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CorrDocs

DR. MARC STERN INTERVIEWED BY THE HUFFINGTON POST: THE CASE FOR VACCINATING PRISONERS EARLY.

Melissa Jeltsen, Senior Reporter, The Huffington Post

("Prisoners in Chicago's Cook County Jail plead for help by posting a sign in window.")

JIM VONDRUSKA / REUTERS

Prisons and jails are among the most dangerous places to be in a pandemic. People housed within them cannot socially distance or quarantine. Mask-wearing is optional in many institutions, which leaves prisoners even more vulnerable to the coronavirus. Compounding these conditions, prisoners are already far sicker than the general population, making them extra vulnerable to the virus.

Since the pandemic began, correctional facilities have been home to some of the biggest outbreaks in the nation. Roughly 250,000 people in prison have been infected with the virus and at least 1,647 have died, according to data collected by The Marshall Project.

The risks for incarcerated people, who are infected by the virus at a rate more than five times higher than the nation's overall average, are clear and undeniable. But where should they rank when it comes to vaccine distribution?

As governors work with health officials to devise each state's distribution plan, they will have to make tough calls about who qualifies to get the vaccine and when, decisions that are doomed to be fraught with political considerations.

An analysis of state draft plans by the Prison Policy Initiative found that while the majority of states considered incarcerated people as a priority group in their vaccination plans, many of them were still prioritizing correctional staff before incarcerated people. Twelve states did not include incarcerated people in any phase of their vaccine allotment plans. ▶

Continued on Page 7...

IN THIS ISSUE

DEFENDING DELIBERATE INDIFFERENCE CLAIMS

Beth Boone, Esq., Partner/ Shareholder, Hall Booth Smith, P.C.

As a physician practicing in correctional health care, you have likely been named in a lawsuit by an incarcerated individual. If you are one of the few that have walked between the proverbial raindrops to date, unfortunately you or your staff may face litigation in the future. A review of a small sample of appellate court rulings from different areas of the country shows interesting results, and more importantly, definite trends that can assist you in your defense. Importantly, by understanding these rulings, we can better defend and perhaps even pro-actively prepare when such allegations are levied against you or your team.

What constitutes deliberate indifference to medical needs? It has been defined in various ways by different courts, which lends itself to difficulties. After all, we want a finite definition and a clear framework, correct? How can you possibly defend yourselves against allegations of deliberate indifference if the courts all have different definitions? Unfortunately there is not a federal statute we can turn to; rather, we must interpret what various courts have found to constitute the same. In general, deliberate indifference is found when a professional knows of and disregards excessive risk to an inmate's health or safety. To state a claim of deliberate indifference, generally, one must show a serious medical need AND a knowledge of and disregard of an excessive risk of harm to a prisoner. One definition I particularly like of a serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *See* Baez v. Rogers, 522 Fed.Appx. 819 (11th Cir. 2013).

In an effort to see what courts have held to be deliberate indifference, a few cases from the various circuits across the nation were reviewed for purposes of what constitutes deliberate indifference.[1] In Pennsylvania, a Third Circuit case, *Whetstone v. Ellers*, 447 Fed. Appx. 286 (3d Cir. 2011), included allegations of medical malpractice by health care providers' treatment of a prisoner's shoulder injury. The Court found that the prisoner did not state a claim of deliberate indifference because the allegations amounted to dissatisfaction with course a of treatment or medical malpractice. In this case, it was agreed that Whetstone sustained a serious shoulder injury while working out in prison gym. He was immediately brought to the prison infirmary for assessment and initial treatment, monitored and treated by medical staff until taken for orthopedic consultation/imaging, received a prescription of acetaminophen and other pain medication in the interim prior to surgery, and was then taken to undergo surgery 14 weeks after injury. After surgery, Whetstone complained of a lump in his chest and sought assistance from prison medical staff, where a physician concurred that the surgery had not been successful. He received a chest exam and was eventually told another surgery would not be performed, with an alternative physical therapy plan prescribed instead. The reasoning of the Court in holding no claim of deliberate indifference was that while the serious medical need was not disputed, the conduct of medical providers did not amount to deliberate indifference as Whetstone had received continuous care since his weightlifting injury – including numerous examinations by providers, received medications, scans, imaging, etc., and, of course, ultimately surgery. As such, the allegations were premised on dissatisfaction with the course of treatment prescribed or malpractice, and such allegations do not amount to a violation of a prisoner's constitutional rights, so long as physician exercises professional judgment. However, another Third Circuit case, *Palakovic v. Wetzel*, 854 F.3d 209 (3rd Cir. 2017), involved a prisoner who committed suicide while in solitary confinement. Upon initial confinement at a state correctional institution, Palakovic informed mental health staff of his history of thoughts of suicide and self-harm and his plans to kill himself. The prisoner was diagnosed with several mental disorders, identified as a "suicide behavior risk," and classified as the lowest stability rating available in the Pennsylvania Department of Corrections system. He was then transferred to another state correctional institution where he reported feeling depressed and acknowledged thoughts of suicide/ death. This information was so well-known that prisoner's nickname became "Suicide". However, the facility did not conduct a suicide risk assessment nor provide any counseling, therapy, or interviews in clinically appropriate settings. The only interviews were conducted through a slit in the door where the prisoner was placed in solitary confinement. The Court held that the parents presented allegations sufficient to state a claim of deliberate indifference. The Court reasoned that the prisoner suffered from severe mental health disorders, of which he informed prison mental health staff prior to suicide attempts and self-injury. While he was labeled as the lowest stability rating, placed on the mental health roster, and received treatment by way of three visits from psychology staff and an antidepressant prescription, this minimal treatment fell below constitutionally adequate standards. Allegations of systemic deficiencies in providing mental health treatment such as: ignorance of requests for therapy, reliance on medication alone, ignorance of policy against placing mentally ill inmates in solitary confinement, lack of screening and assessments, etc., were sufficient to state claim of deliberate indifference ▶

