requires the Federal BOP to:

- (D) establish prerelease planning procedures that help prisoners—
 - (i) apply for Federal and State benefits upon release (including Social Security Cards, Social Security benefits, and veterans' benefits); and
 - (ii) secure such identification and benefits prior to release, subject to any limitations in law; and
- (E) establish reentry planning procedures that include providing Federal prisoners with information in the following areas:
 - (i) Health and nutrition.
 - (ii) Employment.
 - (iii) Literacy and education.
 - (iv) Personal finance and consumer skills.
 - (v) Community resources.
 - (vi) Personal growth and development.
 - (vii) Release requirements and procedures.

Release planning should begin at the time of admission and continue throughout the period of confinement. This is particularly important for prisoners with serious mental disabilities; immediately on admission, such prisoners should be assessed for transition needs, including for housing, education, employment, transportation, support networks, life/social skills, public benefits, and substance abuse or mental health treatment. At the early stages of release planning, correctional authorities should identify gaps in post-release services (e.g., housing, public benefits, mental health services, and other community support) and initiate efforts to secure the needed services. Early release planning is especially important for pretrial detainees, who are particularly likely to be released with little or no warning to jail staff.

Subdivisions (c) & (d): Transition medical services are constitutionally required for prisoners with serious health care needs. For example, the 9th Circuit held in *Wakefield v. Thompson*, 177 F.3d 1160, 1164 (9th Cir. 1999), that

the state must provide an outgoing prisoner who is receiving and continues to require medication with a supply sufficient to ensure that he has that medication available during the period of time reasonably necessary to permit him to consult a doctor and obtain a

³¹⁷ Timothy Hughes and Doris James Wilson, *Reentry Trends in the United States*, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf> (Bureau of Justice Statistics, 2004).

ABA Treatment of Prisoners Standards

Standard 23-8.9 Transition to the community

new supply. A state's failure to provide medication sufficient to cover this transitional period amounts to an abdication of its responsibility to provide medical care to those, who by reason of incarceration, are unable to provide for their own medical needs.³¹⁸

Subdivision (c) applies to every prisoner and imposes a fairly minimal set of requirements designed to facilitate continuity of care: identification of health care services in the community, a description of treatment provided during incarceration, and a list of health care problems that might need follow-up. Subdivision (d) applies to prisoners with ongoing health care needs, and requires more intensive planning by correctional staff.

Medical transition plans should be in writing and should describe the steps that need to be taken to enable the prisoner to have continuity of medication and other health care, case management, housing, therapeutic and other support services, and public benefits. The written plan should address both short term and long term needs; the period immediately following release is critical to preventing recidivism. The plan should be developed in consultation with the prisoner, and when the prisoner's needs are very significant, with family members; prison staff; mental health, housing, and other appropriate government agency representatives; and community service providers involved with the prisoner's care. In addition, under subdivision (d), correctional officials should make reasonable efforts not simply to describe but also to actually facilitate needed treatment; to provide needed medication or medical equipment for the period before the prisoner can access care; and to provide transportation from the correctional facility to the health care facility if the prisoner needs to go directly to a health care facility. The overarching responsibility for prisoners with serious medical or mental health needs is release planning that is timely, individualized, comprehensive, effective, and coordinated with community corrections, social service agencies, and community mental health, substance abuse, and supportive housing providers, as needed.

Subdivision (e): The requirement in this subdivision that prisoners receive information about collateral consequences applicable to them, and the mechanisms that may be available for obtaining relief from them, can be met by written information about relevant laws and policies in the state of imprisonment and other states in which many released prisoners intend to reside. The Uniform Collateral Consequences of Conviction Act requires such notice.³¹⁹ This subdivision is not intended to require personal counseling on the topic of collateral consequences.

³¹⁸ See also *Lugo v. Senkowski*, 114 F. Supp. 2d 111, 115 (N.D.N.Y. 2000) (holding that it would be unconstitutional for state to release a prisoner in immediate need of surgery without facilitating that surgery's occurrence); *Brad H. v. City of New York*, 716 N.Y.S.2d 852 (N.Y. App. Div. 2000) (similar holding relating to mental health care under state law).

³¹⁹ Section 6(c) of the Uniform Collateral Consequences of Conviction Act requires that prisoners be informed of applicable collateral consequences "not more than [30], and, if practicable, at least [10], days before release." See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010) available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.htm. Required notice includes the Internet address of the state's collection of collateral consequences published under Section 4(c) of the Act; that there may be ways to obtain relief from collateral consequences; contact information for government or nonprofit agencies, groups, or organizations, if any, offering assistance to individuals seeking relief from collateral consequences. The Act also requires notice of when an individual convicted of an offense may vote under applicable state law. The Director of the National Institute of Justice is required to identify collateral sanctions and disqualifications in the constitutions, codes and administrative rules of the 50 states, as well as mechanisms for relief. See Court Security Improvement Act of 2007, Pub. L. 110-177 § 510, 121 Stat. 2534, 2544 (2008).

ABA Treatment of Prisoners Standards

Standard 23-8.9 Transition to the community

Subdivision (f): The moment of release from jail or prison is perilous for prisoners: although the transition planning required in this Standard would change this, they often leave with little or no money, no housing, no job, and no prospects. Some correctional policies can make this even worse: for example, releasing prisoners at midnight and in the middle of nowhere. In some cities, prisoners are offered an opportunity to have their family pick up their property, and if nobody comes to take the property it is thrown away, including identification cards and other items necessary for a successful transition. This subdivision directs a number of reasonable steps to help prisoners get through the first few days on release. Prisons have typically done better in this area than jails: for example, giving prisoners a little bit of money when they leave. But prisoners' needs do not go away because they were housed in a county or city jail rather than a state prison.

The phrase "sufficient money or its equivalent necessary for maintenance during a brief period immediately following release" is intended to allow either money or in-kind vouchers; the amount necessary will vary based on the prisoner's situation. A prisoner with housing, for example, will not need very much at all. In any event, this subdivision is not intended to require a large grant. .

Subdivision (g): This subdivision deals with early release mechanisms. See ABA resolution 109, 1996 Annual Meeting (terminally ill prisoners), available at <http://www.abanet.org/crimjust/policy/cjpol.html#am96109>. The intent is to mirror the U.S. Sentencing Guidelines on compassionate release, as amended effective November 1, 2007. See U.S. Sentencing Guidelines § 1B1.13, Application Notes. The permanent disability referenced in the subdivision can be the result of illness, injury, or old age. Exigent family circumstances include, for example, the death or incapacitation of all of the prisoner's family members capable of caring for the prisoner's minor child or children.

Subdivision (h): Medicaid and Medicare exclude prisoners, whether they are convicted offenders or pretrial detainees. See 42 U.S.C. § 1396d(a)(25)(A) (no reimbursement to states for "payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution)."). Inside prisons and jails the effect of this disqualification is not punitive or cost-saving; government-provided health care is, as the commentary to Part VI of these Standards develops in detail, constitutionally required. Rather, the effect is to shift costs from the federal government (for Medicare) and from the federal and state governments (for Medicaid) to state, county, and city governments. And the exclusion of prisoners from Medicaid and Medicare sends entirely the wrong message about the prisoners' membership in our community. The ABA endorses efforts to end the prisoner exclusion, see ABA resolution 122, 2007 Annual Meeting, available at <http://www.abanet.org/leadership/2007/annual/docs/hundredtwentytwo.doc>, and a bill to allow federal health benefits for pretrial detainees is pending in Congress. See H.R.2209, Restoring the Partnership for County Health Care Costs Act of 2009, 111th Cong. (2009).

The moment when the Medicaid and Medicare exclusion matters most to prisoners and to public health is on release from incarceration. It is often time consuming and bureaucratically difficult for prisoners to reactivate their benefits once they are released. For prisoners suffering from debilitating or contagious diseases, even a short period without health care can be tremendously harmful, either to them or to those around them. For prisoners suffering from some diseases, interruptions in medication can create resistance to "frontline" drugs, necessitating the use of stronger, more expensive, and often more dangerous medical interventions when treatment is ultimately resumed.³²⁰ Prisoners with untreated

³²⁰ Theodore M. Hammett, Cheryl Roberts & Sofia Kennedy, *Health-Related Issues in Prisoner Reentry*, 47 CRIME & DELINQ. 390 (2001).

ABA Treatment of Prisoners Standards

Standard 23-8.9 Transition to the community

contagious disease may pass those illnesses on to friends and acquaintances, who may themselves be unable to access proper medical care.³²¹

Lack of adequate medical care poses risks not only to public health, but also to public safety. Gaps in treatment can lead mentally ill persons to commit criminal acts.³²² Moreover, without Medicaid, many newly released persons with substance addictions are not able to access appropriate treatment, increasing the likelihood of reoffending. While the evidence is not conclusive, some studies have suggested that individuals who have health insurance following release from prison have lower rates of re-arrest than their uninsured counterparts.³²³

Even in the absence of an elimination of the federal benefits exclusion, this continuity of care problem can be solved by suspending rather than terminating prisoners from Medicaid and Medicare. This approach has been endorsed by the National Commission on Correctional Health Care.³²⁴ And pilot programs have implemented it, as well as ensuring that Medicaid-eligible individuals not already approved for the program are identified prior to their release.³²⁵

³²¹ Catherine H. Conly, *Helping Inmates Obtain Federal Disability Benefits: Serious Medical and Mental Illness, Incarceration, and Federal Disability Entitlement Programs* (June 2005), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/211989.pdf>; NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, 2 THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS (2004), available at [http://www.ncchc.org/stbr/Volume2/Health%20Status%20\(vol%202\).pdf](http://www.ncchc.org/stbr/Volume2/Health%20Status%20(vol%202).pdf).

³²² See, e.g., M. Nelson, et al., *The First Month Out, Post-Incarceration Experiences in New York City* (Vera Institute of Justice, 1999), available at http://www.vera.org/download?file=219/first_month_out.pdf; Bazelon Center, *Building Bridges: An Act to Reduce Recidivism by Improving Access to Benefits for Individuals with Psychiatric Disabilities upon Release from Incarceration* (2003), available at <http://www.bazelon.org/issues/criminalization/publications/buildingbridges/BuildingBridges.pdf>.

³²³ See, e.g., Joshua Lee et al., *Primary Care and Health Insurance among Women Released from New York City Jails*, 17 J. HEALTH CARE FOR THE POOR AND UNDERSERVED 200 (2006); Reentry Policy Council of the Council of State Governments, *How and Why Medicaid Matters for People with Serious Mental Illness Released From Jail: Research Implications* (n.d.), available at http://consensusproject.org/downloads/Summary_Researchfinal.pdf.

³²⁴ See NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS 62 (2002), available at [http://www.ncchc.org/stbr/Volume1/Health%20Status%20\(vol%201\).pdf](http://www.ncchc.org/stbr/Volume1/Health%20Status%20(vol%201).pdf).

³²⁵ Steve Eiken.& Sara Galantowicz, *Improving Medicaid Access for People Experiencing Chronic Homelessness* 12-15 (Centers for Medicaid and Medicare Services, March 2004) (describing programs in Washington and Texas), available at <http://www.cms.hhs.gov/PromisingPractices/Downloads/homeless32904.pdf>; National GAINS Center for People with Co-Occurring Disorders in the Justice System, *Maintaining Medicaid Benefits for Jail Detainees with Co-Occurring Mental Health and Substance Use Disorders* (rev. ed. 2002) (describing pilot program in Lane County, Oregon), available at http://www.gainscenter.samhsa.gov/pdfs/integrating/Maintaining_Medicaid_02.pdf. In some states, legislation has been introduced to require suspension, rather than termination, of the Medicaid benefits of incarcerated persons. See, e.g., Omnibus Mental Health and Substance Abuse Treatment Act, Washington State House of Representatives Bill E2SSB 5763 (2005); California AB 2004 (requiring state Department of Health Services to suspend health care benefits under Medi-Cal for incarcerated minors, rather than terminate eligibility as provided by current law and requiring Department to ensure that minors who are no longer prisoners have immediate access to health care services under Medi-Cal).

PART IX: GRIEVANCES AND ACCESS TO COURTS

Part IX General Commentary

This Part sets out the basic requirements necessary to ensure that prisoners have the means to enforce rights provided in the substantive provisions of these Standards; the right to counsel, which is covered in Standard 23-9.5 also protects prisoners' fair trial rights. Rights are, after all, meaningful only if prisoners have the realistic ability to enforce them. Organizationally, provisions on grievances and on court and counsel access are grouped together in this Part because all address the same core issue—how can a prisoner seek redress for a claimed violation.

The Standards together require four essential elements:

- Equality: prisoners should not be treated worse than non-prisoners when they appear before the courts; special rules limiting prisoners' court access or the remedies available to them should not be imposed.
- Access: correctional officials should not block access to the courts by imposing barriers between the prisoner and the courts; in fact, the government has an affirmative obligation to facilitate access; the right of access extends to civil legal matters as well as to habeas corpus and civil rights complaints, and extends to all phases of litigation.
- Effectiveness: Once in court, effective remedies should be available for prisoners who demonstrate violations of their rights.
- Fairness: grievance systems, like court access, should be fair and available (but even so should not displace the judicial process).

For reasons related to both statutory law and constitutional doctrine, these elements currently face substantial threats; the Standards in this Part address the salient issues.

In 1996, Congress enacted the Prison Litigation Reform Act (PLRA),³²⁶ which drastically transformed the rules governing litigation by prisoners. The statutes had two goals: to stem what Congress saw as a tide of frequently frivolous lawsuits by prisoners, and to rein in what Congress saw as unduly intrusive court orders in prison and jail class actions.³²⁷ With respect to the first goal, it is clearly the case that pro se prisoner lawsuits in federal court are numerous, often lack legal merit, and pose real management challenges both for courts and for correctional authorities. The PLRA's supporters focused on these problems, but emphasized over and over: "[We] do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system."³²⁸

³²⁶ H.R. 2076, 104th Cong. tit. VIII, Pub. L. No. 104 134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (Apr. 26, 1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997–1997h).

³²⁷ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006).

³²⁸ 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims."); see also 141 CONG. REC. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."); 141 CONG.

ABA Treatment of Prisoners Standards

Standard 23-8.9 Transition to the community

Unfortunately, the results have not fulfilled this sanguine prediction. The PLRA has been extremely effective in shrinking the number of federal lawsuits by prisoners, even as incarcerated populations rise; since its passage, prisoners' federal filing rates have declined 60%, from twenty-six federal cases per thousand prisoners in 1995 to fewer than eleven cases per thousand prisoners in 2006.³²⁹ And the burden posed by litigation for prison and jail officials has diminished even more, because of the statute's screening provisions, which require courts to dispose of legally insufficient prisoner civil rights cases (as well as some cases brought by non-prisoners), often without even notifying the sued officials of the suit against them and without receiving any response from those officials. Under the PLRA, prison or jail officials no longer need to investigate or answer complaints that are frivolous or fail to state a claim under federal law.³³⁰

But the dramatic reduction in the volume of prisoner litigation has by no means been limited to the frivolous or even nonmeritorious cases. If the PLRA were successfully "reduc[ing] the quantity and improv[ing] the quality of prisoner suits,"³³¹ as its supporters intended, one would expect the dramatic decline in filings to be accompanied by a concomitant increase in plaintiffs' success rates in the cases that remain. The evidence is quite the contrary. The shrunken prisoner docket is less successful than before the PLRA's enactment; more cases are dismissed, and fewer settle.³³²

That result is not surprising: many aspects of the PLRA undermine court access even for prisoners with meritorious cases, or are unfair for other reasons. Legislation has been introduced to amend the statute,³³³ and the ABA has endorsed reform. See ABA resolution 102B, 2007 Midyear Meeting (Prison Litigation Reform Act), available at http://www2.americanbar.org/sdl/Documents/2007_MY_102B.pdf. Several provisions of two Standards in this Part state the ABA's positions on these issues; these are further discussed in the individual Standards' commentary, but are listed here:

- The PLRA imposes special and disadvantageous filing fee and cost-assessment rules for prisoners.³³⁴ Standard 23-9.2(b) requires that restrictions on court access accomplished by fees be imposed upon prisoners only if like restrictions are imposed upon non-prisoners.
- The PLRA requires prisoners to exhaust administrative grievance systems or forfeit their right to bring a lawsuit.³³⁵ Standard 23-9.2(d) requires, instead, that lawsuits be stayed for several months

REC. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady) ("These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.").

³²⁹ For 2007 filing statistics, see ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2007, at 148 tbl.C-2A (2007) (prisoner civil rights, prison conditions cases), available at <http://www.uscourts.gov/judbus2007/appendices/C02.pdf>; for 1995 filing statistics, see ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999, at 139 tbl.C-2A (1999), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1999/front/1999JudicialBusiness.pdf>; and for prison population figures, see Bureau of Justice Statistics, U.S. Dep't of Justice, Key Facts at a Glance: Correctional Populations, <http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm>.

³³⁰ 28 U.S.C. § 1915A; see also 28 U.S.C. § 1915(e)(2); 42 U.S.C. §§ 1997e(c)(1), (g)(2).

³³¹ *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

³³² See Schlanger, *Inmate Litigation*, *supra* note 327 at 1644–64.

³³³ Prison Abuse Remedies Act of 2009, H.R. 4335 (111th Cong. 2009).

³³⁴ 28 U.S.C. § 1915.

³³⁵ 42 U.S.C. § 1997e.

ABA Treatment of Prisoners Standards

Standard 23-8.9 Transition to the community

if that time is needed for a complaint to be processed through a grievance system, and then be allowed to proceed in court.

- The PLRA bars damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury.”³³⁶ Standard 23-9.3(c) recommends repeal of this statutory rule.
- The PLRA limits the equitable authority of courts in prisoner litigation in a variety of ways.³³⁷ Standard 23-9.3(d) insists that courts should have the same equitable authority in conditions of confinement cases as in other civil rights cases.
- The PLRA drastically limits the availability of attorneys fees in successful prisoner civil rights cases,³³⁸ altering the ordinary fee-shifting rules.³³⁹ Standard 23-9.4(f) requires that prisoners’ litigation not be singled out in this way.

In short, the PLRA singles out prisoners and places formidable, indeed often insurmountable, obstacles in their path when they seek redress from the courts for violations of their federally secured rights, leaving a wide range of constitutional violations beyond judicial remedy.³⁴⁰ Standards 23-9.2 and 23-9.3 affirm the ABA’s core principles of due process and equality, by requiring that effective and fair procedures for redress be available to prisoners, as they are for others who seek the protections of the legal system.

The same year the PLRA was passed, the Supreme Court decided *Lewis v. Casey*, 518 U.S. 343 (1996), which is pertinent to a number of the Standards in this Part. Two decades prior to *Lewis*, in *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court held that prison officials must not merely refrain from posing obstacles to prisoners’ access to the courts, such as by refusing to forward a court petition as in *Ex Parte Hull*, 312 U.S. 546 (1941), but must actually offer affirmative assistance, usually by providing a law library. *Lewis* overruled *Bounds* in part, holding that the affirmative obligation to assist prisoners with court access is limited to what prisoners need “in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement.” *Lewis v. Casey*, 518 U.S. at 355. Moreover, *Lewis* emphasized that a prisoner asserting a violation of his right of access to courts was not entitled to judicial relief unless he could demonstrate “actual injury”—“for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known,” or “that he had suffered

³³⁶ 42 U.S.C. § 1997e(e); 28 U.S.C. § 1346(b)(2).

³³⁷ 18 U.S.C. § 3626.

³³⁸ 42 U.S.C. § 1997e(d).

³³⁹ 42 U.S.C. § 1988.

