

LEGAL BULLETIN 8.3

AIDS in Prison

(Set: Medical Care - Bulletin 8.3)

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This bulletin will provide some general, introductory information about AIDS and related law as it concerns prisoners. This is an overview. It is important that you follow up with your own research.

Introduction

AIDS stands for Acquired Immune Deficiency Syndrome. It is acquired, meaning that it can be transferred to an individual and he or she can become infected. Immune Deficiency means a weakening in the body's natural defensive protections against disease. Syndrome is a term that applies to a group of health problems that are associated with a disease. The advanced stage of HIV infection is commonly known as AIDS.

The spread of AIDS has resulted in it being one of the main causes of death for Americans between the ages of 25 and 45. Over 20 million people worldwide have been infected with HIV, the virus that causes AIDS.

If HIV infects someone, their body will make antibodies, special molecules that are supposed to fight HIV. A blood test for HIV checks for the presence and level of these antibodies. If these antibodies are found in the blood, it means that the person is HIV-Positive. Being HIV-positive is not the same as having AIDS. There are numerous clinical conditions that affect people with advanced HIV. These conditions are more likely to take hold and be worse in those who are HIV infected because their immune system lacks the ability to protect against the various bacteria and viruses which cause infections. According to the Center for Disease Control, AIDS is six times higher in African-Americans and three times higher among Hispanics than among whites.

One doesn't get AIDS from sneezes, touching the same objects, using the same toilet seat, hugging an infected person or being in the same room with someone who is infected. AIDS is transmitted by having unprotected sex with an infected person; sharing a needle to shoot up drugs with someone who is infected; receiving infected blood in a transfusion; or exposure to infected blood or semen through an opening in the body such as a cut. AIDS can also be spread from a pregnant mother to her unborn child or by the drinking of breast milk from an infected mother.

While there are no documented cases of HIV transmission by tears or saliva, it is possible to catch HIV through oral sex, especially if there are bleeding gums or open sores in the mouth.

Since some HIV infected people show no symptoms, there is no way of being sure if someone is infected by just looking at them. Medical testing is required to find out if someone is HIV positive. An HIV test has two parts. The Eliza (EIA) is the initial screening test and the Western Blot, an HIV specific test. The EIA test can produce a false positive. If the EIA returns a positive test result, ask if the Western Blot test was also used. Being HIV-positive does not necessarily mean that one has AIDS, but it does mean that the person has become infected with HIV and can infect others. An important note: A person may be infected for up to six months before testing positive for HIV.

The weakened immune system of an HIV positive person will make them vulnerable to a number of diseases. The most common ones are:

- Pneumocystis carinii pneumonia (PCP), a lung infection;
- Kaposi's sarcoma (KS), a skin cancer;
- Cytomegalovirus (CMV), an infection usually affecting the eyes; and
- Candida, a fungal infection that can cause thrush (a white film in the mouth)
- or infections in the throat or vagina.

Early symptoms may include flu-like fever, headaches, stomachaches, swollen lymph glands, sore muscles and joints, or skin rashes that last for a week or two. There are a number of other possible health problems associated with AIDS such as extreme weight loss, tumors, etc. Many of the above conditions and symptoms have been controlled or prevented with proper medical care. The HIV virus can mutate and become resistant to medications if not taken properly. An HIV infected prisoner must make all prison officials aware of his or her medical needs and the importance of strict compliance to the drug regimen.

It is possible that HIV treatments can help keep a person healthy and may help ward off other related infections. In many cases, individuals have continued to live healthy and productive lives, even many years after becoming infected. It is important to start treatment as soon as possible and continue with it faithfully. HIV is controllable in most individuals if there is early diagnosis and treatment.

A small percentage of those infected with HIV have not developed AIDS symptoms. Studies are being done to discover the reasons for the lack of progression to full-blown AIDS in those cases. These individuals can still infect others if they engage in any of the risk behaviors mentioned above.

In this bulletin we will review some cases that have addressed AIDS in prison. Remember that the applicable law where you are depends upon the rulings of the courts in your jurisdiction. For example, if you are a federal prisoner incarcerated in Pennsylvania the binding court cases will be from the federal district court responsible for cases that arise from your location, the Third Circuit Court of Appeals and the Supreme Court of the United States. State prisoners can look to these opinions as well as decisions by the courts of the state in which they are located. Decisions of courts that are not binding can still be used to argue that a particular interpretation of law should be adopted.

