
MCLS NOTES

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**8 Winter Street, 11th Floor, Boston MA 02108-
4705**

**Phones: (617) 482-2773, (800) 882-1413; (617)
482-4124 (collect)**

Victory on STG Classification

The SJC, in *Haverty v. Commissioner of Correction*, 437 Mass. 737 (November 2002), affirmed the judgment for plaintiffs rendered by Judge Grabau of the Superior Court. The Court agreed that conditions in the East Wing at MCI-Cedar Junction are “substantially similar” to those in what the DOC once called Departmental Segregation Units, and held that the DSU regulations therefore apply to those units and must be obeyed. The DSU regulations were the relief ordered by the late Chief Justice Liacos in *Hoffer v. Fair*, another case litigated by MCLS, after the Court old DSU’s violated the due process requirements of the Massachusetts Constitution in another case litigated by MCLS on behalf of segregated prisoners, *Hoffer v. Fair*.

Since the SJC decision, there have been four hearings regarding remedies before Judge King, who is specially assigned to the case. As of mid-January, Judge King has yet to issue a ruling in writing. However, he has indicated his intention to give the DOC until approximately mid-March to either remove prisoners from the East Wing or give them DSU hearings. He also said that he intends to

order that the DOC credit prisoners held in the East Wing with 3.75 days of earned good time for each month in confinement after the first month. Finally, he has also stated that he intends to find for defendants on plaintiffs' racial discrimination claims, although he has yet to issue a decision in writing. While this is disappointing, we are comforted by the knowledge that the relief we sought against illegal discrimination is essentially identical to that available under the successful due process claims.

Questions and Answers

1. What was the central issue according to the SJC? Whether the DOC can “ignore regulations, duly enacted and still in effect, which govern placement of prisoners in segregated confinement for non-disciplinary reasons.”
2. What was the Court’s holding in a nutshell? The DSU regulations apply to the STG blocks and the DOC must follow them.
3. What must the DOC therefore do? Refrain from placing prisoners in the East Wing for longer than “brief” periods (measured in “days” not “weeks”) unless they first comply with the protections set forth in the DSU regulations.
4. When will the ruling take effect? Fairly soon. The Superior Court will determine the timing of relief given the need to “effectuate the injunction” issued by the Court in an “orderly and safe manner.”
5. Why do the DSU regulations apply? Because they govern confinement in conditions “substantially similar” to those described in the DSU regulations and the East Wing Segregation blocks at Walpole impose conditions equivalent to conditions in the old DSU. The Court focused on two “critical similarities” between the DSU and the East Wing: (1) “the segregation of a prisoner in near solitary confinement,” as determined by the time spent in their cells; and (2) the fact that confinement continues

“for no specified period” or “indefinitely.”

The Court said that these factors constitute “the essence of” DSU-like confinement. The name of the units doesn’t matter, and neither do the numbers of prisoners confined there.

6. Why is procedural protection so important? Deprivations that constitute “hallmarks of solitary confinement” are, according to quoted language from Harvard psychiatrist Stuart Grassian’s testimony, “highly toxic to psychological functioning” Additionally, without due process in place, prisoners are arbitrarily confined in segregation. They therefore suffer “the very harm the DSU regulations were promulgated to prevent.”
7. Do the DSU regulations have constitutional underpinnings? Yes. They are “constitutionally required.”
8. What about damages? There is no claim for damages raised by the case on behalf of class members. The pursuit of monetary damages was not included in our initial commitment to the *Haverty* class and our office does not have the resources to take on this work now. Prisoners who wish to seek damages will therefore have to file their own individual complaints in the Superior Court. Recovery of damages will probably be quite difficult. Prisoners wishing to raise damages claims associated with *Haverty* should consult with MCLS or other counsel prior to attempting to file them. At a minimum they should promptly file a grievance seeking monetary relief for their confinement in the East Wing without the procedural protections required by the DSU regulations.
9. Can the DOC get around the ruling? The Court left open the avenue tried once before in 1995 – to seek to amend or rescind the regulations – but made it entirely clear that the DOC would have to come up with “meritorious grounds different” from those asserted in ’95 or in the *Haverty* litigation (that prisons are more dangerous now). State Senator Guy Glodis of Worcester (a former

C.O.) has filed legislation that would reverse Haverty by repealing the DSU regulations. It is unclear that proponents of the legislation understand that the DSU regulations are constitutionally required.

Review of Prisoners Labeled as Sex Offenders

Soffen, et al. v. Maloney, et al., SUCV99-1228, was filed as a class action by prisoners identified as sex offenders by the DOC for absurd reasons like public urination, "mooning" as a prank, and consensual sex with like aged children (the 17-year old guy with a 16-year old girlfriend situation). DOC policy has been to send everyone with such convictions, even when they date from many years ago and are not the conviction for which the individual is currently serving time, to the Sex Offender Treatment Program. The plaintiffs seek due process protection (a hearing) to determine whether they are "really" sex offenders who ought to complete that program.