³⁴⁰ Legislation was introduced in both the 110th and 111th Congress to (1) eliminate the PLRA’s requirement of a prior showing of physical injury before a prisoner may bring a claim for mental or emotional injury suffered while in custody; (2) provide for a 90-day stay of nonfrivolous claims relating to prison conditions to allow prison officials to consider such claims through the administrative process; and (3) exclude from the application of the PLRA prisoners under the age of 18. See Prison Abuse Remedies Act of 2009, H.R. 4335 111th Cong., (2d Sess. 2009) In the 110th Congress, hearings were held on H.R. 4109 before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security on November 8, 2007, and April 22, 2008. See Private Prison Information Act of 2007 and Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses?: Hearing on H.R. 1889 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (2007) available at http://judiciary.house.gov/hearings/hear_110807.html; Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (2008) available at http://judiciary.house.gov/hearings/hear_042208.html.

ABA Treatment of Prisoners Standards

Standard 23-9.1 Grievance procedures

arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.” *Id.* at 351.

Lewis sets the constitutional minima, but if officials provide only what is constitutionally required, they restrict prisoners’ access to courts far more than is appropriate. After all, prisoners have many legal needs unrelated to either unconstitutional conditions or the fact of their confinement—they face legal proceedings relating to their families, immigration issues, statutory rights, etc. It is both unduly harsh and not conducive to accurate outcomes in those consequential cases to exempt prisoners from court access rights.³⁴¹ Accordingly, these Standards are not limited to criminal, habeas, and constitutional litigation.

The Standards likewise do not condition court access rights on a showing that a prisoner has suffered a concrete injury linked to the failure to provide such access. This is not inconsistent with *Lewis*, whose requirement of “actual injury” is applied to determine whether a particular individual has been or is being denied access to courts with respect to a particular legal claim. These Standards, by contrast, address the administration of prisons, and its provisions on access to courts are intended to prescribe general conditions and practices that will *prevent* the occurrence of such denials.

Standard 23-9.1 Grievance procedures

(a) Correctional administrators and officials should authorize and encourage resolution of prisoners’ complaints and requests on an informal basis whenever possible.

(b) Correctional officials should provide prisoners opportunities to make suggestions to improve correctional programs and conditions.

(c) Correctional administrators and officials should adopt a formal procedure for resolving specific prisoner grievances, including any complaint relating to the agency’s or facility’s policies, rules, practices, and procedures or the action of any correctional official or staff. Prisoners should be informed of this procedure pursuant to Standard 23-4.1, including any applicable timeframes or other bases for rejecting a grievance on procedural grounds.

(d) Correctional officials should minimize technical requirements for grievances and should allow prisoners to initiate the grievance process by describing briefly the nature of the complaint and the remedy sought. Grievances should be rejected as procedurally improper only for a reason stated in the written grievance policy made available to prisoners. If correctional officials elect to require use of a particular grievance form, correctional authorities should make forms and writing implements readily available and should allow a grievant to proceed without using the designated form if it was not readily available to that prisoner.

³⁴¹ *Lewis* deserves the criticism it has received on constitutional grounds, as well. Doctrinally, prisoners’ court access rights have their origin in the obligation of the state to avoid interference with presentation of grievances to courts, not in the underlying subject matter of those grievances. So even when constitutional rights are not at stake, the right of court access should exist. Besides, even if court access rights were derivative of the rights being enforced, they should still apply in immigration cases, parental rights cases, and many others. Moreover, *Lewis*’s standing obstacle creates a Catch-22 for prisoners; in order to complain about the absence of legal resources, they must, under *Lewis*, already know what those resources would tell them. See, e.g. Susan N. Herman, *Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1261-66 (1998); Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners’ Rights*, 11 B.U. PUB. INT. L.J. 73 (2001).

ABA Treatment of Prisoners Standards

Standard 23-9.1 Grievance procedures

(e) A correctional agency's grievance procedure should be designed to instill the confidence of prisoners and correctional authorities in the effectiveness of the process, and its success in this regard should be periodically evaluated. Procedural protections for prisoners should include, at a minimum:

- (i) access for all prisoners, with safeguards against reprisal;
- (ii) methods for confidential submission of grievances;
- (iii) reasonable filing and appeal deadlines;
- (iv) acceptance of grievances submitted or appealed outside the reasonable deadlines, if a prisoner has a legitimate reason for delay and that delay has not significantly impaired the agency's ability to resolve the grievance;
- (v) written responses to all grievances, including those deemed procedurally improper, stating the reasons for the decision, within prescribed, reasonable time limits;
- (vi) shortened time limits for responses to emergencies;
- (vii) an appeal process that allows no more than [70 days], cumulatively, for official response(s) to all levels of appeal except if a correctional official extends the period upon an individualized finding of special circumstances;
- (viii) treatment of any grievance or appeal as denied, for purposes of the prisoner's subsequent appeal or review, if the prisoner is not provided a written response within the relevant time limit; and
- (ix) an appropriate individual and, when appropriate, systemic remedy if the grievance is determined to be well-founded.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-4.1(c) (rules of conduct and informational handbook, grievances), 23-3.9(c) (conditions during lockdown, grievances), 23-6.7 (quality improvement), 23-7.2 (prisoners with disabilities and other special needs, communication of complaints), 23-9.2 (access to the judicial process), 23-10.3(b)(viii) (training), 23-11.1 (internal accountability)

Related Standards and ABA Resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-7.1 (resolving prisoner grievances)

ABA, RESOLUTION (text in Appendix), 102B (Feb. 2007) (Prison Litigation Reform Act)

ACA, JAIL STANDARDS, 4-ALDF-6B-01 (grievance procedures)

ACA, PRISON STANDARDS, 4-4284 (grievance procedures)

NCCHC, HEALTH SERVICES STANDARDS, A-11 (Grievance Mechanism for Health Complaints).

U.N. Standard Minimum Rules, arts. 35, 36 (complaints by prisoners)

Commentary

Until 1996, prisoner litigants, like other litigants, generally had no obligation to pursue administrative grievances prior to seeking litigated civil rights relief. See *Patsy v. Board of Regents of Florida*, 457 U.S.

ABA Treatment of Prisoners Standards

Standard 23-9.1 Grievance procedures

496 (1982); *McCarthy v. Madigan*, 503 U.S. 140 (1992).³⁴² The PLRA has, however, imposed a requirement that prisoners exhaust grievance procedures prior to bringing a lawsuit; the Supreme Court in *Woodford v. Ngo*, 548 U.S. 81 (2006), interpreted that requirement as imposing a procedural bar on the subsequent litigation. As a result, any misstep by the prisoner in following the requirements of the grievance process generally results in forfeiture of the right to file a lawsuit over the subject matter of that grievance, since grievance time limits are very short and most attempts to cure procedural errors in exhaustion will be time-barred.

Woodford's procedural bar rule creates a strong incentive for prisons and jails to develop ever more complex and difficult grievance procedures. As one federal magistrate judge put it, “the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with 42 U.S.C. § 1997e(a) responsibilities.” *Ouellette v. Maine State Prison*, 2006 WL 173639 at *3 n.2 (D. Me., Jan. 23, 2006), *aff'd*, 2006 WL 348315 (D. Me., Feb. 14, 2006).³⁴³ Although the courts do not always accept such arguments by prison officials, it is inescapable that the impact of the exhaustion requirement is detrimental to prisoners’ ability to bring lawsuits. The exhaustion rule, coupled with the absence of any regulation of the fairness of prison and jail grievance procedures, tends to encourage highly technical grievance procedures that are difficult for prisoners to navigate. To cite just one example, in July 2002, in *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002), the Seventh Circuit reversed the district court’s dismissal of a case for failure to exhaust; in rejecting the prison officials’ argument that the plaintiff’s grievances were insufficiently specific, the court noted that the Illinois prison grievance rules were silent as to the requisite level of specificity. Less than six months later, the Illinois Department of Corrections proposed new regulations that provided:

The grievance shall contain factual details regarding each aspect of the offender’s complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint.

ILL. ADMIN CODE tit. 20, § 504.810(b) (2008); see 26 Ill. Reg. 18065, at § 504.810(b) (Dec. 27, 2002) (proposing amendment).

Compliance with this Standard, along with Standard 23-9.2, would change this situation in two respects. First, this Standard regulates grievance procedures. Regardless of the role of those procedures in subsequent litigation, the grievance process should be easy to use, prompt, comprehensive, and fair. Grievance rules whose complexity challenges experienced lawyers are simply not appropriate. Such rules

³⁴² In 1980, in the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (since amended), Congress created a limited exhaustion requirement for adult prisoners in correctional systems whose grievance policies were certified by the Attorney General or a federal court as meeting certain substantive and procedural criteria. Very few prison and jail systems sought certification under this statute, see JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 49 (1990) (explaining that “few states have sought and obtained certification under this statute”); Note, *Resolving Prisoners’ Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309, 1310-11 (1991) (discussing certification procedure and the Federal Courts Study Committee’s recommendations for revision), and it was repealed by the PLRA in 1996. See 42 U.S.C. § 1997e.

³⁴³ Other courts have expressed similar concerns. See, e.g., *Campbell v. Chaves*, 402 F. Supp. 2d 1101, 1106 n.3 (D. Ariz. 2005) (noting danger that grievance systems might become “a series of stalling tactics, and dead-ends without resolution”); *LaFauci v. N.H. Dep’t of Corr.*, 2005 WL 419691 at *14 (D.N.H., Feb. 23, 2005) (“While proper compliance with the grievance system makes sound administrative sense, the procedures themselves, and the directions given to inmates seeking to follow those procedures, should not be traps designed to hamstring legitimate grievances.”); *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at *5 (S.D.N.Y., June 6, 2002) (“While it is important that prisoners comply with administrative procedures designed by the Bureau of Prisons, rather than using any they might think sufficient, . . . it is equally important that form not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his constitutional rights.”).

ABA Treatment of Prisoners Standards

Standard 23-9.1 Grievance procedures

are unfair (particularly given the limited education of so many prisoners), and they render the grievance procedure ineffective both for prisoners and for officials, who need to use grievances as a window into line-level functioning of each correctional facility. In the words of a brief filed in the Supreme Court by New York State joined by 28 other states, as well as the District of Columbia and the Virgin Islands:

For decades, prison grievance procedures have played an important role in prison administration. Inmate grievances provide timely feedback to state officials about problems that arise in correctional facilities. In individual cases, grievance procedures enable prison administrators to take prompt remedial action that may satisfy the inmate and obviate the need for litigation. From a systemic perspective, such procedures allow prison officials to monitor trends in prisoner complaints before unwise institutional policies or patterns of inappropriate conduct by correctional officers lead to frustration among the inmate population, potentially triggering prisoner unrest or disturbances.³⁴⁴

Subdivisions (a) & (c): Under subdivision (c), correctional officials should allow prisoner use of the grievance system for all requests of any kind not resolved informally under subdivision (a). While some prison systems have established workable separate systems of administrative appeals to deal with specific matters (most often matters relating to a prisoner's criminal case or to disciplinary convictions), in general a single grievance system avoids confusion and hindsight accusations of procedural error. An institution's grievance policy should clearly state the scope of the grievance procedure and of any separate specialized system of dispute resolution, and should clearly specify which matters are for grievance and which are for the separate system.

In addition, subdivision (c) requires officials to make clear to prisoners how the grievance system works so that prisoners can navigate it. If prisoners are directed how to report something, their report should constitute the proper pursuit of a grievance; officials should not engage in "bait and switch" tactics, first designating a means of registering a complaint but then arguing that that complaint was not grieved.³⁴⁵

Subdivisions (d) & (e): These subdivisions are intended to unravel the daunting complexity of some correctional grievance systems, and other obstacles to their effective functioning.

The kinds of technical requirements barred by subdivision (d) include rules requiring prisoners to name each officer and witness to a complained-of incident; to include only one topic and the like. Rules like these sound innocuous enough, but experience demonstrates that they serve less to improve the efficiency or effectiveness of the grievance process than to preclude subsequent litigation. This is especially the case because prisoners – many of whom have little education, read poorly or not at all,³⁴⁶ or have mental illness or intellectual disabilities³⁴⁷ – are ill-equipped to comply with technical rules under short deadlines

³⁴⁴ Brief for New York *et al.* as amicus curiae, *Woodford v. Ngo*, 548 U.S. 81 (2006) (05-416), at 1, available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0039-0010.pdf>.

³⁴⁵ Coming out the other way on this issue is *Amador v. Superintendents of Dep't Corr. Services*, No. 03 Civ. 0650(KTD)(GWG), 2007 WL 4326747, at *7-8 (S.D.N.Y. 2007) (agreeing with the defendant officials that the sexual abuse complaints of the plaintiffs had not been properly exhausted in a situation like the one described in text).

³⁴⁶ The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. KARL O. HAIGLER ET AL., U.S. DEPT. OF EDUC., LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY xviii, 17- 19 (1994) (available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102>).

³⁴⁷ Prisoners with mental illness are subject to the same exhaustion requirement as other prisoners. See *Williams v. Kennedy*, No. C.A. C-05-411, 2006 WL 18314, at *2 (S.D. Tex., Jan. 4, 2006) (dismissing despite prisoner's claim he didn't know of the exhaustion requirement and a prior brain injury made it difficult for him to remember things);

ABA Treatment of Prisoners Standards

Standard 23-9.1 Grievance procedures

and without the assistance of legal counsel. Further, many prison grievance systems have unclear rules³⁴⁸ or are inconsistently administered,³⁴⁹ and some prisoners are subjected to misinformation that impedes them from exhausting properly.³⁵⁰ If prisoners mistakenly take a problem to the wrong forum, it should be the responsibility of that forum to refer it to the correct forum.

Subdivision (e)(i) forbids reprisals against prisoners who invoke the grievance system, and subdivision (e)(ii) requires officials to allow confidential submission of grievances. Both are much needed for grievances (and therefore litigation, in the absence of compliance with Standard 23-9.2(d)) to be realistically available to those prisoners complaining about serious abuse. “The PLRA does not excuse exhaustion for prisoners who are under imminent danger of serious physical injury, much less for those who are afraid to confront their oppressors.”³⁵¹ Without confidential avenues of complaint, many prisoners will forgo complaint and forfeit their constitutional rights; prison officials will never hear about problems that they urgently need to solve. In addition, retaliation clearly violates the First Amendment under operative case law, yet it equally clearly occurs with some frequency.³⁵² It is permissible, however,

Bakker v. Kuhnes, No. C01-4026-PAZ, 2004 WL 1092287, at *6 (N.D. Iowa, May 14, 2004) (rejecting plaintiff’s argument that his medication doses were so high they “prohibited him from being of sound mind to draft a grievance;” noting that he failed to submit a grievance after his medication was corrected, and that he filed other grievances during the relevant period). We note that there is very little law on this subject despite the well-known concentration of persons with mental illness in prison. It is likely that many prisoners with mental illness are not capable of adequately framing an argument that their mental condition has prevented them from strictly complying with grievance procedures as the Supreme Court has directed.

³⁴⁸ See *Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005) (observing prison policies did not “clearly identif[y]” the proper administrative remedy and there was no “clear route” to administrative review of certain decisions); *Abney v. McGinnis*, 380 F.3d 663, 668-69 (2d Cir. 2004) (noting the lack of instruction in the grievance rules for instances where a favorable grievance decision is not carried out).

³⁴⁹ *Warren v. Purcell*, No. 03 Civ. 8736(GEL), 2004 WL 1970642 at *6 (S.D.N.Y. Sept. 3, 2004) (noting ‘baffling’ grievance response that left prisoner with no clue what to do next); *Kendall v. Kittles*, No. C0 Civ. 628(GEL), 2004 WL 1752818 at *2 (S.D.N.Y., Aug. 4, 2004) (noting that Grievance Coordinator’s affidavit said that plaintiff needed a physician’s authorization to grieve medical concerns; no such requirement appears in the New York City grievance policy); *Casanova v. Dubois*, No. Civ.A.98-11277-RGS, 2002 WL 1613715 at *6 (D. Mass., July 22, 2002) (finding that, contrary to written policy, practice was “to treat complaints of alleged civil rights abuses by staff as ‘not grievable’”), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002).

³⁵⁰ See *Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10th Cir. 2001) (holding that plaintiff who was confused by prison officials’ erroneous representations about the powers of the grievance system was still required to exhaust); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (holding that where a plaintiff complained to the warden and was told the warden would take care of his problem, but the warden did not, the plaintiff was not excused from exhausting the grievance system), *cert. denied*, 531 U.S. 1156 (2001); *Mendez v. Herring*, No. 05-1690 PHX/JAT, 2005 WL 3273555 at *2 (D. Ariz., Nov. 29, 2005) (dismissing claim of a prisoner who said staff told him his rape complaint was not grievable, since futility is not an excuse).

³⁵¹ *Broom v. Rubitschun*, No. 1:06-CV-350, 2006 WL 3344997 (W.D. Mich. Nov. 17, 2006); *see also Enright v. Heine*, No. CV-04-115-BLG-RFC, 2006 WL 2594485 at *2 (D. Mont. Sept. 11, 2006) (“Even a prisoner’s fear of retaliatory action could not excuse her from pursuing administrative remedies.”).

³⁵² See, e.g., *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), *cert. denied*, 535 U.S. 1095 (2002); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.) (injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), *cert. denied*, 534 U.S. 1066 (2001); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (jury verdict for plaintiff subjected to retaliation for filing grievances), *cert. denied*, 524 U.S. 936 (1998);

ABA Treatment of Prisoners Standards
Standard 23-9.1 Grievance procedures

for there to be some reasonable adverse consequence for a prisoner found to have committed gross abuse of the grievance process by making an explicit physical threat in a grievance. Adverse consequences should not be allowed for less culpable conduct, such as filing a grievance that is false or even disrespectful.³⁵³

Subdivisions (e)(iii) to (e)(viii) all deal with the timing of grievance filings and responses. Grievance systems generally require prisoners to file the complaints 2-15 days from the relevant event.³⁵⁴ A two-day deadline is obviously unreasonable, especially given the preference in subdivision (a) (and in many prison policies) for informal resolution of problems prior to filing a grievance. Even a two-week deadline may be unduly short if the policy does not include reasonable exceptions, such as for prisoners complaining of incidents that left them hospitalized and therefore unable to file a grievance. Subdivision (iv) then supplements the requirement of reasonableness with respect to deadlines with additional leeway for prisoners who had a legitimate reason to miss that deadline, absent impairment to officials' ability to investigate or resolve the grievance.

Many systems regulate only the prisoners' time to file—not official response times. Subdivisions (e)(v) to (e)(vii) require reasonable time limits for responses. And subdivision (e)(viii) requires that a grievance be deemed denied if not resolved or decided within those reasonable time limits, for purposes of subsequent review or appeal. This avoids the situation in which a prisoner waits and waits for a response from one layer of the process before being able to move up the chain of command. The overall limit of 70 days, in subdivision (e)(vii), does not include the time the prisoner takes to file any appeals; it covers only the time spent responding. Such a limit is helpful both to timely processing within an agency and to prevent situations from arising, as they frequently have, in which a prisoner is stymied in his or her efforts to present a claim to a federal court because corrections officials have failed to process it.

Subdivision (e)(ix) is the one part of subdivision (e) that is not procedural; to be useful, grievance processes must offer remedies for well-founded complaints, both individual and, when appropriate, systemic. In order to know when a systemic remedy is appropriate, correctional agencies should implement a system for tracking, aggregating, and analyzing all grievances and their outcome; for ensuring that correctional administrators review these analyses on a regular basis; and for taking any

Maurer v. Patterson, 197 F.R.D. 244 (S.D.N.Y. 2000) (jury verdict for plaintiff subjected to retaliatory disciplinary charge for complaining about operation of grievance program).