Treatment and Medication

There is currently no vaccine to prevent a person from getting AIDS. However, there has been significant progress in the development of drugs for treatment and health maintenance. These drugs include:

AZT (also known as zidovudine),
ddC (zalcitabine),
ddI (dideoxyinosine),
d4T (stavudine), and
3TC (lamivudine).

AZT and the other drugs used to treat AIDS are expensive. However, the cost of the drugs and monitoring their effect upon the inmate is less than the expense of extensive hospital care that will be required if the condition is left untreated. These drugs require careful monitoring. For example, use of AZT may cause anemia, which could require blood transfusions.

These drugs may inhibit the spread of HIV in the body and delay the onset of some common HIV related infections. Non-nucleoside reverse transcriptase inhibitors (NNRTIs) such as delvaridine (Rescriptor) and nevirapine (Viramune) are also available for use in combination with other antiretroviral drugs.

A second class of drugs has been approved for treating HIV infection. These drugs, called protease inhibitors, interrupt the virus replication in its later life cycle. They include:

- Ritonavir (Norvir),
- Saquinavir (Invirase),
- Indinavir (Crixivan), and
- Nelfinavir (Viracept).

HIV can become resistant to both classes of drugs. Sometimes a combination of the different kinds of drugs is needed. Individuals should be regularly monitored by health professionals to insure that the treatment and drugs they are receiving are correct. Drug treatment for AIDS must be changed and adjusted periodically to be effective. These drugs do not cure AIDS rather they help keep the effects under control. The opportunistic infections of HIV can be treated with various drugs, including:

- foscarnet and ganciclovir, used to treat cytomegalovirus eye infections,
- fluconazole to treat yeast and other fungal infections, and
- TMP/SMX or pentamidine to treat *Pneumocystis carinii* pneumonia (PCP).

General Legal Standards Regarding Medical Care

The Supreme Court case of Turner v. Safley, 482 U.S. 78, 96 L.Ed. 2d 64, 107 S.Ct. 2254 (1987) is an important case affecting many prisoners' rights. In that case the Court states that prisoners' constitutional rights are limited and may be overruled by "legitimate penological objectives," for the safety and other needs of the prison. The tests used for determining when the prison administration may override prisoners' rights is set forth as follows:

1. there must be a valid, rational, connection between the prison regulation and the legitimate government interest asserted,
2. a determination whether there are alternative means of exercising a right (the case suggests that the absence of ready alternatives may be evidence that the regulation is not reasonable),
3. whether the accommodation of the asserted right will have a significant "ripple effect" on fellow inmates or prison staff. (The case instructs that courts reviewing such cases should be particularly deferential to the informed discretion of corrections officials).

The legal standards regarding medical care are set forth in Estelle v. Gamble, 429 U.S. 97, 50 L.Ed. 2d 251, 97 S.Ct. 285 (1976) which held that *deliberate indifference* to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain, which is a violation of the Eighth Amendment. The Court in Estelle, provided legal recognition of several basic principles covering the government's responsibility in providing medical care for inmates.

1. An inmate must rely on prison authorities to meet his medical needs since otherwise such needs will not be met.
2. Even where care is generally available to inmates, a denial of care to an inmate may result in pain and suffering which would serve no valid penological purpose.
3. Contemporary standards of decency require nothing less than that the state provides medical care for prisoners.
4. Deliberate indifference to serious medical needs of prisoners constitutes a violation of the Eighth Amendment.

In order to establish a claim regarding medical care, the inmate must show that the act or omission of the prison officials was deliberately indifferent and that the medical condition was or is serious. Because a prisoner must have strong evidence to show that an official knew or should have known about the need for treatment of a medical condition, we strongly recommend that you write to the officials responsible for your care and provide them with specific information about your condition and treatment needs. As with all prison communications, be sure to date and sign your papers and send a "safe" copy to family or a trusted friend.

Failure by the correctional institution to provide proper medical care may be addressed by a claim under 42 USC sec.1983 for state prisoners or 28 USC sec.1331 for federal prisoners. These civil actions are reviewed in more detail in Civil Actions bulletin 1.1. As in any court action, the inmate must first exhaust all administrative remedies before the court will hear his claims.

Testing and Segregation of Infected Inmates

There are conflicting considerations about mandatory testing. On one side those wanting required testing and disclosure argue that such steps are needed to protect themselves and others. On the other side of the issue, those against mandatory testing contend that such testing and disclosure violates privacy rights.