Attempts to settle the case were partially successful. Revised DOC policy now requires a clinical assessment to prisoners who have committed certain relatively minor "sex crimes." Of 89 prisoners who received this assessment by the end of August 2001, 57 were cleared. However, MCLS believes that current DOC policy still labels too many people as "needing" the program.

The plaintiffs in *Soffen* are completing discovery and expect that the Superior Court will hear cross-motions for summary judgment this spring. In the meantime, prisoners who think they are improperly labeled as sex offenders and who have not received a clinical assessment should write Peter Kane, Phillip Kassel, or Peter Costanza, the MCLS legal team handling the *Soffen* case. Tell us the crime which the DOC cites in justification for your labeling, the efforts you have made to lift the label, results of that effort and the consequences of the labeling for you (such as, classification problems,

denial of parole, denial of programming and work opportunities, harassment or worse at the hands of correctional officers or other prisoners). This type of information will be very helpful for preparing plaintiffs' summary judgment application if the case does not settle.

DNA Claim Lost

The last remaining claim in *Colon, Winters v. DOC*, was denied by the Superior Court in December. That claim was that DOC violated the DNA law by taking prisoners' DNA samples after the 90 day timeframe referenced in the DNA law. The Court issued its decision to grant summary judgment to the DOC on that claim alone, relying on the earlier Superior Court decision in *Eisan v. DiFava*, where the court had rejected the same claim. This ruling does not affect the earlier successful ruling won in *Colon*, to the effect that the DOC must use the indigence standard set forth in the DNA statute rather than the much worse indigence standard in the DOC regulations to determine which prisoners must pay for DNA sampling.

New MCLS Cases

- Bristol "Pay To Stay"

This past August, MCLS filed a class action complaint in the Bristol Superior Court challenging Sheriff Thomas Hodgson's decision to charge prisoners a five dollar daily incarceration fee. The complaint asks the court to order the Sheriff to stop charging prisoners the five dollar "cost-of-care" fees, as well as fees for haircuts, medical care, and GED services. It also asks the court to order the Sheriff to return all money he has already taken. The name of the case is *Souza, et al. v. Sheriff Thomas M. Hodgson*. The Sheriff has removed the case to federal court. Plaintiffs have moved to

return the the case to Bristol County on grounds that their state law claims predominate over their constitutional claims. The federal court will hold a further hearing on that motion on January 31, 2003. Meanwhile, discovery is proceeding.

- Abuse of Mental Health Watches

MCLS has filed *Brown, et al. v. Maloney, et al.* against the DOC's practice of denying prisoners on mental health watch status all attorney access by preventing legal visits, legal phone calls and legal mail to prisoners on that status. We would like to hear from anyone who was denied attorney contact while on mental health watch in the last three years. If you have had that experience, please write to Lauren Petit at MCLS with as much information about the situation as you can. MCLS will contact you after we receive that information.

Project Spotlight: Training Correctional Staff on Health Care

On September 17, 2002, after nearly a year of planning, a training on communicable diseases and how to minimize interference with treatment based on security issues was held at the Suffolk County House of Correction. The training was coordinated by the New England Aids Education and Training Center, Massachusetts Correctional Legal Services and the Suffolk County Sheriff's Department. More than 25 people employed at the SCHOC attended this training.

Dr. David Stone of the Lemuel Shattuck Hospital and New England Medical Center, and Brianna Fitzgerald, RN, MPH of the Boston Medical Center, provided training on HIV and Hepatitis C infections and other chronic diseases. The training focused on the need to understand these illnesses and why interference with access to medication or care can create serious problems that need to be addressed by correctional and healthcare staff.

The training was agreed upon after MCLS met with Deputy Superintendent Gerard Horgan, Kathy Cawley, Sheriff's counsel, and the Social Services staff at the SCHOC. We met to discuss problems MCLS had identified through prisoners who requested assistance from MCLS. Many prisoners with chronic diseases had contacted MCLS because they often missed doses of their medication or could not access healthcare in a timely way.

The Suffolk Sheriff's Department has committed to training all correctional staff on these issues through the Training Officers Unit who attended this session. MCLS will follow-up to make sure that the training occurs.

Special Thanks to Jeanne Internicola, HIV Coordinator at the Suffolk County House of Correction, for all her help in arranging this training.

MCLS Attorney Telephone Assistance

MCLS HAS CHANGED ITS COLLECT CALL ACCEPTANCE POLICY. Prisoners who wish to speak to an MCLS attorney, please call collect on (617) 482-4124. That line is now open Monday to Friday, 9 to 5. *However*, general population calls will still only be accepted on that line on Mondays from 1 p.m. to 4 p.m. Prisoners in segregation, disciplinary, or other close custody units who cannot call on Monday afternoons can call at other times during the week. State your unit to get through. Families and friends of prisoners may also call our Massachusetts toll free number, which is 1-800-882-1413. Prisoners who cannot reach us by phone are encouraged to write. Most of our intake is handled by mail.