³⁵³ In *Bradley v. Hall*, 64 F.3d 1276, 1279–81 (9th Cir. 1995), the court held (correctly, in our view) that applying a rule against “hostile, sexual, abusive or threatening” language to written grievances was an exaggerated response, and that a “threat of punishment for an impolitic choice of words” was an unacceptable burden on court access (since filing a grievance is now required before filing a lawsuit). “If there is any time a prisoner should be permitted to speak freely, it is at the bar of justice.” *Bradley*, 64 F.3d at 1281. Threats of consequences such as litigation (“or I’ll see you in court”) should not lead to any adverse consequence, see *Cavey v. Levine*, 435 F. Supp. 475, 481–83 (D. Md. 1977) (holding prisoner could not be punished for “threat[s]” to write to the press about an inmate suicide), *aff’d sub nom. Cavey v. Williams*, 580 F.2d 1047 (4th Cir. 1978), nor should ambiguous expressions such as “if you don’t do something about this officer’s conduct, something bad could happen to him,” which *might* be a threat but might actually be a useful warning/prediction about other prisoners’ responses to a problematic situation. As for falsehoods in grievances—or statements that prison personnel assert or conclude are false—at least one court has held that sanctioning them is inconsistent with the First Amendment right to petition for redress of grievances. See *Hancock v. Thalacker*, 933 F. Supp. 1449, 1487–93 (N.D. Iowa 1996). The court reasoned that the grievance process contains sufficient safeguards for prison officials to deal with false complaints. Denying the grievance is a sufficient sanction under the circumstances.

³⁵⁴ See Brief for the Jerome N. Frank Legal Services Organization as amicus curiae, *Woodford v. Ngo*, 548 U.S. 81 (2006) (05-416), Appendix A, available at http://www.law.yale.edu/documents/pdf/Woodford_Amicus_brief.pdf.

ABA Treatment of Prisoners Standards

Standard 23-9.2 Access to the judicial process

necessary remedial action when systemic problems are identified, including problems in the operation of the grievance system itself. See Standard 11.1(e).

Standard 23-9.2 Access to the judicial process

(a) Governmental officials should assure prisoners full access to the judicial process.

(b) Prisoners' access to the judicial process should not be restricted by the nature of the action or the relief sought, the phase of litigation involved, or the likelihood of success of the action, except if like restrictions, including filing fees, are imposed on non-prisoners. Prisoners should be entitled to present any judicially cognizable issue, including:

- (i) challenges to the legality of their conviction, confinement, extradition, deportation, or removal;
- (ii) assertions of any rights protected by state or federal constitution, statute, administrative provision, treaty, or common law;
- (iii) civil legal problems, including those related to family law; and
- (iv) assertions of a defense to any action brought against them.

(c) The handbook required by Standard 23-4.1 should advise prisoners about the potential legal consequences of a failure to use the institutional grievance procedures.

(d) A prisoner who files a lawsuit with respect to prison conditions but has not exhausted administrative remedies at the time the lawsuit is filed should be permitted to pursue the claim through the grievance process, with the lawsuit stayed for up to [90 days] pending the administrative processing of the claim, after which a prisoner who filed a grievance during the period of the stay should be allowed to proceed with the lawsuit without any procedural bar.

(e) Upon request by a court, correctional authorities should facilitate a prisoner's participation—in person or using telecommunications technology—in legal proceedings.

(f) A prisoner should be allowed to prepare, receive, and send legal documents to courts, counsel, and public officials. Correctional officials should not unreasonably delay the delivery of these legal documents.

(g) Courts should be permitted to implement rules to protect defendants and courts from vexatious litigation, but governmental authorities should not retaliate against a prisoner who brings an action in court or otherwise exercises a legal right.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-4.1 (rules of conduct and informational handbook), 23-9.1 (grievance procedures), 23-9.3 (judicial review of prisoner complaints), 23-9.5(d) (access to legal materials and information, retention of legal documents)

Related Standards and ABA Resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-2.1 (access to the judicial process)

ABA, COLLATERAL CONSEQUENCES STANDARDS, 19-2.6(b) (deprivation of judicial rights)

ABA Treatment of Prisoners Standards

Standard 23-9.2 Access to the judicial process

ABA, RESOLUTION (text in Appendix), 102B (Feb. 2007) (Prison Litigation Reform Act)

ACA, JAIL STANDARDS, Performance Standard 6A (inmate rights), 4-ALDF-6A-01 (access to courts)

ACA, PRISON STANDARDS, 4-4274 (access to courts)

Commentary

Subdivisions (a) & (b): The general statement in subdivision (a) and the more particular ones in subdivision (b) are about access to courts—but they are not intended to address substantive entitlements to remedies, including under the rules governing habeas corpus. However, they are intended to require equality of access; no special hurdles for prisoners only should be imposed. This covers the PLRA’s imposition of particularly onerous filing fee rules for prisoners.³⁵⁵ The PLRA’s screening provisions are compliant with this subdivision’s requirement because they provide for *judicial* screening—that is, prisoners still have the right to a judicial decision on their case. In addition, the screening rules apply in some circumstances to non-prisoners, as well.³⁵⁶

Subdivision (c): It is only fair that prisoners should be notified of the unique disability they face, under current law; they must use a correctional facility’s grievance process from start to finish, without any mistakes, or they forfeit their right to judicial review of their complaint.

Subdivision (d): This subdivision states that prisoners should not be barred from court for failure to exhaust or to exhaust properly. Rather, the court case should be stayed to allow prisoners to resubmit their complaints to prison officials for consideration. While the PLRA’s exhaustion requirement appears harmless enough (who could object to a regime in which corrections officials are given the first opportunity to respond to and perhaps resolve prisoners’ claims?), in many jails and prisons administrative remedies are very difficult to access. Deadlines may be very short, for example, or the number of administrative appeals required very large.³⁵⁷ The requisite form may be repeatedly unavailable,³⁵⁸ or the grievance system may seem not to cover the complaint the prisoner seeks to make.³⁵⁹ Wardens and sheriffs routinely refuse to engage prisoners’ grievances because those prisoners

³⁵⁵ See 28 U.S.C. § 1915 (2006). The PLRA imposes these filing fees only on indigent prisoners. Because no other indigent litigant is subject to these provisions, they violate the essential element of equality that underpins these Standards. Other aspects of the PLRA also single out suits by prisoners for especially onerous treatment. See *supra* Part IX pp. 191-93.

³⁵⁶ See 28 U.S.C. § 1915(e)(2) (2006); 28 U.S.C. § 1915A (2006); 42 U.S.C. § 1997e(c)(1) (2006). Former law authorized the dismissal of any case filed *in forma pauperis* (as are the vast majority of prisoner cases) if it was frivolous or malicious. Collectively, these PLRA provisions expand the grounds for dismissal of cases filed *in forma pauperis* to include those that fail to state a claim or that seek to recover damages from an immune defendant as well as those that are frivolous or malicious, and they mandate the initial screening process and require dismissal upon a finding of one of these grounds, all before defendant corrections officials need respond.

³⁵⁷ For a survey of prison and jail grievance policy deadlines, see Brief for Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent at 6–13 & A1–A7, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 304573,

³⁵⁸ See, e.g., *Latham v. Pate*, No. 1:06-CV-150, 2007 WL 171792, at *2 (W.D. Mich. Jan. 18, 2007) (dismissing suit due to tardy exhaustion in case in which the prisoner who alleged that he had been beaten maintained that he was placed in segregation and administrative segregation immediately following assault and that “officers did not provide him with the grievance forms”).

³⁵⁹ See, e.g., *Benfield v. Rushton*, No. 8:06-CV-2609, 2007 WL 30287, at *1 (D.S.C. Jan. 4, 2007) (dismissing suit due to untimely filing of grievance brought by prisoner who alleged that he was repeatedly raped by other prisoners; prisoner had explained that he “didn’t think rape was a grievable issue”); *Marshall v. Knight*, No. 3:03-CV-460, 2006 WL 3714713, at *1 (N.D. Ind. Dec. 14, 2006) (dismissing, for failure to exhaust, plaintiff’s claim that prison

ABA Treatment of Prisoners Standards

Standard 23-9.3 Judicial review of prisoner complaints

commit minor technical errors, such as using the incorrect form,³⁶⁰ sending the right documentation to the wrong official,³⁶¹ or failing to file separate forms for each issue, even if the interpretation of a single complaint as raising two separate issues is the prison administration's.³⁶² Prisoners often fear retaliation,³⁶³ and, although some courts have recognized exceptions to the exhaustion requirement based on estoppel or "special circumstances," others have refused to excuse prisoners' lapses.³⁶⁴ The result has been dismissal of many facially meritorious and serious cases based on the technicality of non-exhaustion.

But even if the grievance system is reasonable, as required by Standard 23-9.1, it is reasonable *as a grievance system*, not as a gateway to the federal courts. No other civil rights claimants have so many hurdles to jump, in so short a time. The values served by equality for prisoners and judicial review of prisoner complaints are too important to sacrifice. This subdivision preserves the opportunity correctional officials need for out-of-court resolution of claims, but not at the cost of those values.

Subdivisions (e) through (g): This Standard is about judicial review of prisoners' complaints, but it involves non-judicial authorities to this extent: correctional authorities should not place any barriers between prisoners and the courts. Subdivision (e) requires correctional authorities to use reasonable means to facilitate prisoners' participation in court proceedings, even court proceedings in a different state, whose courts therefore lack authority to compel the prison to produce him or her. It is not, however, the intent of this subdivision to abridge the prisoner's right to resist attendance or participation. And subdivision (f) repeats the holding of *Ex Parte Hull*, 312 U.S. 546 (1941). Finally, under subdivision (g) no governmental authority (correctional or legislative) should retaliate or authorize retaliation against prisoners for seeking judicial redress for claimed violations of rights.³⁶⁵ Thus prisoners' decisions to seek judicial relief should not be the subject of discipline or harassment, nor adversely affect their program, status, or opportunity for release.

Standard 23-9.3 Judicial review of prisoner complaints

(a) Judicial procedures should be available to facilitate timely resolution of disputes involving the legality, duration, or conditions of confinement.

officials retaliated against him in classification and disciplinary decisions, even though prison policy dictated that no grievance would be allowed to challenge classification and disciplinary decisions).

³⁶⁰ See, e.g., *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001).

³⁶¹ See, e.g., *Keys v. Craig*, 160 F. App'x 125 (3d Cir. 2005).

³⁶² *Harper v. Laufenberg*, No. 3:04-CV-699, 2005 WL 79009, at *3 (W.D. Wis. Jan. 6, 2005).

³⁶³ See *Woodford*, 548 U.S. at 118 & n.14 (Stevens, J., dissenting).

³⁶⁴ Compare *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004) (allowing prisoner to proceed), with, e.g., *Garcia v. Glover*, 197 Fed. App'x 866, 867 (11th Cir. 2006) (refusing to excuse non-exhaustion in case in which prisoner alleged that he had been beaten by five guards, despite the fact that prisoner alleged that he feared he would be "killed or shipped out" if he filed an administrative grievance); *Umstead v. McKee*, No. 1:05-CV-263, 2005 WL 1189605, at *2 (W.D. Mich. May 19, 2005) ("[I]t is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies.").

³⁶⁵ See, e.g., *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Atkinson v. Way*, 2004 WL 1631377 (D. Del. 2004) (jury verdict for plaintiff subjected to retaliation for filing lawsuit).

ABA Treatment of Prisoners Standards

Standard 23-9.3 Judicial review of prisoner complaints

(b) When determining whether a pleading or other court filing has stated a legally cognizable claim or complied with other requirements, courts should take into account the challenges faced by pro se prisoners.

(c) Prisoners should not be required to demonstrate a physical injury in order to recover for mental or emotional injuries caused by cruel and unusual punishment or other illegal conduct.

(d) Courts should have the same equitable authority in cases involving challenges to conditions of confinement as in other civil rights cases.

Cross Reference

ABA, TREATMENT OF PRISONER STANDARDS, 23-9.2 (access to the judicial process)

Related ABA Resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-2.1 (access to the judicial process)

ABA, RESOLUTION, 102B (Feb. 2007) (Prison Litigation Reform Act)

Commentary

Subdivision (a): As with Standard 23-9.3(a), this subdivision does not address the rules for resolution of lawsuits, but rather simply requires that a timely avenue of judicial review be available. What “timely” means will vary depending on the complaint. Mediation has been successfully used in prisoner cases,³⁶⁶ and would be one method of facilitating timely dispute resolution.

Subdivision (b): As the Supreme Court explained in *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam), it is appropriate to hold “the allegations of [a] pro se complaint . . . to less stringent standards than formal pleadings drafted by lawyers.”

Subdivision (c): The PLRA provides that prisoner plaintiffs may not recover damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury.”³⁶⁷ Given the commitment by the Act’s supporters that constitutionally meritorious suits would not be constrained by its provisions, perhaps the purpose of this provision was the limited one of foreclosing tort actions claiming negligent or intentional infliction of emotional distress unless they resulted in physical injury,

³⁶⁶ For example, the U.S. District Court for the Northern District of Illinois established a special program where it appoints pro bono attorneys at early stages of litigation for the sole purpose of determining whether a settlement can be reached in the case. See James D. Wascher, *U.S. District Court for the Northern District of Illinois' Settlement Assistance Program: A Follow-up*, 55 FED. LAW. 47 (2008). Other courts, such as the U.S. District Court for the District of Columbia and the Eastern District of California, have also created mediation programs that engage prisoner suits. In the Eastern District of California, the Court created a Section 1983 Pro Bono Panel to take on prisoner and other civil rights suits. Recently, this Court has also implemented court-supervised settlement conferences, primarily conducted by Magistrate Judges. In this program, settlement conferences often take place at the prisons, and some have been conducted in court with the prisoner plaintiff appearing in person and in some cases by video. *Pro Bono Panel*, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA, http://www.caed.uscourts.gov/caed/staticOther/page_1669.htm (last visited May 27, 2010).

³⁶⁷ 42 U.S.C. § 1997e(e).

ABA Treatment of Prisoners Standards

Standard 23-9.3 Judicial review of prisoner complaints

which might have otherwise been available to federal prisoners under the Federal Tort Claims Act.³⁶⁸ Such an attempt to limit what legislators may have considered to be frivolous or inconsequential claims³⁶⁹ would echo fairly common state law limitations on tort causes of action.³⁷⁰

Notwithstanding what may have been the limited intent underlying the physical injury requirement, its impact has been much more sweeping. First, many courts have held that the provision covers all violations of non-physical constitutional rights.³⁷¹ Proven violations of prisoners' religious rights, speech rights, and due process rights have all been held non-compensable, and thus placed largely beyond the scope of judicial oversight. For example, in *Searles v. Van Bebber*,³⁷² the Tenth Circuit concluded that the physical injury requirement barred a suit by a Jewish prisoner who alleged a First Amendment violation based on his prison's refusal to give him kosher food. This result is particularly problematic in light of Congress's notable concern for prisoners' religious freedoms. The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), passed in 2000, states that "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means."³⁷³ See Standard 23-7.3.

Moreover, although the case law is far from uniform, some courts have deemed sexual assault not to constitute a "physical injury" within the meaning of the PLRA.³⁷⁴ As with religious rights, this outcome exists in sharp tension with Congress's efforts to eliminate sexual violence and coercion behind bars by

³⁶⁸ 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (2006); see *United States v. Muniz*, 374 U.S. 150 (1963) (allowing Federal Tort Claims Act lawsuit by federal prisoners for personal injuries caused by the negligence of government employees).

³⁶⁹ See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996).

³⁷⁰ See, e.g., Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or *Refinements Thereof*, 96 A.L.R.5TH 107 § 6 (2002) (citing cases from nine states).

³⁷¹ See, e.g., *Koger v. Bryan*, 523 F.3d 789, 804 (7th Cir. 2008) (noting that RLUIPA claim is "limited" by PLRA physical injury requirement); *Royal v. Kautzky*, 375 F.3d 720, 722-23 (8th Cir. 2004) (concluding that no compensation is available for retaliation for exercise of free speech rights and two months' confinement in segregation resulting from it); *Thompson v. Carter*, 284 F.3d 411, 416-17 (2d Cir. 2002) (concluding that no compensation is available for violation of due process rights); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (concluding that no compensation is available for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (concluding that no compensation is available for violation of religious rights); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (concluding that no compensation is available for violation of constitutional privacy rights). But see *Canell v. Lightner*, 143 F.3d 1210, 1214-15 (9th Cir. 1998) (stating that PLRA "does not preclude actions for violations of First Amendment rights").

³⁷² 251 F.3d at 872, 876.

³⁷³ 42 U.S.C. § 2000cc-1(a)(1)-(2).

³⁷⁴ See *Hancock v. Payne*, No. 1:03-CV-671, 2006 WL 21751 (S.D. Miss. 2006) (no physical injury alleged in case about coerced sodomy; "the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault"); *Smith v. Shady*, No. 3:05-CV-2663, 2006 WL 314514, at *2 (M.D. Pa. 2006) ("Plaintiff's allegations in the complaint concerning Officer Shady grabbing his penis and holding it in her hand do not constitute a physical injury or mental symptoms."); see generally Deborah M. Golden, *It's Not All In My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37 (2004). But see *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (holding that sexual assault constitutes physical injury within the meaning of the PLRA).

ABA Treatment of Prisoners Standards

Standard 23-9.3 Judicial review of prisoner complaints

passing the Prison Rape Elimination Act of 2003.³⁷⁵ See also Standard 23-5.3. Finally, in case after case, courts have held even serious physical symptoms insufficient to allow the award of damages because of the PLRA's physical injury provision.³⁷⁶ In one case, a plaintiff alleged that the defendant correctional officer "punch[ed] Plaintiff repeatedly in his abdominal area, pushed Plaintiff's head down and repeatedly punched Plaintiff with his right hand in the back of his head, hit Plaintiff on his left ear, placed Plaintiff's head between his legs and grabbed Plaintiff around his waist and picked the Plaintiff up off the ground and dropped Plaintiff on his head." The plaintiff further alleged that he "sustained bruises on [his] left ear, back of [his] head and swelling to the abdominal area of his body." Nonetheless, the district court held the claim insufficient under the PLRA's physical injury provision.³⁷⁷ In another, burns to the plaintiff's face were deemed insufficient because those burns had "healed well," leaving "no lasting effect."³⁷⁸

Even when courts *reject* the defense that unconstitutional conduct did not cause a physical injury, the PLRA has led correctional officials to make objectionable arguments that must be litigated, forcing expenditure of resources and prolonging litigation, as well as further dehumanizing prisoners and promoting a culture of callousness.³⁷⁹ Moreover, experienced civil rights attorneys hesitate to file suits alleging many serious abuses (for example, on behalf of prisoners chained to their beds or subjected to sexual harassment by guards), because they know that corrections officials will argue—and often succeed in arguing—that compensatory damages are barred by the PLRA.³⁸⁰

In short, the PLRA's ban on awards of compensatory damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury" has made it far more difficult for prisoners to enforce any non-physical rights—including freedom of religion and freedom of speech—and to seek compensation for any mental rather than physical harm, no matter how intentionally, even torturously, inflicted. (This aspect of the law has, in fact, convinced some courts to save the provision from

³⁷⁵ 42 U.S.C. §§ 15601–15609.

³⁷⁶ See *Jarriett v. Wilson*, 162 F. App'x 394, 396–98 (6th Cir. 2005) (concluding that prisoner confined for twelve hours in "strip cage" in which he could not sit down did not suffer physical injury even though he testified that he had a "bad leg" that swelled "like a grapefruit" and that caused severe pain and cramps); *Myers v. Valdez*, No. 3:05-CV-1799, 2005 WL 3147869, at *2 (N.D. Tex. Nov. 17, 2005) (concluding that alleged "pain, numbness in extremities, loss of mobility, lack of sleep, extreme tension in neck and back, extreme rash and discomfort" did not satisfy PLRA physical injury requirement); *Mitchell v. Horn*, No. 2:98-CV-4742, 2005 WL 1060658, at *1 (E.D. Pa. May 5, 2005) (reported symptoms including "severe stomach aches, severe headaches, severe dehydration . . . and blurred vision," suffered by prisoner confined in cell allegedly "smeared with human waste and infested with flies" did not constitute physical injury for PLRA purposes).