Prison officials' authority to require mandatory testing is supported by the cases, Dunn v. White, 880 F.2d 1188 (10th Cir. 1989) and Harris v. Thigpen, 941 F. 2d 1495 (11th Cir. 1991). The "legitimate penological" reasons underlying this authority are the concerns about preventing the spread of HIV and the beneficial results of early treatment.

However, the courts have not been inclined to force prisons to test all inmates for HIV, choosing instead to leave that decision to the states and their corrections officials. In Fegley v. Fulcomer, 720 F.Supp. 475 (M.D.Pa. 1989) the court stated that required testing does not protect from those whose infection has not yet shown up and therefore could create a false sense of security.

In Jarrett v. Faulkner, 662 F.Supp. 928 (S.D. Ind. 1987) the court decided that the plaintiffs had not shown that they were at risk even though the prison neither tested all inmates nor segregated homosexuals. The court left the policy decisions up to the state.

A prisoner brought an action in court seeking to have all AIDS prisoners segregated from general population in Muhammad v. U.S. Bureau of Prisons, 789 F.Supp. 449 (D.D.C. 1992). The court denied his request, deferring to the prison officials' management of the issue. In Deutsch v. Federal Bureau of Prisons, 737 F.Supp. 261 (S.D.N.Y. 1990) the court ruled that it was not deliberate indifference to house an inmate having AIDS with a non-infected prisoner. The court found that the prison had sufficient safeguards, including segregating infected inmates that demonstrated conduct that posed a possible risk of infection to others.

In Dunn v. White, 880 F.2d 1188 (10th Cir. 1989), the court ruled that a required HIV test administered against a prisoner's wishes did not violate the inmate's Fourth Amendment rights against unreasonable search and seizure because that right was outweighed by the interest of the prison in treating and preventing the spread of the disease. Also see Treff v. Galetka, 74 F.3d 191 (10th Cir.1996) and Saavedra v. City of Albuquerque, 73 F.3d 1525 (10th Cir.1996).

Confidentiality and Disclosure

Most states have laws designed to provide confidentiality for individuals with AIDS. However, even where confidentiality is statutorily established, certain individuals may be informed, including medical staff and specified officials. The reality of many situations is that information gets out either through unauthorized gossip or telltale indicators, such as the wearing of protective gloves, etc. by staff when working with an infected inmate. Even though no one was told, the fact of infection is apparent to others when the inmate is segregated to a place or treated in a manner that is known to be used for HIV infected prisoners.

The Supreme Court has held that privacy interests are of constitutional stature, even though privacy is not enumerated as a right in the Constitution or Bill of Rights. A brief sketch of the history of the legal concept of privacy can be found in the case of Anderson v. Romero, 72 F.3d 518 (7th Cir.1995).

The legal issue of disclosure usually focuses on the question of whether there was a "legitimate penological reason" to inform anyone about the disease. In Harris v. Thigpen, 941 F.2d 1495 (11th Cir.1991) there was a challenge to the prison's policy of compulsory testing of inmates for HIV and to the segregation of those who tested positive. Infected inmates claimed that their privacy interests were being violated. The court indicated that HIV positive inmates have some significant constitutionally protected privacy interests in preventing the non-consensual disclosure of their HIV diagnosis to other inmates, as well as to their families and other outside visitors to the facilities in question. Some subsequent decisions have not regarded that discussion in Thigpen as a holding that establishes those rights.

In Billman v. Indiana Department of Corrections, 56 F.3d 785 (7th Cir.1995) the court held that an inmate housed with an infected prisoner with a known propensity to commit rape violated the inmate's right not to be subjected to cruel and unusual punishment. Compare with Deutch v. Federal Bureau of

Prisons, 737 F.Supp.261 (S.D.N.Y. 1990) affirmed at 930 F.2d 909, where an inmate complained because he was not told that his cellmate was HIV positive. The court held that there was no violation of his rights because there was no evidence that the cellmate intended to infect the plaintiff.

Doe v. Borough of Barrington, 729 F.Supp 376 (D.N.J.1990) ruled that the disclosure of medical information, particularly of HIV infection, violates the constitutional privacy rights of the patient and of family members. The government must show a compelling interest before making such disclosure. The rationale for this decision is based in part upon the realistic acknowledgement of the social stigma, harassment and discrimination that HIV infected people may face. Also see Doe v. Southeastern Pennsylvania Transit Authority, 72 F.3d 1133 (3rd Cir.1995).