Continued on Page 8...

[1] Cases selected were random and references to opinions and holdings are solely for purposes of definition of deliberate indifference. Final outcome or determination of cases may not be reflected in this review.

▶ *"Defending Deliberate Indifference Claims" from Page 4*

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In a case in the Fifth Circuit, *Tustin v. Livingston*, 766 Fed.Appx. 174 (5th Cir. 2019), the Court held that the prison officials' and healthcare providers' 4-year delay in conducting surgery to extract an inmate's abscessed tooth did not amount to deliberate indifference where other health conditions prevented prisoner from being cleared for surgery and he received on-going care for his dental problems. Years before the event at issue, Tustin was diagnosed with an arachnoid cyst on his brain. Four years after this initial diagnosis, Tustin was diagnosed as suffering from widespread cerebral dysfunction following an abnormal EEG. In 2009, he began experiencing pain and swelling on tooth #20. The dentist prescribed him with antibiotics and ibuprofen due to his allergies to local anesthetics. He was scheduled to receive extraction at a university hospital in Galveston, Texas, but he suffered a seizure due to his cyst on the bus ride to the hospital and the dentists refused to extract the tooth. In 2010, he continued to experience pain from the abscess and to consult with prison dentists for treatment, in addition to regular cleaning. In 2011, dentists continued to treat the abscess with antibiotics and ibuprofen instead of local anesthesia as complications related to his cyst during a procedure involving general anesthesia caused dentists to refuse to complete extraction until cyst could be removed or treated. He continued to see prison dentists while unsuccessfully attempting to receive clearance from neurologists for surgery. Tustin also experienced intermittent chest pain, and difficulties in completing a stress test further contributed to his inability to be cleared for surgery. Despite these difficulties, dentists continued to treat the abscess with antibiotics and ibuprofen. Interestingly, the Court said that Tustin's 4-year delay in surgery did *not* constitute cruel and unusual punishment by deliberate indifference. Why indeed? The surgery was only delayed because of Tustin's other medical conditions, including his allergies to local anesthetics, the seizure resulting from the cyst, the cyst itself, and the intermittent chest pain. Additionally, the delay of treatment was a matter of medical judgment, not conduct that evidenced wanton disregard of a serious medical need. *See* Easter v. Powell, 467 F.3d 459, 464 (5th Cir. 2006): precedent holding that delay in medical care "can only constitute an Eighth Amendment violation if there has been deliberate indifference [that] results in substantial harm". Additionally, he received ongoing treatment for his dental problems. "An allegation of [u]nsuccessful medical treatment does not give rise to a §1983 cause of action. Nor does mere negligence, neglect, or malpractice".

Common themes can be found throughout the country. Charting and documentation is key, with a focus on transfers and continuity of care. Carefully chart. If you recommend further treatment or further testing, document the same and follow through with that recommendation. In many of the lawsuits involving deliberate indifference, it appears that appropriate orders were given, but never implemented. Provide care that is continuous, and although the recommendation may be delayed, let that chart show that there was never a lack of care in the interim. Continuously chart. If indeed you or your staff have offered or attempted to provide care that was denied for any reason, chart that refusal of care. And finally, show continuity of care in charting when handling consultations or referrals with outside providers. While it may be a custody or transportation issue beyond your control that is providing a delay of recommended care, make sure you and your staff clearly document it. In other words, if you are going to recommend care and treatment with an outside provider, follow up on it. It appears that many deliberate indifference allegations stem from incarcerated individuals who acknowledged issues on intake, but these identified issues were lost in translation as the patients transferred from facility to facility. ■