³⁷⁷ *Borrito v. McDonald*, No. 5:04-CV-165, 2006 WL 2789152, at *2 (N.D. Fla. Sept. 26, 2006).

³⁷⁸ *Brown v. Simmons*, No. 6:03-CV-122, 2007 WL 654920, at *6 (S.D. Tex. Feb. 23, 2007).

³⁷⁹ See, e.g., *Pool v. Sebastian County*, 418 F.3d 934, 942–43, 943 n.2 (8th Cir. 2005) (describing the argument of the defendant jail officials that the stillbirth of a fetus of four to five months gestational age over a jail cell toilet, preceded by days of bleeding, did not satisfy PLRA physical injury requirement).

³⁸⁰ See Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 7-8 (2008) (statement of Stephen B. Bright, President and Senior Counsel, Southern Center for Human Rights) *available at* <http://www.judiciary.house.gov/hearings/pdf/Bright080422.pdf>. Indeed, some courts have held that punitive damages, too, are barred by the PLRA in the absence of physical injury. See *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998); *Holley v. Johnson*, Civil Action No. 7:08cv00629, 2010 WL 988483, at*14 (W.D. Va., Mar. 16, 2010).

ABA Treatment of Prisoners Standards

Standard 23-9.3 Judicial review of prisoner complaints

constitutional infirmity by reading it not to bar relief.³⁸¹) The PLRA has left the availability of compensatory damages for the constitutional violation of coerced sex an open question. It has posed an obstacle to compensation even for physical violence, if the physical component of the injury is deemed insufficiently serious. It has thereby undermined the important norms that such infringements of prisoners' rights are unacceptable. Just as it contradicts constitutional commitments, the PLRA is simultaneously obstructing Congress's recent statutory efforts to protect prisoners' religious liberty, as well as freedom from sexual abuse. This subdivision recommends its amendment.

Subdivision (d): This subdivision, an important affirmation of the core principles of the ABA, requires equality for prisoners in the rules governing equitable relief. It is intended to affirm that prisoners are as entitled to the protections of the legal system as any other litigant who seeks redress. The object of the subdivision is, again, the PLRA, which singles out prisoners in numerous ways relating to courts' equitable authority. The PLRA limits the amount of time a preliminary injunction can remain in place.³⁸² It bars enforcement of a settlement unless it is found by a court to meet the same requirements imposed on litigated relief; it must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right."³⁸³ It requires termination of court orders (litigated or entered on settlement) two years after their entry unless a court finds that the order remains necessary under the same "narrowly drawn" standard.³⁸⁴ And if a court is unable to rule on a termination motion within 90 days, the order in question is automatically stayed pending the resolution of the termination proceeding.³⁸⁵

Both litigated and settled injunctive orders have been a vital source of prison reform since the 1970s. Each of these rules make it harder for prisoners to win injunctive cases, and harder for them to insist that

³⁸¹ See *Zehner v. Trigg*, 133 F.3d 459, 461-63 (7th Cir. 1997) (holding that the PLRA would be unconstitutional if it barred injunctive relief and contempt sanctions, although a prohibition on damages is not unconstitutional any more than an immunity defense is unconstitutional.) See also *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006) ("the jury was entitled to find that the Plaintiff suffered mental or emotional damages as a result of Defendant's violation of his First Amendment rights [because any] other interpretation of § 1997e(e) would be . . . unconstitutional"); *Percival v. Rowley*, No. 1:02-CV-363, 2005 WL 2572034, at *2 (W.D. Mich. Oct. 12, 2005) ("To allow section 1997e(e) to effectively foreclose a prisoner's First Amendment action would put that section on shaky constitutional ground.").

³⁸² See 18 U.S.C. § 3626(a)(2) (2006).

³⁸³ See 18 U.S.C. § 3626(c)(1) (2006). It remains possible under the PLRA for parties to enter into "private settlement agreements" that are intended to be treated as contracts in state court. However, these agreements are enormously wasteful and duplicative if enforcement is needed, because they cannot be enforced in federal court and the plaintiffs would be put to the expense and delay of starting a new lawsuit, with which a new court would have to become familiar. In one recent decision approving a private settlement of claims of physical abuse of prisoners by jail staff, the federal judge noted that:

[I]t makes little sense that, if a perceived problem with compliance should arise, short of seeking reinstatement of this action, plaintiffs can seek relief only in state court under state law. In view of the time and effort I have spent on this case, including countless hours discussing not only the substantive terms of the Agreement but also its language, it would be a tremendous waste of resources for the parties to have to go to state court to seek relief from a state court judge wholly unfamiliar with the case.

Ingles v. Toro, 438 F.Supp.2d 203, 215-16 (S.D.N.Y. 2006).

³⁸⁴ See 18 U.S.C. § 3626(b)(1)(i)-(iii) (2006).

³⁸⁵ See 18 U.S.C. § 3626 (2006); *Miller v. French*, 530 U.S. 327 (2000) (upholding the termination provision against constitutional challenge).

ABA Treatment of Prisoners Standards

Standard 23-9.4 Access to legal and consular services

court orders be maintained until defendant officials comply with them. Moreover, these are special rules, disadvantaging prisoners only, an independent problem.

Note, however, that the PLRA's procedural and substantive limits on the availability of "prisoner release orders" or population caps, see 18 U.S.C. § 3626(a)(3), do not violate this subdivision; because such orders are available only in prisoner litigation, the rules governing their entry pose no equality problem.

Standard 23-9.4 Access to legal and consular services

(a) Correctional authorities should facilitate prisoners' access to counsel. The provisions of this Standard applicable to counsel apply equally to consular officials for prisoners who are not United States citizens.

(b) A prisoner with a criminal charge or removal action pending should be housed in a correctional facility sufficiently near the courthouse where the case will be heard that the preparation of the prisoner's defense is not unreasonably impaired.

(c) Correctional authorities should implement policies and practices to enable a prisoner's confidential contact and communication with counsel that incorporate the following provisions:

- (i) For letters or other documents sent or passed between counsel and a prisoner:**
 - A. correctional authorities should not read the letter or document, and should search only for physical contraband; and**
 - B. correctional authorities should conduct such a search only in the presence of the prisoner to or from whom the letter or document is addressed.**
- (ii) For meetings between counsel and a prisoner:**
 - A. absent an individualized finding that security requires otherwise, counsel should be allowed to have direct contact with a prisoner who is a client, prospective client, or witness, and should not be required to communicate with such a prisoner through a glass or other barrier;**
 - B. counsel should be allowed to meet with a prisoner in a setting where their conversation cannot be overheard by staff or other prisoners;**
 - C. meetings or conversations between counsel and a prisoner should not be audio recorded by correctional authorities;**
 - D. during a meeting with a prisoner, counsel should be allowed to pass previously searched papers to and from the prisoner without intermediate handling of those papers by correctional authorities;**
 - E. correctional authorities should be allowed to search a prisoner before and after such a meeting for physical contraband, including by performing a visual search of a prisoner's private bodily areas that complies with Standard 23-7.9;**

ABA Treatment of Prisoners Standards

Standard 23-9.4 Access to legal and consular services

- F. rules governing counsel visits should be as flexible as practicable in allowing counsel adequate time to meet with a prisoner who is a client, prospective client, or witness, including such a prisoner who is for any reason in a segregated housing area, and should allow meetings to occur at any reasonable time of day or day of the week; and
 - G. the time a prisoner spends meeting with counsel should not count as personal visiting time.
- (iii) For telephonic contact between counsel and their clients:
- A. correctional officials should implement procedures to enable confidential telephonic contact between counsel and a prisoner who is a client, prospective client, or witness, subject to reasonable regulations, and should not monitor or record properly placed telephone conversations between counsel and such a prisoner; and
 - B. the time a prisoner spends speaking on the telephone with counsel should not count against any applicable maximum telephone time.

(d) The right of access to counsel described in subdivisions (a) and (c) of this Standard should apply in connection with all legal matters, regardless of the type or subject matter of the representation or whether litigation is pending or the representation has commenced.

(e) Governmental authorities should allow a prisoner to engage counsel of the prisoner's choice when the prisoner is able to do so.

(f) Rules governing attorneys fees and their recovery should be the same for prisoners as for non-prisoners.

(g) Government legal services should be available to prisoners to the same extent they are available to non-prisoners. Government-funded legal services organizations should be permitted to provide legal services to prisoners without limitation as to the subject matter or the nature of the relief sought. The relationship between a prisoner and a person providing legal assistance under this subdivision should be governed by applicable ethical rules protecting the attorney-client relationship.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-7.9 (searches of prisoners' bodies), 23-8.1 (location of facilities), 23-8.6 (written communications), 23-8.7 (access to telephones)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-2.2 (access to legal services), 23-6.1(d) (communication rights)

ABA, PROVIDING DEFENSE SERVICES STANDARDS, generally and especially 5-5.1 (criminal cases), 5-5.2 (collateral proceedings), 5-6.1 (initial provision of counsel), 5-6.2 (duration of representation)

ACA, JAIL STANDARDS, 4-ALDF-6A-02 and 6A-03 (access to courts), 6A-06 (foreign nationals)

ACA, PRISON STANDARDS, 4-4275 (access to counsel), 4-4280 (access to media), 4-4492 (inspection of letters and packages), 4-4500 (extended and special visits)

ABA Treatment of Prisoners Standards

Standard 23-9.4 Access to legal and consular services

U.N. Standard Minimum Rules, arts. 38 (contact with diplomatic representatives), 93 (counsel visits)

Commentary

Subdivision (a), (d), & (e): Under Standard 23-1.0(l), “counsel” includes not only “retained or prospectively retained attorneys” but also “others sponsored by an attorney such as paralegals, investigators, and law students.” Prisoners may wish to consult with counsel with respect to their criminal cases (whether the case is pretrial, on direct appeal, or subject to collateral attack); parole grant and revocation proceedings or clemency; extradition or detainer hearings; hearings that determine the length of sentences; a large variety of civil litigation or non-litigation matters, including family law, immigration law, or other issues. The right to engage and to consult with counsel applies to them all.³⁸⁶ The Standard refers to consultation by counsel with persons who are “clients, prospective clients, or witnesses.” A client, for this purpose, is a prisoner who is seeking legal advice or assistance concerning any matter, regardless of whether a formal attorney-client relationship is established, or whether the consultation pertains to or leads to litigation. Access to consular officials for prisoners who are citizens of other countries is included because it has been an issue in recent years, and because access is required by many international treaties to which the United States is a party.³⁸⁷

³⁸⁶ As one court has put it:

The right to hire and consult an attorney is protected by the First Amendment’s guarantee of freedom of speech, association and petition. . . . [T]he state cannot impede an individual’s ability to consult with counsel on legal matters. . . . Furthermore, the right to obtain legal advice does not depend on the purpose for which the advice was sought. . . . In sum, the First Amendment protects the right of an individual or group to consult with an attorney on any legal matter.

Denius v. Dunlap, 209 F.3d 944, 954 (7th Cir. 2000) (internal citations omitted).

³⁸⁷ In *Medellín v. Texas*, 552 U.S. 491 (2008), Medellín, a Mexican national, was convicted of rape and murder and sentenced to death in Houston, TX. He was not, however, afforded his right to consular notification under the Vienna Convention on Consular Relations (VCCR). The VCCR addresses consular notification and access to nationals in prison. See Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Medellín had filed a petition for *habeas corpus* on the grounds of a violation of the VCCR, but the petition was denied because the claim had not been raised at trial and because he could not show prejudice against his case arising from the violation. Mexico then brought this issue regarding Medellín and 51 other Mexican nationals to the International Court of Justice which decided, in *Case Concerning Avena and other Mexican Nationals (Avena)*, 2004 I.C.J. No. 128 (Mar. 31), that the US had failed to meet the notification obligations of Article 36 of the VCCR, and that the US should give further “review and reconsideration” of the convictions. President George W. Bush then issued a directive to the Attorney General saying that the judgment of the ICJ should be given effect under the general principles of comity. However, the Supreme Court denied Medellín’s appeal holding that the *Avena* decision did not preempt state law because the treaties involved—the Optional Protocol to the VCCR (Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820) which granted jurisdiction to the ICJ, the U.N. Charter art. 94, para. 1, which says that each member state “undertakes to comply with the decision of the ICJ in any case to which it is a party,” and the ICJ Statute itself (Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. 993)—were non-self-executing and could not be given effect as federal law without implementing legislation.

In addition to its obligations under the VCCR, the United States also has bilateral agreements with 58 countries, known as “mandatory notification” jurisdictions that require consular notification despite even an individual’s desire to the contrary. See U.S. DEP’T OF STATE, CONSULAR NOTIFICATION AND ACCESS PART 1: BASIC INSTRUCTION (3d ed. 2010), available at http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

ABA Treatment of Prisoners Standards

Standard 23-9.4 Access to legal and consular services

Subdivision (b): This subdivision's requirement that pretrial detainees be housed near the courthouse where their case will be heard aims to protect pretrial detainees' Sixth Amendment rights to the assistance of counsel and to an unimpeded criminal defense, a right that is different from the more general right of access to courts and not subject to its limitations.³⁸⁸ All detainees have pending criminal cases, and a pending trial generally requires a good deal more direct contact with one's attorney and with others (such as investigators, or persons who might be defense witnesses or who help locate witnesses) than does an appeal or a post-conviction proceeding. Unlike convicts, persons awaiting trial have a Sixth Amendment right to the assistance of counsel and to an unimpeded criminal defense. The point of the subdivision, then, is that pretrial detainees should be held in a jail that is accessible and convenient to defense counsel. If for some reason detainees are not held in such a jail, the decidedly second best requirement is that arrangements should be made to ensure adequate access to counsel—for example, returning the detainee temporarily to the jurisdiction for consultation, videoconferencing, and special arrangements for interview time and for telephone communication to ensure adequate, private, uninterrupted consultation.

Subdivision (c): This subdivision sets out rules governing counsel visits that are generally accepted as good correctional practice.³⁸⁹ Reasonable regulation of meetings and correspondence is allowed, but only to prevent abuse, not to intrude on the consultation or gain information. Eavesdropping is not allowed, whether by listening, see subdivision (c)(ii)(B), recording, see subdivision (c)(ii)(C), or more inventive methods such as lip reading. The references to telephonic communication include other real-time oral communication devices as well.

Subdivision (f): This subdivision mandating that rules governing attorneys fees be the same for prisoners and nonprisoners requires a change to the PLRA, which limits prisoners' recovery of attorneys fees under fee-shifting statutes. 42 U.S.C. § 1997e(d). More particularly, when a prisoner has a lawyer and wins a case, he, like any other civil rights plaintiff, is usually authorized to recover a "reasonable attorney's fee,"³⁹⁰ at least in cases involving nonfederal defendants. In areas of litigation not covered by the PLRA, such fees are, generally speaking, calculated by multiplying the number of hours reasonably expended on the case by a reasonable hourly rate.³⁹¹ But the PLRA strictly limits fees in money damages cases to 150 percent of the total judgment, and concurrently limits attorneys' hourly pay, otherwise based on market rates, to 150 percent of the rates authorized for court-appointed criminal counsel.³⁹² (Of course criminal counsel get this fee whether they win or lose.)

³⁸⁸ *Benjamin v. Fraser*, 264 F.3d 175, 184-88 (2d Cir. 2001).

³⁸⁹ Good correctional practice is informed by the significant body of case law addressing aspects of prisoners' communications with attorneys. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) ("Regulations and practices that unjustifiably obstruct the availability of professional representation . . . are invalid."); *Smith v. Coughlin*, 748 F. 2d 783, 789 (2d Cir. 1984) (holding refusal to permit visiting by paralegal unconstitutional); *Jones v. Wittenberg*, 440 F.Supp. 60, 64 (N.D. Ohio 1977) (ordering attorney consultation facilities renovated for contact visits, soundproofed, and provided with adequate ventilation and furnishings).

³⁹⁰ 42 U.S.C. § 1988(b) authorizes fees in actions brought under § 1983. Fees are unavailable for *Bivens* actions brought by federal prisoners, see *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), because the Equal Access to Justice Act allows fees to be awarded against the federal government only when some other substantive statute authorizes them, see 42 U.S.C. § 2412(b), or when a case is against the United States directly or an officer in his or her official capacity. See 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(C). See, e.g., *Kreines v. United States*, 33 F.3d 1105, 1108-09 (9th Cir. 1994).

³⁹¹ *City of Riverside v. Rivera*, 477 U.S. 561, 572-73 (1986).

³⁹² See 42 U.S.C. § 1997e.

ABA Treatment of Prisoners Standards

Standard 23-9.5 Access to legal materials and information

Subdivision (g): The requirement that prisoners who cannot afford counsel receive government legal services “to the same extent that [such services] are available to non-prisoners” implies disagreement with the current statute governing free legal services for indigent clients; since 1996, Congress has forbidden recipients of funds from the federal Legal Services Corporation to represent prisoners.³⁹³ This Standard does not intend to require legal services providers to offer prisoners their assistance—merely to allow those providers to themselves decide, without a federal ban.

Standard 23-9.5 Access to legal materials and information

(a) A correctional facility should provide prisoners reasonable access to updated legal research resources relevant to prisoners’ common legal needs, including an appropriate collection of primary legal materials, secondary resources such as treatises and self-help manuals, applicable court rules, and legal forms. Access to these legal resources should be provided either in a law library or in electronic form, and should be available even to those prisoners who have access to legal services. Correctional authorities should be permitted to regulate the time, place, and manner of prisoners’ access to these resources for purposes of facility security and scheduling, but prisoners should have regular and sufficient access, without interference with the prisoners’ ability to eat meals, work, receive health care, receive visits, or attend required treatment or educational programming. Prisoners who are unable to access library resources because of housing restrictions, language or reading skills, or for other reasons, should have access to an effective alternative to such access, including the provision of counsel, or of prisoners or non-prisoners trained in the law.

(b) Prison officials should provide programs for the education and training of prisoners who can help other prisoners with legal matters.

(c) Correctional authorities should allow prisoners to purchase or, if they are indigent, to receive without charge materials to support their communications with courts, attorneys, and public officials. These materials should include paper, writing implements, envelopes, and stamps. Correctional authorities should provide access to copying services, for which a reasonable fee should be permitted, and should provide prisoners with access to typewriters or word processing equipment.

(d) Correctional authorities should allow prisoners to acquire personal law books and other legal research material and to prepare and retain legal documents. Regulations relating to the storage of legal material in personal quarters or other areas should be only for purposes of safety or security and should not unreasonably interfere with access to or use of these materials.

³⁹³ See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(15), 110 Stat. 1321, 1321–55; see also 45 C.F.R. §§ 1632.1–1632.5 (governing Legal Service Corporation funding recipients’ representation of prisoners). Note, however, that there is currently some other federally funded legal services for those prisoners who have intellectual disabilities, provided under the federal “protection and advocacy” statutes. See Developmental Disabilities and Bill of Rights Act, 42 U.S.C. §§ 15001-115; Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. §§ 10801-10807; and Protection and Advocacy of Individual Rights Act, 29 U.S.C. § 794e. These statutes authorize independent, federally funded legal services providers known as Protection and Advocacy (P&A) organizations to monitor, investigate, and pursue administrative or legal remedies to protect the federal rights of persons with intellectual disabilities.