Apuntes de MCLS está disponible en español

MCLS Notes is available in Spanish. MCLS has also translated many of its information packets into Spanish. Spanish versions of our information

materials will be provided, where available, to people who request them over the phone or in writing. Please share this information with Spanish-speaking prisoners. Aceptamos cartas escritas en español.

Disability Law Center Seeks Young Prisoners In Need of Educational Services

The Disability Law Center (DLC) has a project to increase access to and secure the delivery of free and appropriate public education (FAPE) to institutionalized youth. They are looking for young people under the age of 22 residing in institutions who have special educational needs and who have not received a high school diploma. The Disability Law Center would like to talk with clients in mental health facilities, Department of Youth Services (DYS) facilities, Houses of Corrections (HOC) and prisons.

If you know young people in this situation or their parents, please refer them to the intake unit at the Disability Law Center: (617) 723-8455. Ask for Crystal Chow at extension 148. People with email can reach Ms. Chow at cchow@dlc-ma.org. DLC's mailing address is 11 Beacon Street, Boston, MA 02108.

Coping Tips

Medical Care Grievances

Many prisoners have had the experience of trying to grieve lack of medical care, only to have the grievance summarily denied. The DOC's grievance regulations specify that grievances about the quality or correctness of medical care cannot be processed by the regular grievance procedure. This is because there is a separate grievance process for medical care complaints which you must use. Here it is:

**TITLE: CLINICAL COMPLAINT
MECHANISM**

Subject: Grievance Mechanism (Important)

Purpose: To ensure that inmate concerns and complaints regarding health services are addressed by the Health Services Administrator (HSA) in a timely manner.

Policy:

1. Inmates may communicate complaints or concerns related to health service verbally or in writing.
2. Face to face encounters are recommended and encouraged.
3. CMS healthcare staff will treat all inmates in a professional, courteous manner, ensuring fair, and consistent treatment for each individual.
4. During inmate orientation, the inmate will be advised that complaints regarding healthcare can be resolved informally by communicating with the HSA, or by placing the complaint in writing.
5. Clinical complaints will be reported in the site CQI meeting to identify trends and opportunities to improve health services through corrective action.
6. All clinical complaints will be managed as above. The Department of Correction policy 103 DOC 491 "Inmate Grievances" is not intended to process clinical decisions or complaints and will not be used as such.

Procedure:

1. Clinical complaints may be communicated either verbally or in writing to the HSA [Health Services Administrator] or designee.
2. Face to face encounters are recommended and encouraged.

3. The clinical complaint may be discussed and resolved informally. (i.e., Access to Management/ Happy Hour).

4. Written complaints will be reviewed and addressed by the HSA or designee within five (5) business days of receipt.

5. Written complaints may be resolved verbally (face to face meeting) or in writing.

6. Inmate clinical complaints must be logged in the Inmate Medical Grievance Log and the original complaint (if written) filed by the HSA in a file, not in the medical chart.

7. Complaints that cannot be resolved at the site level must be brought to the attention of the Vice President/Program Director or Regional Medical Director.

Please note that grievances about *access* to medical care (situations where correctional staff won't let you see the medical staff) go through the regular grievance process.

This procedure may change, as the U. Mass. Medical Center has taken over the DOC medical care contract from CMS effective January 1, 2003. MCLS is quite interested in what changes, if any, U. Mass. makes to medical care and whether they are any more responsive to prisoner concerns than CMS was. Keep us posted.

Disciplinary Hearings

MCLS does not handle disciplinary hearings, although MCLS staff sometimes provides advice about how to approach a particular hearing. There are more than twenty thousand d-tickets written each year. For direct assistance with d-hearings, contact:

1) PLAP, Austin Hall, Harvard Law School, Cambridge, MA 02138, collect calls: (617) 495-3127;

2) Prisoner Assistance Project (Sept. to Feb. only),
Northeastern University School of Law, 716
Columbus Ave., Suite 212, Roxbury, MA 02120,
collect calls: (617) 373-3660 (Sept. to Feb. ONLY).

Send a copy of your disciplinary report with a brief explanation. You may be able to obtain a continuance until you find out whether representation is available. Where direct representation is not available, the law schools can provide self-help materials. The law school programs concentrate on the most serious d-hearings, especially DDU hearings.

Be aware of the time limitations in the disciplinary hearing process set forth in 103 CMR 430. The reporting officer and other witnesses (as well as physical and documentary evidence) must be requested in writing within 24 hours of receiving the request for witness / representation form (103 CMR 430.11). You must provide a brief summary of what each requested witness will say (or the significance of other evidence that is requested, such as videotapes) on the request for witness / representation form. You may appeal a guilty finding and sanction to the superintendent within 5 days of receiving the hearing officer's decision (103 CMR 430.18). You must first appeal the finding and sanction to the superintendent in order to be able to challenge the disciplinary conviction in court. All court challenges to disciplinary convictions should be filed within **sixty days** of the superintendent's denial of your administrative appeal, or your complaint will probably be dismissed.

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