While it acknowledged that the risk of spreading HIV infection through service of food was slight, the court in Gates v. Rowland, 39 F.3d 1439 (9th Cir.) found that correctional officials had a reasonable basis for their policy of not allowing HIV positive inmates to work in food service. The prison officials contended that other inmates would perceive a threat regardless of scientific research or medical findings. Prison officials had argued that prisoners were particularly sensitive to food service issues and that such sensitivity had previously caused riots. The defendant prison officials were concerned that the other inmates would think that infected inmates would bleed or spit into the food. The court ruled that correctional officials had adopted a restriction based on "legitimate penological concerns," even though the concerns of the other inmates as presented by the prison officials were not based upon rational thought.

In Casey v. Lewis, 773 F.Supp.1365 (D.Ariz.1991), the district court ruled that the prison officials interest in denying HIV positive inmates jobs in the cafeteria based upon the officials claim of a legitimate penological interest in avoiding hysteria from other inmates who had an irrational fear of exposure was not valid because HIV can only be spread through sexual or blood contact. This decision was reversed. (4 F.3d 1516).

The court in Doe v. Coughlin, 697 F.Supp. 1234 (N.D.N.Y. 1988) issued an injunction against the transfer of an infected prisoner to a special unit which would have had the effect of disclosing his condition. The court reasoned that the individual's decision of whether to tell friends and family may have serious implications. Family members may abandon the AIDS victim and others may not be emotionally prepared to handle such news. The court also noted the possibility that within the institution such an inmate may be subjected to harassment and psychological pressures. Also see Hetzel v. Swartz, 909 F.Supp. 261 (M.D.Pa.1995).

In considering issues related to disclosure the courts will make a determination if disclosure was a legitimate administrative interest based upon a real penological basis or if had the effect of punishing the prisoner. The Eighth Amendment forbids the state from punishing individuals for a physical condition. Robinson v. California, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct.1417 (1962). The law also forbids a violation of equal protection that occurs when the state treats one group, including a group of prison inmates, arbitrarily worse than another. The court in Anderson v. Romero, 72 F.3d 518 (7th Cir.1995) stated that if an inmate was denied a haircut or exercise privileges with no justification relating to AIDS fighting measures that such treatment would be deemed arbitrary and would not support a claim of immunity by the prison. Also see, Eberhardt v. O'Malley, 17 F.3d 1023 (7th Cir. 1994).

Sandin v. Conner, 115 S.Ct.2293 (1995) held that disciplinary measures taken against prisoners, even if they involve the taking away of an entitlement granted by a state statute or prison regulation, are not actionable as deprivations of liberty unless the measure “imposes atypical and significant hardship” on the inmate in relation to the ordinary incidents of prison life.

If you or someone you know is HIV positive or has AIDS, it is important that you seek information, help and support from a counselor and if possible a support group. Listed below are various groups and agencies that work on AIDS-related issues.

American Foundation for AIDS Research (AmFAR)

The nation's leading nonprofit organization dedicated to the support of AIDS research, education for AIDS prevention, and public policy initiatives. Publishes well-known treatment directory.
120 Wall St, 13th Floor
New York, NY 10005-3908
212-806-1600

National Prevention Information Network (NPIN)

Formerly known as the CDC National AIDS Clearinghouse (NAC), the NPIN is a comprehensive information service for people working in the fields of HIV prevention, care, and support. The Network also sends written materials on HIV/AIDS-related issues to the public. All of the Network's services are designed to facilitate the sharing of information and resources on education and prevention, research findings, and news about AIDS-related trends.

Main number: 1-800-458-5231 (Monday to Friday, 9 am-6 pm Eastern time) to access all CDC NPIN services (including NAC FAX and the CDC Business and Labor Resource Service)

TTY/Deaf access: 1-800-243-7012

Mailing address:

CDC NPIN

PO Box 6003

Rockville, MD 20849-6003

National Association of People with AIDS

Multifaceted resource for people infected and affected by HIV/AIDS, offering education and outreach programs, health and treatment information, advocacy and technical assistance.

8401 Colesville Road

Suite 750

Silver Spring, MD 20910

240-247-0880

National Minority AIDS Council

Umbrella group for front-line organizations that deal with HIV infection and AIDS within communities of color.

1931 13th St, NW

Washington, DC 20009-4432

202-483-6622