ABA Treatment of Prisoners Standards

Standard 23-9.5 Access to legal materials and information

(e) Correctional authorities should not read, censor, alter, or destroy a prisoner's legal materials. Correctional authorities should be permitted to examine legal materials received or retained by a prisoner for physical contraband. If correctional authorities have a reasonable suspicion that a prisoner's legal materials contain non-legal material that violates written policy, they should be permitted to read the materials only to the extent necessary to determine whether they are legal in nature.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.3(b) (housing areas, storage compartment), 23-7.8 (searches of facilities), 23-9.2 (access to the judicial process)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-2.3 (access to legal materials)

ACA JAIL STANDARDS, 4-6A-03 (law library)

ACA, PRISON STANDARDS, ACA, 4-4276 (law library), 4-4429 (law library access for disabled)

Commentary

Subdivision (a): Relevant resources for prisoners' common legal needs include at a minimum the state and federal reporters, currently maintained and extending for a reasonable time period in the past.³⁹⁴ Some correctional facilities maintain the bound versions of these reporters while others are converting to an electronic search system. In either case, trained staff or trained prisoners should be available to teach prisoners how to conduct research using either the law books or the electronic system. Although access to legal research materials is required for prisoners regardless of housing restrictions or other reasons,³⁹⁵ if a prisoner is placed in segregation for a short period of time or in jail for only a very short time, such as a few days, then a lack of access to legal research materials could be deemed reasonable.

Subdivision (b): The "jailhouse lawyer" or "writ-writer" is a well known phenomenon in prison – a prisoner who tries to help others with their legal problems even if not a part of an official legal assistance program. The Supreme Court has held that prison officials cannot prohibit prisoners from helping each other with legal matters unless the facility provides reasonable alternatives for court access.³⁹⁶ On such

³⁹⁴ The Supreme Court requires prison officials to provide prisoners "adequate" law libraries or "adequate assistance from persons trained in the law" in order to assist in the preparation of meaningful legal papers. *Bounds v. Smith*, 430 U.S. 817, 828 (1977). Courts have reached a variety of conclusions in defining what an adequate law library must contain. *Johnson v. Moore*, 948 F.2d 517, 521 (9th Cir. 1991) (finding absence of certain titles of the U.S. Code did not deny the plaintiff's court access rights); *Watson v. Olsen*, 660 F.2d 358, 359 n.2 (8th Cir. 1981) (holding state and federal case law and statutes and other materials sufficient); *Ramos v. Lamm*, 639 F.2d 559, 584 (10th Cir. 1980) (holding libraries without federal cases or with many missing volumes inadequate), *cert. denied*, 450 U.S. 1041 (1981).

³⁹⁵ Physical access to the law library is generally required. *See, e.g., Toussaint v. McCarthy*, 801 F.2d 1080, 1108-10 (9th Cir. 1986) *cert. denied*, 481 U.S. 1069 (1987). Prisoners in segregation may, however, be excluded from physical access on security grounds, but even in such circumstances, their court access rights must still be observed. Court cases addressing this situation have generally held that prisoners denied physical access must receive additional assistance such as a basic law library on the housing unit or assistance from legally trained persons. *Knop v. Johnson*, 977 F.2d 996, 1005-08 (6th Cir. 1992) (finding paralegal assistance required) *cert denied*, 1113 S.Ct. 1415 (1993); *Cepulonis v. Fair*, 732 F.2d 1, 5-7 (1st Cir. 1984) (holding satellite law library required in segregation unit).

³⁹⁶ *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

ABA Treatment of Prisoners Standards

Standard 23-9.5 Access to legal materials and information

reasonable alternative formulated by the Supreme Court in *Bounds v. Smith* is to provide adequate assistance by individuals “trained in the law.”³⁹⁷ In response to this well-established holding, some jurisdictions have developed certification programs to train prisoners in the law as legal assistants for their fellow inmates.³⁹⁸

Subdivision (c): It is well established that prisoners must have access to adequate materials to draft legal materials and indigent prisoners must be provided these materials such as paper, pens, postage, and notary services at state expense.³⁹⁹ Although access to typewriters or computers with printers is not required by law, if court rules require papers to be typed, meaningful court access requires allowing prisoners the means to comply. Similarly, allowing prisoners the means to make sufficient copies of papers to comply with court rules is necessary to ensure court access.⁴⁰⁰

Subdivision (d): During the course of incarceration some prisoners will acquire a significant store of legal books and papers. Prisoners should undoubtedly be allowed to keep much of this material in their cells, especially if the cases are in active litigation. However, the Standard recognizes that prison officials must be able to conduct necessary cell searches to ensure institutional security. Such searches are permissible, as long as they are conducted in a manner that does not unnecessarily intrude on the confidentiality of legal communication. Storage of some legal materials outside of a prisoner’s cell may also be necessary due to the bulk of materials involved and health and safety considerations. If storage is necessary, arrangements should be made such that a prisoner may still access the materials from storage upon reasonable request and all such legal materials must be stored in a manner that preserves confidentiality.

Subdivision (e): This Standard recognizes the well established principle that prison officials may not read privileged legal correspondence or open such correspondence outside a prisoner’s presence.⁴⁰¹ Nor may prison staff read prisoners’ legal papers under other circumstances such as cell searches,⁴⁰² though they may search cells for contraband outside a prisoner’s presence.⁴⁰³ While the Supreme Court’s holding that prisoners have no general expectation of privacy in their living quarters was based on the need for prison

³⁹⁷ *Bounds v. Smith*, 430 U.S. at 828.

³⁹⁸ Prison-based programs that neither provide training nor require qualification are not sufficient under the Supreme Court’s holding in *Bounds*. See *Gluth v. Kangas*, 951 F.2d 1504, 1508 (9th Cir. 1991) (finding prisoner legal assistant program that provided no training to prisoners and required no qualifications other than the ability to read and write constitutionally insufficient); *DeMallory v. Cullen*, 855 F.2d 442, 447 & n.3 (7th Cir. 1988) (“Dependence on untrained inmate paralegals as an alternative to library access does not provide constitutionally sufficient access to the courts.”).

³⁹⁹ *Bounds v. Smith*, 430 U.S. at 824-25.

⁴⁰⁰ *Johnson v. Parke*, 642 F.2d 377, 379-80 (10th Cir. 1981).

⁴⁰¹ See, e.g., *Davis v. Goord*, 320 F.3d 346, 351-52 (2d Cir. 2003); *Bieregu*, 59 F.3d at 1458; *Sallier v. Brooks*, 343 F.3d 868, 877-78 (6th Cir. 2003); *Kaufman v. McCaughtry*, 419 F.3d 678, 685-686 (7th Cir. 2005); *Powells v. Minnehaha County Sheriff Dep’t*, 198 F.3d 711, 712 (8th Cir. 1999) (concluding inmate stated constitutional claim based on officers opening legal mail when he was not present); *Al-Amin v. Smith*, 511 F.3d 1317, 1331-32 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 104 (2008).

⁴⁰² *United States v. DeFonte*, 441 F.3d 92, 94-95 (2d Cir. 2006) (per curiam); see also *Cody v. Weber*, 256 F.3d 764, 768-69 (8th Cir. 2001) (holding allegation that prison staff read plaintiff’s legal papers during searches stated a constitutional claim); *Bayron v. Trudeau*, 702 F.2d 43, 45 (2d Cir. 1983) (holding same). But see *Giba v. Cook*, 232 F.Supp.2d 1171, 1187 (D. Or. 2002) (holding that reading letters to and from prisoner’s sister, an attorney, during cell search was not improper where the sister was not providing legal representation to him).

⁴⁰³ *Kalka v. Megathlin*, 10 F.Supp.2d 1117, 1121 (D. Ariz. 1998), *aff’d*, 188 F.3d 513 (9th Cir. 1999). See *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996) (reversing judgment against defendants because prisoner had no Fourth Amendment right to be present when his legal materials were searched).

ABA Treatment of Prisoners Standards

Standard 23-9.5 Access to legal materials and information

officials to have “[u]nfettered access” to search for contraband,⁴⁰⁴ this holding does not compromise the strong expectancy of privacy in privileged legal material.

⁴⁰⁴ *Hudson v. Palmer*, 468 U.S. 517, 527, 530 (1984).

PART X: ADMINISTRATION AND STAFFING

Part X . General Commentary

This Part addresses administration or staff issues that are important to the operation of constitutional, safe, and humane prisons. For example, prisoner safety is compromised if prisons do not maintain sufficient staff to supervise the prisoners or if staff is inadequately trained. Similarly, it is critical that agencies foster an institutional culture that respects human rights and supports appropriate treatment of prisoners. The absence of such a professional culture renders mistreatment of prisoners far more likely. These issues were not addressed in the prior Standards.

As explained in the introduction to these Standards, correctional supervisory failures—failure to screen, failure to train, failure to supervise, failure to discipline—can all cause the violation of prisoners' rights.⁴⁰⁵ More positively, an appropriate professional culture can promote respect and pro-social treatment of prisoners. Standards 23-10.1, 23-10.2, 23-10.3, and 23-10.4 are all aimed at appropriate supervision, and 23-10.5 deals with private prisons, which pose a different type of public supervision problem.

Standard 23-10.1 Professionalism

(a) A correctional agency should have a clear written statement of its mission and core values. Established professional standards should serve as the basis for an agency's operating policies and procedures.

(b) Correctional administrators and officials should foster an institutional culture that helps maintain a safe and secure facility, is conducive to humane and respectful treatment of prisoners, supports adherence to professional standards, and encourages ethical conduct.

(c) To effectuate rehabilitative goals, correctional staff members should have rehabilitative responsibilities in addition to custodial functions. In their interactions with prisoners, they should model fair, respectful, and constructive behavior; engage in preventive problem-solving; and rely upon effective communication.

(d) If a correctional staff member discovers a breach of security; a threat to prisoner, staff, or public safety; or some other actual or threatened harm to a prisoner, staff, or the public, the correctional staff member should report that discovery promptly to a supervisor. A staff member should report any information relating to corrupt or criminal conduct by other staff directly to the chief executive officer of the facility or to an independent government official with responsibility to investigate correctional misconduct, and should provide any investigator with full and candid information about observed misconduct.

⁴⁰⁵ See Introduction, *supra*.

ABA Treatment of Prisoners Standards

Standard 23-10.2 Personnel policy and practice

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-7.2 (prisoners with disabilities and other special needs), 23-10.2 (personnel policy and practice), 23-10.3 (training), 23-10.4 (accountability of staff)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-7C-02 and 7C-03 (code of ethics), 4-ALDF-7D-03 (mission)

ACA, PRISON STANDARDS, Principle 1A (general administration)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, V.B.G.2 (communication skills, crisis intervention)

NCCHC, HEALTH SERVICES STANDARDS, A-06 (Continuous Quality Improvement Program), A-08 (Communication on Patients' Health Needs)

U.N. Standard Minimum Rules, arts. 46, 48 (institutional personnel)

Commentary

Subdivision (a): Mission statements are widely used by organizations to focus employees on a clear, succinct representation of an enterprise's purpose for existence. A correctional mission statement could be as simple as "to promote public safety, reintegrate offenders, and restore victims."

Subdivision (b): Promoting a positive correctional agency culture is not a new concept in the field,⁴⁰⁶ and the possibility for an agency or unit or shift to develop a negative culture must be guarded against constantly.

Subdivision (c): Correctional employees are called upon to exhibit balanced behavior under difficult circumstances. See the commentary to Standard 23-5.2(a)(iii), on the principles of direct supervision, which "allows, and even requires, continuous direct personal interaction between correctional officers and inmates by putting them together, face-to-face in the living unit." Jay Farbstein *et al.*, *Comparison of 'Direct' and 'Indirect' Supervision Correctional Facilities* (NIC 1989), available at <http://www.nicic.org/pubs/pre/007807.pdf>.

Subdivision (d): A corrections officer or administrator cannot be forced to choose between her Fifth Amendment privilege against self-incrimination and her job, *Gardner v. Broderick*, 392 U.S. 273, 277 (1968). Moreover, any statements taken following a threat of discharge are inadmissible, *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). However, a government employee may be terminated for refusing to answer "questions specifically, directly, and narrowly relating to the performance of their duties," *Gardner*, 392 U.S. at 278 citing *Garrity*, 385 U.S. at 500.

Standard 23-10.2 Personnel policy and practice

(a) A correctional agency and facility should be appropriately staffed to promote safety for all staff and prisoners and allow the full operation of all programs and

⁴⁰⁶ See, e.g., Brian E. Cronin, Ralph Kiessig & William D. Sprenkle, *Recruiting and Retaining Staff Through Culture Change*, 70 CORRECTIONS TODAY 48 (2008). The concept of organizational culture is a mainstay of broader organizational theory. See Edgar H. Schein, ORGANIZATIONAL CULTURE AND LEADERSHIP (3d ed. 2004). According to Schein, culture is the most difficult organizational attribute to change, outlasting organizational products, services, founders and leadership and all other physical attributes of the organization.

services and a reasonable work schedule for each staff member. Salaries and benefits should be sufficient to attract and retain qualified staff.

(b) Correctional administrators and officials should implement recruitment and selection processes that will ensure that staff are professionally qualified, psychologically fit to work with prisoners, and certified or licensed as appropriate.

(c) Correctional administrators and officials should strive to employ a work force at each correctional facility that reasonably reflects the racial and ethnic demographics of the prisoner population by engaging in outreach and recruiting efforts to increase the pool of qualified applicants from underrepresented groups and by implementing appropriate retention policies. Each correctional facility should employ sufficient numbers of men and women to comply with Standard 23-7.10.

(d) Correctional staff should be provided with safe and healthful working conditions. They should have opportunities to make suggestions and express concerns, develop innovative practices, and contribute to the agency's institutional planning process.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-5.3 (sexual abuse), 23-6.4 (qualified health care staff), 23-7.10 (cross-gender supervision), 23-8.1 (location of facilities), 23-10.3 (training), 23-10.4 (accountability of staff), 23-11.4(a) (legislative oversight and accountability, funding)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-7D-07 (policies and procedures), 4-ALDF-7E-03 (compensation)

ACA, PRISON STANDARDS, 4-4050 (staffing requirements), 4-4053 (equal employment), 4-4057 (selection and promotion), 4-4065 (compensation and benefits)

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶¶ 14-29 (personnel)

NCCHC, HEALTH SERVICES STANDARDS, C-07 (Staffing), Standard B-03 (Staff Safety)

U.N. Standard Minimum Rules, arts. 46-47, 49 (institutional personnel)

Commentary

Subdivision (a): Staffing is key to safe and effective prison and jail operations, and poses a major challenge, given resource constraints and the often remote location of prisons. See Standard 23-8.1. If correctional staff are paid too little, unduly high turnover is inevitable and the likelihood of corruption increased.

Subdivision (b): Appropriate recruitment and selection should examine an applicant's background thoroughly and independently, not merely relying on the applicant's own reported job history. Applicants who have committed prior misconduct involving prisoners or other institutionalized populations, or people reasonably suspected of such misconduct, should not be hired. It would be useful for correctional administrators to establish a national database relating to prison and jail staff misconduct, so that a staff member who leaves one jurisdiction as a result of misconduct cannot simply start fresh in a new place.⁴⁰⁷ See commentary to Standard 23-7.2.

⁴⁰⁷ See Roger L. Goldman, *State Revocation of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121, 125 (2003).

ABA Treatment of Prisoners Standards
Standard 23-10.3 Training

Subdivision (c): This subdivision requires correctional agencies and their individual facilities to attempt to recruit and maintain a work force that reasonably reflects the racial and ethnic demographics of the prisoner population. People of every race and ethnicity can, of course, be outstanding officers and staff in prisons and jails. Nonetheless, there are many circumstances in which correctional facilities run better—more peacefully and more effectively with respect to rehabilitation—if the race and ethnicity of the group of authority figures is not drastically different from that of prisoners. Many of the steps to achieve this goal are legally uncontroversial, under the heavy weight of applicable authority.⁴⁰⁸ For example, recruiting should occur in minority as well as non-minority communities. And retention often depends on cultural sensitivity which likewise poses no legal issue. The Standard refers not to individually race-conscious hiring or promotion, but rather to targeted recruiting and attention to the racial impacts of race-neutral policies relating to, for example, assignments, promotion, and retention. Such attention, serving an integrative purpose, does not require strict scrutiny for its legitimacy. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 782, 789 (2007) (Kennedy, J., concurring in judgment) (school boards may pursue integrative goal by means that are “race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible”).

It may also sometimes be appropriate for a correctional agency to take individually race conscious employment actions, where such actions serve the compelling state purpose of operational success in the sometimes racially fraught arena of a prison. Such a policy needs to be carefully thought out and narrowly tailored to the circumstance. See, e.g., *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (Posner, J.) (upholding racial preference for black lieutenant at a prison boot camp).

In addition, this subdivision requires the hiring of enough women to fulfill Standards 23-7.10’s restrictions on cross-gender supervision. See the commentary to that Standard for a discussion of the employment discrimination law at issue.

Subdivision (d): Improving working conditions and acknowledging the expertise of correctional staff makes it easier to recruit and retain motivated and skilled staff, and makes those staff more effective.

Standard 23-10.3 Training

(a) For all staff, correctional administrators and officials should integrate training relating to the mission and core values of the correctional agency with technical training.

⁴⁰⁸ See *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999), *vacated by* 216 F.3d 1263 (11th Cir. 2000) (“where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable.”); *Sussman v. Tanoue*, 39 F. Supp. 2d 13, 27 (D.D.C. 1999) (noting that program “does not create preferences in hiring based on race or gender, and therefore need not be examined under strict scrutiny”); *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998) (“Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically “suspect” under the Equal Protection Clause.”); *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 20 (D.C.Cir.2001) (the Equal Protection Clause, as interpreted in *Adarand v. Peña*, 515 U.S. 200 (1995), “requires strict scrutiny only of governmental actions that lead to people being treated unequally on the basis of their race”); *Monteray Mech. Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997). *But cf. Safeco Ins. Co. of America v. City of White House*, 191 F.3d 675, 692 (6th Cir. 1999) (“Outreach efforts may or may not require strict scrutiny”); *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

(b) Correctional administrators should require staff to participate in a comprehensive pre-service training program, a regular program of in-service training, and specialized training when appropriate. Training programs should equip staff to:

- (i) maintain order while treating prisoners with respect, and communicate effectively with prisoners;**
- (ii) follow security requirements, conduct searches, and use technology appropriately;**
- (iii) use non-force techniques for avoiding and resolving conflicts, and comply with the agency's policy on use of force;**
- (iv) identify and respond to medical and mental health emergencies, recognize and report the signs and symptoms of mental disability and suicide risk, and secure appropriate medical and mental health services;**
- (v) detect and respond to signs of threatened and actual physical and sexual assault and sexual pressure against prisoners;**
- (vi) avoid inappropriate relationships, including sexual contact, with prisoners;**
- (vii) understand the legal rights of prisoners relevant to their professional duties;**
- (viii) facilitate prisoner use of the grievance process, and understand that process's benefits for correctional staff and facilities;**
- (ix) maintain appropriate records, including clear and accurate reports; and**
- (x) perform the above functions in a way that promotes the health and safety of staff.**

(c) Correctional administrators and officials should provide specialized training to staff who work with specific types of prisoners to address the physical, social, and psychological needs of such prisoners, including female prisoners, prisoners who face language or communication barriers or have physical or mental disabilities, prisoners who are under the age of eighteen or geriatric, and prisoners who are serving long sentences or are assigned to segregated housing for extended periods of time.

(d) Correctional administrators and officials should provide training to volunteers about how to avoid and report inappropriate conduct.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS: 23-2.1(b)(ii) (intake screening), 23-5.2(a)(iv) (prevention and investigation of violence), 23-5.3 (sexual abuse), 23-5.4 (self-harm and suicide prevention), 23-5.6 (use of force), 23-5.7 (use of deadly force), 23-5.8 (use of chemical agents, electronic weaponry, and canines), 23-5.9 (use of restraint mechanisms and techniques), 23-6.3 (control and distribution of prescription drugs), 23-6.4 (qualified health care staff), 23-7.8 (searches of facilities), 23-9.1 (grievance procedures), 23-7.9(d)(i) (searches of prisoners' private bodily areas), 23-10.1 (professionalism), 23-10.2 (personnel policy and practice), 10-5(d) (privately-operated facilities)

Related Standards

ACA, JAIL STANDARDS, 4-ALDF-7B-05 through 7B-08 and 7B-10, 7B-12, and 7B-13 (training and staff development)

ABA Treatment of Prisoners Standards

Standard 23-10.4 Accountability of staff

ACA, PRISON STANDARDS, 4-4075 (training plan), 4-4082 through 4-4085 (training requirements), 4-4388 (emergency plans), 4-4389 (emergency response)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 25 (correctional staff and mental health referrals), 41 (training for correctional staff assigned to special management units), 52 (in-service training for facility staff)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, V.B.F (specialized training relating to mental health)

NCCHC, HEALTH SERVICES STANDARDS, C-04 (Health Training for Correctional Officers), C-05 (Medication Administration Training)

U.N. Standard Minimum Rules, arts. 22(2), 47, 54(2) (training)

Commentary

Subdivision (a): Training should begin conceptually from the mission and values of the correctional agency, and work down to the minutiae of post operations and paperwork, helping staff to understand the linkage between the overall mission and their actual duties. If training on values such as respect for prisoners comes after concentrated technical training, it is likely to seem like a peripheral add-on.

Subdivision (b)(iii): Training on use of force should cover the various circumstances tending to make different types of force more or less appropriate. In addition, experience teaches that injury in use-of-force incidents is more likely if staff lack confidence in their ability to use the non-injurious techniques they have been taught, and therefore fall back on street fighting moves such as punches to the face. Officers should be required to demonstrate their ability to use the non-injurious techniques of restraint and self-defense taught in the training academy.

Subdivision (b)(iv): All staff who have contact with prisoners should receive basic training regarding mental health issues; advanced training should be provided staff assigned to work specifically with prisoners with mental illness.⁴⁰⁹

Subdivision (d): One of the key topics of training for volunteers is about the need to avoid inappropriate sexual contact with prisoners, and their reporting obligations if they observe signs of sexual abuse.⁴¹⁰

Standard 23-10.4 Accountability of staff

(a) A correctional agency should have clear rules of conduct for staff and guidelines for disciplinary sanctions, including progressive sanctions for repeated misconduct involving prisoners. The chief executive of the facility or a higher-ranking correctional administrator should receive reports of all cases in which staff are found to have engaged in misconduct involving prisoners and should have final responsibility for determining the appropriate sanction.

(b) If correctional officials determine that an allegation of serious misconduct involving a prisoner is credible, the staff member who is the subject of the allegation should

⁴⁰⁹ CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT REPORT Ch. 6, Policy Statement 30 (2002), available at http://consensusproject.org/downloads/Entire_report.pdf.

⁴¹⁰ See NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS 58, 102, 216 (2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-10.5 Privately operated correctional facilities

be promptly removed from a position of trust and placed either on administrative leave or in a position that does not involve contact with prisoners or supervision of others who have contact with prisoners, pending resolution of the matter. A final determination of serious misconduct involving a prisoner should result in termination of the employment of the staff member and should be reported to relevant law enforcement and licensing agencies.

(c) Correctional officials should require all correctional staff arrested or charged with a misdemeanor or felony to report that fact promptly.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-10.1 (professionalism), 23-10.2 (personnel policy and practice)

Related Standards

ACA, JAIL STANDARDS, Performance Standard 7C (staff ethics), 4-ALDF-7E-01 (personnel policies) and 7E-04 (termination)

ACA, PRISON STANDARDS, 4-4069 (code of ethics)

Commentary

Subdivision (b): Because there are almost never objective witnesses to abuse, a staff member may engage in repeated abuse of prisoners that is plausible enough to prompt serious investigation and even a disciplinary hearing, but not certain enough to result in actual imposition of discipline. When correctional administrators believe it is appropriate, they should be able to move such officers to a new post where, for any of a variety of reasons, there are fewer occasions for abuse. Moreover, even if there has been no misconduct, reassignment may be appropriate for officers evidently unsuited to a particular assignment. Administrators must retain the discretionary authority to insist on such moves, as a matter of supervision rather than discipline.

Records of misconduct should be kept and fully considered in applications, even years later. As noted in the commentary to Standard 23-10.2, there should be a national employment clearinghouse to detect and prevent the movement of poor correctional staff from one system to another.

Subdivision (c): Correctional officials need to be advised of off-duty conduct that could call into question, or even prevent, the staff member's fitness to discharge their professional obligations. An example of the latter is the entry of a domestic violence restraining order against a staff member, who would then be prohibited from possessing a firearm and therefore unable to fulfill many security duties.

Standard 23-10.5 Privately operated correctional facilities

(a) Contracts with private corporations or other private entities for the operation of a secure correctional facility should be disfavored. Governmental authorities should make every effort to house all prisoners in need of secure confinement in publicly operated correctional facilities.

(b) Governmental authorities should not enter into a contract with a private entity for the operation of any correctional facility, secure or not, unless it can be demonstrated that the contract will result either in improved performance or in substantial cost savings, considering both routine and emergency costs, with no diminution in performance.

(c) A jurisdiction that enters into a contract with a private entity for the operation of a correctional facility should maintain the ability to house its prisoners in other facilities if termination of the contract for noncompliance proves necessary. Each jurisdiction should develop a comprehensive plan, in advance of entering into any contract, to ensure that this ability remains.

(d) Laws, policies, administrative rules, standards, and reporting requirements applicable to publicly operated correctional facilities of similar security levels in the contracting jurisdiction, including those applicable to staff qualifications and training, freedom of information demands and disclosures, and external oversight, should apply in substance to a privately operated facility either as a matter of statutory law or as incorporated contract terms.

(e) Core correctional functions of determining the length and location of a prisoner's confinement, including decisions relating to prisoner discipline, transfer, length of imprisonment, and temporary or permanent release, should never be delegated to a private entity.

(f) Any contract by which a private entity operates a correctional facility should include terms that comport with the following restrictions:

- (i) The contract should state its duration and scope positively and definitely; incorporate professional standards and require the provider to meet these Standards; incorporate terms governing the appropriate treatment of prisoners, conditions of facilities, and provisions for oversight; and provide a continuum of sanctions for noncompliance including immediate termination of the contract on terms with no financial detriment for the government agency.
- (ii) If a contractor is delegated the authority to use force, the scope of such a delegation should be specified in detail, and should not exceed the authority granted by agency policy to correctional authorities in similar facilities with similar prisoner populations.
- (iii) If a contractor is delegated the authority to classify prisoners, the classification system and instrument should be approved and individual classification decisions reviewed by the contracting agency.
- (iv) The contract should facilitate the contracting agency's on- and off-site monitoring by giving the contracting agency access to all the information it needs to carry out its oversight responsibilities, including access to all files and records, and to all areas of the facility and staff and prisoners at all times.
- (v) The private provider should assume all liability for the operation of the facility, should be prohibited from asserting immunity defenses, and should provide adequate insurance coverage, including insurance for civil rights claims.

(g) Any jurisdiction that enters into a contract with a private corporation or entity for the operation of a correctional facility should implement procedures to monitor compliance with that contract systematically, regularly, and using a variety of on- and off-site monitoring techniques, including reviewing files and records, physically inspecting the facility, and interviewing staff and prisoners.

ABA Treatment of Prisoners Standards

Standard 23-10.5 Privately operated correctional facilities

(h) Except in an emergency, such as a natural disaster, no prisoner of a state or local correctional agency should be sent out-of-state to a private facility pursuant to a contract unless there has been an individualized determination that security of the system or the prisoner requires it, or that the prisoner and the prisoner's individualized programming plan and individualized re-entry plan will not be significantly adversely affected by the move. A contracting agency should make provision for on-site monitoring of each location to which prisoners are sent.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-2.2 (classification system), 23-8.8 (fees and financial obligations), 23-8.9(b) (transition to the community, individualized re-entry plan), 23-11.1(c) (internal accountability, contracting)

Related ABA Resolution

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-4.4 (contracts with private enterprise)

ABA, RESOLUTION, 115B (Feb. 1990) (prison privatization)

Commentary

This Standard addresses the growing issue of private correctional facilities; Standard 23-11.1(c) deals with more limited contracting arrangements with private entities such as private food or health care providers.

The modern private prison business was born in 1984 when the Corrections Corporation of America (CCA) was awarded a contract to run a facility in Hamilton County, Tennessee. The 1980s and 1990s saw enormous growth in use of private prisons; private companies now operate a very significant proportion of correctional facilities in the U.S.⁴¹¹ According to its website, the largest private prison corporation, CCA, operates 64 facilities (44 of which are company-owned) with over 86,000 beds in 19 states and the District of Columbia⁴¹²—which makes it, alone, responsible for more prisoners than any state but California and Texas.⁴¹³ Another company, GEO, operates 61 facilities with approximately 60,000 beds worldwide.⁴¹⁴ According to the Bureau of Justice Statistics, in 2009 over 127,000 prisoners in the custody of federal and state governments were housed in private prisons.⁴¹⁵

⁴¹¹ See HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 15 Table 12 (2010), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2200> (7.9% of state and federal prisoners).

⁴¹² Corrections Corporation of America, Form 10Q (filed Aug. 6, 2009), <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5NTAxMjMtMDktMDMxMTUwL3htbA%3d%3d> (last visited June 21, 2011). CCA currently partners with all three federal corrections agencies (The Federal Bureau of Prisons, the U.S. Marshals Service and Immigration and Customs Enforcement), nearly half of all states and more than a dozen local municipalities.

⁴¹³ See West, *supra* note 411, at 5 Table 2.

⁴¹⁴ About Us, GEO GROUP, <http://www.geogroup.com/about.asp> (last visited May, 27 2011).

⁴¹⁵ See West, *supra* note 411, at 15 Table 12; see also U.S. DEP'T OF JUSTICE BULLETIN: PRISONERS IN 2008, 40 Table 19 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-10.5 Privately operated correctional facilities

Privatization has proceeded promising cost savings and improved performance. But there is now some question whether it has delivered on those promises.⁴¹⁶ And private facilities have been shown to have disproportionately high rates of serious incidents involving prisoner safety.⁴¹⁷ At the same time, privatization does allow government greater flexibility as prison populations in particular jurisdictions expand and contract.

Some close observers of private prisons believe strongly that imprisonment is a core governmental function that should not be delegated to the private sector and should not be a profit-making enterprise. Others find that view anachronistic, over-theoretical, or just wrong.⁴¹⁸ Without recommending a categorical ban on private prisons, this Standard is founded on a high degree of discomfort with the idea of profitable prisons, where—as in every type of commercial enterprise—money may gain priority over law, morality, and rights. Prison privatization can create a financial incentive system in which stockholders become richer when prisoners are fed less, housed in smaller cells, or provided substandard health care, less education, or fewer programs. Privatization can also create an interest group in favor of longer sentences, motivated not by justice, fairness, criminology, or even politics, but by fiscal self-interest. An extreme and corrupt manifestation of this market presence was exposed in February 2009, when two Pennsylvania judges pleaded guilty to taking millions of dollars in kickbacks in exchange for sentencing juveniles to serve time in two privately run youth detention centers.⁴¹⁹ This story is, thankfully, rare and extreme.

With these observations as context, this standard spells out precautions to protect both prisoners and contracting jurisdictions. In 1990, the ABA House of Delegates urged caution in the use of private correctional facilities. ABA resolution 115B, 1990 Midyear Meeting, available at <http://www.abanet.org/crimjust/policy/cjpol.html#my90115b>; see also IRA P. ROBBINS, *THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION* (American Bar Association, 1988). This Standard goes a bit farther, stating that jurisdictions “should make every effort” to avoid privatization where the operation of secure facilities is concerned, and that they should in any case enter into a privatization contract for operation of any correctional facility only if “it can be demonstrated that the contract will result either in

⁴¹⁶ See ARIZONA DEPT. OF CORRECTIONS, FY 2010 OPERATING PER CAPITA COST REPORT: COST IDENTIFICATION AND COMPARISON OF STATE AND PRIVATE CONTRACT BEDS (2011), available at http://www.azcorrections.gov/adcr/reports/ADC_FY2010_PerCapitaRep.pdf; U.S. GEN. ACCOUNTING OFFICE, *PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE* (1996).

⁴¹⁷ See, e.g., James Austin & Gary Coventry, U.S. DEP’T OF JUSTICE, *EMERGING ISSUES ON PRIVATIZED PRISONS* 39-40 (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/181249.pdf> (finding substantially more “assaults, riots, fires and other disturbances” in private facilities). A 2001 study by the Federal Bureau of Prisons found that “[p]rivately operated prisons appear to have systemic problems in maintaining secure facilities,” reflecting shortcomings in policies and procedures, in technology, but primarily in staff capabilities. See SCOTT D. CAMP & GERALD G. GAES, *GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: A NATIONAL SURVEY* 16 (2001). The evidence on violence in private compared to non-private prisons is collected in Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 440, 504-07 (2005).

⁴¹⁸ For a discussion of this view and a review of the literature, see generally Dolovich, *supra* note 417.

⁴¹⁹ See Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22, available at <http://www.nytimes.com/2009/02/13/us/13judge.html>; Stephanie Chen, *Pennsylvania rocked by 'jailing kids for cash'*, CNN (Feb. 24, 2009), <http://www.cnn.com/2009/CRIME/02/23/pennsylvania.corrupt.judges/index.html>.

ABA Treatment of Prisoners Standards

Standard 23-10.5 Privately operated correctional facilities

improved performance or in substantial cost savings, considering both routine and emergency costs, with no diminution in performance.”⁴²⁰

In addition, like the 1990 ABA policy, which endorses contract-related “Guidelines Concerning Privatization of Prisons and Jails” this Standard spells out contractual precautions that protect both the prisoners and the contracting jurisdiction. Even advocates of privatization urge extremely careful and comprehensive contracting with explicit terms governing substance, monitoring, penalties, and termination.⁴²¹

It is worth emphasizing that the misgivings that underlie this Standard run counter to legislative trends. Congress, for example, has occasionally insisted on a certain degree of privatization of federal incarceration,⁴²² and in recent years has tended to relax rather than augment limitations on federal law enforcement agencies’ ability to contract with private entities to run correctional facilities.⁴²³ Like many states, the federal Bureau of Prisons has for many years relied entirely upon private contractors to operate community corrections facilities, and BOP has more recently taken steps to privatize its housing of non-citizen prisoners.

In response to extraordinary increases in prison populations, states have rapidly expanded contracts with private correctional facilities.⁴²⁴ In Arizona, for example, the percentage of all prisoners held in private prisons in 2000 was 5.4 percent, but by 2008 private prison facilities housed 21.1 percent of Arizona prisoners.⁴²⁵ By 2008, the percentage of all prisoners held in private prison facilities in the state of New Mexico had risen to almost 46 percent.⁴²⁶

⁴²⁰ Some states have set a higher standard for contracting out correctional functions. *See, e.g.*, TEX. GOV’T CODE § 495.003(c)(3) (West 2011), available at <http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.495.htm> (“In addition to meeting the requirements specified in the requests for proposals, a proposal must: . . . offer a level and quality of programs at least equal to those provided by state-operated facilities that house similar types of inmates and at a cost that provides the state with a savings of not less than 10 percent of the cost of housing inmates in similar facilities and providing similar programs to those types of inmates in state-operated facilities; . . .”).

⁴²¹ William Collins, *Contracting for Correctional Services Provided by Private Firms* (Association of State Correctional Administrators, 2000), available at http://www.asca.net/system/assets/attachments/2083/Contracting_for_Corr._Services-2.pdf?1296151908. Richard Crane, *Monitoring Correctional Services Provided by Private Firms* (Association of State Correctional Administrators, 2000), available at http://www.asca.net/system/assets/attachments/2084/Monitoring_Corr._Services-2.pdf?1296152471.

⁴²² *See* H.R. Rep. No. 104-863 (Conf. Rep.), accompanying the Omnibus Consolidated Appropriations Act, FY 1997, Pub. L. 104-208, 110 Stat. 3009 (1996) (providing the Conference Committee’s view that the BOP should open two planned private facilities in California as scheduled and later reversed); D.C. Revitalization Act, Pub. L. 105-33 § 11201(c), 111 Stat. 251 (1997) (requiring BOP to house at least 50% of D.C. prisoners in private facilities).

⁴²³ *See, e.g.*, Public Law 106-553, Department of Justice Appropriations Act for 2001 (“Notwithstanding any other provision of law, including section 4(d) of the Service Contract Act of 1965 (41 U.S.C. 353(d)), the Attorney General hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration space or facilities, including related services, on any reasonable basis.”).

⁴²⁴ STEPHEN MCFARLAND ET AL., PRISONS, PRIVATIZATION, AND PUBLIC VALUES (2002), available at <http://government.cce.cornell.edu/doc/pdf/PrisonsPrivatization.pdf>.

⁴²⁵ WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE AND STATISTICS BULLETIN: PRISONERS IN 2008 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

⁴²⁶ *Id.*

ABA Treatment of Prisoners Standards

Standard 23-10.5 Privately operated correctional facilities

Subdivision (c): The possibility of contract termination is key to an appropriate privatization agreement; it functions both to incentivize compliance with the contract and as a safety valve if the contracting entity proves not up to the task. Contract termination is credible only if a jurisdiction complies with this subdivision, which requires a backup plan. This might be accomplished using capacity in public facilities or by back-up contracts with other private providers. (Of course, such backup contracts should comply with this Standard.)

Subdivision (d): Privatization should not function to deregulate prisons and jails—which is why this subdivision requires that all rules applicable to public facilities apply *in substance* to private facilities as well, whether as a matter of statutory law or by contract. The use of the phrase “in substance” is meant to acknowledge that some statutory or regulatory provisions will need to be adapted for the private setting, particularly if a facility is out-of-state. Changes may well be necessary and appropriate with respect to enforcement or procedures, for example. They should be far less acceptable, however, with respect to underlying rights or conditions.

Subdivision (e): In many jurisdictions, private contractor personnel may conduct the investigation of a disciplinary charge, but are prohibited from making the decision of guilt, innocence, or penalty. Instead, hearing officers are brought in from the jurisdiction from which the prisoner came.

Subdivision (f): This subdivision sets out various terms without which privatization would be not just risky but inappropriate. In order to ensure that these qualifications are included in all privatization contracts, it is advisable that they be adopted as a matter of statutory law, as well.⁴²⁷

Subdivision (f)(v): The most controversial of the subparts of subdivision (f) is this one, which requires that private facilities be prohibited from asserting immunity defenses. The reason for this proposed prohibition is that in civil rights contexts, immunities are largely premised on the special characteristics of government—the absence of a monetary incentive for wrongdoing, the purported “chill” that individuals who work for governments are said to feel as a result of liability rules (a chill not counterbalanced by monetary incentives on the other side), etc. See, e.g., *Richardson v. McKnight*, 521 U.S. 399 (1997), holding that officers employed by a private firm systematically organized to manage a prison are not entitled to qualified immunity from suit by prisoners charging a section 1983 violation. The Court found “nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with a governmental immunity.” *Id.* at 412.

It is the more general intent of this subdivision that prisoners housed in private prisons should retain at least the same remedies for violations of their rights as they would have in public facilities. Thus it disapproves caselaw holding that federal prisoners in private facilities lack a *Bivens* remedy against those that mistreat them.⁴²⁸

Subdivision (h): Related to the issue of privatization is the new practice of transferring prisoners out of state due to crowded conditions in the home state, pursuant to a contract with a private facility. Interstate prison transfers are unregulated by the Constitution. *Olim v. Wakinekona*, 461 U.S. 238 (1983) (prisoners do not have a liberty interest in avoiding such a transfer). Yet this is a troubling practice, as it separates

⁴²⁷ See generally, TEX. GOV'T CODE §§ 495.001-.008 (West 2011), available at <http://www.statutes.legis.state.tx.us/Docs/GV/hm/GV.495.htm>.

⁴²⁸ See *Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008) (holding federal prisoner may not recover damages against employees of private prison facility under *Bivens* theory); *Holly v. Scott*, 434 F.3d 287, 294 (4th Cir. 2006) (same). But see *Pollard v. Geo Group, Inc.*, 607 F.3d 583, 603 (9th Cir. 2010) (permitting federal prisoner to sue employees of private prison facility under *Bivens*), *cert. granted sub nom. Minneci v. Pollard*, No. 10-1104 (May 16, 2011).

ABA Treatment of Prisoners Standards

Standard 23-10.5 Privately operated correctional facilities

the prisoner from family, attorneys, and re-entry resources, and often places the prisoner in a highly unfamiliar culture or in a situation without oversight. In recent years, for example, prisoners from Hawaii were sent to jails on the Texas-Mexico border. And when prisoners are sent far away, there is less likely to be someone watching out for their interests, as became clear when Missouri prisoners housed in a private facility in Texas were subjected to horrific beatings and attacks by dogs, all of which were filmed by correctional officers as part of a training video.⁴²⁹ More recently, women prisoners from Hawaii were sexually abused by prison guards while housed in a private facility in Kentucky.⁴³⁰

For these reasons, in keeping with the repeated focus of these Standards on re-entry, this subdivision discourages the practice of out-of-state contractual transfers, though it allows such involuntary transfers if security requires it, or if it can be established that the prisoner's programming and re-entry preparation (including proximity to family) will not be adversely affected. Federal prisoners are not covered by this subdivision due to BOP's national designation policies, though the same general policies should govern placement of federal prisoners in private facilities as govern designation of prisoners to BOP facilities.⁴³¹ See also the commentary following Standard 23-8.5 ("Visitation").

In determining whether a prisoner would be adversely affected by an involuntary transfer, officials should examine such factors as the location of the prisoner's family and whether they ever visit; whether the prisoner is involved in either litigation or an appeal of his criminal case and whether he needs access to lawyers or law books; and whether the prisoner is involved in any programming that would be interrupted by a transfer. As a general matter, prisoners should not without compelling reason be transferred to locations significantly farther away from their families, or out of state if their appeals are still pending; when transfer would interrupt programming, particularly when completion of a particular program is likely to affect eligibility for release; and in the period immediately preceding release unless to a location nearer the place where they will reside upon release. Subdivision (b) would not apply to transfers under the Interstate Compact.⁴³²

⁴²⁹ See Sam Howe Verhovek, *Texas Jail Video Puts Transfer Programs in Doubt*, N.Y. TIMES, Aug. 22, 1997, at A1.

⁴³⁰ See Ian Urbina, *Hawaii to Remove Inmates Over Abuse Charges*, N.Y. TIMES, Aug. 25, 2009, at A12.

⁴³¹ For example, BOP "attempts to designate inmates to facilities commensurate with their security and program needs within a 500-mile radius of their release residence." Designations, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/inmate_programs/designations.jsp (last visited May 26, 2011).

⁴³² See, e.g., TEX. CODE CRIM. PROC. ANN. art. 42.19 (Vernon 2009).

PART XI: ACCOUNTABILITY AND OVERSIGHT

Part XI General Commentary

This Part incorporates current thinking about the most effective way to oversee prisons and jails. While litigation, and particularly implementation of court decrees, is the form of external oversight most familiar to lawyers, it is a last resort rather than a routine method of ensuring the protection of prisoners. (This is especially true since the enactment of the PLRA, with its many limitations on courts' equitable authority.⁴³³) Injunctive orders are important, but all correctional facilities should have several layers of accountability, whereby entities internal and external to the correctional agency are responsible for routine monitoring of conditions in prisons, for the investigation and prosecution of allegations of mistreatment of prisoners, and for handling prisoner grievances. Standard 23-11.1 begins by covering effective internal accountability measures, calling upon corrections officials to take steps to enhance their agencies' transparency and to improve compliance with their own policies and procedures. The remaining Standards in the Part set out a number of external oversight sources. Standard 23-11.5 conceptualizes media access to jails and prisons as an accountability method.

This Part, more than any other in these standards, is geared to the infrastructure rather than the substance of constitutional compliance. It aims to "shape the institutions of government" to facilitate protection of constitutional and legal rights. *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

Standard 23-11.1 Internal accountability

(a) A correctional agency should establish an independent internal audit unit to conduct regular performance auditing and to advise correctional administrators on compliance with established performance indicators, standards, policies, and other internal controls.

(b) A correctional agency should designate an internal unit, answerable to the head of the agency, to be responsible for investigating allegations of serious staff misconduct, including misconduct against prisoners, and for referring appropriate cases for administrative disciplinary measures or criminal prosecution.

(c) If a correctional agency contracts for provision of any services or programs, it should ensure that the contract requires the provider to comply with these Standards, including Standard 23-9.1 governing grievances. The agency should implement a system to monitor compliance with the contract, and to hold the contracted provider accountable for any deficiencies.

(d) Correctional administrators and officials should seek accreditation of their facilities and certification of staff from national organizations whose standards reflect best practices in corrections or in correctional sub-specialties.

⁴³³ See commentary to Standard 23-9.3; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006); James J. Stephan, *Census of State and Federal Correctional Facilities, 2005*, at app. tbl.6 (Bureau of Justice Statistics, Oct. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf05.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-11.1 Internal accountability

(e) Correctional administrators and officials should regularly review use of force reports, serious incident reports, and grievances, and take any necessary remedial action to address systemic problems.

(f) Correctional administrators should routinely collect, analyze, and publish statistical information on agency operations including security incidents, sexual assaults, prisoner grievances, uses of force, health and safety, spending on programs and services, program participation and outcomes, staffing, and employee discipline.

(g) Correctional administrators and officials should evaluate short and long-term outcomes of programs provided to prisoners and, where permitted by applicable law, should make the evaluations and any underlying aggregated data available upon request to researchers, investigators, and media representatives.

(h) Correctional agencies should work together to develop uniform national definitions and methods of defining, collecting, and reporting accurate and complete data.

(i) Governmental authorities should not exempt correctional agencies from their jurisdiction's Administrative Procedure Act, Freedom of Information Act, or Public Records Act.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-5.6(i) (use of force, investigation and reporting), 23-6.7 (quality improvement), 23-9.1 (grievance procedures), 23-10.5 (privately operated correctional facilities)

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standards 23-7.2 (regulation of correctional institutions), 23-7.3 (administrative oversight)

ABA, RESOLUTIONS, 101C (Aug. 1993) (correctional accreditation), 113C (Aug. 1999) (national commission on sentencing, corrections and re-entry)

ACA, JAIL STANDARDS, 4-ALDF-7D-01 and 7D-02 (quality improvement practices)

ACA, PRISON STANDARDS, 4-4036 (independent audit)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, §§ 8 (quarterly reporting), 9 (internal quality assessment/improvement), 48 (quality assessment)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.A (information systems), II.B.A (internal quality improvement)

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶¶ 64-67 (program evaluation)

Commentary

The first step in bringing transparency and accountability into the operations of a correctional agency is through internal assessment, investigation, reporting, and problem-solving measures undertaken by the agency itself. This Standard prescribes methods through which correctional agencies should self-monitor. The problems identified through this self-monitoring and the corrective measures taken in response to deficiencies unearthed during this monitoring can improve a correctional agency's performance, make correctional operations and programs more cost-effective, and prevent small problems from becoming major problems.

ABA Treatment of Prisoners Standards

Standard 23-11.1 Internal accountability

Most of the internal accountability measures required by this Standard are prevalent throughout the United States and can feasibly be implemented in all jurisdictions, including localities operating small jails.⁴³⁴ It bears noting, however, that the information gathering, analyses of the information and data collected, and dissemination of information collected through internal accountability processes will be for naught if correctional and other governmental authorities fail to take the steps needed to remedy problems identified during these internal review processes.

Subdivisions (a) & (b): The audits required under subdivision (a) should cover key facets of the operations of the correctional agency and the operations of, and conditions in, the correctional facilities for which the agency is responsible. Examples of areas on which these audits should focus include, but are not limited to: staff recruitment, training, supervision, and discipline; inmate deaths; medical and mental-health care; use of force; inmate violence; conditions of confinement; inmate disciplinary processes; substance-abuse treatment; educational, vocational, and other programming; and reentry planning.⁴³⁵ The audits should also evaluate the efficacy of, and problems in, various reporting mechanisms, such as the grievance system for prisoners. These reporting mechanisms, if well structured and well run, can be powerful tools for identifying and rectifying problems involving individual prisoners and staff as well as systemic problems.

A primary function of the audits described in subdivision (a) is to discern whether defined policies, procedures, standards, and other internal controls are being followed in practice. By contrast, the internal review process that is the focus of subdivision (b) entails the investigation of specific allegations of serious misconduct by staff, such as excessive force used on a prisoner. The unit responsible for audits under subdivision (a) can be the same or a different unit than that responsible for investigations under subdivision (b), but correctional administrators should ensure that neither function is neglected in favor of the other.

Subdivision (c): When a correctional agency contracts with another entity to provide services or programs, such as medical care or educational programming to prisoners, the agency still retains the responsibility of ensuring that the services and programs are of high quality and comport with the ABA Standards as well as policies, performance indicators, and other criteria identified by the agency. To fulfill this responsibility, the contract with the provider should require that the provider comply with these Standards. In addition, the correctional agency should monitor compliance with the contract, utilizing the monitoring mechanisms set forth in Standard 23-10.5(g). Finally, when monitoring by the correctional agency reveals deficiencies in the services or programs delivered under the contract, the agency must ensure that these deficiencies are rectified with dispatch or must take other appropriate steps to hold the provider accountable for these deficiencies, such as terminating the contract with the provider.

Subdivision (d): This subdivision requires that correctional facilities be accredited and their staff certified by national organizations whose standards reflect best practices in corrections or correctional subspecialties, such as correctional healthcare. Accreditation and certification constitute a form of peer review by outsiders who are experts in corrections.

The certification of correctional staff can enhance their ability to perform their jobs well, help to ensure that there have been no significant gaps in their training, and infuse the corrections field with an ethos of

⁴³⁴ For examples of a range of internal accountability measures adopted by one prison system – that overseen by the Texas Department of Criminal Justice, see Carl Reynolds, *Effective Self-Monitoring of Correctional Conditions*, 24 PACE L. REV. 769 (2004).

⁴³⁵ The external monitoring and inspection required by Standard 23-11.3 would also focus on these areas, among others. See AM. BAR ASS'N, RESOLUTION 104B (2008) (prison oversight), available at http://www2.americanbar.org/sdl/Documents/2008_AM_104B.pdf.

ABA Treatment of Prisoners Standards

Standard 23-11.1 Internal accountability

professionalism. Accreditation also can have many additional benefits. For example, problems in correctional operations or conditions that were not identified through internal review processes or have not been remedied adequately can be spotted by those who are not a part of the correctional agency and are less inured to the status quo. And the desire to secure accreditation or a high accreditation score can spur correctional agencies to resolve problems identified in preparation for, or during, the accreditation audit.

The accreditation of a correctional facility does not obviate the need for the external monitoring by an independent governmental agency required by Standard 23-11.3. Accreditation audit reports and findings rendered at accreditation hearings currently are not made public. Therefore, accreditation does not meet the need for transparency in the operation of correctional facilities. In addition, the dependence of correctional accrediting bodies on accreditation fees paid by correctional facilities potentially can compromise the objectivity of accreditation-related decisions.⁴³⁶ And there typically are long intervals between accreditation audits, limiting their ability to catalyze the resolution of problems early on.⁴³⁷

Despite its limitations, accreditation is the only mechanism already in place nationwide that offers some form of external monitoring for all types of correctional facilities, including small jails. In addition, accreditation can complement the work of the independent monitoring entity required by Standard 23-11.3, serving as a valuable check on the reliability of that entity's findings.

Subdivision (e): This provision requires prison officials to review grievances along with use of force reports and serious incident reports to obtain important information about how their prisons are functioning. Sometimes such a requirement is imposed by a court, see, e.g., *Skinner v. Uphoff*, 234 F. Supp. 2d 1208 (D. Wyo. 2002) (requiring implementation of effective review processes for prisoner-on-prisoner assaults, to enable defendant officials to prevent future harm). But in any event, it is a mainstay of sound correctional management. See commentary to Standard 23-9.1.

Subdivisions (f) & (h): The Association of State Correctional Administrators has spent years developing a performance-based measures system, to enable correctional administrators to better assess their own facilities in comparison with others, and change over time. These measures could be a central component of compliance with these subdivisions. See Association of State Correctional Administrators, Performance-Based Measures System Resource Manual (November 2009), available at <http://nicic.gov/Library/021116>. The development of uniform definitions for key performance data collected and reported by correctional authorities will facilitate their understanding, and the public's understanding, of the true conditions in a correctional facility. At present, for example, correctional authorities define what constitutes an "assault" by an inmate in a number of different ways. Variations in assault statistics at various correctional facilities may simply reflect these definitional distinctions rather than differences in the level of violence at those facilities.

Subdivision (g): Through data collection and analysis, correctional authorities can better assess the performance of certain correctional operations and programs, and determine what facets of their

⁴³⁶ For a discussion of this problem as well as of some of the benefits that can accrue from accreditation, see Lynn S. Branham, *Accrediting the Accreditors: A New Paradigm for Correctional Oversight*, 30 PACE L. REV. 1656 (2010).

⁴³⁷ The Commission on Accreditation for Corrections, which operates under the auspices of the American Correctional Association, currently is the only national entity in the United States that accredits entire correctional facilities, such as prisons and jails. *Id.* at 1658. The accreditation award lasts for three years, and an accredited facility generally is not reaudited until it applies for reaccreditation. Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 61, 109 (2007).

ABA Treatment of Prisoners Standards

Standard 23-11.2 External regulation and investigation

operations need to be improved. They also can identify what is working well and then replicate effective policies, procedures, practices, and programs at other facilities. And correctional authorities can fine-tune the rehabilitative programs established for prisoners under Standard 23-8.2 so that they better meet their purposes.⁴³⁸

Subdivision (i): Correctional agencies should be subject to statutes in their jurisdictions designed to promote procedural fairness, transparency, and accountability. The Model State Administrative Procedure Act provides for emergency regulation in appropriate circumstances. See MSAPA § 3-108(a).

Standard 23-11.2 External regulation and investigation

(a) Independent governmental bodies responsible for such matters as fire safety, sanitation, environmental quality, food safety, education, and health should regulate, inspect, and enforce regulations in a correctional facility. A correctional facility should be subject to the same enforcement penalties and procedures, including abatement procedures for noncompliance, as are applicable to other institutions.

(b) Governmental authorities should authorize and fund an official or officials independent of each correctional agency to investigate the acts of correctional authorities, allegations of mistreatment of prisoners, and complaints about conditions in correctional facilities, including complaints by prisoners, their families, and members of the community, and to refer appropriate cases for administrative disciplinary measures or criminal prosecutions.

(c) When federal or state law authorizes a governmental or non-governmental agency or organization to conduct an investigation relating to a correctional facility, correctional officials should allow that agency or organization convenient and complete access to the facility and should cooperate fully in the investigation.

(d) When a prisoner dies, correctional officials should promptly notify the jurisdiction's medical examiner of the death and its circumstances; the medical examiner should decide whether an autopsy should be conducted. Where authorized by law, a correctional official should also be permitted to order an autopsy.

(e) Correctional officials should encourage and accommodate visits by judges and lawmakers and by members of faith-based groups, the business community, institutions of higher learning, and other groups interested in correctional issues.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.4(a) (healthful food, sanitation), 23-6.6(c) (adequate facilities, equipment, and resources, licensing standards), 23-7.4 (prisoner organizations), 23-8.4(c) (work programs, health and safety), 23-8.5 (visiting), 23-11.3 (external monitoring and inspection)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13 (maintenance of institutions)

⁴³⁸ For several resources discussing such evidence-based programs and policies, see *supra* note 276.

ABA Treatment of Prisoners Standards

Standard 23-11.2 External regulation and investigation

ACA, JAIL STANDARDS, 4-ALDF-1A-01 through 1A-03 (sanitation), 1A-06 (physical plant), 1A-07 (water supply), 4-ALDF-1C-07 (fire safety), 4-ALDF-4A-11 (food service facilities), 4-ALDF-4D-23 (inmate death) and 4D-25 (health care and quarterly meetings)

ACA, PRISON STANDARDS, 4-4123 (building codes), 4-4124 (fire codes), 4-4321 (health and safety regulations), 4-4329 (sanitation inspections), 4-4425 (offender's death)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 10 (quality assessment/improvement oversight)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.B.V (external audits)

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶¶ 65 (external program evaluation)

Commentary

Subdivision (a): Certain particularly important facets of a correctional facility's operations, notably those affecting health and safety and those affecting educational programming for prisoners, should be subject to regulation and inspection by independent governmental entities with relevant regulatory expertise. For example, the state entity responsible for promulgating and enforcing fire-safety regulations in the state should develop and enforce regulations to promote fire safety in the state's prisons.

External regulatory entities should enforce their regulations with the same rigor in correctional settings as the public expects and deserves in other contexts. In fact, health and safety regulations should be implemented with particular rigor in prisons and jails, where the risks tend to be enhanced. The housing of prisoners in close quarters, for example, can facilitate the spread of potentially lethal infectious diseases.⁴³⁹ In case of fire, prisoners' confinement in cells increases the risk of injury or death, both for prisoners and firefighting personnel.

Subdivision (b): This subdivision contemplates designating an official, not part of a traditional law enforcement agency, to investigate allegations of serious staff misconduct, abuses of prisoners, and poor prison conditions. These investigations often will be instigated by a referral from the agency's internal investigative office described in Standard 23-11.1(b), but also may result from complaints from prisoners, their families, and members of the community. This official should be able to clear or support the allegations. An Inspector General with authority independent of the correctional agency would be one method of compliance.⁴⁴⁰

The subdivision does not regulate how the official it requires should open criminal, civil, or disciplinary proceedings. One method would be to give the official independent authority to conduct disciplinary proceedings and criminal and civil rights prosecutions; another might be to require the official to refer such cases back to the correctional agency or to local law enforcement, as appropriate. For the international law version of this subdivision, see UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, Principle 29, available at http://www.unodc.org/pdf/compendium/compendium_2006_part_01_01.pdf.⁴⁴¹

⁴³⁹ See THEODORE M. HAMMETT & LYNNE HARROLD, U.S. DEP'T OF JUSTICE, TUBERCULOSIS IN CORRECTIONAL FACILITIES 4 (1994) (recounting how tuberculosis swept through New York prisons from 1990 through 1992, killing thirty-six prisoners and one correctional officer).

⁴⁴⁰ In California, the Inspector General has been vested with the responsibility to perform the functions described above. For more information about the Inspector General, see *About Us*, OFFICE OF THE INSPECTOR GENERAL, <http://www.oig.ca.gov> (last visited May 27, 2011). In the federal system, the Justice Department's Inspector General performs this function.

⁴⁴¹ 1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or

ABA Treatment of Prisoners Standards

Standard 23-11.2 External regulation and investigation

Subdivision (c): This subdivision's requirement of cooperation for authorized investigations of correctional facilities relates to statutes such as the Civil Rights of Institutionalized Persons Act⁴⁴² ("CRIPA"), and the federal "protection and advocacy" statutes.⁴⁴³ Although CRIPA authorizes the Department of Justice to investigate violations of the civil rights of prisoners, and gives the Department subpoena power in this connection,⁴⁴⁴ at least one court has held that it does not empower the Department to conduct site inspections if the relevant state or local officials do not consent.⁴⁴⁵ The protection and advocacy statutes authorize independent, federally-funded legal services providers known as Protection and Advocacy (P&A) organizations to monitor, investigate, and pursue administrative or legal remedies to protect the federal rights of prisoners with mental illness or mental retardation, but occasionally facilities subject to such investigation contest P&A access.⁴⁴⁶ Subdivision (c) takes the position that access is key to implementing statutes like these, and therefore generally useful in securing constitutional conditions.

Subdivision (d): Because prisoners are vulnerable to abuse and neglect that can culminate in their death, the jurisdiction's medical examiner should be notified whenever a prisoner dies. The medical examiner should have the authority to order an autopsy even over the objection of correctional officials. Correctional officials may also have authority to order an autopsy, and may do so if only to avoid discipline and security problems that can ensue when prisoners believe that a prisoner's death is attributable to staff malfeasance.

Subdivision (e): Prison visits can and should inform decision-making by governmental authorities. They can help judges and lawmakers understand the impact of sentencing laws and sentencing decisions, the challenges prisoners face in adapting to life inside and then outside prison, the difficulties confronting correctional authorities performing their jobs, and how additional resources would help them do so. Similarly, giving students and academic researchers expanded access to correctional facilities has

imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49, Principle 29 (Dec. 9, 1988).

⁴⁴² 42 U.S.C. §§ 1997 *et seq.*

⁴⁴³ See Developmental Disabilities and Bill of Rights Act, 42 U.S.C. §§ 15001-115; Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. §§ 10801-10807; and Protection and Advocacy of Individual Rights Act, 29 U.S.C. § 794e.

⁴⁴⁴ See 42 U.S.C. § 1997a-1 (2006).

⁴⁴⁵ *United States v. Michigan*, 868 F. Supp. 890 (W.D. Mich. 1994). (Other courts have found somewhat broader access rights. *United States v. County of San Diego*, 1991 WL 642768 (S.D. Cal., July 22, 1991) (CRIPA preempts state confidentiality laws relating to juveniles); *United States v. County of Los Angeles*, 635 F. Supp. 588 (C.D. Cal. 1986) (same).)

⁴⁴⁶ See, e.g., *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996); *Mississippi Protection & Advocacy System, Inc. v. Cotten*, 929 F.2d 1054, 1058-59 (5th Cir. 1991) ("The state cannot satisfy the requirements of [the Act] by establishing a protection and advocacy system which has this authority in theory, but then taking action which prevents the system from exercising that authority.").

ABA Treatment of Prisoners Standards

Standard 23-11.3 External monitoring and inspection

important reciprocal benefits, catalyzing public support for correctional reforms and the resources necessary to effectuate them.

Encouraging other groups interested in correctional issues to visit prisons and jails can also help to meet the needs of prisoners. Faith-based groups, for example, can provide prisoners opportunities for spiritual growth, and mentors upon reentry. Members of the business community who visit prisons may be encouraged to provide prisoners jobs upon their release. Media access is important enough to have its own separate section, Standard 11.5.

The heightened public awareness resulting from prison and jail visits will result in improvements in conditions and operations. As Chief Justice Warren Burger once aptly noted: “A visit to most prisons will make you a zealot for prison reform.”⁴⁴⁷

Standard 23-11.3 External monitoring and inspection

(a) **Governmental authorities should authorize and fund a governmental agency independent of each jurisdiction’s correctional agency to conduct regular monitoring and inspection of the correctional facilities in that jurisdiction and to issue timely public reports about conditions and practices in those facilities. This agency, which should be permitted to be the same entity responsible for investigations conducted pursuant to Standard 23-11.2(b), should anticipate and detect systemic problems affecting prisoners, monitor issues of continuing concern, identify best practices within facilities, and make recommendations for improvement.**

(b) **Monitoring teams should possess expertise in a wide variety of disciplines relevant to correctional agencies. They should receive authority to:**

- (i) **examine every part of every facility;**
- (ii) **visit without prior notice;**
- (iii) **conduct confidential interviews with prisoners and staff; and**
- (iv) **review all records, except that special procedures may be implemented for highly confidential information.**

(c) **A correctional agency should be required to respond in a public document to the findings of the monitoring agency, to develop an action plan to address identified problems, and to periodically document compliance with recommendations or explain noncompliance; however, if security requires, the public document should be permitted to be supplemented by a confidential one.**

(d) **The monitoring agency should continue to assess and report on previously identified problems and the progress made in resolving them until the problems are resolved.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-11.2 (external regulation and investigation)

⁴⁴⁷ *Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974) (internal quotations omitted).

ABA Treatment of Prisoners Standards

Standard 23-11.3 External monitoring and inspection

Related Standards and ABA Resolutions

ABA, *LEGAL STATUS OF PRISONERS STANDARDS* (2d. ed. superseded), Standard 23-6.13 (maintenance of institutions)

ABA, *RESOLUTIONS*, 107 (Aug. 2002) (blueprint for corrections), 104B (Aug. 2008) (prison oversight),

Commentary

Subdivision (a): The United States is one of only a few Western countries without a comprehensive mechanism for the routine inspection and monitoring of all places of confinement. Such entities are required by a variety of international treaty instruments, including the Optional Protocol to the Convention Against Torture.⁴⁴⁸ Independent inspection entities take many different forms, from stand-alone executive branch agencies, to legislative bodies, to non-governmental organizations, to name just a few.⁴⁴⁹ The Standard provides that there should be a body outside the correctional agency that performs the oversight function, and that it should be a governmental entity to ensure accountability, but it does not otherwise take a position as to which structure is most appropriate or effective. The inspection entity should not depend upon the correctional agency for funding, staffing, office space, or anything that might compromise its objectivity.

Non-governmental monitoring bodies with authority to inspect correctional facilities can provide a valuable supplement to the government entity required by this Standard. The best-known U.S. non-governmental oversight body is the Correctional Association of New York's Prison Visiting Project, which has had legislative authority to inspect prisons and submit reports to the Legislature since 1846.⁴⁵⁰ The Pennsylvania Prison Society also has statutory authority to visit prisons, and has been conducting inspections through its network of volunteer visitors since 1787. Similarly, the John Howard Association of Illinois has had informal authority to inspect prisons and jails in that state for over 40 years.⁴⁵¹

External oversight can take a variety of forms, but the details in the Standard are the minimum necessary to ensure that a monitoring entity does meaningful work. A similar conclusion was reached by the Commission on Safety and Abuse in America's Prisons, which highlighted oversight issues in its 2006 report. See also ABA resolution 104B, 2008 Annual Meeting (prison oversight), available at http://www2.americanbar.org/sdl/Documents/2008_AM_104B.pdf. The ABA resolution details the key requirements that are necessary for effectiveness in an oversight body, and should be consulted for a fuller picture of the structure of these monitoring entities.⁴⁵²

It is particularly important for the monitoring entity to focus on systemic problems affecting prisoners. While there are many issues that can be monitored in a government agency, financial audits and other performance reviews that deal with management concerns are to be distinguished from inspections that go to the heart of conditions and operations directly affecting the treatment of prisoners. Moreover, the inspection entity should be concerned primarily with identifying systemic and recurring problems, as opposed to addressing individual concerns of prisoners. Individual concerns are best handled through the

⁴⁴⁸ See Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, 2375 U.N.T.S. 237, available at <http://www2.ohchr.org/english/law/cat-one.htm>.

⁴⁴⁹ See Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010).

⁴⁵⁰ *Id.* at 1874-75.

⁴⁵¹ *Id.* at 1815-16.

⁴⁵² See also Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291 (2010).

ABA Treatment of Prisoners Standards

Standard 23-11.4 Legislative oversight and accountability

auspices of an Ombudsman or an effective grievance system. See Standard 23-9.1. Importantly, the inspection body's work is intended to be preventative in nature, anticipating problems that could affect prisoners.

By reporting on best practices, the inspection agency can identify positive aspects of correctional operations as well as areas of concern. This also allows the monitoring body to foster a collaborative relationship with the correctional agency, which is conducive to implementation of the monitor's recommendations.⁴⁵³

Subdivision (b): The staff of the inspection agency should be knowledgeable about correctional systems, sensitive to the challenges faced by managers and staff, and aware of the relevant legal requirements, including civil rights law. This subdivision requires that independent monitors have appropriate "expertise in a wide variety of disciplines relevant to correctional agencies." It does not, however, require that monitoring teams be made up exclusively of persons with corrections backgrounds. Jurisdictions could choose to set out more detailed requirements, perhaps mandating the inclusion of experts on security, classification, sanitation, health care, or others. Lawyers (few of whom had past employment in a corrections agency) have proved useful members of such teams, in the Department of Justice's CRIPA investigations and in the ABA's partnership with Immigration and Customs Enforcement (ICE), to implement national immigration detention standards. See http://www.abanet.org/publicserv/immigration/detention_standards.shtml.

Unannounced inspections are a routine and critical element of the monitoring process for every well-respected inspection entity.⁴⁵⁴ The details of visits should be consistent with security. For example, the requirement that the monitoring agency be allowed to visit without prior notice, in subdivision (b)(ii), does not preclude a very brief wait where security demands it, for example in the middle of a prisoner count. Nevertheless, security concerns do not provide a justification for disallowing unannounced inspections, nor do rationales related to convenience of correctional staff.

Subdivision (c): The requirement that the correctional agency be required to respond publicly to the inspector's reports is intended to guard against the risk that monitoring reports are ignored by the agency, thus making the inspection effort a meaningless enterprise. See ABA resolution 104B, page 7, 2008 Annual Meeting (prison oversight), available at http://www2.americanbar.org/sdl/Documents/2008_AM_104B.pdf.

Standard 23-11.4 Legislative oversight and accountability

(a) Governmental authorities should enact legislation to implement and fund compliance with these Standards.

(b) Legislative bodies should exercise vigorous oversight of corrections, including conducting regular hearings and visits. Correctional authorities should allow legislators who sit on correctional oversight committees to speak privately with staff and prisoners.

(c) Each state legislature should establish an authority to promulgate and enforce standards applicable to jails and local detention facilities in the state.

⁴⁵³ Silvia Casale, *The Importance of Dialogue and Co-operation in Prison Oversight*, 30 PACE L. REV. 1490 (2010).

⁴⁵⁴ See, e.g., Anne Owers, *Submission to Vera Commission*, 22 WASH. U. J.L. & POL'Y 231, 233 (2006).

ABA Treatment of Prisoners Standards

Standard 23-11.4 Legislative oversight and accountability

(d) **Governmental authorities should prepare a financial and correctional impact statement to accompany any proposed criminal justice legislation that would affect the size, demographics, or requirements of the jurisdiction's prison and jail populations, and should periodically assess the extent to which criminal justice legislation is achieving positive results.**

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-1.1(j) (general principles governing imprisonment, funding), 23-2.4(c) (special classification issues, governmental authorities and single cells), 23-3.1(b) (physical plant and environmental conditions), 23-10.2 (personnel policy and practice)

Related Standards and ABA Resolutions

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-7.4 (legislative responsibilities)

ABA, RESOLUTIONS (text in Appendix), (115A Feb. 1990) (prison and jail impact statements), 120B (Aug. 1995) (correctional impact statement), 107 (Aug. 2002) (blueprint for corrections)

ACA, PRISON STANDARDS, 4-4019 (public information)

Commentary

Subdivisions (a) and (b): The laws governing the correctional agency should ensure that correctional facilities are operated safely and that prisoners are treated humanely, and that sufficient funds are appropriated for this purpose. Legislative bodies can and should play an active oversight role in bringing transparency and accountability to the operation of correctional facilities. Whether the pertinent legislative body overseeing corrections is a congressional committee, a state legislative committee, a county-board committee, or some other entity, the oversight committee should monitor a correctional agency's compliance with these Standards. In addition, the committee should determine whether additional funds are needed to bring the agency and correctional facilities in the jurisdiction into compliance with the legal requirements and best correctional practices embodied in these Standards. Finally, the committee should take the necessary steps to ensure that the legislative body appropriates the funds needed to secure this compliance. In particular, funds should be provided to prepare prisoners for reentry into their communities.

This legislative oversight function should go beyond the receipt of information transmitted by correctional authorities in reports and at hearings, to include visits to the correctional facilities over which they have oversight responsibility. During those visits, the legislators must be afforded the opportunity to meet privately with staff and prisoners. These confidential interviews may lead to further inquiries into operational or policy issues about which the legislature and the public should be aware. The work of the Ohio Correctional Institutional Inspection Committee exemplifies such amplified legislative oversight. This committee, which is established by law and includes members from both houses of the legislature, routinely monitors conditions at correctional facilities in the state. With the assistance of legislative staff, the committee inspects facilities, issues reports, and evaluates correctional programs and grievance procedures.⁴⁵⁵

Subdivision (c): The state-level enforceable jail standards suggested here are operational standards, much more detailed than these ABA Standards, and subject to inspection and enforcement. Twenty-eight states

⁴⁵⁵ OHIO REV. CODE ANN. § 103.73 (West 2010).

currently have such jail standards, usually mandatory standards promulgated by a state agency; an additional five states have non-mandatory standards promulgated by the state sheriffs' association. This leaves more than a few states with no jail standards at all (of course, no jail standards are necessary if a state has no jails, as in, for example, Rhode Island). Like this subdivision, a recent National Institute of Corrections publication urged "sheriffs, jail administrators, funding authorities, state legislators, local and state criminal justice administrators, executive branch officials/policymakers, county counsels, state attorneys general, and other policymakers who have a stake in the safe, efficient, and constitutional operation of local jails" to adopt and implement state-level jail standards. As this publication explains, "Jail standards play a key role in translating constitutional and statutory provisions into operational practice," and their provisions extend "from the broadest level down to specific details of jail functions and activities."⁴⁵⁶

Subdivision (d): This subdivision addresses one of the endemic problems plaguing corrections: the enactment of laws without consideration of their adverse effect on the ability of correctional facilities to operate in conformance with legal requirements and best correctional practices. A classic example of such a law is one imposing mandatory prison sentences without also providing the funding necessary to handle the influx of additional prisoners. Another example is a statute requiring confinement of juveniles in adult correctional facilities without providing funds for the specially trained staff, upgraded security, and programming needed for these youthful offenders.

Before legislative bodies enact laws affecting the size, demographics, or requirements of prison or jail populations, they should prepare and take into account financial and correctional impact statements delineating the potential adverse consequences of enacting that legislation. Examples of such adverse impacts are crowding, prisoner idleness due to lack of programming, and strains on prison security. The impact statements should identify steps necessary to avert the adverse consequences identified as potentially ensuing from the proposed legislation, including the appropriation of additional funds and offsetting population reduction measures. Providing legislators with financial and correctional impact statements can help them to understand the consequences of enacting particular legislation, and to take steps to avoid unduly burdening correctional operations and conditions.

Standard 23-11.5 Media access to correctional facilities and prisoners

(a) Correctional administrators should develop agency media access policies and make them readily available to the public in written form. Correctional authorities should generally accommodate professionally accredited journalists who request permission to visit a facility or a prisoner, and should provide a process for expeditious appeal if a request is denied.

(b) Prisoners should have the right to refuse requests for interviews and should be notified of that right and given an opportunity to consult with counsel, if they have counsel, prior to an interview.

(c) Correctional authorities should allow professionally accredited journalists reasonable use of notebooks, writing implements, video and still cameras, and audio recorders.

(d) The time, place, and manner of media visits should be reasonably regulated to preserve the privacy and dignity of prisoners and the security and order of the facility.

⁴⁵⁶ See Mark D. Martin, *Jail Standards and Inspection Programs: Resource and Implementation Guide* (Nat'l Inst. of Corr., Apr. 2007), available at <http://nicic.org/DOWNLOADS/PDF/Library/022180.pdf>.

ABA Treatment of Prisoners Standards

Standard 23-11.5 Media access to correctional facilities and prisoners

(e) Correctional authorities should not retaliate against a prisoner for that prisoner's lawful communication with a member of the media.

Cross References

ABA, TREATMENT OF PRISONER STANDARDS, 23-7.5 (communication and expression), 23-8.5 (visiting), 23-8.6 (written communications), 23-11.2(e) (external regulation and investigation, visits by outside groups)

Related Standards

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.4 (group and media visits)

ACA, PRISON STANDARDS, 4-4022 (media access), 4-4279 (access to media)

Commentary

Subdivision (a): Affording members of the media access to correctional facilities is a means of bringing transparency and accountability into the operations of those facilities. Through media reports, the public can be informed about problems that plague a correctional facility, conditions within it, the effectiveness of correctional programs in the facility, and the extent to which incarceration is facilitating or impeding prisoners' adherence to a crime-free lifestyle upon their release from the facility. Additionally, these media reports can highlight the need for operational changes or the allocation of more resources to make the correctional facility safer, more humane, and in conformance with what are considered "best practices" in the field of corrections.

Under this Standard, professionally accredited journalists receive a greater right of access to correctional facilities than that possessed by the general public under Standard 23-11.2(e), though both groups have greater access rights under these new Standards than the Constitution requires.⁴⁵⁷ A "professionally accredited journalist" is intended to mean a journalist who works for, or is under contract to, a newspaper, magazine, wire service, book publisher, or radio or television program or station, or who, through press passes issued by a governmental or police agency, or through similar convincing means, can demonstrate that he or she is a bona fide journalist engaged in the gathering of information for distribution to the public.

Subdivisions (b) & (d): The broad media access to prisons envisioned by this Standard is not unfettered. First, correctional authorities can and should adopt regulations that delimit the time, place, and manner of media visits. These regulations serve the important mission of protecting prisoners' privacy and dignity, ensuring, for example, that prisoners are not photographed or filmed while unclothed.⁴⁵⁸ Regulations defining the time, place, and manner of media visits may also be needed to safeguard security and order within the correctional facility. But care must be taken to ensure that the interests in transparency and governmental accountability served by affording the media access to correctional facilities are not undermined by these regulations.

⁴⁵⁷ See, e.g., *Pell v. Procunier*, 417 U.S. 817, 833-35 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (holding that the freedom of the press protected by the First Amendment does not accord members of the media a broader right of access to prisons than correctional officials afford the public).

⁴⁵⁸ As Chief Justice Burger observed in *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978), "Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others."

ABA Treatment of Prisoners Standards

Standard 23-11.5 Media access to correctional facilities and prisoners

A second limitation on the media's access to prisons is that prisoners can refuse a request to be interviewed. They must be apprised of this right of refusal and be afforded the opportunity to confer with counsel, if they have an attorney, before deciding whether to agree to an interview. This right of refusal and the attendant safeguards designed to protect that right are designed to preserve prisoners' dignity. In addition, these protections will help prisoners avoid making disclosures unwillingly that bear on litigation in which they are or will be involved.

Subdivision (c): In order to perform the vital function of informing the public about correctional operations and conditions, journalists need to be able to use the basic tools of their profession, including notebooks, writing implements, video and still cameras, and audio recorders. As noted above, however, correctional authorities can and should adopt and enforce reasonable regulations to protect prisoners' privacy and dignity and to preserve security and order within the facility.⁴⁵⁹

Subdivision (e): The informational needs and interests furthered by affording members of the media broad access to prisons cannot be met if correctional authorities retaliate against prisoners for their lawful communications with media representatives. Such retaliation therefore must be prohibited, and these prohibitions strictly enforced. But expelling a prisoner from a witness-protection program if the prisoner has violated its rules barring media contact does not constitute retaliation under this subdivision.

⁴⁵⁹ Cf. *Demery v. Arpaio*, 378 F.3d 1020, 1031 (9th Cir. 2004) (concluding that use of webcams to stream live images of pretrial detainees worldwide while they were being photographed, fingerprinted, frisked, and confined in the jail's holding area "turn[ed] pretrial detainees into the unwilling objects of the latest reality show" and violated due process).